

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
BROOKHART, PENLAND, and ARGUELLES¹
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant TREVAR D. TINSLEY
United States Army, Appellant

ARMY 20200337

U.S. Army John F. Kennedy Special Warfare Center and School
Christopher E. Martin and Charles L. Pritchard, Jr., Military Judges
Lieutenant Colonel Elizabeth F. Allen, Staff Judge Advocate

For Appellant: Captain Lauren M. Teel, JA; Michael J. Millios, Esquire (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Shapira, JA; Captain Allison L. Rowley, JA; Captain Karey B. Marren, JA (on brief).

15 December 2021

OPINION OF THE COURT

ARGUELLES, Judge:

An officer panel sitting as a general court-martial convicted appellant, contrary to his plea, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 (2012) [UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, reduction to the grade of E-1, and a reprimand. This case is now before us for

¹ Judge Arguelles decided this case while on active duty.

review under Article 66, UCMJ. Appellant raises four assignments of error, three of which merit discussion but no relief.²

BACKGROUND

Appellant, a non-commissioned officer stationed at Fort Bragg, was in Arlington, Virginia, on 21 January 2018 for a funeral. Appellant was part of a large group of soldiers staying at the Sheraton Hotel. After arriving in Arlington, appellant met Ms. [REDACTED] (the victim) over the Bumble social media app. Following an initial discussion in which she indicated she was “looking for something long term” and not interested in having sex right away, the victim nevertheless agreed to meet appellant at a strip club, where he and some friends were eating dinner.

The victim arrived at the strip club around 2200. She testified that she thought appellant was “handsome” and “well put together.” The victim explained that she trusted appellant immediately because he seemed to be “a genuine person, who was interesting, who served their country, who was, you know a person who was admirable.” At the club, appellant and the victim shared a bottle of wine and a beer, and at some point she sat on his lap. While on his lap, the victim rebuffed appellant’s attempts to place his hands on her chest and hips.

After departing the club, appellant and the victim walked to a sports bar where they ordered some food and cider. The victim testified that although she was too “intoxicated” to drive, she could still walk and talk, and did not black out at any point that night. Not wanting to pay the premium for a late-night Uber ride, and “just want[ing] to sleep,” the victim decided to stay the night with appellant, as she trusted him and thought “[e]verything is going to be okay.”

Appellant and the victim arrived at his hotel at midnight, and proceeded to a room where four of appellant’s friends had already occupied the two double beds. Although she wanted to sleep on the floor, at appellant’s urging they squeezed into one of the already occupied beds. After the two started kissing and undressing, one of the occupants stepped out into the hallway to gather himself. He then returned to the room and told appellant and the victim (who was by now topless) that they needed to get their own room if they wanted to be intimate. At that point, appellant went to the lobby to secure another room. When he returned, he and the victim walked to their own room holding hands.

² We have also given full and fair consideration to the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be likewise without merit.

Once he and the victim got to the new room, appellant removed his clothing and went to bed naked. The victim stripped down to her "romper" and set her alarm for 0545. The victim testified that when the alarm sounded, she felt tired but "completely sober." Appellant woke up at the same time, and placed her hand on his genitals. At trial, the victim testified that when this happened she thought "he's not going to let me leave unless I do something to please him," and "figured that if she performed oral sex on him, that maybe that would satisfy him and that [she] could leave." Wanting to just "get it over with" so she could leave, the victim told appellant to "[f] - - my mouth."

While receiving oral sex, appellant told the victim that "he would not be able to finish" without vaginal intercourse. The victim testified that when appellant attempted to perform oral sex on her, she "told him no" and closed her legs. She further testified that appellant tried to penetrate her with his penis, but she "wiggle[d] [her] way out of it" and again told him "no," but "he wasn't listening." The victim further described how when appellant repeatedly attempted to initiate sexual intercourse, she refused "over and over and over" because she did not want to have sex on the first date and did not want to get pregnant. Finally, the victim testified that when appellant insisted on having sex she "felt scared because [she] didn't feel heard." On cross-examination, however, the victim conceded that she did allow appellant to digitally penetrate her, and said that although she was outwardly expressing pleasure, she was "faking it."

When appellant then told her that he "just want[ed] to see what you look like bent over the bed," the victim testified that she thought "maybe if I do this, then he'll let me go." She complied and bent over the bed. Appellant then "pressed his hips" into her and, even though she said "no" one last time, penetrated her from behind. The victim stated that at this point her body "completely shut down," and after a few minutes appellant stopped and said "I guess you didn't like that." On cross-examination, the victim admitted that appellant never held her down, threatened her, or prevented her from leaving the room.

After the intercourse ended, the victim immediately gathered her belongings and went to the lobby. While waiting for her Lyft to arrive, the victim texted two close friends and told them she was raped. She also texted with appellant and accused him of raping her, which he denied before blocking her texts. After the victim arrived home, a friend took her to the hospital for a rape examination and an interview with two local police officers. Her friend testified that the victim was "very emotional, very distraught," and "couldn't stop crying." In describing the events in question for the detective, however, the victim did not say anything about performing oral sex on appellant.

LAW AND DISCUSSION

A. Expert Witness vs. Consultant

1. A Distinction Often Confused

In *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)), the Court of Military Appeals (CMA) set forth the general principle that “in trials where expert testimony is central to the outcome,” a defendant must be provided expert assistance. The court in *Turner* explained that an expert may be of assistance to the defense in two ways: (1) as a trial witness subject to being interviewed by the government; and (2) as a consultant whose discussions with the defense team fall under the attorney-client privilege. *Id.* at 488–89. Although the test governing a defense request for an expert to testify at trial is distinct from the test applied to a request for a consultant, the two tests are often intermingled and confused. See, e.g. *United States v. McGuinness*, ARMY 20071204, 2010 CCA LEXIS 96, at *12 (Army Ct. Crim. App. 19 Aug. 2010) (mem. op.) (“The defense request and the military judge’s ruling both blur the distinction between a request for expert assistance and a request for an expert witness to provide testimony at trial.”); *United States v. Langston*, 32 M.J. 894, 895 (A.F.C.M.R. 1991) (“Counsel in this case intermingled the [requests for an expert witness and an expert consultant], creating needless confusion at both the trial and appellate levels.”).

2. Expert Consultant Standard

In *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986), the CMA held that a showing of necessity entitles the accused to an expert consultant. In *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), the same court set forth a three-factor test to determine whether the assistance of an expert consultant is “necessary”: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and, (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop. In addition to addressing these three factors, an accused seeking the appointment of an expert consultant must demonstrate that the denial of such assistance would result in a fundamentally unfair trial. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008) (holding an accused has the burden of establishing that a reasonable probability exists that an expert would be of assistance and that denial of the expert would result in a fundamentally unfair trial).

Further explaining the “necessity” requirement, the Court of Appeals for the Armed Forces (CAAF) held in *United States v. Lloyd* that a desire to “explor[e] all possibilities” is insufficient. 69 M.J. 95, 99 (C.A.A.F. 2010) (alteration in original); see also *United States v. Gray*, 51 M.J. 1, 31 (C.A.A.F. 1999) (“[A]ppellant has confused his right to *necessary* investigative assistance with an unrestricted right to

search for any evidence which might be relevant in his case.”) (emphasis in original). As to the third factor under *Gonzalez*, in *United States v. Kelly*, 39 M.J. 235, 238 (C.A.A.F. 1994), the CAAF concluded that “[d]efense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case.” See also *United States v. Leyba*, ARMY 20160159, 2018 CCA LEXIS 394, at *6 (Army Ct. Crim. App. 13 Aug. 2018) (summ. disp.) (“[D]efense counsel provided virtually no evidence as to what efforts they made and why they were thus unable to understand, gather, develop, or present evidence in the areas of alcohol induced blackouts or false confessions.”).

3. Testifying Expert Standard

In *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993), the CMA set forth six factors a proponent must establish in order to have an expert testify: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and, (6) whether the evidence passes the Military Rule of Evidence [Mil. R. Evid.] 403 balancing test.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), the Supreme Court held that Federal Rule of Evidence 702 requires the trial judge to act as a gatekeeper to ensure “that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” In *Kumho Tire v. Carmichael*, 526 U.S. 137, 141 (1999), the Court held that a trial judge’s gatekeeping function applies to all types of expert testimony, even if it is characterized as “technical” or “other specialized knowledge,” rather than “scientific knowledge.” The Court also held that the trial court may consider one or more of the *Daubert* factors in order to determine the testimony’s reliability. *Id.*

Although *Daubert* was decided after *Houser*, the CAAF has recognized that “the two decisions are consistent, with *Daubert* providing more detailed guidance on the fourth and fifth *Houser* prongs pertaining to relevance and reliability.” *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999). Likewise, although Mil. R. Evid. 702 was amended after *Daubert* to require that expert testimony be the product of reliable principles and methods based on sufficient facts or data, “[t]his amendment does not affect the continued vitality of the *Houser* framework.” *United States v. Bell*, 72 M.J. 543, 552 n.8 (Army Ct. Crim. App. 2013).

4. Discussion

Appellant now claims the military judge erred both by denying his request for an expert consultant and by failing to rule on his request for an expert witness. We review a military judge’s ruling on a request for expert assistance, and his decision regarding the admissibility of expert testimony, for abuse of discretion. *Lloyd*, 69

M.J. at 99; *Bell*, 72 M.J. at 552 (citing *Griffin*, 50 M.J. at 284). The abuse of discretion standard is deferential, predicating reversal on more than a mere difference of opinion. See *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (“[T]he abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.”) (citation omitted).

a. Expert Consultant Ruling

At the heart of the defense request for an expert consultant was the fact that the victim told civilian law enforcement officers that at the time of the assault, she was seeing a therapist for [REDACTED] and [REDACTED] (psychological conditions), and was taking two prescription medications, [REDACTED] and [REDACTED] (medications). Although the victim also said that she experienced no side effects when taking her medications and consuming alcohol, the defense claimed it needed an expert to help understand the impact of the medications on her memory and cognition, especially when mixed with alcohol. The defense also asserted it needed an expert to help determine the likelihood that the victim was in a blacked-out state, and how she might have appeared to others around her.

In denying the request for expert assistance, the military judge found that there was no evidence that the victim’s medications or alcohol consumption in any way affected her memory, recall, or judgment on the night in question. We find this to be especially true given that the assault occurred in the morning, almost six hours after appellant and the victim stopped drinking and went to sleep. The military judge also ruled that the defense failed to demonstrate any interplay between the victim’s alcohol consumption and her medications, and further failed to establish the relevance of any such interplay, given that appellant was not charged with sexual assault upon one suffering substantial incapacitation. Finally, the military judge noted that there was no evidence that the victim suffered from any memory loss on either the evening or morning in question, or that she was ever in a “blacked-out” state.

We agree with the military judge’s well-reasoned conclusion that the “Defense’s generalized assertions, whether about the attributes of [the medications], or about [victim’s] condition on the night in question, do not demonstrate that expert assistance will assist the Defense team, or the factfinder.” As such, because appellant failed to demonstrate a reasonable probability that the denial of his request for an investigator would result in a fundamentally unfair trial, the military judge did not abuse his discretion in denying the request for expert consulting assistance. See *United States v. Cannon*, 74 M.J. 746, 751–52 (Army Ct. Crim. App. 2015) (“We find defense’s proffer does not demonstrate necessity and amounts to the ‘mere possibility of assistance’ from a requested expert.”); *United States v. Bresnahan*, 62

M.J. 137, 143 (C.A.A.F. 2005) (“[N]ecessity requires more than the ‘mere possibility of assistance from a requested expert. . . .’”) (omission in original).

b. Failure to Rule on Expert Witness Request

The underlying defense motion was styled as a “Defense Motion to Compel Expert (Dr. [JD])” (hereinafter “Expert”). Although the motion’s opening and closing paragraphs requested that the court “compel the production of” and/or appoint Expert as “an expert consultant and witness,” for the most part the motion focused on why Expert should be appointed as a consultant, and included a detailed analysis of the three *Gonzalez* factors. There was no discussion of the *Houser* framework, and indeed the only references in the motion to expert testimony were: (1) a brief mention that Expert could “potentially” present recidivism evidence at sentencing; and (2) an assertion that “[a]ssuming that the expert assistant is able to provide useful information, the Defense *envisions requesting* the expert consultant as an expert witness in the case” (emphasis added). Likewise, at oral argument the defense focused on the need for a consultant, arguing to the military judge that “[Expert] would be helpful with us in crafting questions and understanding the case file a little bit more deeper than we know what it is.”

Not surprisingly, the military judge construed the defense motion as a request for an expert consultant, and limited his ruling accordingly:

The Defense request is for a confidential expert consultant, but alludes to the fact that [Expert] may be called to testify if needed. As the standards for an expert consultant versus an expert witness are different, the Court constrains its full analysis to the specific request for an expert *consultant*.

(emphasis in original). *Cf. McGuinness*, 2010 CCA LEXIS 96, at *15 (holding a military judge should first consider whether the defense has met the *Gonzalez* standard before turning to the issue of whether proffered expert testimony is admissible); *United States v. Burnette*, 29 M.J. 473, 475 n.2 (C.M.A. 1990) (noting if the defense wanted its expert to testify at trial after being appointed as a consultant and having an opportunity to review the records, “a standard showing of necessity would be required”).

First, notwithstanding the use of the term “expert witness” in the opening and closing paragraphs, given that the defense motion focused on the standard for the appointment of an expert consultant, and indeed even stated that counsel potentially “envisioned” submitting a request for an expert witness if the consultant proved helpful, the military judge did not abuse his discretion in construing the motion as a request for expert assistance. Moreover, because appellant did not object or seek

reconsideration of the military judge’s characterization of the motion and/or his limited ruling, we decline to consider this argument on appeal. *See Lloyd*, 69 M.J. at 100–01 (“We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level.”); *United States v. Carpenter*, 77 M.J. 285, 289 (C.A.A.F. 2018) (“[O]ur review for error is properly based on a military judge’s disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted.”) (emphasis in original).³

Alternatively, we note that although he did not engage in a detailed analysis of the *Houser* factors, the military judge did ultimately rule that the defense failed to meet its burden to show that the expert would assist either the defense team or “the factfinder.” As such, given his detailed findings that the defense failed to present any evidence that alcohol or medications affected the victim’s memory, recall, or judgment, the military judge did not abuse his discretion in denying the request for an expert witness on relevance grounds. *See United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001) (holding the military judge has “broad discretion” to determine whether the party offering the expert testimony has established an adequate foundation with respect to relevance); *United States v. McHugh*, ARMY 20160647, 2018 CCA LEXIS 462, at *11–12 (Army Ct. Crim. App. 25 Sep. 2018) (mem. op.) (holding appellant failed to meet his burden to demonstrate the legal relevance and probative value of proffered expert’s testimony).

B. Military Rule of Evidence 412 Ruling

1. Additional Facts

As described in greater detail above, after appellant and the victim returned to the hotel room, they began kissing and got into a bed already occupied by two of appellant’s friends. When one of these friends interrupted, appellant left to secure another room. The victim later told law enforcement that when appellant left the room, one of the two men still in the bed inappropriately touched her. During a pretrial interview with government counsel, the victim said that when she told appellant what happened, his response was “unbelievable.”

³ We recognize that under Article 66, UCMJ, this court retains discretion to “treat a waived or forfeited claim as if it had been preserved at trial” in order to determine if the findings “should be approved.” *United States v. Conley*, 78 M.J. 747, 750 (Army Ct. Crim. App. 2017) (citing *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988)); Article 66(d), UCMJ. For the reasons set forth immediately below, however, we decline to exercise our discretion to grant relief under Article 66’s “should be approved” test.

Appellant did not call the victim, or any other witnesses, during the underlying Mil. R. Evid. 412, Article 39(a), UCMJ, hearing. Rather, he proffered that the two men would “emphatically” deny touching her, and his counsel argued that the victim’s assertion that she was inappropriately touched should be admitted at trial to show both the “timeline” of the events in question, and to “discredit her because of her credibility as far as these allegations [against appellant] that she is making.” Likewise, on appeal appellant asserts that “it seems implausible that [the victim] was inappropriately touched by any men in the room,” which is an “important fact for the defense to confront her with if she said she was not only sexually assaulted by [appellant], but also by a man who was sleeping when she crashed into their room.”

2. Law

Military Rule of Evidence 412 limits the admissibility of specified forms of evidence in sexual offense cases. The rule serves “to protect victims of sexual offenses from the degrading and embarrassing disclosure of intimate details of their private lives while preserving the constitutional rights of the accused to present a defense.” *United States v. Banker*, 60 M.J. 216, 219 (C.A.A.F. 2004).

Military Rule of Evidence 412(a) provides that evidence offered to prove that the alleged victim engaged in other sexual behavior is not admissible in any proceeding involving an alleged sexual offense unless it falls within the rule’s enumerated exceptions: (1) evidence that someone other than the accused committed the assault; (2) evidence of other sexual behavior between the accused and the victim; or, (3) exclusion of the evidence “would violate the constitutional rights of the accused.”

Since Mil. R. Evid. 412 is a rule of exclusion, the party seeking to admit such evidence has the burden of establishing by a preponderance of the evidence the exception under which the evidence is admissible. *Banker*, 60 M.J. at 223; *United States v. Erikson*, 76 M.J. 231, 235 (C.A.A.F. 2017). In analyzing admissibility, the military judge must first determine whether the evidence is relevant under Mil. R. Evid. 401, and then apply the balancing test under Mil. R. Evid. 412(c)(3). See *Banker*, 60 M.J. at 222.

As the CAAF stated in *United States v. Ellerbrock*, 70 M.J. 314, 318 (C.A.A.F. 2011), “evidence must be admitted within the ambit of M.R.E. 412(b)(1)(C) when the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice.” The dangers of unfair prejudice include concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Id.* at 319 (citation omitted). See also *Banker*, 60 M.J. at 222 (stating that in determining whether evidence is “material” to the defense, the military judge looks

at the “importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue”). If the evidence is relevant and material, the military judge applies the Mil. R. Evid. 412 balancing test to determine if the evidence is “favorable” or “vital” to the defense. *Id.* The final consideration is whether the evidence in the record supports the inference that the moving party is relying on. *Ellerbrock*, 70 M.J. at 319.

The court in *United States v. Gaddis*, 70 M.J. 248, 256 (C.A.A.F. 2011), held that if the military judge determines that the probative value of the Mil. R. Evid. 412 evidence outweighs the danger of unfair prejudice, it is admissible no matter how embarrassing it might be to the victim. “Likewise, if a military judge determines that the evidence is *not* constitutionally required, the military judge *must* exclude the evidence under Mil. R. Evid. 412 – regardless of how minimal the alleged victim’s privacy interest might be – because it does not fall under an exception to the general rule of exclusion.” *Id.* (emphasis in original). Finally, Mil. R. Evid. 412(c)(3) provides that even evidence which is otherwise relevant under one of the exceptions set forth in 412(b) “is still subject to challenge under Mil. R. Evid. 403.” *See also Gaddis*, 70 M.J. at 256.

Although a military judge applying Mil. R. Evid. 412 generally is not asked to determine if the proffered evidence is true, *see Banker*, 60 M.J. at 224, in *Erikson* the CAAF held that prior allegations of sexual assault are admissible *only* if the accused first meets his burden to show that they are false. 76 M.J. at 234. Squarely rejecting the defense argument that evidence of the victim’s prior false sexual assault accusation “provides evidence of [her] modus operandi, or her plan, or her pattern, of why and how she accuses other men of assaulting her even when untrue,” the court in *Erikson* further held:

At trial, Appellant was required to establish the falsity of [victim’s] previous sexual assault accusation in order for it to be admissible under an M.R.E. 412 exception *or* for it to be admissible under any other rationale such as evidence of modus operandi, motive, or character evidence for lack of truthfulness.

Id. at 236 (emphasis in original) (citing *United States v. Velez*, 48 M.J. 220, 226–27 (C.A.A.F. 1998); *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000)).

3. Discussion

Appellant now asserts that the military judge erred in finding that evidence of the victim’s allegation of inappropriate touching by one of appellant’s friends was not admissible under Mil. R. Evid. 412’s constitutional exception. We review a

military judge's Mil. R. Evid. 412 ruling for abuse of discretion. *Erikson*, 74 M.J. at 234.

First, to the extent appellant was seeking to admit this evidence under Mil. R. Evid. 412, the CAAF in *Erikson* squarely held that evidence of an alleged victim's prior accusation of sexual assault is admissible only if the accused demonstrates that the prior accusation is false. *Id.*⁴ As noted above, defense counsel elected not to call any witnesses at the underlying Mil. R. Evid. 412 hearing. Indeed, because there was no testimony on this subject from either the victim or the two men who allegedly touched her, appellant failed to meet his burden to show the falsity, and therefore admissibility, of the prior allegation.

Moreover, we agree with the military judge that because the alleged incident occurred when appellant was out of the room, it was not relevant under either Mil. R. Evid. 412 or Mil. R. Evid. 403:

[T]he specific details of the sexual interaction between [the victim and one of appellant's friends] is not necessary to establish any timeline . . . the Defense fails to articulate any basis for how this third-party encounter or [victim's] disclosing it is relevant to consent, mistake of fact as to consent, or any other constitutionally required purpose . . . it adds nothing to the question of whether or not the accused committed the charged offense.

As such, we find that the military judge did not abuse his discretion in finding that the victim's allegation that she was inappropriately touched while appellant was out of the room was inadmissible under both Mil. R. Evid. 412 and Mil. R. Evid. 403.

C. Military Rule of Evidence 513 Ruling

1. Additional Facts

⁴ Although the court in *Erikson* questioned in dicta whether a prior sexual assault meets Mil. R. Evid. 412's definition of "sexual behavior" or "sexual predisposition," 76 M.J. at 235, n.2, in *United States v. Taylor*, ARMY 20160744, 2018 CCA LEXIS 499, at *17–20 (Army Ct. Crim. App. 22 Aug. 2016) (mem. op.), we noted that under prior CAAF precedent, evidence of a victim's prior sexual abuse does in fact fall within the ambit of Mil. R. Evid. 412.

As described above, at the time of the alleged assault the victim admitted she was seeing a therapist and taking two medications, but claimed that the medications did not affect her when she drank alcohol. Likewise, the victim testified that on the night in question she suffered no memory loss or other significant impairment.

Prior to trial, the defense asserted that they “believed” it was “likely” that the victim and her therapist discussed the incident, and that such statements “might” contradict what she told law enforcement. Defense counsel also admitted, however, that he had no actual evidence that the victim ever spoke to her therapist about the assault.

Based on these facts, the defense requested access to the victim’s “mental health information and treatment history,” and/or that the military judge review such records *in camera* to determine what information should be disclosed. The victim opposed the release of these records, invoking her psychotherapist-patient privilege under Mil. R. Evid. 513.

2. Law and Analysis

Appellant asserts that the military judge erred by denying his motion to compel either production and/or an *in camera* review of the victim’s mental health records. We review this ruling under an abuse of discretion standard. *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018).

Military Rule of Evidence 513(a) generally provides that a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between the patient and a psychotherapist “if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.” A party seeking disclosure of psychotherapist-patient records may request that the military judge conduct an *in camera* review of the records to determine if their release is justified pursuant to one of the enumerated exceptions to the privilege delineated in Mil. R. Evid. 513(d). In order to get to the first step of an *in camera* review, the proponent must establish *all* of the following by a preponderance of the evidence:

- (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
- (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
- (C) that the information sought is not merely cumulative of other information available; *and*

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

Mil. R. Evid. 513(e)(3) (emphasis added).

a. Reasonable Likelihood

Neither this court nor the CAAF has provided a specific standard as to what constitutes a “reasonable likelihood that the records or communications would yield evidence admissible” under Mil. R. Evid. 513. In *LK v. Acosta*, however, we reasoned that the defense must do more than speculate that, because the complainant has participated in counseling, the records in question might contain certain statements about the incident in question:

On one point there appears to be a unanimous consensus. In sexual-assault and child abuse cases, there is general agreement that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant’s testimony at trial. Because this assertion can be plausibly made in every sexual assault or child molestation case, if this was enough to trigger an in camera review, a court would be required to conduct the review in virtually every such case.

76 M.J. 611, 620 (Army Ct. Crim. App. 2017) (citation omitted).

In arguing to the military judge below, defense counsel asserted that he “believed” it was “likely” that the victim discussed the incident with her therapist, and that such statements “might” conflict with what she told the police. Likewise, appellant now claims that his trial “counsel needed that information in order to find out what underlying mental health conditions impacted [the victim’s] perception and decision making.” Based on nothing more than conjecture and speculation, appellant’s assertions fell woefully short of demonstrating a reasonable likelihood that the victim’s prior mental health records would yield admissible evidence. See *United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1998) (trial judge did not abuse his discretion when defense counsel “could not point to any possibility that there was exculpatory material contained within the victim’s medical records” or articulate “what evidence was expected to be exculpatory, or how any unreleased portion of the medical records could possibly lead to potentially relevant evidence”); *DB v. Lippert*, ARMY MISC 20150769, 2016 CCA LEXIS 63, at *17 n.11 (Army Ct.

Crim. App. 1 Feb. 2016) (mem. op.) (“[A] defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant’s testimony at trial.”) (citation omitted).

b. Enumerated Exceptions

Even if appellant had demonstrated a “reasonable likelihood” that the records at issue would yield admissible evidence, as discussed below he failed to meet his burden to show that the requested information meets one of the enumerated exceptions set forth in Mil. R. Evid. 513(d). Appellant conceded that his request did not fall under one of the exceptions enumerated in Mil. R. Evid. 513(d), but instead claimed that the “constitutional exception” and his right to confront the victim mandated disclosure of the victim’s mental health records. We disagree.

i. There is No Confrontation Clause Exception to Military Rule of Evidence 513

Following the United States Supreme Court’s decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the President adopted a psychotherapist-patient privilege for the military justice system by implementing Mil. R. Evid. 513. As initially drafted, Rule 513(d)(8) provided for an exception “when admission or disclosure of a communication is constitutionally required.” Prior to 2015, military judges would typically review a victim’s mental health records *in camera* under the “constitutional exception” enumerated in Mil. R. Evid. 513(d)(8) as part of a balancing test to determine if the accused’s Confrontation Clause rights outweighed the victim’s psychotherapist-patient privilege. In December of 2014, however, Congress passed and the President signed the 2015 National Defense Authorization Act which modified Rule 513 “to strike the current [constitutional] exception to the privilege contained in subparagraph (d)(8).” National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014); Exec. Order No. 13,696, 80 Fed. Reg. at 35,819 (Jun. 22, 2015) (“Mil. R. Evid. 513(d)(8) is deleted”).

The United States Supreme Court first recognized the existence of a psychotherapist-privilege in *Jaffee*, concluding that such a privilege “promotes sufficiently important interests to outweigh the need for probative evidence” 518 U.S. at 9–10 (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980)). In affirming the Seventh Circuit’s recognition of the existence of a federal psychotherapist-patient privilege, the Supreme Court held that “[l]ike the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’” *Id.* at 10. The Court further explained that effective psychotherapy depended on an atmosphere of trust and confidence, and often included sensitive communications that might cause embarrassment or disgrace

if disclosed. *Id.* “For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Id.*

The Court in *Jaffee* also expressly rejected the use of a balancing test to determine whether the privilege should be upheld on a case-by-case basis, holding instead that “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.” *Id.* at 17–18. The Court opined that an uncertain privilege that “results in widely varying applications by the courts . . . is little better than no privilege at all.” *Id.* (citation omitted).

In *United States v. McCollum*, the CAAF recognized that while the general purpose of evidentiary rules is to enhance the truth seeking process, rules regarding privileges have the opposite goal as “they shut out the light.” 56 M.J. 837, 842 (C.A.A.F. 2002) (citation omitted). Therefore, privileges may be justified by the public good that derives from encouraging “communications without which certain relationships cannot be effective,” which transcends “the normally predominant principle of utilizing all rational means for ascertaining the truth.” *Id.* (citing *Jaffee*, 518 U.S. at 9). *See also Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (the confrontation clause does not guarantee “cross-examination that is effective in whatever way, and to whatever extent, the defense might wish”); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (trial courts have wide discretion to impose limits on cross-examination, based on evidentiary concerns such as those embodied in the Federal Rules of Evidence).

In *United States v. Rodriguez*, the CAAF explained that in contrast to the Federal Rules of Evidence, pursuant to Article 36, UCMJ, Congress delegated to the President the authority to issue rules of evidence for courts-martial in order to “provide the certainty and stability necessary for military justice.” 54 M.J. 156, 157–58 (C.A.A.F. 2000) (citation omitted). The CAAF also held that the President may promulgate military rules of evidence which inhibit an accused’s right to present a defense, so long as the rules are not “arbitrary or disproportionate to the purposes they are designed to serve.” *Id.* at 158 (citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998)) (internal quotation marks omitted).

Specifically addressing Mil. R. Evid. 513, the court in *Rodriguez* first noted that in promulgating the rule, the President created a psychotherapist-patient privilege “based on the social benefit of confidential counseling as recognized by *Jaffee*.” 54 M.J. at 160 (citation omitted). *See also United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (Mil. R. Evid. 513 is “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege”). The court in *Rodriguez* explained that when the President issued Mil. R.

Evid. 513 he did not adopt *Jaffee* in full, but rather created a more limited privilege for the military. 54 M.J. at 159–61. Further elaborating, the court found that:

In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court.

Id. at 161.

Addressing the Mil. R. Evid. 504 spousal privilege in *United States v. Custis*, the CAAF took up the issue of whether the “crime fraud” exception, which is not expressly delineated in Mil. R. Evid. 504, is applicable in the military justice system. 65 M.J. 366, 367–69 (C.A.A.F. 2007). Notwithstanding the fact that such an exception is uniformly recognized by the federal appellate courts, the CAAF held that:

[T]he authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government. . . . To uphold the exception . . . we would need to *create* an exception to a rule where none existed before, not interpret a privilege narrowly or an exception broadly. This we may not do.

65 M.J. at 369 (emphasis in original).

Concluding its discussion of this issue, the court in *Custis* explained that unlike the federal courts, where privileges evolve based on case law determinations, in the military system privileges and their exceptions are expressly delineated. *Id.* at 370–71. As such, the CAAF again emphasized that in the military justice system it is the province of the President and the policy-makers, and not the courts, “to weigh the utility of the . . . privilege against the truth-seeking function of the court-martial and, if appropriate, make adjustments to the express exceptions.” *Id.* at 371.

Directly on point, we have previously held in the context of Mil. R. Evid. 513 that “[t]he presumption is that a rule of evidence is constitutional unless lack of constitutionality is clearly and unmistakably shown.” *Lippert*, 2016 CCA LEXIS 63, at *28, (citing *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)). Given that Mil. R. Evid. 513 is the result of both a legislative and executive act, “the President was likely at the apex of his authority in implementing” M.R.E. 513. *Lippert*, 2016 CCA LEXIS 63, at *27 n.14.

In light of the holdings of *Rodriguez* and *Custis*, there 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. *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F. 2000); *Lippert*, 2016 CCA LEXIS 63, at *28.

In *Lippert*, we found that “prudence suggests that a detailed analysis should accompany” any decision as to whether the revised Mil. R. Evid. 513 is now facially unconstitutional, and that “the significance of the deletion of Mil R. Evid. 513(d)(8) is certainly subject to reasonable debate.” 2016 CCA LEXIS 63, at *25–26, 26 n.14; *Cf. Murdoch v. Castro*, 609 F.3d 983, 994 (9th Cir. 2010) (holding that since the Supreme Court has expressly declined to consider the issue of whether the attorney-client privilege might have to yield to a defendant’s constitutional rights, there is no clearly established constitutional principle). Put simply, if the removal of the constitutional exception grounded in the Confrontation Clause is “subject to reasonable debate,” it cannot also simultaneously be “clearly and unmistakably” unconstitutional.

A number of federal courts have similarly held that there is no Confrontation Clause exception to the psychotherapist-patient privilege. For example, in *Kinder v. White*, 609 Fed. Appx. 126, 128 (4th Cir. 2015) (unpub.), the lower court determined that the psychotherapist-patient privilege included an exception where necessary to vindicate a criminal defendant’s constitutional rights, especially when the records involved the “star witness” for the prosecution. Rejecting this conclusion, the Fourth Circuit held that the district court’s conclusion was “demonstrably at odds” with *Jaffee* and the basic principles underpinning testimonial privileges. *Id.* at 130. Further explaining, the appellate court in *Kinder* held that when the Supreme Court recognizes a privilege, “it necessarily has already determined that the privilege in question ‘promotes sufficiently important interests to outweigh the need for probative evidence.’” *Id.* at 131 (citing *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990)).

In *Newton v. Kemma*, 354 F.3d 776, 779 (8th Cir. 2004), the Eighth Circuit was faced with a state habeas petitioner who argued that the trial court violated his Sixth Amendment Confrontation Clause rights when it refused to turn over the psychiatric records of the prosecution’s only eyewitness to the crime. Rejecting this claim, the Court of Appeals held that the trial court’s decision was “neither contrary to, nor did it involve any unreasonable application of, clearly established Supreme Court precedent.” *Id.* at 781. The court in *Newton* reiterated that “the Confrontation

Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Id.* (citing *Fensterer*, 474 U.S. at 20). *See also Johnson v. Norris*, 537 F.3d 840, 842–45 (8th Cir. 2008) (same). Both *Newton* and *Johnson* are particularly relevant here given the similarity between the federal habeas standard (unreasonable application of clearly established Supreme Court precedent) and the standard in this case (whether the deletion of Mil. R. Evid. 513(d)(8) is clearly and unmistakably constitutional).

It is also worth noting that 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. *See Jaffee*, 510 U.S. at 10 (“Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’”) (citing *Trammel*, 445 U.S. at 1); *Clark*, 62 M.J. at 199 (C.A.A.F. 2005) (Mil. R. Evid. 513 is “based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege”); *Manual for Courts-Martial, United States* (2016 ed.), App. 22 at p. A22–51 (the psychotherapist-patient privilege is “similar to the clergy-penitent privilege”).

In *United States v. Doyle*, 1 F.Supp.2d 1187, 1189–90 (D. Or. 1998), the district court noted *Jaffee*’s rationale, that the psychotherapist-patient privilege was “[l]ike the spousal and attorney-client privileges,” before observing that under defendant’s theory, “[l]awyers, spouses, even priests, presumably, could be ordered to cough up their notes or memories about the most private and confidential communications.” Relying on *Jaffee*’s express rejection of a balancing test, the court in *Doyle* refused to conduct an *in camera* examination of the records, finding that such a review would itself violate the privilege. *Id.* at 1191. *See also United States v. Schrader*, 716 F.Supp.2d 464, 472–73 (S.D. W.Va. 2010) (holding that because no other privilege recognizes a Confrontation Clause exception, any such challenge to the psychotherapist-patient privilege “is similarly deficient,” and that “[a]ny court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant’s cross-examination needs”); *Cf. United States v. Rainone*, 32 F.3d 1203, 1207 (7th Cir. 1994) (“A trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney-client privilege was a good reason.”).

Accordingly, we find that any “constitutional exception” to Mil. R. Evid. 513 grounded in the Confrontation Clause does not exist. *See Jaffe*, 518 U.S. at 9–10 (holding that the psychotherapist-patient privilege “promotes sufficiently important interests to outweigh the need for probative evidence”) (citation omitted);

McCollum, 56 M.J. at 842 (privileges may be justified by the public good that derives from encouraging “communications without which certain relationships cannot be effective,” which transcends “the normally predominant principle of utilizing all rational means for ascertaining the truth”).⁵

ii. *There is also no “Brady” Exception to Military Rule of Evidence 513*

In *LK v. Acosta* we did not directly address the issue discussed above, but rather simply noted that “the Constitution is no more or less applicable to a rule of evidence because it happens to be specifically mentioned in the Military Rules of Evidence.” 76 M.J. at 615. Looking at the viability of the “constitutional exception” through that lens, we held that because the “right to confront witnesses does not include the right to *discover* information to use in confrontation,” there is “no general constitutional right to discovery in a criminal case.” *Id.* at 615–16 (emphasis in original).

Along the same lines, we were critical of the fact that we previously “treated privileged mental health records as having no privilege at all[,]” and emphasized that the “traditional” low threshold for discovery under R.C.M. 701 does *not* apply in the context of determining whether privileged material should be disclosed under Mil. R. Evid. 513. *Id.* at 614 (“The disclosure of privileged matter is an entirely separate question, governed by separate rules, from whether the information would be otherwise discoverable under R.C.M. 701 and Article 46, UCMJ.”).

Rather, we explained that constitutional “discovery” is instead delineated by the contours of *Brady v. Maryland*, 373 U.S. 83 (1963) (*Brady*), which is limited to

⁵ We are aware of the Supreme Court’s plurality decision in *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), but find that case to be easily distinguishable. Far from imposing a blanket rule that a defendant’s “fundamental due process” rights require an *in camera* review in all cases and for all privileges, the Court in *Ritchie* was addressing a specific state privilege which expressly included an exception that allowed disclosure to a “court of competent jurisdiction pursuant to a court order.” *Id.* at 43–44. Given the qualification embedded within the state-law privilege, the Court remanded the case to the trial court to conduct an *in camera* review to determine if the records were material to the defense. The Court also noted, however, the difference between the privilege it was ruling on and the state’s absolute privilege for communications between sexual assault counselors and victims. *Id.* at 57 (comparing the qualified privilege before it to the “unqualified statutory privilege for communications between sexual assault counselors and victims”). In short, because Mil. R. Evid. 513 no longer enumerates a “constitutional” exception, the analysis and rationale of *Ritchie* are inapposite.

matter that is: (1) exculpatory or impeachment evidence; (2) “material;” and (3) is in the actual or constructive possession of the prosecution. *Id.* at 616 (citing *United States v. Shorts*, 76 M.J. 523, 531–32 (Army Ct. Crim. App. 2017)). Although we did not explicitly establish or add an additional “*Brady* exception” to Mil. R. Evid. 513(d), our discussion in *LK v. Acosta* seemed to implicitly recognize such an exception:

As the mental health records in question here were not in the possession of the prosecution, they do not fall under the ambit of *Brady*. As we see no other constitutional right to disclosure at play, the disclosure of the mental health records in this case is not constitutionally required.

Id. (internal quotation marks omitted). While we take no issue with the discussion about what constitutes *Brady* material for purposes of discovery, to the extent we recognized an exception to Mil. R. Evid. 513 based on *Brady*, that portion of *LK v. Acosta* is overruled.

A problem with any *Brady* exception predicated on the government’s possession of an alleged victim’s mental health records is that it sidesteps the issue of how the government acquired those privileged records in the first place. Regardless of how the government obtains the records, that is either intentionally or inadvertently, it is no less bound to honor evidentiary privileges than the defense. See *LK v. Acosta*, 76 M.J. at 616 (“The privilege governing mental health records, by contrast, applies to both the prosecution and the defense.”).

Hence, the government cannot intentionally subpoena or otherwise solicit a healthcare provider to procure what it knows to be privileged records. See *In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 255 (2d. Cir. 1986) (holding that the government “may not obtain evidence in violation of a valid privilege established under the Constitution, statute or common law”) (citing *United States v. Calandra*, 414 U.S. 388, 346 (1974)). It follows that the privilege remains intact if the government intentionally obtains confidential treatment records. By the same token, the government’s intentional misconduct cannot trigger a *Brady* obligation to disclose the privileged materials to another. See Mil. R. Evid. 510 (privilege waived only if the holder “voluntarily discloses or consents to disclosure”); Mil. R. Evid. 511(a) (“Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.”); *United States v. Ankeny*, 30 M.J. 10, 16 (C.M.A. 1990) (holding in context of attorney-client privilege that Mil. R. Evid. 511 “prevent[s] the use ‘in any way’ of an improperly divulged communication”) (citations omitted); *Vaughn v. State*, 608 S.W. 569, 574–54 (Ark. 2020) (absent a legislatively recognized exception to the psychotherapist-patient privilege, fact that government

possesses the records still does not mandate disclosure since government cannot waive the privilege).

On the other end of the spectrum is when the government inadvertently obtains privileged records, *i.e.* a health care provider's inadvertent production of "routine" medical records that contain privileged communications between the patient and his or her therapist. But, even in that case, assuming that the patient timely asserts the privilege upon learning of the inadvertent disclosure, the records generally retain their privileged character. Addressing a related issue in the context of the marital privilege, the CAAF in *McCollum* held:

Courts have regularly held that the unauthorized disclosure of privileged information by one spouse does not constitute waiver of the privilege. In such cases, the nondisclosing spouse can still assert the privilege and prevent the use of the confidential information in a legal proceeding.

58 M.J. at 339. *See also United States v. De La Jara*, 973 F.3d 746, 750 (9th Cir. 1992) ("When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege") (citation omitted); *Transamerica Computer Co. v. International Bus. Mach. Corp.*, 573 F.2d 646, 650–52 (9th Cir.1978) (holding that privilege is waived only if privilege holder voluntarily discloses communication); *United States v. Rigas*, 281 F.Supp. 733, 738 (S.D.N.Y. 2003) (holding that there is no waiver by inadvertent disclosure unless the privilege holder's actions were "so careless as to suggest that it was not concerned with the protection of the asserted privilege") (citation omitted).

Accordingly, to the extent 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 *Brady* duty to disclose. Rather, in such a case the government is required to inform both the defense and the patient of the inadvertent disclosure in order to allow the patient to invoke the privilege. And, if the patient timely asserts privilege, and/or any disputed issues of waiver are resolved in the patient's favor, disclosure is barred and the government must return those portions of the records that are privileged. *See Lippert*, 2016 CCA LEXIS at *33 ("The effect of this ruling is to restore the disclosed records to their privileged status" such that the petitioner "may prevent another from being a witness or disclosing any matter or producing any object or writing."); *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d

168, 172 (5th Cir. 1996) (holding no abuse of discretion where trial court finds no waiver and orders inadvertently produced privileged records returned to privilege holder); *Alldread v. Gren.*, 988 F.2d 1425, 1433–35 (5th Cir. 1993) (same).⁶

Another fundamental flaw in recognizing a *Brady* exception to Mil. R. Evid. 513 is that it runs afoul of both *Jaffee* and CAAF precedent. While we acknowledge that the President retains discretion to deviate from *Jaffee*, there is no dispute that the 2015 National Defense Authorization Act modified Rule 513 “to strike the current [constitutional] exception to the privilege contained in subparagraph (d)(8).” And, it is worth reiterating that the Supreme Court has rejected any constitutional “balancing component” exception to the psychotherapist-patient privilege:

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn* [an attorney-client privilege case], if the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. Any uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Jaffee, 518 U.S. at 17–18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

As noted above, in *Rodriguez* the CAAF found that “[i]n the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court.” 54 M.J. at 161. Likewise, in *Custis* the CAAF held because privileges and their exceptions are expressly delineated in the military system, appellate courts may not create or otherwise recognize exceptions to the privileges set forth in the Military Rules of Evidence. 65 M.J. at 370–71 (citing *McCollum*, 58 M.J. at 342 n.6) (the “political elements of government” should make

⁶ We recognize that if the government comes into possession of an individual’s therapy records under one of the recognized exceptions delineated in Mil. R. Evid. 513(d)(1)–(7), *i.e.*, the patient is dead, and those records contain exculpatory information, the government is of course obligated under *Brady* to disclose those *non*-privileged records the defense.

policy determinations with respect to privileges in the military system). Also relevant to our discussion is the CAAF's recognition in *Custis* that the rules of statutory construction are equally applicable to the Military Rules of Evidence:

It is a well established rule that principles of statutory construction are used in construing the *Manual for Courts-Martial* in general and the Military Rules of Evidence in particular. *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006); *United States v. Lucas*, 1 C.M.A. 19, 22, 1 C.M.R. 19, 22 (1951). “[W]hen the statute’s language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (citations and quotation marks omitted).

Id. at 370.

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).

Applied here, appellant clearly failed to meet his burden to show that the requested records fell within one of Mil. R. Evid. 513(d)’s enumerated exceptions.

iii. Cumulative

Regarding the third Mil. R. Evid. 513(e)(2) “cumulative” factor, where there is no evidence of the contents of the victim’s mental health records, “it [i]s likely impossible for the military judge to determine whether the records were cumulative with other defense evidence.” *Lippert*, 2016 CCA LEXIS 63, at *28. In other words, unless the defense can show evidence or a proffer of what specifically is in the mental health records, the military judge abuses his discretion in making a finding that the defense has satisfied its burden to show the records are not cumulative. *Id.*

In this case, because appellant did not show any evidence of what specifically was in victim’s mental health records, he failed to satisfy his burden to demonstrate that the records were not cumulative to what was already in the record, including

evidence that the victim suffered from two psychological conditions, was taking two prescribed medications, and was seeing a therapist.

iv. Non-privileged Sources

Finally, as to the fourth “non-privileged sources” factor, the relevant inquiry is whether other non-privileged sources like emails, texts, testimony of family members/friends/associates could establish the same information without resorting to piercing a privilege. *Id.* at *29–30. Because appellant failed to satisfy any of the other requirements of Mil. R. Evid. 513(e)(2), we need not reach the issue of whether he demonstrated there were no other non-privileged sources of information for the mental health information he sought.

v. Summary

As described above, under Mil. R. Evid. 513(e)(2), in order to get to the first step of having the military judge review the records *in camera*, the proponent must establish *all* of the following by a preponderance of the evidence: (1) a specific factual basis demonstrating a reasonable likelihood that the mental health records would yield admissible evidence; (2) that the requested information meets one of the enumerated exceptions under Mil. R. Evid. 513(d); (3) that the information sought is not cumulative of other information available; and; (4) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.

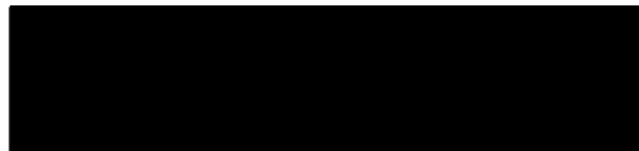
Applied here, because appellant failed to meet his burden to satisfy the first three prongs of the test, the military judge did not abuse his discretion in denying the request for an *in camera* review and production of the victim’s mental health records.

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge BROOKHART and Judge PENLAND concur.

FOR THE COURT:



✓ JOHN P. TAITT
Clerk of Court