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REPRESENTING MILITARY-CONNECTED VICTIMS: PRESENTATION HANDOUTS

Friday

December 1, 2023

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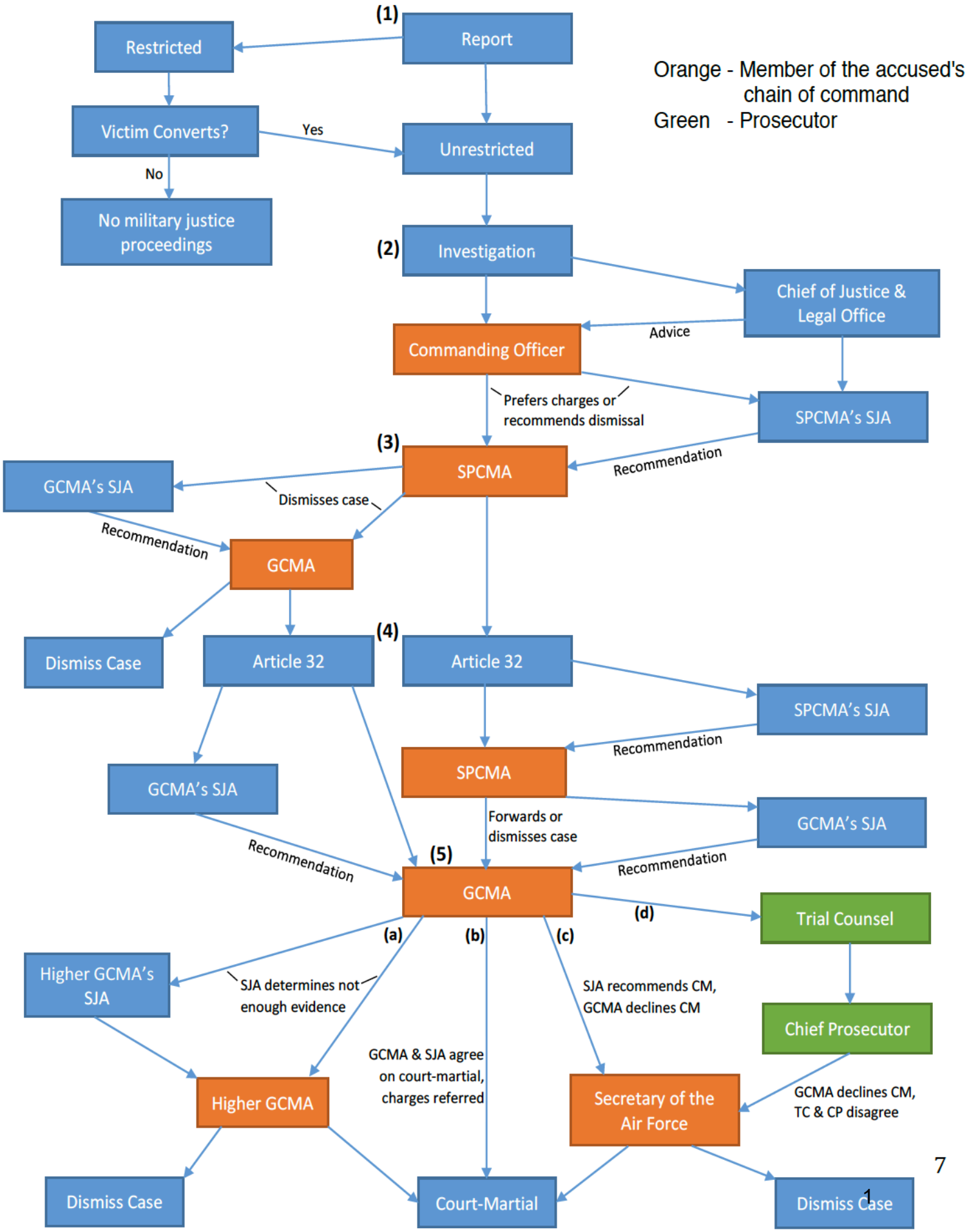

LRM, Airman First Class,
U.S. Air Force, Appellant

v.

Joshua E. KASTENBERG, Lieutenant Colonel,
U.S. Air Force, Military Judge, Appellee

and

Nicholas E. DANIELS,
Airman First Class, U.S. Air Force, Real Party in Interest

No. 13-5006
App. Misc. Dkt. No. 2013-05

United States Court of Appeals for the Armed Forces

Argued June 11, 2013

Decided July 18, 2013

BAKER, C.J., delivered the opinion of the Court, in which ERDMANN, J., and EFFRON, S.J., joined. STUCKY, J., filed a separate opinion, concurring in part and dissenting in part and in the result. RYAN, J., filed a dissenting opinion, in which STUCKY, J., joined as to Part A.

Counsel

For Appellant: Colonel Kenneth M. Theurer, (argued); Major Christopher J. Goewert, Major Matthew D. Talcott, and Major R. Davis Younts (on brief).

For Appellee: Major Ryan N. Hoback (argued).

For Real Party in Interest: Dwight H. Sullivan, Esq. (argued); Captain Christopher D. James and Captain Danko Princip (on brief).

Amici Curiae:

For the United States: Major Tyson D. Kindness (argued); Colonel Don M. Christensen and Gerald R. Bruce, Esq. (on brief).

For the Army Defense Appellate Division: Colonel Patricia A. Ham, Lieutenant Colonel Jonathan F. Potter, and Captain Matthew M. Jones.

For the Navy-Marine Corps Appellate Defense Division: Captain Paul C. LeBlanc, JAGC, USN, and Captain Jason R. Wareham, USMC.

For the National Crime Victim Law Institute: Margaret Garvin, Esq., Rebecca S. T. Khalil, Esq., and Sarah LeClair, Esq.

For the U.S. Marine Corps Defense Services Organization: Colonel John G. Baker, USMC.

For the Air Force Trial Defense Division: Colonel Donna Marie Verchio.

For Protect Our Defenders: Peter Coote, Esq.

Military Judge: Joshua E. Kastenberg

Chief Judge BAKER delivered the opinion of the Court.

The Air Force Judge Advocate General (JAG) certified three issues for review by this Court:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY HOLDING THAT IT LACKED JURISDICTION TO HEAR A1C LRM'S PETITION FOR A WRIT OF MANDAMUS.

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING A1C LRM THE OPPORTUNITY TO BE HEARD THROUGH COUNSEL THEREBY DENYING HER DUE PROCESS UNDER THE MILITARY RULES OF EVIDENCE, THE CRIME VICTIMS' RIGHTS ACT AND THE UNITED STATES CONSTITUTION.

III. WHETHER THIS HONORABLE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

BACKGROUND

On October 16, 2012, Airman First Class (A1C) Nicholas Daniels (Real Party in Interest) was charged with raping and sexually assaulting A1C LRM in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2006). Lieutenant Colonel (Lt Col) Joshua E. Kastenberg (Appellee) was detailed to the case as military judge. The Real Party in Interest was arraigned at Holloman Air Force Base, New Mexico, and elected trial by enlisted and officer members.

Captain (Capt) Seth Dilworth was appointed as special victims' counsel for LRM. In his formal notice of appearance, Capt Dilworth stated that LRM had "standing involving any issues arising under [Military Rules of Evidence (M.R.E.)] 412, 513, and 514 in which she is the patient or witness as the subject of

the motion." Capt Dilworth noted that his formal involvement in the court-martial would "be limited to asserting A1C [LRM]'s enumerated rights as a victim of crime under federal law and [M.R.E.] 412, 513, and 514." He requested that the court direct counsel to provide LRM with copies of related motions. Trial counsel and trial defense counsel did not object to LRM receiving copies of the motions, but trial defense counsel opposed Capt Dilworth's presence or participation at the evidentiary hearings. Before the arraignment hearing, LRM received copies of defense motions to admit evidence under M.R.E. 412 and 513.

Initially during the arraignment hearing, Capt Dilworth indicated that he did not intend to argue at any future M.R.E. 412 or 513 motions hearings. Later during the same hearing, Capt Dilworth argued that there may be instances where LRM's interests in the motions hearings were not aligned with the Government, in which case Capt Dilworth asked the court to reserve LRM's right to present an argument. The military judge treated this request as a "motion in fact."

In a judicial ruling, the military judge limited LRM's right to be heard to factual matters, finding that standing "denotes the right to present an argument of law before a court, which is fundamentally different than the opportunity to be heard." The military judge then found that LRM had no standing,

through counsel or otherwise, to motion the court for relief in the production of documents, and that Capt Dilworth could not argue evidentiary matters in LRM's interest. The military judge concluded that "the prospect of an accused having to face two attorneys representing two similar interests [is] sufficiently antithetical to courts-martial jurisprudence" and would "cause a significant erosion in the right to an impartial judge in appearance or a fair trial."

LRM filed a motion to reconsider, asking for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, [Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)], and the United States Constitution." The military judge denied the motion for reconsideration in full.

LRM filed a petition for extraordinary relief in the nature of a writ of mandamus and petition for stay of proceedings, but the CCA concluded that it lacked jurisdiction to review LRM's petition for extraordinary relief. After the United States Air Force Criminal Court of Appeals (CCA) denied LRM's motion for reconsideration en banc, the Air Force JAG certified three issues for review by this Court.

JURISDICTION

Jurisdiction is a question of law that this Court reviews de novo. United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

As a preliminary matter, this Court has statutory jurisdiction to review the decision of the CCA under Article 67, UCMJ, 10 U.S.C. § 867 (2006). Article 67(a)(2), UCMJ, provides that this Court shall review the record in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review."

In United States v. Curtin, this Court considered the definition of a "case" as used in Article 67(a)(2), UCMJ. 44 M.J. 439 (C.A.A.F. 1996), cited with approval in United States v. Dowty, 48 M.J. 102, 107 (C.A.A.F. 1998). In Curtin, the military judge ruled that trial counsel's subpoenas duces tecum for the financial statements of the accused's wife and her father were administrative, and that the appropriate United States district court was the proper forum for challenging the subpoenas. Id. at 440. The Air Force JAG filed a certificate for review of a CCA decision denying the government's petition for extraordinary relief in the form of a writ of mandamus. Id. This Court held that it had jurisdiction, and determined that the "definition of 'case' as used within that statute includes a

'final action' by an intermediate appellate court on a petition for extraordinary relief." Id. (citing United States v. Redding, 11 M.J. 100, 104 (C.M.A. 1981)).

Similarly, in this case the CCA took a final action on a petition for extraordinary relief when it denied LRM's writ-appeal petition. Thus, as in Curtin, this Court has jurisdiction over the certificate submitted by the JAG pursuant to Article 67(a)(2), UCMJ, as we would in the case of a writ-appeal.

Subject-Matter Jurisdiction

The CCA erred by holding that it lacked jurisdiction to hear LRM's petition for a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (2006), and Article 66, UCMJ, 10 U.S.C. § 866 (2006), establish the CCA's jurisdiction. The All Writs Act grants the power to "all courts established by act of Congress to issue all writs necessary and appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Extraordinary writs serve "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953). "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." United States v. Denedo, 556 U.S. 904, 911 (2009).

The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. Clinton v. Goldsmith, 526 U.S. 529, 534-35 (1999). Rather, the All Writs Act requires two determinations: (1) whether the requested writ is "in aid of" the court's existing jurisdiction; and (2) whether the requested writ is "necessary or appropriate." Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) (internal quotation marks omitted). In the context of military justice, "in aid of" includes cases where a petitioner seeks "to modify an action that was taken within the subject matter jurisdiction of the military justice system." Id. at 120. A writ petition may be "in aid of" a court's jurisdiction even on interlocutory matters where no finding or sentence has been entered in the court-martial. See, e.g., Hasan v. Gross, 71 M.J. 416 (C.A.A.F. 2012); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943).

To establish subject-matter jurisdiction, the harm alleged must have had "the potential to directly affect the findings and sentence." Ctr. for Constitutional Rights v. United States (CCR), 72 M.J. 126, 129 (C.A.A.F. 2013) (citing Hasan, 71 M.J. 416). There is no jurisdiction to "adjudicate what amounts to a civil action, maintained by persons who are strangers to the courts-martial, asking for relief . . . that has no bearing on any findings and sentence that may eventually be adjudged by the

court-martial." Id. The CCA's holding that the present case "does not directly involve a finding or sentence that was –– or potentially could be imposed –– in a court-martial proceeding," does not accurately reflect this analysis.

Under the appropriate analysis, LRM prevails. The petition invited the CCA to evaluate whether the military judge can limit the right to be heard under M.R.E. 412 and 513 by precluding LRM from presenting the basis for a claim of privilege or exclusion, with or without counsel, during an ongoing general court-martial. The military judge's ruling has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the court-martial on the issues of guilt or innocence -- which will form the very foundation of a finding and sentence. Furthermore, unlike "strangers to the courts-martial," CCR, 72 M.J. at 129, LRM is the named victim in a court-martial seeking to protect the rights granted to her by the President in duly promulgated rules of evidence, namely to a claim of privilege under M.R.E. 513 and a right to a reasonable opportunity to be heard under M.R.E. 412(c)(2) and 513(e)(2). Indeed, this Court has reversed court-martial convictions based on erroneous M.R.E. 412 evidentiary rulings. See, e.g., United States v. Ellerbrock, 70 M.J. 314, 321 (C.A.A.F. 2011) (reversing rape conviction after finding that evidence of the

victim's prior extramarital affair was improperly excluded under M.R.E. 412). LRM is not seeking any civil or administrative relief. Cf. Goldsmith, 526 U.S. at 533 (challenging an administrative separation proceeding, rather than a court-martial). Rather, she is seeking her right to be heard pursuant to the M.R.E. Thus, the harm alleged has "the potential to directly affect the findings and sentence," and the CCA erred by holding that it lacked jurisdiction. See CCR, 72 M.J. at 129.

Standing

LRM's position as a nonparty to the courts-martial, see Rule for Courts-Martial (R.C.M.) 103(16), does not preclude standing. There is long-standing precedent that a holder of a privilege has a right to contest and protect the privilege. See, e.g., CCR, 72 M.J. 126 (assuming that CCR had trial level standing to make request); United States v. Wuterich, 67 M.J. 63, 66-69 (C.A.A.F. 2008) (assuming standing for CBS in part under R.C.M. 703); United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006) (assuming standing for victim's mental health provider); United States v. Johnson, 53 M.J. 459, 461 (C.A.A.F. 2000) (standing for nonparty challenge to a subpoena duces tecum or a subpoena ad testificandum during an Article 32, UCMJ, 10 U.S.C. § 832 (2006), pretrial investigation); ABC, Inc. v. Powell, 47 M.J. 363, 364 (C.A.A.F. 1997) (standing under First Amendment); Carlson v. Smith, 43 M.J. 401 (C.A.A.F 1995)

(summary disposition) (granting a writ of mandamus where the real party in interest did not join petitioners, but rather was added by this Court as a respondent).

Limited participant standing has also been recognized by the Supreme Court and other federal courts. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (standing created by First Amendment right); Church of Scientology v. United States, 506 U.S. 9, 11, 17 (1992) (standing created by attorney-client privilege). In particular, "[f]ederal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed." United States v. Hubbard, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); see, e.g., United States v. Antar, 38 F.3d 1348, 1350 (3d Cir. 1994); In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1561 (11th Cir. 1989); Doe v. United States, 666 F.2d 43, 45 (4th Cir. 1981); Anthony v. United States, 667 F.2d 870, 872-73 (10th Cir. 1981); In re Smith, 656 F.2d 1101, 1102-05, 1107 (5th Cir. 1981); United States v. Briggs, 514 F.2d 794, 796, 799 (5th Cir. 1975).

Ripeness

Finally, this issue is ripe for review. The military judge's ruling limits LRM's right to be heard to factual

matters, preventing her from making legal arguments while invoking her legal privilege under M.R.E. 513.

Furthermore, while LRM's counsel initially indicated at the arraignment hearing that he did not intend to argue at a future motions hearing, noting that LRM had not received any documents, discovery, or court filings with respect to such hearings, counsel asked the military judge to reserve that right. The military judge treated this request as a "motion in fact." In the judicial ruling, the military judge specified whether counsel had standing to represent LRM during applicable hearings arising from the M.R.E. at trial as one of the issues before the court-martial, and ultimately denied the motion to grant standing. Accordingly, LRM interpreted the military judge's ruling as finding that she "does not have standing to be represented by counsel during applicable hearings arising from the military rules of evidence at trial." In the motion to reconsider, LRM asked for relief in the form of production and provision of documents, and that the military judge grant LRM "limited standing to be heard through counsel of her choosing in hearings related to M.R.E. 412, M.R.E. 513, CVRA, and the United States Constitution." The military judge denied the motion for reconsideration in full.

Thus, the issue of whether LRM has limited standing to be heard through counsel in hearings related to M.R.E. 412 and 513

comes to this Court in the form of a challenge by a limited participant to a concrete ruling by a military judge in an adversarial setting. See United States v. Chisholm, 59 M.J. 151, 153 (C.A.A.F. 2003) ("In the absence of a challenge by a party to a concrete ruling by a military judge in an adversarial setting, we conclude that consideration of Issue I under the circumstances of the present case would be premature."). The parties have argued, and the military judge has addressed, the relevant legal issues. The issue is ripe for review by this Court.

SUBSTANTIVE ISSUES

Construction of a military rule of evidence, as well as the interpretation of statutes, the UCMJ, and the R.C.M., are questions of law reviewed de novo. United States v. Matthews, 68 M.J. 29, 35-36 (C.A.A.F. 2009); United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008).

The military judge erred by determining at the outset of the court-martial, during arraignment proceedings and before any M.R.E. 412 or 513 evidentiary hearings, that LRM would not have standing to be represented through counsel during applicable hearings arising from the M.R.E. The President has expressly stated the victim or patient has a right to a reasonable opportunity to attend and be heard in evidentiary hearings under M.R.E. 412 and 513. M.R.E. 412(c)(2) provides that, before

admitting evidence under the rule, the military judge must conduct a hearing where the "alleged victim must be afforded a reasonable opportunity to attend and be heard." See also M.R.E. 513(e)(2) ("The patient shall be afforded a reasonable opportunity to attend the hearing and be heard . . . ."). M.R.E. 513(a) also provides that a patient has the privilege to refuse to disclose confidential communications covered by the psychotherapist-patient privilege. A reasonable opportunity to be heard at a hearing includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel. This is self-evident in the case of M.R.E. 513, the invocation of which necessarily includes a legal conclusion that a legal privilege applies.

Statutory construction indicates that the President intended, or at a minimum did not preclude, that the right to be heard in evidentiary hearings under M.R.E. 412 and 513 be defined as the right to be heard through counsel on legal issues, rather than as a witness. Both M.R.E. 412 and 513 permit the parties to "call witnesses, including the alleged victim [or patient]." M.R.E. 412(c)(2); M.R.E. 513(e)(2). However, in addition to providing that the victim or patient may be called to testify as a witness on factual matters, the rules also grant the victim or patient the opportunity to "be heard." Id. Furthermore, every time that the M.R.E. and the R.C.M. use

the term "to be heard," it refers to occasions when the parties can provide argument through counsel to the military judge on a legal issue, rather than an occasion when a witness testifies. See, e.g., R.C.M. 806(d) Discussion; R.C.M. 917(c); R.C.M. 920(c); R.C.M. 920(f); R.C.M. 1005(c); R.C.M. 1102(b)(2); M.R.E. 201(e).

This interpretation of a reasonable opportunity to be heard at a hearing is consistent with the case law of this Court and other federal courts. In Carlson, for example, this Court provided extraordinary relief to two sexual assault victims who had sought to prevent "unwarranted invasions of privacy" and to protect their rights under M.R.E. 412, Article 31, UCMJ, 10 U.S.C. § 831, and other privileges recognized by law. 43 M.J. 401. The Court ordered that the victims "will be given an opportunity, with the assistance of counsel if they so desire, to present evidence, arguments and legal authority to the military judge regarding the propriety and legality of disclosing any of the covered documents." Id. (emphasis added). While Carlson is a summary disposition, this Court "has profited from guidance offered in prior summary dispositions." United States v. Diaz, 40 M.J. 335, 339-40 (C.M.A. 1994); see also Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court); United States v. Sanchez, 44 M.J. 174, 177 (C.A.A.F.

1996) (citing Carlson). Similarly, in United States v. Klemick, the Navy-Marine Corps CCA found that the military judge did not abuse his discretion in rulings on M.R.E. 513 matters. 65 M.J. 576, 581 (N-M. Ct. Crim. App. 2006). During the evidentiary hearing, the patient opposed trial counsel's motion "through counsel who entered an appearance in the court-martial on her behalf for this limited purpose," and the military judge considered the patient's brief and argument. Id. at 578.

Furthermore, while the military judge suggests that LRM's request is novel, there are many examples of civilian federal court decisions allowing victims to be represented by counsel at pretrial hearings. Although not precedent binding on this Court, in the United States Court of Appeals for the Fifth Circuit, for example, victims have exercised their right to be reasonably heard regarding pretrial decisions of the judge and prosecutor "personally [and] through counsel." In re Dean, 527 F.3d 391, 393 (5th Cir. 2008). The victims' "attorneys reiterated the victims' requests" and "supplemented their appearances at the hearing with substantial post-hearing submissions." Id.; see also Brandt v. Gooding, 636 F.3d 124, 136-37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard."). Similarly, in United States v. Saunders, at a pretrial Fed. R. Evid. 412(c)(1) hearing, "all counsel, including the alleged

victim's counsel, presented arguments." 736 F. Supp. 698, 700 (E.D. Va. 1990). In United States v. Stamper, the district court went further and, in a pretrial evidentiary hearing, allowed counsel for "all three parties," including the prosecution, defense, and victim's counsel, to examine witnesses, including the victim. 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

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

Based on the foregoing discussion, the military judge's ruling in the present case runs counter to the M.R.E., and is in

error for three reasons. First, by prohibiting LRM from making legal arguments, the military judge improperly limited LRM's right to be heard on the basis for the claim of privilege or admissibility. M.R.E. 513(a) creates a privilege to refuse to disclose confidential communications, which necessarily involves a legal judgment of whether the privilege applies, as well at the opportunity for argument so that a patient may argue for or against the privilege. Neither M.R.E. 412 nor 513 preclude the victim or patient from arguing the law.

Second, the military judge's ruling, made during the arraignment hearing process and prior to any M.R.E. 412 or 513 proceedings, is a blanket prohibition precluding LRM from being heard in M.R.E. 412 or 513 proceedings through counsel without first determining whether it would be unreasonable under the circumstances. Instead, the military judge based his ruling on his flawed conclusion that LRM was precluded from making legal argument. While LRM's right to be heard through counsel is not absolute, LRM has a right to have the military judge exercise his discretion on the manner in which her argument is presented based on a correct view of the law.

Third, the military judge cast the question as a matter of judicial impartiality. It is not a matter of judicial partiality to allow a victim or a patient to be represented by counsel in the limited context of M.R.E. 412 or 513 before a

military judge, anymore than it is to allow a party to have a lawyer. The military judge's ruling was thus taken on an incorrect view of the law, and is in error.

REMEDY

As a threshold matter, the Government argues that, even though the Judge Advocate General has certified three issues to this Court, this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law. The relevant text of Article 67, UCMJ, states:

> (a) The Court of Appeals for the Armed Forces shall review the record in --
>
> . . . .
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review;
>
> . . . .
>
> (c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. 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. 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. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

Emphasis added. The first clause of Article 67(c), UCMJ, does not confine the second clause in the way the Government proposes. In United States v. Leak, for example, this Court considered that:

> One possible reading of the language in subsection (c) of the statute is that because the lower court did not affirm the finding with respect to Appellant's rape charge, or set it aside as incorrect in law, this Court is without authority to "act." Under this reading, this Court would be obliged to "review" the Judge Advocate General's certified question, but we would have no statutory authority to "act."

61 M.J. 234, 239 (C.A.A.F. 2005). The Court concluded that "Article 67 does not preclude review of questions of law certified by Judge Advocates General where the courts of criminal appeals have set aside a finding on the ground of factual insufficiency." Id. at 242. Similarly, in the present case, even though the CCA did not reach the substantive issues, this Court may still take action with respect to all of the certified issues, including whether this Court should issue a writ of mandamus.

Furthermore, prudential concerns, such as the impending court-martial start date, the parties' interest in the speedy resolution of these issues, and the JAG's certification of all three issues, counsel the Court to reach all the substantive issues and proceed to grant relief at this time, if appropriate. In addition, the military judge's ruling raises issues of law of

first impression which could apply in all M.R.E. 412 and M.R.E. 513 hearings. Absent any guidance from this Court and with no other meaningful way for these issues to reach appellate review, every military judge could interpret the scope and extent of a victim's rights differently, so that a victim or patient's rights vary from courtroom to courtroom. Under these circumstances, this Court should not decline to address substantive issues which are properly before it, and which present a novel legal question regarding the interpretation of the M.R.E. affecting an ongoing court-martial. As in Wuterich, "[i]n view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we [should] review directly the decision of the military judge without remanding the case to the lower court." 67 M.J. at 70. "[N]either justice nor judicial economy would be served by delaying the [court-martial] pending remand to the Court of Criminal Appeals." Powell, 47 M.J. at 364.

However, while this Court may appropriately take action at this time, a writ of mandamus is not the appropriate remedy. At the lower court, LRM petitioned for a writ of mandamus directing the military judge "to provide an opportunity for [LRM] to be heard through counsel at hearings conducted pursuant to [M.R.E.] 412 and 513, and to receive any motions or accompanying papers

reasonably related to her rights as those may be implicated in hearings under [M.R.E.] 412 and 513." The military judge's ruling must be based on a correct view of the law. M.R.E. 412 and M.R.E. 513 create certain privileges and a right to a reasonable opportunity to be heard on factual and legal grounds, which may include the right of a victim or patient who is represented by counsel to be heard through counsel. However, these rights are subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801, and the law does not dictate the particular outcome that LRM requests.

CONCLUSION

Certified questions I and II are answered in the affirmative. Certified question III is answered in the negative. The current record is returned to the Judge Advocate General of the Air Force for remand to the military judge for action not inconsistent with this opinion.

STUCKY, Judge (concurring in part and dissenting in part and in the result):

While I agree with the majority that we have subject matter jurisdiction in this case, I nonetheless agree with the discussion of standing in Part A of Judge Ryan's dissent. I would therefore dismiss the petition for lack of standing and would not reach either the second or the third certified issues.

RYAN, Judge, with whom Stucky, J., joins as to Part A (dissenting):

A.

Whether it is more irregular that the Judge Advocate General of the Air Force (TJAG) "certified" these issues or that the Court chooses to answer them is a close call, particularly in light of the Supreme Court's recent decision in Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1155 (2013) (holding that the respondents lacked standing "because they cannot demonstrate that the future injury they purportedly fear is certainly impending," and, therefore, cannot establish a sufficient injury-in-fact), and the plain language of Article 67(a)(2) and Article 69, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 867(a)(2), 869 (2006).

The putative victim in this pending court-martial, LRM, through her attorney, asked the military judge to order that she be provided copies of motions related to the admission of evidence under Military Rules of Evidence (M.R.E.) 412, 513, and 514, and that the court reserve to her attorney the right to argue on those motions, although, at that point, her attorney admitted that he "[did] not intend to do so." Trial and defense counsel did not object to LRM receiving informational copies of any motions filed

pursuant to those rules. While the military judge found that LRM lacked standing to motion the court for production of documents or be heard through counsel, the Government avers that trial counsel provided LRM, through her attorney, with (1) copies of defense motions to admit evidence pursuant to M.R.E. 412 and 513, (2) the Government's response to the defense motion to admit evidence under M.R.E. 412, and (3) other trial-related documents.[1]

Based on the foregoing, at this point in the proceedings, LRM -- having no intention to speak or legal arguments to raise -- has not suffered any actual harm. She alleges no "certainly impending" harm, Clapper, 133 S. Ct. at 1155, and does not allege any divergence between her interests and those of the Government, or that such a divergence in interests is likely, let alone certain, to occur at a later stage in the proceedings. The absence of any actual or imminent injury to LRM, a nonparty to the pending court-martial below, makes TJAG's unprecedented use of his certification power to certify interlocutory issues to this Court all the more perplexing.

[1] In the Government's Response to Judicial Order –- Special Victims' Counsel, the Government avers that it did not provide LRM with a copy of its response to defense motion to admit evidence under M.R.E. 513.

While we are assuredly not an Article III court, we have, up until now, understood ourselves to be bound by the requirement that we act only when deciding a "case" or "controversy." See U.S. Const. art. III, §2; United States v. Johnson, 53 M.J. 459, 462 (C.A.A.F. 2000) (holding that the appellant lacked standing to object to an unlawful subpoena issued to secure the attendance of his wife as a witness at an Article 32, UCMJ, 10 U.S.C. § 832 (2006), hearing where the appellant "was neither deprived of a right nor hindered in presenting his case"); United States v. Jones, 52 M.J. 60, 63-64 (C.A.A.F. 1999) (holding that the appellant lacked standing to challenge the violation of a witness's Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2006), or Fifth Amendment rights and explaining that "[t]he requirement is designed to allow a moving party with a personal stake in the outcome to enforce his or her rights" (quotation marks and citations omitted)). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) (quotation marks and citations omitted). And paramount to enforcing that jurisdictional threshold is

the requirement that, inter alia, a party have standing. See Raines v. Byrd, 521 U.S. 811, 818 (1997).

Integral to standing is a showing of injury-in-fact; "an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper, 133 S. Ct. at 1147 (citing Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2752 (2010)). This requirement ensures that federal courts resolve only actual disputes where people are being harmed in fact, leaving hypothetical issues of law to be resolved where they should be, by the coordinate executive and legislative branches of government. See Hollingsworth v. Perry, 133 S. Ct. 2652, __ (2013), slip op. at 6 ("The doctrine of standing . . . 'serves to prevent the judicial process from being used to usurp the powers of the political branches.'" (quoting Clapper, 133 S. Ct. at 1146)); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea -- the idea of separation of powers.").

The issues before us are not justiciable because LRM has not been presently harmed and any future injury "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" Clapper, 133 S. Ct. at 1143. Per the representations of

both parties, LRM either has or will be permitted to have the documents she requested, and her attorney stated that he does not intend to speak on LRM's behalf, as LRM's interests are aligned with the Government's. Which begs the question: at this point, what, if any, injury would be redressed by a favorable decision from this Court? On these facts, I can see no injury to be remedied, rendering any decision from this Court purely advisory and outside the "judicial Power" of Article III federal courts. See U.S. Const. art. III, §2. On this ground alone the certification should be dismissed.

B.

Additional grounds exist for dismissal of this certification. By acting on the present certificate, the majority approves a road map for evading the ordinary limitations on our review of interlocutory issues. LRM, a nonparty to the litigation who has not suffered any actual injury or even a reasonable likelihood of future injury, had interlocutory issues involving hypothetical future harm to her rights certified by TJAG to this Court via Article 67(a)(2), UCMJ. This unprecedented use of Article 67(a)(2) was made despite the fact that to have its interlocutory issues considered, the Government would have to meet the stringent requirements of Article 62, UCMJ, 10 U.S.C. § 862

(2006), and an accused would have to satisfy both the jurisdictional requirements of Article 67, UCMJ, in order to invoke the power of the All Writs Act, 28 U.S.C. § 1651(a) (2006) (allowing this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction"), and the extraordinary burdens needed to meet the criteria for an extraordinary writ. See, e.g., Hasan v. Gross, 71 M.J. 416, 416-17 (C.A.A.F. 2012) ("Applying the heightened standard required for mandamus relief, [and] conclud[ing] that based on a combination of factors, a reasonable person, knowing all the relevant facts, would harbor doubts about the military judge's impartiality.").

Further exacerbating the impropriety of the situation is that the instant certification was made in the early stages of a criminal case; TJAG's actions having ground the accused's proceedings to a halt ostensibly to determine the contours of a right of a witness who has identified no injury-in-fact and no divergence between her interests and those of the Government. Considering that "[t]he exercise of prosecutorial discretion is a prerogative of the executive branch of government," United States v. O'Neill, 437 F.3d 654, 660 (7th Cir. 2006) (citing Wayte v. United States, 470 U.S. 598, 607 (1985)), and the ordinary state

of affairs in our adversarial system where the government, not TJAG, is the accused's adversary, TJAG's decision to certify the question whether this nonparty should be allowed to effectively intervene in this criminal proceeding is all the more remarkable.

Nor is the certification proper under any provision of the UCMJ. As relevant to this issue, Article 69(d), UCMJ, provides that a Court of Criminal Appeals (CCA) may review (1) "any court-martial case which (A) is subject to action by [TJAG] under this section, and (B) is sent to the [CCA] by order of [TJAG]; and, (2) any action taken by [TJAG] under this section in such case." Article 69(a)-(c), UCMJ, provides the circumstances in which TJAG may modify or set aside the findings and sentence in a court-martial case. Nowhere do these sections provide TJAG with authority to intermeddle on an interlocutory issue that is not case dispositive, let alone the authority to certify an interlocutory issue to this Court.

Yet despite the lack of statutory authority to intrude at this juncture of the case, TJAG "certified" the issues before this Court pursuant to Article 67(a)(2), UCMJ, which presents yet another problem. Article 67(a)(2), UCMJ, provides that "[this Court] shall review the record in all cases reviewed by a [CCA] which [TJAG] orders sent to [this

Court] for review." In reviewing such "cases," this Court may "act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the [CCA]." Article 67(c), UCMJ; see also Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128-30 (C.A.A.F. 2013).

But there have been no findings or sentence entered here, and in requesting review of this particular interlocutory ruling, TJAG has not properly certified a "case" under Article 67(a)(2), UCMJ. In United States v. Redding, 11 M.J. 100, 102-04 (C.M.A. 1981), the Court clearly and fully considered whether TJAG had properly certified a "case" when he requested review of a trial judge's ruling "which rejected a command determination that a military lawyer requested by the accused . . . was unavailable" and where review of that ruling had been initiated directly in the Court of Military Review by a petition for extraordinary relief after the trial judge effectively dismissed the case for failure to make the requested military lawyer available.

The Court directly addressed whether the proceedings before it constituted a "case," and, therefore, were properly certifiable, and explicitly distinguished the military judge's ruling from "an intermediate or

interlocutory order" solely because "[the ruling] end[ed] court-martial proceedings on the charges; it is, therefore, not an intermediate or interlocutory order but a final decree." Id. at 104. The Court reasoned that because "the posture of the proceedings . . . was tantamount to a final disposition of the case," TJAG had properly certified a "case" within the meaning of Article 67(b)(2), UCMJ (now Article 67(a)(2), UCMJ). Id. (internal quotation marks and citation omitted).

Given the plain language of Articles 67 and 69, UCMJ, Redding at best expresses the outermost limits of TJAG's certification power, allowing him to certify an interlocutory issue only where it is "tantamount to a final disposition" of a case. Id. The majority, however, ignores both the plain statutory language and this precedent and instead, in cursory fashion, relies on United States v. Curtin, 44 M.J. 439 (C.A.A.F. 1996), a case which cited Redding to hold, without discussion, and contrary to both the plain language of Article 67, UCMJ, itself and the actual holding in Redding, that a "case" within Article 67(a)(2) "includes a 'final action' by an intermediate appellate court on a petition for extraordinary relief," quoting Redding, 11 M.J. at 104. See Curtin, 44 M.J. at 440; LRM v. Kastenberg, __ M.J. __, __ (6-7) (C.A.A.F.

2013). Redding narrowly held that "proceedings of the kind in issue are certifiable" and distinguished between action by a military judge that amounts to a "final decree," which could be certified because "[s]uch action ends court-martial proceedings on the charges," from a ruling that is "interlocutory in nature," which could not be certified. Redding, 11 M.J. at 104 (internal quotation marks and citation omitted).[2]

Where, as here, an interlocutory ruling is not "tantamount to a final disposition of the case," id., the proper channels of review of the issue include (1) review in the ordinary course of appellate review by the CCA under Article 66, UCMJ, (2) an appeal by the Government subject

[2] Moreover, in responding to the Government's argument that "this Court is not authorized to act with respect to matters of law when the CCA has not acted with respect to the same matters of law," LRM, __ M.J. at __ (19), the majority misapplies United States v. Leak, 61 M.J. 234 (C.A.A.F. 2005), in holding that, here, as in Leak, this Court may act on the substantive issues "even though the CCA did not reach [them]." LRM, __ M.J. at __ (20). Leak, however, more narrowly held that this Court could review "a lower court's determination of factual insufficiency for application of correct legal principles," Leak, 61 M.J. at 241, and the majority's passing extension of that holding to the present case is unwarranted. See United States v. Nerad, 69 M.J. 138, 147 (C.A.A.F. 2010) ("[T]he power to review a case under Article 67(a)(2), UCMJ, includes the power to order remedial proceedings . . . to ensure that the lower court reviews the findings and sentence approved by the convening authority in a manner consistent with a 'correct view of the law.'" (quoting Leak, 61 M.J. at 242)).

to the limitations of Article 62, UCMJ, or (3) a petition for extraordinary relief from the interlocutory ruling requested by a person with standing to challenge the ruling. See Article 66, UCMJ; Article 62, UCMJ; 28 U.S.C. § 1651(a).

It is entirely unclear why this Court would adopt a more expansive interpretation of "case" in this context, contrary to the plain language of the statute and unsupported by legislative history. The Supreme Court, in those limited instances where its jurisdiction is mandatory, see, e.g., 15 U.S.C. § 29 (particular class of civil antitrust cases), has been most exacting in requiring that the case is actually one it must decide. See Heckler v. Edwards, 465 U.S. 870, 876 (1984) (interpreting 28 U.S.C. § 1252 (repealed 1988), to provide mandatory jurisdiction in the Supreme Court only where "the holding of federal statutory unconstitutionality is in issue"); Palmore v. United States, 411 U.S. 389, 395-96 (1973) (holding that an appeal as of right would not lie to the Supreme Court under 28 U.S.C. § 1257 (amended 1988), in the context of a District of Columbia court's upholding a local statute against constitutional attack, and noting that "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress

has expressed its wishes; and we are particularly prone to accord strict construction of statutes authorizing appeals to this Court") (internal quotation marks and citations omitted).

What the instant certification amounts to is an improper attempt by TJAG to shortcut proper procedure without statutory authority to do so at this juncture and force this Court to review an interlocutory ruling that (1) does not come before us in the form of a petition for extraordinary relief, (2) is neither case dispositive nor an adjudged finding or sentence, and (3) does not involve an injury-in-fact to anyone (other than perhaps the accused's right to a speedy trial). This is not an effort that should be rewarded. Article 67(a)(2), UCMJ, which requires us to decide certified issues in "cases," should be strictly construed to require just that, and all interlocutory routes to this Court should require parties with standing and issues that qualify for review under either Article 62, UCMJ, or the All Writs Act and Article 67, UCMJ. By presently certifying issues pursuant to Article 67(a)(2), UCMJ, TJAG circumvented (1) the specific requirements for a Government appeal under Article 62, UCMJ; (2) the heightened scrutiny required for an extraordinary writ by either LRM or the accused; and (3)

this Court's discretion over whether to grant review of this issue if, in the future, LRM suffers or is reasonably certain to suffer injury-in-fact and seeks a writ appeal.

TJAG may employ both congressional and executive routes to answer interlocutory questions definitively where his curiosity cannot await resolution of a particular case and where those claiming a right have no injury-in-fact such that they could seek a writ themselves. Permitting certification of interlocutory issues that are neither justiciable nor case dispositive in any sense distorts the limited role of both TJAG and this Court within the military justice system. For these additional reasons, I would dismiss the certification as improper, and I respectfully dissent.

[redacted]

GENERAL COURT-MARTIAL

UNITED STATES

v.

[redacted]

TRIAL MANAGEMENT ORDER

31 JAN 22

1. **Trial Dates and Milestones**. The following are due on or before 2359 on the ordered date:

a. Arraignment (and appointment of victim's designee if applicable)	**31 JAN 22**
b. Defense request for discovery	4 FEB 22
c. Government disclosure obligations[i]	11 FEB 22
d. Defense reciprocal disclosure obligations[ii]	11 FEB 22
e. Defense expert consultant request	11 FEB 22
f. Defense witness request[iii]	11 FEB 22
g. Government response to Defense witness request	17 FEB 22
h. Government response to Defense expert consultant request	22 FEB 22
i. Government notices pursuant to M.R.E. 404(b), 413(b), 414(b)	22 FEB 22
j. Motions filed and notice pursuant to M.R.E. 412**	24 FEB 22
k. Responses to motions	3 MAR 22
l. **Article 39(a)**	**8 MAR 22**
m. Motions Filed	20 ~~25~~ MAR 22
n. Responses to Motions	31 ~~APR~~ MAR 22
o. Article 39(a)	**7 APR 22**
p. Written notice of certain defenses[iv]	10 ~~15~~ APR 22
q. Written notice of pleas and forum[v]*	10 ~~15~~ APR 22
r. Final pretrial matters[vi]*	22 APR 22
s. **Trial Dates at** [redacted]	**2-~~15~~ 10 MAY 22**

Appellate Exhibit 1
Page 1 of 2

Rule 412. Sex-Offense Cases: The Victim

Primary tabs

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) ***Criminal Cases*****.** The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) ***Civil Cases*****.** In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Notes

(Added Pub. L. 95–540, §2(a), Oct. 28, 1978, 92 Stat. 2046; amended Pub. L. 100–690, title VII, §7046(a), Nov. 18, 1988, 102 Stat. 4400; Apr. 29, 1994, eff. Dec. 1, 1994; Pub. L. 103–322, title IV, §40141(b), Sept. 13, 1994, 108 Stat. 1919Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Rules—1994 Amendment

Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy,

potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which

the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. *Cf*. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. *See, e.g., United States v. Galloway*, 937 F.2d 542 (10th Cir. 1991), *cert. denied*, 113 S.Ct. 418 (1992) (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather*, 702 F.2d 736 (8th Cir. 1983) (birth of an illegitimate child inadmissible); *State v. Carmichael*, 727 P.2d 918, 925 (Kan. 1986) (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. *See* 23 C. Wright & K. Graham, Jr., *Federal Practice and Procedure*, §5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does

not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, “except as provided in subdivisions (b) and (c)” is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. *See United States v. Begay*, 937 F.2d 515, 523 n. 10 (10th Cir. 1991). Evidence offered for the specific purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. *See, e.g., United States v. Azure*, 845 F.2d 1503, 1505–06 (8th Cir. 1988) (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is

alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosection [sic] for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988) (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. *Cf*. Fed.R.Civ.P. 35 (a).

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be

present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed.R.Civ.P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed.R.Civ.P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962–63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language

would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. *See* 1 S. Saltzburg & M. Martin, *Federal Rules Of Evidence Manual*, 396–97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

[The Supreme Court withheld that portion of the proposed amendment to Rule 412 transmitted to the Court by the Judicial Conference of the United States which would apply that Rule to civil cases. This Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee. The proposed amendment to Rule 412 was subsequently amended by section 40141(b) of Pub. L. 103–322. See below.]

Congressional Modification of Proposed 1994 Amendment

Section 40141(a) of Pub. L. 103–322 [set out as a note under section 2074 of this title] provided that the amendment proposed by the Supreme Court in its order of Apr. 29, 1994, affecting Rule 412 of the Federal Rules of Evidence would take effect on Dec. 1, 1994, as otherwise provided by law, and as amended by section 40141(b) of Pub. L. 103–322. See 1994 Amendment note below.

Committee Notes on Rules—2011 Amendment

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to

be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Amendment by Public Law

1994 —Pub. L. 103–322 amended rule generally. Prior to amendment, rule contained provisions relating to the relevance and admissibility of a victim's past sexual behavior in criminal sex offense cases under chapter 109A of Title 18, Crimes and Criminal Procedure.

1988 —Pub. L. 100–690, §7046(a)(1), substituted "Sex Offense" for "Rape" in catchline.

Subd. (a). Pub. L. 100–690, §7046(a)(2), (3), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rate" and "such offense" for "such rape or assault".

Subd. (b). Pub. L. 100–690, §7046(a)(2), (5), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or of assault with intent to commit rape" in introductory provisions and "such offense" for "rape or assault" in subd. (b)(2)(B).

Subds. (c)(1), (d). Pub. L. 100–690, §7046(a)(4), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

Effective Date

Section 3 of Pub. L. 95–540 provided that: "The amendments made by this Act [enacting this rule] shall apply to trials which begin more than thirty days after the date of the enactment of this Act [Oct. 28, 1978]."

use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or Inference Not Permitted.*

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn there from except when determined by the military judge to be required by the interests of justice.

(b) *Claiming a Privilege Without the Knowledge of the Members.* In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. Subdivision (b) does not apply to a special court-martial without a military judge.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn there from except as provided in subdivision (a)(2).

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 or defense counsel 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;

(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; or

(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 comprised of a military judge and members, the military judge must conduct the hear- ing 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 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.

(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 subsection (d) of this Rule and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) of this Rule.

(5) To prevent unnecessary disclosure of evi- dence 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. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Rule 514. Victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege.

(a) *General Rule.* A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made be-

tween the alleged victim and a victim advocate or between the alleged victim and Department of Defense Safe Helpline staff, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating advice or assistance to the alleged victim.

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

(1) "Victim" means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) "Victim advocate" means a person who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) "Department of Defense Safe Helpline staff" are persons who are designated by competent authority in writing as Department of Defense Safe Helpline staff.

(4) A communication is "confidential" if made in the course of the victim advocate-victim relationship or Department of Defense Safe Helpline staff-victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a victim's records or communications" means testimony of a victim advocate or Department of Defense Safe Helpline staff, or records that pertain to communications by a victim to a victim advocate or Department of Defense Safe Helpline staff, for the purposes of advising or providing assistance to the victim.

(c) *Who May Claim the Privilege.* The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a counsel representing the victim to claim the privilege on his or her behalf. The victim advocate or Department of Defense Safe Helpline staff who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, Department of Defense Safe Helpline staff, guardian, conservator, or a counsel representing the victim 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 victim is dead;

(2) When federal law, state law, Department of Defense regulation, or service regulation imposes a duty to report information contained in a communication;

(3) When a victim advocate or Department of Defense Safe Helpline staff believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) If the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate or Department of Defense Safe Helpline staff are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

(5) 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

(6) when admission or disclosure of a communication is constitutionally required.

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

(1) In any case in which the production or admission of records or communications of a victim 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 practicable, notify the victim or the victim's guardian, conservator, or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a victim'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 victim, and offer other rele-

vant evidence. The victim 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 coun- sel, 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 hear- ing 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 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.

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

(5) To prevent unnecessary disclosure of evidence of a victim'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. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

SECTION VI

WITNESSES

Rule 601. Competency to testify in general

Every person is competent to be a witness unless these rules provide otherwise.

Rule 602. Need for personal knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Mil. R. Evid. 703.

Rule 603. Oath or affirmation to testify truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Military judge's competency as a witness

(a) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Member's competency as a witness

(a) *At the Trial by Court-Martial.* A member of a court-martial may not testify as a witness before the other members at any proceeding of that court-martial. If a member is called to testify, the military judge must – except in a special court-martial without a military judge – give the opposing party an opportunity to object outside the presence of the members.

Military Rule of Evidence 513

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A REVIEW OF 2022 COURT OF APPEALS FOR THE ARMED FORCES UPDATES TO MILITARY RULE OF EVIDENCE 513

C.A.A.F.'s opinions and actions this term helped to demarcate some of the boundaries to Mil. R. Evid. 513, yet the likelihood of litigation remains high.

Introduction

During the 2022 term, the Court of Appeals for the Armed Forces (C.A.A.F.) had the opportunity to certify four cases for review, all involving Military Rule of Evidence (Mil. R. Evid.) 513: *Tinsley*, *Beauge*, *Mellette*, and *McClure*.[1] Through both opinions and nonaction, C.A.A.F. provided practitioners clarity concerning the construction and applicability of Mil. R. Evid. 513, resolving longstanding disputes amongst military courts of appeal. This article outlines two C.A.A.F. opinions directly addressing Mil. R. Evid. 513, *Mellette*[2] and *Beauge*,[3] and the implications of C.A.A.F.'s decision to allow two Army Court of Criminal Appeal's opinions, *McClure*[4] and *Tinsley*,[5] to stand. After reviewing the substantive law at issue, the authors provide recommendations on how to interpret and apply the rule in light of these decisions, and the practical impact on military justice practitioners.

The Scope of Mil. R. Evid. 513 – According to its Plain Language

In 1996, the United States Supreme Court formally recognized the psychotherapist-patient privilege under federal common law in *Jaffee v. Redmond*.[6] In its decision, the Supreme Court acknowledged the societal benefits of encouraging mental health treatment and protecting those communications associated with treatment.[7] In 1999, the President also recognized this important public policy consideration[8] establishing the privilege as an evidentiary rule for the military.[9]

The privilege's plain text provides that "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and the psychotherapist … [when] such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition."[10] Since its codification, military courts of appeal had been split on how liberally to interpret the privilege.[11] Specifically, whether the privilege applies only to the "communications" between a patient and mental health provider, or whether it also includes the diagnosed disorders and prescribed medications that derive directly from those communications.[12] This year, C.A.A.F.

resolved the issue in *Mellette*.[13]

In a three-to-two decision, the court held that the **privilege is limited** solely to the "communications" between the psychotherapist and patient.

In a three-to-two decision, the court held that the privilege is limited solely to the "communications" between the psychotherapist[14] and patient.[15] It does not protect the diagnoses, treatments, or other documents that derive from those communications, yet it does protect the portions of those documents which contain protected communications.[16]

Focusing on the plain language of Mil. R. Evid. 513(a), C.A.A.F. found that the "phrase 'communication made between the patient and a psychotherapist' does not naturally include other evidence, such as routine medical records, that do not memorialize actual communications between the patient and the psychotherapist."[17] C.A.A.F. highlighted a Florida statute to demonstrate the kind of additional verbiage added by the legislature that ensures the privilege is interpreted broadly enough to envelop "any diagnosis made, and advice given."[18] C.A.A.F. opined that similar expansive "nouns such as 'documents,' 'information,' or 'evidence[,]'" could have been used to expand the privilege's scope,[19] and reasoned that, if the President had so intended—like some state legislatures have done—the rule could have explicitly included this broader language, but no such effort was made.[20] As a result, C.A.A.F. rejected the government's numerous arguments to support a more expansive reading of the rule's scope,[21] and determined the omission to be intentional.[22] Thus, the plain language of the rule controls—only the "communications" between a patient and psychotherapist are protected.

Notably, C.A.A.F. emphasized that its holding was "not based on [its] views on the proper scope" of the privilege; rather, its analysis "rest[ed] solely on the specific text" of Mil. R. Evid. 513(a), and precedent.[23] C.A.A.F. put the limitation of the privilege's scope squarely on the President's shoulders, as the President possesses "both the authority and the responsibility to balance a defendant's right to access information that may be relevant to his defense with a witness's right to privacy."[24] C.A.A.F. reasoned it must respect the President's "choice" to limit the privilege's scope merely to communications, and regarding any future amendments to the rule, it would respect his decision making, "unless the President's decision with respect to that balance contravenes a constitutional or statutory limitation[.]"[25]

Apart from the scope of the privilege, C.A.A.F.'s opinions this term addressed the standard that governs the review of these records, and several of the rule's exceptions. The language of Mil. R. Evid. 513 governs both, and the standards that authorize an *in camera* review, and exceptions, are intertwined.

In Camera Review & Exceptions Standards

In practice, the first step of analysis regarding a request for mental health records begins with either a discovery[26] or production request[27], which may lead to a subpoena[28], or a motion to compel, culminating in a Mil. R. Evid. 513 hearing. C.A.A.F.'s decisions this term did not directly affect any of these rules or procedures, so practitioners can continue to rely on the applicable rules, and interpretative case law, when circumstances warrant a request for mental health records.[29] However, this term C.A.A.F. made clear the importance of the *in camera* review standard, and the limited nature of the scope of information that may be released based on an exception.

Generally, to determine the admissibility of mental health records, the movant seeking release of these communications or records must file and serve a written motion on the opposing party, military judge, and, if practical, the patient, at least five days prior to entry of pleas "specifically describing the evidence and stating the purpose" for the release.[30] The military judge must then hold a closed hearing[31] and provide the patient "a reasonable opportunity to attend … and be heard," which includes the right to be heard through their victims' counsel.[32] Thereafter, the military judge "may" elect to review the records via an *in camera* review to determine the applicability of the privilege.[33]

Prior to authorizing an *in camera* review of potentially privileged records, a military judge must first find, by a preponderance of the evidence, that the moving party has

established **four factors**.

Yet, prior to authorizing an *in camera* review of potentially privileged records, a military judge must first find, by a preponderance of the evidence, that the moving party has established four factors: (1) a specific, credible factual basis that demonstrates a reasonable likelihood that the records would contain information admissible under an exception to the privilege; (2) the requested information meets an enumerated exception; (3) the information is not cumulative of other, available information; and (4) the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. Mil. R. Evid. 513(e)(3)(A)-(D).

In *Beauge*, C.A.A.F. specifically addressed the *in camera* review standard, and the significance of a party's failure to sufficiently establish it. C.A.A.F. emphasized the military judge's decision-making and obligations:[34] "the permissive nature of this passage … states that a military judge '*may* examine the evidence *in camera*,'" thus, clearly emphasizing that a military judge is neither presumed or obligated to conduct such a review.[35] To further support this position, C.A.A.F. "underscore[d] the fact that where an Appellant's motion to compel does not meet the standard laid out in [Mil. R. Evid.] 513(e)(3) [the four prong analysis], a military judge *does not have the authority* to conduct an *in camera*review."[36] This language clarifies both the importance of this standard for advocates, the repercussions for failing to meet this standard,[37] and appears to reaffirm a precedent set by the Army Court of Criminal Appeals that a military judge's decision to improperly engage in an *in camera* review is reversible error.[38]

The rule also makes clear that the movant seeking to pierce the privilege must rely on one of the "enumerated exceptions" listed in Mil. R. Evid. 513(d).[39] In the rule's current form, there are seven exceptions.[40] C.A.A.F's decision in *Beauge* addressed two of these exceptions,[41] which are discussed in detail below.[42] Previously, an eighth exception authorized the release of documents when "constitutionally-required" to do so, but the President removed this exception by amendment in 2015.[43] Despite its removal, some military courts of appeal were reading the exception back into the rule. Although C.A.A.F. did not explicitly resolve this issue this term—despite having ample opportunity to do so—its opinions and decisions provide clarity on the way-ahead for this exception.

Constitutionally-Required Exception

Mil. R. Evid. 513 is unambiguous and authorizes piercing the privilege for only "enumerated" exceptions; nonetheless, some military courts have been incorporating the now-excluded "constitutionally-required" exception back into the rule, creating a split between military courts of appeal.

In *J.M. v. Payton-O'Brien*, the Navy Marine Corps Court of Criminal Appeals held that practitioners and the courts may still read this exception into the rule,[44] and further held that even if none of the enumerated exceptions apply, if each of the factors for an *in camera* review are met, then the military judge must then determine whether an *in camera* review is constitutionally-required.[45] Specifically, the court reasoned that it could "not allow the privilege to prevail over the Constitution," because "the privilege may be absolute outside the enumerated exceptions, but it must not infringe upon the basic constitutional requirements of due process and confrontation." However, in any instance in which the court finds the accused's constitutional rights demand disclosure of privileged material belonging to the victim, the victim always retains the right to deny waiver of the privilege.[46] Yet, such a denial is not without judicial remedy – it may result in the military judge abating the proceedings, with prejudice.[47]

This term, C.A.A.F. had the opportunity in at least four separate cases—*Mellette*, *Beauge*, *McClure*, and *Tinsley*—to address the constitutionally-required exception directly, but it chose not to. Although C.A.A.F. has not explicitly addressed this exception, by considering each of these cases in total, it appears C.A.A.F. has arguably overruled by implication the reasoning proffered in *J.M. v. Payton-O'Brien*.[48]

In *McClure*, the defense raised issues of waiver, and sought to pierce the **psychotherapist-patient privilege** based on the exception.

McClure and *Tinsley*, two Army Court of Criminal Appeals (A.C.C.A.), delivered opposite conclusions than *J.M. v. Payton-O'Brien* regarding the constitutionally-required exception. In *McClure*, the defense raised issues of waiver, and sought to pierce the psychotherapist-patient privilege based on the exception.[49] The defense requested access to the victim-patient's medical records because she admitted having multiple mental health diagnoses and related prescriptions.[50] As part of its basis to pierce the privilege, the defense argued, in a circular manner, that the mental health records were "constitutionally required because 'constitutionally required evidence very likely exists within the mental health records.'"[51] Specifically, the defense argued the appellant had due process rights, and the right to confrontation, to request and review these records, but no additional context for the request was provided.[52] The military judge denied the request because it found the victim-patient did not waive her privilege, and the defense failed to establish the four prongs of the *in camera* review standard.[53]

In affirming the military judge's decision, A.C.C.A. made clear that the military judge's decision "did not undermine appellant's confrontation rights,"[54] and relied on Supreme Court of the United States precedent, *Pennsylvania v. Ritchie*'s holding that, "the constitutional right to confront witnesses does not include the right to discover information to use in confrontation … [and] [t]he right to question adverse witnesses 'does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'"[55] Despite the defense's arguments, the court found the right did not overcome the privilege.

After A.C.C.A. issued its decision affirming the lower court's finding, the appellant sought review before C.A.A.F., which initially accepted and certified an issue, in part, regarding the applicability of the constitutionally-required exception.[56] C.A.A.F., however, did not issue an opinion in *McClure* in light of its decision in *Mellette*, thereby affirming A.C.C.A.'s decision, and leaving the issue expressly unresolved.[57]

After A.C.C.A. decided *McClure*, it more directly addressed both the issues of waiver and the constitutionally-required exception in the published opinion, *Tinsley*.[58] There, the court explicitly held there is no constitutionally-required exception under Mil. R. Evid. 513 and it cannot be a basis as an exception to pierce the privilege.[59]Specifically, the court held that neither the Confrontation Clause nor *Brady*[60] created an exception to pierce the psychotherapist-patient privilege for a victim's mental health records based on the plain language of Mil. R. Evid. 513 and the congressional intent to eliminate the constitutionally-required exception.[61] *Tinsley*, like *Mellette*, relied primarily on the President's authority to promulgate the military rules of evidence, and determined the lack of a constitutionally-required exception was not "clearly and unmistakably unconstitutional,"[62] especially in light of the fact several other recognized privileges, like the attorney-client privilege, have no such exception.[63] C.A.A.F. ultimately denied a petition to hear *Tinsley*, foregoing the opportunity to address this issue, and allowing A.C.C.A.'s decision to stand.[64]

C.A.A.F.'s opinion in *Beauge* was the court's first explicit discussion of the constitutionally-required exception this term. One of the issues the court addressed was whether the defense counsel was ineffective for failing to raise the exception.[65] Ultimately, it found counsel was not ineffective,[66] because counsel did not raise a "cutting-edge claim" as a basis to pierce the privilege.[67] However, in doing so, the court stated that it was not explicitly addressing the viability of the constitutionally-required exception, because it was unnecessary to resolve the issues before it;[68] still, its later discussion of the applicable Supreme Court precedent appears to undermine this very assertion.

The right to confront witnesses does not include the right to **discover information** to use in confrontation.

C.A.A.F. recognized an accused's constitutional concerns to pierce the privilege would arise from the right to confrontation and right to present a complete defense.[69] Even though C.A.A.F. recognized these concerns, the court found that Supreme Court precedent limited these arguments, because "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."[70] In coming to this conclusion, C.A.A.F. relied on *Ritchie*, and its discussion of the balance between discovery and an accused's Sixth Amendment right under the confrontation clause by citing to the proposition that "the right to confront witnesses does not include the right to *discover* information to use in confrontation[.]"[71] Further, it recognized that, based on *Holmes v. South Carolina*, any due process right to present a complete defense is only viable when rules "infring[e] upon a weighty interest of the

accused *and* are arbitrary or disproportionate to the purposes they are designed to serve[.]"[72] In this case, it did not find that the privilege was either "arbitrary or disproportionate to the purpose served" in light of *Jaffee*, which held that the psychotherapist-patient privilege "promotes sufficiently important interests to outweigh the need for probative evidence."[73]

C.A.A.F.'s decision to address the constitutional issue in this way, arguably, undermined its stated purpose of not addressing the issue. The court framed both an accused's arguments for the constitutionally-required exception, and then responded in kind with how they are not constitutionally sound based on three Supreme Court cases. Although perhaps unintentional, one could argue that C.A.A.F. has, at the very least, signaled its position on the exception, and most importantly, laid out arguments regarding why the constitutionally-required exception is not viable.

This position is further supported by C.A.A.F.'s reliance on identical precedent and reasoning in A.C.C.A.'s *Tinsley* and *McClure*, which both held the constitutionally-required exception no longer exists.[74] In *Beauge*, C.A.A.F relied on *Ritchie*[75] in the same way that A.C.C.A. did in *McClure*.[76] Further, C.A.A.F.'s reliance on *Jaffee*[77] mirrors the position taken by A.C.C.A. in *Tinsley*.[78] These two cases predate *Beauge*.[79] C.A.A.F. could have reviewed these cases and affirmatively answered the question whether the constitutionally-required exception is still viable, but, instead, it elected otherwise and made the same arguments A.C.C.A. did regarding this exception.

C.A.A.F.'s decision in *Mellette* also supports the position that the constitutionally-required exception no longer exists, though less explicitly. By solely limiting its opinion to the scope of the privilege, C.A.A.F. did not need to address the exception. In its reasoning regarding limiting the privilege's scope, however, two important concepts implicate the constitutionally-required exception: courts must strictly construe the language of privileges, and the President has ultimate authority over the military rules of evidence.

First, by C.A.A.F. reaffirming the precedent that privileges must be strictly construed, it supports the position that the language in the rule matters. The underlying rationale for this precedent is that privileges cut against the truth-seeking concept of judicial fact-finding, and thus, information protected from release must be as limited as possible.[80] One could argue that the truth-seeking intent behind this admonition supports inserting the constitutionally-required exception back into the rule. Nevertheless, such an argument is fatally flawed. Inherent in the reasoning is that the rule's language, or lack of language in a rule, must control.[81] Thus, because an enumerated constitutionally-required exception does not exist in the rule, it cannot be a basis to pierce the privilege. This reasoning is in line with *Mellette*'s narrowing the scope of the privilege to include only "communications," and excluding all other types of derivative informative, because the rule did not explicitly include the more expansive nouns of "documents," or "information."[82] Simply put, words matter, and so does their exclusion.

"Psychotherapist-patient privilege trumps an accused right[s]."

Second, C.A.A.F. made clear the President solely controls the text of the rule.[83] C.A.A.F. relied almost exclusively on the plain text of the rule when interpreting its scope, and stated that, if the President wanted to change the rule, he had every right to do so.[84] When this same logic is applied to the constitutionally-required exception, it is clear that the President has already exercised is authority similarly by removing the exception in 2015. For C.A.A.F. to specifically reinforce the position that the President controls the language of the rule, and then undermine that position by reinserting the language into the rule that the President has already specifically excised, would be fundamentally illogical, and antithetical to *Mellette*.

Although C.A.A.F. did not explicitly state so, its decisions, and importantly, the reasoning behind those decisions, demonstrates a strong argument that the constitutionally-required exception is not a viable basis to pierce the privilege.[85] Importantly, C.A.A.F. signaled that it would respect the President's textual decisions, as long as no constitutional or statutory basis precluded agreement.[86] Here, with the court's reliance on *Ritchie*, and its statement in *Beauge* that the "psychotherapist-patient privilege trumps an accused right[s]."[87] the likeliest constitutional hurdle to upholding the President's decision to remove the exception seems unlikely. As a result, with no constitutional or statutory argument to the contrary, C.A.A.F. is likely to uphold the President's decision to have removed the exception.

C.A.A.F.'s silence on the constitutionally-required exception aside, the court explicitly weighed in on at least one of the enumerated exceptions this term. In *Beauge*, the court addressed the duty-to-report exception in the context of an alleged assault of a child, and based on the facts of the case, also discussed the evidence-of child abuse exception as well.[88]

Duty-to-Report and Evidence-of-Child-Abuse Exceptions

In *Beauge*, C.A.A.F. reviewed the scope and application of the duty-to-report exception under the rule,[89] and held that only the specific information required to be reported by state or federal law is not subject to the privilege.[90] In other words, only the information that must be reported under state law is a non-privileged communication. Moreover, the court opined that communications not required to be reported, but that were nonetheless disclosed, would remain privileged.[91]

Generally, Mil. R. Evid. 513(d)(3) allows for disclosures of privileged communications when federal law, state law, or a service regulation imposes a duty to report. Often times, mandatory reporter laws do not detail precisely what reporters must disclose to authorities. As a result, the information subject to disclosure can often be extremely limited. Sometimes, mandatory reporting laws require only a name.[92] Other times, the law may require a handful of identifiers, such as the name and address of the individual, the nature and extent of injuries, and any information that might be helpful identifying the perpetrator.[93] This means the mandated reporter—whether it be a teacher, therapist, nurse, day care provider—who received the information can have a significant amount of discretion as to what to disclose.

Through *Beauge*, C.A.A.F. has interpreted the rule in a way that balances the purpose of the rule (to allow patients to seek advice, diagnosis or treatment of mental or emotional conditions) with the purpose of the exception (to initiate safety assessments for a vulnerable category of the population). As a result, the communications that fall within the exception, in application, are constricted.[94] Thus, counsel must examine the plain language of the specifically relied-upon mandatory reporting requirement to determine the scope of the disclosure.[95]

Based on the facts of the case, *Beauge* also tangentially addressed the evidence-of-child-abuse exception. Although communications involving evidence of child abuse or neglect are typically enveloped under state mandated reporter laws; however, Mil. R. Evid. 513(d)(2), expressly excepts such communications from a privileged status. Regardless of whether a duty to report such communications exists under state law, these types of psychotherapist-patient communications are likely not privileged in the military.[96]

> Critical to every discussion of privilege are the issues of when and how a communication or document **loses its privileged status**.

Critical to every discussion of privilege are the issues of when and how a communication or document loses its privileged status. C.A.A.F.'s opinions this term did not specifically address wrongful disclosure or waiver in the context of Mil. R. Evid. 513; nevertheless, both *McClure* and *Tinsley* did.

Wrongful Disclosures

Privileged records are not always obtained by discovery or production requests. An overeager law enforcement agent may unilaterally request and receive an accused or victim's mental health records without providing notice. An estranged spouse may have gained access to victim's medical records and turned them over to defense counsel. When a patient does not have an opportunity to object to the disclosure, counsel should evaluate the information's release under a wrongful disclosure analysis. Practitioners should look to the text of Mil. R. Evid. 511, and *Tinsley* for support when such disclosures occur.[97]

Mil. R. Evid. 511 explains that privileged matters disclosed under erroneous compulsion or without an opportunity to claim privilege are not admissible against the holder of the privilege. When records have been wrongfully disclosed, counsel may file a motion to restore the records to their privileged status in order that a determination about their production or admissibility can be properly assessed under the appropriate rule.[98] The privilege holder then should be able to "prevent another from being a witness or disclosing any matter or producing any object or writing."[99]

Beyond the text of the military rules of evidence, *Tinsley* provides guidance that is more explicit on how to handle wrongful disclosures. It held that if a "health care provider, Criminal Investigation Division, or any other source inadvertently provides the government with potentially exculpatory privileged information, such action does not constitute a waiver or otherwise trigger an immediate duty to disclose."[100] In such situations, the government must inform the opposing party and patient of the

inadvertent disclosure so the patient has an opportunity to assert privilege, which, if done timely, bars disclosure and requires return of the privileged records to the patient. [101] Notably, if there are any disputes about waiver after the disclosure, if the patient asserts the privilege, then the dispute should be resolved in the patient's favor.[102] Thus, in instances in which privileged records are inadvertently released with non-privileged records, privileged records maintain their status.

Waiver

Another commonly litigated issue generally implicated by privilege involves waiver. Practitioners should familiar with Mil. R. Evid. 510, and, in the context of mental health records, *McClure*.

Under Mil. R. Evid. 510, a person may waive a privilege if he or she "voluntarily ;discloses or consents todisclosure of any *significant* part of the matter or communication under such circumstances that it would beinappropriate to allow the claim of privilege."[103] Based on a plain reading of the rule, when a party asserts waiver, there are essentially three steps to the analysis: (1) whether the disclosure was voluntary or consensual, (2) how significant was the disclosure in relation to the protected information, and (3) whether it would be inappropriate to allow the privilege to continue based on the circumstances of the release.

The significance and voluntariness of the disclosure is fact-intensive. Generally, the issue turns on how much information has been released and to whom. Courts have determined waiver to underlying communications or documents has not occurred when counsel has failed to object to a discovery or production request[104] or when a victim voluntarily disclosed information about mental health diagnoses and treatments.[105] Conversely, C.A.A.F. has found that, where a privilege holder has voluntarily consented to the disclosure of privileged statements to trial counsel without express limitation, it would be "inappropriate to allow a claim of privilege to prevent [the accused] from using those statements at trial."[106]

Regarding the "inappropriateness to allow [the] privilege," courts have held that the privilege should not act as both a "sword" and a "shield." In other words, the privilege holder may not use it to disclose evidence "to establish advantageous facts and then invoke the privilege to deny the evaluation of their context, relevance, or truth—thus turning the privilege from a shield into a sword—a circumstance the waiver rule's broader language seeks to avoid."[107]Regarding appropriateness, practitioners should consider the perceived intent behind the communication when it was made and for what purpose.[108]

Practice Recommendations

After C.A.A.F.'s 2022 term, military justice practitioners litigating Mil. R. Evid. 513 issues should be mindful of the following points.

Mil. R. Evid. 513 is not an easy rule. Procedurally, and substantively, there are several subtleties, and the law is ever changing. Practitioners should take the time necessary to understand the issues before responding to requests for information, and practitioners should address disagreements on nuanced Mil. R. Evid. 513 issues.

Although *Mellette* has clarified the scope of the privilege, the rules or procedures regarding request for mental health records have not been affected. To the contrary, C.A.A.F. has reaffirmed their importance. The R.C.M.s regarding discovery and production, their applicable standards, and the *in camera* review standard, all still apply. Counsel should be mindful of the need to continue to articulate how the requested records meet the applicable standards, and how the *in camera* review standard has, or has not, been met.

Mil. R. Evid. 513 is not an easy rule. Procedurally, and substantively, there are several subtleties, and **the law is ever changing**.

C.A.A.F. has not explicitly held whether the constitutionally-required exception is still viable, but when reading the plain text of the rule, and its recent opinions and decisions, one can reasonably argue that the exception no longer exists. Although there are arguments on both sides, a plain reading of the current rule makes one thing abundantly clear—there is no such exception in the rule. Practitioners should argue as they (and their client's interest) see fit.

Based on C.A.A.F.'s interpretation of the duty-to-report exception, practitioners should narrowly construe enumerated exceptions to the privilege. Any release of information should be cross-referenced with the laws mandating such reports to ensure no spillage of privileged information occurred. Practitioners should take necessary steps to mitigate over-disclosures and work to return unnecessarily released information back to a privileged status.

Finally, although C.A.A.F. has not explicitly addressed the issue of wrongful disclosure or waiver in the context of Mil. R. Evid. 513, practitioners should feel confident relying on the holdings and reasoning in *Tinsley* and *McClure*, as well as the text of Mil. R. Evid. 510 and 511, when addressing these issues.

Conclusion

C.A.A.F.'s opinions and actions this term helped to demarcate some of the boundaries to Mil. R. Evid. 513, yet the likelihood of litigation remains high. Military justice practitioners should anticipate the potential for legal disagreements involving mental health records, and work to stay current on the ever-changing nature of the law regarding this privilege.

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Endnotes

[1] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544 (C.A.A.F. July 27, 2022); United States v. Beauge, 82 M.J. 157 (C.A.A.F. 2022); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454 (A. Ct. Crim. App. Sep. 2, 2021); and United

States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).
[2] *Mellette*, No. 21-0312, 2022 CAAF LEXIS 544.
[3] *Beauge*, 82 M.J. 157.
[4] *McClure*, No. ARMY 20190623, 2021 CCA LEXIS 454.
[5] *Tinsley*, 81 M.J. 836.
[6] Jaffee v. Redmond, 518 U.S. 1 (1996); *see* Anne B. Pulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here?*, 76 Wash. U. L. Q. 1341 (1998) (discussing how Congress failed to codify privileges within the Federal Rules of Evidence, which were statutorily adopted in 1975).
[7] *Jaffe*, 518 U.S. at 11-12 (discussing that, without a psychotherapist-patient privilege, "confidential communications between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.").
[8] United States vs. Jacinto, 79 M.J. 870, 879 (N-M Ct. Crim. App. 2020), *rev'd on other grounds*, 81 M.J. 350 (C.A.A.F. 2021) ("The public policy behind Mil. R. Evid. 513 is that '[e]ffective psychotherapy … depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.' Such treatment may cause 'embarrassment or disgrace' and the 'mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.' The important public interest in promoting mental health treatment is balanced with the right of an accused to present the most probative evidence during criminal trials.") (citations omitted).
[9] See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999); Major Stacy E. Flippin, *Military Rule of Evidence (Mil. R. Evid.) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists*, Army Law., Sept. 2003.
[10] Mil. R. Evid. 513(a).
[11] United States v. Rodriguez, No. ARMY 20180138, 2019 CCA LEXIS 387, *8 (A. Ct. Crim. App. Oct. 1, 2019) (holding that neither the diagnosed disorder nor the medications prescribed to treat the disorder are "confidential communications" under the privilege); H.V. v. Kitchen, 75 M.J. 717, 719-721 (U.S.C.G. Ct. Crim. App. 2016) (holding both the diagnosis, as well any prescribed medications, are covered by the privilege); *see* United States v. Mellette, 81 M.J. 681, 691-693 (N-M. Ct. Crim. App. 2021).
[12] *Id.*
[13] United States v. Mellette, 82 M.J. 13 (C.A.A.F. 2021) (certifying the question, "Did the lower court err by concluding diagnoses and treatment are also subject to the privilege, invoking the absurdity doctrine?"); *United States v. Mellette*, No. 21-0312/NA, 2022 CAAF LEXIS 32 (C.A.A.F. Jan. 13, 2022).
[14] Mil. R. Evid. 513(b)(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.").
[15] Mil. R. Evid. 513(b)(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."); Mil. R. Evid. 513(b)(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.").
[16] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544 (C.A.A.F. July 27, 2022).
[17] *Id.* at *11.
[18] *Id.* at *10.
[19] *Id.* at *11.
[20] *Id.* at *11-*13.
[21] *Id.* at *9-*19.
[22] *Id.* at *19.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] R.C.M. 701(a)(2)(i) and 701(B)(i) (discovery requests require the government to disclose information in its "possession, custody or control," when the information is "relevant to defense preparation").

[27] R.C.M. 703(e)(1) (production requests must be "relevant and necessary"); R.C.M. 703(b)(1) ("Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact."); *see also*, R.C.M. 703 (c)(2)(B)(i) (witnesses on findings or motions); R.C.M. 703(c)(2)(B)(ii) and 1001(f) (sentencing).
[28] R.C.M. 703(g)(3)(C)(ii) ("Before issuing a subpoena under this subparagraph and unless there are exceptional circumstances, the victim must be given notice so that the victim can move for relief under subparagraph (g)(3)(G) or otherwise object.").
[29] *See, e.g.*, United States v. Jones, No. ACM 39543, 2020 CCA LEXIS 207, *50 (A.F. Ct. Crim. App. June 11, 2020) (holding that the military judge reasonably found the defense's motion failed on a "fundamental level to establish relevance and necessity for records as required by R.C.M. 703(f)(3)."); LK v. Acosta, 76 M.J. 611, 616 (A. Ct. Crim. App. 2017) ("Mental health records located in military or civilian healthcare facilities that have not been made part of the investigation are not 'in the possession of prosecution' and therefore cannot be '*Brady* evidence.'").
[30] Mil. R. Evid. 513(e)(1)(A)-(B).
[31] Mil. R. Evid. 513(e)(2).
[32] *Id.*
[33] Mil. R. Evid. 513(e)(3).
[34] United States v. Beauge, 82 M.J. 157, 166 (C.A.A.F. 2022).
[35] *Id.*
[36] *Beauge*, 82 M.J. at 166 (emphasis added) (citing to Mil. R. Evid. 513(e)(3) "('[p]rior to conducting an *in camera* review, the military judge *must* find by a preponderance of the evidence that the moving party' met their burden (emphasis added))").
[37] *See, e.g.,* United States v. Arnold, No. ACM 39194, 2018 CCA LEXIS 322, *33-34 (A.F. Ct. Crim. App. June 27, 2018) (holding the military judge properly denied accused's request to order *in camera* review of victim's mental health records because accused failed to meet its burden); *see also*, United States v. Morales, No. ACM 39018, 2017 CCA LEXIS 612, *8 (A.F. Ct. Crim. App. Sep. 13, 2017) ("… trial defense counsel conceded he had 'no way of knowing' and could 'merely speculate' as to what information was in the requested records. The Government opposed the motion, which assistant trial counsel characterized as 'a fishing expedition in the extreme.'"); United States v. Marquez, No. 201800198, 2019 CCA LEXIS 409, *13-14 (N-M Ct. Crim. App. Oct. 28, 2019) ("The mere fact that an alleged victim has a discussion with her mental health provider about the subject matter of her prospective trial testimony does not, in and of itself, provide a *specific factual basis* demonstrating a reasonable likelihood that access to those privileged discussions would yield admissible evidence.").
[38] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *33 (A. Ct. Crim. App. Feb. 1, 2016) (petition for writ of mandamus granted where the military judge failed to adhere to the *in camera* review standard analysis prior to reviewing mental health records).
[39] Mil. R. Evid. 513(e)(3)(B).
[40] Mil. R. Evid. 513(d)(1)-(7).
[41] Mil. R. Evid. 513(d)(2)-(3).
[42] *Infra* Duty-to-Report & Evidence-of-Child-Abuse Exceptions.
[43] *Compare* Exec. Order No. 13,643, *reprinted in* 78 Fed. Reg. 29,559, 29,592 (May 15, 2013) *with* Exec. Order 13,696 *reprinted in* 80 Fed. Reg. 35,783 (showing "constitutionally required" exception removed from Mil. R. Evid. 513).
[44] J.M. v. Payton-O'Brien, 76 M.J. 782, 787-788 (N-M. Ct. Crim. App. 2017).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] "To overrule a precedent by implication. An overruling sub silentio is a decision by a court that contradicts a precedent but fails to expressly state that the precedent is overruled. The later opinion may be written in such a manner to suggest it could be distinguished from the earlier opinion because of some variation in the facts, which would be considered a limitation of the earlier opinion rather than its overruling. When the later opinion appears, however, to be logically inconsistent with the reasoning of the earlier opinion, the earlier opinion is impliedly overruled, or overruled sub silentio." *Overrule Sub Silentio (Overruled by Implication or Effectively Overruled)*, The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).
[49] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *15 (A. Ct. Crim. App. Sep. 2, 2021).
[50] *Id.*

[51] *Id.*
[52] *Id.*
[53] *Id.* at *20-*22.
[54] *Id.* at *22.
[55] *Id.* at *22-23 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52-53 (1987)).
[56] United States v. McClure, No. 22-0023/AR, 2022 CAAF LEXIS 48 (C.A.A.F. January 18, 2022) (certifying the questions: "Whether the military judge abused his discretion when he denied defense's motion for access to JS's mental health records under Mil. R. Evid. 510 and 513 and refused to review the mental health records *in camera* to assess whether a constitutional basis justified the release of the records to the defense."
[57] United States v. McClure, No. 22-0023/AR, 2022 CAAF LEXIS 574 (C.A.A.F. Aug. 8, 2022) ("No. 22-0023/AR. U.S. v. Michael L. McClure. CCA 20190623. On further consideration of the granted issue, 82 M.J. 194 (C.A.A.F. 2022), and in light of United States v. Mellette, __ M.J. __ (C.A.A.F. July 27, 2022), we conclude that even assuming some error by the military judge, Appellant was not prejudiced. Accordingly, it is ordered that the judgment of the United States Army Court of Criminal Appeals is affirmed.").
[58] United States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).
[59] *Id.* at 850-853.
[60] Brady v. Maryland, 371 U.S. 812 (1962).
[61] *Id.* at 850 ("Accordingly, we find that any 'constitutional exception' to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exist."); *id.* at 853 ("In 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).").
[62] *Id.* at 849 ("[T]here is no dispute that it is the President, and not the military courts, who has the authority to promulgate the Military Rules of Evidence, including privileges and their exceptions. It is also clear 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. Rather, the question that we must address in analyzing any continued reliance on the 'constitutional exception' is whether the lack of a Confrontation Clause exception to the psychotherapist-patient privilege is 'clearly and unmistakably' unconstitutional.") (citations omitted).
[63] *Id.* at 849-50 ("there is no 'constitutional exception' to the attorney-client, spousal, and clergy-penitent privileges as set forth in the Military Rules of Evidence. Nor is there any indication that either the Supreme Court or CAAF has ever considered the psychotherapist-patient privilege to be 'less worthy' than any other recognized privilege.").
[64] United States v. Tinsley, No. 22-0109/AR, 2022 CAAF LEXIS 392 (C.A.A.F., May 26, 2022).
[65] United States v. Beauge, 81 M.J. 301 (C.A.A.F. 2021) ("Did the lower court create an unreasonably broad scope of the psychotherapist-patient privilege by affirming the military judge's denial of discovery, denying remand for in camera review, and denying Appellant's claim of ineffective assistance of counsel?").
[66] United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022) ("We next hold that Appellant's counsel was not ineffective for failing to raise a constitutional objection.").
[67] Beauge, 82 M.J. at 168 n. 12 (noting "that Appellant's counsel was not constitutionally ineffective for failing to raise what would have been a cutting-edge claim."); *see, e.g.*, Murray v. Carrier, 477 U.S. 478, 486 (1986) ("The constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").
[68] Beauge, 82 M.J. at 167 n.10 ("We note that there is disagreement among the lower courts regarding the significance of the removal of the 'constitutional exception' from the list of enumerated exceptions in M.R.E. 513(d). Because the Government agrees with the reasoning of the United States Army Court of Criminal Appeals in LK v. Acosta, 76 M.J. 611 (A. Ct. Crim. App. 2017), 'that the removal of a constitutional exception from an executive order-based rule of evidence cannot alter the reach of the Constitution,' we need not decide the precise significance of the removal of this express exception in order to decide this case. Brief for Appellee at 34, United States v. Beauge, No. 21-0183 (C.A.A.F. Sept. 24, 2021) (internal quotation marks omitted) (quoting Acosta, 76 M.J. at 615)"); *id.* at 168 n. 12 ("Because this issue was presented as an ineffective assistance claim, we express no opinion as to when the Constitution may compel discovery of documentary records. Rather, we simply note that Appellant's counsel was not constitutionally ineffective for failing to raise what would have been a cutting-edge claim.").

[69] Beauge, 82 M.J. at 167.
[70] *Id.*
[71] Beauge, 82 M.J. at 167 (quoting Pennsylvania v. Ritchie, 480 U.S. 39 (1987) ("If we were to accept this broad interpretation … the effect would be to transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery. Nothing in the case law supports such a view.")).
[72] *Id.* at 167 (quoting Holmes v. South Carolina, 547 U.S. 319, 324-25 (2006) (alteration in original) (emphasis added) (internal quotation marks omitted) (citation omitted)).
[73] *Id.* at 167-168 (quoting Jaffe, 518 U.S. at 9-10 (internal quotation marks omitted) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
[74] United States v. Tinsley, 81 M.J. 836, 850 n.5 (A. Ct. Crim. App. 2021); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021).
[75] Beauge, 82 M.J. at 167 ("the confrontation issue is limited by the Supreme Court's decision in *Pennsylvania v. Ritchie*, in which a plurality of the Court opined that the Sixth Amendment right 'to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.'") (citing 480 U.S. 39, 53 (1987) (plurality opinion)).
[76] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021) (relying on *Ritchie*, and stating that "Appellant's constitutional argument amounts to little more than a claimed right to discover information, regardless of any privilege, that may not prove useful in their cross examination of victim. Such an absolute right, however, does not exist.").
[77] Beauge, 82 M.J. at 167-168 ("And as the Supreme Court recognized in *Jaffee*, the psychotherapist-patient privilege 'promotes sufficiently important interests to outweigh the need for probative evidence'") (quoting Jaffee, 518 U.S. at 9-10) (internal quotation marks omitted) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
[78] United States v. Tinsley, 81 M.J. at 850 ("Accordingly, we find that any 'constitutional exception' to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exists.") (citing to Jaffee, 518 U.S. at 9-10)); *but see, id.* at 850 n.5 (distinguishing the analysis and rationale in *Ritchie* as inapplicable, because Mil. R. Evid. 513 no longer enumerates a constitutionally-required exception, and is different than the absolute state privilege at issue in *Ritchie*).
[79] United States v. Tinsley, 81 M.J. 836, 850 n.5 (A. Ct. Crim. App. 2021); United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, at *22-23 (A. Ct. Crim. App. Sep. 2, 2021).
[80] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544, at *9 (C.A.A.F. July 27, 2022) (citing Trammel v. United States, 445 U.S. 40, 50 (1980); United States v. Jasper, 72 M.J. 276, 280 (C.A.A.F. 2013)).
[81] *Id.* at *19 ("Instead, our analysis rests solely on the specific text of M.R.E. 315(a) and the Supreme Court's mandate—and our own precedent—that states that evidentiary privileges 'must be strictly construed.'") (quoting *Trammel*, 445 U.S. at 50; citing *Jasper*, 72 M.J. at 280).
[82] *Id.* at *11.
[83] *Id.* at *19.
[84] *Id.*
[85] Although "overruling by implication is disfavored," *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007), "it should be apparent that no special language is necessary to overrule a prior decision; the simple existence of some later, irreconcilably inconsistent holding by the same court is sufficient. Indeed, it does not seem particularly important whether the later court intended to overrule its prior holding or whether it was even aware that it was doing so." Bradley Scott Shannon, *Overruled by Implication*, 33 Seattle U. L. Rev. 151, 154 (2009).
[86] United States v. Mellette, No. 21-0312, 2022 CAAF LEXIS 544, at *19 (C.A.A.F. July 27, 2022).
[87] United States v. Beauge, 82 M.J. 157, 167 (C.A.A.F. 2022).
[88] Beauge, 82 M.J. at 167 ("From our perspective then, the duty-to-report exception and the evidence-of-child-abuse exception are effectively coterminous in this case.").
[89] Beauge, 82 M.J. at 157.
[90] *Id.* at 166.
[91] *Id.* at 162, n.3 (maintaining the privilege for information "that *was* reported but which was not *required* to be reported.") (emphasis maintained).
[92] *Id.*

[93] *See, e.g.*, Ga. Code Ann. § 19-7-5(e)(2).
[94] *See generally* Beauge, 2021 CCA LEXIS, at *12-14, *aff'd*, United States v. Beauge, 82 M.J. 157, 165-166 (C.A.A.F. 2022).
[95] *See* Beauge, 82 M.J. 157 (C.A.A.F. 2022).
[96] United States v. Beauge, 82 M.J. 157, 166 (C.A.A.F. 2022) ("In other words, the language of the duty-to-report exception should be read to mean that the privilege is vitiated *only* in regard to the specific *information* that *was contained in the communication to state authorities* and *was required by law or regulation to be reported*.") (emphasis maintained); *see also*, Air Force Instruction 40-301, ¶ 8.6.1 (2020) ("There is no privilege when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse.").
[97] United States v. Tinsley, 81 M.J. 836, 850-853 (A. Ct. Crim. App. 2021).
[98] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *33 (A. Ct. Crim. App. Feb. 1, 2016).
[99] Mil R. Evid. 501(b)(4).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Mil. R. Evid. 510(a) (emphasis added).
[104] DB v. Lippert, No. ARMY MISC 20150769, 2016 CCA LEXIS 63, *12 (A. Ct. Crim. App. Feb. 1, 2016) ("[T]he failure to object cannot be construed as either an affirmative waiver of a privilege or waiver of the procedural requirements under Mil. R. Evid. 513. Even if the SVC had been included in the email chain, which he apparently was not, his silence cannot be deemed a waiver of procedural requirements." (internal citations omitted)).
[105] United States v. McClure, No. ARMY 20190623, 2021 CCA LEXIS 454, *18 (A. Ct. Crim. App. Sep. 2, 2021).
[106] United States v. Jasper, 72 M.J. 276, 281 (C.A.A.F. 2013).
[107] United States v. Mellette, 81 M.J. 681, 701 n.14 (N-M. Ct. Crim. App. 2021).
[108] *See, e.g.*, MAJ Colby P. Horowitz, *Confessions of a Convicted Sex Offender in Treatment: Should They be Admissible at a Rehearing?* 228 Mil. L. Rev. 44, 82-84 (2020) (arguing privilege is likely waived when a convicted offender has made statements while in treatment and then returned to courts-martial on rehearing).

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10 U.S. Code § 806b - Art. 6b. Rights of the victim of an offense under this chapter

(a) Rights of a Victim of an Offense Under This Chapter.—A victim of an offense under this chapter 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) 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 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.
(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.
(c) Appointment of Individuals to Assume Rights for Certain Victims.—
In the case of a victim of an offense under this chapter 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;

(2)
to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter 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).
(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) 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).
(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.
(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.

(Added Pub. L. 113–66, div. A, title XVII, § 1701(a)(1), Dec. 26, 2013, 127 Stat. 952; amended Pub. L. 113–291, div. A, title V, §§ 531(f), 535, Dec. 19, 2014, 128 Stat. 3364, 3368; Pub. L. 114–92, div. A, title V, § 531, Nov. 25, 2015, 129 Stat. 814; Pub. L. 114–328, div. E, title LI, § 5105, title LVI, § 5203(e)(1), Dec. 23, 2016, 130 Stat. 2895, 2906; Pub. L. 115–91, div. A, title V, § 531(a), title X, § 1081(a)(22), (c)(1)(B), Dec. 12, 2017, 131 Stat. 1384, 1595, 1597; Pub. L. 116–283, div. A, title V, § 541, Jan. 1, 2021, 134 Stat. 3611; Pub. L. 117–81, div. A, title V, § 541, Dec. 27, 2021, 135 Stat. 1708.)