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 (E-6) United States Navy Appellant	)	USCA Dkt. No. 24-0144/NA

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

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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946

MANUAL FOR COURTS-MARTIAL

Issues Presented

I.

DID THE LOWER COURT FAIL TO COMPLY WITH THIS COURT'S REMAND ORDER?

II.

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

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a bad-conduct discharge and confinement for more than two years. The lower court reviewed this case upon remand by this Court under Article 67(e), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(e) (2021). This Court now has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

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.

Statement of Facts

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

The United States charged Appellant with, *inter alia*, raping and sexually abusing the Victim, his minor stepdaughter. (J.A. 108–10.) Appellant allegedly committed the offenses "from on or about August 2012 to on or about May 2013." (J.A. 108–10.)

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

On April 25, 2018, Appellant moved under Mil. R. Evid. 513 for production and in camera review of the Victim's mental health records [redacted] (J.A. 383–98, 429.)

[redacted]

(J.A. 429.)

[redacted] (J.A. 429.)

The Victim opposed, invoking her Mil. R. Evid. 513 privilege. (J.A. 440.)

[redacted] (J.A. 445.)

1. The Military Judge granted production of the Victim's diagnoses and prescriptions, and the identity of her psychotherapist. He denied production of privileged materials for an in camera review.

On May 24, 2018, the Military Judge granted Appellant's Motion to produce non-privileged materials; he denied Appellant's Motion for in camera review of privileged materials. (J.A. 159.)

a. The Military Judge found [redacted] after disclosing Appellant's abuse to multiple people. [redacted]

[redacted] (J.A. 160.) [redacted] (J.A. 160.) [redacted] (J.A. 506, 508, 511–12.) [redacted] (J.A. 160.)

[redacted] (J.A. 509.) [redacted] (J.A. 509–11.) [redacted] (J.A. 479, 513.)

The Military Judge also found that the Victim [redacted] (J.A. 160.)

On May 18, 2017, the Victim reported Appellant's abuse to law enforcement during a forensic interview. (J.A. 160.)

b. The Military Judge ordered production of (1) the identity of the Victim's psychotherapist, (2) her diagnoses, and (3) her prescriptions. He ruled Appellant failed to demonstrate an in camera review of privileged material was necessary.

Citing Mil. R. Evid. 513 and *J.M. v. Payton-O'Brien*, 76 M.J. 782 (N-M. Ct. Crim. App. 2017), the Military Judge concluded [redacted] (J.A. 166–68.)

The Military Judge also concluded Appellant failed to [redacted] (J.A. 167.) [redacted] (J.A. 167.) He ruled that Appellant failed to demonstrate the privileged material was necessary t[redacted] (J.A. 167.)

2. The hospital produced the non-privileged material, showing the Victim's diagnoses and prescriptions. [redacted]

On June 8, 2018, the Military Judge ordered the Victim's treating hospital to produce: (1) any mental health diagnoses associated with her hospital stay; and (2) a "complete and accurate record of all medications prescribed to [the Victim]" during her term of treatment. (J.A. 169.)

[redacted] (J.A. 457.) [redacted] . (J.A. 151–58, 172–75.) [redacted] (J.A. 151, 170.)

(J.A. 172–75.)

3. Appellant again moved for in camera review of the Victim's mental health records. Appellant also moved for a continuance.

In a closed Article 39(a) session on June 14, 2018,

(J.A. 84, 96.)

(J.A. 84.)

(J.A. 97–98.)

(J.A. 61–83.)

(J.A. 401.)

[redacted] (J.A. 65 (emphasis added).) [redacted]

[redacted] (J.A. 73–74, 408.)

After hearing argument from all parties, the Military Judge denied Appellant's continuance Motion. (J.A. 102–03.) [redacted] (J.A. 103.)

But the Military Judge also ordered [redacted] (J.A. 103.) [redacted]. (J.A. 103.)

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

Three days later, Appellant moved the Military Judge to reconsider his continuance Motion and grant a two-week continuance. (J.A. 143.) [redacted] (J.A. 143, 148; 171.) [redacted]

[redacted] (J.A. 146–47.)

[redacted] (J.A. 147.)

The Military Judge denied Appellant's Motion both on the Record and in an email to all parties. (J.A. 149, 229–30.)

C. The Victim testified at trial that Appellant sexually abused her in 2012 and 2013. The Victim disclosed Appellant's sexual abuse in 2013 and again in 2017, and the disclosures were corroborated.

The Victim testified at trial that Appellant sexually abused her three times in 2012 and 2013, when she was around nine years old. (J.A. 231–45.) The first assault happened in the kitchen at of the Victim's home. (J.A. 232.) Appellant put his left hand in her pants and touched her vagina without penetration. (J.A. 233.) The second time happened again in the kitchen and this time Appellant penetrated the Victim's vagina with his hand and made the Victim touch his penis. (J.A. 235–37.) On the third incident, Appellant pushed the Victim onto his bed after he called her to his room. (J.A. 239.) Appellant then "dry hump[ed]" the Victim while she was on her stomach. (J.A. 240.)

The Victim further testified she initially disclosed Appellant's abuse to her mother in 2013. (J.A. 243–47.) When her mother and Appellant jointly

confronted her about the allegations, she recanted because she was "afraid." (J.A. 246–47.)

She also testified that she disclosed Appellant's abuse to her best friend. (J.A. 250.) The Victim's best friend confirmed this report. (J.A. 324–25.)

The Victim testified that in 2017 she and her mother had a verbal fight and around an hour later, the Victim disclosed Appellant's abuse to her mother. (J.A. 265–69.) The Victim's school counselor testified that the Victim disclosed Appellant's abuse to her the following day. (J.A. 339–40.)

On cross-examination the Victim denied she made either report to "get out of trouble." (J.A. 305–08.)

The Victim's mother testified that in 2017 the Victim told her about Appellant's abuse. (J.A. 332.) The Victim's mother testified that she immediately confronted Appellant. (J.A. 326–31.) Appellant had been drinking and that he did not know if the Victim's allegations were true. (J.A. 330, 335.) When the Victim's mother confronted Appellant a second time the next day, he was sober and denied the Victim's allegations. (J.A. 337–38.)

D. 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, Dr. Stein, explained how "confabulation," "suggestibility," "secondary gain," and "contamination" could affect "the recall of

memory" and explain "inconsistencies" in a case. (J.A. 350, 357.) She also agreed that "some victims of child sexual abuse recant." (J.A. 354.) She testified that children six years old and younger are more suggestible than older children. (J.A. 362.)

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

In closing, Trial Defense Counsel argued that the Victim had motives to lie and characterized the Victim as untruthful. (J.A. 368–74.) Trial Defense Counsel argued the Victim had provided inconsistent statements during her forensic interview and at trial. (J.A. 369–70.)

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, and sentenced Appellant to eight years of confinement and a bad-conduct discharge. (J.A. 380–82.)

G. Appellant raised seven assignments of error before the lower court, including that the Military Judge abused his discretion by denying Appellant's Motion for in camera review and Appellant's Motion for a continuance. The lower court affirmed.

On Article 66 appeal, Appellant raised seven assignments of error, including that the Military Judge abused his discretion when he denied Appellant's Motion for in camera review of one of the Victim's medical records and Motion for a

continuance. *United States v. Jacinto*, 79 M.J. 870, 875 (N-M. Ct. Crim. App. 2020). The Navy-Marine Corps Court of Criminal Appeals panel affirmed the findings and sentence. *Id*.

H. This Court set aside the lower court's decision in part and remanded for further factfinding.

This Court granted Article 67 review and explained that "to properly assess the military judge's continuance and in camera rulings" this Court must determine if the following rulings by the Military Judge were clearly erroneous: (1) "[t]here is no evidence that [the Victim] ever experienced psychotic agitation," (2) "[t]here is no evidence the prescription for Thorazine was ever filled," and (3) "[t]here is no evidence [the Victim] ever took Thorazine." *United States v. Jacinto*, 81 M.J. 350, 354 (C.A.A.F. 2021).

But this Court could not resolve these issues "because of obvious omissions and ambiguities in the record." *Id*. First, the Record omitted "five pages of hospital documents reviewed by the defense forensic psychologist . . . when she testified at the 39(a) session." *Id*. Second, the Record omitted "information that the military judge ordered the Government and the hospital to produce on June 14, 2018." *Id*.

Hence, this Court vacated the lower court's decision in part and remanded "for further factual development of the record." *Id*. at 354. This Court ordered that:

> The lower court—either on its own or by way of *DuBay* proceedings—shall obtain the missing record evidence and any other evidence (such as affidavits from medical providers) relevant to whether [the Victim] was diagnosed with psychotic agitation in May 2017 . . . The lower court or *DuBay* military judge should specifically identify the five missing pages reviewed by the defense forensic psychologist, any remainder of the earlier hospital records produced in response to the June 8, 2018, order, and any documents that were produced or should have been produced pursuant to the military judge's June 14, 2018, orders. The fact-finder also may enter any other findings of fact necessary to resolve the granted appellate issues. [Mil. R. Evid.] 513 and other privileges will apply and the appropriate authority—i.e., either the lower court or a *DuBay* military judge—shall conduct an in camera review, issue appropriate protective orders, and place portions of the record under seal as required.

Id.

This Court stated that "only the records as they existed at the time of the court-martial are to be produced because those are the only records relevant for determining if the military judge abused his discretion." *Id*.

This Court stated that "[o]nce the record is fully developed on the psychotic agitation issue, the lower court shall reexamine the military judge's continuance and in camera review rulings." *Id*.

The Court further stated that if the lower court found an abuse of discretion in denying the continuance, "the lower court also shall determine [if] . . . denial . . . materially prejudiced Appellant [and t]his inquiry may require the lower court to make (or order a *DuBay* military judge to make) further findings of fact about

whether there was discoverable and admissible information that would have helped Appellant's defense." *Id*.

I. The lower court ordered a fact-finding hearing.

The Navy-Marine Corps Court of Criminal Appeals ordered a *DuBay* hearing directing "the military judge assigned [to] make detailed findings of fact addressing the following questions":

> A. What documents were produced from the hospital in response to the military judge's June 8, 2018, Order?
>
> B. Of the hospital records produced in response to the military judge's June 8, 2018, Order, which of those documents were reviewed by the Defense expert in forensic psychology for his testimony at an Article 39(a), UCMJ, session on June 14, 2018?
>
> C. Which hospital records were supposed to be contained in Appellate Exhibit LXXI?
>
> D. Which hospital records are the missing pages from the 17 pages produced by the hospital? (It has been suggested that five pages are missing.)
>
> E. Which documents were produced by the hospital in response to the military judge's June 14, 2018, Order?
>
> F. Which documents should have been produced in response to the military judge's June 14, 2018, Order?

(J.A. 194–95.)

The Court of Criminal Appeals directed the *DuBay* judge to "make additional findings of fact . . . relevant to the two issues granted" by this Court, "whether the military judge abused his discretion by denying [the] continuance

request" and "whether the military judge abused his discretion by denying the . . . motion to conduct an in camera review." (J.A. 195.)

J. A *DuBay* Hearing was convened and witnesses were called.

The *DuBay* Judge commenced the fact-finding hearing. (J.A. 219.) The Victim continued to assert her privilege under Mil. R. Evid. 513. (J.A. 220.)

1. Appellant requested production of Dr. Gill, but the *DuBay* Judge denied the request.

Appellant moved the *DuBay* Judge to compel production of [redacted] (J.A. 196.) [redacted] (J.A. 455.)

[redacted] (J.A. 462.) [redacted] (J.A. 462.) [redacted] (J.A. 463.) [redacted] (J.A. 484.) [redacted]

[redacted] (J.A. 464.)

[redacted] (J.A. 483.) [redacted]

[redacted] (J.A. 482.)

[redacted] therefore the Motion was denied. (J.A. 483.) [redacted]

[redacted] (J.A. 483.)

[redacted]

[redacted]. (J.A. 467.)

2. Appellant's expert witness, Dr. Stein, provided her Affidavit and additional testimony about her review of the Victim's mental health records.

Dr. Stein provided an Affidavit to the *DuBay* Judge. (J.A. 199.) She also

testified at the *DuBay* Hearing. (J.A. 468.) [redacted] (J.A. 471.) [redacted] (J.A. 470.)

[redacted] (J.A. 476.) [redacted] (J.A. 473.)

[redacted] (J.A. 479.) [redacted] (J.A. 479.) [redacted] (J.A. 479.)

K. The *DuBay* Judge responded to the specified issues as well as made additional Findings of Fact.

The *DuBay* Judge issued Findings of Fact, [redacted] (J.A. 219–28.) [redacted] (J.A. 223.)

The *DuBay* Judge also explained what each of the previously missing documents were. (J.A. 223.) [redacted] (J.A. 224.)

The Victim asserted her Mil. R. Evid. 513 privilege [redacted] (J.A. 225.)

[redacted] (J.A. 226.) [redacted]

[redacted] (J.A. 227.) [redacted] (J.A. 227.) [redacted] [redacted] [redacted] [redacted] (J.A. 228.)

L. The lower court found that the *DuBay* Judge complied with the Remand Order. The court found the Military Judge abused his discretion denying the continuance request, but found no prejudice.

The Navy and Marine Corps Court of Criminal Appeals held that the *DuBay* Judge answered all questions ordered by the court except "regarding which documents should have been produced in response to the military judge's 14 June 2018 Order." *United States v. Jacinto*, No. 201800325, 2024 CCA LEXIS 14, at *8 (N-M. Ct. Crim. App. Jan. 18, 2024).

The Court of Criminal Appeals recognized that the question was "inartfully drafted" because answering that question would pierce the Victim's privilege under Mil. R. Evid. 513. *Id*. at *9. The court found that the *DuBay* Judge "adequately carried out the instructions in our Order" by reviewing the entirety of the medical records in camera, made findings of fact, and addressed the question as appropriate in light of the Victim's assertion of privilege. *Id*.

The lower court then found that the Military Judge abused his discretion by denying the continuance request, as Appellant "was surprised by the untimely appearance of potentially exculpatory evidence six days before trial." *Id*. at *11. But the court found a lack of prejudice because:

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

Id. at *12.

The court again affirmed the Findings and the Sentence. *Id*. at *17.

Argument

I.

> THE *DUBAY* JUDGE AND THE COURT OF CRIMINAL APPEALS COMPLIED WITH THIS COURT'S REMAND ORDER. THEY WERE REQUIRED TO FIND MISSING EVIDENCE FROM THE RECORD AND THEN RE-EXAMINE THE MILITARY JUDGE'S DENIALS OF THE CONTINUANCE AND IN CAMERA REVIEW. ADDITIONAL FINDINGS OF FACT WERE AT THEIR DISCRETION.

A. Standard of review.

Whether a Court of Criminal Appeals has complied with a remand order is reviewed de novo. *See e.g. United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008); *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004); *United States*

v. Rendon, 58 M.J. 221, 224 (C.A.A.F. 2003) (interpretation of Uniform Code and R.C.M., and military judge's compliance, questions of law reviewed de novo).

The scope of the Court of Criminal Appeals' review on remand is confined to the terms of the superior court's order, which is to be interpreted closely. *United States v. Jordan*, 35 M.J. 856, 861 (N.M.C.M.R. 1992). "Only the court issuing the order can *Ultimately* decide if its order has been complied with." *United States v. Hawkings*, 11 M.J. 4, 6 (C.M.A. 1981) (capitalization and emphasis in original).

"[T]he factual findings of the *DuBay* judge are reviewed under a clearly-erroneous standard . . . . A finding of fact is clearly erroneous when there is no evidence to support the finding." *United States v. Harpole*, 81 M.J. 8, 10–11 (C.A.A.F. 2021) (citation and quotation omitted). The *DuBay* judge's conclusions of law are reviewed de novo. *United States v. Cooper*, 80 M.J. 664, 672 (N-M. Ct. Crim. App. 2020).

A military judge's decision to admit or exclude evidence for relevance is reviewed for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010). A *Dubay* judge's decision to grant or deny a motion to produce a witness is reviewed for an abuse of discretion. *United States v. Miller*, 47 M.J. 352, 359 (C.A.A.F. 1997).

The Court of Criminal Appeals is a "factfinder in an appellate-review capacity and not in the first instance as a trial court. This unusual appellate-court-

factfinding power is not unlimited in scope but is expressly couched in terms of a trial court's findings of guilty and its prior consideration of the evidence." *United States v. Ginn*, 47 M.J. 236, 242 (C.A.A.F. 1997). Nevertheless, "some precedents have allowed [Courts of Criminal Appeals] to supplement the record when deciding issues that are raised by materials in the record." *United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020).

B. This Court's Remand Order required the lower court or *DuBay* Judge to only find missing Record evidence on the psychotic agitation issue, and then determine if the Military Judge abused his discretion at trial. Additional fact-finding was discretionary.

"On a remand from this Court, a Court of Criminal Appeals 'can only take action that conforms to the limitations and conditions prescribed by the remand.'" *United States v. Riley*, 55 M.J. 185, 188 (C.A.A.F. 2001) (citing *United States v. Montesinos*, 28 M.J. 28, 44 (C.M.A. 1989)).

In *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003), the appellant was convicted of unpremeditated murder of her newborn infant. The service court affirmed only a lesser-included offense of involuntary manslaughter through culpable negligence. *Id*. at 309. This Court found that the factual sufficiency review appeared to affirm a theory not presented to the trier of fact—a possible due process error. *Id*. So this Court remanded and ordered the service court to clarify if "that court also found the evidence factually insufficient to support a conviction

of a lesser-included offense premised on negligent infliction of the fatal injuries on the baby." *Id*. at 309.

Instead, the lower court in *Riley* reconsidered its findings—holding some of clearly erroneous, and modifying them. On return of the case to this Court, the *Riley* Court found the lower court's reconsideration and modification of its findings of fact beyond the scope of the remand order. *Id*. at 310. After the case was remanded and returned a second time, this Court found that the lower court's third factual sufficiency analysis complied with the limited scope of the original remand order. *Id*.

In *United States v. McMurrin*, 72 M.J. 697 (N-M. Ct. Crim. App. 2013), the appellant contended that when the Navy and Marine Corps Court of Criminal Appeals set aside guilty findings and dismissed those underlying offenses, it did so with prejudice and therefore re-prosecution was barred on remand. On rehearing, the appellant was again convicted for offenses based on the same underlying conduct as at the first court-martial. *Id*. at 700. Back at the appellate court, the appellant claimed that the prior dismissal barred re-prosecution for that offense and therefore the rehearing lacked jurisdiction. *Id*. at 701.

The *McMurrin* court cited to *United States v. Riley*, 55 M.J. at 188, for the rule that a lower court must comply with a superior court's mandate and "take action that conforms to the limitations and conditions prescribed." This court

further pointed out that "the intent and scope of our mandate is not governed solely by the terms in our decretal paragraph," and "'[t]he opinion delivered by [the] court at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate.'" 72 M.J. at 703, *citing In Re Sanford Fork & Tool Co*., 160 U.S. 247, 256 (1895). This Court then said its opinion focused on lack of notice which was remedied through proper referral and therefore–given the context–nothing in the mandate barred the re-prosecution. *Id*. at 703.

As in *Riley*, the superior court's order limits the scope of the remand. However, as in *McMurrin*, this Court's entire Opinion should be used to provide context and clarity to its remand. This Court's Opinion found that gaps in the Record caused its inability to review the Military Judge's Rulings. This Court spent a significant portion of its Opinion discussing the Victim's mental health records and their lack of completeness, ultimately finding that "[b]ecause the record before us is unclear and incomplete, we cannot make an informed decision about whether the military judge's crucial factual findings are clearly erroneous." *Jacinto*, 81 M.J. at 354.

Specifically, this Court was unable to determine whether these two factual findings are clearly erroneous: "(1) Although the hospital prescribed Thorazine as needed for psychotic agitation, '[t]here is no evidence that [the Victim] ever experienced psychotic agitation'; and (2) 'there is no evidence [that] the

prescription for Thorazine was ever filled' or that '[the Victim ever took Thorazine,' and, in fact, Thorazine was 'never administered to [the Victim].'" *Id*.

Ultimately this Court was reviewing the Judge's Rulings for an abuse of discretion—as the Military Judge was the factfinder in the first instance determining the Victim's actual diagnoses. In accordance with its jurisdiction, this Court gave the factfinder on remand the discretion to "enter any other findings of fact necessary to resolve the granted appellate issues." *Id*.; (*see* Appellant Br. at 20, Sept. 16, 2024.)

To cure the gaps in the records—and thereby conduct its appellate review—this Court ordered the lower court or *DuBay* Judge to "obtain the missing record evidence and any other evidence (such as affidavits from medical providers) relevant to whether [the Victim] was diagnosed with psychotic agitation in May 2017." *Id.* at 355. This Court limited the scope of factfinding to "only the records as they existed at the time of the court-martial are to be produced because those are the only records relevant for determining if the military judge abused his discretion." *Id*. at 355.

The lower court then directed the *DuBay* Judge to make "additional findings of fact that are relevant to the two issues granted by CAAF," which were whether the Military Judge abused his discretion in denying Appellant's Motions for Continuance and for in camera review. (J.A. 195.) And, "[o]nce the record is fully

developed on the psychotic agitation issue, the lower court shall reexamine the military judge's continuance and in camera review rulings." *Jacinto*, 81 M.J. at 355. The legal matter under review by the lower court, and this court, is whether the Military Judge abused his discretion—and not the factual determination, in the first instance, whether the Victim actually suffered from psychotic agitation.

This Court did not direct the lower court or *DuBay* Judge to make a specific finding as to whether the Victim had psychotic agitation. Similarly, the lower court also did not direct the *DuBay* Judge to make any such finding—despite listing six specific findings the Judge was directed to make. (J.A. 194–95.)

In order to comply with this Court's Order—considered in context of its Opinion—the *DuBay* Judge ensured that "[t]he pages missing from the original record of trial are now pages one thorough 13 of Appellate Exhibit CXLIX." (J.A. 223); *see Jacinto*, 81 M.J. at 355 ("identify the five missing pages reviewed by the defense forensic psychologist, any remainder of the earlier hospital records produced pursuant to the military judge's June 8, 2018, order, and any documents that were produced or should have been produced pursuant to the military judge's June 14, 2018, orders."). Furthermore, "[i]n order to ensure the necessary documents were produced consistent with both the 8 June 2018 and 14 June 2018 Orders, [the *DuBay* Judge] ordered the production of the entire medical record [redacted] (J.A. 224.)

The *DuBay* Judge also acquired a new Affidavit and testimony from Dr. Stein regarding the missing documents. (J.A. 199; 468–81.)

With the addition of these records, documents, and testimony, the *DuBay* Judge fully developed the Record that would have been available to the Military Judge at the time of his Rulings. Thus, the lower court was able to re-examine whether the Military Judge abused his discretion in denying Appellant's Motions for in camera review and continuance. *Jacinto*, 2024 CCA LEXIS 14, at *10, 13.

The *DuBay* Judge and lower court complied with this Court's Remand Order.

C. The lower court and the *DuBay* Judge complied with the Order. They acquired missing Record evidence and re-examined the Military Judge's continuance denial and in camera review. [redacted] thus Appellant invited any error and cannot object now to the lack of an affidavit or testimony by [redacted]

Like *Riley*, the lower court acted within the scope of the Remand Order and made necessary findings. First, the lower court ordered a *DuBay* Hearing. The *DuBay* Judge ensured that "[t]he pages missing from the original record of trial are now pages one thorough 13 of Appellate Exhibit CXLIX." (J.A. 223); *see Jacinto*, 81 M.J. at 355 ("identify the five missing pages reviewed by the defense forensic psychologist, any remainder of the earlier hospital records produced pursuant to the military judge's June 8, 2018, order, and any documents that were produced or should have been produced pursuant to the military judge's June 14, 2018,

orders."). Furthermore, "[i]n order to ensure the necessary documents were produced consistent with both the 8 June 2018 and 14 June 2018 Orders, [the *DuBay* Judge] ordered the production of the entire medical record from [redacted] for [the Victim]." (J.A. 224; *see* J.A. 505–13.) The *DuBay* Judge also acquired a new Affidavit and testimony from Dr. Stein regarding the acquired documents previously missing. (J.A. 199; 468–81.)

With the addition of these records, documents, and testimony, the *DuBay* Judge developed the Record that would have been available to the Military Judge at the time of his Rulings. Thus, the lower court re-examined whether the Military Judge abused his discretion in denying Appellant's Motions for camera review and continuance. *Jacinto*, 2024 CCA LEXIS 14, at *10, 13.

1. The Record is complete and the Victim's unprivileged diagnoses and treatments that should have been reviewed by to the Military Judge were fully explored. The lower court's finding that no evidence supports the administration of Thorazine is not clearly erroneous, and this Court's remand did not require investigation into whether evidence beyond the completed record contained evidence of psychotic agitation.

In *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010), this Court granted review to determine if the military judge abused his discretion in refusing to compel production of certain evidence and excluding or limiting testimony of witnesses. Both the United States and the appellant submitted motions related to the issues attempting to supplement the record. However, the *Graner* court denied

the motions and declined to supplement the record. *Id*. at fn. 1. The court held that while it "may remand for further factfinding if an issue concerning an unresolved fact affects the Court's resolution of the case," none of the records were necessary to resolve the issues. *Id*. As the record was sufficiently developed, the *Graner* court was able to issue its opinion. *Id*. at 110.

Here, this Court ordered re-examination of the Military Judge's Rulings after "the record is fully developed on the psychotic agitation issue." *See Jacinto*, 81 M.J. at 355. This Court required the complete Record to determine if two of the Military Judge's factual findings were clearly erroneous: "(1) Although the hospital prescribed Thorazine as needed for psychotic agitation, '[t]here is no evidence that [the Victim] ever experienced psychotic agitation'; and (2) 'there is no evidence [that] the prescription for Thorazine was ever filled' or that '[the Victim ever took Thorazine,' and, in fact, Thorazine was 'never administered to [the Victim].'" *Id*. at 354.

The *DuBay* fully developed the Record that was available at the time of the Military Judge's Rulings. The Record includes the Victim's diagnoses and prescriptions, [redacted] (J.A. 172–75, 473.) [redacted]

[redacted] (J.A. 473.) [redacted] (J.A. 476.) [redacted]. (J.A. 479.)

After review of the fully developed Record, and consistent with Dr. Stein's testimony, the lower court found that "it is clear that [the Victim] was never administered Thorazine. Nor do the hospital records indicate that she had any problem with perception or memory. And there is no indication in the Calvert Memorial Hospital records that she was fabricating any allegations." *Id*. at *12. The court also found that the medical records did not contain constitutionally required material. *Id*. at *16.

After review of the fully developed Record, the lower court then found that the Military Judge abused his discretion by denying the continuance request because Appellant "was surprised by the untimely appearance of potentially exculpatory evidence six days before trial." *Id*. at *11. However, the court found there was no prejudice. *Id*. at *12. The court again affirmed the Findings and the Sentence. *Id*. at *17.

As the Record was fully developed—and the lower court was able to properly conduct its Article 66 review—whether the Victim was actually diagnosed with psychotic agitation is unnecessary to resolve the appellate issues. The lower court and the *DuBay* Judge complied with this Court's Remand Order.

2. The *DuBay* Judge properly denied Appellant's Motion to produce [redacted] because, by Appellant's own admission, he was unnecessary.

"Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." R.C.M. 703(B)(1). R.C.M. 703 applies to motions to produce witnesses in *DuBay* proceedings. *Miller*, 47 M.J. at 359.

"Testimony is 'necessary' within the meaning of RCM 703(b)(1) 'when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'" *United States v. Lofton*, 48 M.J. 247, 248–49 (C.A.A.F. 1998); *see* R.C.M. 703(b)(1) Discussion; *see United States v. Tangpuz*, 5 M.J. 426, 429 (CMA 1978) (no right to cumulative evidence).

In *Lofton*, the military judge denied the appellant's request to produce a witness to testify to the two victims' bias against the appellant. 48 M.J. at 248. This Court found no abuse of discretion because some of the proffered evidence would be barred by Mil. R. Evid. 412 and two witnesses were already available to testify on the same issue. *Id*. at 249.

Like *Lofton*, the *DuBay* Judge properly found that [redacted] was not a necessary witness because [redacted]

[redacted] (J.A. 484.) [redacted] (J.A. 462.) [redacted], thus rendering [redacted] cumulative and unnecessary. (J.A. 467.)

Therefore, it was not an abuse of discretion for the *DuBay* Judge to deny the Motion when [redacted] (J.A. 483.)

3. Appellant agreed during the *DuBay* Hearing that [redacted] was not relevant and unnecessary if [redacted] Appellant thus invited the error and cannot complain now that [redacted] should have been directed to produce an affidavit.

"The invited error doctrine prevents a party from 'creating error and then taking advantage of a *situation of his own making' on appeal." United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (quoting *United States v. Eggen*, 51 M.J. 159, 162 (C.A.A.F. 1999)). "Invited error does not provide a basis for relief." *United States v. Raya*, 45 M.J. 251, 254 (C.A.A.F. 1996).

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). When a known right is waived, "it is extinguished and may not be raised on appeal." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)).

In *Raya,* the appellant alleged that the social worker's witness testimony improperly commented on the victim's credibility. 45 M.J. at 253. But the only testimony the appellant cited to was elicited by the appellant's trial defense counsel on cross-examination. *Id*. The *Raya* court found that this was invited error—the appellant cannot create this error and then take advantage of this situation of his own making to find relief. *Id*. at 254.

Here, Appellant now claims that: "Contrary to this Court's order to 'obtain the missing record evidence and *any other evidence such as affidavits from medical providers*,' the *DuBay* judge denied the defense's request to produce the witness that could have fully resolved this issue," referring to [redacted]. (Appellant Br. at 16–17.) Appellant also claims that the Record is "devoid of any clarification from [redacted] (Appellant Br. at 21.)

But like *Raya,* Appellant is taking advantage of a situation of his own making. *See* 45 M.J. at 254. During the hearing on Appellant's Motion to Produce

[redacted]

[redacted]

(J.A. 462–63, 483); *see Jacinto*, 81 M.J. at 354. [redacted]

[redacted]

[redacted] (J.A. 462, 483.)

Instead, Appellant argued [redacted]

[redacted].

(J.A. 484.) [redacted]

[redacted]

[redacted]

[redacted] (J.A. 462.)

[redacted]

[redacted] (J.A. 483.)

Appellant invited, and waived, any objection to the *DuBay* Judge not ordering an affidavit from or requiring [redacted] to testify at the *DuBay* Hearing.

II.

APPELLANT SUFFERED NO PREJUDICE FROM THE DENIAL OF THE CONTINUANCE REQUEST. AS THE *DUBAY* JUDGE AND LOWER COURT FOUND, THE RECORD—ONCE FULLY DEVELOPED—SHOWED THAT THE VICTIM WAS NOT ADMINISTERED THORAZINE, AND SHE DID NOT HAVE ANY PROBLEMS WITH PERCEPTION OR MEMORY.

A. Standard of review.

"When a military judge abuses his discretion denying a continuance or denying in camera review, the reviewing court will not grant relief unless the appellant suffers prejudice." *Jacinto*, 81 M.J. at 354; *see* Article 59(a), UMCJ, 10 U.S.C. § 859(a) (2012).

Appellate courts need not decide whether an abuse of discretion has occurred where an appellant fails to establish prejudice. *United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003).

"[T]he factual findings of the *DuBay* judge are reviewed under a clearly-erroneous standard . . . . A finding of fact is clearly erroneous when there is no evidence to support the finding." *Harpole*, 81 M.J. at 10–11 (citation and quotation omitted).

B. Appellant suffered no prejudice. Upon review of the completed Record, the lower court found that the Victim was never administered Thorazine, never had any problem with perception or memory, and did not fabricate any allegations.

To warrant relief for non-constitutional error, an appellant must demonstrate the error "materially prejudice[d] [his] substantial rights." Article 59(a), UMCJ. This standard applies to continuance denials. *Wellington*, 58 M.J. at 425 (citing *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). This is done by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

"Materiality" and "quality of the evidence" requires consideration of "the particular factual circumstances of each case." *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020).

In *United States v. Roberson*, 65 M.J. 43 (C.A.A.F. 2007), the court found the exclusion of hearsay and other evidence did not deprive the appellant of his constitutional right to a complete defense. *Id*. 47. This is because he presented other similar evidence. *Id*. At trial, the appellant was able to admit evidence to raise the defense of duress against charges he stole and forged checks. *Id*. at 45. But, the military judge excluded hearsay evidence of a statement the co-accused made that the appellant owed him money that he would "get by any means." *Id*. at 45. He also excluded that the appellant seemed scared when he was later told

about this statement and that the co-accused had a gun and an aggressive personality. *Id*. On appeal, the court found it was error to exclude the evidence, but it did not deprive the appellant of his constitutional right to present a complete defense because other similar evidence was introduced. *Id*. at 47. Therefore, the court tested for prejudice using the non-constitutional *Kerr* factor test. *Id*.

Here, like *Roberson*, the Appellant was able to admit substantially similar evidence such that if the Military Judge erred, it did not deprive Appellant of his constitutional right to a complete defense. *Roberson*, 65 M.J. at 47. At trial, Appellant called Dr. Stein to attack the Victim's memory and truthfulness. (J.A. 342.) Dr. Stein explained how "confabulation," "suggestibility," "secondary gain," and "contamination" could affect "the recall of memory" and explain "inconsistencies" in a case. (J.A. 350, 357.) She also gave her expert opinion regarding the Victim's recantation in 2013. (J.A. 246–47, 354.) Appellant even characterized the Victim as untruthful during closing argument. (J.A. 368–69, 372, 374.) In reviewing the completed Record, a continuance would not have resulted in Appellant presenting substantially different or more beneficial defense, and therefore he was not prejudiced by the continuance denial.

Appellant was not prejudiced by any error because the United States' case was strong, the defense's case was weak, and the materiality and quality of any additional preparation from a continuance do not show Appellant was harmed.

1. The United States' case was strong.

The United States' case was strong because the Victim testified at trial that Appellant sexually abused her on three separate occasions in 2012 and 2013, when she was approximately nine years old. (J.A. 231–245.)

While the Victim recanted once in 2013, Dr. Stein and the child forensic interviewer also testified that recantations are expected among victims of child sexual abuse. (J.A. 341, 354.)

2. Appellant's defense was weak.

Appellant's defense was weak because it relies on the theory that the Victim was untruthful. As evidence, he merely relied on the Victim's recantation, Dr. Stein's expert testimony on possible memory contamination among child victims of sexual abuse, and theoretical motives for the Victim to lie because of her relationship with her boyfriend and troubles at school. (J.A. 363–78.)

Appellant argues that the prejudice was "being deprived of adequate time to prepare." (Appellant Br. at 26.) But even Appellant concedes that the Victim only "*may* have been suffering from psychotic agitation when she made her allegations." (Appellant Br. at 27 (emphasis added).) [redacted]

[redacted] (J.A. 145–46.) Appellant's theory relies on the Victim's prescription for Thorazine. (Appellant Br. at 27.) But both the *DuBay* Judge and the Court of Criminal Appeals found that the Record did not support that the Victim actually took Thorazine. (J.A. 227); *Jacinto*, 2024 CCA LEXIS 14, at *12. Furthermore, Appellant, his Counsel, and his expert already had indications of the Victim's mental health from her mother's statements to law enforcement, the previously discovered diagnosis and prescriptions, and from Appellant's own observation of the Victim.

In *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2019), the Court of Appeals for the Armed Forces found a mental health diagnosis could not be retroactively applied to assess a previous confession because there was "simply no temporal tie" between the mental health condition and the proffered evidence. *Id*. at 454. The court ruled the military judge's finding that the defendant was suffering from an adjustment disorder during his statement to law enforcement, based exclusively on a subsequent diagnosis, was clearly erroneous without a temporal tie. *Id*.

Here, like *Lewis*, there is "simply no temporal tie" between the Victim's mental health condition in 2017 and her ability to perceive the sexual assaults in 2012 and 2013 or to testify accurately in 2018. (J.A. 104–07.) The Victim first disclosed Appellant's abuse to her mother in 2013. (J.A. 243–47.) The Victim

also testified in court in 2018. (J.A. 231–45.) [redacted] (J.A. 479, 513.)

[redacted]. (J.A. 460.) [redacted] *Compare* (J.A. 457)[2] *with* (J.A. 145–46.) [redacted] (J.A. 81.)

[redacted] (J.A. 457.) [redacted] (J.A. 457.) [redacted] (J.A. 457.) [redacted]

[2] Appellant explicitly incorporated the Mil. R. Evid. 513 litigation from June 14, 2018, (J.A. 399–428), into his June 17, 2018, Motion for Reconsideration of Continuance. (J.A. 143.)

[redacted] (J.A. 477, 513.) [redacted]

[redacted]. (J.A. 460–61.)

Unlike *Miller*, where the defendant was deprived of his choice of counsel based solely on inconvenience to the court, here, the Military Judge denied the continuance request because Appellant sought to investigate irrelevant and inadmissible matters. Whereas *Miller* was a matter of inconvenience, here, it was a matter of irrelevance and inadmissibility. (J.A. 457); *see Miller*, 47 M.J. at 358; *see also United States v. Weisbeck*, 50 M.J. 461, 465 (C.A.A.F. 1999) (military judge abused discretion denying continuance to support critical defense expert when "the only justification for denying the continuance was expeditious processing").

[redacted]—and therefore it was irrelevant to the case—the Military Judge did not abuse his discretion denying the continuance request.

3. The materiality and quality weigh against finding prejudice.

The lower court held that "an analysis of prejudice requires review of the complete 212-page record from Calvert Memorial Hospital that is contained in

Appellate Exhibit CLXXXVII." *Jacinto*, 2024 CCA LEXIS 14, at *12. The court found the following facts:

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

Id.

The Military Judge deemed [redacted] (J.A. 460.) [redacted] (J.A. 460.) Appellant does not challenge this Ruling. As in *Lewis*, the retroactive application of the Victim's mental health in 2017 to her ability to perceive events in 2012 and 2013 is improper, or at best has low probative value.

Consistent with the Military Judge factual findings and the Record, the court correctly found that there was no prejudice to Appellant because there were no constitutionally required portions in the medical records. *Id*. at *13; (J.A. 227; (J.A. 457.) Furthermore, the Victim's mental health in 2017 was irrelevant to her ability to perceive in 2012 and 2013 or to testify in 2018. *See supra* Section II.B.2.

As Appellant sought discovery of evidence that was both irrelevant and inadmissible, there was no potential impact on the verdict.

[redacted] (J.A. 455.) The Military Judge denied Appellant's Motion for a continuance on the Record, (J.A. 102–03), after hearing testimony from the Defense expert, (J.A. 399–426), and argument from all parties, (J.A. 83–102). [redacted] (J.A. 103.)

Even if Appellant was surprised by the particular prescription, he and his expert were already generally familiar with the Victim's mental health and previously consulted on the general topic. The prescription was a change in a single variable to an already well-understood situation.

As in *United States v. Hedgecock*, 80 M.J. 509 (N-M. Ct. Crim. App. 2020), where a delay to obtain unnecessary experts had no possible impact on the verdict, here, any delay to investigate irrelevant matters had no possible impact on the verdict. *Id*. at 516. Although Appellant claims he would have used a delay to contact the clinicians and submit additional discovery requests, he makes no

argument how such actions would have resulted in admissible evidence, nor does he assert that he would have taken different actions at trial. (Appellant's Br. at 26–27.)

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

4. This is not structural error.

Appellant is incorrect that this could be structural error. (Appellant Br. at 28.)

"Structural errors involve errors in the trial mechanism" so serious that "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). They are not amenable to harmless error review and will always result in reversal if properly preserved for appeal. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

But there is a "'strong presumption' that an error is not structural." *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (citing *Rose v. Clark*, 478 U.S.

570, 579 (1986) (overruled on other grounds by *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993))).

Here, Appellant fails to show how being denied a continuance rendered the trial unable to "reliably serve its function as a vehicle for determination of guilt or innocence" when the basis of the request was a search for irrelevant and inadmissible evidence. (Appellant Br. at 28–31.) This is not structural error.

5. This is a non-constitutional error.

Appellate courts review erroneous exclusion of evidence as non-constitutional error. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). In *Kohlbek*, the military judge erred by failing to admit the appellant's polygraph examination. *Id.* Applying the *Kerr* factors, the *Kohlbek* court found no substantial prejudice because of "the overwhelming strength of the Government's case" given the victim's testimony. *Id.* The victim provided details including where the appellant touched her, what he told her, and that she immediately reported the incident to her father and later the appellant's stepdaughter. *Id*.

Here, [redacted] (J.A. 455.) Like *Kohlbek*, the purpose of the continuance was to develop defense evidence against the sexual assault allegations.

Like *Kohlbek*, the United States' case is strong due to the Victim's testimony. The Victim remembered details such as the assaults occurring while she was in the fourth grade. (J.A. 231.) That two of them happened in the kitchen. (J.A. 232.) What she was wearing. (J.A. 232.) And Appellant specifically put his left hand in her pants and touched her vagina without penetration during the first incident. (J.A. 233.) That Appellant penetrated the Victim's vagina with his hand and made the Victim touch his penis during the second incident. (J.A. 235–37.) At the third incident, the Victim testified Appellant called her to his room and pushed him onto his bed. (J.A. 239.) There, Appellant "dry hump[ed]" her while she was on her stomach. (J.A. 240.)

Like *Kohlbek*, the Victim also disclosed Appellant's abuse to her best friend, her school counselor, and her mother in 2013 and again in 2017. (J.A. 243–47, 324–25, 339–40.)

Denial of Appellant's continuance request was non-constitutional error.

6. Even if constitutional error, any error was harmless beyond a reasonable doubt.

Even assuming that the error is of constitutional dimension, we assess whether it was harmless beyond a reasonable doubt. *United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009); s*ee United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (applying harmless beyond reasonable doubt standard to constitutional error).

For the same reasons for why there was no material prejudice, any prejudice is also harmless beyond a reasonable doubt. *See supra* Sections II.B.1–5.

Conclusion

The United States respectfully requests this Court affirm the findings and sentence as adjudged and approved below.

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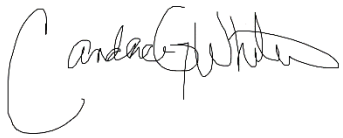

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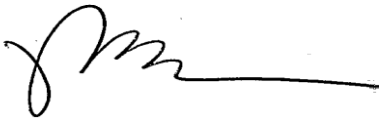

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I certify that I delivered a copy of the foregoing electronically to the Court and opposing Counsel, Lieutenant Jesse B. NEUMANN, JAGC, U.S. Navy, on December 3, 2024.

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