**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| **UNITED STATES,**<br>Appellee<br><br>v.<br><br>**Salvador JACINTO**<br>Aviation Structural Mechanic First Class Petty Officer (E-6)<br>U.S. Navy<br>Appellant | **REPLY BRIEF ON BEHALF OF APPELLANT**<br><br>Crim. App. Dkt. No. 201800325<br><br>USCA Dkt. No. 20-0359/NA |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

MICHAEL W. WESTER
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-5188
michael.wester@navy.mil
Bar no. 37277

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## I.

**A MILITARY JUDGE MAY GRANT A CONTINUANCE FOR REASONABLE CAUSE AS OFTEN AS MAY APPEAR JUST. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING APPELLANT'S FIRST CONTINUANCE REQUEST AFTER THE GOVERNMENT DISCLOSED ONLY DAYS BEFORE TRIAL THE COMPLAINING WITNESS LIKELY SUFFERED FROM A PSYCHOTIC CONDITION?**

A. The Government fails to reconcile the military judge's decision to proceed to trial without waiting for the hospital to clarify the records.

The Government acknowledges the military judge ordered the Government "to get in touch with the hospital and see if they can get someone to decipher what the records mean."[1] Yet it fails to acknowledge that he forced the defense to go to trial before he clarified this. As counsel explained in its motion the day before trial, it "remain[ed] unknown why a medical professional chose to prescribe Thorazine to E.B. for psychotic agitation, if in fact she did not show signs of such illness."[2]

On the record, the military judge acknowledged there were strong reasons to believe the records would yield highly probative evidence.[3] After all, the defense

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[1] Ans. at 8.
[2] J.A. 830.
[3] J.A. 638 ("I've got paperwork here that says—and witness testimony that says she was prescribed something for psychotic agitation."); J.A. 638-39 ("But are you telling me that, you know, the government's reading of this document, understanding you're not any of the physicians or psychiatrists that filled out this paperwork, is that . . . the defense shouldn't even be able to bring up the fact that

had presented evidence that E.B. was prescribed "a very serious antipsychotic neuroleptic medication" one day after bringing back allegations she had previously recanted.[4] The defense expert had testified that a person with psychotic agitation "may be more acting out" "may not be reacting appropriately or accurately to their environment" and may be "laboring under the burden of delusions."[5] E.B.'s behavior was consistent with this: the evidence also showed that the day after E.B. brought back the allegations, she fabricated a story to her school counselor of having taken ecstasy[6]—though the military judge did not allow the defense to elicit these facts at trial.[7]

Despite this evidence, the military judge expressed a lack of understanding about the nonprivileged records and wanted clarity before "breaking open the mental health records."[8] Thus, he ordered the government to "get in touch with the

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she was prescribed a medication that can be prescribed for psychotic agitation?"); J.A. 654 ("But that combined with what appeared to be symptoms of psychotic agitation. . . from an individual on here, that combined with the expert witness' testimony and that a person who's suffering from psychotic agitation may be stimulated externally, *I've got in all caps, misperceiving, things that are not really happening*[.]") (emphasis added).

[4] J.A. 622.

[5] J.A. 611.

[6] J.A. 503; J.A. 686 (stating that the drug test at the hospital came back negative).

[7] *See* R. at 1040-43.

[8] J.A. 649 ("Do we have any ER records in this case? And do we know if there are ER records that are mental health records that are separate and apart from the inpatient mental health records? I'm going to assume the answer is that we don't know. But if we do know, I'd like to know that information because that may

hospital and see if they can get someone to *decipher what the records mean*, without getting into the specific—you know, any specific mental health statements or anything that would be covered by [M.R.E.] 513."[9]

Given his lack of understanding, the military judge should have waited. As the Government concedes, it would have suffered no prejudice from a brief continuance, the length of the requested continuance was reasonable, and Appellant requested the continuance in good faith.[10] Instead, the military judge denied the continuance without any legal reasoning.[11] Without waiting for a definitive answer, he ruled there was "no evidence" E.B. "ever experienced psychotic agitation" or took Thorazine.[12]

This was "'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay[.]'"[13]

B. <u>That the Government concedes Appellant was surprised by the evidence only further explains why a continuance was the proper remedy</u>.

In *Williams v. Florida*, the Supreme Court explained that a continuance

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certainly be a way to handle—to provide some clarity on this issue without breaking open the mental health records.").

[9] J.A. 653 (emphasis added).

[10] Ans. at 24 (conceding that eight of the twelve factors from *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997) favored Appellant).

[11] J.A. 564 ("Motion denied. See you all tomorrow morning.").

[12] J.A. 821.

[13] *Miller*, 47 M.J. at 358 (citation omitted).

would be proper if the defense surprised the Government at trial by calling an alibi witness without prior notice.[14] Similarly, the Advisory Committee Notes of Federal Rule of Evidence 403 advocate in favor of "the granting of a continuance" rather than excluding evidence when a party alleges "unfair surprise."[15]

The same logic should have applied here. The Government concedes that Appellant was surprised by the Government's last-minute disclosure of E.B.'s mental health records.[16] Indeed, as the defense explained in its motion, the Government had been telling it for months E.B. had *not* been prescribed antipsychotic medication.[17] Thus, when the defense requested a two-week continuance to investigate the evidence, the proper remedy was a continuance.

C. The Government's argument that Appellant must point to specific evidence that would have been admitted at trial ignores that Appellant was not given enough time to investigate and present such evidence.

The Government claims that even if the military judge erred by not giving Appellant time to investigate the new evidence, Appellant cannot show prejudice since he could not show the specific evidence in E.B.'s records that would have

[14] *Williams v. Florida*, 399 U.S. 78, 85-86 (1970) ("Petitioner concedes that absent the notice-of-alibi rule the Constitution would raise no bar to the court's granting the State a continuance at trial on the ground of surprise as soon as the alibi witness is called.").
[15] Fed. R. Evid. 403, Advisory Committee Note (1972).
[16] Ans. at 24.
[17] J.A. 826.

been admitted at trial.[18]

This overlooks that the military judge's ruling prevented the defense from investigating and obtaining the evidence. As this Court wrote in *Miller*, an appellant can be prejudiced by the denial of a continuance that prevents him from mounting an adequate defense.[19] Additionally, as one federal circuit has held, an accused need not "produce actual new evidence to show prejudice."[20] As the court explained, "[n]ot only would such a rule expect defendants to know the results of investigations they were not given time to conduct, it would overload the resources of criminal defendants and their attorneys and strain the rules of appellate procedure by requiring defendants to supplement the record."[21]

So too here. The defense expert explained a review of the "complete record" was necessary, and the defense was trying to follow this advice by requesting more time to investigate records even the military judge acknowledged were important.

D. Even if Appellant could only show prejudice by demonstrating the materiality of expected evidence, he satisfied his burden in this case.

As the Supreme Court has explained, where it is not possible to interview a

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[18] Ans. at 26 ("But Appellant fails to acknowledge that the Military Judge separately found evidence of E.B.'s Thorazine prescription to be not relevant, and therefore inadmissible—Rulings which he does not challenge.").
[19] 47 M.J. at 359 ("Certainly in this case, where defense counsel had so little time to prepare, it would be difficult to find harmless error.").
[20] *United States v. Williams*, 576 F.3d 385, 391 (7th Cir. 2009).
[21] *Id*.

witness, an appellant can still demonstrate the necessity of such a witness by explaining "the events to which a witness *might* testify, and the relevance of those events to the crime charged[.]"[22]

Here, the defense met this standard. It presented testimony from its expert witness explaining that E.B. was most likely suffering from a "thought disorder" causing "aberrant" behavior causing one to be "unable to perceive their environment correctly" when she brought back the allegations.[23] It explained the evidence would affect E.B.'s "ability to recall and recount" the allegations.[24] It proposed having the Government "enter into a stipulation with the Defense regarding the anti-psychotic prescription records, so that the Defense may offer it as substantive evidence."[25] But the Government opposed any mention of the mental health evidence at trial.[26]

In short, Appellant cannot be faulted for failing to articulate the specific evidence that would have been admitted when he was deprived sufficient time to investigate such evidence—and the Government rejected a stipulation proposal.

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[22] *United States v. Valenzuela-Bernal*, 458 U.S. 858, 871 (1982) (emphasis added).
[23] J.A. 611, 619-20.
[24] J.A. 830.
[25] J.A. 761.
[26] J.A. 779 ("Any mention of Thorazine or 'Psychotic Agitation' should not be allowed as it is not relevant, and any probative value of the information is substantially outweighed by the unfair prejudice to E.B.").

## II.

## THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO CONDUCT AN IN CAMERA REVIEW OF THE MENTAL HEALTH RECORDS AFTER APPLYING THE WRONG LEGAL STANDARD.

### A. The Government concedes the removal of the constitutional exception from M.R.E. 513 did not alter Appellant's constitutional rights and that a military judge may issue remedies in the event of nondisclosure.

The Government and Appellant agree on two key points.

First, the Government concedes the removal of the constitutional exception from M.R.E. 513 did not curb Appellant's constitutional rights. The Government correctly finds *Holmes v. South Carolina* on point for the authority that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense" whether based in the Due Process, Compulsory Process, or Confrontation Clauses.[27] The Government also cites case law finding it "axiomatic" that the changes to M.R.E. 513 did not affect Appellant's constitutional right to a fair trial.[28]

Second, the Government agrees that even if Appellant could not meet his burden for in camera review under the changes to M.R.E. 513, the military judge

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[27] Ans. at 27 (citing 547 U.S. 319, 324 (2006)).
[28] *Id*. at 32 (citing *L.K. v. Acosta*, 76 M.J. 611, 615 (A. Ct. Crim. App. 2017); *see also Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

could issue remedies to cure any harm to Appellant's right to a fair trial.[29] The Government cites R.C.M. 907 (dismissal), R.C.M. 915 (mistrial), and M.R.E. 403 (excluding government evidence).[30]

B. Appellant argues that in camera review was necessary, not that the military judge could order in camera review over E.B.'s objections.

To clarify, Appellant does not argue the military judge had authority to order in camera review over E.B.'s objections. Nor does he challenge the constitutionality of M.R.E. 513. Rather, he argues the military judge erred in concluding that in camera review was not necessary to a fair trial after relying on clearly erroneous facts.[31] Specifically, the military judge's finding that there was "no evidence"[32] E.B. experienced psychotic agitation or took Thorazine was contradicted by the records themselves and the defense expert's analysis of them. As the defense expert explained, the records "very clearly" stated "the reason for giving [Thorazine] is, quote, psychotic agitation."[33]

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[29] *Id*. at 37 ("Third, the limitation does not preclude an accused from seeking remedy for alleged violations of the right to present a meaningful defense, it merely directs an accused to other remedies prescribed by the President.").
[30] Ans. at 37.
[31] *Cf.* J.A. 824 ("But the defense has not made a specific enough showing that the [sic] leads this court to conclude it ought to conduct an *in camera* review of privileged records. An accused's right to present a defense is not without limits, and here the defense must do more than assert the records might be helpful.") (italics in original).
[32] J.A. 821.
[33] J.A. 615.

C. The Government's new argument that M.R.E. 513(e)(3) is an "incorrect test" is itself incorrect: a military judge must still apply this test regardless of the removal of the constitutional exception.

Before the lower court, the Government did not challenge *J.M.* or ask the lower court to overrule it. To the contrary, in its brief, it claimed the military judge applied the "correct law" when he relied on *J.M.* and M.R.E. 513(e)(3).[34]

But now, it argues the exact opposite. It claims that M.R.E. 513(e)(3) is an "incorrect test" and *faults* the lower court for relying on it.[35] Despite this, it points to no test the lower court should have applied.[36] It merely claims that once the President removed the constitutional exception, M.R.E. 513(e)(3) became "inapplicable to claims that exercise of the privilege violates an accused's constitutional rights."[37]

The Government's new claim is incorrect. Even though there is no longer a constitutional exception, M.R.E. 513 still governs the issue. Under M.R.E. 513(e), the moving party still must file a written motion describing the specific evidence

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[34] *See* Answer on Behalf of Appellee (Sept. 19, 2019) at 38 ("Here, after citing Mil. R. Evid. 513(e)(3) and *Payton-O'Brien*, the Military Judge determined that Appellant failed to demonstrate 'a reasonable probability that the records contain information otherwise unavailable to the defense, and that the information sought is vital to the defense theory of the case.'") (citation omitted).
[35] Ans. at 29, 32 n.5.
[36] *Id*. at 37.
[37] *Id*. at 32.

sought.[38] The military judge must still conduct a closed hearing.[39] And a military judge must still apply M.R.E. 513(e)(3) before ruling on whether in camera review is necessary.[40] While M.R.E. 513(e)(3) no longer compels disclosure under a constitutional exception, it remains the starting point in determining whether in camera review is necessary to a fair trial.[41]

Here, the military judge correctly noted his duty to apply M.R.E. 513(e)(3) but erred in his conclusion that Appellant did not make "a specific enough showing" that in camera review was necessary despite the removal of the constitutional exception.[42]

D. Even if M.R.E. 513(e)(3) were inapplicable, *J.M. v. Payton-O'Brien* follows this Court's precedents and the Rules for Courts-Martial, which afford military judges broad discretion to regulate discovery, including to review evidence in camera and issue remedies in the event of nondisclosure to ensure a fair trial.

As the Government concedes, even if M.R.E. 513(e)(3) were inapplicable, a court would need to craft an appropriate remedy to ensure a fair trial.[43] Before

[38] M.R.E. 513(e)(1)(A).
[39] M.R.E. 513(e)(2).
[40] M.R.E. 513(e)(1)(A).
[41] *J.M.*, 76 M.J. at 789 ("The procedure to determine admissibility of the victim's records or communications under Mil. R. Evid. 513(e)(2) begins in a closed hearing, where the military judge applies the same test for *in camera* review found in Mil. R. Evid. 513(e)(3).") (italics in original).
[42] J.A. 824.
[43] Ans. at 37.

doing so, a court would need to provide a legal framework explaining when such remedies were necessary. The framework in *J.M.* aligns closely with this Court's precedents and the Rules for Courts-Martial.

As the NMCCA in *J.M.* explained, it relied on *United States v. Bowser*.[44] In *Bowser*, trial counsel invoked the attorney work-product privilege after the military judge ordered him to submit interview notes for in camera review believing they may have contained evidence favorable to the defense.[45] When he refused to do so, the military judge dismissed all charges and specifications with prejudice.[46] On an interlocutory appeal, the Air Force CCA affirmed, noting that a "military judge receives broad deference in matters of trial management and choice of remedy[.]"[47]

On certification, this Court affirmed the CCA's decision.[48] This Court explained that "a judge is ultimately responsible for the control of his or her court and the trial proceedings," and that "[p]roper case management during a trial, necessary for the protection of an accused's due process rights and the effective administration of justice, is encompassed within that responsibility."[49] This Court

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[44] *J.M.*, 76 M.J. at 790 (citing 74 M.J. 326 (C.A.A.F. 2015) (summary disposition)).
[45] 73 M.J. 889, 892-93 (A.F. Ct. Crim. App. 2014).
[46] *Id*. at 894.
[47] *Id*. at 903.
[48] *Bowser*, 74 M.J. at 326.
[49] *Id*. (quoting *United States v. Vargas*, 74 M.J. 1, 8 (C.A.A.F. 2014)).

recognized that "a judge has broad discretion and a range of choices in crafting a remedy to cure discovery violations and ensure a fair trial[.]"[50]

*J.M.* adopted a similar rationale. As the NMCCA explained at the outset, it did not disturb Congress' removal of the constitutional exception from M.R.E. 513.[51] Rather, as in *Bowser*, it explained that "when the failure to produce said information for review or release would violate the Constitution, military judges may craft such remedies as are required to guarantee a meaningful opportunity to present a complete defense."[52] It explained that a military judge should first apply M.R.E. 513(e)(3) to determine if in camera review is necessary.[53] If so, the military judge should then ask the holder of the privilege if he or she would be willing to waive it for in camera review.[54]

This approach was similar to that in *United States v. Wuterich*.[55] There, a news organization moved to quash a subpoena to produce unaired footage citing a "'qualified reporter's privilege.'"[56] This Court ultimately concluded that even if a privilege applied, "such a privilege would not preclude an in camera review

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[50] *Id*.
[51] *J.M.*, 76 M.J. at 783.
[52] *Id*.
[53] *Id*. at 789.
[54] *Id*. at 790.
[55] 67 M.J. 63 (C.A.A.F. 2008).
[56] *Id*. at 66.

pursuant to R.C.M. 703(f)(4)(C) under the circumstances of the present case."[57]

Indeed, *J.M.'s* approach affording the holder of the privilege the option to waive it for in camera review is supported by R.C.M. 703(f)(4)(C)[58] *and* R.C.M. 701(g)(2).[59] Likewise, *J.M.'s* proposed remedies in the event of nondisclosure find a home in R.C.M. 703(f)(2), which states that when a party refuses to provide evidence "essential to a to a fair trial," a military judge "shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings" unless the moving party is at fault.[60]

Thus, *J.M.* adheres to this Court's precedents and aligns with the broad discretion given to military judges in the Rules for Courts-Martial to ensure the accused's right to a fair trial.

E. The Government's claim that Appellant was able to attack E.B.'s credibility on other matters ignores that an accused has the right to explore all relevant avenues of impeachment—especially evidence relating to a witness' inability to accurately perceive due to a mental defect.

The Government argues that Appellant was able to elicit that E.B. was "in

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[57] *Id*. at 79.
[58] R.C.M. 703(f)(4)(C) (explaining that if a person in custody of evidence objects to its disclosure, a military judge "may direct that the evidence be submitted to the military judge for an in camera inspection").
[59] R.C.M. 701(g)(2) (providing that in regulating discovery, a military judge "may make such other order as is appropriate" and may permit inspection of evidence "only by the military judge").
[60] R.C.M. 703(f)(2).

trouble" when she made the allegations and elicited her inability to recall some details of the events.[61] This overlooks that "the defendant has the right to explore every facet of relevant evidence pertaining to the credibility of those who testify against him."[62] This includes "relevant evidence of a mental defect or treatment at a time probatively related to the time period about which [the witness] testified."[63]

As one federal court has explained, it could think of "no more relevant or significant material than a hospital record indicating that a witness who is testifying. . . had been under treatment for mental illness which rendered him at that time delusional and hallucinatory with poor judgment and insight."[64] Likewise, this Court has explained that evidence of a witness' mental health "should be admitted if it relates to the witness's ability to perceive events and testify accurately."[65]

Here, the military judge did not allow the defense to present any evidence that E.B. was prescribed Thorazine for psychotic agitation.[66] As a result, Appellant

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[61] Ans. at 39.
[62] *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974).
[63] *Id*.
[64] *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 1980 U.S. App. LEXIS 21757, *23 (4th Cir. 1980).
[65] *United States v. Sullivan*, 70 M.J. 110, 117 (C.A.A.F. 2011).
[66] J.A. 825 ("Evidence of a prescription of an anti-psychotic medication and the stated reason for that prescription being 'psychotic agitation' is not admissible at trial.") (emphasis in original).

was prevented from presenting a theory that E.B. was suffering from a "thought disorder" causing her to experience "delusions" when she made the allegations against Appellant.[67] This could have caused reasonable court members to "'receive a significantly different impression of the [witness]'s credibility."[68]

1. The prejudice was compounded when the Government forensic psychologist testified it was common for child victims to forget details of events but also stated she saw no reason to believe E.B.'s memory was distorted.

Additionally, it is important to consider that while Appellant was denied the opportunity to elicit E.B.'s psychotic condition, the Government was able to *bolster* the reliability of E.B.'s memory. After the defense cross-examined E.B. on inconsistencies in her testimony, the Government forensic psychologist testified that this was common in child sexual abuse cases.[69] The expert also opined that she saw no reason to believe E.B.'s memory was affected by confabulation or similar distortions.[70] Based on this, trial counsel argued in summation that there was "nothing" that would cast doubt on the reliability of E.B.'s memory.[71]

## Conclusion

This Court should set aside the findings and sentence.

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[67] J.A. 611, 619.
[68] *United States v. Chisum*, 77 M.J. 176, 180 (C.A.A.F. 2018) (citation omitted).
[69] J.A. 291-92.
[70] J.A. 302 (answering "No" to trial counsel's question of whether she has seen evidence of "suggestibility" or "confabulation" in E.B.'s testimony).
[71] J.A. 422-23.

## Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c)(2) because: This brief contains less than 7,000 words.

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## Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on May 5, 2021.

MICHAEL W. WESTER
Lieutenant, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-5188
michael.wester@navy.mil
Bar no. 37277