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MILITARY RULE OF EVIDENCE 513

A Review of 2022 Court of Appeals for the Armed Forces Updates to Military Rule of Evidence 513

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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

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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 to disclosure of any *significant* part of the matter or communication under such circumstances that it would be inappropriate 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).