IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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REGULATIONS, RULES, OR OTHER SOURCES

Issues presented

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?

II.

THE FIFTH AND SIXTH AMENDMENTS GUARANTEE AN ACCUSED THE RIGHT TO A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY DENYING THE DEFENSE MOTION FOR IN CAMERA REVIEW OF THE COMPLAINING WITNESS'S MENTAL HEALTH RECORDS?

Statement of Statutory Jurisdiction

Appellant's approved general court-martial sentence includes a punitive discharge and nearly eight years of confinement.[1] The Navy-Marine Court of Criminal Appeals (NMCCA) exercised jurisdiction under Article 66(b), UCMJ, and this Court has jurisdiction under Article 67(a)(3), Uniform Code of Military Justice (UCMJ).[2]

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[1] Joint Appendix (J.A.) 47.
[2] 10 U.S.C. §§ 866(b)(1), 867 (2016).

Introduction

E.B. told so many lies that her mother called her a "pathological liar."[3] She once claimed Appellant rubbed his body against her.[4] She admitted it was a lie.[5]

But four years later, when her mother punished her for having an improper relationship with her boyfriend, she brought back this allegation.[6] She also told her mother about a second incident.[7] [redacted]

While waiting for E.B. to be admitted, the mother asked E.B.'s sister, J.B., if Appellant ever touched her.[9] She disclosed one incident from five years before.[10] E.B. later said she and J.B. previously discussed their allegations and J.B. told her: "[W]e're sisters" and "[w]e have a strong. . . bond. We can't break that."[11]

E.B. was admitted for two weeks.[12] Partial treatment records revealed she was prescribed Thorazine—an "older, dirtier drug"[13]—to treat "psychotic

[3] J.A. 193, 686.
[4] J.A. 240, 488.
[5] J.A. 487.
[6] J.A. 490-93.
[7] J.A. 497.
[8] J.A. 501-02.
[9] J.A. 112; J.A. 483-84.
[10] J.A. 484.
[11] J.A. 554.
[12] J.A. 781, 506.
[13] J.A. 622.

agitation."[14] But the defense did not learn this until about four days before trial.[15] It quickly phoned its forensic psychologist, who testified it was "very likely" E.B. had a "thought disorder," causing "aberrant" behavior that makes one "unable to perceive their environment correctly" when she recalled the allegations.[16]

With no explanation, the judge denied a two-week continuance.[17] He told defense it "has Friday and all of the weekend" to prepare its case.[18] He ordered trial counsel to "get in touch with the hospital and see if they can get someone to decipher what the records mean[.]"[19] There is no indication it did so.

The judge denied in camera review.[20] E.B.'s counsel urged the judge to destroy E.B.'s records; otherwise, "appellate authorities" could review them.[21] The judge removed the records from the record and gave them to E.B.'s counsel.[22]

The day before trial, the defense said it was "not prepared to go to trial."[23] The judge responded: "Motion denied. See you all tomorrow morning."[24]

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[14] J.A. 804.
[15] J.A. 755.
[16] J.A. 611, 619-20.
[17] J.A. 652.
[18] J.A. 653.
[19] J.A. 653.
[20] *United States v. Jacinto*, 79 M.J. 870, 879 (N-M. Ct. Crim. App. 2020).
[21] J.A. 799.
[22] J.A. 67.
[23] J.A. 826.
[24] J.A. 564.

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.[25] They sentenced him to eight years of confinement and a bad-conduct discharge.[26] The Convening Authority ordered three days of confinement credit but otherwise approved the sentence.[27] The NMCCA affirmed the findings and sentence as correct in law and fact on April 30, 2020. On May 29 2020, Appellant moved for en banc reconsideration, which the NMCCA denied on July 1, 2020. Appellant petitioned this Court on August 28, 2020. This Court granted review on January 14, 2021.

Statement of Facts

A. Appellant's stepdaughters, E.B. and J.B., moved to live with Appellant and their mother, but never had a close relationship with him.

Appellant's wife had two daughters from a prior marriage, E.B. and J.B., who were raised in Guam.[28] When they were seven and nine years old,[29] they

[25] 10 U.S.C. §§ 920b, 934 (2016).
[26] J.A. 47.
[27] J.A. 47.
[28] J.A. 201-203.
[29] J.A. 137, 95.

moved to Maryland to live with their mother and Appellant.[30]

The girls were not happy with the move. They did not want to leave Guam since "they were leaving behind their family."[31] And while the girls ended up living in the same house as Appellant for years, they never grew close to him.[32]

B. Four years after the move, E.B. claimed Appellant "touched her" on one occasion before quickly admitting she fabricated the allegation.

Four years after the move, E.B. called her mother out of the blue one day claiming Appellant "had touched her."[33] She did not provide further details.[34] Appellant's wife, who was in Thailand, returned two days later and asked E.B. to tell her what happened.[35] In response, E.B. stated that on one occasion a few months before, Appellant rubbed his body against her as she lay on the bed.[36] When Appellant's wife confronted Appellant, he denied the incident occurred.[37]

Appellant's wife was skeptical of E.B.'s claim. As she later explained in an interview with an agent from the Naval Criminal Investigative Service (NCIS), E.B. was a "pathological liar" and she would "always catch her lying" during this

[30] J.A. 202, 204-05.
[31] J.A. 243.
[32] J.A. 479.
[33] J.A. 486.
[34] J.A. 486.
[35] J.A. 486.
[36] J.A. 488, 240.
[37] J.A. 221.

time.[38] E.B. also "had gotten in trouble at school" right before Appellant's wife left for Thailand.[39] Thus, it came as no surprise when only days later, E.B. told her mother she had fabricated this allegation.[40]

C. Four years later, E.B. resurfaced the first allegation after getting in trouble with her boyfriend—while adding a new allegation—prompting Appellant's wife to kick Appellant out of the house.

Four years later, E.B. resurrected this allegation and claimed Appellant had *also* touched her outside her clothes four years earlier.[41] As before, Appellant's wife was skeptical: earlier that day, she had made E.B. break up with "the love of her life" after finding hickeys on E.B.'s neck after a party from two days earlier.[42]

Like she did with the first allegation, Appellant's wife confronted Appellant.[43] As she later stated to an NCIS agent, Appellant was "pretty drunk," and she did not remember what he said.[44] But the following day when he was sober, she said he adamantly denied the allegations.[45] Appellant's wife did not report the allegations, but she kicked Appellant out of the house.[46] As she put it, "I

[38] J.A. 486, 686.
[39] J.A. 485.
[40] J.A. 488.
[41] J.A. 493.
[42] J.A. 491-92.
[43] J.A. 493.
[44] J.A. 493.
[45] J.A. 494.
[46] J.A. 495.

just didn't know what to do. I'm like just get the hell out, you know."[47]

D. Two days later, E.B.'s school counselor recommended she be admitted to a mental health facility based on admitted ecstasy use at a party days earlier.

Two days after E.B. resurrected the allegations, her school counselor recommended she be admitted to a mental health hospital.[48] [redacted]

When E.B. met with her counselor, she admitted to the ecstasy use.[51] She also discussed the allegations.[52] This time, she disclosed *three* incidents and changed facts about the incidents she described to her mother.[53] She said that when she was "ten years old," Appellant "reached into her pants and touched her vagina" and digitally penetrated her on another occasion.[54] Another time, Appellant "laid her on the bed and began 'humping' her" while he was clothed.[55]

[47] J.A. 495.
[48] J.A. 502.
[49] J.A. 688.
[50] J.A. 688.
[51] J.A. 688.
[52] J.A. 688.
[53] J.A. 688.
[54] J.A. 688.
[55] J.A. 688.

The counselor had Appellant's wife come to the school.[56] She did not tell Appellant's wife about the allegations.[57] Instead, the focus was on E.B.'s drug use.[58] Appellant's wife agreed with the counselor that admitting E.B. to a mental health facility was appropriate.[59]

But when they arrived at the hospital, E.B. told her mother she had fabricated the story about taking ecstasy.[60] Incredulous, Appellant's wife asked E.B. why she would lie about something like this.[61] E.B. did not reply.[62] Still, Appellant's wife had E.B. admitted to the hospital to "get it checked out."[63]

E. <u>While waiting for E.B. to be checked in to the hospital, J.B. told her mother Appellant had abused her on one occasion five years earlier</u>.

Appellant's wife drove E.B. and J.B. to the hospital.[64] By this point, J.B. was aware of E.B.'s allegations.[65] While E.B. was in the hospital waiting to be checked in, Appellant's wife asked J.B. whether Appellant "had ever touched [her]" too.[66] In response, J.B. calmly told her mother that Appellant had "touched

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[56] J.A. 501.
[57] J.A. 688.
[58] J.A. 501-02.
[59] J.A. 502.
[60] J.A. 503.
[61] J.A. 503.
[62] J.A. 503.
[63] J.A. 503.
[64] J.A. 110-11.
[65] J.A. 113.
[66] J.A. 112, 483.

her down there."[67] She did not provide details.[68]

F. E.B., who was at the hospital for two weeks, discussed the allegations to hospital workers and gave a different version in a forensic interview.

E.B. was admitted for inpatient mental health treatment for a week.[69] She remained at the hospital for another week undergoing "partial treatment."[70] [redacted]

Shortly after she was released, E.B. was interviewed by a social worker.[72] E.B. changed details of the allegations again.[73] She said when she was nine or ten, Appellant (1) rubbed her vagina; (2) *put her hand on his penis* on a separate occasion while he digitally penetrated her vagina; and (3) "dry hump[ed]" her in her mother's room as she lay on a bed on another occasion.[74]

G. In a detailed story, E.B. said she chased a boy with a knife before she and J.B. both discussed being sexually abused by Appellant.

When the social worker asked E.B. if she told her sister about the allegations, E.B. told a detailed story in which she held a knife and chased a boy

[67] J.A. 483-84.
[68] J.A. 484.
[69] J.A. 781.
[70] J.A. 506; *see also* J.A. 709 ("She entered a course of partial treatment from 10-19 May 2017.").
[71] J.A. 694.
[72] J.A. 505, 691.
[73] J.A. 515.
[74] J.A. 515-20, 523-26, 529-30 (emphasis added).

who was with J.B. in their basement.[75] E.B. claimed she then "came to [J.B.] to talk to [J.B.] about it, and she said it's okay."[76] E.B. claims J.B. told her: "[I]t's okay. He did it to me, too."[77] E.B. said that J.B. said: "[W]e're sisters" and "[w]e have a strong, like, connection, a bond. We can't break that."[78]

H. J.B. denied ever discussing her allegation with E.B.

The same day, the same social worker also interviewed J.B. J.B. said her mother did not ask her whether Appellant abused her; rather, J.B. said she sought out her mother.[79] J.B. said that five years before, Appellant digitally penetrated as she slept on the floor of their residence during a party.[80] She said she pushed Appellant's face and ran to a room where E.B. was sleeping.[81]

Unlike E.B.'s story of shared abuse, J.B. told the social worker she and E.B. had never discussed their allegations.[82]

I. E.B.'s boyfriend said E.B. "started breaking down" before she went to see her school counselor.

An NCIS agent later spoke with E.B.'s boyfriend.[83] He stated that E.B.

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[75] J.A. 551-53.
[76] J.A. 554.
[77] J.A. 554.
[78] J.A. 554.
[79] J.A. 475.
[80] J.A. 475.
[81] J.A. 476-77.
[82] J.A. 474, 478.
[83] J.A. 461.

would "cry and stuff" even before they dated.[84] He stated that the day she went to see her counselor she "started breaking down."[85] When asked about any allegations he was familiar with, he said E.B. told him Appellant "would, like, rub her vagina" while trying to get her to do push-ups.[86]

J E.B.'s close friend said E.B. disclosed the allegations at a party where friends gathered in a circle.

E.B.'s close friend told NCIS E.B. told her Appellant would "ask her to do push-ups [a]nd then when he'd do that, he'd take this thumb and press it against her vagina."[87] She said Appellant would "dry hump her" and "tried to rape her[.]"[88]

She also said E.B. disclosed allegations against Appellant at the party where she supposedly took drugs.[89] At the party, everyone got into a circle as E.B. described the allegations.[90] Afterward, someone called E.B. an "attention whore."[91]

K. Months before trial, the defense moved to compel production of E.B.'s treatment records from the hospital.

Before trial, the defense expressed its desire to "minimize surprise at trial."[92]

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[84] J.A. 470.
[85] J.A. 469.
[86] J.A. 463.
[87] J.A. 456-57.
[88] J.A. 457.
[89] J.A. 459.
[90] J.A. 459-60.
[91] J.A. 459-60.
[92] J.A. 52.

It informed the military judge that J.B., E.B., and one of E.B.'s friends were refusing to be interviewed by the defense team.[93] In response, trial counsel stated: "The Sixth Amendment applies inside the courtroom, not outside the courtroom."[94]

The defense also moved to compel disclosure of "E.B.'s treating psychotherapist, diagnoses, and prescription related to her hospital stay" at the mental health hospital.[95] The defense asked the military judge to conduct in camera review of all her mental health records and produce relevant records.[96] The Government twice represented E.B. had not been prescribed antipsychotic medications during her stay at the hospital.[97]

L. The military judge waited until six days before trial before ordering production of limited information in E.B.'s inpatient records.

After a closed hearing, the military judge ordered production of non-privileged evidence: (1) identity and contact information of E.B.'s providers during her stay; (2) diagnoses reached by these providers; and (3) a complete record of all medications prescribed during her two-week stay.[98] For reasons unexplained in the record, the judge did not issue an order for this information until six days before

[93] J.A. 555.
[94] J.A. 50.
[95] J.A. 681.
[96] J.A. 681.
[97] J.A. 702 ("Upon her release from Calvert Memorial Hospital, E.B. was prescribed two medications (NFI) for depression and anxiety."); *see also* J.A. 770.
[98] J.A. 721-22.

trial.[99] His order required the records to be delivered to the trial counsel.[100]

The judge said he would not conduct in camera review of E.B.'s full records because he claimed the defense had not demonstrated "a reasonable probability that the records contain information otherwise unavailable to the defense, and that the information is vital to the defense theory of the case."[101]

[redacted]

[99] J.A. 558.
[100] J.A. 558.
[101] J.A. 721.
[102] J.A. 774-75.
[103] J.A. 773.
[104] J.A. 771.
[105] J.A. 67.

N. A smaller volume of records arrived only several days before trial, and they revealed E.B. had been prescribed Thorazine to treat "psychotic agitation."

The hospital sent a smaller volume of records several days before trial.[106] A list of E.B.'s "Active Medications" showed "Thorazine."[107] Under a header that stated "PRN Reason" were the words "Psychotic Agitation."[108] [redacted] This was only two days after E.B. brought back the allegations against Appellant.[110]

O. In a closed hearing, an expert testified the records strongly suggested E.B. was experiencing a psychotic condition when she resurfaced the allegations.

The defense had a forensic psychologist testify the morning after it received the records.[111] At the hearing, the expert explained what psychotic agitation is:

> 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.[112]

The expert also stated that such a person's "interactions with [their] environment appear aberrant or unusual to those around them and may in fact be

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[106] J.A. 755.
[107] J.A. 804.
[108] J.A. 804.
[109] J.A. 804.
[110] J.A. 79 (stating that E.B. resurfaced allegations on "May 1st of 2017").
[111] J.A. 633.
[112] J.A. 611.

improper because they are not responding to the environment as it exists, but as they are perceiving it."[113]

Defense counsel directed the expert's attention to a diagnosis in E.B.'s record that stated she was experiencing "depression *without* psychotic features."[114] In response, the expert stated this was a "direct contradiction" since E.B.'s treatment providers "very clearly" explain "the reason for giving this drug is, quote, psychotic agitation."[115] [redacted]

[redacted]

Still, the expert explained it was her opinion that E.B. experienced psychotic agitation while hospitalized.[117] [redacted]

[redacted]

[redacted]

[redacted]

[113] J.A. 620.
[114] J.A. 615 (emphasis added). Though the parties refer to diagnoses as if this information was in records, this information does not appear in any mental health records in the record of trial. *See generally* J.A. 781-84, 802-09.
[115] J.A. 615.
[116] J.A. 615.
[117] J.A. 625.
[118] J.A. 622.
[119] J.A. 622.

[redacted]

[120] J.A. 611.
[121] J.A. 622.
[122] J.A. 619 ("[O]ne doesn't suddenly appear psychotic on [May 3], but not having had some preliminary symptoms that probably brought the patient to the facility by [May 3].").
[123] J.A. 623-24. The annotations from E.B.'s mental health provider do not appear in the mental health records that are part of the record of trial.
[124] J.A. 625. The medication discharge summary is at J.A. 781-84.
[125] J.A. 625.

P. Trial counsel conceded the evidence would be relevant if there were inconsistencies in E.B.'s accounts; victim's legal counsel conceded it was possible E.B. was suffering psychotic agitation at some point.

The Government argued the records did not conclusively show E.B. took Thorazine.[126] But it conceded the evidence would be relevant if E.B. had given inconsistent accounts of the allegations.[127]

E.B.'s victim's legal counsel conceded it was possible psychotic agitation "was accurate at the time with that doctor and then discontinued from thereon."[128]

Q. The military judge appeared to agree the evidence was highly relevant.

At first, the military judge appeared to side with the defense. He told trial counsel: "I've got paperwork here . . . and witness testimony that says she was prescribed something for psychotic agitation."[129] He asked trial counsel: "[A]re you telling me that . . . the defense shouldn't even be able to bring up the fact that she was prescribed a medication that can be prescribed for psychotic agitation?"[130] He later added: "[T]he expert witness' testimony [was] that a person who's suffering from psychotic agitation may be stimulated externally, *I've got in all*

[126] J.A. 639, 776.
[127] J.A. 641 ("If there was any inconsistency in any of that . . . I think, you know, defense can connect the dots and this evidence could come in.").
[128] J.A. 646.
[129] J.A. 638.
[130] J.A. 638-39.

caps misperceiving, things that are not really happening[.]"[131]

R. The defense moved for a continuance, telling the military judge it would likely make further discovery requests.

Near the end of the hearing, the defense said it was requesting a two-week continuance to further investigate the case due to this "bombshell on the eve of trial."[132] It said it needed more time to discuss the issue with its expert and would likely be requesting additional discovery from the Government.[133]

S. The military judge suddenly denied the defense's motion for a continuance and ordered the Government to "decipher" the records.

Despite his earlier statements indicating his apparent agreement that the evidence was highly relevant to E.B.'s credibility, the military judge abruptly denied the continuance motion without explanation.[134] He then told defense it "has Friday and all of the weekend" to strategize about the evidence.[135]

Separately, he ordered 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]."[136]

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[131] J.A. 654 (emphasis added).
[132] J.A. 634-35.
[133] J.A. 647.
[134] J.A. 652 ("Here's what we're going to do, the defense request for a continuance is denied.").
[135] J.A. 653.
[136] J.A. 653.

T. Four days before trial, the military judge ordered the hospital to produce records of medications administered to E.B. at the hospital and prescribed upon her discharge.

Later that day, the military judge signed a court order requiring the hospital "to produce the below information from the medical records of [E.B.]" including: (1) records of when she was administered Thorazine during her inpatient treatment; and (2) records of all "medications and dosages that were prescribed to patient [E.B.] upon in-patient discharge" from the hospital."[137]

The military judge ordered any records be provided to the trial counsel.[138]

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

The day before trial, the defense moved for reconsideration of the military judge's denial of its two-week continuance request.[139] It told the military judge it was "not prepared to go to trial" the following morning.[140] It explained that it was misled by the Government's prior statements about E.B.'s treatment and needed time to investigate "the alleged victim's capacity to recollect and recount."[141] It said more investigation would "possibly alter its theory of the case."[142]

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[137] J.A. 562.
[138] J.A. 562.
[139] J.A. 826.
[140] J.A. 826.
[141] J.A. 826, 830.
[142] J.A. 830.

Within hours of receiving the motion, the military judge responded with a one-line email that read: "Motion denied. See you all tomorrow morning."[143]

V. E.B.'s victim's legal counsel asked the military judge to destroy the large volume of E.B.'s mental health records from the record of trial for fear that "reviewing and appellate authorities" could examine them.

The defense separately moved: (1) for in camera review of E.B.'s mental health records; (2) to be allowed to cross-examine witnesses at trial on the fact that E.B. was prescribed Thorazine to treat psychotic agitation; and (3) to order the Government to produce E.B.'s prescribing physician at trial.[144]

Trial counsel and E.B.'s victim's counsel opposed the motion.[145] Trial counsel argued that E.B.'s records show she never experienced psychotic agitation and was never administered Thorazine.[146] He based this off the medical records provided to the defense and discussed at the closed hearing.[147]

[redacted]

[143] J.A. 564.
[144] J.A. 754.
[145] J.A. 776, 788.
[146] J.A. 778.
[147] J.A. 778.
[148] J.A. 778.
[149] J.A. 785-86.

[redacted]

She also argued that E.B.'s records should be destroyed. She stated that keeping the records in the record under seal "only further violates E.B's M.R.E. 513 privilege[.]"[155] She added that if the records remained under seal in the record, "reviewing and appellate authorities" could review them since the standard on appeal is "significantly lower than it is at the trial level."[156]

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[150] J.A. 778.
[151] J.A. 778.
[152] J.A. 778.
[153] J.A. 793. Again, these notations are not in the records attached to her motion.
[154] J.A. 794.
[155] J.A. 799.
[156] J.A. 799.

W. While there is no indication the hospital complied with the military judge's second order to the hospital, the judge denied the defense's motion for in camera review and barred it from mentioning the mental health evidence.

The evening before trial, the military judge denied the defense motion.[157] In his "Findings of Fact," he noted that "Calvert Memorial Hospital records show that Thorazine was ordered as needed to address 'psychotic agitation.'"[158] But he found: "There is no evidence that E.B. ever experienced psychotic agitation."[159] He also found: "There is no evidence the prescription for Thorazine was ever filled."[160] He also found: [redacted] Thorazine, and [redacted] were prescribed "PRN" or "as needed" and were never administered to E.B." at the hospital.[161]

The ruling does not explain how he arrived at these conclusions. For example, it does not state the hospital complied with his order and disclosed the records he requested.[162] Nor are there any such records in the record of trial.

He also applied the wrong in camera review standard. He stated the defense first needed to "demonstrate a reasonable probability that the records contain information otherwise unavailable to the defense, *and that the information sought*

[157] J.A. 820.
[158] J.A. 821.
[159] J.A. 821.
[160] J.A. 821.
[161] J.A. 821.
[162] J.A. 562.

is vital to the defense theory of the case."[163]

Separately, the judge denied the defense's requests to cross-examine witnesses on the fact that E.B. was prescribed Thorazine for psychotic agitation.[164]

X. The judge removed the large volume of E.B.'s records from the record and gave them to victim's legal counsel "to do with as she and her client see fit."

When the parties got on the record the next day, the military judge summarized the most recent developments in the case.[165] He did not acknowledge that he issued an order to Calvert Memorial Hospital after the closed hearing.[166] Nor did he acknowledge whether the hospital provided responsive records.[167]

He also removed the large volume of E.B.'s records the hospital initially sent and gave them to E.B.'s counsel "to do with as she and her client see fit."[168]

Y. At trial, the Government piggybacked J.B.'s allegation to E.B.'s.

In opening statement, trial counsel told the members "this case is also about courage."[169] Specifically, trial counsel said E.B. had "the courage that she gave her older sister to also come forward with the truth of her abuse."[170] Trial counsel

[163] J.A. 824 (emphasis added).
[164] J.A. 824.
[165] J.A. 65-66.
[166] J.A. 65-66.
[167] J.A. 65-66.
[168] J.A. 67.
[169] J.A. 70.
[170] J.A. 70.

added that only after "watching her little sister have the courage to go through what she went through, [J.B.] decided that she needed to be brave too and tell her mom what happened to her."[171] Trial counsel explained again that J.B. "didn't have the courage to tell anyone what had happened to her until she saw what her little sister was going through . . . years and years later."[172]

The defense's main theory was that NCIS conducted "an absolute mess" of an investigation.[173] The defense stated that NCIS failed to interview numerous important fact witnesses.[174]

The defense also stated that J.B. and E.B.'s allegations were not credible since the girls' developed "resentment" toward Appellant.[175]

Z. The evidence for J.B.'s and E.B.'s allegations consisted of their testimony.

First, J.B. testified to the allegation she described in the forensic interview.[176] She stated she did not tell anyone about it until she learned that E.B. disclosed her own allegation.[177] She said her mother asked her if Appellant had

[171] J.A. 80.
[172] J.A. 81.
[173] J.A. 93.
[174] J.A. 84-87.
[175] J.A. 89.
[176] J.A. 106-07.
[177] J.A. 112.

ever touched her.[178] She stated she then disclosed because E.B. decided to do so.[179]

On cross-examination, the defense confronted her with her prior statement in which she made clear that she did not report in response to her mother's question but rather did so on her own.[180] J.B. acknowledged the inconsistency.[181]

Immediately after J.B.'s testimony, E.B. testified to the three acts she described during her forensic interview.[182] She testified that what "triggered" her to bring back the allegations was an incident in which Appellant was "pushing on [her] butt" as he helped her retrieve something from a kitchen counter.[183]

Contrary to her prior statement, E.B. denied ever telling J.B. about the allegations.[184] But she maintained that J.B. told her years ago about J.B.'s allegation against Appellant.[185]

On cross-examination, the defense confronted E.B. with inconsistencies.[186] Defense counsel confronted her with her prior statement that she and J.B. discussed their allegations before,[187] and that she never told the social worker

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[178] J.A. 112.
[179] J.A. 112.
[180] J.A. 119-21.
[181] J.A. 121.
[182] J.A. 144-152.
[183] J.A. 156-57.
[184] J.A. 151.
[185] J.A. 171.
[186] J.A. 170.
[187] J.A. 173-74.

about the story of her climbing on the kitchen counter.[188]

AA. E.B. also testified in support of two specifications of child endangerment.

E.B. also testified that around 2015 or 2016, Appellant would host parties at the family home and would leave "beer bottles and beer cans everywhere."[189] She stated that on one occasion, she drank alcohol after Appellant's friends left it around in the basement.[190] She testified Appellant saw this happen and did not tell her to stop.[191] She also testified that her friend, a minor, was with her on this occasion as well.[192] She testified that her friend also drank beer.[193]

The friend later testified at trial that she drank beer at the party.[194] She testified that as she was playing "beer pong," Appellant told her she "had" to drink beer if the ball went into the cup.[195]

BB. Appellant's wife at first suggested Appellant did not deny E.B.'s allegations, but the military judge acknowledged this was "misleading."

The Government also called Appellant's wife. She confirmed that when E.B.

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[188] J.A. 177-79.
[189] J.A. 161, 164-65.
[190] J.A. 167.
[191] J.A. 164-69.
[192] J.A. 168-69.
[193] J.A. 169.
[194] J.A. 196.
[195] J.A. 196. This friend also alleged that Appellant touched her "buttocks and hips" at a party. *See* J.A. 417-19. Appellant was acquitted of this specification. *See* J.A. 46.

resurrected the claims against Appellant, E.B. changed details of the first allegation: her mother agreed that E.B. initially said "she was touched *outside* of the clothes in the kitchen.[196] Her mother also acknowledged that E.B. added "a new incident" when she brought back the claims.[197]

She also testified that when she confronted Appellant with E.B.'s resurfaced allegations, "[h]e was quiet, and he didn't deny it, and he didn't admit to it."[198]

When the defense attempted to impeach Appellant's wife on this statement, the Government objected.[199] In an Article 39(a) session, the military judge allowed the defense to impeach the statement after reviewing Appellant's wife's interview with NCIS in which she discussed the same event.[200]

In the interview, Appellant's wife said: "I confronted him, and god, *I don't even remember what he said*. He was pretty drunk. He was pretty drunk, so he went to bed. I found him on the floor of my room."[201] The military judge said it would be "misleading" to suggest Appellant did not deny the allegations.[202]

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[196] J.A. 246.
[197] J.A. 245 ("She told me what happened, when I was in Thailand, but that that did happen*, and then she told me of a new incident that had happened*.") (emphasis added).
[198] J.A. 211.
[199] J.A. 248.
[200] J.A. 255.
[201] J.A. 253 (emphasis added).
[202] J.A. 255.

After the defense read this statement to Appellant's wife, she merely replied: "He did go to bed, yes."[203]

CC. The defense called a witness who claimed he was asleep feet away from where the allegation involving J.B. allegedly occurred and heard nothing.

One witness claimed that at the Fourth of July party, he saw either J.B. or E.B. asleep on the couch feet away from where he fell asleep on an adjacent couch.[204] He stated he did not recall any incident J.B. described.[205]

He also said that an adult couple was sleeping in the room where J.B. said she ran after the incident, and that another guest was sleeping on the floor in front of him when he awoke the next morning.[206]

Another witness confirmed that the adult couple was sleeping in the room where J.B. said she entered after the incident.[207]

DD. A Government forensic psychologist testified that J.B.'s decision to come forward was consistent with "observational learning."

The Government also called a forensic psychologist who explained the principle of "observational learning."[208] She explained that observational learning is the concept that "you see somebody else do something, you see the response to

[203] J.A. 257.
[204] J.A. 325-26.
[205] J.A. 325-26.
[206] J.A. 327.
[207] J.A. 336.
[208] J.A. 288.

that action, you see how it went, and that informs you[.]"[209]

The expert explained that J.B. "had the benefit of observing the maternal response to [E.B.'s] report, and it appears from her testimony that she utilized that learning to make her decision."[210]

EE. The Government psychologist also testified that it is common for child victims to forget certain details of events over time.

Regarding memory, the expert testified that traumatic events can affect a child's ability to recall specific details from an event from years ago.[211] She explained that children may "emphasize[e] certain details over other details over time, just depending on their emotional or psychological importance to the child."[212] She said a person may forget "peripheral details" of an event, and that "people don't tell and retell stories exactly the same way every single time."[213]

FF. The defense forensic psychologist was only permitted to discuss general topics relating to child memory—and not E.B.'s mental health condition.

The defense also called the same psychologist who testified during the closed hearing on E.B.'s medical records.[214] In compliance with the military judge's ruling, she did not discuss E.B.'s mental health records. Instead, her

[209] J.A. 288.
[210] J.A. 288.
[211] J.A. 291-92.
[212] J.A. 292.
[213] J.A. 291-92.
[214] J.A. 352.

testimony focused on a general discussion of how memory can be unreliable.[215]

She testified about "confabulation," a phenomenon in which a person is "inserting something that didn't necessarily happen, but makes sense to the person reporting that sequence of events."[216] She stated that inconsistencies in an alleged victim's story can suggest the person is confabulating.[217]

GG. On rebuttal, the Government psychologist testified she saw no evidence of confabulation in the "entire case record."

Trial counsel then recalled its expert forensic psychologist.[218] He asked her whether in her "review of the *entire case record*," she saw "any evidence" of "confabulation."[219] She answered in the negative.[220]

HH. In closing argument, trial counsel again linked J.B. and E.B.'s allegations, stating (1) there were similarities in the girls' allegations; (2) J.B. came forward because E.B. did; and (3) "you don't want his hands on your stepdaughters[.]"

Trial counsel said that J.B. "came forward because she saw the courage, she saw how brave her little sister was[.]"[221] Trial counsel said J.B. did not "volunteer the information" but did so after her mother asked her and her response was

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[215] J.A. 363-77.
[216] J.A. 360.
[217] J.A. 366.
[218] J.A. 295.
[219] J.A. 302 (emphasis added).
[220] J.A. 302.
[221] J.A. 404.

because "if my sister was brave enough to tell, I should be too[.]"[222]

Trial counsel also argued that Appellant engaged in a similar pattern with both E.B. and J.B. Trial counsel stated "these events happened when he's with the children alone, they happen at night, in the dark[.]"[223]

Trial counsel also stated at one point: "[W]e don't want a hands-on dad, because you don't want his hands on your stepdaughters, because that's what the accused did."[224] Trial counsel did not refer to the spillover instruction or otherwise tell the members to keep the evidence for the offenses separate.

II. Trial counsel also suggested its expert reviewed "everything" and that there was no basis to question E.B. or J.B.'s memories.

Trial counsel referred to its forensic psychologist eight times.[225] Trial counsel referenced the expert's opinion there were no signs of "suggestibility" or "contamination" in either J.B. or E.B.'s forensic interviews.[226] But trial counsel also suggested that there was *no* evidence to question their memories:

> I asked her, did you review the case file? Yes.
> You reviewed *everything*? Yes.
> Did you notice anything? No.
> There's nothing there, members, nothing at all."[227]

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[222] J.A. 404.
[223] J.A. 421.
[224] J.A. 421.
[225] J.A. 394-424.
[226] J.A. 422.
[227] J.A. 422-23 (emphasis added).

JJ. Defense counsel argued the NCIS investigation was poor and there were inconsistencies in E.B. and J.B.'s statements.

In closing argument, defense counsel focused on the poor quality of the NCIS investigation as well as inconsistencies in J.B. and E.B.'s allegations.[228]

Defense counsel also urged the members to keep the offenses separate, referring to the military judge's spillover instruction.[229]

KK. On appeal, the NMCCA affirmed.

On appeal, Appellant asserted, *inter alia*, that the military judge abused his discretion by denying a continuance and by denying in camera review.[230]

Regarding the denial of a continuance, the NMCCA wrote that "Appellant had ample time . . . to gather evidence of [E.B.]'s psychotic delusions from non-privileged sources."[231] It wrote that Appellant "lived with her and saw her almost continuously for nearly a decade" and that defense counsel "could have spoken with [E.B.]'s friends and teachers, or even gathered evidence of psychotic delusions on social media."[232]

In resolving the in camera review issue, the NMCCA concluded that the

[228] J.A. 425-41.
[229] J.A. 439.
[230] *Jacinto*, 79 M.J. at 875.
[231] *Id*. at 881.
[232] *Id*.

military judge abused his discretion by applying the wrong legal standard.[233] But the court found the error harmless. It wrote: "[T]here was no evidence [E.B.] ever had the psychotic disorder Appellant alleges or that she ever took Thorazine because she was suffering from psychotic disorders or "laboring under delusions."[234] It wrote that Appellant was "far from showing a 'specific factual basis' demonstrating a reasonable likelihood the records would yield any evidence admissible under an exception to the privilege."[235] It added that even if E.B. had suffered from psychotic delusions when she resurrected the allegations, "Appellant would have to somehow tie those later-occurring problems to the timeframe when the alleged abuse actually happened, some four years prior."[236]

The NMCCA also found that E.B. had "merely repeated the *same disclosure* she had previously made to her mother four years earlier[.]"[237]

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[233] *Id*. at 880.
[234] *Id*.
[235] *Id*.
[236] *Id*.
[237] *Id*. (emphasis added).

Summary of Argument

I. The military judge abused his discretion in denying the defense's motion for a continuance. As this Court and many others have long recognized, evidence of a mental health condition affecting the witness' ability to accurately perceive is highly relevant to evaluating the witness' credibility. Here, the defense presented expert testimony explaining it was very likely E.B. was experiencing a psychotic condition causing delusional thinking and aberrant behavior when she brought back a previously recanted allegation and made new ones. The judge's finding that E.B. did not have the condition ignored the evidence. The proper relief is to set aside the findings and sentence and authorize a rehearing.

II. The military judge abused his discretion in denying in camera review. In 2014, Congress revised M.R.E. 513 to remove the exception allowing access when constitutionally required. Since the NMCCA's procedures in *J.M. v. Payton-O'Brien* provide a workable framework to ensure a right to a fair trial while respecting the policy decision of Congress and the President, this Court should adopt its reasoning. Here, as the NMCCA noted, the military judge failed to apply *J.M.* properly. Under the correct standard, Appellant met his burden for in camera review. This Court should set aside the findings and sentence. Only if this Court believes it cannot decide the issue otherwise should it order in camera review.

Argument

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE CONTINUANCE MOTION. THE ERROR WAS NOT HARMLESS SINCE IT PREVENTED THE DEFENSE FROM INVESTIGATING AND PRESENTING CRITICAL IMPEACHMENT EVIDENCE THAT THIS COURT CAN BE CONVINCED WOULD HAVE UNDERMINED THE CREDIBILITY OF THE ALLEGATIONS.

A. The standard of review is abuse of discretion.

A military judge's decision to grant or deny a continuance is reviewed for an abuse of discretion.[238] An abuse of discretion occurs where "'reasons or rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice.'"[239]

B. This Court applies the factors from *United States v. Miller*.

As the Court of Military Appeals stated long ago, when a motion for a continuance "'is not made on frivolous grounds or solely for delay, the request should ordinarily be granted.'"[240] Article 40, UCMJ, specifies that a military judge may grant a continuance where the moving party has shown "reasonable cause."[241]

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[238] *United States v. Watkins*, 80 M.J. 253, 259 (C.A.A.F. 2020).
[239] *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (citations omitted).
[240] *United States v. Daniels*, 11 U.S.C.M.A. 52, 55 (1959) (citation omitted).
[241] 10 U.S.C. § 840 (2016).

An "insufficient opportunity to prepare for trial" is recognized as a valid reason for a continuance in the Discussion of Rule for Courts-Martial 906(b)(1).[242]

In *United States v. Miller*, this Court identified the following factors as relevant to the inquiry: "surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice."[243]

The Court looked to Supreme Court precedent, which cautions against "'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay[.]"[244]

C. Since the military judge in this case failed to apply any *Miller* factors, this Court should give little deference to his ruling.

A reviewing court can afford little deference to a military judge's ruling that fails to articulate the guiding legal analysis on the record.[245] Consistent with this

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[242] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [HEREINAFTER MCM], Rule for Courts-Martial (R.C.M.) R.C.M. 906(b)(1) Discussion.
[243] *Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (citations omitted); *see also Watkins*, 80 M.J. at 259 (explaining that these factors can help a military judge determine whether a continuance is appropriate).
[244] *Miller*, 47 M.J. at 358 (quoting *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964))).
[245] *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted).

principle, this Court recently determined in *United States v. Watkins* that a military judge erred after recognizing that he failed to "balance the factors mentioned in *Miller*" in denying the appellant's request for a continuance.[246]

The same occurred here, where the military judge did not provide any analysis for his summary denials of the defense's motions.[247] Thus, this Court should give no deference to his rulings.[248]

D. All *Miller* factors supported granting a continuance.

A proper application of the *Miller* factors shows that Appellant's request should have been granted.

1. Appellant was surprised by the evidence.

The defense requested this evidence months before trial.[249] The Government repeatedly indicated E.B. had not been prescribed antipsychotic medications.[250] The military judge waited until six days before trial before ordering the hospital to provide partial records.[251] The defense said the evidence was a "bombshell on the

[246] *Watkins*, 80 M.J. at 259.
[247] J.A. 564, 652.
[248] *United States v. Briggs*, 64 M.J. 285, 287 (C.A.A.F. 2007) ("However, deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts.").
[249] J.A. 681.
[250] J.A. 702, 770.
[251] J.A. 558.

eve of trial" that caused it to "reassess the case."[252]

2. The evidence was of a nature to undermine the allegations.

As this Court recognized in *United States v. Sullivan*, evidence of a mental health disorder "should be admitted if it relates to the witness's ability to perceive events and testify accurately."[253] Indeed, the Fifth Circuit has explained that an accused "has the right to explore *every facet* of relevant evidence pertaining to the credibility of those who testify against him."[254] This extends to "relevant evidence of any mental defect or treatment at a time *probatively related* to the time period about which [the witness] was attempting to testify."[255]

Regarding the time lapse between the condition and testimony, the Second Circuit has held that a lapse of *five years* is not too remote to make the psychiatric evidence relevant, even in the context of civil litigation.[256]

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[252] J.A. 634.

[253] *United States v. Sullivan*, 70 M.J. 110, 117 (C.A.A.F. 2011); *United States v. Butt*, 955 F.2d 77, 82 (1st Cir. 1992) ("Evidence about a prior condition of mental instability that 'provides some significant help to the jury to evaluate the witness's ability to perceive or to recall events or to testify accurately' is relevant.") (citation omitted).

[254] *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974) (emphasis added).

[255] *Id*. (emphasis added).

[256] *Chnapkova v. Koh*, 985 F.2d 79, 81-82 (2d Cir. 1993) (finding abuse of discretion after trial judge prevented defendant from admitting psychiatric records that "bore on the plaintiff's credibility as a witness").

a. The time period including E.B.'s hospitalization was highly probative of the reliability of her allegations.

E.B. made her first allegation less than five years before trial and during a time in which her mother stated she was "always lying."[257] Thus, treatment records relevant to her ability to perceive were highly relevant and admissible.[258]

Of course, this was not the only disclosure. E.B. was hospitalized only two days after she brought back the first allegation she previously said was a lie—and added entirely new ones.[259] And this occurred only a year before trial.[260] As such, the period surrounding her hospitalization was "probatively related to the time period about which [the witness] was attempting to testify."[261]

b. The evidence suggested E.B. was medicated for psychotic agitation at the hospital, and the judge's finding to the contrary was arbitrary.

Despite the Government's argument that E.B. never took Thorazine, there were strong indicators to the contrary. For one, Thorazine was listed on her "Active Medications."[262] [redacted]

[redacted]

[257] J.A. 486, 686.
[258] *Chnapkova*, 985 F.2d at 81-82.
[259] J.A. 502.
[260] J.A. 502.
[261] *Partin*, 493 F.2d at 763.
[262] J.A. 804.
[263] J.A. 804.

[redacted]

Even the military judge's ruling acknowledged that E.B. was prescribed Thorazine during her stay.[265] For example, his order to the hospital seeking to clarify whether she was administered Thorazine did not ask whether she was prescribed the medication during her stay; rather, it was a fact he did not dispute.[266]

But there is no indication the hospital clarified whether E.B. took Thorazine. For example, though the military judge asked the hospital for records, there are none in the record of trial, nor are any referred to in the military judge's ruling.[267] Indeed, rather than *definitively* stating that E.B. never took Thorazine, the military judge's ruling merely stated: "There is *no evidence* E.B. ever took Thorazine."[268] This suggests he made his finding without having a definitive answer.

His ruling's reasoning only confirms this. He found that E.B. did not take Thorazine because of the "PRN" notation in E.B.'s record.[269] But simply because Thorazine was recommended "as needed" did not answer whether it *was* needed.

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[264] J.A. 625. The medication discharge summary is at J.A. 781-84.
[265] J.A. 821 ("Acetaminophen, Thorazine, and Vistaril were prescribed 'PRN' or 'as needed' and were never administered to E.B. at Calvert Memorial.").
[266] J.A. 562.
[267] *See generally* J.A. 820-25.
[268] J.A. 821 (emphasis added).
[269] J.A. 821.

c. Even if E.B. never took Thorazine, evidence that she experienced "psychotic agitation" was highly relevant to the credibility of her allegations.

As the expert explained, a person who is experiencing psychotic agitation "may be stimulated internally by things that are not actually going on in their environment[.]"[270] She added that a person with this condition "may not be reacting appropriately or accurately to their environment because they are either misperceiving that environment or laboring under the burden of delusions."[271]

This is the sort of evidence federal courts have repeatedly held is highly relevant to a witness' credibility. For example, in *United States v. Robinson*, the Tenth Circuit reversed the appellant's convictions after the judge excluded evidence that an informant was "seeing 'things out through the window that are not really there,' and possibly experiencing psychosis.'"[272] Similarly, the Eleventh Circuit has specifically stated that "[a] psychotic's veracity may be impaired by a lack of capacity to observe, correlate, or recollect actual events."[273]

Thus, even assuming *arguendo* E.B. never took Thorazine at the hospital and was not prescribed Thorazine upon discharge, the defense needed to be able to investigate why, nevertheless, E.B.'s provider prescribed Thorazine and listed the

[270] J.A. 611.
[271] J.A. 611.
[272] 583 F.3d 1265, 1272 (10th Cir. 2009).
[273] *United States v. Lindstrom*, 698 F.2d 1154, 1160 (11th Cir. 1983).

"PRN Reason" as "Psychotic Agitation."[274]

i. Even trial counsel acknowledged the evidence would be admissible if there was evidence E.B. provided inconsistent accounts of her allegations.

Trial counsel conceded that the records would be relevant for the defense to investigate if there were inconsistencies across E.B.'s allegations.[275]

And here, there were numerous inconsistencies. At trial, her mother stated E.B. first told her Appellant touched her *outside* the clothing.[276] She also stated E.B. added "a new incident.[277] When interviewed by a social worker, E.B. added the *third* allegation.[278] Finally, E.B.'s friends described a fourth allegation that had no resemblance to the other three.[279]

d. The military judge's finding that there was "no evidence" E.B. experienced psychotic agitation directly contradicted the evidence before him.

The military judge provided conflicting findings on whether E.B. experienced psychotic agitation. In one place, he wrote: "Thorazine was ordered as needed *to address* 'psychotic agitation.'"[280] Yet he also found: "There is no evidence that E.B. ever experienced psychotic agitation."[281] This was clearly

[274] J.A. 781, 802-03.
[275] J.A. at 641.
[276] J.A. 246.
[277] J.A. 245.
[278] J.A. 688.
[279] J.A. 457, 463.
[280] J.A. 821 (emphasis added).
[281] J.A. 821.

erroneous since it contradicted the unrebutted evidence.

In fact, the military judge even acknowledged: "I've got paperwork here . . . and witness testimony that says she was prescribed something for psychotic agitation."[282] And the expert explained at the hearing that E.B.'s records "very clearly" listed "psychotic agitation" as the reason for the Thorazine prescription.[283]

The expert stated her reading of E.B.'s records indicated to her that it was "very likely" that E.B. was suffering from a "thought disorder" around the time she brought back the allegation against Appellant and added new ones.[284]

Even victim's legal counsel conceded the psychotic agitation notation may have been correct in the eyes of one doctor.[285]

Context is also important: E.B. had a history of telling lies, having breakdowns in school, and engaging in "aberrant"[286] behavior like the defense expert explained, including chasing a boy with a knife.[287] During her forensic interview, she told an elaborate story involving mutual disclosure of the allegations with her sister—a story J.B. said was not true.[288] In fact, even on the way to the

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[282] J.A. 638.
[283] J.A. 615.
[284] J.A. 611, 619-20.
[285] J.A. 646.
[286] J.A. 620.
[287] J.A. 551-53.
[288] J.A. 474, 478.

hospital, she had told her mother she fabricated the story to her counselor about having taken ecstasy.[289] This behavior was consistent with the expert's explanation that a person suffering from psychotic agitation "may not be reacting appropriately or accurately to their environment[.]"[290]

And if E.B. was *not* lying about the drug use, evidence that she was admitted to a mental health hospital for taking mind-altering drugs near the time she recalled allegations was an independent reason to review her records.[291]

It is also telling that while trial counsel and victim's legal counsel repeatedly referenced E.B.'s psychotherapist by name, the Government never called him to clarify the matter. [redacted] these do not change that he also prescribed Thorazine for psychotic agitation.[292] [redacted]

[289] J.A. 638.
[290] J.A. 611.
[291] *Robinson*, 583 F.3d at 1272 ("Illegal drug use does not merely bear on the CI's veracity but also on his capacity as a witness.").
[292] J.A. 781, 802-03.
[293] J.A. 623-24.

3. The defense moved for a continuance immediately.

The defense moved for a continuance the morning after it received E.B.'s mental health records.[294] The military judge even acknowledged the defense had given "the court a heads up" that they would be requesting a continuance.[295]

4. There was no substitute evidence available, contrary to the NMCCA's suggestions.

The defense had no other way to present the evidence. It tried to interview E.B. and J.B. before trial to no avail.[296] In another motion, it unsuccessfully sought alternative ways to introduce the evidence, including calling E.B.'s providers or having the Government stipulate to the evidence.[297]

The lower court suggested that E.B.'s mental health disorders may have been found "on social media."[298] It offered no evidence for this claim. It also suggested Appellant would have witnessed E.B.'s delusions since he lived with her "for nearly a decade."[299] But this ignored that by the time E.B. was admitted to the hospital, Appellant's wife had kicked Appellant out of the house.[300] It also ignores that Appellant likely did observe E.B.'s well-known history of lying.

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[294] J.A. 634.
[295] J.A. 622.
[296] J.A. 50.
[297] J.A. 761.
[298] *Jacinto*, 79 M.J. at 881.
[299] *Id*.
[300] J.A. 495.

5. The evidence would have become available with a brief continuance.

[redacted] added that a review of E.B.'s "complete" record and not "pieces" of it would clarify the extent of the underlying condition.[302] And the judge already had placed a larger volume of E.B.'s mental health records in the record of trial that he could have quickly reviewed.[303]

6. The requested length of the continuance was reasonable.

In *United States v. Weisbeck*, this Court did not find a continuance of six weeks to be unreasonable to secure the presence of a defense expert.[304] Here, the defense only requested two weeks.[305]

7. The Government identified no prejudice it would suffer from the delay.

In *Weisbeck*, this Court found it important that the "Government did not assert any prejudice arising from a continuance."[306] Similarly, here, the Government did not point to any harm it would suffer from a continuance.[307]

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[301] J.A. 615, 619.
[302] J.A. 615, 625.
[303] J.A. 67.
[304] 50 M.J. 461, 465 (C.A.A.F. 1999).
[305] J.A. 634-35, 830.
[306] 50 M.J. at 465.
[307] J.A. 638.

8. The defense had not requested any prior continuances.

This was the first continuance request for the defense.[308]

9. The defense showed good faith in its attempts to prevent delay.

As was true in *Weisbeck*, the Government did not question the defense's good faith in requesting delay.[309] After all, before trial, the defense explicitly told the military judge it wanted to "minimize surprise at trial."[310]

10. The defense demonstrated reasonable diligence.

The defense made every effort to obtain the evidence as quickly as possible. It submitted a timely discovery request months before trial.[311] When the Government denied this request, the defense moved to compel the evidence.[312] When the Government disclosed the records only several days before trial, the defense had its expert provide testimony in a closed hearing the next morning.[313]

11. The evidence would have undermined all of the allegations.

The evidence would have attacked the reliability of all charges and specifications of which Appellant was found guilty.

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[308] J.A. 827.
[309] 50 M.J. at 465.
[310] J.A. 52.
[311] J.A. 674, 692.
[312] J.A. 672.
[313] J.A. 607.

a. The evidence would have undermined E.B.'s allegations.

There were no eyewitnesses to E.B.'s allegations. And contrary to the Government's suggestion at trial—which the military judge called "misleading"—Appellant denied them.[314] Thus, the credibility of the allegations rested on the members' perception of the E.B.'s credibility and memory from years earlier.

And here, the evidence would have undermined this credibility. The members would have been presented with evidence that E.B. may have been "stimulated internally by things that [were] not actually going on in [her] environment[]" when she made the.[315] As the Fourth Circuit once stated, "[w]e can 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."[316]

Since E.B. testified in support of both child endangerment offenses, which she said occurred within two years of her hospitalization, evidence of her mental health condition would have undermined these allegations as well.[317]

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[314] J.A. 255.
[315] J.A. 611.
[316] *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 1980 U.S. App. LEXIS 21757, *23 (4th Cir. 1980).
[317] J.A. 43, 164-169.

b. The evidence would have undermined J.B.'s allegations.

In *United States v. Haye*, the Government charged appellant of adultery and fraternization.[318] The appellant was found guilty of both specifications.[319] The Court of Military Review reversed the adultery conviction but affirmed the fraternization conviction.[320] The appellant asserted the fraternization conviction could not be affirmed if the adultery specification had been reversed.[321]

The Court of Military Appeals agreed. The Court noted that the military judge issued a spillover instruction.[322] But it also noted that "sexual conduct of the accused in both specifications was similar" and the Government presented the evidence such that it "was so merged into one that it is difficult to distinguish its intended purpose."[323] It noted that "the adulterous conduct with [one accuser] was piggy-backed to the evidence of the adulterous affair with [the other accuser]."[324] It observed the evidence "was so close that there was a significant risk that the evidence of the adulterous affair . . . was the deciding factor."[325]

That describes this case. The defense in closing argument made its best

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[318] 29 M.J. 213, 214 (C.M.A. 1989).
[319] *Id*.
[320] *Id*.
[321] *Id*. at 213.
[322] *Id*. at 214.
[323] *Id*. at 214-15.
[324] *Id*. at 215.
[325] *Id*.

effort to tell the members to keep these nearly-identical offenses separate.[326] But trial counsel made no such effort, and, in fact, repeatedly told the members to view E.B. and J.B.'s claims *together*. Trial counsel did so in the following ways:

- In opening statement, by stating J.B. decided to disclose her single allegation because she witnessed the "courage" of E.B.'s reporting her three allegations[327];
- On direct examination of J.B., by asking her why she came forward, and receiving the response: "I felt that if she was brave enough to come out and tell her story that I should be too"[328];
- On direct examination, by having its expert describe "observational learning" by stating that J.B. "had the benefit of observing the maternal response to [E.B.'s] report, and it appears from her testimony that she utilized that learning to make her decision."[329];
- In closing argument, by arguing that J.B. "came forward because she saw the courage, she saw how brave her little sister was[.] and that J.B. said: "if my sister was brave enough to tell, I should be too"[330];

[326] J.A. 439.
[327] J.A. 70.
[328] J.A. 112.
[329] J.A. 288.
[330] J.A. 404.

- In closing argument, by emphasizing the similarity of the allegations by stating: "These events happened when he's with the *children* alone, they happen at night, in the dark[.]"[331]
- In closing argument, by stating J.B. "came forward *because* she saw the courage, she saw how brave her little sister was[.]"[332]
- In closing argument, by stating: "[W]e don't want a hands-on dad, because you don't want his hands on your *stepdaughters*, because that's what the accused did."[333]

As was true in *Haye*, these deliberate efforts by the Government to urge the members to view the offenses together makes it exceedingly difficult for this Court to be convinced the members did not use E.B.'s allegations to evaluate the credibility of J.B.'s.

This Court's task is made more difficult because the evidence was not overwhelming. There were no witnesses to J.B.'s incident, and she waited five years before reporting it.[334] There were also factual difficulties: a witness who was feet away was not awakened even though J.B. said she pushed Appellant's face

[331] J.A. 421.
[332] J.A. 404 (emphasis added).
[333] J.A. 421 (emphasis added).
[334] J.A. 474, 478.

and ran into a nearby room.[335] Another witness said an adult couple—not E.B.—was sleeping in the room where J.B. said she ran.[336] The defense also exposed an important inconsistency: J.B. acknowledged at trial she disclosed the allegation only in response to her mother's asking her—but in her forensic interview, she stated: "[My mother] didn't tell me. I went to *her*."[337]

E. This Court is not forced to guess whether the evidence would have been helpful since the defense expert provided this testimony.

In *United States v. Olson*, the Eighth Circuit described the test for prejudice as "whether defendant was materially prejudiced by the court's refusal to give his counsel time for investigation and preparation of what appeared facially to be significant evidence for the defense."[338] There, the court refused a several-day continuance to investigate possible mistaken identification witnesses.[339]

Similarly, in *United States v. Daniels*, the Court of Military Appeals reversed after finding that "an issue *may well* have been raised" in the appellant's defense had the case been continued to allow a witness to testify.[340] And in *Weisbeck*, this Court found a denial of a continuance left appellant with "no expert

[335] J.A. 325-26.
[336] J.A. 336.
[337] J.A. 475 (emphasis added).
[338] 697 F.2d 273, 275 (8th Cir. 1983).
[339] *Id*.
[340] *Daniels*, 11 U.S.C.M.A. at 55 (emphasis added).

testimony to attack the credibility of" the complaining witness' allegations."[341]

Here, though a continuance would have allowed the defense to further develop the issue, with the limited information the defense expert had, she provided strong reasons—even with no additional records—that would have undermined the allegations. As she explained, E.B.'s records "very clearly state[d] . . . that the reason for giving this drug is, quote, psychotic agitation."[342]

Trial counsel even conceded the evidence the expert described would have been admissible if there were inconsistencies in E.B.'s testimony.[343]

Thus, this Court is not placed in a position in which "it is impossible to say whether any information in the . . . records may [have been] relevant to [Appellant's] claim of innocence[.]"[344] Like in *Olson*, *Daniels*, and *Weisbeck*, there was good reason to believe the evidence would have been helpful.

F. The prejudice was compounded by considering that the Government successfully suggested at trial there was "nothing" that would question E.B.'s memory.

At trial, the Government made the reliability of E.B. and J.B.'s memories central to its case, and the defense was effectively powerless to rebut these

[341] *Weisbeck*, 50 M.J. at 465.
[342] J.A. 615.
[343] J.A. at 641.
[344] *Cf. Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (remanding an ordering in camera review of child's youth agency records).

arguments. For example, its expert testified that she reviewed "the entire case record" and found no evidence of confabulation.[345] The expert also testified children often forget details of traumatic experiences.[346] In closing argument, trial counsel suggested there was "nothing" in that would undermine E.B.'s memory.[347]

By contrast, the defense expert was not allowed to rebut this by discussing her statements from the closed hearing regarding E.B.'s records.[348]

G. The proper remedy is to set aside the findings and sentence.

The defense was forced to go to trial unprepared. It told the military judge it needed time to reevaluate its case in light of the eleventh-hour "bombshell."[349]

The Eleventh Circuit's reasoning in *United States v. Lindstrom* is on point:

> We hold that the jury was denied evidence necessary for it to make an informed determination of whether the witness' testimony was based on historical facts as she perceived them or whether it was the product of a psychotic hallucination. . . The jury was denied any evidence of whether the witness was capable of distinguishing reality from hallucinations. Such denial was reversible error.[350]

Conclusion

This Court should set aside all charges and specifications.

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[345] J.A. 302.
[346] J.A. 291-92.
[347] J.A. 422-23 (emphasis added).
[348] J.A. 363-77.
[349] J.A. 647.
[350] 698 F.2d at 1168.

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 standard of review is abuse of discretion.

The decision to grant or deny a motion for in camera review is reviewed for an abuse of discretion.[351] An abuse of discretion occurs when "the findings of fact upon which [the military judge] predicates his ruling are not supported by the evidence of record [or] if incorrect legal principles were used[.]"[352]

B. Rules of evidence must yield to an accused's constitutional right to defense.

As the Supreme Court has explained, "[u]nder our Constitution, the Federal Government is one of enumerated powers."[353] Thus, "Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution."[354]

This prohibition extends to rules of evidence. For example, the Supreme

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[351] *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018); *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) ("Finally, we review for abuse of discretion the district court's decision not to conduct *in camera* review of the withheld documents . . . .").
[352] *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted).
[353] *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (citation omitted).
[354] *Dickerson v. United States*, 530 U.S. 428, 437 (2000).

Court has made clear that evidence necessary to the accused's right to cross-examination may not be excluded for fear that it would potentially embarrass a witness.[355] The same applies to a statute seeking to protect a witness' privacy.[356]

This applies to the military with equal force. As this Court explained in *United States v. Gaddis*, military judges may not "exclude constitutionally required evidence merely because its probative value does not outweigh the danger of prejudice to the alleged victim's privacy[.]"[357]

C. In 2014, Congress amended M.R.E. 513 by removing an exception that allowed an accused access to an alleged victim's privileged mental health records where "constitutionally required."

Under M.R.E. 513(a), "[a] patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist in a case under the [UCMJ]."[358] Under the previous version of M.R.E. 513, there was no privilege "when admission or disclosure of a communication [was] constitutionally required."[359] But in 2014,

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[355] *Olden v. Kentucky*, 488 U.S. 227, 230 (1988) (reversing conviction after noting that the lower court "held that petitioner's right to effective cross-examination was outweighed by the danger that revealing [the complaining witness'] interracial relationship would prejudice the jury against her.").
[356] *Davis v. Alaska*, 415 U.S. 308, 319 (1988) (reversing convictions after judge excluded evidence that key witness was on probation for burglary when police asked him to identify appellant in theft case).
[357] 70 M.J. 248, 254 (C.A.A.F. 2011) (citing *Dickerson*, 530 U.S. at 444).
[358] MCM, Military Rules of Evidence (M.R.E.) 513(a) (2016).
[359] M.R.E. 513(d)(8) (2012).

Congress explicitly removed this exception from the Rule.[360]

D. In the same statute, Congress also established a procedure allowing the military judge to conduct in camera review of privileged mental health records in certain circumstances.

In the same statute, Congress amended M.R.E. 513(e)(3) to create in camera review procedures allowing a military judge to review communications when the moving party has established by a preponderance of the evidence:

> (A) a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege;
>
> (B) that the requested information meets one of the enumerated exceptions under subsection (d) of this rule;
>
> (C) that the information sought is not merely cumulative of other information available; and
>
> (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[361]

1. This in camera review standard is nearly identical to a standard the NMCCA adopted in *United States v. Klemick*.

In *United States v. Klemick*, the NMCCA recognized that the old version of M.R.E. 513 was "silent" on when in camera review of privileged records could

[360] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) (explaining that M.R.E. 513 "shall be modified" so as "[t]o strike the current exception to the privilege contained in [M.R.E. 513(d)(8)].").
[361] *Id*.

occur.[362] The NMCCA established the following test:

> (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to [M.R.E. 513];
>
> (2) is the information sought merely cumulative of other information available; and
>
> (3) did the moving party make reasonable efforts to obtain the same or
>
> (4) substantially similar information through non-privileged sources?[363]

The NMCCA made clear the moving party's burden is "not high, because we know that the moving party will often be unable to determine the specific information contained in a psychotherapist's records."[364] It referred to a Wisconsin Supreme Court case that described "reasonable likelihood" as meaning "slightly higher" than a "mere possibility" the records would yield helpful evidence.[365]

E. In *J.M. v. Payton-O'Brien*, the NMCCA reconciled Congress' removal of the constitutional exception with an accused's right to a meaningful defense.

In *J.M. v. Payton-O'Brien*, the accused moved, *inter alia*, for in camera review of the alleged victim's privileged mental health records under the current M.R.E. 513.[366] The military judge recognized the Rule no longer contained a

[362] 65 M.J. 576, 579 (N-M. Ct. Crim. App. 2006).
[363] *Id*.
[364] *Id*.
[365] *Id*. at 579-80 (citing 253 Wis. 2d 356, 379 (2002)).
[366] 76 M.J. 782, 783 (N-M. Ct. Crim. App. 2017).

constitutional exception.[367] Yet the judge granted the accused's motion for in camera review anyway, citing the accused's right to present a complete defense.[368]

The alleged victim then petitioned the NMCCA for a writ of mandamus.[369] The alleged victim argued the new version of the Rule made the privilege "absolute" outside of the enumerated exceptions.[370]

The NMCCA agreed "in part."[371] It found "the President was likely at the apex of his authority in implementing M.R.E. 513 [to remove the constitutional exception] as he acted in his constitutional role as Commander in Chief and under a specific legislative direction."[372] It also cited *United States v. Custis* for the idea that a "military judge cannot add an exception to a military rule of privilege."[373]

1. <u>The NMCCA stated judges should apply the new in camera review standard and first give the holder of the privilege an option to waive the privilege</u>.

Nevertheless, the NMCCA also wrote that "[w]hile we decline to wholly override the psychotherapist-patient privilege, we may not allow the privilege to prevail over the Constitution."[374] The Court then established procedures military

[367] *Id*. at 785.
[368] *Id*. at 784.
[369] *Id*. at 783.
[370] *Id*. at 786.
[371] *Id*. at 786-87.
[372] *Id*. at 787 (citations omitted).
[373] *Id*. (citing 65 M.J. 366 (C.A.A.F. 2007)).
[374] *Id*. at 787-88.

judges should follow in weighing in camera review under M.R.E. 513(e)(3).[375]

The Court wrote that the judge should first allow the moving party to make a showing for in camera review.[376] After the hearing, the military judge determines if the moving party satisfied the standard but failed to meet an exception.[377] If so, "the military judge determines whether the accused's constitutional rights still demand production or disclosure of the privileged materials."[378]

The military judge then gives the holder of the privilege the option to waive the privilege for in camera review only.[379] If the holder of the privilege waives the privilege for this limited purpose, the judge reviews the material in chambers.[380] After this, if the judge believes disclosure is constitutionally necessary, the judge marks the items before again giving the holder of the privilege the opportunity to waive the privilege.[381]

2. <u>The NMCCA stated that a military judge may abate the proceedings or issue other remedies if the evidence is deemed constitutionally necessary but the holder of the privilege refuses to waive the privilege</u>.

If the holder of the privilege refuses to waive the privilege, a judge may

[375] *Id*. at 789.
[376] *Id*.
[377] *Id*.
[378] *Id*. at 790.
[379] *Id*.
[380] *Id*.
[381] *Id*.

"fashion an appropriate remedy."[382] The NMCCA consulted remedies in M.R.E. 505 regarding the Government's refusal to disclose relevant classified evidence.[383] Adopting these, the NMCCA concluded that a judge may: "(1) strike or preclude all or part of the witness's testimony; (2) dismiss any charge or charges, with or without prejudice; (3) abate the proceedings permanently, or for a time certain to give the witness an opportunity to reconsider; or (4) declare a mistrial."[384]

F. Since the procedures in *J.M* provide a workable balance between the Constitution and policy branch prerogatives on this issue, this Court should adopt them.

The procedures in *J.M.* allow military courts to protect the constitutional right to a defense while respecting the policy choice of Congress and the President.

For example, these procedures do not allow a judge to disregard the removal of the constitutional exception from the Rule.[385] At the same time, they guarantee an accused will not be forced to defend without all necessary evidence.[386]

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[382] *Id*. at 790.
[383] *Id*. (citing M.R.E. 505(j)(4)(A) (2016)).
[384] *Id*. at 791.
[385] *Custis*, 65 M.J. at 369 ("But the authority to add exceptions to the codified privileges within the military justice system lies not with this Court or the Courts of Criminal Appeal, but with the policymaking branches of government.") (citation omitted).
[386] *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citations omitted).

Additionally, the remedies in the event of non-disclosure that *J.M.* proposes are well established in military practice. In fact, these remedies not only coincide with those in M.R.E. 505 but also those in R.C.M. 703 for when the Government fails to produce an essential witness at trial.[387]

Thus, this Court should adopt the CCA's procedures in *J.M.* and provide uniformity among the service courts in this unsettled area of military justice.[388]

1. To avoid the handling problems that occurred in this case, this Court should require any records be delivered directly to the military judge and kept in the record of trial in accordance with the Rules for Court-Martial.

Since *J.M.* does not clarify how records will be handled, this Court should require that all records will be delivered directly to the military judge, placed under seal, and kept in the record of trial.

[redacted]

[387] *Cf.* MCM, R.C.M. 703(b)(1)(3) (2016) (explaining that "the military judge shall grant a continuance or other relief in order to attempt to secure" an essential witness' presence "or shall abate the proceedings, unless the availability of the witness is the fault of or could have been prevented by the requesting party").
[388] *United States v. Lopez de Victoria*, 66 M.J. 67, 71 (C.A.A.F 2008) (recognizing that review by the Court of Appeals of the Armed Forces and the Supreme Court "fulfills one of the central purposes of the Uniform Code of Military Justice – uniformity in the application of the Code among the military services").
[389] J.A. 774-75.
[390] J.A. 774-75.

[redacted]

Later, the military judge removed the large volume of E.B.'s records from the record of trial and gave them to victim's counsel after she asked them to be destroyed.[393] This violated R.C.M. 1103A, which states that sealed materials shall be "inserted at the appropriate place in the original record of trial."[394]

Guidance from this Court in this area will ensure that sensitive matter potentially highly relevant to an appellant's constitutional right to a fair trial will be safeguarded by disinterested in parties, including appellate authorities.

G. Here, as the lower court noted, the military judge applied the wrong in camera review standard. Under the correct application of *J.M.*, the defense satisfied its burden for in camera review of E.B.'s records.

Here, the military judge recognized that he was bound by *J.M.* [395] But as the lower court correctly noted, he did not apply the correct in camera review standard under M.R.E. 513(e)(3) as required by *J.M.*[396] Instead, he applied a standard similar to the one governing the admission of evidence under M.R.E. 412 of which

[391] J.A. 774-75.
[392] J.A. 773.
[393] J.A. 67.
[394] MCM, R.C.M. 1103A(a) (2016). The current rule is R.C.M. 1113(a) (2019).
[395] J.A. 823.
[396] *Jacinto*, 79 M.J. at 880.

the parties are already in possession.[397] Under a proper application of M.R.E. 513(e)(3), the defense satisfied its burden.

First, the defense showed a "reasonable likelihood"—or more than a "mere possibility"[398]—that material evidence would be found in E.B.'s complete records.[399] [redacted], which by itself suggests the records contain statements relevant to the case.[400] Additionally, the expert stated the partial records showed it was "very likely" E.B. was suffering from a thought disorder and that the complete records would yield a fuller understanding of the extent of her mental health problems.[401]

The evidence also was not "merely cumulative" since the defense had no other evidence.[402] The defense also showed it made reasonable efforts to obtain the evidence from unprivileged sources.[403] For example, it sought interviews with

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[397] *Id*.; *compare* J.A. 824 ("They must 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.") *with United States v. Banker*, 60 M.J. 216, 222 (C.A.A.F. 2004) (explaining that a military judge must employ a balancing test under M.R.E. 412 and determine whether the evidence is "vital").
[398] *Id*. at 579-80; *Green*, 253 Wis. at 379d.
[399] M.R.E. 513(e)(3)(A) (2016).
[400] J.A. 694.
[401] J.A. 615, 619.
[402] M.R.E. 513(e)(3)(C) (2016).
[403] M.R.E. 513(e)(3)(D) (2016).

E.B., J.B., and E.B.'s friend, but these witnesses were uncooperative.[404] Additionally, the evidence was not disclosed until shortly before trial, leaving the defense little time to find the records from unprivileged sources.

1. The NMCCA adopted clearly erroneous facts and legal principles in evaluating the military judge's ruling.

In reviewing the judge's ruling, the lower court wrote that E.B. had "merely repeated the same disclosure she had previously made to her mother four years earlier[.]"[405] But in fact, E.B. added new allegations and changed one of *those*.

Additionally, the NMCCA wrote that even if E.B. had the psychotic condition, "Appellant would have to somehow tie those later-occurring problems to the timeframe when the alleged abuse actually happened."[406] This is incorrect. An accused has the right to present "relevant evidence of any mental defect or treatment at a time *probatively related* to the time period about which [the witness] was attempting to testify."[407] And here, the time surrounding E.B.'s hospitalization was such a time period since this is when she brought back the first allegation and added the new allegations.

Even assuming *arguendo* Appellant had to tie the condition to E.B.'s *first*

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[404] J.A. 555.
[405] *Jacinto*, 79 M.J. at 880.
[406] *Id*.
[407] *Partin*, 493 F.2d at 763 (emphasis added).

allegation, he did so. Five years is not too remote for mental health evidence to be essential to evaluating a witness' credibility.[408] And here, E.B. was hospitalized only four years after making the first allegation.[409]

H. This Court should set aside the findings and sentence since it can be reasonably convinced the records contained critical impeachment evidence.

In *Pennsylvania v. Ritchie*, the Supreme Court held that the state's failure to provide the accused with the alleged child sexual abuse victim's youth agency records violated due process.[410] Regarding the proper remedy, the Court ordered the trial court to review the files "to determine whether it contains information that probably would have changed the outcome of the trial."[411] The Court reached this conclusion after stating "it is impossible to say whether any information in the [youth agency] records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information[.]"[412]

Here, by contrast, the parties *have* seen a critical portion of E.B.'s records. The defense expert has testified the records "very likely" indicated that E.B. was suffering from psychotic agitation at a critical period in the investigation.[413]

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[408] *Chnapkova*, 985 F.2d at 81-82.
[409] J.A. 506, 709.
[410] 480 U.S. at 57.
[411] *Id*. at 58.
[412] *Id*. at 57.
[413] J.A. 611, 619-20.

I. Alternatively, this Court should order the NMCCA to conduct an in camera review of all of E.B.'s mental health records from the relevant time.

In *United States v. Chisum*, this Court reviewed the decision of the Air Force CCA, which held that the military judge abused his discretion by failing to conduct in camera review of an alleged victim's mental health records.[414] As this Court noted, the military judge had not required the records be attached to the record of trial.[415] Thus, the CCA ordered the Government to produce the records so the CCA could determine whether the error prejudiced Appellant."[416]

Thus, only if this Court believes in camera review is required to resolve the issue, the *Chisum* framework should apply in this case.

[414] *Chisum*, 77 M.J. at 178.
[415] *Id*.
[416] *Id*.

Conclusion

This Court should set aside the findings and sentence and authorize a rehearing. If this Court believes in camera review is necessary, it should set aside the lower court's judgment and return the record of trial to the Judge Advocate General with an order to produce all records relating to E.B.'s mental health treatment in May 2017.

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