



ARNOLD & PORTER LLP

October 24, 2014

Judicial Proceedings Panel
One Liberty Center
875 N. Randolph Street
Suite 150
Arlington, VA 22203

Chairwoman Holtzman and Panel Members,

Thank you for the opportunity to testify before you on October 10th. During our testimony, you requested our analysis of U.S. v. Gaddis, 70 M.J. 248 (CAAF 2011), along with our recommended changes to Mil. R. Evid. 412 and 513. We have provided our response to each request in the attached.

We are grateful to the panel for your recognition of the need to better protect the privacy rights of victims, and for your focus on improving the military justice system. We are happy to provide any additional information or clarification that may be needed.

Respectfully,

Miranda Petersen,
Protect Our Defenders

Ryan Guilds,
Arnold and Porter

Enclosed:

- (1) Mil. R. Evid. 412 Proposed Changes and Analysis
- (2) Mil. R. Evid. 513 Proposed Changes and Analysis

Military Rule of Evidence (“M.R.E.”) 412 Analysis and Proposal For Reform

ANALYSIS

United States v. Gaddis and Victims Right to Appeal

When the President first promulgated Mil. R. Evid. 412, subsection (c)(3) required the military judge to balance the probative value of the evidence against the danger of unfair prejudice. There was no mention of a victim’s privacy. Despite the absence of an explicit reference to victim privacy, the CAAF recognized the implicit purpose of the rule and strongly supported protection of victim privacy. In *U.S. v. Sanchez*, 44 M.J. 174, 179 (CAAF 1996), the CAAF held that in determining admissibility under Mil. R. Evid. 412, there must be a weighing of the probative value of the evidence against the interest of shielding the victim's privacy.

In *Banker*, the CAAF (which included three of the five judges who later decided *Gaddis*) held that the balancing test under Mil. R. Evid. 412 requires the military judge to consider “not only the M.R.E. 403 factors such as confusion of the issues, misleading the members, undue delay, waste of time, needless presentation of cumulative evidence, but **also prejudice to the victim's legitimate privacy interests.**” *Banker*, at 223 (emphasis added). The CAAF in *Banker* stated that there is thus no justification for limiting the scope of Mil. R. Evid. 412 because the Rule was “**intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses . . .**” *Banker* 174 at 220 (emphasis added).

In 2007, the President amended Mil. R. Evid. 412(c)(3) to add the words, “to the victim’s privacy” after “unfair prejudice.” As explained by Chief Judge Effron in his concurring opinion in *Gaddis*, neither *Sanchez* nor *Banker* held that the President was obligated to provide expressly for consideration of the alleged victim's interests. *Sanchez* and *Banker* did not limit the authority of the President to take a different approach, including consideration of matters particular to military practice. *Gaddis*, at 259-260 (concurring opinion).

In *U.S. v. Roberts*, 69 M.J. 23 (2010), the same five judges who later decided *Gaddis* **unanimously** held that a military judge must balance the victim's privacy interests. "In balancing this low probative value against the danger of unfair prejudice to the legitimate privacy interests of [victim], we agree with the CCA that this evidence is precisely the type of evidence that MRE 412 was designed to exclude." *Id.* Only a year later, three of the *Roberts* judges would muddy the waters.

The *Gaddis* majority begins its analysis by quoting applicable Supreme Court precedent:

"[T]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, **bow to accommodate other legitimate interests** in the criminal trial process.’ *Rock v. Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (citation and quotation marks omitted); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302-03, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).”

Gaddis, at 252 (emphasis added). See also, *Michigan v. Lucas*, 500 U.S. 145 (1991) (cited elsewhere in *Gaddis*, and upholding a rape shield law), and *Holmes v. South Carolina*, 547 U.S. 319 (2006) (also cited by the *Gaddis* majority).

The *Gaddis* majority goes on to explain:

“[R]ape-shield statutes like M.R.E. 412 do not violate an accused's right to present a defense unless they are ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’ See *Scheffer*, 523 U.S. at 308 (citation and quotation marks omitted). M.R.E. 412 is a ‘rape-shield’ law intended ‘to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses.’ Drafters' Analysis app. 22 at A22-35. **The M.R.E. 412 balancing test is neither arbitrary nor disproportionate to this purpose. Therefore, the test is not facially unconstitutional.**”

Gaddis, at 253-254 (emphasis added).

Despite quoting the appropriate law and determining consideration of a victim's privacy is not arbitrary or disproportionate, the *Gaddis* majority nevertheless states in *dictum*:

“[B]ecause of the confusing structure of M.R.E. 412, the test has the potential to lead military judges to exclude constitutionally required evidence merely because its probative value does not outweigh the danger of prejudice to the alleged victim's privacy, which would violate the Constitution. See *Dickerson*, 530 U.S. at 437, 444. And the test is a problem of our own devise, since it was enacted in response to this Court's decision in *Banker*, [60 M.J. 216 (CAAF 2004)].”

Gaddis, at 253-254.

The CAAF majority's speculative opinion that in other cases under other facts not then before the court, consideration of a victim's privacy may be unconstitutional is pure dicta.¹ However, although then Chief Judge Efron stated in his concurring opinion that the balancing test remains the law, in practice military judges and the service courts of criminal appeals have since refused to consider victims privacy.

On October 19, 2011, the Joint Service Committee on Military Justice proposed changing Mil.R.Evid. 412 to eliminate any consideration of the victim's privacy from the subsection (c)(3) balancing test. 76 FR 65062-65093. This proposed change and numerous other proposed changes were submitted to the President for signature in the fall of 2012. After Protect Our Defenders and other public commenters voiced opposition to the Mil.R.Evid. 412 changes, the President refused to sign the proposed Executive Order encompassing all the changes. The President made a deliberate decision that military judges will continue to consider and respect victims' privacy. On May 15, 2013, the President signed the Executive Order, 2013 Amendments to the Manual for Courts-Martial, in which Mil.R.Evid. 412(c)(3) remained unchanged and still requires consideration of the victim's privacy interests.

¹ The *dictum* in *Gaddis* is extraordinary because it not only stated that in other cases consideration of a victim's privacy may be unconstitutional, but there was no evidence in the record that the military trial judge in *Gaddis* ever considered the victim's privacy. The court “presume[d]” the military judge considered the victim's privacy. *Gaddis*, at 255, footnote 2.

Despite the President's decision, military judges and the service courts of criminal appeals are using *Gaddis* and *Ellerbrock* as the foundation for their analysis of Mil. R. Evid. 412. In *U.S. v. Lopez*, 2013 CCA LEXIS 603, (A. Ct. Crim. App. 2013)(unpublished), the military judge ruled, prior to the *Gaddis* decision, that the probative value of the victim's other sexual behavior did not outweigh the prejudice to her privacy. The Army Court of Criminal Appeals reversed the military judge, explicitly stating that the Mil. R. Evid. 412 balancing test "is no longer viable following our superior court's decisions in *Gaddis* and *Ellerbrock*." *Lopez*, at 10. The court further explained that the military judge "used a pre-*Gaddis* and pre-*Ellerbrock* view that **overly emphasized the privacy of the victim.**" *Lopez*, at 12 (emphasis added). Despite pleas and detailed analysis from Protect Our Defenders, the Army Government Appellate Division and the Army Judge Advocate General refused to petition or certify for review the Army Court of Criminal Appeals decision.

In *U.S. v. Sousa*, 72 M.J. 643 (A.F.Ct.Crim.App. 2013), *review denied*, 73 M.J. 84 (C.A.A.F. 2013), the Air Force Court of Criminal Appeals did not discuss the victim's privacy interests. Quoting *Gaddis*, the court held that the "probative value of the evidence must be weighed against and outweigh the ordinary countervailing interests." *Sousa*, 72 M.J. at 649 (emphasis added). "Even relevant evidence remains subject to a Mil. R. Evid. 403 balancing test before it can be deemed constitutionally required." *Id.* The court's entire discussion is about the Mil. R. Evid. 403 balancing test. It does not mention the Mil. R. Evid. 412 balancing test. In *Sousa*, the Government Appellate Counsel *conceded* that if the military judge relied on the balancing tests under *Banker* and Mil. R. Evid. 412(c)(3), he abused his discretion. *Sousa*, at 648-649. The *Government* argued that the Air Force Court of Criminal Appeals *should conduct only a Mil. R. Evid. 403 balancing test.* *Id.* **If Mil. R. Evid. 403 is the only standard to be applied, a Mil.R.Evid. 412 motion is effectively a Mil R. Evid. 403 motion.**

The victim's privacy was not considered by the trial judge in any of the following unpublished cases from the service courts of appeals: *U.S. v. Allen*, 2014 CCA LEXIS 216 (A.F.Ct.Crim.App. 2014); *U.S. v. Hohenstein*, 2014 CCA LEXIS 179 (A.F.Ct.Crim.App. 2014); *U.S. v. Barlow*, 2014 CCA LEXIS 166 (A.F.Ct.Crim.App. 2014); *U.S. v. Grimes*, 2014 CCA LEXIS 63 (A.Ct.Crim.App. 2014); *U.S. v. Evans*, 2013 CCA LEXIS 1087 (A.F.Ct.Crim.App. 2013); *U.S. v. Wickware*, 2013 CCA LEXIS 856 (A.F.Ct.Crim.App. 2013); *U.S. v. Sarracino*, 2013 CCA LEXIS 752 (A.F.Ct.Crim.App. 2013); *U.S. v. Hohenstein*, 2013 CCA LEXIS 626 (A.F.Ct.Crim.App. 2013); *U.S. v. Jones*, 2013 CCA LEXIS 52 (A.F.Ct.Crim.App. 2013); *U.S. v. Brown*, 2012 CCA LEXIS 388 (A.F.Ct.Crim.App. 2012); and *U.S. v. Perry*, 2012 CCA LEXIS 288 (N-M.Ct.Crim.App. 2012). In these cases, the military judge denied admission of at least some evidence and the convicted defendant appealed. In each case, the service court of criminal appeals applied only the Mil. R. Evid. 403 standard. There is never an appeal when the military judge admits the evidence, and we believe military judges have admitted Mil. R. Evid. 412 evidence in all cases except those cases cited above.

The *Gaddis dictum*, and its subsequent distortion by military judges, will not be overcome by the Judicial Proceedings Panel, the President, or even Congress.² **The single most important thing the**

² At the October 10th hearing, the Panel asked about *U.S. v. Ellerbrock*, 70 M.J. 314 (CAAF 2011). *Ellerbrock* was decided within three weeks of *Gaddis*, and it cites *Gaddis* as authority. *Ellerbrock* contains absolutely no discussion or analysis of the victim's privacy interests except in Judge Baker's dissent. The court-martial trial in *Ellerbrock* was conducted before the 2007 change to Mil. R. Evid. 412; and therefore is *dictum*. The *Ellerbrock* ruling was

Panel can do to address this injustice is to ask Congress to give victims the right to an immediate interlocutory appeal of any decision by a military judge that affect a victim's privacy rights. Currently, victims of military sexual assault have no right to appeal decisions by military judges.³ In contrast, civilian federal crime victims enjoy an immediate and automatic right to appeal when their rights are implicated. See 18 U.S.C. 3771(d).

The appeal rights victims need must be an automatic, timely, and direct appeal to the service courts of criminal appeals, and, if relief is denied by the service courts, to CAAF. This is the standard applied in federal civilian courts, and there is no legitimate military objective served by offering military victims of sexual assault less protections than civilian victims. By giving victims the right to directly appeal military judges' rulings, victims will be able to bring before CAAF real facts upon which CAAF can consider and rule upon the constitutionality of considering victims' privacy rights when determining the admissibility of Mil. R. Evid. 412 evidence. This is the most effective way to restore Mil. R. Evid. 412 to its intended purpose and make it consistent with civilian courts.

The *Gaddis dictum* is wreaking havoc not only upon the victims of sexual assault, but also the ability of the Commander in Chief and the entire military leadership to end the scourge of military sexual assault that threatens our national security by destroying the good order and discipline of our military forces. The victims in these other cases are proud soldiers, sailors, marines and airman. It is wrong to humiliate and harass them by not even considering their privacy, especially since the law – Mil. R. Evid. 412 – requires such consideration.

PROPOSAL

Mil. R. Evid. 412 should be amended to explicitly state that victims' privacy is a legitimate governmental interest that promotes good order and discipline in the Armed Services, and should be further revised structurally to address concerns expressed in the *Gaddis* majority regarding the 412 balancing test. The rule should further be revised to make clear that the purpose of the hearing set forth in Mil. R. Evid. 412 is not for discovery.

Proposed Language:

(Note: **red** language means language added; ~~strikethrough~~ language means language deleted.)

Mil. R. Evid. 412 subsections (a), (b), (d) and (e) require no changes. Mil. R. Evid. 412(c) should be changed as follows:

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must—

based entirely on the old form of Mil. R. Evid. 412 that did not require consideration of the victim's privacy.

³ Victims are able to file a petition for review under the All Writs Act, but the service courts of criminal appeals and CAAF are not required to accept for review any such petition. Acceptance for review is discretionary, and review is accepted only if the petitioner makes an extraordinary showing. *L.R.M. v. Kastenberg*, 72 MJ 364 (CAAF 2013).

(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 offered 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 and the military judge and notify the alleged victim or, when appropriate, the alleged victim's attorney, guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may offer relevant evidence; however, the hearing is to determine the admissibility of evidence and is not for the purpose of discovery. ~~call witnesses, including the alleged victim, and offer relevant evidence.~~ The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) Before admitting evidence under this rule, the military judge must determine whether an exception in subsection (b) applies. In order for an exception to apply, the military judge must find, ~~If the military judge determines~~ on the basis of the hearing described in paragraph (2) of this subsection, that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b), ~~and~~ that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, and that the evidence is admissible under Mil. R. Evid. 403. The victim's privacy is a legitimate governmental interest that promotes good order and discipline in the Armed Services.

(4) ~~If the military judge determines any~~ such evidence shall be admissible under this rule, ~~the military judge shall issue an order specifying the extent to which~~ an order made by the military judge specifies evidence ~~that~~ may be offered and areas with respect to which the alleged victim may be examined or cross-examined. ~~Such evidence is still subject to challenge under Mil. R. Evid. 403.~~

The proposed change to subsection (c)(2) will take away the parties' absolute right to call the victim or others to testify, but will instead leave to the military judge the right to determine what relevant evidence the parties may present. It further guides the military judge by explaining the purpose of the hearing is to determine the admissibility of evidence and not to conduct discovery.

The proposed change to subsection (c)(3) is intended to address the *Gaddis* majority's concern about the "confusing structure" of Mil. R. Evid. 412. See *Gaddis*, at 253. It is also useful because it will give military judges new language to apply to future cases. If these judges rule in favor of victims, the service courts of criminal appeals and CAAF will have the opportunity to review the new language on appeals by convicted defendants.

The change to subsection (c)(3) clarifies that there is no determination of whether evidence is constitutionally required until after the military judge first finds that the evidence is relevant, its probative value outweighs the unfair prejudice to the victims privacy, and its probative value is not substantially outweighed by the usual Mil. R. Evid. 403 considerations. Under the current misapplication of the *Gaddis dictum*, the military judge accepts that the evidence is constitutionally required before applying the privacy balancing test (which is why the *Gaddis* majority suggests that the balancing test may be unconstitutional – if it is constitutionally required then it cannot be excluded by any balancing test).

In addition to correcting the *Gaddis* majority’s perceived “confusing structure,” the proposed change states that the victim’s privacy is a legitimate interest under the established Supreme Court precedent. The military judges, service courts of criminal appeals and CAAF will not be able to continue to ignore this important limitation on a defendant’s constitutional rights. Victims’ privacy will be recognized as a legitimate governmental interest.

The final change to subsection(c)(3) is to separate out into a new (c)(4) the language concerning the military judge’s order.

CONCLUSION

We ask the Judicial Proceedings Panel to recommend that:

1. Victims be given the right to appeal military judges’ orders that adversely affect their privacy rights. This appeal right must be interlocutory and immediate. A discretionary *mandamus* standard should not be used, and military judges’ determinations of law should be reviewed *de novo*. Victims should also be given the right to automatic appeal to the CAAF for review of the service courts of appeals decisions.
2. Mil. R. Evid. 412(c) be amended to the language provided above. The rule should explicitly state that victims’ privacy is a legitimate governmental interest that promotes good order and discipline in the Armed Services. The rule should further make clear that the purpose of the hearing set forth in Mil. R. Evid. 412 is not for discovery.

Military Rule of Evidence (“M.R.E.”) 513 Analysis and Proposal For Reform

WHY CHANGE IS NEEDED

1. The Supreme Court has recognized the necessity of the privilege.

“The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.

“In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations 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. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”
Jaffee v. Redmond, 518 U.S. 1, 11-12 (1996)

2. In the military, the “constitutionally required” exception to the rule has rendered the privilege virtually non-existent.

In practice, the overwhelming majority of military judges automatically order an in camera review of all of the mental health records and often disclose substantial portions of the records under the theory that any discussion about the charged offenses is constitutionally required. This is contrary to the law and to the committee’s intent.

MCM, App 22, Rule 514(d) states in pertinent part: “In drafting the constitutionally required exception, the Committee intended that communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless. Id.”

3. As a result, the rule as presently constructed does not serve its societal purpose.

In response to a recent article regarding mental health records being used in military trials, a member of the American Psychoanalyst Association Executive Council said: “Military defense lawyers’ attempts to search sexual assault victims’ psychotherapy records to ‘expose inconsistencies’ demonstrate an appalling misunderstanding of psychotherapy and the narratives that emerge from it. Far from the calculated, exquisitely targeted missiles that lawyers train on their opponents, the stories that patients tell in psychotherapy are full of self-doubt, shame and self-blame as a soul tries to reach a tolerable version of what really happened. To consider as evidence records based on these tentative descriptions, assertions and retractions seems to me to

require a denial of everything we have learned in the past 50 years about how people experience trauma.”¹

PROPOSAL

M.R.E. 513 should be re-written to give communications between patients and mental health professionals the same level of protection as those under the attorney-client privilege.

Benefits:

- **Brings privilege in line with other privileges under RCM 502, 503, and 504.**
- **Brings the military in line with thirteen states that have conformed their psychotherapist-patient privilege to the model of an attorney-client privilege, including Alabama, New Jersey and Pennsylvania².**
- **Offers the highest protection to victims of crime.**

PROPOSED LANGUAGE:

(Note: **red** language means language added; ~~strikethrough~~ language means language deleted.)

Rule 513:

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. **The privilege under this rule shall be on the same basis as the privilege provided to communications between a lawyer and client under Mil.R.Evid. 502.**

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

(1) A “patient” is a person who consults or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A “psychotherapist” is a psychiatrist, clinical psychologist, ~~or~~ 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 from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

¹ http://www.washingtonpost.com/opinions/mental-health-records-should-remain-off-limits/2014/02/17/cecfa094-972d-11e3-ae45-458927ccedb6_story.html

² See Ala.Code 1975 § 34-26-2 - Confidential relations between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients: “For the purpose of this chapter, the confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.” See also 42 Pa.C.S.A. §5944; N.J.S.A. 45:14B-28.

(3) An “assistant to a psychotherapist” is 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. **Confidential communications includes communications by persons, other than the patient, who are participating in the diagnosis and treatment under the direction of a psychotherapist, including members of the patient’s family.**

(5) “Evidence of a patient's records or communications” is 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 **patient’s** psychotherapist or assistant to the psychotherapist ~~who received the communication may~~ **has authority during the life of the patient to** 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:~~ **The following exceptions to this rule shall apply only to extent of such exception, and all other communications shall remain confidential:**

- (1) **There is no privilege under this rule** when the patient is dead;
- (2) **There is no privilege under this rule to the extent** ~~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, **there is no privilege as to the information required to be reported;**
- (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;~~³
- (5) **There is no privilege under this rule** if the communication clearly contemplated the future

³ The deletion of this exception is not intended to prevent a psychotherapist from making appropriate disclosures necessary to prevent harm to the patient or others. This exception should be deleted because it is irrelevant at a court-martial because disclosure at a court-martial will not prevent harm to patient or others, but may actually cause harm. It is not uncommon for victims of sexual assault to consider suicidal or other self-destructive behaviors. It would be wrong to eliminate the privilege in this circumstance. This exception probably originated from ethical guidelines for psychotherapists so that the therapist can prevent harm. The harm sought to be prevented is not present in courts-martial proceedings.

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;⁴ or~~

(7) **There is no privilege under this rule** 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~~

~~(8) when admission or disclosure of a communication is constitutionally required.⁵~~

(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 shall:

(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~~. **The moving party must demonstrate by a preponderance of the evidence that the requested evidence meets one of the enumerated exceptions. The moving party must:**

(1) show a specific factual basis demonstrating a reasonable likelihood that the requested records would yield evidence admissible under an exception to the patient-psychotherapist privilege;

(2) show that the information sought is not merely cumulative of other information available; and

(3) show that the moving party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.⁶

⁴ The deletion of this exception, like exception (4), is not intended to prevent a psychotherapist from making a disclosure to ensure the safety and security of others, property, classified information or accomplishment of the military mission. This exception should be deleted because it is irrelevant at a court-martial just as exception (4) is irrelevant because the harm sought to be prevented is not present at a court-martial.

⁵ The deletion of this exception is not intended to prohibit admission or disclosure if required by the constitution. All privileges in the military rules of evidence must bow to the requirements of the constitution; however, the explicit exceptions in Mil. R. Evid. 513 and 514 cause military judges to apply a different stand than they would under Mil. R. Evid. 502, 503 or 504 because these other privileges do not have an explicit “constitutionally required” exception.

⁶ U.S. v. Klemick, 65 M.J. 576, 579 (NMCCA 2006)

(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 subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party **or the patient** and upon good cause shown, the military judge ~~may~~ **shall** order the hearing closed. At the hearing, the parties may ~~call witnesses, including the patient, and offer other relevant evidence.~~ **The patient may not be compelled to disclose the content of any confidential communications during this hearing.** The patient shall be afforded a reasonable opportunity to attend the hearing and be heard ~~at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing.~~ However, the proceedings may not be ~~unduly delayed for this purpose.~~ In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) **If the military judge finds that the moving party has met its burden under (e)(1)(A) above and an examination of the information is necessary to rule on the motion,** the military judge shall examine the evidence or a proffer thereof *in camera*; ~~if such examination is necessary to rule on the motion.~~

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence. **Any disclosures made by the military judge should be narrowly tailored to only those specific communications which fit an enumerated exception and which fit the purposes described by the moving party.**

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise.

CONSTITUTIONAL ANALYSIS

The DoD may claim that a "constitutionally required" exception to the psychotherapist-patient privilege is necessary for due process and a fair trial. However, many states, such as Alabama, New Jersey and Pennsylvania, have psychotherapist-patient privilege statutes modeled after the attorney-client privilege, and these laws have never been overturned on due process grounds.

Further, the Constitution does not require disclosure of privileged communications because withholding the communications does not violate a defendant's 6th Amendment right to confront witnesses or 5th Amendment right to due process⁷.

⁷ The 6th Amendment right to confront witnesses is not applicable because it is a trial right and not a right to discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-53 (1987). Unless the prosecution introduces the records into evidence or puts the therapist on the stand, the defendant has no right to confront and no right to disclosure.

The 5th Amendment right to due process is intended to ensure the defendant has equal access to the information available to the prosecutor. *Brady v. Maryland*, 373 U.S. 83 (1963); and *Ritchie*, 480 U.S. 39. If the prosecutor does not have access to the therapist's records, the defendant's due process rights are not implicated. Even if a

CONCLUSION

It is extremely rare that evidence from mental health records is used by an accused in a court-martial. Yet, in every sexual assault trial the defense requests access to the victim's records. Although accused do not try to admit victims' mental health records into evidence, they use the records to intimidate and humiliate them. Almost reflexively, judges order the records produced and often turn them over to the defense. The benefit of enabling victims to seek help from caregivers with confidence that their communications will not be disclosed and thereby saving them from the harassment they undergo more than offsets whatever minimal evidence the accused may lose. We also cannot forget that often victims are not members of the military. Under the current MRE 513, these civilian victims often have their records turned over contrary to state law protecting their confidentiality.

Currently the military recognizes an absolute privilege for communications with clergy and attorneys.⁸ This absolute privilege must be extended to communications between victims and other witnesses seeking mental health treatment and the mental health professionals providing them with badly needed care.

Unnecessary violation of victims' privacy has a chilling effect on victims, and serves as an extreme disincentive from participating in the prosecution of perpetrators. M.R.E. 513 was designed to prevent disclosure of confidential information communicated between a patient and his or her therapist. Sexual assault victims must be able to rely on this privilege when deciding whether to seek out mental health treatment or counseling or when weighing whether to report their assault. Deterring victims from seeking care leaves members of the military in worse shape and less able to perform duties important to the service and the nation. It is unfair to promise victims privacy and protection when seeking help, only to betray them and allow their most personal and private thoughts to be turned over to their rapist to be used against them in court.

defendant's 5th or 6th Amendment rights were implicated, these constitutional rights may bow to legitimate governmental interests. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Failure to recognize the privilege would entirely thwart the purpose of MRE 513: to facilitate and secure the "social benefit of counseling" recognized by *Jaffe v. Redmond*, 518 U.S.1 (1996). *U.S. v. Klemick*, 65 M.J. 576 (NMCCA 2006). *See also* UCMJ Art. 6b, Rights of the Victim. In addition to being a legitimate governmental interest, the MRE 513 privilege also enforces the victim's constitutional right to privacy and to be free under the 4th Amendment from an unreasonable governmental search.

⁸ *See* MRE 502 (Lawyer-Client Privilege); M.R.E. 503 (Clergy Privilege).