IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a bad-conduct discharge and one year or more of confinement. This Court has jurisdiction over this case under Article 67(a)(2)–(3), UCMJ, 10 U.S.C. § 867(a)(2)–(3) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of rape of a child, sexual abuse of a child, and child endangerment by culpable negligence, in violation of Articles 120b and 134, UCMJ, 10 U.S.C. §§ 920b, 934 (2012). The Members sentenced Appellant to eight years of confinement and a bad-conduct discharge. The Convening Authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

On direct appeal, a Navy-Marine Corps Court of Criminal Appeals panel affirmed the findings and sentence. *United States v. Jacinto*, 79 M.J. 870, 875 (N-M. Ct. Crim. App. 2020). On May 29, 2020, Appellant moved for *en banc* reconsideration and on June 5, 2020, the United States opposed. The Navy-Marine Corps Court of Criminal Appeals denied Appellant's Motion on July 1, 2020.

Appellant timely petitioned this Court for review on August 28, 2020, and this Court granted review on January 14, 2021. Appellant filed his Brief and the Joint Appendix on March 11, 2021.

Statement of Facts

A. The United States charged Appellant with, *inter alia*, raping and sexually abusing his minor stepdaughters.

In Charge I, the United States alleged that Appellant committed, *inter alia*: (1) a sexual act upon E.B.—his younger stepdaughter—by penetrating her vulva

with his finger (Specification 2); (2) a lewd act upon E.B. by intentionally and directly touching her genitalia (Specification 3); (3) a lewd act upon E.B. by intentionally causing E.B. to touch Appellant's penis (Specification 4); and (4) a lewd act upon E.B. by intentionally causing her to touch Appellant's penis through his clothing (Specification 5). (Charge Sheet, Jan. 19, 2018.) Each Specification alleged Appellant committed the offense "from on or about August 2012 to on or about May 2013." (*Id.*)

B. Before trial, the Parties litigated the admissibility and production of various portions of E.B.'s mental health records.

On April 25, 2018, Appellant moved under Mil. R. Evid. 513 ("Rule 513") for *in camera* review and production of E.B.'s mental health records from May 3–19, 2017. (J.A. 567–83, 672–97 (Appellate Ex. XXIII).) [redacted]

(J.A. 672 (Appellate Ex. XXIII at 1).)

Appellant noted that "[t]o adequately prepare for trial [he] must know if [redacted] *Id.*

E.B. opposed, invoking the Rule 513 privilege. (J.A. 698–712 (Appellate Ex. XXIV).) She noted in her response that Appellant knew, through discovery of a law enforcement interview with E.B.'s mother, that [redacted]." (J.A. 704.)

1. The Military Judge granted production of [redacted] He denied production of privileged materials for an *in camera* review.

In a written Ruling on May 24, 2018, the Military Judge granted Appellant's Motion as to production of non-privileged materials; he denied Appellant's Motion for *in camera* review. (J.A. 713–22 (Appellate Ex. CXXIV).)

a. The Military Judge found [redacted]

The Military Judge found as fact that E.B. disclosed Appellant's sexual abuse to her mother on May 1, 2017, and then to school officials the following day. (J.A. 714.) [redacted] (*Id.*) [redacted]. (*Id.*)

On May 18, 2017, E.B. reported Appellant's abuse to law enforcement during a forensic interview. (*Id.*; *see also* J.A. 504–54 (transcript of forensic interview).)

[redacted]

b. The Military Judge ordered production [redacted] He ruled Appellant failed to demonstrate an *in camera* review of privileged material was necessary.

Citing Rule 513 and relying on *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), the Military Judge concluded that the following items were not privileged and must be produced: [redacted]. (J.A. 720–22 (Appellate Ex. CXXIV at 8–10).)

The Military Judge also noted that "[e]vidence or information which is privileged is not subject to compulsory process, except as may be provided by the law pertaining to privileges exclusively." (J.A. 715.) He concluded Appellant failed to "demonstrate a reasonable probability that the [privileged] records contain information otherwise unavailable to the defense, and that the information sought is vital to the defense theory of the case." (J.A. 721.) He further concluded E.B.'s privileged communications would be "merely cumulative" of the information he had ordered produced. (J.A. 721.) He ruled that Appellant failed to demonstrate

the privileged material was necessary to "provide the accused a meaningful opportunity to present [a] defense." (J.A. 721.)

[redacted] (J.A. 558–59.)

2. The hospital produced the non-privileged material, showing [redacted]

On June 13, 2018, the hospital produced the ordered records which showed [redacted]. (J.A. 821.) [redacted] (J.A. 781–84; 802–09.) [redacted] (J.A. 781, 802.) [redacted] (*See* J.A. 781–84.)

[1] [redacted].

3. The next day, Appellant again moved for *in camera* review of E.B.'s mental health records. Appellant also moved for a continuance.

In a closed Article 39(a) session on June 14, 2018, (J.A. 605–61), Appellant again moved for the Military Judge to conduct an *in camera* review of E.B.'s mental health records and also moved for a continuance. (J.A. 634, 646.)

Without specifying how long he needed, Appellant said the continuance was for "some time to reassess the case" in light of discovering the night before that [redacted]." (J.A. 634.) The purpose of the continuance was "to consult with [his] expert further about the impact of this information on strategy and tactics, further discovery requests, and prepare robust [Rule] 513 filings." (J.A. 756.)

a. A Defense expert testified that [redacted]

In support of both Motions, Appellant presented the expert testimony of a child psychologist. (J.A. 606–33.) [redacted] (J.A. 608.) [redacted] (J.A. 611.)

The expert also acknowledged [redacted] (J.A. 615 (emphasis added).)

Ultimately, the expert [redacted] (J.A. 615, 623–24.) Having reviewed the transcript and video of E.B.'s forensic interview from May 18, 2017, the Defense expert [redacted] (J.A. 631.)

b. The Military Judge denied Appellant's Motion for a continuance and ordered further briefing by all Parties on the Rule 513 Motion for *in camera* review.

After hearing argument from all parties, (J.A. 633–52), the Military Judge denied Appellant's Motion for a continuance. (J.A. 652–53, 656.) The Military Judge noted that "[t]he defense ha[d] Friday and all of the weekend to consult with their expert, to go over these records, to strategize, and to discuss tactics . . . to go about addressing this issue." (J.A. 653.)

The Military Judge ordered the United States "to get in touch [redacted] (J.A. 653.) He ordered the United States to "get that as soon as possible" and provide it to the court and Appellant. (J.A. 653.)

He also ordered Parties to provide bench briefs later that same day on the eventual admissibility of [redacted] stating that "the only thing that would make anything on [the disclosed records] relevant is obviously if it [redacted] (J.A. 653.)

4. Parties submitted additional briefing on whether [redacted] was sufficient to constitutionally require *in camera* review of E.B.'s mental health records.

Following the Motions session and in response to the Military Judge's order, Defense, the United States, and Victim's Legal Counsel each submitted additional briefing as to [redacted]. (J.A. 754–819 (Appellate Exs. CXXVII, CXXVIII, LXXV).)

a. Appellant argued his constitutional right to a "meaningful opportunity to present a complete defense," required *in camera* review of E.B.'s privileged records.

Appellant noted that whether the Constitution requires *in camera* review or disclosure of materials privileged under Rule 513 depends on whether "infringement of the privilege is required to guarantee a meaningful opportunity to present a complete defense." (J.A. 756 (citation and internal quotation marks omitted).) Appellant argued "weighty interests, like due process and confrontation" compelled *in camera* review because [redacted] (J.A. 757.)

b. The United States argued that [redacted] was irrelevant because [redacted].

The United States opposed the admissibility of [redacted] on the grounds that [redacted]. (J.A. 776.) The United States provided evidence that [redacted] (J.A. 786 (Appellate Ex. CXXVIII at 11).)

c. E.B. argued that Appellant produced no evidence that [redacted]

E.B. asserted her privilege over the documents Appellant requested. (J.A. 788–800.) She argued that, because no Mil. R. Evid. 513(d) exceptions applied to [redacted], Appellant "failed to demonstrate that a denial of [his] motion would impinge [his] due process right to 'a meaningful opportunity to present a complete defense.'" (J.A. 792.) E.B. argued that Appellant failed to produce any evidence [redacted]. (*Id.*)

5. The Military Judge denied Appellant's Rule 513 Motion for *in camera* review because no evidence supported that [redacted]

On June 17, 2018, the day before trial, the Military Judge denied Appellant's request for an *in camera* review in a written Ruling, making factual findings and legal conclusions. (J.A. 820–25 (Appellate Ex. LXXIV).)

The Military Judge found [redacted]. (J.A. 820–21.) This included [redacted] (J.A. 821.) He found [redacted]. (J.A. 821.)

The Military Judge also found E.B. [redacted] (J.A. 821 (emphasis added).)

The Military Judge analyzed whether Appellant demonstrated "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." (J.A. 824.) The Military Judge concluded Appellant failed to "ma[ke] a specific enough showing . . . [for] an *in camera* review of privileged records." (*Id.*)

6. The Military Judge denied Appellant's Motion for Reconsideration of the Continuance.

On June 17, 2018, Appellant moved the Military Judge to reconsider his continuance request and grant a two week continuance. (J.A. 826–31; 564 (Appellate Exs. LXXII–LXXIII).) Appellant's Motion incorporated "the facts and analysis" from his Rule 513 bench brief, *see* Section B.4.a., *supra*, and the same expert testimony that the Military Judge heard prior to denying the initial continuance request, *see* Section B.3.a., *supra*. (J.A. 826, 831.) In his Motion, Appellant again argued that [redacted] that *in camera* review of E.B.'s mental health records was required to protect Appellant's constitutional right to confront E.B. (J.A. 829–30.)

Appellant stated that "[t]here is no other extrinsic evidence that the defense currently possess [sic] to impeach her testimony along these lines." (J.A. 830.)

The Military Judge denied Appellant's Motion both on the Record and in an email to all parties. (J.A. 65–66; 564 (LXXIII).)

C. In its case-in-chief, the United States presented evidence that E.B. first disclosed Appellant's sexual abuse in 2013. She disclosed it again in 2017.

1. E.B. testified that Appellant sexually abused her multiple times when she was nine years old.

E.B. testified that Appellant sexually abused her on three separate occasions when she was approximately nine years old. (J.A. 142–55.)

2. E.B. testified that in 2013, she disclosed one incident of Appellant's abuse to her mother and her best friend. When jointly confronted by her mother and Appellant, E.B. recanted.

E.B. testified she initially disclosed Appellant's abuse to her mother in 2013. (J.A. 155–59.) When her mother and Appellant jointly confronted her about the allegations, she recanted because she was "afraid." (J.A. 158–59.)

She also testified that she disclosed Appellant's abuse to her best friend. (J.A. 162.) E.B.'s best friend later confirmed this. (R. 984–85.)

3. E.B. testified that in 2017, she disclosed all three incidents of Appellant's sexual abuse to her mother and her school counselor.

E.B. testified that in 2017, she and her mother fought because E.B. had been "seeing [E.B.'s] boyfriend behind her [mother's] back." (R. 905–06.) In the ensuing fight, E.B.'s mother forbade her from seeing her boyfriend anymore. (R. 906.) Approximately an hour later, E.B. disclosed Appellant's abuse to her mother. (R. 906–09.)

Later, E.B.'s school counselor testified that E.B. disclosed Appellant's abuse to her the following day. (R. 1169–70.)

4. On cross-examination, Appellant elicited testimony that E.B. was "in trouble" both times she disclosed Appellant's abuse.

On cross-examination, Trial Defense Counsel elicited that E.B. was "in trouble" when she reported Appellant's abuse to her mother in 2013, (J.A. 180), and disclosed Appellant's abuse to her mother in 2017 during a fight she had with her mother after being forbidden from seeing her boyfriend anymore, (R. 930–33). During cross-examination, Trial Defense Counsel focused on E.B.'s motive to fabricate and inability to accurately recall the alleged assaults. (J.A. 170–87.)

E.B. later denied, on redirect examination, that she made either report to "get out of trouble." (R. 945–48.)

5. E.B.'s mother testified to the circumstances of E.B.'s various disclosures.

On cross-examination, Trial Defense Counsel elicited that E.B. disclosed Appellant's abuse during a fight in which E.B.'s mother prohibited E.B. from seeing her boyfriend anymore. (J.A. 244.)

E.B.'s mother also testified that she confronted Appellant immediately after E.B.'s disclosure. (J.A. 207–212.) Appellant had been drinking and stated that he did not know if E.B.'s allegations were true. (J.A. 211, 247.)

When E.B.'s mother confronted Appellant a second time the following day, he was sober and denied E.B.'s allegations. (J.A. 258–59.)

6. The forensic interviewer testified that E.B. was "calm and serious" during the interview.

The child forensic interviewer testified that E.B. was "calm and serious" during the interview. (R. 1216.) The expert also testified that recantation can happen when the allegations are true or false. (J.A. 274.) She testified a victim might recant even when an allegation is true, because after "suppressing detection" or trying to hide the incident, revealing it is a "180-degree shift." (J.A. 275.) Recantation could also happen when the victim is "disbelieved," "argued with," or "punished." (J.A. 275.)

D. In his case in chief, Appellant presented evidence from a forensic psychologist of factors that could affect a child's "recall of memory," such as confabulation and suggestibility.

Appellant's expert explained how "confabulation," "suggestibility," "secondary gain," and contamination" could affect "the recall of memory" and explain "inconsistencies" in a case. (J.A. 360, 379.) She also agreed that "some victims of child sexual abuse recant." (J.A. 376.) She testified that children six years old and younger are more suggestible that older children. (J.A. 384.)

E. In closing, Appellant argued E.B. had a motive to lie and only reported allegations against Appellant when she was "in trouble."

In closing, Trial Defense Counsel argued that E.B. had a motive to lie during both her 2013 allegation (trouble at school) and her 2017 allegations (trouble with mom about an inappropriate relationship with her boyfriend). (J.A. 430, 435–36.)

Throughout the argument, Appellant characterized E.B. as untruthful. (*See* J.A. 430 (either E.B. or her sister "lied to you under oath"), 431 (E.B. recanted because she had "a motivation to lie"), 434 (E.B. lied for her best friend), 436 (her friends "were calling her a liar").)

Trial Defense Counsel argued E.B. had provided inconsistent statements during her forensic interview and at trial about which hand Appellant used to touch her vagina when she was nine years old. (J.A. 431–32.)

F. The Members convicted Appellant and sentenced him.

The Members convicted Appellant of rape of a child, sexual abuse of a child, and child endangerment by culpable negligence, in violation of Articles 120b and 134, UCMJ, and sentenced Appellant to eight years of confinement and a bad-conduct discharge. (J.A. 442–44.)

G. The lower court held the Military Judge did not abuse his discretion denying the continuance. Although the lower court held the Military Judge abused his discretion by applying the wrong legal standard to the Rule 513 issue, the panel found the error harmless beyond a reasonable doubt.

On direct appeal, a Navy-Marine Corps Court of Criminal Appeals panel affirmed the findings and sentence. *Jacinto*, 79 M.J. at 875; (J.A. 008). The court held that the Military Judge did not abuse his discretion by denying the continuance, "focus[ing] on the 'possible impact on verdict.'" *Id.* at 881; (J.A. 013). The court found "there was no possible impact on the verdict because there appears to be no evidence [E.B.] was having psychotic delusions in 2017, and even if she were, it would not be relevant to [her 2013 allegations]." *Id.*

The court found the Military Judge abused his discretion applying the wrong legal standard, (*see* J.A. 824), in denying Appellant's request for *in camera* review.

Instead, the Court held that Appellant was required to "show[] a 'specific factual basis' demonstrating a 'reasonable likelihood' the records would yield any evidence admissible under an exception to the privilege." *Id.* Because "there 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,'" the court held Appellant was "far from" meeting the correct standard. *Id.* The court noted that "the timeline does not support Appellant's argument" either: even if there were some evidence of psychotic

delusions in 2017, "there was absolutely no evidence she had any mental health problems" when she initially disclosed the abuse in 2013. *Id.*

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS "BROAD DISCRETION" DENYING APPELLANT'S CONTINUANCE MOTION WHICH WAS BASED ON IRRELEVANT EVIDENCE.

A. The standard of review is abuse of discretion.

Appellate courts review a military judge's decision to deny continuance motions for abuse of discretion. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). "To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Jasper*, 72 M.J. 276, 279–80 (C.A.A.F. 2013). A military judge abuses his discretion when he (1) predicates his ruling on findings of fact that are not supported by the evidence of record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable, or (4) fails to consider important facts. *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017). Appellate courts review conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

B. A military judge has "broad discretion" to grant or deny a request for a continuance. Appellate courts evaluate the *Miller* factors to determine if a military judge has abused that discretion in denying a request for a continuance.

1. Rulings on continuance requests are reviewed under a "very deferential" standard of review.

A military judge "may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just." Article 40, UCMJ, 10 U.S.C. § 840 (2012); *see also* R.C.M. 906(b)(1) (only military judge may grant continuance). There is a "very deferential standard of review" on matters of continuances, *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003), under which the trial judge has "broad discretion" to grant or deny a continuance, *Morris v. Slappy*, 461 U.S. 1, 12 (1983). Absent an "[u]nreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay," a military judge does not abuse his discretion by denying a continuance request. *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999) (citation and internal quotation marks omitted).

"Recognizing that the military judge is tasked with insuring that courts-martial are conducted in a fair, orderly, and efficient manner, [appellate courts] are willing to accord him the authority and latitude necessary to perform this difficult job." *United States v. Thomas*, 22 M.J. 57, 58–59 (C.M.A. 1986) (citing *United States v. Browers*, 20 M.J. 356, 361 (C.M.A.1985) (Cox, J., concurring) for

proposition that "appellate courts . . . must zealously defend the military trial judge's authority to manage the proceedings over which he presides").

2. The *Miller* factors apply to appellate review of a trial judge's decision to deny a continuance request.

Factors relevant in determining whether a military judge abused his discretion by denying a continuance, include:

> 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.

Weisbeck, 50 M.J. at 464 (quoting *Miller*, 47 M.J. at 358).

C. The Military Judge did not abuse his "broad discretion" denying either (1) Appellant's initial continuance request or (2) Appellant's motion to reconsider the continuance request.

1. Appellant's initial continuance motion was for "some time to reassess the case." The Military Judge did not abuse his discretion finding the remaining three days until trial were sufficient for "reassess[ing] the case."

Appellant first requested a continuance "to consult with [his] expert further about the impact of this information on strategy and tactics, further discovery requests, and prepare robust [Mil. R. Evid.] 513 filings." (J.A. 756.)

The Military Judge denied Appellant's Motion for a continuance on the Record, (J.A. 652–53, 656), after hearing testimony from the Defense expert, (J.A. 606–33), and argument from all parties, (J.A. 633–52). The Military Judge noted

that "[t]he defense ha[d] Friday and all of the weekend to consult with their expert, to go over these records, to strategize, and to discuss tactics . . . to go about addressing this issue." (J.A. 653.)

It was not "arbitrary, fanciful, [or] clearly unreasonable," *Jasper*, 72 M.J. at 279–80, for the Military Judge to conclude that three days was sufficient time for Appellant to consult with an expert he had already retained, who already reviewed the evidence, and who had already testified in the proceedings, to determine the impact of [redacted].

The *Miller* factors of "nature of the evidence" and "possible impact on the verdict" are dispositive: as the lower court put it, "there was no possible impact on the verdict because there appears to be no evidence [E.B.] was having psychotic delusions in 2017, and even if she were, it would not be relevant to [her 2013 allegations]." *Jacinto*, 79 M.J. at 875; (J.A. 008).

2. Appellant's Motion to Reconsider requested two weeks "to investigate [redacted] Having already found "there [was] no evidence that [redacted] the Military Judge did not abuse his discretion denying the Motion.

Appellant's Motion to Reconsider his continuance request was based on a suspicion that [redacted] which would result in a need to "possibly alter [Appellant's]

theory of the case." (J.A. 829–30.) But E.B.'s disclosed diagnoses refute this—

(J.A. 821.)[3] Neither the Defense Expert, nor anyone,

(J.A. 631; *see also* J.A. 821 (Military Judge found as fact no evidence).)

On these facts, application of the *Miller* factors shows the request for more time to investigate a theory that was unsupported by the evidence was not a 'justifiable request for delay," and the Military Judge's denial of the request was neither unreasonable nor arbitrary. This is evidenced primarily by the nature of the evidence, availability of substitute evidence, and impact on the verdict.

a. *Miller* Factor 2: Nature of the evidence.

The Military Judge, in his Rule 513 Ruling, found "no evidence

" (J.A. 821.) The Record supports this:

. (*See id.*) The mental health records did not provide a basis for questioning E.B.'s credibility and therefore did not impact the conviction in this case. (*Contra* Appellant's Br. at 38 (arguing evidence of

[3] Appellant explicitly incorporated the Mil. R. Evid. 513 litigation from June 14, 2018, (J.A. 605–61) into his June 17, 2018, Motion for Reconsideration of Continuance, (*see* J.A. 826).

[redacted] constituted new information "of a nature to undermine the allegations").)

But the records do not show [redacted] (J.A. 821.) [redacted]. As the evidence never showed [redacted] was necessary, the Military Judge did not abuse his discretion denying the continuance Motion.

b. *Miller* Factors 4 and 5: Substitute testimony or evidence and availability of evidence requested.

Appellant's argument that there is no substitute evidence available, (Appellant's Br. at 45), highlights the reason the Military Judge denied his continuance request in the first place: there was no evidence that [redacted]. (J.A. 821.)

c. *Miller* Factor 11: Possible impact on the verdict.

The Military Judge ultimately ruled [redacted] was irrelevant, and therefore inadmissible. (J.A. 824.) Because the basis for Appellant's continuance Motion was the discovery of evidence that was both irrelevant and inadmissible, there was no potential impact on the Members' verdicts.

d. The remaining eight *Miller* factors—1, 3, 6, 7–10, 12—do not undermine the Military Judges justification for denying Appellant's continuance request.

The United States concurs with Appellant that the evidence that [redacted] was a surprise (*Miller* factor 1), his request was timely (*Miller* factor 3), the length of the requested continuance was reasonable (*Miller* factor 6), a two week continuance would not likely have prejudiced the United States (*Miller* factor 7), that there were no prior continuance requests (*Miller* factor 8), Appellant demonstrated good faith in requesting the delay (*Miller* factor 9), and Appellant demonstrated reasonable diligence (*Miller* factor 10). (*See* Appellant's Br. at 45–47.) Finally, the Military Judge provided Appellant notice that he denied the continuance the same day Appellant made the request (*Miller* factor 12).

Still, none of these remaining factors undermine the Military Judge's justification for denying Appellant's continuance request.

3. This Court should not give the Military Judge's decision less deference for not explicitly referencing *Miller*—the litigation shows implicit consideration of the factors most relevant here.

Appellant cites *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000), for the proposition that this Court should afford less deference to the Military Judge's ruling on a continuance motion if he does not specifically mention the *Miller* factors. (Appellant's Br. at 36–37.) But Appellant fails to cite any authority

that supports this proposition—*Manns* references impact on deference when a military judge fails to articulate his Mil. R. Evid. 403 "balancing analysis" on the record. *See Manns*, 54 M.J. at 166.

Although [redacted], there is no evidence [redacted] The Military Judge consequently found evidence that [redacted] (J.A. 825.) This finding alone shows that the Military Judge considered the substance of the most relevant *Miller* factors on this issue: nature of the evidence (factor 2), substitute testimony or evidence (factor 4), availability of evidence (factor 5), and possible impact on the verdict (factor 11).

More importantly, while the Military Judge did not state that he was applying the *Miller* factors in arriving at his decision to deny Appellant's motion for a continuance, the evidence, pleadings, and argument he received from all Parties, coupled with his written Ruling on the Rule 513 motion, indicate that he implicitly considered the most relevant of the *Miller* factors.

D. Even assuming error, Appellant suffered no prejudice.

To warrant relief for nonconstitutional error, an appellant must demonstrate that the error "materially prejudice[d] [his] substantial rights." Article 59(a), UMCJ, 10 U.S.C. § 859 (2012). This standard applies to the nonconstitutional

error of continuance denials. *Wellington*, 58 M.J. at 425 (citing *Slappy*, 461 U.S. at 11).

Appellate courts need not decide if a military judge abuses discretion denying a continuance where an appellant fails to establish prejudice. *Wellington*, 58 M.J. at 425.

Here, Appellant fails to demonstrate the denial of his continuance Motion prejudiced his case. Instead, he alleges that Trial Defense Counsel "was forced to go to trial unprepared." (Appellant Br. at 54.) But Appellant fails to acknowledge that the Military Judge separately found [redacted] and therefore inadmissible—Rulings which he does not challenge. (J.A. 824–25.)

Because Appellant's continuance Motion was premised on the discovery of irrelevant and inadmissible evidence, he fails to demonstrate how "newly discovered evidence" that was not relevant and not admissible prejudiced his case.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION DENYING APPELLANT'S MOTION FOR *IN CAMERA* REVIEW BECAUSE THERE IS NO "CONSTITUTIONAL EXCEPTION" TO THE MIL. R. EVID. 513 PRIVILEGE AND THE VICTIM DID NOT WAIVE HER PRIVILEGE. REGARDLESS, APPELLANT WAS NOT DEPRIVED "A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE" BECAUSE HE FAILS TO SHOW THAT RULE 513 IS "ARBITRARY OR DISPROPORTIONATE" TO THE PURPOSES IT IS DESIGNED TO SERVE.

A. The standard of review is abuse of discretion.

Appellate courts review a military judge's decision to deny production of mental health records for *in camera* review for an abuse of discretion. *See United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018); *see also supra*, Section I.A (describing abuse of discretion standard).

B. Nondisclosure of privileged psychotherapist-patient communications does not violate the 5th or 6th Amendments of the Constitution unless it deprives an accused of a "meaningful opportunity to present a complete defense."

1. An accused's right to "a meaningful opportunity to present a complete defense" is not abridged by a rule excluding evidence unless the rule is "arbitrary or disproportionate to the purposes [it is] designed to serve."

"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." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation and internal quotation marks omitted). However "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted).

As a result, "'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.'" *Holmes*, 547 U.S. at 324 (quoting *Scheffer*, 523 U.S. at 308). "Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *Scheffer*, 523 U.S. at 308 (citations omitted). This is tested by evaluating "whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right[s]. . . ." *Rock v. Arkansas*, 483 U.S. 44, 56 (1987).

2. The President established a psychotherapist-patient privilege in Mil. R. Evid. 513, preventing disclosure of psychotherapist communications in courts-martial absent an applicable exception or patient consent to disclosure.

"The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996); *see also Jaffee*, 518 U.S. at 12 (all fifty States and the District of Columbia recognize psychotherapist privilege). Put simply, there is a social benefit to confidential

counseling. *See Lk v. Acosta*, 76 M.J. 611, 614 (A. Ct. Crim. App. 2017) (citation omitted).

After *Jaffee*, the President adopted a psychotherapist-patient privilege in the military justice system by implementing Mil R. Evid 513. *United States v. Clark*, 62 M.J. 195, 199 (C.A.A.F. 2005) (citing Exec. Order No. 13,140, 64 Fed. Reg. 55116 (1999)); *see also United States v. Rodriguez*, 54 M.J. 156, 160 (C.A.A.F. 2000) (detailing transition from *Jaffee* to Mil. R. Evid. 513 in military justice system); *United States v. Jenkins*, 63 M.J. 426, 430 (C.A.A.F. 2006) (Rule 513 approach more limited than *Jaffee*).

Under the Rule, communications between a patient and a psychotherapist made for the purpose of facilitating mental health diagnosis or treatment are privileged. Mil. R. Evid. 513(a). Unless one of the Mil. R. Evid. 513(d) exceptions apply, a patient may both refuse to disclose psychotherapist communications and prevent any other person from disclosing them. *Id*.; *see also Clark*, 62 M.J. at 199 (same).

3. Because Congress removed the enumerated "constitutional exception," Rule 513(e)(3) is an incorrect test to determine if an accused was denied the constitutional right to present a defense.

When "necessary to rule on the production or admissibility of" a patient's protected mental health records or communications, a military judge may examine "the evidence or a proffer thereof *in camera*." Mil. R. Evid. 513(e)(3). But prior

to conducting an *in camera* review, the moving party bears the burden of demonstrating to the military judge, by a preponderance of the evidence, *inter alia*, that "[t]he requested information meets one of several enumerated exceptions" under the Rule." Mil. R. Evid. 513(e)(B).[4] "The exceptions were drafted to limit the privilege in order to balance the public policy goals stated in *Jaffee* with the specialized society of the military . . . ." *Jenkins*, 63 M.J. at 430; *Clark*, 62 M.J. at 199 ("An exception to [Rule] 513 . . . eliminates the privilege.").

Until 2015, there were eight exceptions to the psychotherapist-patient privilege in the military justice system. Mil. R. Evid. 513(d)(1)–(8), Supp. to Manual for Courts-Martial, United States (2012 ed.). "The eighth exception provided that there is no privilege when the 'admission or disclosure of a communication is constitutionally required.'" *Acosta*, 76 M.J. at 615 (quoting Mil. R. Evid. 513(d)(8), Supp. to Manual for Courts-Martial, United States (2012 ed.)).

Congress mandated removal of this "constitutionally required" exception in

[4] The complete Mil. R. Evid. 513(e)(3) test requires a moving party to show by a preponderance of the evidence:

(A) There is a "specific factual basis" demonstrating a "reasonable likelihood" that the records or communications would yield evidence admissible under an exception to the privilege;
(B) The requested information meets one of several enumerated exceptions in Mil. R. Evid. 513(d)(1)–(7);
(C) The information sought is not merely cumulative; and
(D) The requesting party has made "reasonable efforts" to obtain substantially similar information through non-privileged sources.

2015. *See* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3369 (2014) ("2015 Act") (requiring Rule 513 to be modified "[t]o authorize the military judge to conduct a review in camera of records or communications *only* when [513(e)(3) test is met]). The President implemented this change. Exec. Order 13,696, 80 Fed. Reg. 35,783 (17 Jun. 2015). This "substantially broadened the protections" of the Rule. *Payton-O'Brien*, 76 M.J. at 786; *accord E.V. v. Robinson*, 200 F. Supp. 3d 108, 111 (D.D.C. 2016) (after 2015 Act, a military judge may only examine Rule 513 communications *in camera* or disclose them if information meets an enumerated exception).

Since the 2015 Act, service courts have arrived at different conclusions when analyzing an accused's purported constitutional right to disclosure of a witness's privileged psychotherapy communications when no enumerated exclusions applies. *See Payton-O'Brien*, 76 M.J. at 789–90 (if no enumerated exception yet constitution still demands privileged materials, victim given option to waive privilege); *Acosta*, 76 M.J. at 615 ("[T]he reach of the constitutional exception is the same today as it was prior to the deletion of the constitutional exception pursuant to [the 2015 Act]."); *United States v. Morales*, No. 39018, 2017 CCA LEXIS 612, at *26–27, (A.F. Ct. Crim. App. Sep. 13, 2017) (assuming *arguendo* a non-enumerated constitutional exception exists).

Although "[i]t is axiomatic that the removal of a constitutional exception from an executive order-based rule of evidence cannot alter the reach of the Constitution," *Acosta*, 76 M.J. at 615, the President's removal of that exception—at Congress's behest— renders the Mil. R. Evid 513(e)(3) test inapplicable to claims that exercise of the privilege violates an accused's constitutional rights.[5]

C. None of the Military Judge's Findings of Fact were clearly erroneous.

"The clearly erroneous standard is a very high one to meet" and is not met "by suggesting that the findings are 'maybe' or 'probably wrong.'" *United States v. Leedy*, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007). A finding is not "clearly erroneous" where "some evidence" supports it. *Id.* Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (*citing United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949)).

Here, the Military Judge found [redacted] (J.A. 821), a fact supported by both [redacted] (J.A. 781–84), and Appellant's expert's testimony (J.A. 615, 623–24).

First, [redacted]

[5] Both the lower court and Appellant incorrectly rely on Mil. R. Evid. 513(e)(3) to test whether the privilege violates an accused's constitutional rights. (*See* J.A. 12 (*Jacinto*, 79 M.J. at 880 (applying Mil. R. Evid. 513(e)(3)(A))); Appellant's Br. at 64 (asserting he "satisfied his burden" under "a proper application of [Mil. R. Evid.] 513(e)(3)").)

[redacted], she was never administered [redacted]. (J.A. 781–84.) In contrast, those same records show that [redacted]. (*See id.*)

Second, Appellant's expert testified that [redacted] (J.A. 623–24) and, in E.B.'s videotaped forensic interview, [redacted] (J.A. 631.)

Relying exclusively on [redacted], Appellant challenges only one of the Military Judge's Findings of Fact as clearly erroneous — [redacted] (Appellant's Br. at 42–43.) However, this argument fails to appreciate both the evidence and the standard of review. E.B.'s records indicate [redacted] (J.A. 781–84.) Further, the Military Judge's view of the evidence was "permissible," meaning his factual findings "cannot be clearly erroneous." *See Bessemer City*, 470 U.S. at 574.

D. The Military Judge did not abuse his discretion declining Appellant's Motion for *in camera* review of E.B.'s privileged psychotherapist communications because (1) the Military Judge had no authority to grant the Motion; and (2) Rule 513 is not "arbitrary or disproportionate" to the purposes it is designed to serve.

1. The Military Judge was statutorily barred from ordering *in camera* review of E.B.'s privileged Rule 513 communications absent a showing that an enumerated exception applies. Appellant makes no argument that one does.

A military judge is statutorily authorized "to conduct a review in camera of records or communications *only* when . . . the moving party has met its burden [under Mil. R. 513(e)(3)]." 2015 Act, Section 537(4) (emphasis added). The Mil. R. Evid. 513(e)(3) test requires, *inter alia*, that the moving party show by a preponderance of the evidence that the information requested "meets one of the enumerated exceptions." Mil. R. Evid. 513(e)(3)(B).

In *United States v. Custis*, 65 M.J. 366, 367 (C.A.A.F. 2007), this Court considered whether a military judge could "admit marital communications otherwise privileged under [Mil. R. Evid.] 504(b) by reference to a common law exception generally recognized in the United States federal courts but not listed within the exceptions specifically enumerated under [that rule]." *Id.* This Court noted that "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." *Id.* at 369. In holding the military judge abused his discretion there, this Court distinguished the issue before

it from "the principle that privileges should be construed narrowly." *Id.* "To uphold the exception relied on by the military judge and the Court of Criminal Appeals in this case, we would need to create an exception to a rule where none existed before, not interpret a privilege narrowly or an exception broadly." *Id.*

Here, at no point in the litigation has Appellant argued that the information he seeks in E.B.'s privileged communications would meet an exception enumerated in Mil. R. Evid. 513(d). (*Compare* J.A. 672 (April 25, 2018, trial motion arguing "constitutionally required"), *and* J.A. 756 (June 14, 2018, trial motion (same), *with* Appellant's Br. at 45, Apr. 22, 2019 (before lower court, same), *and* Appellant's Br. at 55–66, Mar. 11, 2021 (before this Court, same).) Because Congress and the President have removed the "constitutional exception" from Rule 513, and Appellant does not argue any extant exception applies here, no authority remained under Rule 513 for the Military Judge to order *in camera* review of E.B.'s privileged communications. It is for Congress and the President to determine what exceptions should apply to Rule 513. *See Custis*, 65 M.J. at 371. The Military Judge had no authority to create one himself. *See id.* at 369.

2. Even if the Military Judge had the authority to grant *in camera* review in the absence of an applicable exception, Appellant fails to show—as he must—that Rule 513 is "arbitrary or disproportionate to the purposes [it is] designed to serve."

In *Scheffer,* the Supreme Court found that the rule unilaterally barring polygraph evidence was neither arbitrary nor disproportionate because the rule

served three broad purposes. 523 U.S. at 312. First, the Court found that Rule 707 was a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." *Id.* Second, the Court found that preserving the jury's core function of making credibility determinations was served by Rule 707. There, the Rule kept the focus on the jury, not the witnesses, as truth-finder. *Id.* at 312–13. And third, the Court found that Rule 707 legitimately acted to "avoid[] litigation over issues other than the guilt or innocence of the accused." *Id.* at 315. This too supported that the rule was neither arbitrary nor disproportionate. *Id.*

The Supreme Court has held exclusions of evidence violate the Constitution where they significantly undermined fundamental elements of the accused's defense. *See e.g. Rock*, 483 U.S. at 62 (per se rule excluding all posthypnosis testimony impermissibly infringed on defendant's right to testify on his own behalf); *Chambers v. Mississippi*, 410 U.S. 284, 302, (1973) (due process violation where critical testimony excluded coupled with the refusal to permit defendant to cross-examine key witness); *Washington v. Texas*, 388 U.S. 14, 23 (1967) (Sixth Amendment violation where state arbitrarily denied defendant right to put on relevant and material witness who was physically and mentally capable of testifying).

As in *Scheffer*, so too here. First, removing the "constitutional exception" simplifies litigation on whether to pierce a Rule 513 privilege because it focuses litigants on well-defined enumerated exceptions rather than on more discretionary claims of a "meaningful right to present a defense." *See* Mil. R. Evid. 513(d) (listing seven exceptions). This simultaneously increases Rule 513 protections for victims without sacrificing an accused's right to a fair trial (see below).

Second, this focus on discrete exceptions alleviates the risk of having a trial within a trial, avoiding potentially lengthy litigation on whether to pierce the privilege.

Third, the limitation does not preclude an accused from seeking remedy for alleged violations of the right to present a meaningful defense, it merely redirects an accused to other remedies prescribed by the President. *See, e.g.*, Mil. R. Evid. 403 (enabling exclusion of government evidence where absence of defense-requested evidence might have misled members or created constitutional prejudice); R.C.M. 703(f)(2) (where evidence of central importance is not subject to compulsory process, judge may continue, abate, or grant other relief); R.C.M. 907 (judge may dismiss on grounds that the defense unable to present constitutionally-required evidence); R.C.M. 915 (accused may move for mistrial).

Rule 513 also promotes a legitimate public interest: it encourages victims to receive mental health treatment. *See Jaffee*, 518 U.S. at 11. The Rule's

importance is reflected in Congress's action in the 2015 Act which "substantially broadened" the Rule's protections. *See Payton-O'Brien*, 76 M.J. at 786. Further, the privilege is not unique to the military justice system—every state and the District of Columbia recognize a psychotherapist privilege. *Jaffee*, 518 U.S. at 12. Given the widely recognized "social benefit to confidential counseling," *see Acosta*, 76 M.J. at 614, Rule 513 cannot be said to be arbitrary or disproportionate to its purpose. If anything, this case—where the patient is a child who has been sexually abused by her stepfather—serves only to highlight the importance of the Rule 513 privilege.

Neither *Rock*, *Chambers*, nor *Washington* require that Rule 513 be invalidated because, unlike the evidentiary rules at issue in those cases, Rule 513 does not implicate any significant interest of Appellant. For example, Rule 513 did not inhibit Appellant's right to testify (as in *Rock*), it did not present a rare combination of facts that "defeat the ends of justice," 410 U.S. at 303, (as in *Chambers*), nor did it preclude Appellant from calling a critical witness (as in *Washington*). Appellant's argument—that [redacted]—is directly refuted by the Military Judge's Findings of Fact that there was no evidence supporting that notion. (*See* J.A. 821.)

Further, Appellant was not denied the opportunity to attack E.B.'s credibility: during cross-examination of E.B., Appellant focused on E.B.'s motive

to fabricate, eliciting that she was "in trouble" both times she reported the sexual assault. (J.A. 180, R. 930–33). Appellant also questioned E.B. repeatedly on her ability to accurately recall the assaults. (J.A. 170–87.) Appellant's expert explained how "confabulation" and "suggestibility" could affect "the recall of memory" and explain "inconsistencies" in a case. (J.A. 360, 379.) In closing, Appellant argued that E.B. lied to Members, lied to her mother, lied to her best friend, and was considered a liar by her friends. (*See* J.A. 430, 431, 434, 436.)

In sum, Rule 513 is not arbitrary or disproportionate to the purpose it was designed to serve and, here, it did not implicate any significant interest of Appellant. The Military Judge did not abuse his discretion by denying Appellant's request to pierce the privilege and, even if he did, Appellant was not prejudiced.

E. If this Court disagrees and holds the Military Judge erred by denying Appellant's Motion for *in camera* review to the prejudice of Appellant, the appropriate remedy is to remand to the lower court to (1) provide E.B. another opportunity to waive the privilege so that the court may order production of the records for *in camera* review or, absent such waiver, (2) order an appropriate remedy provided in the Rules promulgated by the President.

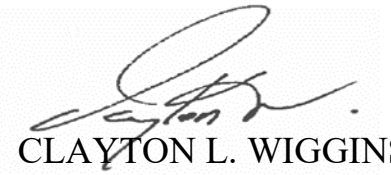
A person holding a privilege under Rule 513 may elect to waive the privilege to permit *in camera* review. *See* Mil. R. Evid. 510(a) (permitting waiver of privilege). If necessary, after *in camera* review, the privilege holder may elect to further waive the privilege for disclosure to the parties. *Id.* If the privilege holder elects not to waive a privilege under Rule 513, despite the military judge

having determined that disclosure of the disputed communications is necessary for a fair trial, a military judge may select from remedies the President explicitly provides in the Manual for Courts-Martial. *See, e.g.*, Mil. R. Evid. 403 (permitting exclusion of testimony or material related to undiscoverable evidence if danger of unfair trial); R.C.M. 703(f)(2) (abatement).

Here, if this Court holds Appellant's substantial rights were prejudiced, the Court should remand to the lower court and order that it conduct *in camera* review of E.B.'s mental health records if she elects to waive her privilege. If she does not, the lower court should consider remedial measures consistent with options promulgated by the President.

Conclusion

The United States respectfully requests that this Court affirm.



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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on April 22, 2021.

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