IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Wendell E. MELLETTE, Jr.** Electrician's Mate (Nuclear) First Class (E-6) U.S. Navy, Appellant	**REPLY ON BEHALF OF APPELLANT** USCA Dkt. No. 21-0312/NA Crim. App. Dkt. No. 201900305

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

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I.

THE LOWER COURT ERRED BY CONCLUDING THAT DIAGNOSES AND TREATMENT ARE PRIVILEGED BY THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER M.R.E. 513.

A. The Government was right the first time: M.R.E. 513(a) protects only communications made to *facilitate*—bring about—diagnosis or treatment, not the diagnosis and treatment *resulting from* the communications.

The Government has completely changed its position. Before the Court of Criminal Appeals (CCA), the Government's argument header stated that "[t]he plain language of Mil. R. Evid. 513 only protects 'communications' between patients and psychotherapists [and] does not extend to records of mental health treatment, diagnoses, or prescriptions."[1] It cited a 2014 definition of "communication" from *Black's Law Dictionary* for the proposition that 'communication' in M.R.E. 513 refers to the "interchange of messages or ideas by speech, writing, or conduct" before writing:

> Nothing in the common definition of 'communication' or the phrase limiting the extension of the privilege to only communications made *for the purpose* of diagnosis or treatment suggests the President intended to extend the privilege to diagnosis and treatment *resulting from* the communication.[2]

It argued that to extend the privilege "to treatments, diagnoses, and

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[1] *See* Ans. on Behalf of Appellee (Nov. 12, 2020) at 25.
[2] *Id*. at 25-26 (citing *Black's Law Dictionary*, 336 (10th ed. 2014) (emphasis in original)).

prescriptions would ignore the President's delineation of the [privilege]."[3]

The Government did not stop there. It also told the CCA not to follow the majority opinion in *H.V. v. Kitchen*.[4] Instead, it favorably quoted the *dissent*, which wrote that the specific wording the President chose in crafting M.R.E. 513 balanced "'the important interests in protecting confidential communications, while also respecting the need for probative evidence . . .'"[5] By the same token, the Government stated the *Kitchen* majority was "incorrect" for holding that diagnosis and treatment were privileged, explaining that "the court did not acknowledge the plain language limitation of the Rule and did not cite rules of statutory interpretation."[6]

Finally, the Government asked the CCA not to rely on the Supreme Court's understanding of the psychotherapist-patient privilege in *Jaffee v. Redmond*.[7] The Government cited *United States v. Rodriguez*, where this Court wrote that "'the psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee* [*v. Redmond*] as being part of federal common law' did not apply in courts-martial" because the President 'occup[ied] the field' on this matter through M.R.E. 513."[8]

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[3] *Id*. at 27.
[4] *Id*. at 27 (citing *H.V. v. Kitchen*, 75 M.J. 717 (C.G. Ct. Crim. App. 2016)).
[5] *Id*. (quoting 75 M.J. 717, 721 (Bruce, J., dissenting)).
[6] *Id*. at 29.
[7] *Id*. at 27-29 (citing *Jaffee v. Redmond*, 518 U.S. 1 (1996)).
[8] *Id*. at 28 (quoting *United States v. Rodriguez*, 54 M.J. 156, 157, 161 (C.A.A.F. 2000)).

Yet now, the Government has changed its position on all three points. It now argues that diagnosis and treatment *are* privileged, citing a definition of "communication" from an *earlier* version of *Black's Law Dictionary*.[9] It now cites the *Kitchen* majority favorably.[10] It even asks this Court to rely on *Jaffee*.[11] It argues that because "communication" refers to "'the expression or exchange of information by speech, writing, gestures, or conduct,'" as well as "'the process of bringing an idea to another's perception,'" this word must necessarily extend to diagnosis or treatment when used in M.R.E. 513(a). After all, it argues, diagnosis and treatment are communicated to the patient, either directly or indirectly.[12]

This new argument ignores the surrounding language in the Rule. As the Government argued before the CCA, the President did not place the term "confidential communication" in isolation. Rather, he qualified it with the phrase "made for the purpose of facilitating diagnosis and treatment."[13] Merriam-Webster defines "facilitate" as "to make (something) easier: to help cause (something)" and

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[9] Answer on Behalf of Appellee (Dec. 20, 2021) at 18 (citing *Black's Law Dictionary*, (8th ed. 2004)).
[10] *Id*. at 17 (citing *Kitchen*, 75 M.J. at 719).
[11] *Id*. at 23-24.
[12] *Id*. at 18 ("Practically, the psychotherapist also documents those communications—the diagnosis, the prescriptions, and the treatments—in patient records.") (quoting *Communication, Black's Law Dictionary* (8th ed. 2004)).
[13] *See* Ans. on Behalf of Appellee (Nov. 12, 2020) at 27 (citing MANUAL FOR COURTS-MARTIAL [M.C.M.], UNITED STATES (2019), Military Rule of Evidence (M.R.E.) 513(a)).

to "help bring about."[14] Applied in the context of M.R.E. 513(a), this suggests that the term "confidential communication" refers to those communications that help the psychotherapist *bring about* diagnosis or treatment. Thus, the term "communication" would not refer to the diagnosis or treatment itself, even if these are communicated to the patient verbally or in medical records.

To illustrate further, to accept the Government's position would allow for the following interpretation of the Rule:

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

Such a reading does not make sense. A patient does not "make" a diagnosis or treatment between himself and the psychotherapist. Rather, the diagnosis and treatment are matters rendered by the psychotherapist after developing an understanding the patient's mental health condition through conversations.

Additionally, such a reading would sidestep the canon that 'a word is known by the company it keeps,' which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of

[14] "Facilitate." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/facilitate. Accessed Jan. 11, 2022.

Congress."[15] Indeed, as the Government argued before the CCA, this Court should carefully examine the President's words in M.R.E. 513(a).[16] And in M.R.E. 513(a), he used "diagnosis or treatment" to *qualify* "communication."

Finally, it is telling that the Government does not respond to Appellant's citation of the rule that privileges "are narrowly construed."[17] And here, even if "confidential communication" could have a potentially broad meaning, there is a plausible narrower reading. In reality, the narrower reading is also the *most natural* reading: M.R.E. 513(a) protects only those private conversations between the patient and provider that help the provider give a diagnosis and treatment.

B. <u>The Government's reliance on M.R.E. 513(b)(5) is misplaced: this term does not deal with the scope of the privilege. Regardless, this term does not suggest that diagnosis and treatment are privileged</u>.

The Government wants this Court to look outside M.R.E. 513(a) to understand the scope of the privilege by seizing upon the term "evidence of a patient's records or communications."[18] This term is not used in M.R.E. 513(a) but rather M.R.E. 513(e), a section of the Rule discussing preliminary procedures before a military judge may order production or admission of mental health

[15] *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).
[16] Ans. on Behalf of Appellee (Nov. 12, 2020) at 27.
[17] *United States v. Jasper*, 72 M.J. 276, 280 (C.A.A.F. 2013) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).
[18] Ans. on Behalf of Appellee (Dec. 20, 2021) at 19-20.

evidence.[19] Used in M.R.E. 513(e)(2) specifically, the term "evidence of a patient's records or communications" is defined as:

> [T]estimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.[20]

The Government then concludes that this definition must be an extension of the privilege since *another* section of M.R.E. 513(e) uses the word "protected." Specifically, the Government points to M.R.E. 513(e), which provides that a military judge may examine mental health records if necessary "to rule on the production or admissibility of *protected* records or communications."[21]

But nothing within M.R.E. 513(e)—the only section of the Rule in which the term "evidence of a patient's record or communications" is used—suggests this section should be read as expanding upon M.R.E. 513(a). Rather, by its own terms, M.R.E. 513(e) merely tells a military judge how to review and disclose confidential communications that would otherwise be covered by M.R.E. 513(a) but are *not* because an exception applies.[22]

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[19] M.R.E. 513(e)(2).
[20] M.R.E. 513(b)(5).
[21] Ans. on Behalf of Appellee (Dec. 20, 2021) at 20 (citing M.R.E. 513(e)(3) (emphasis added)).
[22] M.R.E. 513(e)(3)(B) ("Prior to conducting an in-camera review, the military judge must find by a preponderance of the evidence that the moving party showed . . . that the requested information meets one of the enumerated exceptions under subdivision (d) of this rule.").

Such an interpretation would not render R.C.M. 703 superfluous, contrary to the Government's argument.[23] Unlike M.R.E. 513(e)(3), R.C.M. 703 does not directly address how a military judge should handle mental health records.[24] Likewise, R.C.M. 703 does not address how a military judge should separate unprivileged from privileged mental health evidence when reviewing it.[25]

Regardless, even assuming *arguendo* the term "evidence of a patient's records or communications" were an extension of the privilege, this would not lead to the conclusion that a patient's diagnosis or treatment are privileged. The term applies only to evidence relating to the *patient's* communications.[26] And diagnosis and treatment are not communicated by the patient, as the Government concedes earlier in its brief.[27]

Additionally, the Government's interpretation would also suffer from the

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[23] Ans. on Behalf of Appellee (Dec. 20, 2021) at 20.
[24] *Cf.* R.C.M. 703(g)(3)(B) (stating that trial counsel may issue a subpoena for evidence not under the control of the government but not specifying how this evidence should be reviewed before disclosure).
[25] *Cf.* M.R.E. 513(e)(4) ("Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, *or portions of such records or communications*, that meet the requirements for one of the enumerated exceptions to the privilege. . . .") (emphasis added).
[26] M.R.E. 513(b)(5).
[27] Ans. on Behalf of Appellee (Dec. 20, 2021) at 18 ("As part of that 'examination,' the psychotherapist confidentially communicates to the patient his medical conclusions of her 'diagnosis as well as an application of remedies'—the treatment and any prescriptions—to 'effect a cure of an injury or disease.'") (citing J.A. 437).

same problem of ignoring the canon that 'a word is known by the company it keeps.' Similar to the term "confidential communication" in M.R.E. 513(a), the term "evidence of a patient's records or communications" in M.R.E. 513(b)(5) is qualified by the phrase: "that pertain to communications by a patient to a psychotherapist . . . *for the purposes of diagnosis or treatment* of the patient's mental or emotional condition."[28] Like with M.R.E. 513(a), the President's decision to qualify "evidence of a patient's records or communications" with "for the purposes of diagnosis or treatment" strongly suggests he intended the term to cover communications *leading to* diagnosis or treatment—but not including these.

C. The lawyer-client privilege would not cover "professional legal services" just as the psychotherapist-patient privilege does not cover "diagnosis and treatment."

The Government also asks this Court to consult the lawyer-client privilege in M.R.E. 502(a) to interpret "diagnosis or treatment" in M.R.E. 513(a).[29] Even assuming *arguendo* the two privileges were *in pari materia* such that one could interpret the other, the wording of M.R.E. 502(a) would not lead to the conclusion that diagnosis or treatment in M.R.E. 513(a) are privileged.

M.R.E. 502(a) shields "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client" between the

[28] M.R.E. 513(b)(5) (emphasis added).
[29] Ans. on Behalf of Appellee (Dec. 20, 2021) at 20-23.

client and lawyer and others.[30] Similar to M.R.E. 513(a), the term "confidential communications" is qualified by a phrase: "for the purpose of facilitating the rendition of professional legal services."[31] Thus, the Rule only privileges communications that facilitate—bring about—something: "the rendition of professional legal services." It does not follow that the "professional legal services" would be privileged. Rather, only the confidential communications between the lawyer and client that *brought about* such services are privileged.

Such an interpretation is consistent with how federal courts understand the attorney-client privilege. As the Fourth Circuit has explained, "the attorney-client privilege does not protect all aspects of the attorney-client relationship, it protects only confidential communications occurring between the lawyer and his client."[32] A leading treatise similarly explains that for the privilege to apply, "'the communication claimed to be privileged must have been made in confidence.'"[33]

In the same way, M.R.E. 513(a) only privileges the confidential communications that led to the diagnosis or treatment, not diagnosis or treatment.

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[30] M.R.E. 502(a)-(1).
[31] M.R.E. 513(a).
[32] *Hawkins v. Stables*, 148 F.3d 379, 384-85 (4th Cir. 1998).
[33] *Id*. (quoting 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure*, § 5722 at 514-15 (1992)).

II.

THE LOWER COURT ERRED BY CONCLUDING THE EVIDENCE WAS BOTH PREJUDICIAL AND NON-PREJUDICIAL WITHOUT REVIEWING IT AND THUS THIS COURT SHOULD REMAND FOR AN EVIDENTIARY HEARING.

A. The claim that the defense "already had" the evidence is incorrect: the defense had S.S.' incomplete recollection of her diagnoses and treatment based on her admittedly bad memory as well as conflicting answers on when she stopped receiving treatment. Thus, review of her records was essential.

The Government claims Appellant "already had the requested information" regarding S.S.' mental health.[34] In reality, the defense had only a limited understanding of S.S.' mental health condition based on S.S.' limited recollection during a deposition six years after she underwent inpatient treatment.

To illustrate, in S.S.' deposition, the following exchange took place:

[redacted]

[34] Ans. on Behalf of Appellee (Dec. 20, 2021) at 31.

[redacted]

Her mother likewise could not definitively recall her medications.[36]

Additionally, when reflecting about medications she was taking six years after leaving inpatient treatment, [redacted]

[redacted]

On top of this, S.S. admitted she had a poor memory. During the same

[35] J.A. 494.
[36] J.A. 563 [redacted]
[37] J.A. 494-95 (emphasis added).

deposition, the following exchange took place:

Likewise, as S.S. testified at trial, she could "remember things from a couple weeks ago but not a couple years ago."[39]

It also worth noting that S.S.' poor memory seemed to reveal itself during the deposition as she gave conflicting answers on when she received treatment. For example, at one point, [redacted] Yet in an interview months later with trial counsel, she disclosed [redacted] which would have been *two to three years* following her inpatient treatment.[41] Likewise, as quoted above, S.S.

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[38] J.A. 525
[39] J.A. 103.
[40] J.A. 497 ("About a year.").
[41] These notes are contained within J.A. 573 and were originally included as an enclosure to the defense motion, which is J.A. 438. The Government referred to them as "handwritten notes from an interview with the Victim" in its motion to

told an attorney in her deposition that she took medications in 2019 that gave her "really bad nightmares."[42] This would suggest that she continued to receive some form of mental health treatment *six years* after her inpatient treatment.

Thus, contrary to the Government's suggestion that the defense "already had" the evidence, S.S.' admitted inability to recall all her medications, her poor memory, and her conflicting answers on when she stopped receiving mental health care show why this was not true.

B. The claim that the defense "strategically" chose not to use the mental health evidence it had overlooks: (1) the evidence's usefulness depended on review of S.S.' long-term records, which the military judge refused to order produced; and (2) the military judge had already ruled that Borderline Personality Disorder was irrelevant.

There is no merit to the Government's claim that the defense "strategically chose" not to cross-examine S.S. on the limited mental health evidence it had.[43]

First, the defense was given an incomplete account of S.S.' mental health treatment history that had no value apart from review of S.S.' long-term records. Before trial, Dr. Holguin explained why S.S.' cutting may have meant that she had a disorder causing "attention-seeking and manipulative behaviors" or engagement in "drastic or volatile behavior in response to that fear."[44] But he explained that

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attach before the NMCCA. *See* Appellee's Mot. to Attach Enclosures (F)-(I) to Appellate Exhibit III (Sep. 29, 2020) at 2.

[42] J.A. 495.

[43] Ans. on Behalf of Appellee (Dec. 20, 2021) at 32.

[44] J.A. 482.

clarifying this required access to S.S.' long-term records, which the military judge refused to order produced.[45]

Second, by the time of cross-examination, S.S. had already testified she had been sent to Vista because she "was depressed and had a little bit of anxiety."[46] Even if the defense were tempted to cross-examine her to suggest she had Borderline Personality Disorder based on this, the military judge had already ruled that even if S.S. *had* Borderline Personality Disorder, this was irrelevant.[47] Thus, the defense had nothing to gain by cross-examining S.S. on the fact that she had anxiety and depression or had engaged in self-harm in the past.

C. The Government was right the first time: this was constitutional error.

Before the CCA, the Government agreed any error would be constitutional.[48] This was also its position in *United States v. Jacinto* last term.[49] Yet now, it argues

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[45] J.A. 481 ("Often mental health providers can and will provide some sort of personality disorder diagnosis in follow-up counseling or treatments of the patient who attended an inpatient facility, if a personality disorder does exist. The diagnosis of a personality disorder in this follow up, longer term, ongoing, outpatient counseling following an inpatient stay is more readily able to be achieved given that this type of setting affords longer term contact with the patient (which is often times necessary and helpful in being able to accurately diagnose a personality disorder")").

[46] J.A. 74.

[47] J.A. 616 ("Moreover, the Court finds that, even if such a diagnosis existed, the defense has failed to establish how it would be relvant [sic] and necessary.").

[48] Ans. on Behalf of Appellee (Nov. 12, 2020) at 35-36 (citing *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018)).

[49] *See* Ans. on Behalf of Appellee, No. 20-0359/NA (Apr. 22, 2021) at 27, https://www.armfor.uscourts.gov/newcaaf/briefs/2020Term/Jacinto200359Appelle

the error is merely a "discovery error and thus nonconstitutional."[50]

The Government was correct the first time. This Court has already tested a denial of production of mental health impeachment evidence for Sixth Amendment constitutional error in *United States v. Chisum*, and the Government does not ask this Court to overrule this decision.[51] And *Chisum* was consistent with *United States v. Jasper*, where this Court tested an erroneous ruling that statements were privileged for constitutional error where the statements would have impeached the complaining witness' credibility.[52] Further, as the Government asserted in *Jacinto*, denying evidence like this implicates an accused's constitutional right to a "'meaningful opportunity to present a complete defense.'"[53]

That the evidence was not in the Government's hands is not dispositive. As this Court has explained in a case in which the Government *lost* Jencks Act

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eBrief.pdf.

[50] Ans. on Behalf of Appellee (Dec. 20, 2021) at 25.

[51] *Chisum*, 77 M.J. at 180 ("Having reviewed the sealed materials, we agree with the conclusion of the CCA that, under these circumstances, any error by the military judge in failing to inspect and order the disclosure of the mental health records of AB AK and AB CR was harmless beyond a reasonable doubt.").

[52] *Jasper*, 72 M.J. at 281-82 (explaining that military judge's ruling "prevent[ing] Appellant from using BK's statements to impeach her credibility through cross-examination or otherwise" implicated the appellant's Sixth Amendment right of confrontation).

[53] Ans. on Behalf of Appellee, No. 20-0359/NA at 27 ("Nondisclosure of privileged psychotherapist-patient communications does not violate the 5th or 6th Amendments of the Constitution unless it deprives an accused of a 'meaningful opportunity to present a complete defense.'") (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)).

statements, "'the failure to provide material to which the defendant is entitled under the Jencks Act may adversely affect a defendant's ability to cross-examine government witnesses and thereby infringe upon his constitutional right of confrontation."[54] Thus, contrary to the Government's argument, that trial counsel did not possess the evidence and that its failure to be produced did not occur during trial on the merits did not *ipso facto* cleanse the error of constitutional dimension.

D. Regardless, the error was not harmless: that S.S. had a disorder causing "attention-seeking," "manipulative," and "volatile behavior" was an entire area of inquiry courts find highly relevant and that would have discredited S.S.' emails and bolstered the defense's theory of her motive to lie.

Courts have explained the highly relevant nature of mental health impeachment evidence. As the Eleventh Circuit put it in *United States v. Lindstrom*, "'the defendant has the right to explore *every facet* of relevant evidence pertaining to the credibility of those who testify against him,' and evidence on mental capacity may be especially probative of the ability to 'comprehend, know and correctly relate the truth[.]'"[55] Citing *Lindstrom*, this Court in *United States v. Sullivan* explained that mental health evidence "should be admitted if it relates to

[54] *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020) (quoting *Krilich v. United States*, 502 F.2d 680, 682 (7th Cir. 1974)); *United States v. Augenblick*, 393 U.S. 348, 355-56 (1969) (suggesting in the context of lost evidence that "in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right").

[55] 698 F.2d 1154, 1165 (11th Cir. 1983) (quoting *United States v. Partin*, 493 F.2d 750, 763-64 (5th Cir. 1974) (emphasis added)).

the witness's ability to perceive events and testify accurately."[56]

Here, the military judge's ruling deprived the defense of the ability to attack S.S.' credibility through a mental illness that could have discredited the Government's claims about the emails. This could have been done through testimony of Dr. Holguin and by cross-examination of S.S.

Before trial, Dr. Holguin explained that someone with Borderline Personality Disorder will often engage in "attention-seeking and manipulative behaviors" and that "[o]ther symptoms may include fear of abandonment, and drastic or volatile behavior in response to that fear."[57]

At trial, the Government repeatedly claimed S.S.' emails corroborated her allegations.[58] By contrast, the defense argued that S.S. was infatuated with Appellant and the emails were merely S.S.' words.[59] If the defense had been able to show that S.S. suffered from a mental illness causing "attention-seeking" or "drastic or volatile behavior" when she sent emails asking Appellant if he wanted

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[56] 70 M.J. 110, 117 (C.A.A.F. 2011).
[57] J.A. 482.
[58] J.A. 319 ("Now this progression down the path that . . . started in August of 2013, you have e-mails that occurred right in the middle of this progression."); J.A. 324 ("And, again, I want to direct the members' attention to Exhibit 9, that e-mail where he quotes her saying, 'When you were touching me, I wanted more.'"); J.A. 327 ("Again, you have e-mails stating, 'When you were touching me, I wanted more.'").
[59] J.A. 338 ("She had a crush on her brother-in-law . . . . Those e-mails didn't say, I touched you. Those e-mails were from [S.S.] to Petty Officer Mellette. And those e-mails were flagged because of what [S.S.] said.").

to "f*ck [her]" and stating "when you were touching me, I wanted more,"[60] this would have allowed the defense to present a scientific reason for why the emails may have been erratic utterances rather than reflections of reality.

Additionally, the evidence would have scientifically bolstered the defense's theory that S.S. was lying out of fear of creating disharmony in the family.[61] The defense established that S.S. made the allegations shortly after Appellant received permission from a judge to take his daughter to Guam—an arrangement that greatly displeased Appellant's ex-wife.[62] The defense showed that S.S.' mother, sister, and aunt drove to Appellant's command after Appellant filed a contempt order when his ex-wife refused to comply with the court order.[63] Appellant's ex-wife then met with Appellant's commanding officer, and told him that Appellant had carried on an improper relationship with S.S. years before.[64] She admitted she did this in response to the contempt order.[65] Further, S.S. testified that she spent a lot of time with her niece and would do anything to help the family.[66] She also

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[60] J.A. 311, 315.
[61] J.A. 336 ("This is all about what [S.S.' family] wouldn't do to keep [Appellant's daughter] with them, to get at Petty Officer Mellette.").
[62] J.A. 205-06 (containing Appellant's ex-wife's testimony that she did not want her daughter to go to Guam and told Appellant's commanding officer this as S.S. made her allegations).
[63] J.A. 205..
[64] J.A. 206.
[65] J.A. 225 ("I went to the commanding officer as a result of the contempt filing.").
[66] J.A. 103; J.A. 115.

testified that her mother asked her to make a statement to NCIS.[67] She said she accompanied her mother, aunt, and sister to when she made her NCIS statement.[68]

In short, even if the error in this case were non-constitutional, the error had "a substantial influence on the findings."[69]

E. The Government's claim that there was no prejudice because the defense elicited evidence of S.S.' poor memory overlooks that the Government countered this evidence through expert testimony.

The Government claims that the defense already elicited that S.S. had a poor ability to remember dates or other details about the alleged incidents and showed that S.S. made the allegations amid a child custody dispute.[70] It omits that it rebutted this with testimony from a forensic psychologist.[71]

After the defense cross-examined S.S., the Government called a forensic psychologist to testify about, *inter alia*, witness memory and suggestibility. The expert testified that memories from "about age 15 to about age 29" occur during "the reminiscence bump, which is where . . . our memories acquire a lot of meaning."[72] The expert testified that "you'll see, kind of, an increase in how much memory an adult holds on to about life experiences dating back to their

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[67] J.A. 122.
[68] J.A. 121.
[69] *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008) (citations omitted).
[70] Ans. on Behalf of Appellee (Dec. 20, 2021) at 30.
[71] R. at 762.
[72] R. at 764.

[adolescence]."[73]

Additionally, the expert testified about suggestibility, which "has to do with influences that affect how you remember something[.]"[74] When trial counsel explained that this case "is about a 15 turned 16-year old," he asked the expert "[h]ow does suggestibility apply to that age?"[75] The expert replied: "[t]he same as it applies to me or you or anyone in this courtroom."[76]

Thus, even if Appellant undermined S.S.' memory to some extent, the effectiveness of this was minimized by the Government's expert testimony.

F. The Government's claims that Appellant "adopted" S.S. emails and that another witness testified that Appellant admitted to lying about not having touched S.S. are both misleading.

The Government also claims Appellant "adopted" S.S.' emails.[77] But Appellant did not "adopt" the *content* of S.S.' emails. Rather, in the same emails, he maintained he did not engage in sexual activity with S.S.[78]

Additionally, the Government's claim that Appellant told Petty Officer Robertson he "talked his way out of it" omits important context.[79] Petty Officer Robertson said he asked Appellant if he was going to be okay after his command

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[73] R. at 764.
[74] R. at 766.
[75] R. at 768.
[76] R. at 768.
[77] Ans. on Behalf of Appellee (Dec. 20, 2021) at 33.
[78] J.A. 312 ("She asked, I said no.").
[79] *Id*. at 32.

learned of S.S.' emails.[80] In response, he said Appellant told him: "I talked my way out of it. I just explained that . . . she's just young, she doesn't know what she's talking about" and that "it's just . . . [S.S.'] perception of things" and it was "a big misunderstanding."[81] Thus, in context of his entire statement, "talking his way out of it" meant he explained to his command that S.S. was infatuated with him.

Finally, as to the Government's suggestion that Petty Officer Robertson testified that Appellant admitted the story he told his command "wasn't the full truth," it is not clear that Petty Officer Robertson claimed Appellant said this.

Trial counsel asked Petty Officer Robertson what the "actual story that he talked his way out of," but Petty Officer Robertson did not claim Appellant provided one. Instead, he merely stated:

> Basically, saying that—that, like, some—at—on—at least on some level, the—the—story he gave wasn't the full truth, which, during this first conver—this initial conversation, *we didn't have too much more detail of—about what really was occurring.*[82]

This suggests that Petty Officer Robertson was offering his *belief* that what Appellant told his command was not true. As he admits, he "didn't have too much more detail of—about what really was occurring." This hardly "corroborated" S.S.' allegations, contrary to the Government's suggestion.[83]

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[80] J.A. 245.
[81] J.A. 245.
[82] J.A. 246 (emphasis added).
[83] Ans. on Behalf of Appellee (Dec. 20, 2021) at 32.

G. As in *Jacinto*, this Court should at least afford the CCA the option of ordering an evidentiary hearing to allow the parties to review relevant records, including through the lens of an expert if necessary.

The Government claims that there is no need for a *DuBay* hearing because the CCA can simply review the records on its own.[84] Given the complexity of mental health evidence, this Court should at least follow its approach in *Jacinto* and allow the CCA to order a *DuBay* hearing if it believes one is necessary.[85] Doing so would allow the defense to have a forensic psychologist such as Dr. Holguin review necessary records.

Conclusion

This Court should set aside the lower court's judgment and remand for a *DuBay* hearing.

Respectfully submitted,

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[84] *Id*. at 37 (arguing that "this Court should remand to the lower court to allow it to review the Victim's mental health records in camera and reassess for prejudice" while adding that a "*DuBay* hearing is unnecessary").
[85] 81 M.J. 350, 354-55 (C.A.A.F. 2021) (instructing the CCA "either on its own or by way of *DuBay* proceedings" to obtain relevant mental health evidence).

Certificate of Compliance

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

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on January 18, 2022.

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