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09/16/2024

CLERK OF THE COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Salvador JACINTO** Aviation Structural Mechanic First Class (E-6) United States Navy, Appellant	**BRIEF ON BEHALF OF APPELLANT (FILED UNDER SEAL)** Crim.App. Dkt. No. 201800325 USCA Dkt. No. 24-0144/NA

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

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DID APPELLANT SUFFER PREJUDICE FROM THE MILITARY JUDGE'S ERRONEOUS CONTINUANCE DENIAL?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a punitive discharge and more than two years of confinement. The Navy and Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b), UCMJ. Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

Statement of the Case

Contrary to Appellant's pleas, a general court-martial panel of members found him guilty of two specifications of rape of a child, three specifications of sexual abuse of a child, and two specifications of child endangerment by culpable negligence in violation of Articles 120b and 134, UCMJ. The members sentenced Appellant to eight years of confinement and a bad-conduct discharge. The Convening Authority ordered three days of confinement credit, but otherwise approved the sentence.[1]

The lower court affirmed the findings and sentence as correct in law and fact.[2] Appellant moved for *en banc* reconsideration, which the lower court denied.

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[1] JA at 30.
[2] *United States v. Jacinto*, 79 M.J. 870 (N-M. Ct. Crim. App. 2020) [hereinafter *Jacinto I*].

This Court set aside the lower court's decision in part and remanded for further proceedings.[3] Consistent with this Court's opinion, the lower court issued an Order to Remand for a Fact-Finding Hearing ("Remand Order), instructing that a fact-finding hearing be conducted pursuant to *United States v. DuBay.*[4]

The *DuBay* hearing was held, and the *DuBay* judge's findings of fact were issued on June 1, 2022. The case was re-docketed with the lower court on June 15, 2022.

Intervenor E.B. moved this Court for a permanent stay of the lower court's order granting Appellant access to sealed portions of the *DuBay* record on December 7, 2022. This Court granted a temporary stay on December 22, 2022 and then dismissed her motion and vacated the stay on January 26, 2023.

Appellant filed a Motion for Additional Fact-Finding with the lower court on February 23, 2023. The NMCCA denied Appellant's Motion (as well as a government Motion for *En Banc* Reconsideration and a Motion to Stay) on March 13, 2023 and ordered a briefing schedule.

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[3] *United States v. Jacinto*, 81 M.J. 350, 351 (C.A.A.F. 2021) [hereinafter *Jacinto II*].
[4] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968).

On January 18, 2024, the lower court again affirmed the findings and sentence as correct in law and fact.[5] The government moved for *en banc* reconsideration, which was denied on March 12, 2024. On May 7, 2024, Appellant timely petitioned this Court and was granted review on July 19, 2024.

Statement of Facts

A. E.B. alleged Appellant sexually abused her, then recanted the allegation, then resurrected the allegation years later after taking illicit drugs and having a seizure.

In March 2013, E.B. alleged to her mother that Appellant sexually abused her.[6] However, after her mother took steps to ensure that E.B. was telling the truth—because her mother considered E.B. to be a "pathological liar"—E.B. recanted her allegations.[7] Four years later, E.B. resurrected her allegations to her mother after her mother made her break up with her boyfriend.[8] E.B.'s resurrected allegation also occurred following a weekend party at which E.B. took ecstasy and had a seizure.[9]

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[5] *United States v. Jacinto*, No. 201800325, slip op. (N-M. Ct. Crim. App. Jan. 18, 2024) [hereinafter *Jacinto III*].
[6] JA at 104-05.
[7] JA at 107.
[8] JA at 120-22.
[9] JA at 124.

B. E.B. gave conflicting accounts of her drug use, and her school counselor recommended she be admitted to a mental health facility.

After the party, one of E.B.'s friends reported her ingestion of ecstasy as a suicide attempt to the school guidance counselor.[10] While E.B. apparently denied trying to kill herself, she admitted to using ecstasy, but then later told her mother she did not take the drug.[11] E.B.' school counselor recommended she be admitted to a mental health hospital, and E.B.'s mother agreed.[12]

C. The government did not disclose that E.B. was prescribed an antipsychotic medication for "psychotic agitation" until three business days before the start of trial.

The military judge granted the defense motion for production of E.B.'s diagnosis and prescriptions.[13] At first, the government disclosed that E.B. had been diagnosed with "PTSD and Major Depressive Disorder (recurrent, active, without psychotic features)" and represented that E.B. had been prescribed medications not used to treat psychotic conditions.[14]

Then, three business days before trial, the government disclosed—for the first time—that E.B. had been prescribed Thorazine to treat "psychotic agitation"

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[10] JA at 123-24.
[11] JA at 124-26.
[12] JA at 125.
[13] JA at 168.
[14] JA at 171.

upon admission to the hospital.[15] This information was listed on a medication discharge summary and within several redacted pages of E.B.'s inpatient records.[16]

D. At a subsequent closed hearing, the defense expert testified that the records strongly suggested E.B. was experiencing a psychotic condition when she resurrected her allegations against Appellant.

The morning after receiving the records, the defense called Dr. Sierra, a forensic psychologist, to testify in an Article 39(a) hearing.[17] She described "psychotic agitation:"

> So psychotic agitation now refers to the idea that they may be stimulated internally by things that are not actually going on in their environment; therefore, they may not be reacting appropriately or accurately to their environment because they are either misperceiving that environment or they are laboring under the burden of delusions.[18]

Dr. Sierra testified that such a person's "interactions with [their] environment appear aberrant or unusual to those around them and may in fact be improper because they are not responding to the environment as it exists, but as they are perceiving it."[19]

The defense counsel directed Dr. Sierra's attention to a diagnosis in E.B.'s record that she stated she was experiencing "depression *without* psychotic

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[15] JA at 79, 151-58.
[16] JA at 151-58, 172-75.
[17] JA at 83.
[18] JA at 61.
[19] JA at 70.

features."[20] The defense counsel asked how she could square that with the fact that E.B. was apparently prescribed an antipsychotic medication.[21] Dr. Sierra responded that this was a "direct contradiction."[22] Indeed, E.B.'s treatment records clearly indicated that the reason for prescribing Thorazine was "psychotic agitation" even though the records stated she had "depression without psychotic features."[23]

[redacted] She explained that Thorazine is "a very serious antipsychotic neuroleptic medication; it's an older, dirtier drug, it comes with so many side effects."[25]

[redacted]

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[20] JA at 65.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] JA at 72.
[25] *Id.*
[26] JA at 69.

[redacted]

[redacted]

F. The military judge denied the defense continuance motion requesting time to investigate the late discovery, adjust their defense strategy and adequately prepare for trial.

One day after receiving this "bombshell" discovery, the defense requested a two-week continuance to further investigate the credibility evidence.[28] The defense also informed the court it would discuss the issue further with its expert and likely make additional discovery requests.[29]

The military judge abruptly denied the defense continuance motion without explanation, stating "Here's what we're going to do, the defense request for a continuance is denied."[30] The military judge then told defense it "has Friday and all of the weekend" to strategize about the brand new evidence.[31]

But then the military judge told trial counsel to "get in touch with the hospital and see if they can get someone to decipher what the records mean, without getting . . . specific statements or anything that would be covered by [M.R.E. 513]."[32]

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[27] JA at 69.
[28] JA at 84 ("eve" meaning only days prior to the scheduled start of trial).
[29] JA at 97.
[30] JA at 102.
[31] JA at 103.
[32] *Id*.

Later that day, the military judge issued an order requiring Calvert Hospital "to produce the below information from the medical records of [E.B.]" including "records of when she was administered Thorazine during her inpatient treatment, and records of all "medications and dosages that were prescribed to [E.B.] upon in-patient discharge."[33]

H. The defense again asked for a continuance, but the military judge responded: "Motion denied. See you all tomorrow morning."

The day before trial, and without receiving further clarification regarding the Thorazine prescription, the defense moved for reconsideration of its two-week continuance request.[34] The defense told the military judge they were "not prepared to go to trial" the next morning.[35] The defense maintained the government's prior statements about E.B.'s treatment misled them and they needed more time to investigate "the alleged victim's capacity to recollect and recount."[36] This further investigation would "possibly alter its theory of the case."[37]

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[33] JA 169.
[34] JA 143-48.
[35] *Id*.
[36] *Id*.
[37] *Id*.

Within hours of receiving the motion to reconsider, the military judge responded with a one-line email that read: "Motion denied. See you all tomorrow morning."[38]

I. This Court set aside the lower court's decision, and ordered further proceedings.

In its decision directing further fact-finding, this Court noted there is a:

> [C]rucial dispute between the parties about whether the medical records indicate that E.B.'s physician diagnosed E.B. with psychotic agitation and authorized attending medical personnel to administer Thorazine *when* needed, *or* that E.B.'s physician was merely indicating in the charts that medical personnel were authorized to administer Thorazine *if* needed in the event E.B. subsequently displayed symptoms of psychotic agitation.[39]

While noting the military judge essentially sided with the government in this "crucial dispute," this Court was unable to evaluate the military judge's critical factual findings "because of obvious omissions and ambiguities in the record."[40] Thus, this Court remanded for further fact-finding.

In ordering a remand, this Court directed that the lower court—either on its own or by way of *DuBay* proceedings—"shall obtain missing record evidence and

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[38] JA at 149.
[39] *Jacinto II*, 81 M.J. at 351.
[40] *Id*.

any other evidence (such as affidavits from medical providers) relevant to whether E.B. was diagnosed with psychotic agitation in May 2017."[41]

J. Dr. Sierra provided additional testimony during the *DuBay* hearing that provided further details about E.B.'s diagnosis and medication.

Prior to the *DuBay* hearing, Dr. Sierra provided an affidavit indicating that she reviewed an additional eight pages of medical records that were not attached to the record of trial.[42] Even after reviewing these additional pages, Dr. Sierra did not believe questions regarding E.B.'s diagnosis and prescriptions could be resolved.[43]

At the *DuBay* hearing, Dr. Sierra testified about E.B.'s apparent diagnosis for "major depressive disorder without psychotic features."[44] Although major depressive disorder is listed in the Diagnostic and Statistical Manual, Fifth Edition ("DSM-V"), the specifier "without psychotic features" is *not.*[45] Dr. Sierra added that it was impossible to understand the nature of the contradictory terms in E.B.'s records.[46] Specifically, it is contradictory for E.B. to have been prescribed Thorazine to target psychosis if she also had a condition "without psychotic features."[47] Dr. Sierra clarified that she was not surprised that E.B. was not

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[41] *Jacinto II*, 81 M.J. at 351 (emphasis added).
[42] JA at 199.
[43] JA at 178.
[44] *Id*.
[45] JA at 179.
[46] JA at 180.
[47] *Id*.

diagnosed with psychotic agitation because "that's not a diagnosis. That's a behavioral description."[48]

Dr. Sierra expressed that she wanted clarification on "what the clinicians were observing, what they were considering, and what their rationale was for what they ultimately memorialize[d]."[49] She stated she needed to review test results, treatment plans, and case notes that could indicate a concern for psychosis—all documents missing from the reviewed records that would "further allow any reader to better understand why these otherwise contradictory terms are being found in what limited records we are reviewing."[50]

Defense counsel asked Dr. Sierra whether Thorazine is the type of drug an emergency room clinician would prescribe "just in case."[51] Dr. Sierra expressed some skepticism, reminding the court that Thorazine is an "older, dirtier neuroleptic antipsychotic drug . . . primarily for major mental illness."[52] Because Thorazine is uncommon to prescribe, especially for children, she wanted to know which days, if ever, Thorazine was applied or even "under consideration."[53] Dr. Sierra testified that because Thorazine is such an unusual medication: "you would

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[48] JA at 187.
[49] JA at 181.
[50] JA at 182.
[51] JA at 183.
[52] *Id*.
[53] *Id*.

have to have a reason to put it in the medication record. You wouldn't just put it down because—like vitamins, just in case she needed them[.]"[54] There has to be a "rationale reason."[55]

K. During the *DuBay* hearing, the defense requested production of E.B.'s treating physician, which the *DuBay* judge denied.

During the *DuBay* proceedings, Appellant requested production of Dr. Golf, the provider who was E.B.'s physician and who apparently prescribed E.B. Thorazine.[56] The defense noted that Dr. Golf was likely the person who could "most effectively explain what E.B.'s condition and symptoms were; what he diagnosed her with; and what medications he prescribed or administered to her at the hospital[.]"[57]

The government did not object to production of Dr. Golf and even requested that the *DuBay* judge issue an order that would allow the parties to speak with Dr. Golf.[58] The government only sought to put limitations on the questions that Appellant could ask Dr. Golf, opining that some of Appellant's proposed questions fell outside the scope of this Court's Remand Order.[59]

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[54] JA at 183.
[55] *Id*.
[56] JA at 196.
[57] *Id*.
[58] JA at 197.
[59] *Id*.

Ultimately, the *DuBay* judge did not grant production of Dr. Golf, nor did he seek an alternative form of testimony such as an affidavit and Dr. Golf's input is absent from the *DuBay* record.[60]

L. The *DuBay* military judge issued findings of fact, but did not fully resolve this Court's remand order.

The *DuBay* military judge recognized that whether E.B. suffered from psychotic agitation or was administered Thorazine was relevant to Appellant's defense.[61] The *DuBay* judge specifically noted that "the perception and capacity of E.B. was an appropriate and potentially significant avenue of trial strategy for the defense to pursue which, again, could only be evaluated through the review of her medical records from Calvert [Hospital]."[62]

However, because E.B. exercised her purported privilege over all records produced by Calvert Hospital, the *DuBay* judge did not answer the question of whether the military judge abused his discretion by denying Appellant's continuance request.[63] Instead, the *DuBay* judge wrote that the answer to this question was "inconclusive."[64]

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[60] JA 176-77.
[61] JA at 226.
[62] *Id*.
[63] *Id*.
[64] *Id*.

M. The lower court found that the Military Judge abused his discretion in denying the continuance, but found no prejudice to Appellant.

The lower court found that Appellant was surprised by potentially exculpatory evidence six days before trial, which "unquestionably militate[d]" its conclusion that the military judge abused his discretion in denying a "reasonable continuance."[65] In assessing the prejudice caused by the erroneous ruling, like the *DuBay* judge, the lower court reviewed the "212-page record from Calvert Memorial Hospital that is contained in Appellate Exhibit CLXXXVII" in camera.[66] The lower court found the *DuBay* judge's finding—that the records included information that was constitutionally required to be provided—was erroneous.[67] The lower court did not consider whether the late discovery impacted the defense's preparation for trial. Instead, it held—solely because it concluded the records contained no constitutionally required disclosures—that Appellant suffered no prejudice as a result of the military judge's erroneous denial of the continuance.[68]

Additionally, while finding E.B. was prescribed Thorazine, the lower court made no finding concerning why she was prescribed a drug used to treat psychotic

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[65] *Jacinto III*, slip op. at 8-9.
[66] *Id.*
[67] *Id.* The *DuBay* judge did not identify which records were constitutionally required to be produced.
[68] *Id*. at 12.

agitation.[69] It instead found that E.B. "was never administered [Thorazine]" to support its conclusion that she was not suffering from psychotic agitation.[70] The lower court did not point to any support for this conclusion and Appellant can find none.

Summary of Argument

This Court explicitly and clearly ordered the lower court to "obtain the missing record evidence and any other evidence such as affidavits from medical providers relevant to whether E.B. was diagnosed with psychotic agitation in May 2017[.]"[71] This Court further emphasized that the lower court was to "fully develop[] the psychotic agitation issue[.]"[72] However, the lower court failed to do so.[73] Even after remand and an evidentiary hearing, the record remains silent as to why E.B. was prescribed Thorazine—a powerful antipsychotic drug—just days after she made her allegations. Contrary to this Court's order to "obtain the missing record evidence and *any other evidence such as affidavits from medical providers*,"[74] the *DuBay* judge denied the defense's request to produce the witness

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[69] *Jacinto III*, slip op. at 4.
[70] *Id*. at 9.
[71] *Jacinto II*, 81 M.J. at 354-55 (emphasis added).
[72] *Jacinto II*, 81 M.J. at 355.
[73] *Jacinto II*, 81 M.J. at 355.
[74] *Jacinto II*, 81 M.J. at 354-55 (emphasis added).

that could have fully resolved this issue. Thus, whether E.B. had the capacity to perceive her environment when she made the allegations remains unknown.

This unknown information demonstrates how the military judge's erroneous denial of Appellant's reasonable and singular request for a continuance was prejudicial. The defense learned that E.B. was prescribed Thorazine for psychotic agitation only six days before trial. Understanding that this "bombshell" revelation opened up a brand new theory of the case, the defense requested a fourteen-day continuance—its first continuance request—in order to investigate the potential theory and adjust its trial strategy accordingly.[75] However, the military judge erroneously denied this request and, consequently, prevented the defense from adequately investigating E.B.'s mental health condition and further developing case strategies in response.

[75] JA at 84.

Argument

I.

THE LOWER COURT FAILED TO COMPLY WITH THIS COURT'S REMAND ORDER.

Standard of Review

Whether the lower court properly interpreted and complied with legal authority is a question of law and is reviewed de novo.[76]

Discussion

A. The factual disputes this Court ordered to be addressed remain unresolved.

The lower court failed to comply with the full extent of this Court's remand order. As a result, much of the ordered factual development went unaccomplished, leaving several critical questions unanswered. This Court issued three mandatory orders (1, 2 and 4 below) and one permissive order (3 below).[77] The pertinent parts of these orders, and whether each was satisfied, is as follows:[78]

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[76] *Cf. United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).
[77] *Jacinto II*, 81 M.J. at 354-55.
[78] For the sake of clarity, these orders may be also hereinafter referred to by the bracketed numbers.

Factual Development Ordered by this Court	Satisfied?
[1.] "The lower court *either* on its own *or* by way of DuBay proceedings shall obtain the missing record evidence and any other evidence such as affidavits from medical providers relevant to whether E.B. was diagnosed with psychotic agitation in May 2017. . . ."[79]	**No.**[80]
[2.] "The lower court or DuBay military judge should specifically identify [:]	—
[a.] the five missing pages reviewed by the defense forensic psychologist,	Yes.[81]
[b.] any remainder of the earlier hospital records produced in response to the June 8, 2018 order, and	Yes.[82]
[c.] any documents that were produced or should have been produced pursuant to the military judge's June 14, 2018 orders."[83]	**No.**[84]

[79] *Jacinto II*, 81 M.J. at 354-55 (emphasis added).
[80] JA 219-28; *Jacinto III*, No. 201800325, 2024 CCA LEXIS 14.
[81] JA 223-24.
[82] *Id*.
[83] *Jacinto II*, 81 M.J. at 355.
[84] The *DuBay* MJ did not specifically identify documents that should have been produced, but did identify the existence of documents that were "constitutionally required to be released[.]" JA at 225, n.45.

Factual Development Ordered by this Court	Satisfied?
[3.] "The fact finder also may enter any other findings of fact necessary to resolve the granted appellate issues. . . ." [85]	—
[a.] "Did the military judge abuse his discretion by denying Appellant's first continuance request . . . ?	Yes.[86]
[b.] Did the military judge abuse his discretion by denying the defense motion for in camera review of the complaining witness's mental health records?"[87]	Yes.[88]
[4.] "[T]he lower court also shall determine whether the denial of either motion materially prejudiced Appellant. This inquiry may require the lower court to make (*or order a DuBay military judge to make*) further findings of fact about whether there was discoverable and admissible information that would have helped Appellant's defense." [89]	**No.**[90]

1. Neither the *DuBay* military judge nor the NMCCA resolved the crucial dispute of whether E.B. was suffering from psychotic agitation when she made her allegations (Order 1).

In accordance with this Court's first ordered factual finding (Order 1), the factfinder was directed to obtain, in addition to E.B.'s medical records, "any other

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[85] *Jacinto II*, 81 M.J. at 355.
[86] *Jacinto III*, slip op. at *3.
[87] *Jacinto II*, 81 M.J. at 354-55, n.1.
[88] *Jacinto III*, slip op. at *3.
[89] *Jacinto II*, 81 M.J. at 355 (emphasis added).
[90] There is conflict between the findings of the *DuBay* judge and the lower court. *Compare* JA at 226 *with Jacinto III*, slip op. at *9.

evidence *such as affidavits from medical providers* relevant to whether E.B. was diagnosed with psychotic agitation in May 2017."[91] To date, the medical records alone have not answered this question. Despite this, the *DuBay* military judge denied production of E.B.'s treating physician—whom ostensibly prescribed the Thorazine to E.B. After the denial, the *DuBay* military judge did not seek an alternative form of testimony, such as an affidavit—as referenced in this Court's order. The *DuBay* record is devoid of any clarification from Dr. Golf.

The NMCCA subsequently stated that

> [f]rom a review of the entire record it is clear that E.B. was never administered Thorazine. Nor do the hospital records indicate that she had any problem with perception or memory. And there is no indication in the Calvert Memorial Hospital records that she was fabricating any allegations.[92]

However, the first and third of these sentences are demonstrably false. And the second is entirely representative of why further proceedings were needed in the first place.

First, the NMCCA's conclusion falls victim to the logical fallacy of *argumentum ad ignorantiam*—or, as commonly conveyed: the absence of evidence is not evidence of an absence. Without an affirmative showing E.B. was *not* administered the drug, it is not reasonable to conclude that "it is clear that E.B. was

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[91] *Jacinto II*, 81 M.J. at 354-55 (emphasis added).
[92] *Jacinto III*, slip op. at *9.

never administered Thorazine."[93] [redacted] But regardless of the lower court's unsupported assumption, the question of whether E.B. was *actually administered* the drug is largely irrelevant. What is relevant is whether the treating physician observed symptoms that warranted prescribing Thorazine. [redacted]

Second, the fact that the records do not indicate E.B. had any problems with perception or memory (despite being prescribed a powerful anti-psychotic) is precisely one of the reasons this Court ordered further fact-finding.[97] Indeed, the absence of information on the record regarding perception or memory is not

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[93] *Jacinto III*, slip op. at *9.
[94] JA at 203, 205.
[95] JA at 184.
[96] *Id*.
[97] *Jacinto II*, 81 M.J. at 354 ("On the one hand, the record indicates that E.B. was diagnosed with PTSD and major depressive disorder without psychotic features. On the other hand, the medical records indicate that E.B. was prescribed Thorazine for psychotic agitation.").

dispositive on the question of whether E.B. suffered psychotic agitation, despite the NMCCA's conclusion to the contrary.

Third, E.B.'s medical records indicate [redacted] Therefore, it cannot reasonably be said that "there is no indication in the Calvert Memorial Hospital records that she was fabricating *any* allegations."[99]

Regardless, neither the *DuBay* military judge nor the NMCCA reached a specific finding as to whether E.B suffered from psychotic agitation. Therefore, the lower court failed to adhere to this Court's first ordered factual finding (Order 1).

2. <u>The question of what documents should have been produced remains inconclusive (Orders 2.c. and 4.).</u>

The *DuBay* military judge ultimately "found that certain portions of the records were constitutionally required to be produced."[100] Conversely, the NMCCA sought to substitute the *DuBay* judge's findings with its own—stating that "the *DuBay* military judge erred when he made a conclusion of law that

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[98] JA at 200-02, 204.
[99] *Jacinto III*, slip op. at *9 (emphasis added).
[100] *Jacinto III*, slip op. at *7; JA at 225.

certain pages of that document were constitutionally required."[101] However, neither the *DuBay* military judge nor the NMCCA provided analysis to support their opposing conclusions. Further, neither the *DuBay* judge nor the NMCCA specifically identified the documents or pages in dispute. As such, this Court's order to "specifically identify . . . any documents that were produced or *should have been produced*" remains unaccomplished.[102] Without the specific identification of the portions of E.B.'s records in dispute, this Court cannot review the conclusions of law regarding whether such unidentified portions contain "discoverable and admissible information that would have helped Appellant's defense."[103] Therefore, this Court cannot affirm the lower court's findings.

B. The lack of factual development regarding E.B.'s psychotic agitation renders the lower court's conclusion regarding prejudice preemptive.

This Court's order to determine prejudice (Order 4), was issued with predicate conditions. Namely, that the record be "fully developed on the psychotic agitation issue[.]"[104] So to the extent that the NMCCA found no prejudice, such a finding is preemptive in light of the unanswered question of E.B.'s psychotic agitation. Therefore, the lower court's conclusion regarding prejudice was

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[101] *Jacinto III*, slip op. at *12.
[102] *Jacinto II*, 81 M.J. at 355 (emphasis added).
[103] *Id*.
[104] *Jacinto II*, 81 M.J. at 355.

unauthorized in accordance with this Court's fourth order (Order 4). The appropriate remedy is to set aside the affected charges and specifications.

Conclusion

In light of E.B.'s assertion of privilege and the lower court's inability to develop the factual record as ordered, Appellant requests that this Court set aside the findings and dismiss with prejudice the affected charges and specifications. In the alternative, Appellant requests this Court to order the lower court to comply with its initial remand order.

II.

APPELLANT SUFFERED PREJUDICE FROM THE MILITARY JUDGE'S ERRONEOUS CONTINUANCE DENIAL.

Standard of Review

This Court reviews a lower court's prejudice analysis de novo.[105]

Discussion

"Timely appointment and *opportunity for adequate preparation* are absolute prerequisites for counsel to fulfill his *constitutionally* assigned role of seeing to it that available defenses are raised and the prosecution put to its proof."[106]

A. Appellant was prejudiced by being deprived of adequate time to prepare.

> 'A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' . . . For preserved constitutional errors, such as in the instant case, the Government bears the burden of establishing that the error is harmless beyond a reasonable doubt.[107]

Because these facts support a finding of "injury to [Appellant's] constitutional right to a fair trial[,]" the burden is on the Government to prove that such injury was harmless beyond a reasonable doubt.[108]

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[105] *United States v. Diaz*, 45 M.J. 494, 496 (C.A.A.F. 1997).
[106] *Brescia v. New Jersey*, 417 U.S. 921, 924 (1974) (emphasis added).
[107] *United States v. Riggins*, 75 M.J. 78, 85 (C.A.A.F. 2016) (quoting *Mitchell v. Esparza*, 540 U.S. 12, 17-18 (2003)).
[108] *United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015).

The question of prejudice here arises from a last-minute disclosure of discovery that was requested months prior. In instances of late discovery, the appropriate remedy is to order a continuance—the very thing denied here.[109] As such, this Court's jurisprudence on delayed discovery is instructive.

In *United States v. Stellato*, this Court discussed how harm (i.e. "injury to [an accused's] right to a fair trial") is assessed by considering "whether the belated disclosure hampered the ability to prepare a defense," and "whether the nondisclosure would have allowed the defense to rebut evidence more effectively[.]"[110] Here, both questions are resolved in Appellant's favor.

Prior to the last-minute disclosure that E.B. was prescribed anti-psychotic medication, the Defense's theory of the case centered on E.B.'s motive to fabricate.[111] It was only after that discovery—a mere three business days before trial—that the Defense became aware that E.B. may have been suffering from psychotic agitation when she made her allegations. That fact that would have helped Appellant "rebut evidence more effectively" by calling into question her ability to accurately perceive and recall events.[112] Thus, the Government is unable

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[109] *See United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015).
[110] *Stellato*, 74 M.J. at 490 (quoting *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000)).
[111] JA at 127-32.
[112] *United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015).

to satisfy its high standard of proving the denial was harmless beyond a reasonable doubt.

Regardless, in the past six years the lower courts have yet to answer the question of E.B.'s psychotic agitation despite (1) a complete court-martial, (2) a *DuBay* hearing, and (3) two reviews at the NMCCA. This shows that the military judge's allowance of a mere three business days for the defense to attempt similar factual development was demonstrably insufficient—thereby hampering Appellant's "opportunity for adequate preparation [as an] absolute prerequisite[] for counsel to fulfill his *constitutionally* assigned role."[113]

The full extent to which Appellant suffered harm from the military judge's erroneous denials cannot be determined because of the lack of adequate factual development. Regardless, any argument otherwise is based on pure speculation as the factual record fails to support that the error would have been harmless beyond a reasonable doubt.

B. In light of the speculation required to fully answer the question of harm to Appellant, the Government cannot meet its burden of showing harmlessness beyond a reasonable doubt.

While the error here perhaps does not rise to structural error, the treatment of prejudice in that context is instructive. One test for structural error considers

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[113] *Brescia v. New Jersey*, 417 U.S. 921, 924 (1974) (emphasis added).

whether "a court is faced with 'the difficulty of assessing the effect of the error[.]'"[114] Where the harm is too speculative, the requirement to show prejudice is dispensed with.[115]

Here, the question of whether Appellant suffered prejudice calls for at least two layers of speculation. Specifically, it requires (1) speculation on what different steps would have been taken by trial defense counsel had the erroneously denied continuance been granted, and (2) speculation as to what the ultimate effect would have been from those different steps. Reasonably, the consequences of such *speculation within speculation* "are necessarily unquantifiable and indeterminate[.]"[116]

In this regard, the Supreme Court's reasoning behind the structural error of *denial of counsel of choice* is specifically instructive. Indeed, regardless of whether we are discussing (1) the rejection of counsel of choice, or (2) the rejection of counsel's request for a continuance, the following statement rings true:

> It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions . . . do not even concern the conduct of the trial at all. Harmless-error

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[114] *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)).
[115] *Id*.
[116] *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

> analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.[117]

As it pertains to Appellant's constitutional right to a complete defense, had the defense been given adequate time to contemplate the last-minute disclosure of E.B.'s Thorazine prescription, they may have taken significantly different steps to prepare for trial. For example, such steps may have included obtaining a more appropriately qualified expert—one with a medical degree and specialized training in psychotic disorders and pharmacological treatment.[118]

In addition to helping better convey the significance of E.B.'s antipsychotic medication, a medical doctor with specific experience in psychotic disorders could have also assisted the Defense in pursuing a theory of shared psychotic disorder, or *folie à deux*,[119] as a theory against the similar allegations made by E.B.'s sibling.[120] From this "different choice" alone, the erroneous denial of the continuance would implicate prejudice beyond just the charges and specification addressed now (i.e. also implicating the allegations by E.B.'s siblings of which Appellant was

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[117] *Gonzalez-Lopez*, 548 U.S. at 150.
[118] JA at 111-19.
[119] *See generally United States v. McRary*, 616 F.2d 181, 184 (5th Cir. 1980). ("Folie a deux, the psychosis of association, has been defined as the transference of delusional ideas and/or abnormal behaviour from one person to one or more individuals who have been in close association with the primary affected person.") (quoting Soni and Rockley, "Socio-Clinical Substrates of Folie a Deux," Brit. J. Psychiat. (1974), at 230) (internal quotations omitted).
[120] JA at 108.

convicted). This single, and non-exhaustive, alternate choice serves as just one example of how "necessarily unquantifiable and indeterminate" the effect of the erroneous continuance denial was.[121]

Notwithstanding the previous showing of prejudice (section II. A.), the Government bears the burden to prove that the error was harmless beyond a reasonable doubt. At the very least, structural error jurisprudence demonstrates why the Government cannot prove the erroneous continuance denial was harmless beyond a reasonable doubt. Any argument is based on pure speculation as the record fails to support that the error would not have impacted the defense's case preparation, strategy, or the production of other discoverable evidence.

The findings of both the *DuBay* judge and the NMCCA make no assertion that the Government has specifically met this burden, nor do they identify what government evidence allegedly proves such. Therefore, the question of prejudice must be resolved in Appellant's favor.

Conclusion

In light of the intervening years, E.B.'s assertion of privilege, and the lower court's inability to fully develop the factual record as ordered, Appellant requests

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[121] *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

that this Court set aside the findings and dismiss with prejudice the affected charges and specifications.

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Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and that copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 16, 2024.

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This brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. The brief contains 5,769 words. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

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