RUDDERLESS: 15 YEARS AND STILL LITTLE DIRECTION ON THE BOUNDARIES OF MILITARY RULE OF EVIDENCE 513

MAJOR MICHAEL ZIMMERMAN*

I. Introduction

Though Military Rule of Evidence (MRE) 513 was enacted in 1999, there has been very little case-law authored in the ensuing fifteen years defining the scope of the rule.[1] While litigation over MRE 513 has increased at the trial level, particularly in sexual assault cases, the appellate courts have been conspicuously silent on defining the parameters of the rule.[2] One possible explanation of this silence could be

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* Judge Advocate, United States Marine Corps. Presently assigned as a Military Judge in the Navy and Marine Corps Trial Judiciary. LL.M, 2014, The Army Judge Advocate General's Legal Center and School, Charlottesville Virginia; J.D., 2002, University of Cincinnati; B.A., 1999, The Ohio State University. Previous assignments include Legal Services Support Section, Camp LeJeune, North Carolina, 2010-2013 (Chief Trial Counsel 2010-2011, Military Justice Officer, 2011-2012, Chief Review Officer 2012-2013); Assistant County Prosecutor, Hamilton County Ohio Prosecutor's Office 2007-2009; Marine Corps Air Station, New River, North Carolina, 2003-2006 (Chief Trial Counsel, 2003-2006). Member of the bars of Ohio, Kentucky, and the Supreme Court of the United States. The views represented in this article are the author's own, do not necessarily reflect the views of the Navy and Marine Corps Trial Judiciary, and are not intended to signal a predisposition toward the author's position in any case before a court to which the author is detailed as military judge.

[1] STEPHEN A SALTZBURG ET AL., 2 MILITARY RULES OF EVIDENCE MANUAL § 513.04 (7th ed., Matthew Bender & Co. 2011).

[2] *Id.* (citing United States v. Rodriguez, 54 M.J. 156 (C.A.A.F. 2000) (declining to recognize a psychotherapist-patient privilege under MRE 501(a)(4), recognizing instead a privilege more limited under MRE 513 than that recognized by the Supreme Court in Jaffee v. Redmond, 518 U.S. 1 (1996)); United States v. Jenkins, 63 M.J. 426 (C.A.A.F. 2006) (recognizing a more limited privilege under MRE 513 than that adopted in *Jaffee* and finding that the military judge's admission of the accused's statements to a federal civilian psychologist during a command-directed mental health evaluation was proper under the exceptions listed in MRE 513(d)(4) and (d)(6)); *see also* United States v. Bazar, 2012 CCA LEXIS 267, at *8 (A.F. Ct. Crim. App. July 20, 2012) (finding no abuse of discretion when the military judge conducted an MRE 403 balancing test and determined that defense proposed cross-examination "was not constitutionally required under either [MRE 412 or 513]."); United States v. Palmer, 2013 CCA LEXIS 1116, at *13-*16 (A.F. Ct. Crim. App. Nov. 25, 2013) (upholding a military judge's review and release of a victim's mental health records but limiting cross examination regarding those records to rebutting specific impacts that the victim testified to during the sentencing phase); United States v. Hudgins, 2014 CCA LEXIS 227, *15 (A.F. Ct. Crim. App. Apr. 3, 2014)

that trial courts have tended to err on the side of reviewing mental health records *in camera* and releasing some privileged material, thus leaving little opportunity for the issue to be addressed on appeal.[3] Whatever the reason, the lack of clear boundaries has continued to frustrate practitioners—who are searching for a consistent and reliable analytical framework to address MRE 513 issues.

In a common scenario faced at the trial level, the defense seeks an alleged victim's mental health records either to: (1) search for impeachment evidence, or (2) present evidence that the victim has a mental disease or defect, which may either raise an issue of witness competency under MRE 601[4] or serve also as impeachment evidence under MRE 608(c).[5] The oft-cited basis for requesting these records is that they are constitutionally required under the Fifth and Sixth Amendments. This clash between the accused's constitutional rights and the application of the psychotherapist-patient privilege sets the stage for vehement litigation.

On December 12, 2014, the United States Congress passed the Fiscal Year 2015 National Defense Authorization Act (NDAA), which the President subsequently signed into law.[6] Section 537 of the NDAA requires significant changes to MRE 513.[7] Among those changes are the elimination of the explicit "constitutionally required" exception in MRE 513(d)(8), and significant refinements to the procedural requirements of

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(finding no abuse of discretion where the military judge conducted an *in camera* review of the victim's mental health records, released at least one record to the defense, the defense did not cross-examine the victim on the one record released, the remaining records were not aligned with the defense theory of the case, and the victim's relationship with her boyfriend began several weeks after the acts charged).

[3] *See* Annys Shin, *Alleged Military Sex Assault Victims Seek To Block Use Of Counseling Records*, WASH. POST, Feb. 14, 2014, http://www.washingtonpost.com/blogs/local/wp/2014/02/14/alleged-military-sex-assault-victims-seek-to-block-use-of-counseling-records/; *see also* JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 115-16 (Feb. 2015) [hereinafter JPP INITIAL REPORT].

[4] As a practical matter, competency is a very low threshold and is unlikely to be the foundation for excluding a witness's testimony. *See* United States v. Lyons, 33 M.J. 543 (A.C.M.R. 1991).

[5] *See* JPP INITIAL REPORT, *supra* note 3, at 110.

[6] *See* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter NDAA].

[7] *See id.*

the rule.[8] Though this act of Congress seems to eliminate a contentious issue,[9] litigation in this area is not likely to end.[10]

This is true because, although the "constitutionally required" exception will no longer be printed in the text of MRE 513, the privilege is still subordinate to the dictates of the Constitution. Consequently, litigation will likely continue as counsel seek to pierce the privilege under the auspices of the Constitution even without an enumerated exception. This article focuses on establishing a framework for addressing this issue.

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[8] *See id*.

[9] Annys Shin, *supra* note 3.

[10] The negligible impact of eliminating the "constitutionally required" exception under MRE 513(d)(8) is rooted in both the Constitution and case-law. When viewing the intersection of the Constitution and a rule created by legislative or judicial act, it is imperative to remember that constitutional rights prevail over conflicting statutes and rules. *See* Rock v. Arkansas, 483 U.S. 44, 56 (1987) (where the Court noted that evidentiary rules must be evaluated as applied for a determination whether the interests served justify the potential limitation imposed on a defendant's constitutional rights); Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004) (noting "that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges" and that "[w]hether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake"). One federal district court has already succinctly handled this issue, stating "[a]s important as the psychotherapist-patient privilege may be, it simply does not trump the Constitution." United States v. White, 2013 U.S. Dist. LEXIS 49426, *41 (S.D. W. Va. Apr. 5, 2013), *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015). *But see* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010) (stating "[t]he Court finds that the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of Defendant"); State v. Fromme, 949 N.E.2d 789 (Ind. 2011). The Court of Appeals for the Armed Forces has been equally clear regarding the supremacy of constitutionally required evidence. United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011). Furthermore, commentators have recognized that the "constitutionally required" language has always been superfluous. *See* STEPHEN A. SALTZBURG ET AL., 1 MILITARY RULES OF EVIDENCE MANUAL §412.02 (7th ed., Matthew Bender & Co. 2011); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §4:81, at 306 (3d ed. 2007) (stating that the identical constitutionally required language found in Federal Rule of Evidence 412 is "arguably unnecessary because Fed.R.Evid. 412 is subordinate to the Constitution anyway"). As the *Military Rules of Evidence Manual* points out regarding the same constitutionally required language found in MRE 412, "this final exception is unclear. It also is unnecessary. Any limitation on a constitutional right would be disregarded whether or not such a Rule existed. Perhaps its real function is to explicitly recognize that serious constitutional questions are likely to be raised with frequency and to put judges and lawyers on the alert." SALTZBURG ET AL, *supra* 10, § 412.02; *see also* JPP INITIAL REPORT, *supra* note 3, at 120.

With little guidance from the appellate courts, practitioners have been forced to determine for themselves how to navigate the intersection of the Constitution and this privilege.[11] As a result, the temptation has been to simply borrow from the most heavily litigated military rule of evidence that expressly contains a constitutionally required exception, namely, MRE 412. Though the phrase "constitutionally required" does appear in that rule,[12] it is important to recognize up front that MRE 412 is a rule of relevance[13]—while MRE 513 is a rule of privilege. The difference is critical because rules of privilege operate to exclude otherwise relevant evidence based on countervailing public policy concerns.[14] Therefore, while MRE 412 might be a good place to begin the analysis—even if MRE 513 no longer contains an explicit "constitutionally required" exception—completely exporting the standard from MRE 412 leads to an incomplete result, as the MRE 412 case law focuses on relevance and does not consider the important public policy interests underlying a rule of privilege.

This article argues that the proper evaluation of the constitutional aspects of piercing the psychotherapist–patient privilege requires three steps: First, practitioners must understand the rationale behind the psychotherapist-patient privilege in order to identify and account for all of the interests at stake. Second, counsel should analyze constitutional requirements by supplementing MRE 412 jurisprudence with federal and

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[11] The need for a coherent interpretation is made more pressing in light of LRM v. Kastenberg, 72 M.J. 364, 370–71 (C.A.A.F. 2013) (recognizing a victim's right to be heard through counsel on matters related to the privacy interests contained in MRE 412 and MRE 513); *see also* NG v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012) (involving an alleged victim of sexual assault who appealed a trial court ruling requiring that she sign a release so that decades of mental health records could be produced for an *in camera* review).

[12] *See* SUPPLEMENT TO MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2012) [hereinafter MCM SUPPLEMENT].

[13] *See* United States v. Saipaia, 24 M.J. 172, 175 (C.M.A. 1987). *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 analysis, at A22-41 [hereinafter MCM] (stating that the rule should "not be interpreted as one of absolute privilege"). This language appears to be more of an unfortunate use of the term rather than a recognition that a rule in the four-hundred section of the *Manual* dealing with relevance actually belongs in the five-hundred section dealing with privilege.

[14] *See* United States v. Trammel, 445 U.S. 40, 50 (1980) (stating "privileges contravene the fundamental principle that the public . . . has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth") (internal citations omitted).

state psychotherapist-patient privilege case law. The MRE 412 decisions provide a starting point but do not properly account for all of the interests involved. Thus case-law from other jurisdictions concerning the privilege can be used to construct the rest of the framework needed to ensure a complete analysis. Third, practitioners must understand and be able to apply the new procedural requirements under the NDAA. There are substantial changes to the process, particularly regarding the standard for an *in camera* review. These changes reflect Congress's intent to strengthen the privilege so a functional knowledge of their impact on the analysis is crucial.

Ultimately, this issue is important for trial counsel, defense counsel, victim's legal counsel (or special victim's counsel), and military judges to understand in order to ensure that the proper balance is struck between a victim's[15] right to privacy, including avoiding interfering with a victim's psychological recovery; society's interest in encouraging people to seek mental health services; the government's right to bring an accused to trial; and the accused's rights guaranteed by the Constitution.[16]

II. The Rationale Behind The Enactment of MRE 513

The underlying policy objective of MRE 513 is to facilitate mental health diagnosis and treatment. As with most rules of privilege, like the lawyer-client privilege or the husband-wife privilege, there are exceptions. Those exceptions outline the policy interests against which the privilege competes. While there are several exceptions in MRE 513, this article focuses on whether the Constitution demands production and admission of the records at issue in a given case. Before one can ascertain if the Constitution overrides the psychotherapist-patient privilege, it is necessary to understand the reason why the privilege was enacted. To do so, it is imperative to consider the seminal case of *Jaffee v. Redmond*, the four distinct interests implicated by piercing of the psychotherapist-patient privilege, and the stated purpose of MRE 513.

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[15] The individual with the privacy interest throughout this article is presumed to be the victim. However, it is worth noting that the standard and procedure for reviewing an MRE 513 issue is the same no matter who the patient is.

[16] *See* Clifford S. Fishman, *Defense Access to a Prosecution Witness' Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 62 (2007); Jaffee v. Redmond, 518 U.S. 1 (1996).

A. *Jaffee v. Redmond*

The Supreme Court first recognized the existence of a psychotherapist-privilege in federal law in *Jaffee v. Redmond*.[17] The majority began its discussion by noting that testimonial privileges are disfavored and should only be accepted if they serve a significant public policy goal.[18] The Court concluded that the psychotherapist-patient privilege is based on the same foundational principle as the attorney-client and spousal privileges: the "imperative need for confidence and trust."[19] In drawing this comparison, the Supreme Court found that:

> [e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[20]

The Court specifically identified the public policy interest at stake, finding that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[21]

The Court was so concerned with reinforcing trust and confidence in the strength of the new privilege that it rejected the circuit court's

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[17] 518 U.S. 1 (1996). The enactment of MRE 513 implemented *Jaffee* in military courts. *See* MCM, *supra* note 13, MIL. R. EVID. 513 analysis, at A22-51.
[18] *See Jaffee*, 518 U.S. at 9; s*ee also* Upjohn Co. v. United States, 449 U.S. 383, 389, (1981).
[19] *Jaffee*, 518 U.S. at 10.
[20] *Id.*
[21] *Id.* at 11.

balancing test, which considered the evidentiary need for mental health records.[22] Significantly, the Court stated:

> 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*, 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. An 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."[23]

This language from *Jaffee* led to the enactment of MRE 513, which was a significant change to military jurisprudence. Prior to the codification of MRE 513, military courts had used an evidentiary-value analysis. For instance, in *United States v. Morris,*[24] the trial court was confronted with a defense discovery request for the medical, psychological, and counseling records of the victim.[25] The judge reviewed the records *in camera* and—using the discovery standard under Rule for Courts-Martial (RCM) 701—disclosed those portions of the records in which the victim mentioned the charged offense.[26]

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[22] The balancing test that the circuit court advanced "requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." Jaffee v. Redmond, 51 F.3d 1346, 1357 (7th Cir. 1995). Some argue the Supreme Court's rejection of this overt balancing appears to render the privilege absolute. *See* Fishman, *supra* note 16, at 5. However, the presence of numerous listed exceptions in MRE 513(d) makes the privilege as enacted qualified. *See* United States v. Isham, 48 M.J. 603, 606 (N-M Ct. Crim. App. 1998). Ultimately, the distinction between an absolute and qualified privilege is not dispositive to the analysis of the constitutionally required exception in MRE 513(d) in light of United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).

[23] *Jaffee*, 518 U.S. at 17-19 (*citing* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)). In a footnote, the Court does state that "future developments in the federal psychotherapist privilege might uncover situations in which the privilege must give way." *Id.*

[24] 47 M.J. 695, 704 (N-M Ct. Crim. App. 1997).

[25] *See id.* at 699.

[26] *See id*. at 700.

Cases like *Morris* analyzed the disclosure of psychiatric records of a victim based on a mixture of the RCM 701 and MRE 412 standards.[27] While there was some consideration by the court of the confidentiality interests of the alleged victim, there was certainly no consideration of the societal interest identified in *Jaffee* since the privilege did not exist at the time. Further although the Supreme Court's rejection of the lower court's balancing test in *Jaffee* may seem to preclude consideration of any competing interests, such a broad interpretation was never intended.[28] The "constitutionally required" standard, which was formerly found explicitly in MRE 513(d)(8) but is now implicitly included, is mandated by the supreme law of the land, and it is distinct from the lesser balancing test of mere evidentiary need that the Supreme Court rejected in *Jaffee*.[29]

In both civilian and military jurisprudence, when the Constitution conflicts with a rule created by legislative or judicial act, constitutional rights frequently supersede.[30] The Court of Appeals for the Armed

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[27] *Id.*

[28] *See* Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996).

[29] *See* Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003) (stating "the issue . . . is not whether [an accused's] 'need' for the evidence should be balanced against [a witness's] interest in maintaining the confidentiality of her psychotherapy, but whether the constitutional rights afforded to a criminal defendant by the Fifth, Sixth, and Fourteenth Amendments to [the] United States Constitution prevail over a state policy interest expressed in a statute or rule creating an evidentiary privilege").

[30] *See* Rock v. Arkansas, 483 U.S. 44, 56 (1987) (noting that evidentiary rules must be evaluated when applied for a determination whether the interests served justify the potential limitation imposed on a defendant's constitutional rights); Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004) (noting "that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges" and that "[w]hether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake"); United States v. White, 2013 U.S. Dist. LEXIS 49426, at *41 (S.D. W. Va. Apr. 5, 2013) ("[a]s important as the psychotherapist-patient privilege may be, it simply does not trump the Constitution.") , *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015). *But see* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va., 2010) ("[t]he Court finds that the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of Defendant. The *Jaffee* court explicitly foreclosed the possibility that the privilege contain[s] a balancing test. Defendant, by arguing that the privilege is secondary to his rights under the Sixth Amendment, is explicitly and impermissibly asking the Court to balance his rights with that of the privilege. While the Court notes that *Jaffee* can be distinguished from the instant case due to the fact that the former was a civil action, it finds that the emphatic language used by the *Jaffee* court regarding the fallacy of a balancing test demonstrates that the court intended for the privilege to apply in all circumstances, civil and criminal. Exceptions to the privilege, even in the Sixth Amendment context, would, indeed, eviscerate the

Forces has been clear regarding the supremacy of constitutionally required evidence in relation to other interests.[31] Therefore, despite language in *Jaffee* that suggests the privilege is not subject to weighing it against other needs, the accused's interest in a trial that comports with the Constitution is not extinguished by the enactment of the privilege. This is no less true after congressional elimination of the "constitutionally required" language from the rule itself. While the language of the rule has changed, the Constitution has not.

B. Defining the Interests

Prior to continuing with the analysis, practitioners must identify the interests at stake in psychotherapist-patient privileged evidence when an accused's constitutional rights are also implicated. Because privileges exclude otherwise relevant evidence based on an overriding public policy interest,[32] there is an obvious tension between the party seeking to pierce the privilege and the holder. However, the psychotherapist-patient privilege is far more complex than merely the intersection of two competing parties. In fact, there are four distinct interests involved when MRE 513 collides with the Constitution: (1) society's interest in encouraging people to seek mental health treatment; (2) the patient's interest in confidentiality; (3) the state's interest in prosecuting crime; and (4) the accused's interest in challenging the witnesses against him.

Turning first to society's stake, as the Court in *Jaffee* noted, rules of privilege are enacted because they serve a significant public interest.[33] The Court specifically recognized society's interest in encouraging people with mental and emotional problems to seek treatment for those issues.[34] The Court further stated that confidentiality is critical to ensuring that people with mental health issues seek that treatment.[35] Thus, society's interests are served by a rule that gives patients reassurance that the information they reveal will remain confidential.

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effectiveness of the privilege.") (quotation and internal citation omitted); State v. Fromme, 949 N.E.2d 789 (Ind. 2011).

[31] *See* United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).

[32] *See* United States v. Trammel, 445 U.S. 40, 50 (1980).

[33] *See Jaffee*, 518 U.S. at 11.

[34] *See id.*

[35] *See id.* at 10.

Secondly, the patient has an interest in confidentiality because of the significant embarrassment and shame often felt about the issues discussed in a mental health setting.[36] These feelings about deeply personal events in one's life can be so pronounced that patients are willing to forego treatment or the prosecution of an accused in order to protect their privacy.[37] As the Supreme Court noted, a process and a standard for evaluating the intrusion into the mental health communications of a patient that does not address the need for predictable confidentiality is no better than no rule at all.[38]

Third, the government has an interest in prosecuting crime.[39] Part of that interest involves encouraging victims to come forward and participate in the justice process.[40] That interest is ill-served by a privilege that does not afford some measure of confidentiality because victims are less likely to pursue a case when they believe their mental health history will be open for others to see—especially the accused.[41]

To that end, it could be suggested that maximizing the confidentiality of the privilege by treating it as absolute—such that it can only be overcome with the consent of the patient[42]—would best serve the interests of society, the victim, and the government. However, an absolute privilege does not fully address the government's concern. States that treat the privilege as absolute have accounted for the accused's interests in challenging the witnesses against him by striking the witness's testimony or barring the witness from testifying at all if the witness will not consent to disclosure.[43] This exclusion persists until the witness waives the privilege.[44] Such a formula favors the confidentiality

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[36] *See* State v. Thompson, 836 N.W.2d 470, 489 (Iowa 2013); Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003); People v. Foggy, 521 N.E.2d 86, 91-92 (Ill. 1988); State v. Peseti, 65 P.3d 119, 129 (Haw. 2003); State v. L.J.P., 637 A.2d 532, 537 (N.J. 1994).

[37] *See* Shin, *supra* note 3; Jennifer L. Herbert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1454-55 (2005).

[38] *See Jaffee*, 518 U.S. at 17-18.

[39] *See* Fishman, *supra* note 16.

[40] *See* Shin, *supra* note 3; *see also* Herbert, *supra* note 37.

[41] *See* Shin, *supra* note 3; *see also* Herbert, *supra* note 37.

[42] *See* Fishman, *supra* note 16 at 18 (discussing Connecticut, Michigan, Nebraska, New Mexico, Wisconsin and South Dakota as states that follow the method of requiring a witness to consent to release of the records or striking that witness's testimony).

[43] *See id.*

[44] *See id.*

that society and the patient seek while also addressing the accused's needs. Unfortunately, it leaves the state's interest in punishing potentially serious criminal misconduct unaddressed as the case is unlikely to go to trial without the testimony of a key witness. In the military context, where courts-martial are functions of command, such a rubric also fails to address one of the dual purposes of military justice, the good-order and discipline interests of the commander.[45]

Finally, the accused has an interest in challenging the witnesses against him through cross examination.[46] While this interest could outweigh all others if the evidence is constitutionally required,[47] not every limitation on cross-examination is of a constitutional magnitude.[48] Therefore, any standard used to address the intersection of the Constitution and MRE 513 must account for this interest while recognizing that evidence rising to the level of a constitutional deprivation must be disclosed regardless of countervailing interests.

With those four concerns in mind, one can then view a conflict between the Constitution and the psychotherapist-patient privilege in the proper context. Ensuring that the standard balances the needs of all while also recognizing the fundamental nature of the guarantees of the Fifth and Sixth Amendments to the Constitution is imperative to a full analysis of the issue.

C. MRE 513 Is a Rule of Privilege

In 1999, President Clinton signed Executive Order 13,140, which codified *Jaffee* in MRE 513.[49] The new privilege protected confidential communications between a patient and psychotherapist.[50] The analysis to MRE 513 makes clear this is not a doctor-patient privilege. Instead it is a separate rule, which is based on the social benefit of confidential counseling, which was recognized by *Jaffee* and which is similar to the

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[45] *See* MCM, *supra* note 13, pt I, ¶ 3.
[46] *See* Fishman, *supra* note 16, at 9.
[47] United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).
[48] *See* Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (stating "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").
[49] *See* Exec. Order No. 13,140, 64 Fed. Reg. 55, 115 (Oct. 12, 1999).
[50] *See id.*

clergy-penitent privilege.[51] However, the clergy-penitent privilege in MRE 503 is an absolute privilege.[52] Thus, if the three elements of that privilege are established, there are no exceptions to the rule and the evidence is protected.[53]

By contrast, after the implementation of the NDAA, MRE 513 will contain seven specific exceptions that can operate to overcome the protections of the privilege.[54] Even though there are listed exceptions to MRE 513, it is still a rule of privilege just like the attorney-client protection found in MRE 502–which also has listed exceptions. Consequently there is no rationale to give it less weight than any other similarly-situated privilege.[55]

In practice, the psychotherapist-patient privilege has not received the same deference as other rules of privilege. One court highlighted the disparate treatment of the psychotherapist-patient privilege compared to the attorney-client privilege by noting that "any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs."[56] When considering the reason for the treatment of the different privileges in relation to the Constitution, one court succinctly noted that "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges. Whether a constitutional right might

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[51] *See* MCM, *supra* note 13, MIL. R. EVID. 513 analysis, at A22-51.

[52] *See* MCM, *supra* note 13, MIL. R. EVID 503.

[53] *See* United States v. Isham, 48 M.J. 603, 606 (N-M Ct. Crim. App. 1998). Despite the fact that the clergy-penitent privilege has been historically strong, there is no justification for this privilege to be immune from the other dictates of the Constitution – at least any more than the attorney-client privilege. *See* Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004).

[54] MCM, *supra* note 13, MIL. R. EVID. 513(d); Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537 (2014).

[55] *See* State v. Thompson, 836 N.W. 2d 470, 489 (Iowa 2013) (noting that "[i]f we were to find that a criminal defendant has a general due process right to obtain otherwise privileged evidence, where would it end? Consider a case where a victim of a serious violent crime gives somewhat inconsistent accounts as to what happened—a not uncommon occurrence. Could the crime victim's spouse be subpoenaed to testify under oath about what the victim told him or her? Could the victim's priest be subpoenaed? Could the victim's attorney be required to produce communications with the victim?") (internal citations omitted).

[56] *See* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010).

prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake."[57]

Within that sliding-scale perspective, MRE 513 seems to be a comparatively weak privilege, particularly in light of the anecdotal evidence suggesting that the protections are often pierced for at least an *in camera* review.[58] However, Congress has recently fortified the privilege significantly, and that policy decision cannot go unnoticed.[59] Therefore, decisions to pierce MRE 513 can be made only by weighing the strength of the privilege against the potential harm to the constitutional right at stake. While MRE 513 does have exceptions, it still establishes a statutory privilege and any decision to override it should be made as cautiously as the decision to invade a privilege like the attorney-client privilege.

Practitioners need to understand the rationale behind the Court's decision in *Jaffee*, the four interests involved in breaching the psychotherapist-patient privilege, and the fact that MRE 513 is a rule of privilege, just like the attorney-client privilege, in order to begin a full review of an MRE 513 issue. Failure to consider these matters will lead to an inadequate result, one that unwittingly extinguishes some important interest.[60]

III. When Can the Constitution Overcome MRE 513?

As noted above, assessing the application of MRE 513 by evaluating its enumerated exceptions does not end the analysis. While Congress eliminated the explicit exception for "constitutionally required" evidence in the FY15 NDAA, the implicit exception inherent in our system of justice remains. In fact, the explicit "constitutionally required" exception can still be found in other rules of evidence whose policy objectives are

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[57] *See* Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004).

[58] *See* Shin, *supra* note 3.

[59] *See* § 537.

[60] *See* United States v. Tigueros, 69 M.J. 604 (Army Ct. Crim. App. 2010). Though not a case analyzed under MRE 513, the court in *Tigueros* stated, "In this case and others like it where there is no dispute over the relevance of the requested material, due diligence requires trial counsel to ask each victim whether she has attended any mental health counseling sessions, investigate the existence of any medical records, and obtain them, employing a subpoena or other compulsory process where necessary." *Id*. Though there may have not been an assertion of the privilege in this case, language such as this reflects a lack of consideration for all of the interests involved in MRE 513.

aimed at the protection of similar rights.[61] However, the appearance of that language in different portions of the MRE should not imply that the Constitution's impact on every evidence rule is, or ought to be, uniform.

For example, the military "rape shield" law contains a "constitutionally required" exception in MRE 412.[62] As a result, military appellate courts have developed a significant body of case law on the intersection between the Constitution and MRE 412.[63] Given that MRE 513 had previously included an explicit "constitutionally required" exception, it is tempting to apply MRE 412 case law when interpreting MRE 513. However, MRE 412 is a rule of relevance, whereas MRE 513 is a rule of privilege.[64] Since privileges act to exclude otherwise relevant evidence,[65] merely borrowing the MRE 412 rubric—without more—would result in a flawed and inadequate analysis. The following will show how two foundational Supreme Court cases, the MRE 412 jurisprudence, and the addition of the element of necessity combine to form a complete analytical framework.

A. The Collision of Privileges and Constitutional Rights

When reviewing a request to pierce the MRE 513 privilege one of the most commonly cited considerations is the accused's interest in challenging the credibility of the witnesses against him. That interest can ultimately become paramount to all others if it rises to a constitutional magnitude.[66] Practitioners facing this issue should first look to the cornerstone decisions of *Pennsylvania v. Ritchie*[67] and *Davis v. Alaska*[68] concerning the interaction between rules of privilege and an accused's rights under the Constitution.

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[61] *See* MCM, *supra* note 13, MIL. R. EVID. 412, 514.
[62] *See id.* MIL. R. EVID. 412.
[63] *See* United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004); United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[64] *See supra* Part I. Though the phrase "constitutionally required" was formerly an exception under MRE 513(d)(8) before the enactment of the Fiscal Year 2015 National Defense Authorization Act, the boundaries of that exception had never been the subject of an Appellate opinion.
[65] *See supra* Part I.
[66] *See* United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).
[67] 480 U.S. 39 (1987).
[68] 415 U.S. 308 (1974).

In *Pennsylvania v. Ritchie***,** the United States Supreme Court weighed the Sixth Amendment confrontation rights of an accused in the context of a state law that privileged certain government agency documents from the state department of Children and Youth Services**.**[69] The accused claimed that his confrontation rights were violated by the law because the documents limited his ability to impeach the only eyewitness, his daughter, and that the file may contain names of some witnesses favorable to him.[70] The plurality specifically rejected the Pennsylvania State Supreme Court's holding that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony."[71] Instead the Court found that the "ability to question adverse witnesses . . . does not include the power to require disclosure of any and all information that might be useful in contradicting unfavorable testimony."[72] The Court also stated that "the Confrontation Clause only guarantees 'an opportunity for effective cross examination, not cross examination that is effective in whatever way and to whatever extent the defense might wish.'"[73] Thus, the Court recognized that the right to confront witnesses is not a mechanism that triggers a wholesale search through any document that might bear the fruit of impeachment. Put simply, when confronted with a privileged document, a greater showing than the mere possibility of impeachment material is needed.

The other important Supreme Court case to consider when examining the clash of a privilege and the Constitution is *Davis v. Alaska.* In that case, the Supreme Court examined Alaska's law that privileged certain

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[69] *See* 480 U.S. at 43-44.

[70] *See id.* at 51-54. The opinion contains language suggesting that the Confrontation Clause is not applicable to pre-trial discovery materials. *Id.* at 52-53. It is also worth noting that this is a plurality opinion and only four justices (Powell, Rehnquist, White, and O'Connor) agreed with this proposition regarding the Confrontation Clause. The fifth justice needed for a majority (Blackmun) was of the opinion that there may be situations in which the Confrontation Clause is violated by the lack of pre-trial discovery. *Id*. at 61. Finally, two justices (Brennan and Marshall) dissented regarding this view of the Confrontation Clause, while two justices (Stevens and Scalia) declined to reach the merits as they found that a writ of certiorari should not have been granted because the lower court's judgment was not final. *Id.* at 66, 73. Thus this opinion cannot stand for the proposition that the Confrontation Clause does not apply to pre-trial discovery. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

[71] *Ritchie*, 480 U.S. at 52.

[72] *Id. at 53.*

[73] *Id.* (internal citation omitted).

juvenile court records. The defense presented the court with a concrete, specific theory of a possible motive to fabricate, which was based on specific facts that it discovered through witness interviews, namely, that the witness was still on probation from a juvenile offense, and therefore, he would want to implicate someone else in order to keep from violating his probation.[74] The Supreme Court found that the state law of privilege violated the confrontation clause when the defense was not permitted to delve into that matter at trial.[75]

The difference between *Davis* and *Ritchie* illustrates the confluence of the Constitution and rules of privilege very clearly. In *Davis*, the defense already knew certain information existed, clearly articulated the importance of that information to the defense theory of the case, and made an adequate record at trial of how that theory of the case was related to the Constitution. By contrast, the defense in *Ritchie* could not overcome a statutory protection to view a privileged document by merely speculating that the covered communication might contain more ammunition for cross examination.

These cases demonstrate that simply invoking one's right to confront is not enough to overcome the protections afforded the privileged material.[76] However, there is a point at which those protections must yield to the ultimate guarantees of the Fifth and Sixth Amendments. Thus, it is important to look at how those constitutional guarantees have been evaluated in other settings.

B. Constitutionally Required Under MRE 412

Even though "constitutionally required" has been deleted in MRE 513, that exception cannot be legislated away.[77] The explicit "constitutionally required" language has always been viewed as

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[74] *See* Davis v. Alaska, 415 U.S 308, 308-9 (1974).
[75] *Id.*
[76] *See* MCM, *supra* note 13, MIL. R. EVID. 514 analysis, at A22-52 ("The exceptions to Rule 514 are similar to the exceptions found in Rule 513 and are intended to be applied in the same manner. 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 a 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 renders the privilege meaningless.").
[77] *See supra* Part I.

superfluous.[78] However, it does appear in MRE 412(b)(1)(C) and has been the subject of significant litigation in that context. Under MRE 412, evidence is constitutionally required if the proponent (typically, the defense) can articulate how the evidence sought is relevant and material, and that the probative value outweighs the danger of unfair prejudice.[79]

In applying this analysis, relevance is defined in MRE 401 as "any tendency to make a fact more or less probable than it would be without the evidence [when that] fact is of consequence" to the case.[80] Regarding materiality, courts have held, when "determining whether evidence is material, 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."[81] Finally, "the probative value must be balanced against and outweigh the ordinary countervailing interests reviewed in making a determination as to whether the evidence is constitutionally required."[82] In MRE 412 jurisprudence, those countervailing interests are the dangers of unfair prejudice, such as harassment, confusion of the issues, the witness's safety, or an interrogation that is repetitive or only marginally relevant.[83]

However, simply borrowing this standard, without more, does not adequately address all of the interests at stake when litigating a psychotherapist-patient privilege issue. Though MRE 412 case law does contain some minimal consideration of the alleged victim's interests—contained in the balancing test—and recognizes the supremacy of the accused's interests in evidence that rises to a constitutional magnitude, there are many substantial interests not accounted for. Specifically, MRE 412 jurisprudence does not: weigh the victim's interest in confidentiality;[84] consider society's interest in encouraging people to seek mental health treatment, which was recognized in *Jaffee*; or account for the government's interest in prosecuting crime, as detailed above. Based on *Ritchie* and *Davis*, something else must be shown when

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[78] *See* SALTZBURG, *supra* note 10.
[79] *See* United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[80] MCM, supra note 13, MIL. R. EVID. 401.
[81] United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004).
[82] *Ellerbrock*, 70 M.J. at 318 (citing United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).
[83] *See* MCM, *supra* note 13, MIL. R. EVID. 412; *see also Gaddis*, 70 M.J. at 252.
[84] *See Banker*, 60 M.J. at 222.

determining whether piercing a rule of privilege is constitutionally required. That something else is necessity.

C. Adding a Fourth Prong of Necessity to the MRE 412 Rubric Completes the Analysis

The above three-pronged standard from MRE 412—relevance, materiality, and the balancing of probative value with unfair prejudice—ensures that the accused's interest in due process and witness confrontation are accounted for by the court. However, the interests of society, the government, and the patient must also be factored in when determining whether the court should breach an MRE 513 privilege. Since there are no military or Supreme Court cases that address piercing the psychotherapist-patient privilege on constitutional grounds, it is instructive to look at state cases that have done so. State courts dealing with provisions similar to MRE 513—without an explicit "constitutionally required" exception—have required that the accused demonstrate that the evidence is necessary in order to justify the intrusion.[85] "Necessary" has been defined as "unavailable from less intrusive sources."[86] This additional element is added to ensure that due regard is paid to the protected nature of the psychotherapist-patient communications.

The addition of necessity to the analysis is important because there is the potential to overlook the fact that MRE 513 is a rule of privilege under a standard that is simply borrowed completely from MRE 412. As a result, courts could easily default to looking through very personal records and releasing any portion deemed relevant.[87] Such a low standard is similar to the RCM 701 rubric, which was used in *United*

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[85] *See* State v. Thompson, 836 N.W.2d 470, 489 (Iowa 2013); Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003); People v. Foggy, 521 N.E.2d 86, 91-92 (Ill. 1988); State v. Peseti, 65 P.3d 119, 129 (Haw. 2003); State v. Green, 646 N.W.2d 298 (Wis. 2002); State v. L.J.P., 637 A.2d 532, 537 (N.J. 1994).

[86] *Barroso*, 122 S.W.3d at 564; *see also* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) (adopting the language from United States v. Klemick, 65 M.J. 576, 580 (N-M Ct. Crim. App. 2006), that the proponent must show whether the information sought was not merely cumulative of other information available and that the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources).

[87] *See* Shin, *supra* note 3.

States v. Morris.[88] To do so ignores the fact that privileges purposefully exclude otherwise relevant evidence based on a larger public policy goal,[89] and such an analysis would not address all of the interests at stake.

Requiring the court to consider the necessity of reviewing the privileged material, as well as the necessity in disclosing it, ensures that the court takes into account society's interests in fostering the atmosphere of confidence and trust that *Jaffee* found so imperative to the mental health of the citizenry.[90] Necessity also ensures that the alleged victim's interests in keeping some of the most personal, private, and potentially embarrassing information[91] confidential remains a consideration in the analysis. In addition, necessity serves the interest of the government in encouraging alleged victims' participation in the legal process, as it fosters trust that their most private records will not be handed over to the alleged perpetrator without the proponent demonstrating that the information is vital and cannot be obtained any other way.[92]

When all of the above facets are taken together, a standard emerges defining when the Constitution can overcome the MRE 513 privilege. Given the fact that there are four separate interests at work, the standard must be one that accounts for the victim's interest in privacy of very sensitive information, society's interest in encouraging people to seek mental health treatment, the state's interest in prosecuting crimes, and the accused's interests in a vigorous defense. Under precedent set by the Court of Appeals for the Armed Forces, if evidence is of a constitutional magnitude, there is no countervailing interest that can prevent its

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[88] 47 M.J. 695, 704 (N-M Ct. Crim. App. 1997); *supra* Part I.A.

[89] *See* United States v. Trammel, 445 U.S. 40, 50 (1980).

[90] *See* Jaffee v. Redmond, 518 U.S. 1, 10-11 (1996).

[91] *See Thompson*, 836 N.W.2d at 483.

[92] *See* Herbert, *supra* note 37 (citing Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARV. WOMEN'S L.J. 14, 16 (1997)) (discussing a case that was dismissed when the victim refused to reveal her pre-assault mental health records, which would have disclosed her private struggle with an eating disorder); Chauncey B. Wood, Note, *Rape Prosecutions and Privileged Psychological Counseling Records: How Much Does a Defendant Have a Right to Know About His Accuser?*, 3 B.U. PUB. INT. L.J. 351, 352 (1993); NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 23 (1977) (reporting a survey of prosecutors in which 52% of respondents cited victim fear or embarrassment as the predominate reason for withdrawal of rape complaints).

disclosure or admission.[93] However, simply borrowing completely from the MRE 412 jurisprudence is not enough. The addition of the necessity prong ensures that all involved—trial counsel, defense counsel, victim's counsel, and the military judge—consider every aspect before reviewing or disclosing the privileged records. Viewing the constitutionally required standard with these four prongs in mind balances the four competing interests at stake when mental health records are in issue.[94]

IV. The Process

Once the standard for when the Constitution can supersede the psychotherapist–patient privilege is defined, the next question to answer is what process should be used to evaluate the issue? Despite the language in the NDAA that limits MRE 513(e) to only exceptions under the rule,[95] there is no real justification for abandoning the statutory procedure when the grounds asserted are the ubiquitous protections of the Constitution.[96] The current version of MRE 513(e) provides detailed guidance on the mechanics of how to conduct an MRE 513 hearing. The NDAA adds clarity to the procedure by establishing a two-stage analysis to MRE 513(e) in which a threshold showing must first be made before an *in camera* review is conducted and any determination to pierce the privilege is made.

A. Procedural Mechanics

As an initial matter, all practitioners should read and follow MRE 513(e) before filing a motion seeking to pierce the privilege and, certainly, before holding any hearing. Despite the language in the NDAA that suggests the procedure only applies to the listed exceptions, MRE 513(e)(1) states that the process applies to any dispute regarding

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[93] *See* United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[94] *See* Fishman, supra note 16, at, 62; *see also Jaffee*, 518 U.S. at 11.
[95] *See* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014). The act states that a party seeking to pierce the privilege must show "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege" and "demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege." *Id.*
[96] *See* SALTZBURG, *supra* note 10.

the production or admission of psychotherapist-patient records.[97] Further MRE 513(e) contains several very important procedural steps that must be followed.[98] At the hearing, all parties—trial counsel, defense counsel, and victim (either alone, through a guardian, or through counsel)—must be given an opportunity to be heard.

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[97] *See* MCM, *supra* note 13, MIL. R. EVID. 513(e)(1).

[98] *See id*.; *see also* 80 Fed. Reg. 23, 6059 (Feb. 4, 2015) (proposing a modification to rule 513). Incorporating the changes proposed on February 4, 2015, and in pertinent part, Rule 513 will require that "(1) in any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling the party must: (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered or objected to unless the military judge, for good cause shown, requires a different time for filing, and (B) serve the motion on the opposing side and 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 Further, (2) before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the proceedings shall not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including victims' counsel under 10 U.S.C.S § 1044e (Lexis 2014). In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members; (3) the military judge may examine the evidence or a proffer thereof *in camera* if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an *in camera* review, the military judge must find by a preponderance of the evidence that the moving party: (A) showed 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 this rule; (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. (4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) above and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) above. Further (5) 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. Finally, (6) the motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise." (emphasis added) (The forgoing includes changes to MRE 513(e) contained in the Manual for Courts Martial Proposed Amendments, 80 Fed. Reg. 23, 6059 (Feb. 4, 2015)).

B. A Threshold Showing Is Required Before Conducting an *in camera* Review

Prior to ordering the production of and unsealing the privileged records, the military judge must require a minimum showing by the proponent.[99] As the Supreme Court has stated, it is not the mere possibility of constitutionally required evidence that must be articulated.[100] Further, the text of the rule requires that the party seeking admission specifically describe the evidence sought and the purpose for which it is sought.[101] Military courts are unwilling to allow the defense to go on a "fishing expedition" into a victim's record based upon mere speculation that those records might contain some helpful cross-examination material.[102] Thus, some initial threshold must be met. This is true because even the court's view of the mental health records results in the revelation of very private information to someone who was not meant to receive it.[103]

Prior to the passage of the NDAA, *United States v. Klemick* was the lone authority that outlined the standard for an *in camera* review under MRE 513.[104] In *Klemick*, the prosecution sought records of the accused's spouse in relation to a child abuse and manslaughter prosecution.[105] The government proffered that the spouse sought mental health services in the months immediately following the death of her son, so those conversations must have included details of what the accused's wife witnessed.[106] The main contention by the defense on appeal was that the military judge improperly decided to conduct the *in camera* review of the records in the first place.[107] The Navy-Marine Corps Court

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[99] *See* § 537; *see also* United States v. Zolin, 491 U.S. 554, 572 (1989); United States v. Klemick, 65 M.J. 576, 580 (N-M Ct. Crim. App. 2006).
[100] Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987).
[101] *See* MCM, *supra* note 13, MIL.R.EVID. 513(e)(1)(A).
[102] *See* United States v. Briggs, 48 M.J. 143 (C.A.A.F. 1998).
[103] *See* State v. Spath, 581 N.W.2d, 123, 126 (N.D. 1998) (quoting State v. Hummel, 483 N.W.2d 68, 72 (Minn. 1992)); Fishman, *supra* note16, at 53 (stating that it is clear courts should not do an *in camera* review simply because the defense asks because "[t]o do so would accord insufficient significance to the privacy of complainants and witnesses whose records are at issue"); s*ee also* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010) (stating that "this Court's review of the . . . files would itself be a breach of the privilege, and the Court declines to undertake such a breach").
[104] *See Klemick*, 65 M.J. at 580.
[105] *See id.* at 578.
[106] *See id*.
[107] *See id*. at 579.

of Criminal Appeals noted the lack of military and federal cases addressing the issue and turned to state appellate courts for persuasive authority.[108] Relying on a Wisconsin decision,[109] the court identified a three-pronged standard to determine when the threshold has been met for an *in camera* review:

> (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?[110]

The first prong sets forth the standard that the proponent must meet, while the last two prongs really address the concept of necessity—whether the evidence is available from some other source. The court went on to determine that the proper threshold showing had been made in that case and that the judge did not err in conducting the *in camera* review.[111]

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[108] *See id*.

[109] State v. Green, 646 N.W.2d 298 (Wis. 2002).

[110] *Klemick*, 65 M.J at 580.

[111] *See id*. ("In this case we find that the Government satisfied the three part standard. The death of a child at the hands of his father, followed soon thereafter by a discussion between the parents of the father's treatment of the child and then by psychological counseling for the child's mother, reasonably led to the conclusion that records of that counseling would contain information related to the event."). While the decision does a good job of pointing out the need for a standard to initially be met before piercing the privilege and conducting an *in camera* review, the decision in *Klemick* suffers from one main deficiency. The premise that the privilege can be breached because mental health counseling occurred after a traumatic event so that, therefore, there must be information about the event in the records is flawed. Many state courts have addressed this matter when dealing with similar state privileges. A large number of cases have done so specifically in the arena of sexual assault. As one author stated:

> There appears to be a near unanimous consensus . . . 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 case, if this was enough to trigger an in camera review, a

The NDAA both codified and added to the *Klemick* decision.[112] Under the new additions to MRE 513, a proponent must initially show that: (1) a specific factual basis exists demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (2) by a preponderance of the evidence, the requested information meets one of the enumerated exceptions; (3) the information sought is not merely cumulative of other information available; and (4) the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[113]

For the first prong, when the reason to breach the privilege is cited as the Constitution, practitioners should evaluate the claim to see if a specific factual basis exists demonstrating a reasonable likelihood that the records or communications are relevant and material and that the balancing test is satisfied. This will give the proponent, the opposition, the victim—either alone or through counsel—and the military judge an opportunity to evaluate the potential for the records to be admissible as required under the suggested standard.

The second prong is apparently part of the concerted effort to focus the court's attention on only the listed exceptions and curtail what Congress saw as a major hole in the privilege, the "constitutionally required" exception.[114] This attempt to strengthen the privilege was taken to reverse what Congress perceived as a rising tide of privileged records being routinely reviewed in military courts.[115] However, as has been previously shown, simply deleting the words "constitutionally required" does not extinguish the fundamental constitutional rights at stake.[116]

> court would be required to conduct the review in virtually every such case.

Fishman, *supra* note 16, at 37-38 (footnote omitted).

[112] *Compare* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014), *with Klemick*, 65 M.J. at 576..

[113] *See* § 537.

[114] *See Military Response to Sexual Assaults* Part 2, CSPAN (Oct. 10, 2014), http://www.c-span.org/video/?322037-2/military-response-sexual-assaults-part-2 (beginning at 1:00:07); *see also* JPP INITIAL REPORT, *supra* note 3, at 116, 123.

[115] *See supra* note 114.

[116] *See supra* Part I.

The final two prongs of the new procedure are simply synonyms for the concept of necessity—specifically that the material sought is unavailable from any other source. The determination to review the documents must be made with an appreciation that even the court's review is a piercing of the privilege by someone who was never intended to review the records. Necessity reminds the court that these records are not to be reviewed *pro forma* and only when absolutely required.

If the proponent can meet this standard, the military judge can conduct an *in camera* review if it is necessary to rule on the issue.[117] Military judges are cautioned to narrowly tailor any resulting production or admission "to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which the records or communications are sought."[118] This final caution, and the repeated reference to only the enumerated exceptions, appears to be an effort by Congress to reinforce the strength of the psychotherapist-patient privilege while erecting barriers to the continued use of the deleted "constitutionally required" exception. As stated above, simply striking that language does not eliminate the protections of the Constitution and thereby eliminate the "constitutionally required" exception.[119]

V. Applying the Process

Having determined when the Constitution can overcome the MRE 513 privilege, and what must be demonstrated in order to trigger an *in camera* review, it is now worth examining the application of those concepts in relation to the most common reasons these records are sought: (1) to search for impeachment evidence; or (2) to present evidence that the victim has a mental disease or defect that makes his or her testimony unreliable.

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[117] *See* § 537.
[118] *See id.*
[119] *See supra* Part I.

A. Impeachment

One of the common reasons a party seeks access to psychiatric records is to gather impeachment evidence, particularly inconsistent statements. As noted above, it is not the mere possibility of evidence rising to the level of a constitutional deprivation that must be articulated by the proponent.[120] The text of the rule requires that the party seeking admission specifically describe the evidence sought and the purpose for which it is sought.[121] In addition, the party seeking disclosure 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 that are inconsistent with the expected testimony at trial.[122] Thus, to succeed, a party must give the court clear direction on what they expect to be in the files and how those statements are relevant and material, and how the balancing test is satisfied such that piercing the privilege is necessary—meaning the information is unavailable from some other means.[123] This can occur in a myriad of ways. Certainly information that the patient recanted to the psychotherapist would qualify. Short of that, there are many different things that could be significant given the facts raised by a party.[124]

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[120] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987).
[121] *See* MCM, *supra* note 13, MIL.R.EVID. 513(e)(1)(A).
[122] *See* Fishman, *supra* note 16.
[123] *See supra* Part II.B and C.
[124] One court recently addressed the issue as follows:

> We recognize how unlikely it may be that a defendant or defense counsel will *know* in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information. We look to our sister states for examples of facts that could reveal a likelihood that the privileged records contain exculpatory evidence. One such example is evidence of prior inconsistent statements. In *State v. Peseti*, the victim's sister testified that the victim had on one occasion "admitted that the incident 'didn't happen.'" 101 Haw. 172, 65 P.3d 119, 129. Similarly, in *Brooks v. State*, 33 So. 3d 1262, 1269 (Ala. Crim. App. 2007), other records produced by the State during discovery included an inconsistent statement by the victim. Another example is strange behavior by the victim surrounding the counseling sessions, such as *Burns v. State*, 968 A.2d 1012 (Del. 2009), where the victim destroyed notes about alleged abuses after an interview with her psychiatrist. *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557

Whatever the facts may be, the party seeking disclosure must articulate why a specific factual basis exists, demonstrating a reasonable likelihood that the records or communications would yield evidence that rises to a constitutional magnitude. It is not incumbent on the court to scour the records for every inconsistency or to simply release any statement that may have been made about the offense so the parties may do so. The release should be tied to those specific grounds articulated by the party seeking disclosure and not a broader release to "see what's in the file."

Once the court determines that an *in camera* review is necessary, the records can be examined. The court should concentrate on searching for those items that the proponent established under the "reasonable likelihood" standard were in the privileged documents. Any applicable areas should be identified and then evaluated under the four-pronged relevant, material, balancing test, and necessary standard. If a portion meets that standard, then only that portion should be subject to disclosure. The court should take care to remember the privileged nature of the document and ensure that the review does not become a broader search for any and all inconsistencies or impeaching evidence.

B. Mental Disease or Defect That Makes Testimony Unreliable

The other common reason a party seeks to review psychotherapist-patient records is to search for evidence of a mental disease or defect that makes the witness's testimony less reliable, either as an issue of

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> (Mich. 1994), a case cited by this Court in *Goldsmith*, also provides a useful example of a defendant pointing to actual facts to support a proffer that the mental health records likely contained exculpatory evidence. In that case, the defense's theory was "that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation." In support of a request to review the claimant's mental health records, the defendant pointed to prior abuse of claimant by her biological father and factual support for sexually aggressive behavior by the victim. Although the trial court denied the defendant's request, the Supreme Court of Michigan held, based on defendant's proffer, that *in camera* review "may have been proper" and remanded for further proceedings, including to further develop the record.
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> State v. Johnson, 102 A.3d 295, 309-10 (Md. 2014).

competence under MRE 601 or for impeachment under MRE 608(c). The same standard applies to this purpose as noted above. The party seeking disclosure must set forth the specific factual basis demonstrating a reasonable likelihood that the evidence is relevant and material, the balancing test is satisfied, and breaching the privilege is necessary before the records are produced for an *in camera* inspection. The judge must use that same standard to determine what, if anything, to disclose.

At the outset, courts have found that a witness's mental health condition is only relevant to the issue of bias or motive to fabricate under MRE 608(c) or competency to testify under MRE 601.[125] Furthermore, the fact that a witness has some mental disorder does not automatically give rise to a bias or motive to fabricate.[126] The proponent of mental health evidence must establish that there was a real and direct nexus between the witness's disorder and the facts of the case.[127] Whether that nexus exists is a question of logic and common sense answered by the presentation of evidence, not by the incantation of words like "bias" or "motive to fabricate".[128]

When the evidence is being offered on competency to testify, it must relate to the witness's ability to perceive and tell the truth.[129] This is a fine line to walk. Care should be taken to ensure that the evidence remains squarely focused on the issue of competence, which is presumed and is a high bar to overcome under MRE 601.[130] Parties should remain vigilant so that testimony does not stray into prohibited "human lie detector" territory.[131]

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[125] *See* United States v. Smith, 2012 CCA LEXIS 367, at *4 (N-M Ct. Crim. App. Sept. 28, 2012) (citing United States v. Soifer, 47 M.J. 425, 427-28 (C.A.A.F. 1998)).

[126] *See id.* at *9-*10.

[127] *See* United States v. Sullivan, 70 M.J. 110, 115 (C.A.A.F. 2011).

[128] *See Smith*, 2012 CCA LEXIS 367, at *9-*10 (specifically the court found that testimony that a witness had a condition (Borderline Personality Disorder) was not sufficient to make it relevant when there were no facts suggesting that the condition was "triggered" by the facts of this case.); *see id.* at *10-*11; N.G. v. Superior Court, 291 P.3d 328 (Alaska, 2012) (where the victim successfully sought a ruling from the Alaska Court of Appeals reversing a trial court order for the victim to turn over mental health records).

[129] *See Sullivan*, 70 M.J. at 117; *see also* United States v. Butt, 955 F.2d 77, 82 (1st Cir. 1992) (summarizing over forty years of federal jurisprudence).

[130] *See* MCM, *supra* note 13, MIL. R. EVID 601; *see also* United States v. Lemere, 16 M.J. 682 (A.C.M.R. 1983).

[131] *See* United States v. Cameron, 21 M.J. 59, 63 (C.M.A. 1985) (stating "the rule remains that, absent unusual circumstances, opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for

It is important to consider this distinction when examining the disclosure of psychotherapist-patient communications under this rationale. When a proponent endeavors to make the initial "reasonable likelihood" showing regarding a witness's mental health condition, the military judge must pay close attention to the relevance prong when determining whether the balancing test is satisfied and disclosure is necessary with the above precedent in mind. If a judge determines that the standard for an *in camera* review is met, the document should be examined with an eye towards whether there was a real and direct nexus between the witness's disorder and the facts of the case at hand, keeping in mind that expert testimony on credibility is typically disfavored. These facts play a significant role in determining whether the information really is relevant to the case.

Finally, when examining a proponent's claim for this type of information, the argument might be made that the party seeking disclosure does not want the confidential communications made to the psychotherapist but merely the diagnosis that psychotherapist made. MRE 513(a) seems to privilege the former and not the latter by stating, "[A] patient has a privilege to disclose and to prevent any other person from disclosing a confidential communication . . . if such communication was made for the purpose of facilitating diagnosis or treatment."[132] However, it would be a curious result, and not in keeping with the public interest behind enacting the privilege, to say that the diagnosis is automatically not covered by the protections of MRE 513 even though

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the factfinders are perfectly capable of observing and assessing a witness' credibility"); *see also* United States v. Jenkins, 54 M.J. 12, 16 (C.A.A.F. 2000) ("This Court has consistently held that a witness may not opine that another witness is lying or telling the truth."); United States v. Birdsall, 47 M.J. 404, 410 (C.A.A.F 1998) ("An expert's opinion evaluating the truthfulness of a witness' story also usurps the jury's exclusive function to weigh evidence and determine credibility"); United States v. Hill-Dunning, 26 M.J. 260, 262 (C.M.A. 1988) ("We have consistently held that the opinions of one witness concerning the credibility or believability of another witness are inadmissible. We do not permit witnesses to pit themselves against one another."); United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988) ("[E]xpert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony"); United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981) (noting that an expert should not "go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility") (quoting United States v. Ward, 169 F.2d 460, 462 (3d Cir. 1948)).

[132] *See* MCM, *supra* note 13, MIL.R.EVID. 513(a).

the underlying communications are.[133] Such a finding would result in regular disclosure of a large portion of a witness's mental health history and would have the chilling effect that concerned the Court in *Jaffee*.[134]

VI. Conclusion

The lack of appellate case law in the fifteen years since MRE 513 was enacted regarding the parameters of the privilege is frustrating for all involved. That frustration has also been felt by the federal district courts that have struggled with the boundaries of the *Jaffee* privilege in federal court.[135] However, when practitioners take into account the four interests at stake, the significant state case law on the issue, and MRE 412 jurisprudence, as well as the boundaries established in *Pennsylvania v. Ritchie* and *Davis v. Alaska*, a definite framework emerges. When analyzing a MRE 513 issue, all involved should consider how the requested intrusion is relevant and material, whether the balancing test is

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[133] *See* United States v. White, 2013 U.S. Dist. LEXIS 49426, at *23 (S.D.W. Va. Apr. 5, 2013) ("A psychiatric diagnosis is born of and inseparably connected to private communications between a therapist and his or her patient. For this reason, any attempt to draw a line between communications and diagnoses would undermine the basis for recognizing a privilege in the first place."), *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015); Caver v. City of Trenton, 192 F.R.D. 154, 159-62 (D.N.J., 2000). In addition, as one court has stated:

> [I]t is clear that the privilege is designed to protect confidential communications made and information given by the client to the psychotherapist in the course of treatment. The psychiatric file is imbued with the privilege because it might contain such confidential information. However, the privilege is not designed to specifically protect the psychotherapist's own opinion, observations, diagnosis, or treatment alternatives particularly when such information finds its way beyond the client's personal file. While such information may be protected from disclosure by some other privilege, we decide that the [psychotherapist-patient] privilege is designed to protect disclosures made by the client. Having said this, we need to look to the precise nature of the files [the treatment facility] seeks to protect, and their actual role in the treatment process.

Swanger v. Warrior Run Sch. Dist., 2014 U.S. Dist. LEXIS 178890, at *7-*8 (M.D. Pa. Dec. 31, 2014). Further the court clarified that "the psychotherapist patient privilege does not extend to information regarding the occurrence of treatment including whether a psychotherapist treated [someone], the dates of such treatment and the length of treatment on each date." *Id.* at 8*-*9 (internal citations omitted).

[134] *See* Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[135] *See White*, 2013 U.S. Dist. LEXIS 49426, at *35.

satisfied, and whether piercing the privilege is necessary. The records should not be reviewed *in camera* by the military judge unless the moving party can make the reasonable-likelihood showing that the four-pronged standard above is met. If the movant can do so, the judge can review the documents *in camera*, and determine whether the standard is actually met regarding the specific area identified by the proponent and narrowly tailor any resulting disclosure. Following this procedure and using this standard will effectively balance all of the interests involved at the intersection of the Constitution and MRE 513.