2017

Privileged Communications of Military Chaplains and Mental Health Professionals: Case Law of Military Rules of Evidence 503 and 513

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PRIVILEGED COMMUNICATIONS OF MILITARY CHAPLAINS AND MENTAL HEALTH PROFESSIONALS: CASE LAW OF MILITARY RULES OF EVIDENCE 503 AND 513

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I. Introduction

Alarmingly high rates of post-traumatic stress disorder (PTSD) and suicide among Service members returning from military action[1] has increased focus within the United States military about effectively providing mental health services.[2] Concerns include problems related to an insufficient mental health workforce, military culture, and delivery of services.[3] Within this context, how sensitive personal information is handled while seeking mental healthcare is a major concern for servicemembers. The Department of Defense (DoD) and the U.S.

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[1] *See* Robert H. Pietrzak et al., *Risk and Protective Factors Associated with Suicidal Ideation in Veterans of Operations Enduring Freedom and Iraqi Freedom*, 123 J. OF AFFECT. DIS. 102, 102-07 (2010) (discussing rates of suicide among Iraq and Afghanistan war service members and risk factors); Josefin Sundin et al., *PTSD after deployment to Iraq: conflicting rates, conflicting claims*, 40 PSYCH'L MED. 367, 367-82 (2010) (discussing data and rates of PTSD prevalence among veterans following deployment to the Middle East).

[2] *See* INSTITUTE OF MEDICINE, PREVENTING PSYCHOLOGICAL DISORDERS IN SERVICE MEMBERS AND THEIR FAMILIES: AN ASSESSMENT OF PROGRAMS 9-10 (2014) (discussing the need to address mental health issues for military service members and their families in the wake of deployment); INSTITUTE OF MEDICINE, RETURNING HOME FROM IRAQ AND AFGHANISTAN: READJUSTMENT NEEDS OF VETERANS, SERVICE MEMBERS, AND THEIR FAMILIES 13-14 (2013) (outlining the scope of the military and estimates of mental health issues among its members).

[3] *See* Audrey Burnam et al., *Mental Health Care for Iraq and Afghanistan War Veterans*, 28 HEALTH AFF'S 771, 771-82 (providing an overview of mental health services and challenges within the military in light of continued deployments to Iraq and Afghanistan).

Department of Veterans Affairs (DVA) recently partnered to examine opportunities for chaplains to have a role in improving mental health efforts, largely because of their well-respected place within military culture, and the absolute confidentiality they enjoy with communications.[4] This initiative—the Integrated Mental Health Strategy—recognizes the important potential chaplains have to promote mental healthcare.[5] However, it generates a need to address important practical concerns. A primary issue is how chaplains and mental health providers can work—separately or together—to handle sensitive mental health information of servicemembers.[6] This is a major concern because many servicemembers fear that disclosure of mental health issues can jeopardize their military careers if they are perceived as being unfit.[7] At the same time, the appropriate handling of such information can be instrumental in helping servicemembers obtain assistance if needed. This raises the question of what the current legal landscape is for the treatment of confidential information by either chaplains or mental health providers within military courts. Military rules regarding privileged communications are currently the primary sources of guidance on these issues. This article provides an overview of applicable military case law on the treatment of privileged communications for both chaplains and mental health professionals. After the introduction in Part I, Part II provides an overview of military chaplaincy, their potential role in addressing mental health needs among servicemembers, and a summary of the mental health landscape. Part III focuses on a review of military cases concerning Military Rule of Evidence 503: Communications to clergy. It identifies the policy rationale behind the clergy privilege, and outlines major military appellate cases which have examined privileged communications under this rule for chaplains, many of which are relevant to situations involving instances of self-harm or harm to others. Part IV outlines case law concerning Military Rule of Evidence 513: Privileged Communications and Psychotherapists. This section identifies the policy rationale of the psychotherapist privilege, and discusses major military appellate cases which have arisen since the privilege was created by presidential order in

[4] *See infra* discussion at notes 71-74.

[5] DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy (Sept. 2010).

[6] For example, HIPAA privacy protections for personal health information contains exceptions for servicemembers. The military may access personal health information in order "to assure the proper execution of the military mission." 45 CFR 164.512(k)(1)(i).

[7] *See* DoD Regulation 6025.18-R(C7.11.1.3) (allowing disclosure of health information to military command to determine fitness for duty)

1999. Finally, part V discusses the implications of this case law within the framework of the wider policy goals of each rule of evidence, and offers suggested guidance for those working in this area.

II. Chaplaincy and Mental Health in the Military

Chaplains have been active in the nation's military since General George Washington requested them to serve in the continental army in 1775.[8] Congress first funded chaplaincy positions for the Army and Navy in 1791.[9] Since then, chaplains have taken part in hundreds of military missions and served in over 120 countries.[10] Chaplains occupy a unique space in military service. As stated by the Joint Chiefs of Staff, chaplains' main duties are to "accommodate religious needs, to provide religious and pastoral care, and to advise commanders on the complexities of religion with regard to its personnel and mission."[11] The military must provide for the free exercise of religion under the U.S. Constitution, so chaplains play a primary role in facilitating religious activities for troops and commanders.[12] This includes advising commanders about religious affairs, ethical and moral issues, troop morale during all operations, and providing or facilitating religious worship and support.[13] Thus, the historical and still most important function of military chaplains is to facilitate the free expression of religion within the services.[14]

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[8] *See The Chief of Chaplains, Strategic Roadmap: Connecting Faith, Service, and Mission*, ARMY.MIL 10 (n.d.), http://www.chapnet.army.mil/usachcs/pdf/chaplain_roadmap.pdf (discussing history of American chaplaincy in military service); DEP'T OF ARMY, REG. 165-1, RELIGIOUS SUPPORT: ARMY CHAPLAIN CORPS ACTIVITIES 1 (2009) [hereinafter RELIGIOUS SUPPORT].

[9] *See* CHARLOTTE HUNTER, A DEAL WITH THE DEVIL? THE CLERGY-PENITENT PRIVILEGE IN THE U.S. MILITARY, 140-41 (2006) (discussing history of chaplains in U.S. armed forces).

[10] *See The Chief of Chaplains*, *supra* note 7, at 4 (summarizing service of chaplains in the U.S. military).

[11] JOINT CHIEFS OF STAFF, RELIGIOUS AFFAIRS IN JOINT OPERATIONS, JOINT PUBLICATION 1-05, I-1 (Nov. 2013) [hereinafter JOINT CHIEFS OF STAFF].

[12] *See id*. at I-1–2 (discussing the role of chaplains in military service).

[13] *See id*. at II-1 (outlining religious advisement and support activities of chaplains). *See also* Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 5-8 (2002) (discussing historical role of chaplains in the U.S. military).

[14] *See* JOINT CHIEFS OF STAFF *supra* note 11 at I-1 ("US military chaplains are a unique manifestation of the nation's commitment to the values of freedom and conscience and free exercise of religion proclaimed in her founding documents.").

Some commentators have questioned the constitutionality of military-supported chaplaincy, arguing that it amounts to an establishment of religion.[15] However, the services have emphasized the fundamental importance of chaplaincy in maintaining freedom of religious expression within the military.[16] Although these broad legal questions have been discussed elsewhere, it is worth recognizing that federal courts have ruled in favor of the constitutionality of military and government-sponsored chaplaincy.[17]

Contemporary chaplains play many day-to-day roles in the military. Obvious examples include providing sacramental rites and religious services for service members, advising command on troop morale, and coordinating educational, community, family, or recreational activities.[18] Yet beyond religious services and counseling, a major role of chaplains in both operational and garrison settings is monitoring the emotional well-being of servicemembers, in either informal or formal settings. This is what chaplains commonly refer to as providing a "ministry of presence"—a mix of emotional and social support, frequent visitation, clinical pastoral

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[15] *See* William J. Dobosh, *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1499-1530 (2006) (discussing various establishment clause tests and their applicability to chaplaincy sponsored by the government); Steven K. Green, *Reconciling the Irreconcilable: Military Chaplains and the First Amendment*, 110 W. VA. L. REV. 167, 174-81 (2007) (discussing and critiquing the reasoning behind the Katcoff v. Marsh decision); Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NORTHWESTERN U. L. REV. 145, 185-86 (2008) (noting James Madison's support for chaplains in military service around the time of the War of 1812); Richard D. Risen, *Katcoff v. Marsh at Twenty-One: The Military Chaplaincy and the Separation of Church and State*, 38 U. TOL. L. REV. 1137, 1138-42 (2006) (discussing the history and merits of the Katcoff v. Marsh case).

[16] *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."). *See also* Emilie Kraft Bindon, *Entangled Choices: Selecting Chaplains for the United States Armed Forces*, 56 ALA. L. REV. 247, 247-53 (2004) (discussing the case of James Yee and the obligations of military chaplains); JOINT CHIEFS OF STAFF, JOINT PUB. 1-05, RELIGIOUS AFFAIRS IN JOINT OPERATIONS I-1(Nov. 2013) (noting the obligation of military chaplains to ensure freedom of religion).

[17] *See Marsh v. Chambers*, 463 U.S. 783 (1983) (finding the use of government-sponsored chaplains in state legislatures to be constitutional); *Katcoff v. Marsh*, 582 F. Supp. 463 (E.D.N.Y 1984) (finding the use of chaplains in the U.S. military to be constitutional).

[18] *See generally* RELIGIOUS SUPPORT, *supra* note 8, para. 1-2–1-7 (outlining the roles of chaplains in the Army); U.S. DEP'T OF NAVY, OPNAV INSTR. 1730.1E, 4-7 (Apr. 2012) (outlining the duties and responsibilities of chaplains in the Navy); NANCY B. KENNEDY, MIRACLES & MOMENTS OF GRACE 20-232 (2011) (presenting stories of chaplain experiences and activities in the armed forces); Pauletta Otis, *An Overview of the U.S. Military Chaplaincy: A Ministry of Presence and Practice*, 7 REV. OF FAITH & INT'L AFF'S 3, 3-10 (2009) (providing an overview of military chaplains).

counseling, or religious ministry for those who request it.[19] Because many chaplains in deployment settings are literally where the Soldiers, Marines, Airmen/women or Sailors are, they play a critical role in triaging those individuals in need of help by determining whet her the need is for emotional "first aid," or more intensive clinical care by professionals.[20]

Some servicemembers are more likely to seek out chaplains to discuss emotional or mental health issues than they would with mental health professionals. This is because within military culture there may be less stigma[21] attached to talking with a chaplain than with a mental health professional. Chaplains are more accessible, and mental health professionals are not obliged to the same standards of confidentiality as

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[19] *See* Bruce W. Crouterfield, The Value of the Naval Chaplain in the Fleet Marine Force Environment (Doctor of Ministry Thesis) 18-26 (Mar. 2009) (discussing the roles and responsibilities of naval chaplains during deployment); Mark A. Tinsley, The Ministry of Service: A Critical Practico-theological Examination of the Ministry of Presence and its Reformulation for Military Chaplains 11-70 (Jan. 2012) (unpublished Master of Theology Thesis, Liberty University) (on file with Liberty University) (discussing the ministry of presence, its dynamics and limitations).

[20] *See* Denise Bulling et al., *Confidentiality and Mental Health/Chaplaincy Collaboration*, 25 MIL. PSYCH. 557, 558 (2014) (discussing the roles of chaplains within the military services).

[21] Military culture is generally considered to be unconducive to discussions about mental health. *See* affidavit of James Anthony Martin in *U.S. v Kreutzer*, 59 M.J. 773, 813 (2004):

> The peculiar culture at Fort Bragg was a tremendous influence in this case. The pervasive atmosphere at Fort Bragg was that soldiers with mental health problems should not seek mental health services. Soldiers with mental health problems need to "suck it up and drive on" and failure due to mental health falls into the area of "no excuses."

Id. *See also* Paul Y. Kim, Thomas W. Britt, Robert P. Klocko, Lyndon A. Riviere, & Amy B. Adler, *Stigma, Negative Attitudes About Treatment, and Utilization of Mental Health Care Among Soldiers*, 23 MIL. PSYCH. 65, 65-81 (2011) (discussing impact of attitudes toward mental health care and impact among mental health care usage among Iraq and Afghanistan servicemembers); Robert H. Pietrzak et al., *Perceived Stigma and Barriers to Mental Health Care Utilization Among OEF-OIF Veterans*, 60 PSYCH. SERV. 1118, 1118-22 (2009) (discussing stigma and barriers to mental health care among Iraq and Afghanistan war veterans); Tiffany Greene-Shortridge, Thomas Britt, & Carl Andrew, *The Stigma of Mental Health Problems in the Military*, 172 MIL. MED. 157, 157-61 (2007) (discussing the problem of stigma in the military generally towards individuals with mental health issues). Generally speaking, servicemembers would prefer to visit a chaplain rather than a mental health professional because of the knowledge that chaplains enjoy higher confidentiality protections. *See* Barbara J. Zanotti & Rick A. Becker, *Matching To The Beat of A Different Drummer: Is Military Law and Mental Health Out-of-Step after* Jaffee v. Redmond?, 41 AIR FORCE L. REV. 66-67 (1997) (discussing the stigma surrounding mental health care and the preference for chaplains among service members).

are chaplains.[22] Chaplains are professionally and ethically obliged to maintain strict confidentiality in all matters, principally to maintain absolute trust and confidence.[23] Legally, individuals have an official privilege to prevent their communications to clergy from being disclosed.[24] This is codified in the Military Rule of Evidence 503, Communications to clergy, which remains a near absolute privilege.[25] In contrast, Military Rule of Evidence 513, psychotherapist-patient privilege, permits exceptions to the privilege to prevent disclosure in cases of child abuse or neglect, legal obligations, safety to the person or others, future commission of crime or fraud, or anything else that would jeopardize safety of military personnel, property or mission.[26]

There is a profound contrast in the absolute privilege that chaplains enjoy, versus that of the psychotherapist. This has resulted in a *defacto* situation where servicemembers will prefer to speak about their actions with chaplains rather than mental health professionals about behavior that may be illegal, pose dangers to themselves or others, or jeopardize their military careers or family lives. This *defacto* reality is acknowledged in *United States v. Thompson* (C.A.A.F. 1999),[27] in which a military attorney involved in a claim for effective assistance of council testified as to why he always advises military clients to confer with chaplains rather than mental health professionals:

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[22] For a discussion of attitudes towards military mental health professionals prior to the establishment of a confidential privilege in communications, see James Corcoran & John Breeskin, *Absence of Privileged Communications and its Impact on Air Force Officers*, 19 A.F.L.REV. 51 (1977). In this article, the authors discuss the results of a survey of U.S. Air Force officers and their preferences regarding whom to seek out to disclose personal mental health matters. Results indicated that chaplains were the most cited category of professionals to seek out, and that officers would also strongly prefer civilian mental health professionals rather than military ones. The main reason for these choices was the lack of confidentiality and fear that matters disclosed to military mental health professionals could damage the careers of officers if they were disclosed to command.

[23] *See* ROBERT C. LYONS, A CHAPLAIN'S GUIDE TO PRIVILEGED COMMUNICATION (Master of Theology Thesis) 70-79 (2001) (discussing the expectation of strict confidentiality among chaplains). See also DEPARTMENT OF THE ARMY, RELIGIOUS SUPPORT: ARMY CHAPLAIN CORPS ACTIVITIES, ARMY REGULATION 165-1, 49-50 (2009) (outlining the definition and parameters of privileged communications under U.S. Army regulations). *But see* Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 58-59 (2002) (noting that definitions of privileged communications and confidentiality differ between the services).

[24] Manual for Courts-Martial, United States, MIL. R. EVID. 503 (2016) [hereinafter MCM].

[25] *Id*.

[26] *Id*. at r. 513

[27] 51 M.J. 431 (C.A.A.F. 1999).

> I remember him being distraught and informed him I was not a counselor. However, I advised him to talk with a priest or a chaplain, because of the penitent-priest privilege. I informed him there would be no confidentiality with mental health. It has been my habit to inform my clients they could talk to anybody, but I recommend they talk only to my paralegal, a chaplain, or me about the case, because of confidentiality. I never prohibited a client from speaking to or seeking help from someone other than myself, my defense paralegal, or chaplain; however, I always warned them of the possible consequences.[28]

Because of both the surge in mental health needs among the military, and a defacto culture which places less stigma on conferring with chaplains rather than psychotherapists, there has been renewed focus on utilizing military chaplains as key front-line personnel in military mental health. In 2010, the DoD and DVA developed the Integrated Mental Health Strategy (IMHS).[29] The purpose of the IMHS was to develop a coordinated and comprehensive strategy to address mental health among active duty service members, reserve and guard members, veterans, and family.[30] The initiative was a direct response to the mental health needs of those serving in Operation Enduring Freedom and Operation Iraqi Freedom.[31] In particular, Strategic Action #23 of the IMHS focused on the role of chaplains in improving services for integrated mental health and spiritual care in the DVA system, and how chaplains can facilitate continuity of mental health care between the armed services, DVA system, and community.[32]

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[28] *Id*. at 434.

[29] DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy (Sept. 2010).

[30] *See id*. at 2 ("The Departments will advance an integrated and coordinated public health model to improve the access, quality, effectiveness, and efficiency of mental health services for all Active Duty Service members, National Guard and Reserve members, Veterans, and their families.").

[31] *See id*. ("The population of [servicemembers] and Veterans with mental health needs continues to grow. Operation Enduring Freedom (OEF), the war in Afghanistan, and Operation Iraqi Freedom (OIF), the war in Iraq, are the longest wars in U.S. history that have been fought with an all-volunteer force.").

[32] *See* DEPARTMENT OF DEFENSE & DEPARTMENT OF VETERANS AFFAIRS, INTEGRATED MENTAL HEALTH Strategy 119-23 (Sept. 2010) (outlining Strategic Action #23–Chaplains role).

The practical implications of chaplains' involvement in mental health support are profound. By providing ministry, presence, and formal or informal pastoral counseling, chaplains can identify individuals in need of assistance. Operational settings present significant mental health stresses: continued deployments,[33] marital separation,[34] combat trauma, injury, or death. This puts servicemembers at long-term risk for drug or alcohol abuse, post-traumatic stress disorder,[35] serious or terminal illnesses, and long-term spiritual injuries.[36] Chaplains are well-placed to refer serious cases of concern to mental health professionals. Commenters have discussed collaborative practices and models in which chaplains can work with mental health professionals in operational settings to triage or refer personnel for adequate help.[37] These practices leverage the accessibility and lack of stigma that chaplains enjoy, and link them with mental health and health care professionals.[38]

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[33] *See* Joshua E. Buckman et al., *The Impact of Deployment Length on the Health and Well-being of Military Personnel: A Systematic Review of the Literature*, 68 OCCUP'L & ENVIR'L MED. 69, 69-76 (2011) (discussing findings from a meta-analysis of studies on the impacts of deployment length on health outcomes and noting that longer deployment generally resulted in worse outcomes).

[34] *See* Major Peter S. Jensen, at al., *The Military Family in Review: Context, Risk, and Prevention*, 25 J. AM. ACAD. OF CHILD PSYCH'Y 225-34 (1986) (discussing reviews of studies on military families, including the impacts of marital separation).

[35] *See* J. Douglas Brenner et al., *Chronic PTSD in Vietnam Combat Veterans: Course of Illness and Substance Abuse*, 153 AM. J. PSYCH'Y 369-75 (1996) (discussing onset and development of PTSD and substance abuse among veterans of the Vietnam War over an extended period); Matthew Jakupcak et al., *Posttraumatic Stress Disorder as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans*, 22 J. TRAUM. STRESS 303-06 (2009) (discussing prevalence of PTSD and other mental illnesses and risk for suicidal ideation among veterans of Iraq and Afghanistan wars); Miles E. McFall et al., *Combat-related Posttraumatic Stress Disorder and Severity of Substance Abuse in Vietnam Veterans*, 53 J. STUD. ON ALCOHOL & DRUGS 357-63 (1992) (discussing impacts of PTSD on substance abuse outcomes among Vietnam veterans).

[36] *See* Kent D. Drescher et al., *An Exploration of the Viability and Usefulness of the Construct of Moral Injury in War Veterans*, 19 TRAUM'Y 243-50 (2013) (outlining the construct and presence of spiritual or moral injuries among war veterans from the perspectives of chaplains and health professionals); Brett T. Litz, Nathan Stein, Eileen Delaney, Leslie Lebowitz, William P. Nash, Caroline Silva, & Shira Maguen, *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOLOGY REV. 695-706 (2009) (discussing the concept of moral or spiritual injury among veterans and potential interventions).

[37] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 4-14 (2013) (discussing recent initiatives in which chaplains in the DoD and DVA have identified strategies for collaboration with mental health professionals)

[38] *See* Frank C. Budd, *An Air Force Model of Psychologist-Chaplain Collaboration*, 30 PROF'L PSYCH.: RES. & PRACTICE 552-56 (1999) (discussing and recommending the need for greater collaboration between mental health professionals and chaplains); Michael D.

The active duty contexts in which mental health professionals work varies widely, and depends on the service branch, deployment status or garrison environment. Depending on the situation, a range of formal counseling or behavioral health services can be available.[39] Much emphasis has been placed on meeting the needs of those deployed for Operation Enduring Freedom and Operation Iraqi Freedom. For example, the United States Army has structured its Comprehensive Behavioral Health System of Care (CBHSOC) to align with force deployment cycles.[40] This initiative is intended to provide a seamless system of care from screening to treatment during all phases of active duty, and employs the use of embedded mental health professionals within units.[41] Within the Army, division psychiatrists still oversee all clinical activities within command positions, and as part of their duties are regularly expected to coordinate with medical personnel, chaplains, social workers and other command officers.[42] In addition to providing direct clinical services, these psychiatrists and mental health specialists are also responsible for command directed evaluations, general and specialized screenings and clearance evaluations, medical evaluation and forensic examinations, and suicide incident-related activities, both in garrison and during active deployment.[43] The Marine Corps has evolved a similar model called OSCAR (Operational Stress Control and Readiness), in which psychiatrists, psychologists, and psychiatric technicians are embedded

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Howard & Ruth P. Cox, *Collaborative Intervention: A Model for Coordinated Treatment of Mental Health Issue within a Ground Combat Unit*, 173 MIL. MED. 339-48 (2008) (discussing models for collaborative practices between unit chaplains and mental health officers).

[39] *See, e.g.*, DEPARTMENT OF DEFENSE, DEPARTMENT OF VETERANS AFFAIRS, & DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERAGENCY TASK FORCE ON MILITARY AND VETERANS MENTAL HEALTH 12-16 (2013) (listing a variety of services for suicide prevention and mental health services within each of the four service branches).

[40] *See* REBECCA PORTER, THE ARMY COMPREHENSIVE BEHAVIORAL HEALTH SYSTEM OF CARE (CBHSOC) CAMPAIGN PLAN: STANDARDIZE TO OPTIMIZE (2011).

[41] *See* Christopher Warner et al., *Division Mental Health in the New Brigade Combat Team Structure: Part I. Predeployment and Deployment*, 172 MIL. MED. 907, 907-11 (2007) (describing structure of clinical services within Task Force Baghdad in pre-deployment and deployment); Christopher Warner et al., *Division Mental Health in the New Brigade Combat Team Structure: Part II. Redeployment and Post Deployment*, 172 MILI. MED. 907, 912-17 (2007) (describing structure of clinical services within Task Force Baghdad in redeployment and post deployment).

[42] *See* Christopher Warner et al., *The Evolving Roles of the Division Psychiatrist*, 172 MILITARY MEDICINE 918, 918-924 (2007) (discussing overall restructuring of mental health resources within Army and role of the division psychiatrist).

[43] *See id*. at 921 (outlining roles of Army division mental health).

with combat units through deployment.[44] The purpose of the embedding is to intentionally expose the mental health provider to the Marine in combat and vice versa, so repeated contact creates trust and facilitates early monitoring, intervention and treatment.[45]

Despite the presence of mental health resources, confidentiality remains a principal barrier to seeking help from mental health professionals. An anonymous survey of Army Soldiers post-deployment from Iraq or Afghanistan revealed up to four times the rate of depression or PTSD than those reported on standard questionnaires.[46] A study involving incidence of child sexual abuse indicated that Navy Sailors were far more likely to report experiences on anonymous surveys rather than screenings requiring identification.[47] The principal concern with disclosing mental health problems is that doing so will jeopardize one's security clearance or entire military career.[48] For this reason, mental health professionals in the armed services are widely known as "wizards" – because they can make one "disappear" from the unit, or service altogether.[49] Indeed, under the Health Insurance Portability and

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[44] *See* William Nash, *Operational Stress Control and Readiness (OSCAR): The United States Marine Corps Initiative to Deliver Mental Health Services to Operating Forces* 1-10 (2006) (describing the OSCAR model and its creation and objectives).

[45] *See id*. at 6-8 (discussing the functions of the OSCAR team).

[46] *See* Christopher Warner et al., *Importance of Anonymity to Encourage Honest Reporting in Mental Health Screening After Combat Deployment*, 68 ARCHIVES OF GENERAL PSYCHIATRY 1065, 1065-1071 (2011) (discussing findings from the use of anonymous post deployment surveys compared to standard screening instruments and finding much higher rates of depression and PTSD in anonymous surveys).

[47] *See* Cheryl Olson, Valerie Stander, & Lex Merrill, *The Influence of Survey Confidentiality and Construct Measurement in Estimating Rates of Childhood Victimization Among Navy Recruits*, 16 MILITARY PSYCHOLOGY 53, 53-69 (2004) (discussing results from anonymous and non-anonymous survey conditions for questionnaire involving child sexual experiences).

[48] *See* Camilla Schwoebel & Roger Schlimbach, *Confidentiality: A Conundrum in Veterans Behavioral Health Care*, 32 DEVELOPMENTS IN MENTAL HEALTH LAW 1, 1 (2013) (discussing the example of a Navy Sailor worried about a PTSD diagnosis that would be a "career ender").

[49] *See* David A. Litts, *Suicide and Veterans, What we Know, How We Can Help*, HEALTH PROGRESS: JOURNAL OF THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES 24, 27 (May – June 2013) ("In some sectors of military culture, mental health professionals are called 'wizards.' Go to the 'wizard' and he'll make you disappear — from your military unit that is — and leave you stereotyped as someone with a weak character."); William Nash, *Operational Stress Control and Readiness (OSCAR): The United States Marine Corps Initiative to Deliver Mental Health Services to Operating Forces* 1, 2 (2006) ("In U.S. military services, a common derogatory term for psychiatrists and psychologists among the troops is "wizard," referring disparagingly to mental health professionals' one

Accountability Act (HIPAA), which governs the management of personal health information, specific exceptions are made for military service members. Otherwise protected health information under the HIPAA privacy rule may be provided to military command to assure "proper execution of the military mission."[50]

Department of Defense health information privacy regulations allow for the disclosure of health information about service members if it is deemed necessary by command to properly execute a military mission,[51] to determine the member's general fitness for duty,[52] and to determine a member's fitness to perform a particular mission or activity.[53] Although the DoD regulations do distinguish between general medical records and psychotherapy notes, such notes are exempted from authorization requirements for disclosure in order "to avert a serious and imminent threat to health or safety of a person or the public, which may include a serious and imminent threat to military personnel or members of the public or a serious or imminent threat to a specific military mission or national security."[54] For positions that require security clearances, evidence of mental health "issues" may derail the clearance process, jeopardizing an individual's career opportunities within the service. For example, U.S. Army regulations governing the process for obtaining security clearances

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consistent trick of being able to make service members with problems disappear from the ranks of their services.").

[50] *See* 45 C.F.R. § 164.512(k) (1)(i) ("Armed Forces personnel. A covered entity may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission."). See also Camilla Schwoebel & Roger Schlimbach, *Confidentiality: A Conundrum in Veterans Behavioral Health Care*, 32 DEVELOPMENTS IN MENTAL HEALTH LAW 1, 1-2 (2013) (discussing both HIPAA and DoD regulations that implicate release of health information in military settings).

[51] *See* Department of Defense, Health Information Privacy Regulation, C7.11.1.1, at 69 (DoD 6025.18-R) (January 2003):

> A covered entity (including a covered entity not part of or affiliated with the Department of Defense) may use and disclose the protected health information of individuals who are Armed Forces personnel for activities deemed necessary by appropriate military command authorities to assure the proper execution of the military mission. *Id.*

[52] *See id*. C7.11.1.3.1, at 70. ("To determine the member's fitness for duty, including but not limited to the member's compliance with standards and all other activities…").

[53] *See id*. C7.11.1.3.2, at 70. ("To determine the member's fitness to perform any particular mission, assignment, order, or duty, including compliance with any actions required as a precondition to performance of such mission, assignment, order, or duty.").

[54] *Id*. at C5.1.2.2.5.

state that, "[i]f information developed by the command indicates the existence, current or past, of any mental or nervous disorder or emotional instability, a request for a PSI will not be submitted and interim clearance will not be granted."[55]

An affirmative mandate for reporting incidents of child abuse in federal jurisdictions exists through the Victims of Child Abuse Act of 1990, codified at 42 U.S.C. 13031. The statute requires that persons engaged in covered professional capacities or activities on federally owned or operated property must report suspected child abuse to applicable authorities.[56] The statute specifically requires reporting by physicians, health care practitioners, mental health professionals, social workers, counselors, alcohol/drug treatment professionals, and a variety of other professions.[57] Chaplains or clergy are not, however, identified in the statute's list of covered professionals, no military cases and only one federal case—*Zimmerman vs. U.S.*—has explored the issue of whether military chaplains are covered in the statute's reporting requirements, but reached no direct conclusion.[58] The statute does however, specifically

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[55] Army Regulation 380-67: Security: Personnel Security Program, at 5-8 (Ground for denial).

[56] *See* 42 U.S.C.A. § 13031(a)-(h):

> A person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.

Id.

[57] *See id*. at (b) Covered professionals (listing professionals mandated to report suspected child abuse).

[58] *See* Zimmerman v. U.S., 171 F.Supp.2d 281 (2001). In, *Zimmerman* the plaintiff's daughter had been sexually assaulted by a naval officer at West Point military academy, was caught, and subsequently sentenced to confinement and dismissal from the Navy. The officer had previously engaged in behavior that suggested he was a sexual predator, and that information had been provided to a chaplain and other staff of a ministry program at the academy. The chaplain and other staff had not warned authorities about the behavior, and plaintiff sued arguing that they breached their responsibility to report suspected child abuse under 42 U.S.C. 13031, allowing the officer to later assault his daughter. *See id*. at 283-287. The government argued that the chaplain staff was not covered under the statute as they were clergy. Without ruling on the substance of the issue, the court held that in order for them to not be covered, they needed to be acting in their capacities as clergy. *See id*. at 298. This suggests that clergy acting in their professionals as chaplains may not be covered by the statute's reporting requirements, but the court never specifically answered that inquiry.

require psychologists, psychiatrists, and other mental health professionals to report suspected child abuse.[59] The 42 U.S.C. 13031 reporting requirements have been recognized and integrated into Department of Defense[60] and Veterans Affairs[61] regulations. Additionally, DoD instructions such as Instruction 6400.01 and others recognize DoD policy to promote early identification and reporting of suspected child abuse, assessment and treatment of abusers, and establishment of reporting mechanisms.[62]

Arguably, embedding mental health providers within active duty units might alleviate the stigma of mental health professionals and enhance trust within military culture. However, the regulatory framework that allows personal health information to be provided to command is still a significant barrier to communication between Service members and mental health professionals. It should be noted that the military has developed services that offer a degree of confidentiality and/or anonymity for Service members concerned with mental health issues, such as Military OneSource (www.militaryonesource.mil) and Military Pathways (www.militarymentalhealth.org). However, communications are still subject to stated exceptions that mandate reporting in some instances.[63] The development of mechanisms for chaplains (who enjoy complete confidentiality) to work with mental health providers (whose communications are subject to significant exceptions) would aid in fulfilling the objectives of an integrated mental health strategy for military personnel.[64]

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[59] 42 U.S.C.A. § 13031(b)(2).

[60] *See generally* U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 6400.03 (Apr. 2014) (outlining instructions for Family Advocacy Command Assistance Team).

[61] *See generally* U.S. DEPARTMENT OF VETERANS AFFAIRS, VHA DIRECTIVE 2012-022 (Sept. 2012) (outlining instructions for reporting cases of abuse and neglect).

[62] *See generally* U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 6400.01 (Feb. 2015) (outlining instructions regarding identification, reporting, and prevention of domestic and child abuse).

[63] *See* Frequently Asked Questions on Confidential Face-to-Face Non-medical Counseling, http://www.militaryonesource.mil/counseling?content_id=267023 (stating "exceptions to confidentiality are legal and military requirements to report child abuse, spouse abuse, elder abuse, threats of harm to self or others and any present or future illegal activity").

[64] *See* Barbara J. Zanotti & Rick A. Becker, *Matching To The Beat of A Different Drummer: Is Military Law and Mental Health Out-of-Step after* Jaffee v. Redmond? 41 AIR FORCE L. REV. 66-67 (1997) (discussing the case of an Airman who committed suicide and did not seek help because of fear it would jeopardize his career, concern about confidentiality with mental health problems, and preferences for services members to talk with chaplains because of the privileged communications).

III. Military Rule of Evidence 503: Privileged Communications and Chaplaincy

The legal application of chaplain confidentiality is the concept of privileged communication. Black's Law Dictionary defines privileged communication as "[t]hose statements made by certain persons with a protected relationship such as husband-wife, attorney-client, priest-penitent and the like which the law protects from forced disclosure on the witness stand at the option of the witness, client, penitent, spouse."[65] Privileged communication is a long-standing legal device recognized in common law and Rule 501 of the Federal Rules of Evidence.[66] It was first cited in the United States in the case of *People v. Phillips*[67], in which the court ruled that a priest could not be compelled to testify in court against an alleged thief before a grand jury.[68] In 1828, New York enacted the first statute recognizing the privilege, stating that no minister could be forced to testify to the contents of a confession made to him.[69] The functional basis of the privilege is that the social benefit of maintaining confidentiality between an individual and their religious minister outweighs the evidentiary value of that information presented in court.[70] By the early 1960s, almost all the states had developed a statute recognizing a clergy privilege.[71] Generally speaking, these statutes

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[65] HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY (6th ed.) 832 (1991).

[66] FED. R. EVID. 501 (Privilege in General).

[67] *People v. Phillips* (N.Y. Ct. Gen. Sess. 1813) (unpublished decision).

[68] *See* Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 BYU L. REV. 489, 489-490 (2002) (describing the case of *People v. Phillips*, in which a catholic priest was protected from testifying in court against the defendant).

[69] *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 106 (1983) (discussing New York state legislation N.Y. Rev. Stat. § 72, pt. 3, ch. VII, art. 8 (1828)).

[70] *See id*. at 109-110 ("First, it is often stated that protecting the privacy of the conversation between minister and penitent is in the general interests of society."); Lennard K. Whittaker, *The Priest-Penitent Privilege: Its Constitutionality and Doctrine*, 13 REGENTS U. L. REV. 145, 160-161 (2000) (discussing the balancing of interests between compelled testimony and preservation of confidentiality between a minister and penitent). Whittaker notes that there is a constitutional argument for maintaining the privilege as well: If the contents of a confession were to be disclosed in a court of law, it would impede an individual's freedom of religious expression as he might be discouraged from confessing sins or thoughts to a minister—an important part of a person's religious activity. *Id*.

[71] *See* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 107-108 (1983) ("From 1955 to 1963 fourteen more states enacted minister's privilege statutes. Today forty-six states and the District of Columbia have enacted such statutes.")

recognize the existence of a privilege in cases where an individual is seeking spiritual counsel with a member of the clergy while acting in his or her professional capacity.[72] Since the creation of the privilege statutes, civil law courts have grappled with a number of issues, including the definition of who is considered a qualifying member of the clergy,[73] whether clergy were acting in their "official capacity" at the time they received communications,[74] and other issues. The privilege has been recognized by the Supreme Court, which stated in *Trammel v. United States* (1980)[75]:

> The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.[76]

This understanding of the intent of the clergy privilege was also reflected in the important case of *United States v. Moreno* (A.C.M.R.),[77] discussed *infra*,[78] in which the Army Court of Military Review stated that:

> The privilege regarding communications with a clergyman reflects an accommodation between the public's right to evidence and the individual's need to be able to speak with a spiritual counselor, in absolute confidence, and disclose the wrongs done or evils thought and receive spiritual absolution, consolation, or guidance in return.[79]

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[72] *See* R. Michael Cassidy, *Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege? 44 WM. & MARY L. REV. 1627, 1647* (2003) (discussing the majority trends in state clergy-penitent statues).

[73] *See* Yellin, *supra* note 69, at 114-121 (discussing cases defining covered clergyman).

[74] *See id*. at 121-126 (discussing cases examining the status and situation of clergymen while receiving communications from penitents).

[75] 445 U.S. 40 (1980).

[76] *Id*. at 51.

[77] 20 M.J. 623 (A.C.M.R. 1985).

[78] *See infra* notes 102-110 and accompanying discussion on the *Moreno* case.

[79] *Moreno*, 20 M.J. at 626 (A.C.M.R. 1985).

The compelling policy rationale for the clergy privilege in the military thus seems to be the protection of deeply personal communications about spiritual matters with chaplains. This aligns with the primary historic role of chaplains in the military to facilitate the free expression of religion within the ranks.[80] The clergy privilege is the legal mechanism which protects the confidentiality of servicemembers' spiritual and religious communications as a manifestation of the free practice of religion.

In recent years, however, the clergy privilege has been modified in the civilian world as a matter of social policy. The most common situations in which clergy privileges do not apply are in cases of child abuse or other serious crimes.[81] Criticism of the privilege has grown sharper with the revelation of child sexual abuse cover-ups within some Roman Catholic parishes.[82] Many states thus currently maintain mandatory reporting statutes for child abuse which include members of the clergy.[83] In such cases, the reporting exceptions abrogate the privilege. The variation within state statutes, however, has prompted some to call for the adoption of uniform statutes to rectify conflicts between protecting victims of abuse with clergy confidentiality.[84]

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[80] *See* JOINT CHIEFS OF STAFF *supra* note 11 at I-1 ("US military chaplains are a unique manifestation of the nation's commitment to the values of freedom of conscience and free exercise of religion proclaimed in her founding documents.").

[81] *See id*. at 1687-1699 (arguing for an exception to clergy-penitent statutes in cases where a parishioner notifies a member of the clergy about intent or activity of harm to another person); J. Michael Keel, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 681 (1997-1998) (discussing disparities of treatment that might manifest due to the exercise of the clergy-penitent privilege).

[82] *See generally* Mary G. Frawley-O'Dea, *The History and Consequences of the Sexual-Abuse Crisis in the Catholic Church*, 5 STUDIES IN GENDER AND SEXUALITY 11 (2004) (discussing the sexual abuse crisis in the Catholic church and its impact on survivors and the church); Christina Mancini & Ryan T. Shields, *Notes on a (Sex Crime) Scandal: The Impact of Media Coverage of Sexual Abuse in the Catholic Church on Public Opinion*, 42 J. CRIMINAL JUSTICE 221 (2014) (discussing news media stories about the Catholic Church sex abuse scandals and public opinion about the church's response); Thomas G. Plante & Courtney Daniels, *The Sexual Abuse Crisis in the Roman Catholic Church: What Psychologists and Counselors Should Know*, 52 PASTORAL PSYCHOLOGY 381 (2004) (discussing the sexual abuse crisis in the Catholic church and stereotypical "myths" involved with the crisis).

[83] *See* Child Welfare Information Gateway, Clergy as Mandatory Reporters of Child Abuse and Neglect (discussing the status of state laws on mandatory reporting and clergy), http://www.bishop-accountability.org/news2010/03_04/clergymandated.pdf

[84] *See* Norman Abrams, *Addressing the Tension Between the Clergy-Communicant Privilege and the Duty to Report Child Abuse in State Statutes*, 44 B.C.L. REV. 1127 (2003)

The creation of the Integrated Mental Health Strategy, and its recommendations for integrating chaplaincy more closely with military mental health, does present a new context in which to consider the clergy privilege, and its policy rationale. However, the military rule itself has remained relatively static since its creation, and maintains no exceptions. The heart of the privileged communication rule within the armed services is Military Rule of Evidence 503, Communications to clergy.[85] In its entirety, the rule states:

> Rule 503. Communications to clergy
>
> (a) General rule of privilege
> A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.
>
> (b) Definitions
> As used in this rule:
> (1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.
> (2) A "clergyman's assistant" is a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.
> (3) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(discussing the problem of conflict of societal interests and proposing uniform state laws that rectify reporting with exercise of religion).

[85] MCM, *supra* note 24, MIL. R. EVID. 503.

> (c) Who may claim the privilege
> The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

The critical components of the rule are (1) identification of the speaker as the holder of the privilege; (2) requirement that the communication be made as an act of religion or matter of conscience; and (3) requirement that the clergyman be acting in a capacity as a "spiritual advisor". If those conditions are met, the communication cannot be revealed in courts-martial against a defendant.[86] The party asserting the privilege—the one attempting to stop the introduction of information in a court (usually the defendant)—has the burden of showing the communication is privileged by a preponderance of the available evidence.[87] The few cases that have examined the clergy privilege typically involve defendants' counsels requesting suppression of evidence in appellate cases. Whether the privilege applies is a mixed question of fact and law.[88]

It should be noted that communications to clergy is one of several forms of privileged communication that were specifically identified in

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[86] *See* MIL. R. EVID. 1101 (discussing applicability of the rules of evidence and stating that "[e]xcept as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial…."). It should be noted that the version of this rule in the Military Commission Rules of Evidence is significantly different, as it carves out a wide exception for communications about future commissions or a crime, or concealment of a past crime. *See* MIL. C'MMN. R. EVID. 503(D). The military commission rules – applicable to aliens in military commissions – thus contemplate situations in which clergy are made aware of information about potential terrorist strikes or plans. This would be the case for example of a U.S. service clergyman counseling a foreign national prisoner in Guantanamo Bay. For a discussion of this hypothetical, see Jonathan G. Odom, *Beyond Arm Bands and Arms Banned: Chaplains, Armed Conflict, and the Law*, 49 NAVAL L. REV. 1, 62-63 (2002) (discussing interview with a U.S. military chaplain who counsels detainees at Guantanamo Bay).

[87] *See U.S. v. McCollum*, 58 M.J. 323 (2003) (discussing the framework for application of communication privileges).

[88] *See U.S. v. Coleman*, 26 M.J. 407, 409 (1988) ("The question of whether a privilege exists is a mixed question of law and fact."); *U.S. v. Isham*, 48 M.J. 603, 605 (1998) ("The question of whether a privilege applies to a conversation 'is a mixed question of law and fact.'"); *U.S. v. Shelton*, 64 M.J. 32, 37 (2006) ("Whether a communication is privileged is a mixed question of fact and law.").

section V of the Military Rules of Evidence. Thus, unlike the Federal Rules of Evidence (FRE), which contain no individual privileges and defer to the courts to recognize such, the MRE codify specific privileged communications.[89] The specification of privileges within the MRE was a significant departure from the FRE, which served as the general foundation for the military rules. When the MRE were created, the drafting committee sought to align the MRE with the FRE where possible, in order to create symmetry between the military and federal laws.[90] The codification of individual privileges within the MRE, however, reflected a desire to minimize uncertainty and promote uniformity in the military environment and courts-martial.[91] The new privileges in the MRE were derived from the Manual for Courts-Martial, and commentary on proposed privileges from the FRE adapted to this military environment.[92] MRE 501 outlines general rules for privileges, stating that no other claims of privilege exist beyond those listed therein, unless required or provided by the Constitution,[93] an Act of Congress,[94] or common law principles of the federal courts.[95] It should be noted that rule 501 specifically bars a privilege on communications to medical officers or civilian physicians.[96] As noted in the official commentary of the Military Rules of Evidence, this is because "such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel."[97]

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[89] *See* FED. R. EVID. 501 (stating that the interpretation of common law by the federal courts governs claims of privilege).

[90] *See* Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 12-13 (1990) (describing the intention of the MRE drafting work group to base the MRE on the FRE to the extent possible, with necessary modifications to the military context).

[91] *See* Major David L. Hayden, *Should There Be A Psychotherapist Privilege in Military Courts-Martial?* 123 MIL. L. REV. 31, 70 (1989) (noting the intention of the MRE drafters to provide simple, clear rules to privileges in order to fit the military environment).

[92] *See* Lederer, *supra* note 81, at 26-27 (discussing codification of the individual privileges in the MRE).

[93] *See* MIL. R. EVID. 501(a)(1) (stating that no privilege exists unless required by "[t]he Constitution of the United States as applied to members of the armed forces").

[94] *See* MIL. R. EVID. 501(a)(2) (stating that no privilege exists unless required by "[a]n act of Congress applicable to trials by courts-martial").

[95] *See* MIL. R. EVID. 501(a)(4) (stating that no privilege exists unless required by "principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence").

[96] *See* MIL. R. EVID. 501(d): "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."

[97] *See* MANUAL FOR COURTS MARTIAL UNITED STATES A22-39 (2012).

A. The seminal cases: *Moreno*, *Beattie*, *Isham*, and *Shelton*

Only a handful of cases that significantly implicate Rule 503 have come before the military courts. The seminal case is *United States v. Moreno* (A.C.M.R. 1985),[98] in which the Army Court of Military Review reviewed the major criteria for the privilege to apply. The holding in *Moreno* would thus serve as a major precedent for subsequent cases analyzing the basic requirements for application of Rule 503. Although the courts have yet to deal with a case involving the flow of communications among or between chaplains and psychotherapists in a mental health treatment setting, there are also two important cases that are relevant to referral of servicemembers to other help-providing entities within the service environment: *United States v. Beattie* (A.F.C.M.R. 1987),[99] and *United States v. Isham* (N-M. Ct. Crim. App. 1998).[100] Additionally, *United States v. Shelton* (C.A.A.F. 2006)[101] provides further guidance on the Moreno requirements, and discussion on the intent of the communicator as a component of the Rule 503 privilege.

In *United States v. Moreno* (A.C.M.R. 1985),[102] the defendant Moreno intentionally shot and killed another soldier he was having an affair with in the barracks. Immediately after the killing, and before he had been caught, Moreno went to a chapel on base to speak to an Army chaplain. According to the chaplain, Moreno was extremely emotional and upset and said, "I've sinned. I've hurt somebody real bad," and confessed to the shooting.[103] The chaplain called the barracks, learned that the killing had occurred, and then told Moreno he would have to contact the police. Moreno apparently consented to that action. The chaplain subsequently contacted the military police, who came and arrested Moreno. Moreno opted to remain silent after being taken into custody as per his Article 31 rights of the Uniform Code of Military Justice, which states that no person may be interrogated without being notified of his right to remain silent to not incriminate oneself.[104] The trial judge allowed the chaplain's

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[98] 20 M.J. 623 (A.C.M.R. 1985).

[99] 1987 CMR LEXIS 622 (A.F.C.M.R. Aug. 7, 1987).

[100] 48 M.J. 603 (N-M. Ct. Crim. App. 1998).

[101] 64 M.J. 32 (C.A.A.F. 2006).

[102] 20 M.J. 623 (A.C.M.R. 1985).

[103] *See id*. at 624-625 (outlining the facts to the case and the encounter between Moreno and the chaplain after the shooting.)

[104] *See* 10 U.S.C.A. § 831. Art. 31. Compulsory self-incrimination prohibited. The article states that:

testimony about the event at court, considering Moreno's actions as a confession to a crime, and not a spiritual discussion.[105] He was subsequently convicted of murder by the trial court.

On appeal, Moreno argued that the chaplain's testimony should have been privileged under Rule 503 and not introduced in court. The Army Court of Military Review identified three criteria for the rule to apply:

> (1) The communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor or to his assistant in his official capacity; and (3) the communication must be intended to be confidential.[106]

The court then found that the first two conditions were met, because Moreno was 1) clearly wanting to communicate about a spiritual issue ("I've sinned"), and 2) the Army chaplain was clearly a clergyman on duty acting in his official role as a spiritual advisor.[107] As to the third condition, the court noted that the chaplain believed that the primary purpose of

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> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Id.

[105] *See* U.S. v. Moreno, 20 M.J. 623, 626 (A.C.M.R. 1985) (discussing the trial court's consideration of the facts of the case and disagreeing with them).

[106] *Id*. at 626.

[107] *See id*. ("Chaplain George testified that, among the reasons he thought appellant came to him, was because appellant had a conscience and knew the chaplain to be a man of God. That testimony, plus appellant's opening remark to George, "I have sinned," satisfy the first two criteria.").

Moreno's visit was to confess to the crime through the chaplain. However, the court observed that Moreno himself could have easily turned himself in without even seeing a chaplain, and from Moreno's standpoint, the primary purpose of this communication was to seek spiritual counsel for his actions. The court thus held that, "As we read Mil. R. Evid. 503, appellant's intent is controlling, not [the chaplain's] impression of it."[108] Because Moreno intended for the conversation to be confidential, it thus met all the requirements of Rule 503, and thus the chaplain's testimony should not have been admitted to the trial court.[109] The *Moreno* holding suggests that a necessary requirement of the Rule 503 test—that the communication is intended to be confidential—is interpreted in favor of the speaker, and should not be presumed to be meant as a confession to command beyond the chaplain. An additional by-product of the *Moreno* decision was its structuring of the Rule 503 requirements into a three-pronged test, which would be cited in subsequent cases by courts examining the clergy-penitent privilege.[110]

United States v. Beattie[111] (A.F.C.M.R. 1987) involved a question of whether advising a service member to report himself for a crime was a violation of Rule 503. In *Beattie*, the defendant airman went to a U.S. Air Force base chapel to seek advice from a chaplain. Beattie met the chaplain, and told him he wanted to turn himself in and seek help for child sexual abuse. The chaplain believed that Beattie was basically asking for a referral, and the chaplain thus suggested he go to the family advocacy office to talk to a commander, but did not direct or order him to go. The defendant went there, where the commander told him to go to the military police. Beattie went to the police, and confessed to sexually abusing his children. His statements were introduced at the trial court, and he subsequently pled guilty to sexual abuse.[112]

On appeal, Beattie argued that the chaplain's referral amounted to a violation of Rule 503. The Air Force Court of Military Review disagreed,

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[108] *Id*.

[109] *Id*. ("Instead, we believe appellant's intent that the communication be confidential is adequately revealed by his initial purpose for speaking with George and by his later refusal to make a statement to investigators after being apprehended. We conclude the military judge committed error in allowing Chaplain George to testify over appellant's objection.").

[110] *See infra* notes 114-136 and accompanying discussion on *U.S. v. Isham*, 48 M.J. 603 (1998) and *U.S. v. Shelton*, 64 M.J. 32 (2006), two recent Rule 503 cases which made use of the three part Moreno test.

[111] 1987 CMR LEXIS 622 (A.F.C.M.R. Aug. 7, 1987).

[112] *See id*. at 1-3 (outlining background to the case).

and held that "[t]he privilege provided for under Rule 503 is against the disclosure of a confidential communication, not giving advice when it is requested."[113] Therefore, there was no violation of Rule 503, and Beattie's conviction was affirmed. *Beattie* thus stands for the important holding that a chaplain—upon being told of a troubling, illegal action—can refer the speaker to another entity, and even inform them that their actions are illegal, and such a referral would not be considered a privileged communication. In this sense, the holding in *Beattie* supports what is a critically important role for military chaplains—to refer troubled servicemembers to other entities or available resources, but without coercing the servicemember, or violating confidentiality.

United States v. Isham[114] revisited some of the same concerns involving referral, and spoke to the extent confidential communications to clergy can be shared with others and still be privileged under Rule 503. In *Isham*, the defendant was a Marine experiencing anxiety and depression, and went to seek help from the unit chaplain. During a private meeting, Isham told the chaplain he had thoughts of shooting other people and then killing himself.[115] The chaplain stopped Isham, and told him he would have to break confidentiality and tell others of his thoughts. The chaplain's testimony was later provided in the court-martial in which Isham was convicted of communicating a threat.[116]

On appeal to the Navy-Marine Corps Court of Criminal Appeals, Isham argued that the military trial judge had erred by allowing the chaplain to testify against him. The court agreed with Isham. First, the court held that the controlling rule in the case was the three-prong test established in *Moreno*: whether the communication was an act of religion or conscience, whether the chaplain was acting in official capacity as a spiritual advisor, and whether the communication was intended to be confidential.[117] The court found that the first two conditions were met

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[113] *Id*. at 4.
[114] 48 M.J. 603 (N-M. Ct. Crim. App. 1998).
[115] *See id*. at 604-607 (discussing the conversation between Isham and the chaplain).
[116] *See id*. (same).
[117] *See id*. at 605 citing *Moreno* discussed *supra*:

> In *Moreno*, 20 M.J. at 626, our Army brethren listed three criteria for the privilege on communications to clergy to apply: '(1) the communication must be made either as a formal act of religion or as a matter of conscience; (2) it must be made to a clergyman in his capacity as a spiritual advisor...; and (3) the communication must be intended to be confidential.'

because Isham had sought out the chaplain, and met with him "in the chaplain's office, while he was wearing the cross on his collar, and discussed matters of conscience with obvious religious overtones."[118] The third prong, however, was at issue. The chaplain had explained to Isham that he would inform others about the situation only to the specific and limited extent that it could prevent Isham from carrying out his thoughts of shooting others, and "[t]he appellant agreed to this further disclosure for the limited purpose of getting help and preventing him from carrying out his threats."[119] In other words, Isham had agreed that information would be disclosed only to the extent for him to get necessary help, but believed that he would continue to serve as a Marine and not be court-martialed. In Isham's words: "I wanted to keep it confidential. That way, nothing would affect me in the battalion. I could get help for my problems and without making everybody look at me as a bad Marine."[120] Isham believed that his communication would thus still be protected under Rule 503.[121] However, the chaplain's testimony at Isham's court-martial was a clear breach of privileged communication. The appellate court stated:

> The appellant properly expected that he would be able to meet with a mental-health professional and that his unit would bar him from having access to any weapons. He no doubt anticipated that reassignment or administrative separation would be forthcoming. However, the chaplain did not go on to explain that he would have to testify against the appellant at a court-martial.

Thus, the Navy-Marine Corps Court of Criminal Appeals ruled that the trial court had erred by allowing the chaplain to testify, and the conviction and sentence were removed.[122] Importantly, the *Isham* decision established a key holding: chaplains may relay information from a penitent to others for the limited and specific purpose of addressing the penitent's

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Id.

[118] *Id*.

[119] *Id*. at 606.

[120] 48 M.J. 603, 604 (N-M. Ct. Crim. App. 1998).

[121] *See id*. at 606 ("The appellant agreed to this further disclosure for the limited purpose of getting help and preventing him from carrying out his threats. Therefore, his statements fell directly within the expansive definition of a "confidential communication" under Military Rule of Evidence 503(b)(2).").

[122] *See id*. at 608 ("We hold, therefore, that the provisions of Military Rule of Evidence 503 applied such as to bar the communications the appellant made to the chaplain from coming into evidence against him.").

immediate situation. In this case, the *Isham* court believed that the immediate situation permitted the chaplain to relay enough information to prevent Isham from harming himself or others, and no more. The *Isham* holding thus suggests that the chaplain could and should have had mental health professionals or command remove his weapon and monitor him, so long as the reason for doing so was not relayed to others. Doing so preserves the multiple interests of maintaining confidentiality with chaplains, and preventing impending violence.

United States v. Shelton[123] involved another situation concerning admission of child abuse. In *Shelton*, an army soldier had sexually abused his daughter. The daughter had told her mother (Shelton's wife) about the abuse, and the mother then confronted Shelton but he refused to acknowledge the matter. She then went to seek help from the civilian chaplain at the church she and Shelton attended. Shelton and his wife had been receiving marriage counseling from this chaplain for some time on other issues. She told the chaplain about the alleged abuse, and he agreed to talk to Shelton about it.[124] Shelton went to the church and met the chaplain and the chaplain's assistant, where they prayed together and then talked. During the discussion, the chaplain said, "Your wife told me something and I want to know if you did it because it's serious and you can go to jail for it . . . you claim to be a Christian, Christians don't tell lies, and so I need to know."[125] Shelton then admitted to sexually abusing his daughter. The chaplain told him he should bring his wife back to the church, and he immediately did so. Once she was there, Shelton told his wife, "I did it. I did it. I'm wrong. I did it."[126] The chaplain then told both the defendant and his wife that Washington state law required him to report the abuse. Weeks later, the chaplain advised the wife that she should report her husband or he would do so. She went to the military police, who conducted an investigation that led to Shelton's admission of abuse. He later told both a social worker and psychotherapist about the abuse as well. The chaplain's testimony, among others, was introduced into trial against Shelton, and he was subsequently convicted.[127]

On appeal, Shelton argued that his communications to the chaplain were privileged, and thus wrongly used against him in the court-martial.

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[123] 64 M.J. 32 (C.A.A.F. 2006).

[124] *See id*. at 34-35 (discussing factual circumstances of the case).

[125] *Id*. at 34.

[126] *Id*. at 35.

[127] *See id*. at 34-35 (discussing factual circumstances of the case leading to Shelton's eventual confession of abuse to the military investigators).

The appellate court first examined whether the three-part test in *Moreno* was satisfied. It held that the discussion between Shelton and the chaplain qualified as a "matter of conscience" because of its heavy religious overtones. Specifically, they had prayed together prior to their discussion, and the chaplain had admonished him that, "You claim to be a Christian, Christians don't tell lies, so I need to know."[128] Even though the chaplain had previously counseled Shelton and his wife on secular matters, that did not preclude the possibility that their subsequent conversation was a religious one:

> These circumstances burdened Appellant's conscience, and following the advice of his pastor, Rev. Dennis, Appellant confessed. We note that the past secular discussion between Appellant and Rev. Dennis related to financing, budgeting, and family matters. But there is nothing in the record to establish that these counseling sessions were as spiritually charged as the counseling involved in the present case. The mere prior counseling contact between Rev. Dennis and Appellant on other matters does not preclude a conclusion that, in the present instance, Appellant's communication with Rev. Dennis was a matter of conscience.[129]

For these same reasons, the court also concluded that the second prong of the test was met—the communication was made to a clergyman in his capacity as a spiritual advisor.[130] Finally, there was the question of whether Shelton intended the communication to be confidential, which required that the "[c]ourt focuses on Appellant to make this determination."[131] Even though the defendant's wife was present in the second conversation, there was, from Shelton's perspective, a "reasonable expectation that the counseling was indeed confidential."[132] This was because the "wife's presence was

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[128] *See* 64 M.J. at 38 (citing testimony from the trial court to show that the discussion between the chaplain and Shelton had clear religious overtones that qualified the discussion as one of a "matter of conscience").

[129] *Id.*

[130] *See id.* ("Again, we consider the circumstances of Rev. Dennis beginning the meeting with prayer, the fact that the counseling session occurred at the church, and the religious atmosphere and spiritual language of the meeting as critical facts establishing that Appellant's communication with Rev. Dennis was in the clergy's official capacity.").

[131] *Id.*

[132] *Id*. at 39.

necessary for his redemption"[133] and she thus fell under the meaning of those whom "disclosure is in furtherance of the purpose of the communication" under 503(b)(3). In support of this holding, the appellate court cited the Third Circuit decision of *In re Grand Jury Investigation,*[134] which held that the presence of a third party in a family counseling session did not preclude the existence of a clergy-penitent privilege.[135] The appellate court thus concluded that Shelton's communication was privileged and should not have been introduced in court.[136]

B. Determining who is a qualified chaplain under Rule 503: *Kidd*, *Coleman*, *Napolean*, and *Garries*

The military courts have examined cases involving the question of who qualifies as a chaplain covered by the Rule 503 privilege. This question is a pertinent one and deserving of judicial review, particularly with military chaplains potentially serving in multiple roles and settings while interacting with servicemembers. However, the military cases which have examined this issue have been based on very narrow factual bases.

A very early pre-*Moreno* case was *United States vs. Kidd* (A.F.B.R. 1955),[137] in which the Air Force Board of Review examined the circumstances following an airman's desertion from Andrews Air Force Base. Defendant Kidd left the base without permission for several months. Kidd was tried before a Staff Judge Advocate and convicted of desertion. Prior to sentencing, the Staff Judge Advocate considered the opinion of a chaplain who was a staff member at the confinement facility that held Kidd. The chaplain had interviewed Kidd and concluded he was not suited to be in the Air Force, and should therefore be removed.[138] Kidd argued that the Staff Judge Advocate should not have heard the chaplain's opinion

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133 64 M.J. at 39.

134 918 F.2d 374 (1990).

135 *Id*. (citing *In re Grand Jury Investigation,* 918 F.2d 374(1990): "[a]s is the case with the attorney-client privilege, the presence of third parties, [which is] essential to and in furtherance of the communication, does not vitiate the clergy-communicant privilege.").

136 *See* 64 M.J. at 39 ("Because M.R.E. 503 grants Appellant a right to keep this privileged conversation confidential, we conclude that the military judge abused his discretion by ruling that Appellant's statements to his pastor were not privileged and would be otherwise admissible evidence.").

137 20 CMR 713 (A.F.B.R. 1955).

138 *See id*. at 719 (discussing the circumstances in which the chaplain interviewed the defendant and recommended his severance from service).

because it was privileged communication. The court considered the fact that:

> [A]n Air Force Chaplain assigned to a confinement facility as an additional duty occupies a dual role. On the one hand he is a staff officer whose function is to aid in the retraining and rehabilitation of the prisoners and to advise the commander in matters concerning prisoner policy . . . On the other hand, he acts as clergyman for those prisoners who profess his faith or who desire his spiritual services. Whether a chaplain acts in his secular or spiritual role may vary from time to time depending upon the circumstances involved.[139]

The Air Force Board of Review held that there was no affirmative showing that the information gathered by the chaplain was done so in his official capacity as a clergyman, nor was it clear if the nature of the chaplain's conversation with Kidd was about religious or spiritual matters. Rather, the board simply noted that it was possible that the information about Kidd was gathered from the chaplain in his non-clergy capacity. Thus, "absent clear evidence" of that fact, the "presumptions operate in his [the chaplain's] favor rather than the reverse" and the board therefore ruled that there was no privileged communication in this case.[140] Thus, the *Kidd* case suggests that for chaplains who have dual roles as clergy and non-clergy staff, unless there is clear evidence that the chaplain heard information while acting in his capacity as a clergyman, then it is presumed that he was acting as non-clergy.

Because of the lack of factual information presented in *Kidd*, the fact that it was adjudicated decades before *Moreno*, and has not yet been revisited to any significant extent by subsequent courts, it is unclear what value *Kidd* has to the question of chaplains having dual roles in professional settings. Clearly, *Kidd* does touch on the important issue of where Rule 503 ends for clergy serving in professional settings in non-chaplain roles, and seemingly demarcates those limits based on whether the chaplain is serving as a clergyman or a non-clergyman. Subsequent cases exploring this issue, however, offer little guidance in this area because of the limited factual scenarios presented.

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[139] *Id.*
[140] *Id*.

In *United States v. Coleman* (C.M.A. 1988),[141] the Court of Military Appeals focused on the questions of whether a communication was made to a clergyman "in the clergyman's capacity as a spiritual adviser."[142] In *Coleman*, the defendant Coleman had sexually abused his daughter. The daughter had told her mother (Coleman's wife) about the abuse, and both the daughter and mother testified against Coleman in a court-martial. The wife had also informed her father—a church reverend—about the sexual abuse.[143] The reverend had also received a call from Coleman, and testified in the court-martial to the following:

> I received a phone call from Sergeant Coleman, and . . . he said to me . . . Dad, can you help me, my marriage is falling apart, and knowing what I had known—my daughter had come from Michigan . . . and she had told me about the alleged incident, and . . . I was upset and I'm sure that . . . [appellant] was upset . . . the whole family was upset, and I said, "Son, is there any wonder that your marriage is falling apart? Is it true that you took liberties with your daughter?" And that, basically was the end of that conversation, and he said, "to pray for me" and I said, "I will," and that's basically what was said.[144]

The lower court had admitted the reverend's testimony over Coleman's objection that it be suppressed under Rule 503. The court's reasoning was that Rule 503 did not apply. Although they held that the reverend was a chaplain, the communication itself was not considered a formal act of religion or a matter of conscience, and it was not communicated to a chaplain in an official capacity as a spiritual advisor.[145] That was evidenced by the fact that the defendant had referred to the reverend as "dad" several times.[146] Additionally, Coleman had argued that the admission of the testimony was information that materially prejudiced the court against him. However, the appellate court noted that there was overwhelming evidence from the daughter which indicated his guilt, and

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[141] 26 M.J. 407 (C.M.A. 1988).
[142] MIL. R. EVID. 503(b).
[143] *See Coleman*, 26 M.J. at 407-408 (discussing the factual background of the case).
[144] *Id*. at 408.
[145] *See id*. at 409 (discussing the trial court's reasoning).
[146] *See id*. ("I find that the accused did not perceive the communications to have been made to the clergyman in his capacity as spiritual adviser, as evidenced by his repeated use of the term "Dad" throughout the conversation.").

the father's testimony added little or no additional prejudice.[147] The appellate court also held that the communication was not intended to be confidential either.[148]

The Court of Military Appeals affirmed the appellate court, stating that the communication neither amounted to an act of religion nor pertained to a matter of conscience.[149] The Military Appeals court was silent on the other requirements of the rule. The *Coleman* holding seems to indicate that the fact the reverend was the defendant's father in law was a significant factor excluding the conversation from the privilege. It is unclear exactly why the conversation itself was not considered a matter of conscience nor act of religion. That conclusion could have arisen from the perception that the substance of the conversation did not rise to that level. Additionally, the fact that the conversation was deemed not intended to be confidential seems to have arisen from the fact that Coleman's abuse was already known to both the reverend and Coleman's wife. The *Coleman* holding in totality seems to suggest that when a clergyman is also a family member, a discussion with that person cannot be privileged if the facts of the case suggests that person was communicated to primarily as a family member.

The issue of defining clergy under Rule 503 when another personal relationship existed was revisited in *United States v. Napolean* (C.A.A.F. 1997).[150] In that case, Air Force member Napolean stabbed and killed another person. She was subsequently confined in a holding facility. Napolean's friend Sgt. Walters visited her in jail. Walters testified at the court-martial that at the jail, Napolean had said that "she wasn't angry or

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147 *See id*.:

> Competent evidence, independent of the communication, overwhelmingly established appellant's guilt of the offense as charged. The victim, appellant's daughter, using an anatomically correct doll, testified clearly, convincingly, and in detail about the indecent acts committed on her. In addition, appellant's wife testified he admitted his misconduct to her when she confronted him about the allegation.

Id.

148 *See Coleman*, 26 M.J. at 409 (discussing holding of the case).

149 *Id*. at 409:

> The threshold for claiming the privilege is that "such communication is made either as a formal act of religion or as a matter of conscience." Mil.R.Evid. 503(a). As was found by both the military judge and the Court of Military Review, neither of these two elements is present in the record before us.

150 46 M.J. 279 (C.A.A.F. 1997).

enraged or anything when the incident occurred."[151] Walters also testified that he visited her "as a friend"[152] but that he prayed with her and was a lay minister at a base chapel.[153] Napolean was convicted of pre-meditated murder, and she argued on appeal that her attorney had erred by allowing Walter's testimony at trial. She asserted that without his testimony, her conviction would have been to a lesser charge of murder or manslaughter.[154] Even though Napolean argued that she believed her communication to Walters was privileged under Rule 503,[155] the appellate court held that she could not have "reasonably believed" he was a clergyman.[156] In the court's view, a lay minister did not rise to the status of a clergyman.[157] Additionally, the communication itself fell short of being an act of religion or matter of conscience. Rather, it was a communication of emotional support and not "guidance and forgiveness."[158] Interestingly, the court in *Napolean* also added the distinction that a "communication is not privileged, even if made to a clergyman, if it is made for emotional support and consolation rather than as a formal act of religion or as a matter of conscience"[159] and that a satisfactory definition of the latter would be a communication reflecting "guidance and forgiveness."[160] This definition seems to suggest that the Court of Appeals for the Armed Forces recognizes a clear distinction between communications made to clergy for purposes of emotional support, which would not be covered by the rule, and communications based in spiritual or religious concerns about forgiveness and guidance, which would be covered language. *Napolean* is thus relevant in that sense as it can speak to the dual roles that pastoral chaplains may have in providing emotional support, or spiritual or religious guidance.

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151 *Id*. at 284.
152 *Id*. at 283.
153 *See id*. at 284 (quoting testimony from Sergeant Walters about his visits to Napolean).
154 *See id*. ("Appellant argues that she was prejudiced by TSgt Walters' testimony because it was the only direct evidence of premeditation and without it, she probably would have been convicted only of unpremeditated murder or voluntary manslaughter.").
155 *See* 46 M.J. at 284 (describing the defendant's arguments that she believed her communications with Walters were privileged).
156 *Id*. at 285.
157 *See id*. (noting that a lay minister is not a clergyman).
158 *See id*. ("Finally, we hold that appellant has failed to show that her admissions to TSgt Walters were a 'formal act of religion' or were made 'as a matter of conscience.'. . . The circumstances of TSgt Walters' visit, as described in the affidavits, suggest that appellant was seeking emotional support and consolation, not guidance and forgiveness.").
159 *Id.*
160 46 M.J. at 285.

A final case in this line worth noting is the earlier decision of *United States v Garries*.[161] In *Garries*, the defendant Garries allegedly murdered his wife in a premeditated fashion. A significant amount of evidence and witness testimony pointed to Garries' guilt, and an Air Force trial court convicted him of murder.[162] The issue in the case involved the testimony of a church deacon and friend of Garries. The deacon was a fellow Air Force member and Garries' neighbor. Both of them attended the same off-base church. Prior to the murder, Garries had come to the deacon, and asked him where he could find the church pastor. The deacon said the pastor was out of town. In private, Garries then made remarks to the deacon that he was upset with his wife and wanted to "bust her in the face."[163] The deacon testified that at that time, he was only a deacon and not a pastor certified to do pastoral counseling, and had only presented himself to the defendant as a friend, and not a religious figure. On appeal, Garries argued that the witness testimony from the church deacon was wrongfully introduced into court as it violated Rule 503. The appellate court ruled against Garries on this matter. They held that the deacon was not a clergyman, that the defendant did not at the time believe he was a clergyman, and therefore the discussion they had was not privileged communication under Rule 503.[164] *Garries* confirmed that the definition of a "clergyman" is a narrow one, and limited to those who provide spiritual or pastoral preaching, teaching, and counseling, and not administrative members of a religious organization such as a church deacon.

C. Clergy communications and criminal investigation warning requirements: *Richards* and *Benner*

Two MRE 503 cases have presented factual scenarios in which defendants have raised Uniform Code of Military Justice Article 31 arguments. Article 31 prohibits compulsory self-incrimination, and any violation of such renders subsequent communications inadmissible in trial.[165] This scenario emerges when a servicemember communicates with a chaplain about a purported crime, and later raises as a defense the

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[161] 19 M.J. 845 (A.F.C.M.R. 1985).
[162] *See id*. at 848-852 (describing background of the case).
[163] *Id*. at 860.
[164] *See id*. at 860 ("First, we hold that Sgt. Hinton was not a person who could act as a clergyman. Second, we find that the accused did not reasonably believe that Hinton was a clergyman. Third, we find that the conversation between Hinton and the accused was not under circumstances amounting to a privileged communication.").
[165] UCMJ art. 31 (2008).

argument that the chaplain should have warned the speaker to his Article 231 rights prior to making the communication. An early case was *United States v. Richards* (N.M.C.M.R. 1984).[166] In *Richards*, the defendant was a Navy clerk who had stolen funds from his ship. Richards met with the ship chaplain to express his feelings of guilt and to seek advice about next steps. The chaplain suggested that she meet with a legal officer to consult about the situation, without disclosing Richards' identity, and Richards agreed. At the meeting, the legal officer advised the chaplain that the defendant should voluntarily admit to the crime. The chaplain communicated that advice to Richards, and he agreed to have the chaplain tell command about his crime. He was subsequently convicted and sentenced by a court-martial.[167]

On appeal to the Navy-Marine Court of Military Review, Richards argued that the chaplain should have read him his Article 31 rights prohibiting self-incrimination.[168] He argued that because the chaplain had not read him those rights prior to their initial discussion, all the subsequent information revealed should have been inadmissible in a court-martial. The court, however, ruled against Richards, noting that Article 31 rights are only required when there is a "criminal investigatory purpose."[169] In this case, the initial conversation between the chaplain and Richards was a privileged communication covered under Rule 503 as an "a matter of conscience," and not a criminal investigation. Additionally, Richards' subsequent confession to the crime through the chaplain was considered a waiver to the privilege under Rule 510 (Waiver of privilege by voluntary disclosure).[170] His conviction was thus affirmed. Richards thus holds that

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[166] 17 M.J. 1016 (N.M.C.M.R. 1984).

[167] *See id*. at 1017-1079 (discussing the factual background to the Richards case).

[168] *See* 10 U.S.C.A. § 831. Art. 31. Compulsory self-incrimination prohibited (discussed *supra* on Moreno case).

[169] *See* 17 M.J. 1016, 1019 (1984):

> In our judgment the considerations of concern to Congress in the enactment of Article 31, UCMJ, are not present in the instant case. There was no criminal investigatory purpose in the communication between the chaplain and appellant. The only motivation was the conduct of a privileged conversation pursuant to MIL.R.EVID. 503. *Id.*

[170] *See* MIL. R. EVID. 510(a):

> A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege

a discussion about issues of conscience with a clergyman resulting in information about criminal activity is not automatically an "investigation," and such discussions do not require the reading of one's rights against self-incrimination.

United States v. Benner (C.A.A.F. 2002)[171] also implicated Article 31. In *Benner*, the defendant's wife caught Benner sexually abusing their daughter. The wife and daughter left Benner and urged him to seek help, but did not report him to authorities.[172] Benner decided to seek counseling from an Army chaplain, and at their first meeting, he told the chaplain he had sexually abused his daughter. The chaplain told Benner he would have to report this information to the military police. The chaplain contacted the Army Family Advocacy office, where he was (erroneously) informed that he was required to report the abuse. He then told Benner it would be best if he turned himself in, and would escort him to the military police. Benner was hesitant, but went with the chaplain. Once there, he was notified of his Article 31 rights, and confessed to the police. He was subsequently convicted of sodomy with a child.[173]

On appeal, Benner argued that Rule 503 had been violated when the chaplain told him he was required to report the abuse. The appellate court acknowledged that privileged communications with a clergyman are sealed, and that such communications do not require clergyman to warn penitents of Article 31 rights against self-incrimination or rights to an attorney.[174] However, if a military officer happens to be a clergyman, but "acts on the premise that the penitent's disclosures are not privileged, then warnings are required."[175] The court held that because the chaplain had (erroneously) told Benner he had to report Benner's actions, and encouraged him to turn himself in, it effectively tainted his confession. The appellate court ruled that Benner had come to the chaplain seeking

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> voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. *Id.*

171 57 M.J. 210 (C.A.A.F. 2002).
172 *See id*. at 211-212 (discussing factual background of Benner and his family).
173 *See id*. (discussing factual background of Benner's interaction with the chaplain and subsequent confession to the military police).
174 *See id*. at 212 ("When a chaplain questions a penitent in a confidential and clerical capacity, the results may not be used in a court-martial because they are privileged. Therefore, the Article 31(b) and *Tempia* warnings are not required.").
175 *Id*.

confidential communications, but instead, the chaplain had acted not as a chaplain giving proper counseling, but as an ordinary officer. Because he had not properly warned Benner of his rights, his resulting confession was invalid.[176]

D. Synopsis of Rule 503 Cases

The evolved case law on Rule 503 has direct application for chaplains working in the field, and provides guidance on what to expect in the event of a legal case. The *Moreno* case offers an important starting foundation. The military courts have consistently relied[177] on the three-part test elucidated in *Moreno* that operationalizes Rule 503.[178] *Moreno* is clear that if a Service member "confesses" as a matter of conscience or religion to a chaplain in his or her role as a spiritual advisor, that communication should be kept confidential and not shared with command. If it is shared, the communication will be ruled inadmissible under Rule 503. The *Moreno* case was reaffirmed in *Benner* where a military chaplain erroneously believed he had to report a Service member who had confided in him that he had abused children.[179] However, both *Benner* and *Moreno* should be compared to the facts and holding in the *Beattie* case, where a chaplain advised a Service member who had committed child abuse to report himself to command, and the Service member voluntarily decided to do so.[180] The *Beattie* case illustrates an example of a chaplain acting within his legal and ethical bounds in a proper fashion, whereas in *Benner* and *Moreno* the chaplains acted improperly. In the very difficult situation when a chaplain is told information by a Service member in confidence that suggests he poses an actual, immediate threat to himself or others – such as suicide or murder – the chaplain should advise the person to seek help voluntarily. In a dire situation involving immediate harm, *Isham* suggests that a chaplain can inform others to take necessary action to prevent that Service member from committing harmful activity (such as

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[176] *See* 57 M.J. 210, 213-214 (C.A.A.F. 2002) ("Appellant was seeking clerical help. Instead of providing confidential counseling, the chaplain informed appellant that he was obliged to report appellant's action and thus, unknown to the chaplain, breach the "communications to clergy" privilege. At this point, the chaplain was acting outside his responsibilities as a chaplain, and he was acting solely as an Army officer. As such, he was required to provide an Article 31 warning before further questioning.").

[177] *See supra* discussions at notes 114-22 and accompanying text on *U.S. v. Isham*, 48 M.J. 603 (1998) and notes 123-36 and accompanying text on *U.S. v. Shelton*, 64 M.J. 32 (2006), two recent Rule 503 cases which made use of the three-part Moreno test.

[178] U.S. v. Moreno, 20 M.J. 623, 626 (1985).

[179] 57 M.J. 210, 211-212 (2002) (discussing the facts of the case).

[180] *See* 1987 CMR LEXIS 622 at 1-3 (discussing facts in the *Beattie* case).

removing that person's weapon or placing him under observation) but not the reason for doing so in order to preserve confidentiality.[181]

The *Moreno* and *Coleman* rulings also indicate that the intention of the penitent has important implications for the applicability of Rule 503. Courts will examine whether communications are intended to be confidential from the perspective of the confessor, but as per *Coleman* will examine the totality of the factual background to determine whether the substance of the communication had already been known to others (and therefore not intended to be confidential),[182] and if the person communicated to was a clergyman acting within his/her professional capacity as a spiritual advisor. *Coleman* holds that if a person is primarily approached as a family member, Rule 503 does not apply.[183] The *Garries* and *Napolean* cases support *Coleman* in holding that for a person to be a clergyman covered by Rule 503, he/she must be a professional clergyman responsible for religious preaching, teaching, and counseling, and the confessor must "reasonably believe" the person to be so.[184] Rule 503 only applies to clergy or their assistants,[185] and not to deacons or lesser administrative positions within a church,[186] or to lay ministers.[187] The *Kidd* case is also relevant, as many chaplains may serve in dual roles as a matter of official assignment. In *Kidd*, a chaplain assigned to serve on a review board within a confinement facility was not considered a clergyman for purposes of Rule 503.[188] Additionally, the *Kidd* court indicated that in such a situation, there must be "clear evidence" that the chaplain was serving in a role as a clergyman as a spiritual advisor in order for coverage to apply.[189] This case law indicates that courts will permit a strict interpretation of Rule 503's requirements for who constitutes a clergyman,

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[181] 48 M.J. 603, 606 (1998) (holding that in the specific facts of *Isham*, action could be taken for the limited purposes of getting help to a service member while preserving confidentiality).

[182] *See Coleman*, 26 M.J. at 409 (discussing confidentiality in the *Coleman* case).

[183] *See id*. (discussing facts and holding of the *Coleman* case).

[184] *See* 19 M.J. 845, 860 (1985) (discussing whether the church deacon was a clergyman, and deciding that he was not).

[185] MIL. R. EVID. 503(B)(1-2).

[186] *See* 19 M.J. 845, 860 (1985) (discussing whether the church deacon was a clergyman, and deciding that he was not).

[187] *See* 46 M.J. at 116 (holding that a lay minister is not a covered clergyman).

[188] *See* 20 CMR 713, 714-719 (1955) (discussing whether chaplain was acting in hiscapacity as a clergyman while serving at a confinement facility and holding that he was not at the time he had received information about a plaintiff).

[189] *See id*. at 719 (discussing the court's consideration of the chaplain's dual roles at the confinement facility in Kidd).

and in what circumstances. Military chaplains should be cognizant of whether they are working in their professional capacities as spiritual or religious figures in their interactions with service members, and their assignments, circumstances, and individual relationships all factor into a determination of whether they are covered by Rule 503.

IV. Military Rule of Evidence 513: Privileged Communications and Psychotherapists

The military psychotherapist-patient privilege was created by an executive order from President Clinton in November of 1999.[190] The privilege is codified as Rule 513 of the Military Rules of Evidence. It creates a privilege on the part of a patient to prevent disclosure of confidential communications with psychotherapists in military courts.[191] As defined by the rule, a "psychotherapist" includes psychiatrists, clinical psychologists, clinical social workers, or other mental health professionals, who are licensed to provide such services, and their assistants, or people reasonably believed by a patient to have those credentials.[192] "Confidential" communications include those that are not

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[190] *See* 64 FR 55155 (1999) §2 (amending the Manual for Courts-Martial by Executive Order No. 13140 to include a psychotherapist-patient privilege).

[191] *See* MIL. R. EVID. 513(a):

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. *Id.*

[192] *See* MIL. R. EVID. 513(b)(2):

> A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials. *Id.*

intended to be disclosed to third persons other than those necessary for transmission of the communication.[193]

The establishment of the privilege came after the federal courts recognized its existence in the 1996 case of *Jaffee v. Redmond*.[194] In *Jaffee*, the Supreme Court identified the social policy rationale for creating the federal psychotherapist privilege:

> Effective 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 . . .
>
> The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.[195]

Prior to *Jaffee*, the military courts had affirmatively rejected the notion that this privilege existed within the military, largely because the Military Rules of Evidence expressly barred—and still bars—a physician/doctor-patient privilege.[196] Following the lead of the federal courts, the military psychotherapist privilege was also created in recognition of the benefits of

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[193] *See* MIL. R. EVID. 513(b)(4): A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication. Id.

[194] 518 U.S. 1 (1996).

[195] *Id*. at 8-9.

[196] *See* MIL. R. EVID. 501(d): "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity." See also Stacy E. Flippin, Military Rule of Evidence (MRE) 513: A Shield To Protect Communications of Victims and Witnesses to Psychotherapists, ARMY LAWYER 1, 2-7 (Sept. 2003) (outlining the development of the privilege in federal law and military cases ruling against it prior to 1999); Barbara J. Zanotti & Rick A. Becker, Marching to the Beat of a Different Drummer: Is Military Law and Mental Health Out-of-Step after Jaffee v. Redmond? 41 A.F. L. REV. 1, 1-25 (1997) (discussing the Jaffee ruling by the Supreme Court and historical treatment of the psychotherapist-privilege in federal law).

confidential mental health counseling. As recognized in the rule commentary, the military privilege "is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege."[197] The psychotherapist privilege thus facilitates a wider policy goal of encouraging servicemembers to seek help, albeit balanced against the special considerations of the military context. As also noted in the MRE commentary, these exceptions largely exist to further operational and mission success:

> In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security.[198]

Thus, unlike the absolute privilege clergy have with Rule 503, there are seven significant exceptions to Rule 513. No psychotherapist privilege applies when the patient dies,[199] in communications which are evidence of child abuse/neglect, or in a proceeding in which a spouse is charged with a crime against a child or either spouse,[200] when federal or state law or service regulations require reporting of information,[201] when the psychotherapist believes the patient is a danger to others or himself,[202] in communications involving future commissions of crime,[203] when

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[197] *See* MCM, *supra* note 24, at analysis at App. 22-51 ("Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege.").

[198] *Id*.

[199] *See* MIL. R. EVID. 513(d)(1) (stating privilege does not exist "when the patient is dead").

[200] *See* MIL. R. EVID. 513(d)(2) (stating privilege does not exist "when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse").

[201] *See* MIL. R. EVID. 513(d)(3) (stating privilege does not exist "when federal law, state law, or service regulation imposes a duty to report information").

[202] *See* MIL. R. EVID. 513(d)(4) (stating privilege does not exist "when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient").

[203] *See* MIL. R. EVID. 513(d)(5) (stating privilege does not exist "if the communication clearly contemplated the future commission of a fraud or crime").

necessary to ensure safety of military personnel, property, or missions,[204] and when a defendant provides information about his mental conditions pursuant to a military case not covered under other privileges.[205] The exceptions generally mirror those found in state law[206] and are thus very broad.

It is significant to note that the psychotherapist privilege has recently been amended for policy reasons. Prior to 2015, the privilege contained an eighth exception for "when admission of disclosure of a communication is constitutionally required."[207] This exception was often exploited by defense counsel to introduce mental health information as evidence for witness impeachment,[208] and was criticized for being particularly problematic in cases involving sexual assault.[209] The amendment removing that exception was directed through the National Defense Authorization Act (NDAA) for 2015 *Subtitle D, Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response*,[210] ostensibly reflecting congressional intent to reform Uniform Code of Military Justice and MRE provisions dealing with the problem of sexual assault and violence in the military.[211] Eliminating the

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[204] *See* MIL. R. EVID. 513(d)(6) (stating privilege does not exist "when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission").

[205] *See* MIL. R. EVID. 513(d)(7) (stating privilege does not exist "when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302").

[206] For a discussion of legal requirements implicating confidentiality of psychotherapists, see Bruce Sales, Mark DeKraai, Susan Hall & Julie Duvall, Child Therapy and the Law, in THE PRACTICE OF CHILD THERAPY 519-542 (Richard Morris & Thomas Kratochwill eds., 4th ed., 2007); Mark DeKraai & Bruce Sales, Confidential communications of psychotherapists, 21 Psychotherapy 293-318 (1984); Mark DeKraai & Bruce Sales, Privileged communications of psychologists, 13 Professional Psychology: Research and Practice 382 – 388 (1982).

[207] Manual for Courts-Martial, United States, MIL. R. EVID. 513(d)(8) (2012).

[208] *See* Major Michael Zimmerman, *Rudderless: 15 Years and Still Little Direction on the Boundaries of Military Rule of Evidence 513, 223 MIL. L. REV. 312, 313 (2015) (discussing the scenario of using the constitutionality exception in defenses to impeach witnesses based on mental health information).*

[209] *See* Major Angel M. Overgaard, *Redefining the Narrative: Why Changes to Military Rule of Evidence 513 Require Courts to Treat the Psychotherapist-Patient Privilege as Nearly Absolute. 224 MIL. L. REV. 979, 980-81 (2016) (discussing the scenario of defense counsel using the constitutionality exception in sexual assault cases, and asserting that the "privilege's misapplication was re-victimization of sexual assault victims").*

[210] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter NDAA 2015].

[211] *See* Overgaard, *supra* note 228 at 982-83 (discussing congressional intent and national interest in preventing sexual assault and providing due protections to victims).

constitutionality exception thus prevented the possibility of a broad search through a potential victim's therapy records on the basis of constitutionality for purposes of impeachment, a concern the MRE drafting committee had when crafting the exceptions.[212]

Similarly, the NDAA of 2015 also clarified the procedural requirements for MRE 513 hearings. Prior to the changes, if a party sought to introduce evidence in which there was a dispute as to whether it was covered by an exception, the rule simply stated that the military judge must first examine the evidence *in camera*, though no further guidance was provided as to when that would be appropriate.[213] Thus, highly sensitive information could be easily reviewed in closed sessions. As discussed at length by Major Michael Zimmerman,[214] the 2015 amendments incorporated elements from the *Klemick* case,[215] discussed *infra*,[216] establishing clear thresholds necessary to conduct *in camera* review of the mental health information. This includes a finding by the judge by a preponderance of evidence that the moving party has shown a reasonable likelihood that the evidence fits under one of the MRE 513 exceptions,[217] is not cumulative of other information,[218] and the moving party made reasonable efforts to obtain the same information from non-privileged sources.[219] The NDAA amendments also provided victims the right to

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[212] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 514 (2012), analysis at App. 22-46 (discussing exceptions to MRE 513 and 514 and noting concern that "this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless"). See also Major Cormac M. Smith, Applying the New Military Rule of Evidence 513: How Adopting Wisconsin's Interpretation of the Psychotherapist Privilege Protects Victims and Improves Military Justice, THE ARMY LAWYER, Nov. 2015, 6, at 6 (describing the scenario where sexual assault victims' psychotherapy records are produced for in camera review under the constitutionality exception); Zimmerman, supra note 227 at 329-333 (discussing concern brought about by the constitutionality exception that would allow searching through very private and personal mental health records of victims).

[213] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 513(3)(3) (2012) (stating that review of evidence must be done by a military judge in camera). For an example of a pre-Klemick case in which in camera review of mental health records with little additional guidance is presumed, see United States v. Harding, 63 M.J. 65 (C.A.A.F. 2006).

[214] *See* Zimmerman, *supra* note 227 at 331-336 (discussing post-NDAA 2015 requirements to MRE 513 derived from the Klemick case).

[215] 65 M.J. 576 (2006).

[216] See discussion *infra* on the 2006 *Klemick* case at notes 261-270.

[217] MCM, *supra* note 24, MIL. R. EVID. 513(e)(3)(A-B).

[218] *Id*. at MIL. R. EVID. 513(e)(3)(C).

[219] *Id*. at MIL. R. EVID. 513(e)(3)(D).

petition for a writ of mandamus to compel compliance to these requirements if they believed they were being violated.[220]

Another noteworthy addition in the 2015 amendments to the rule included an expansion of the definition of psychotherapists to include other mental health professionals.[221] Previously, the privilege's definition of a psychotherapist was restricted to a psychiatrist, clinical psychologist, or clinical social worker.[222] Expanding that definition to include other mental health professionals ostensibly indicates that professionals such as licensed professional counselors, alcohol and drug abuse counselors, nurse psychotherapists, and marital and family therapists, may also now be covered by the privilege. In theory, this broadening of the definition of psychotherapists should also include pastoral counselors—clergy members with clinical training to provide counseling or psychotherapy. Some states do specifically license clinical pastoral therapists, or if not, pastoral counselors can apply for and practice as other types of mental health professionals, such as licensed marriage and family therapists.[223] Pastoral counselors typically blend clinical psychotherapy and counseling techniques with their theological and spiritual training to address issues like addiction and recovery, relationships, and spiritual and moral injuries.[224] The inclusion of pastoral counselors as psychotherapists covered by Rule 513 has important implications for clearly identifying relationships, roles, and ethical boundaries during interactions with patients and other professionals in a mental health setting.

By both removing the constitutionality exception, and expanding the coverage of the privilege to include a greater scope of mental health professionals, Congress effectively strengthened the psychotherapy privilege, a trend which ostensibly facilitates the goal of encouraging servicemembers to seek confidential mental health counseling from qualified professionals.

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[220] *See* NDAA 2015, *supra* note 229, at §537(1) (providing for victims to petition for a writ of mandamus to enforce compliance with the MRE 412 and 513).

[221] *See id.* §537(1) (stating that Rule 513 be expanded to cover "other licensed mental health professionals").

[222] *See* Manual for Courts-Martial, United States, MIL. R. EVID. 514 (2012),

[223] *See* American Association of Pastoral Counselors, Licensing, http://www.aapc.org/Default.aspx?ssid=74&NavPTypeId=1189 (last visited April 6, 2017) (outlining state licensing status for pastoral counselors).

[224] *See generally*, ROBERT J. WICKS, RICHARD D. PARSONS, & DONALD CAPPS, CLINICAL HANDBOOK OF PASTORAL COUNSELING, VOL. 1 (1993).

A. Setting the foundations in *Jenkins* and *Klemick*

Two early cases in which a military court examined the new privilege of Rule 513 were *United States v. Rodriguez* (C.A.A.F. 2000)[225] and *United States v. Paaluhi* (C.A.A.F. 2000).[226] *Rodriguez* involved a defendant stationed in Bosnia who rigged a weapon to shoot himself in order to avoid duty. During counseling treatment with a psychiatrist, Rodriguez admitted he intentionally shot himself to get out of duty and was not suicidal. That testimony was later introduced in his court-martial, and he was subsequently found guilty of wounding himself to avoid hazardous duty.[227] The shooting, communication with the psychiatrist, and original court-martial all took place prior to when Rule 513 was established. Rodriguez argued to the Court of Appeals for the Armed Forces that the psychotherapist privilege prevented the testimony from being introduced, but the court instead ruled that because the military psychotherapist privilege was not yet in force at the time of the activity in question, it did not shield the communications.[228] Similarly, *Paaluhi* involved a defendant's confession to a Navy psychologist that he had been having sexual relations with his stepdaughter, though those communications also occurred before the military psychotherapist privilege had been recognized.[229] As in *Rodriguez*, the Court of Appeals for the Armed Forces also ruled that the privilege did not apply because the incriminating statements were made in 1996, prior to the creation of the privilege.[230]

It was not until 2006 that the courts examined two cases with significant substantive repercussions. One was *United States v. Jenkins* (C.A.A.F. 2006),[231] in which the Court of Appeals for the Armed Forces scrutinized the breadth of the exceptions under Rule 513. The other major case was *United States v. Klemick* (N-M. Ct. Crim. App. 2006).[232] *Klemick* established parameters for Rule 513 hearings that would later be

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225 54 M.J. 156 (C.A.A.F. 2000).
226 54 M.J. 181 (C.A.A.F. 2000).
227 *See Rodriguez*, 54 M.J. 156, 156-158 (C.A.A.F. 2000) (stating background facts to the case).
228 *See* 54 M.J. at 160-61 (finding that presidential intent towards the psychotherapist privilege controlled the outcomes of the case).
229 *See id*. at 182-84 (discussing the timing and background of Paaluhi's communications to the Navy clinical psychologist).
230 *See id*. at 183 (holding no military psychotherapist privilege existed at the time of the activity in question).
231 63 M.J. 426 (C.A.A.F. 2006).
232 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

incorporated into the 2015 NDAA amendments, and is thus significant for strengthening the psychotherapist privilege in light of its many exceptions.

In *Jenkins*, the defendant was drunk and accosted a black airman with racial taunts. During the confrontation, Jenkins drew a knife and chased the airman while yelling "I'm going to kill y'all n****** tonight." He was apprehended by military police and released the next day, and ordered to walk home by the officer in charge. He then told friends about the officer in command: "That f****** bitch made me mad . . . I would have cut her f****** throat." His behavior was reported to command, and he was directed to a mental health evaluation by the command clinical psychologist.[233] At his court-martial, the psychologist testified that Jenkins had abnormally high anger, low self-control, should be confined due to his danger to others, and should ultimately receive treatment outside of the military.[234] He was subsequently found guilty on several charges of disorderly conduct, threats, and substance abuse, and ordered to jail time and then dishonorable discharge.[235]

Before the Court of Appeals for the Armed Forces, Jenkins argued that the court-martial judge had erred by allowing the psychologist to testify via the "dangerousness" exceptions to the psychotherapist privilege: 513(d)(4)—when a psychotherapist believes the patient is a "danger to any person, including the patient";[236] and 513(d)(6)—"when necessary to ensure the safety and security of military personnel."[237] He asserted that the exceptions were so broad and vague, that a reasonable Service member could not know what would or would not qualify under these dangerousness exceptions, and that their ambiguity was thus unfair to prospective mental health patients.[238] The court recognized that the exceptions were broad, and their applicability necessitated a fact-specific inquiry by judges.[239]

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[233] *See id*. at 427 (describing the defendant's behavior).

[234] *See id*. at 428 (describing the findings and testimony of the clinical psychologist to Jenkins' mental state of mind).

[235] *See id*. at 426 (describing charges and sentencing for defendant).

[236] MIL. R. EVID. 513(d)(4).

[237] MIL. R. EVID. 513(d)(6).

[238] *See* 63 M.J. at 429-430 (describing defendant's arguments that the exceptions to Rule 513 were unfairly broad and demanded more specific definitions).

[239] *See id*. at 430 (noting that "Whether the exceptions apply is necessarily a fact-specific determination for a military judge to consider with an accurate awareness of the facts underlying the dispute, just as hearsay determinations necessarily involve context. It is for this reason that the M.R.E. forego detailed analyses of their application in different factual scenarios").

In its ruling, the court declined to establish new tests, and held that the factual evidence was sufficient to indicate that the dangerousness exceptions applied. Jenkins had chased another airman with a knife, threatened to kill the commanding officer, and the psychologist had tested and confirmed Jenkins' anger and control issues. The court concluded that, "[a]lthough we may not at this point be able to determine every context in which M.R.E. 513(d)(4) and (6) might apply, we conclude with confidence that the two exceptions were implicated when Appellant made threats to kill persons while brandishing a fourteen-inch knife."[240] *Jenkins* serves as a clear example of the rationale for these dangerousness exceptions to psychotherapy communications. The court found no need to further narrow the exception language beyond the text of the rule. The presence of actual death threats, as well as the findings of the clinical psychologist establishing the defendant's dangerousness, were sufficient to trigger those exceptions to the psychotherapist privilege.

United States v. Klemick[241] involved a determination of whether a factual basis was necessary to review evidence *in camera* (in private) for admissibility under the Rule 513(d)(2) exception for communications that are evidence of child abuse. Klemick had been charged with assault and manslaughter following the shaking death of his baby child. During his court-martial, the government had sought admission of treatment information from discussions between Klemick's wife and her psychotherapist following the child's death. The military prosecutor argued that the information could be introduced as an exception to the psychotherapist privilege because it was relevant to the case, over the protests of both Klemick and his wife, who was unavailable to testify due to a high-risk medical situation.[242] The trial judge reviewed the psychotherapist records *in camera*, and then released portions of it to both the defense and prosecution to be potentially used in cross-examination as part of Rule 513(e) procedures for evidentiary review.[243] Klemick was subsequently convicted of manslaughter, and argued on appeal that prior

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[240] *Id*. at 431.

[241] 65 M.J. 576 (N-M. Ct. Crim. App. 2006).

[242] *See id*. at 578 (noting the argument that the psychotherapist records which show information about "substantive events in the instant case").

[243] *See* MIL. R. EVID. 513(e)(2-3) (stating that "[b]efore ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing . . . The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion").

to *in camera* review of evidence, some threshold indication of evidentiary relevance must be established to use the exception.[244]

The Navy-Marine Court of Criminal Appeals noted that there was no prior precedent within military or federal law to the immediate question, and then looked to state law for relevant cases.[245] Citing the Wisconsin Supreme Court case of *Wisconsin v Green*,[246] the military court quoted Wisconsin's ruling requiring in such circumstances "a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence and is not merely cumulative to other evidence."[247] Adapting this threshold, the Navy-Marine Court identified a three-part test for Rule 513 requiring a determination of whether (1) a specific factual basis showed a "reasonable likelihood" that privileged records were admissible under the child abuse exception, (2) the information had independently probative value and was not just cumulative to other information already available, and (3) a requirement that reasonable efforts were made to obtain the "same or substantially similar information through non-privileged sources."[248] In *Klemick*, the government had satisfied each of these requirements. The known facts of the case were enough to demonstrate the likelihood that the psychotherapist records of Klemick's wife were reasonably likely to contain information related to child abuse, that information had independent probative value, and attempts had been made to interview the wife but were unsuccessful as she was experiencing medical issues.[249] The *Klemick* ruling thus established the threshold to determine requirements for review of privileged communications, with the relevant standard being "reasonable likelihood" that it was admissible. As noted *supra*,[250] the *Klemick* analysis was incorporated into the NDAA 2015 amendments as part of an effort to strengthen the privilege.

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[244] *See* 65 M.J. at 579 (outlining the defendant's arguments about that the "[g]overnment showing in this case was not sufficient to pierce the veil of privilege").

[245] *See id*. ("We have found no applicable military or Federal case law. For their persuasive authority only, we will consider State appellate court decisions addressing the issue of prerequisites for in camera review under State psychotherapist-patient privilege rules similar to MIL. R. EVID. 513.").

[246] 253 Wis. 2d 356 (2002).

[247] *See* 65 M.J. at 579 (citing *Wisconsin v. Greene*, 253 Wis. 2d 356 (2002)).

[248] *Id*. at 580.

[249] *See id*. (outlining reasons why "the Government satisfied this three-part standard").

[250] *See* footnotes 226-243 *et seq* and accompanying text discussing the NDAA 2015 changes.

B. Introducing sexual behavior evidence via the constitutionality exception to Rule 513: *Nixon, Hohenstein, Palmer*, and *Hudgins*

United States v. Nixon (A.F. Ct. Crim. App. Nov. 14, 2012),[251] *United States v. Hohenstein* (A.F. Ct. Crim. App. July 1, 2013),[252] *United States v. Palmer* (A.F. Ct. Crim. App. Nov. 25, 2013),[253] and *United States v. Hudgins* (A.F. Ct. Crim. App. Nov. 25, 2013),[254] are pre-NDAA 2015 cases that illustrated how the constitutionality exception of MRE 513 was litigated as a defense tactic. Under this exception, a move to admit mental health records under an argument that it furthered constitutional rights to a fair trial (e.g. via the sixth amendment) was possible. Defense would also seek to introduce evidence about sexual behavior that would bypass MRE 412,[255] the military rape shield provision (which was also strengthened under NDAA 2015 amendments to protect victims of sexual assault).[256]

United States v. Nixon[257] was an appeal based on an asserted error in the introduction of potential impeachment or exculpatory evidence. Defendant Nixon allegedly sexually assaulted three of his daughters, which he had admitted to his wife.[258] Nixon was subsequently convicted of rape and sentenced to 18 years confinement.[259] Prior to his court-martial, the military judge had reviewed *in camera* the mental health records of his wife and three daughters, and subsequently released a summarized portion of the records – but not all of them – to the defense and prosecution. On appeal to the Air Force Court of Criminal Appeals, Nixon argued that the judge erred by not releasing all of those records, as they arguably would have showed that A) one of his daughters had been untruthful about her sexual activity, and B) another daughter may have been sexually abused by her brother, not Nixon, and that her recollection about who assaulted her may thus not have been correct.[260] To support his assertion, Nixon relied on the Military Rules of Court Martial

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[251] 2012 WL 5991775 (A.F. Ct. Crim. App. Nov. 14, 2012).
[252] 2013 WL 3971576 (A.F. Ct. Crim. App. July 1, 2013)
[253] 2013 WL 6579713 (A.F. Ct. Crim. App. Nov. 25, 2013).
[254] 2014 WL 2038866 (A.F. Ct. Crim. App. Apr. 3, 2014).
[255] MCM, *supra* note 24, MIL. R. EVID. 412.
[256] *See* NDAA 2015, *supra* note 229, at §537(1) (providing for victims to petition for a writ of mandamus to enforce compliance with the MRE 412 and 513).
[257] 2012 WL 5991775 (A.F. Ct. Crim. App. Nov. 14, 2012).
[258] *See id*. at 1 (discussing facts involving Nixon's sexual assaults on his daughters).
[259] *See id*. (discussing court-martial and sentencing of defendant).
[260] *See id*. at 16 (outlining Nixon's arguments that information not released may have altered or mitigated the case against him).

701(a)(2)(B), which allow the defense in discovery to obtain "results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities . . . and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial."[261]

The court disagreed with Nixon. It noted that Rule of Evidence 412[262] prevents the admission of evidence of a victim's sexual behavior unless it is offered to prove someone other than the accused was the source of semen, injury or other evidence, proves consent, or violates the constitutional rights of the accused.[263] It also noted that despite the Courts-Martial Rule 701(a)(2)(B), Rule 513 protects psychotherapist records.[264] In this case, the court held that the information from the records was appropriately withheld by the trial judge because its alleged contents

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[261] Rules for Court Martial 701(a)(2)(B).

[262] *See* MIL. R. EVID. 412(a)(1-2):

> (a) Evidence generally inadmissible. The following evidence is not admissible in any proceeding involving an alleged sexual offense except as provided in subdivisions (b) and (c):
> (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
> (2) Evidence offered to prove any alleged victim's sexual predisposition.

Id. It is noted in the official commentary to the Military Rules of Evidence that the purpose of Rule 412 is "intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses." *See* MANUAL FOR COURTS MARTIAL UNITED STATES A22-36 (2012).

[263] *See* MIL. R. EVID. 412(b)(1)(A-C):

> (1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:
> (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
> (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
> (C) evidence the exclusion of which would violate the constitutional rights of the accused.

Id.

[264] *See* 2012 WL 5991775 at 17 (stating that "Mil. R. Evid. 513(a) protects the records covered under R.C.M. 701(f), and none of the exceptions under Mil. R. Evid. 513(d)(1)-(8) justify disclosure in the case sub judice").

amounted to an "alleged act of a third party, and not the accused."[265] The alleged content would not have resulted in a reasonable probability that its disclosure would have changed the result of the case in light of the totality of the evidence, as enough evidence existed pointing to Nixon's guilt, and it would outweigh any probative value of speculation that the records may have helped Nixon's position.[266] Finally, the contents of the records were not admissible under any of the exceptions of Rule 412.[267]

United States v. Hohenstein[268] featured a similar discovery-based argument as that in *Nixon*. Defendant Hohenstein had allegedly sexually assaulted a friend of his daughter's during a sleepover. Hohenstein denied the assault had occurred.[269] The trial record showed that in addition to the assault, there was a dispute about whether the victim had been truthful about another sexual assault that had allegedly occurred a year earlier by a different perpetrator.[270] The military judge, however, had not introduced evidence of that prior alleged assault as it was prevented by Rule of Evidence 412, which bars admissibility of evidence of prior sexual behavior unrelated to the immediate case.[271] Hohenstein argued that evidence of her untruthfulness regarding the prior assault should be used to question her credibility.[272] Following his conviction, the Air Force Court of Criminal Appeals ruled that the trial judge had correctly excluded evidence regarding the alleged prior assault because it was not relevant to Hohenstein's case and risked prejudice towards the victim.[273] Hohenstein also argued that the judge erred by not admitting evidence from the victim's discussions with a psychotherapist, which he argued was admissible under Rule 513(d)(8) (no psychotherapy privilege "when admission or disclosure of a communication is constitutionally required"), because he could use that information to impeach the victim.[274] The court

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[265] *Id*. at 17.

[266] *See id*. at 18 (noting that the alleged information not disclosed, in order to be material to Nixon's case, had to have been information that would have created a reasonable probability that its disclosure would have resulted in a different conclusion).

[267] *See id*. (noting that "[f]inally, even if the appellant was entitled to discover this information, Mil. R. Evid. 412 barred its admission, and none of the exceptions under Mil. R. Evid. 412(b) apply").

[268] 2013 WL 3971576 (A.F. Ct. Crim. App. July 1, 2013).

[269] *See id*. at 1-2 (discussing the facts of the case).

[270] *See id*. at 1-2 (discussing the alleged sexual assault a year earlier).

[271] *See* MIL. R. EVID. 412(a)(1-2) (barring evidence about a victim's prior sexual behavior).

[272] *See* 2013 WL 3971576 at 2 (outlining the appellant's argument about judicial error).

[273] *See id*. at 4 (agreeing with the trial judge that the evidence of the prior alleged sexual assault was correctly excluded under Rule 412).

[274] *See id*. at 5 (discussing the alleged error under Rule 513).

also ruled against Hohenstein on this point, noting that the trial judge had correctly reviewed the psychotherapist records *in camera*, found that there was no or little information relevant to the defense within the privileged information, and thus properly excluded it.[275] The *Hohenstein* ruling, along with *Nixon*, confirmed that the courts are reluctant to admit evidence from psychotherapy records via the 513 child abuse ((d)(2)) or constitutionality ((d)(8)) exceptions, though they also reflect how the constitutionality exception served as an opportunity for defense counsel to exploit.

Palmer involved an assignment for error regarding a trial judge's discretion in the limited release of psychotherapist records. Palmer was the next door neighbor of the alleged victim. During a night of drinking at his house, Palmer slipped some GHB "date rape" drug into the victim's drink, and sexually assaulted and raped her while she was unconscious. Upon waking up, she was taken to the hospital for examination, where doctors found both traces of GHB in her urine, and physical evidence of the sexual assault.[276] The victim also testified to having nightmares and being emotionally upset after the experience.[277] Palmer was subsequently convicted by the trial judge of rape, and sentenced to four years in prison.

Before the Air Force Court of Criminal Appeals, Palmer argued that the trial judge had erred by not allowing further evidence from the victim's psychotherapist records be used in cross-examination.[278] Prior to the rape, the victim had been seeing a psychotherapist and had taken a mental health questionnaire with forty-five questions on it. Several weeks after the rape, she re-took the same questionnaire. The military judge had released all records to both parties prior to trial, but only allowed the defense to cross-examine the victim on 5 of the 45 questions. Palmer's argument was that being allowed to cross-examine her on all the questions would have shown that her test results had not changed following the incident, indicating that the rape did not badly affect her.[279]

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[275] *See id*. (stating "[w]e agree with the military judge. As he pointed out, the evidence in the mental health records was 'scant.'")

[276] *See* Palmer, *supra* note 273 at 1-3 (describing the facts of the case).

[277] *See id*. at 4 (noting that the victim had testified about having nightmares and becoming upset whenever she encountered the perpetrator after the attack).

[278] *See id*. (outlining Palmer's assertions on appeal regarding the victim's mental health records).

[279] *See id*. ("The trial defense counsel's argument was that her overall interpersonal relations score remained essentially the same, which showed she was not affected by the rape.").

In its review of the trial judge's discretion, the court noted that judges "have broad discretion to impose reasonable limitations on cross-examination"[280] as per Rule 513(e)(4) procedures in the judge's determination of admissibility of patient records.[281] However, the Rule 513(8) exception allowing disclosure of communication when constitutionally required still requires admission of evidence if it is necessary for one's constitutional right to confront witnesses under the sixth amendment.[282] In the immediate case, the victim had testified about having nightmares after the incident, and the trial judge had restricted cross-examination using the questionnaire only to those items relevant to that specific testimony, and not all the mental health records. The court thus concluded that this narrowing by the trial judge had "struck an appropriate balance between the appellant's constitutional rights and the alleged victim's privileged communications to her mental health provider."[283] The conviction of Palmer was therefore upheld.

Hudgins[284] involved a similar situation to that of *Palmer*. In *Hudgins*, the defendant allegedly raped two airwomen in two different and separate times. Physical medical examination had confirmed at least one of the sexual assaults. One victim had reported the alleged rape weeks after it had occurred, only after experiencing nightmares and her boyfriend encouraged her to report it to her command. Hudgins had denied the charges and testified that the sex was consensual. The trial judge reviewed records from a psychotherapist the victim had been seeing, and released selected amounts to the defense.[285] Hudgins was ultimately convicted of the charges, but on appeal he argued the trial judge had erred by not providing more of the victim's psychotherapist records under the constitutionality exception of Rule 513(d)(8).[286] He argued the theory that the

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[280] *See* 2013 WL 6579713 at 4 (citing *U.S. v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F.2000)).

[281] *See* MIL. R. EVID. 513(e)(4) ("To prevent unnecessary disclosure of evidence of patient's records or communications, the military judge may issue protective orders or may a admit only portions of the evidence.").

[282] *See id*. at 4-5 (discussing the constitutionality requirements regarding cross examination and exceptions to privileged psychotherapist records).

[283] *Id*. at 5.

[284] 2014 WL 2038866 (A.F. Ct. Crim. App. Apr. 3, 2014).

[285] *See id*. at 1-4 (discussing the factual background to the case and the situation involving airman A1C PS).

[286] *See id*. at 5 (outlining the defendant's arguments that more of the victim's mental records should have been release because they were constitutionally required for at least two reasons).

psychotherapist records would have shown the victim's relationship with her boyfriend was not strong, and that she made up the allegation of assault so her boyfriend would not know the sex was consensual.[287]

In reviewing *Hudgins*' argument, the appellate court recognized that Rule 513(d)(8) required disclosure of psychotherapist records when constitutionally required.[288] It applied an analysis to determine if any error in not releasing further records was harmless beyond a reasonable doubt.[289] Noting that the records in question did not have any compelling evidence to show a poor relationship between the victim and her boyfriend, and the fact that defense counsel had an opportunity to cross examine the victim on the alleged issue but did not, the appellate court decided that any error was harmless beyond a reasonable doubt, and thus had no or little impact on the court-martial to find that the information was constitutionally required.[290]

D. Synopsis of Rule 513 Cases

Significant case law surrounding Military Rule of Evidence 513 case law has largely focused on evidence admissibility issues for information covered under one of the rule's broad exceptions. The *Klemick* case, and the incorporation of the court's holding into the post-NDAA 2015 Rule 513, have provided additional protections for mental health records by closing the constitutionality exception and clarifying the evidentiary

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[287] *See id*.:

> "He argues such records were constitutionally required for two reasons: (1) The defense could have used the records to counter A1C PS's testimony in the Mil. R. Evid. 412 hearing that her relationship with her boyfriend was very strong; and (2) The statements in the mental health records could have supported the defense's theory that A1C PS fabricated the sexual assault allegation to cover up a consensual sexual encounter with the appellant out of fear that her boyfriend would be upset with her."

Id.

[288] *See id*. (citing Rule 513(d)(8) regarding the constitutional exception to the psychotherapist privilege record).

[289] *See* 2014 WL 2038866 at 5-6 (examining the trial judge's admittance of evidence to determine if an error was harmless beyond a reasonable doubt).

[290] *See id*. at 5 ("Trial defense counsel's own actions therefore demonstrate that the additional evidence contained in A1C PS's mental health records was not so probative as to be constitutionally required, or if it was required to be disclosed, its absence was harmless beyond a reasonable doubt.").

threshold for *in camera* review of evidence for introduction. These changes presumably support the wider policy objectives of protecting victim's rights, as well as encouraging individuals to seek help from psychotherapists without fear that highly personal information would be used in cross-examination.

Outside of these cases, there is a dearth in case law examining the other parameters of the Rule 513 exceptions. *Jenkins* remains a vitally important holding. The narrow ruling indicates that testimony of a psychotherapist will be allowed under the dangerousness exception if the behavior of the person at issue rises to level of assault and death threats. This suggests that courts will examine the total circumstances of a case to determine if a psychotherapist's assessment of an individual as dangerous is warranted. The broader relevance of *Jenkin*s is that it reflects judicial deference to psychotherapists' determinations of dangerousness, and the extent to which the psychotherapist privilege is limited by the exception. This clearly reflects the valid military concerns of ensuring the safety and security of other personnel, and the success of military operations and missions.

V. Conclusion: Towards Guidance for Chaplains and Mental Health Practitioners in the Military

We found no cases directly involving chaplains and mental health providers working together in a military context, either by design or happenstance. Additionally, we found no instances of official regulation for the joint handling of confidential, sensitive information by chaplains and mental health providers working together. This seems to suggest that this is an area in need of policy guidance, particularly given the fact that the handling of sensitive mental health-related information is a significant concern for many servicemembers, and that efforts to integrate chaplains and mental health providers together have become more pronounced with the Integrated Mental Health Strategy. Recent surveys conducted by the DoD to explore implementation strategies of the Integrated Mental Health Strategy indicate that military chaplains welcome collaboration with mental health professionals.[291] The desire by both professionals in the field and leadership to improve collaboration also justifies a

[291] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 13 (2013) (discussing results of DVA / DoD chaplain survey which indicated 95% support for closer collaboration between chaplains and mental health professionals).

reconsideration of how the military rules of evidence would facilitate such collaboration, and whether any changes to the rules, or to practices, are necessary.

This review of the MRE 503 and 513 case law is helpful in conceptualizing how each rule facilitates the wider policy rationales of each privilege, and its applicability to the current needs of the military. Developments in Rule 513 demonstrate an adherence to wider policy goals. As recognized by the Supreme Court in *Jaffee* and the MCM commentary, the policy rationale behind the psychotherapist privilege codified in MRE 513 is to encourage servicemembers to seek help and counseling from mental health professionals.[292] This rationale is, however, balanced against the military interests of preventing dangers to oneself or others, criminal activities, or other issues that jeopardize safety, security, and the success of military missions.[293] This includes exceptions for other compelling societal and military interests, such as preventing child abuse.[294] Appellate case law surrounding MRE 513 reflected how the constitutionality exception of the rule allowed for mental health records to be scrutinized in courts. The NDAA 2015 amendments eliminating that exception thus reflect a clear intent to strengthen the psychotherapist privilege, furthering the policy of encouraging servicemembers to seek help from psychotherapists without a concern that such very personal information might be reviewable in evidentiary hearings. This development should thus be welcome by patient-servicemembers, plaintiff-victims, mental health professionals, and the military in general.

Whereas the policy rationale of the psychotherapist privilege is to encourage help-seeking behavior among servicemembers, the historical and still main policy reason behind MRE 503 is to facilitate free expression of religion within the services.[295] Courts like *Moreno* have recognized that this includes safeguarding communications between individuals and clergyman about deeply personal, troubling matters.[296]

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[292] *See supra* footnotes 208-216 and accompanying discussion about the policy rationale behind Rule 513.
[293] *See* MCM, *supra* note 24, MIL. R. EVID. 513(d)(1-7) (listing exceptions to the psychotherapist privilege).
[294] *See id*. at (d)(2) (stating no privilege for evidence of child abuse or neglect).
[295] *See supra* footnotes 77-84 and accompanying discussion about the policy rationale behind Rule 503.
[296] *See United States v. Moreno*, 20 M.J. 623 (A.C.M.R. 1985):

Cases under MRE 503 such as *Beattie*, *Isham*, and others, do indeed indicate that, at times, military chaplains are confronted with situations that present clear and sometimes immediate dangers.[297] Although it is unclear how often this occurs, it does raise legitimate questions about the clergy privilege. Commenters have debated why, for example, the compelling state interest in protecting children from abuse does not apply to military chaplains vis-a-vis an exception to privileged communications, when it does for military psychotherapists and their civilian clergy counterparts through state law.[298] No official rationale has been offered by military or courts to precisely explain the uniquely absolute privilege military clergy maintain, but it is likely a combination of historical deference to the profession, an unwillingness by the military to intrude on religious expression generally, and most importantly, a recognition that weakening the privilege would dis-incentivize confidential communications and counseling with chaplains. The absolute nature of the privilege thus seems to affirm an unspoken position by the military placing great value on the importance of completely confidential communications with chaplains and its role in troop morale and military life. This policy position is affirmed in rulings like *Beattie* and *Isham*, which recognize an important role for chaplains in referring troubled servicemembers to others in cases of immediate danger, while maintaining the confidentiality of communications.[299]

The desire of the military to integrate chaplains more prominently in mental health presents at least two different policy approaches. Professional military chaplains, such as certified pastoral counselors, have shown both greater aptitude and willingness to address servicemembers' mental health issues. This signifies an opportunity to potentially expand the role of military chaplaincy from its historical role of facilitating freedom of religious expression to a more pronounced and specific role in

> The privilege regarding communications with a clergyman reflects an accommodation between the public's right to evidence and the individual's need to be able to speak with a spiritual counselor, in absolute confidence, and disclose the wrongs done or evils thought and receive spiritual absolution, consolation, or guidance in return.

Id. at 626.

[297] *See supra* footnotes 111-122 and accompanying discussion on MRE 503 cases.

[298] For a comprehensive discussion of this debate, see Shane Cooper, *Chaplains Caught in the Middle: The Military's 'Absolute' Penitent-Clergy Privilege Meets State "Mandatory' Child Abuse Reporting Laws*, 49 NAVAL L. R. 128 (2002).

[299] *See supra* footnotes 111-122 and accompanying discussion on MRE 503 cases.

facilitating spiritual care within the larger military health system. The argument for doing so would be grounded in two general assertions. First would be that spiritual well-being plays an important role in overall well-being and health, and that chaplains are uniquely fit to address this role.[300] The second assertion would be that chaplains already play a *defacto* role as informal (and sometimes formal) mental health professionals, in addition to their traditional role of facilitating religious expression. A formal recognition of a shift in the overall responsibilities of military chaplains would be a major sea change in policy, however. Arguably, such a shift *might* involve a corresponding change in the MRE 503 as well, but such a debate would involve multiple considerations. We would anticipate that major questions would revolve around the extent to which the absolute privilege for clergy would be suitable in situations where chaplains assume a role that falls outside of religious communications, and into the realm of psychotherapy. The related major question would therefore be whether "spiritual care" is a part of religious communications (covered under MRE 503), or psychotherapy (covered under MRE 513), and identifying where the line between the two exists.

A second approach, and likely the approach that will be maintained for the foreseeable future, is maintenance of the status quo in terms of the official roles of chaplains and psychotherapists in the military, and their respective privileges of communication. However, this does not diminish the need to address the need to better facilitate integration and collaboration between the two professions in terms of improving practices. For example, the presence of chaplains in treatment settings is not new, but their role as an active treatment team member may not be fully understood by servicemembers who have expectations of complete confidentiality in

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[300] Numerous studies have linked spiritual health, religiosity, and well-being with the presence or absence of depression or other mental health issues, substance abuse issues, and health resiliency in general. This can be particularly prominent among military veterans and/or PTSD survivors. See for example, Kenneth Pargament & Patrick J. Sweeney, Building Spiritual Fitness in the Army: An Innovative Approach to a Vital Aspect of Human Development, 66 AM. PSYCHOLOGIST 58 (2011) (presenting the conceptual model for spiritual fitness within the U.S. Army). Numerous studies or models have linked spiritual health, religiosity, and well-being with the presence or absence of depression or other mental health issues, substance abuse issues, and health resiliency in general. See Jill Bormann et al., Spiritual Wellbeing Mediates PTSD Change in Veterans with Military-Related PTSD, 19 INTL. J. BEHAVIORAL MED. 496 (2012); Joseph m. Currier et al., Spiritual Functioning among Veterans Seeking Residential Treatment for PTSD: A Matched Control Group Study, 1 SPIRITUALITY IN CLINICAL PRACTICE 3 (2014); Brett Litz et al., Moral Injury and Moral Repair in War Veterans: A preliminary Model and Intervention Strategy, 29 CLINICAL PSYCH. R. 695 92009).

their interactions with them. Commenters have offered suggestions for how practices can be improved to clarify role boundaries and expectations, and develop or augment systems of support to further collaboration, effective communication, and positive outcomes for servicemembers. For example, credentialing of chaplains to work in mental health environments within military settings should include guidance to assist chaplains as they navigate the roles they occupy as spiritual advisors in conjunction with that of mental health treatment team member.[301] Standard language should be developed for chaplain use to explain the limits of privilege and the type of information they will share with other team members. Additionally, clear guidance must be made available to mental health professionals about what to expect from chaplains participating on treatment teams and the role of chaplains in general.[302] In cases where referrals to or from mental health professionals or chaplains to the other is an appropriate option, clear protocols should be developed for communications of necessary information while adhering to confidentiality.[303] The ultimate goal of such recommendations is to enhance access to safe, coordinated, quality mental health care for servicemembers that recognizes spiritual care as a treatment component.

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[301] *See* Denise Bulling et al., *Confidentiality and Mental Health/Chaplaincy Collaboration*, 25 MIL. PSYCH. 557, 565 (2014) (discussing recommendations for training chaplains to collaborate with mental health professionals).

[302] *See* Jason A. Nieuwsma et al., *Chaplaincy and mental health in the Department of Veterans Affairs and Department of Defense*, 19 J. HEALTH CARE CHAPLAINCY 3, 9-10 (2013) (discussing the need to improve understanding and trust between mental health professionals and chaplains in order to promote collaboration).

[303] *See* Jason A. Nieuwsma et al., Improving Patient-Centered Care via Integration of Chaplains with Mental Health Care, DVA/DoD Joint Incentive Fund project final report 26 (2015) (outlining progress towards streamlining and adjusting referral practices between mental health and chaplaincy within DVA and DoD settings).