IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee	)	BRIEF ON BEHALF OF APPELLANT
	)	
v.	)	Crim. App. Dkt. No. 20170336
	)	
Staff Sergeant (E-6) **THOMAS AYALA** United States Army Appellant	)	USCA Dkt. No. 20-0033/AR

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

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Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On December 1, 2016, March 17, 2017, and May 31 to June 1, 2017, a military judge[1] sitting as a general court-martial convicted Staff Sergeant (SSG) Thomas Ayala, contrary to his pleas, of two specifications of aggravated sexual contact, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The military judge sentenced appellant to be confined for eight months, and to be discharged from the service with a bad-conduct discharge. (JA 248). The military judge credited appellant with sixty days of confinement against the sentence to confinement. (JA 248). On November 21, 2017, the convening authority approved the sentence as adjudged, and credited appellant with sixty days of confinement. (JA 20).

On July 18, 2019, the Army Court issued a decision affirming the findings and sentence, and denied a motion for reconsideration on September 3, 2019. Counsel filed a Petition for Grant of Review on December 5, 2019. On January 21, 2020, this Honorable Court granted review to determine whether the military judge abused his discretion admitting the victim's prior consistent statement under Military Rule of Evidence (Mil. R. Evid.) 801(d)(1)(B)(i) and 801(d)(1)(B)(ii). On April 15, 2020, this Honorable Court ordered briefs.

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[1] The Supplement to the Petition for Grant of Review stated correctly on page 1 that appellant was tried by a military judge alone. The Supplement incorrectly argued on pages 3 and 17–19 that panel members were involved in appellant's trial.

Summary of the Argument

United States v. Finch settled that Mil. R. Evid. 801(d)(1)(B)(ii) does not provide *carte blanche* to a party to introduce what would otherwise be inadmissible hearsay. 79 M.J. 389 (C.A.A.F. 2020). "It is not the case that under Mil. R. Evid. 801(d)(1)(B)(ii), all prior consistent statements are now automatically admissible following impeachment on any ground." *Id.* at 396. Rather, such statements must be narrowly tailored to fit within the ambit of the rule.

In appellant's case, the defense's theory was that Specialist (SPC) AN lied and that she had lied from the very beginning. She lied when she first texted SGT Rolf that something had happened in the wee hours of April 17, 2016, minutes after arriving back in her room from appellant's room. The lies continued a few hours later, when she repeated her claims of assault to her mother. She reiterated those lies when provided a video recorded interview to NCIS. She lied again two days later, parroting back the same accusations in a written sworn statement. Her lies continued through trial.

The defense theory was predicated upon multiple motives. First, SPC AN had been in trouble a month prior to the alleged assault for drinking alcohol. On the night of the alleged assault, she purchased three alcoholic beverages in violation of Camp Lemmonier policy, the joint naval base in Djibouti where she

and appellant were stationed. Second, SPC AN also broke the rules when she entered a male CLU (containerized living unit) after hours the night of the alleged assault. Three people knew about it. Third, SPC AN was romantically interested in SGT Rolf, and she did not want him to find out that she was nonetheless flirting and being intimate with appellant. Lastly, SPC AN did not want her behavior that night contributing to her already bad reputation on Camp Lemmonier. The defense theory was that, as soon as she left appellant's CLU, she had determined what her story would be—*before* she uttered a word to anyone.

The defense called out SPC AN out for being remarkably consistent—consistent in her lies. After the defense successfully exposed those lies, the military judge gave the government a blank check to fill the record with inadmissible hearsay that merely repeated SPC AN's lies.

The military judge admitted text messages between SPC AN and her mother from the morning after the alleged assault, premising admissibility on the defense's purported attack on SPC AN's extensive trial preparation. He did not just allow in statements of SPC AN—he substantively admitted hearsay statements of SPC AN's mother. When the military judge realized that the defense had not alleged a recent fabrication or improper motive to testify, he outright rejected these theories of admissibility for any of SPC AN's prior statements. At that point, he should

have revisited his prior ruling. His failure to do so was error, as the entire text conversation is inadmissible hearsay.

Furthermore, once the motive of recent fabrication was dispelled, the government had the burden to demonstrate that SPC AN's prior statements rehabilitated her in-court testimony on some other ground. The government's burden is not satisfied with a cursory invocation of "another ground"; it requires that the proponent of the evidence establish a nexus between specific prior statements and how those statements rehabilitate specific in-court testimony of the declarant-witness.

The military judge, however, failed to hold the government to its burden, opting instead for a mere recital of the rule without providing any analysis as to how those statements rehabilitated SPC AN's in court testimony. Unlike *Finch*, the military judge excluded portions of the video to which the defense had objected. 79 M.J. at 396. But like *Finch*, he improperly admitted the recording before reviewing it. *Id*. Additionally, he never made clear after reviewing it which portions of the nearly hour-long interview he had or had not substantively considered. *Id*. In doing so, he considered large swathes of inadmissible hearsay that were prejudicial to the appellant.

The erroneous admission of such prejudicial hearsay was not harmless. The admission of the prior statements enabled the government to bolster SPC AN's

testimony in direct contravention of the rule. The military judge clearly appreciated the inflammatory impact of the evidence, noting that had appellant's trial been before members, he would not have admitted the same evidence. "The presumption that the military judge knows and follows the law is only as valid as the law itself." *United States v. Hukill*, 76 M.J. 219, 223 (C.A.A.F. 2017). In appellant's case, it is an unreasonable presumption that the military judge knew and followed the law[2] when he repeatedly waivered on theories of admissibility on the record. When presented with SPC AN's repeated, emotionally charged echoes of sexual assault, the factfinder concluded they were more credible, to appellant's prejudice.

Statement of Facts

A. SPC AN's In Court Testimony.

The government opened its case with the testimony of SPC AN, the alleged victim. (JA 42). She testified that on the evening of April 16, 2016, after returning around midnight from one of the bars on Camp Lemmonier, Djibouti, appellant began a conversation with SPC AN outside of her containerized living unit (CLU). (JA 44). After attempting to return a cell phone to a mutual acquaintance, SPC AN and appellant went back to appellant's CLU. (JA 45–48). Camp Lemmonier

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[2] *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997).

policy prohibited personnel from being in opposite sex's rooms between 2200 and 0700 hours. (JA 60, 82).

Appellant's roommate, SSG Cavanaugh, was present when they arrived. (JA 49). Specialist AN sat on appellant's bed. She testified that appellant tried to kiss her, and held her arms over her head and touched her breasts without her consent. (JA 53–56). At one point, SSG Cavanaugh told SPC AN she could not stay in their room. (JA 89). Appellant accompanied SPC AN on the walk back to her CLU. (JA 60). Specialist AN testified that during the walk, appellant grabbed her hand and forced her to touch his penis. (JA 62). Upon returning to her room, Specialist AN testified that she "was confused, I guess." (JA 63).

B. SPC AN's Out of Court Prior Statements.

1. Text Messages with her mother.

On April 17, 2016, SPC AN reported via text message to her mother that she had been sexually assaulted. (JA 65; JA 253). Specialist AN stated, "It wasn't that bad Like idk I'm just confused." (JA 260). Her mother countered, "You need to be confident You KNOW what happened was WRONG." (JA 260).

2. Interviews with law enforcement.

Following the conclusion of her text message conversation with her mother, SPC AN reported the assault to NCIS; she conducted a nearly hour-long video

recorded interview. (JA 65–67). She also provided a written sworn statement. (JA 67 and 131).

C. Admissibility of Evidence under Mil. R. Evid. 801(d)(1)(B)(i) and (ii).

1. Admission of Prosecution Exhibit 4.

On cross-examination, trial defense counsel elicited that SPC AN had conducted four or five interviews with the prosecution prior to submitting to an interview—the day before trial—with the defense. (JA 74). When asked if she had prepared again with the prosecutor following this interview, she stated that she had, ". . . but it wasn't about the interview we had." (JA 75). Additionally, SPC AN acknowledged that in preparation for trial, she had reviewed her video-recorded statement, her written sworn statement, and the text message conversation with her mother. (JA 74–75). Trial defense counsel elicited that prior to the alleged incident, SPC AN had broken some rules, and was concerned about her reputation. (JA 78, 80, 82).

On redirect, the government offered Prosecution Exhibit 4—alleged prior consistent statements by SPC AN—to ostensibly rebut the inference of an improper influence on her testimony. (JA 119). Trial defense counsel objected, contending that he had highlighted SPC AN's previous repetitions of her story, not to show a recent fabrication, but rather to show the story had been remarkably consistent: "I did not impeach her on her preparation. In fact, the preparation I

used for the opposite effect; which was to establish that she claims that her statement is accurate and the text are accurate, not that she's now coming up with a motive to fabricate." (JA 120). Furthermore, trial defense counsel specifically argued that SPC AN's motive to fabricate originated the night of the alleged incident: "Our motive to fabricate is when the roommate, Cavanaugh, tells her to get out of the room and she knows that all of this stuff is happening. I don't—we do not allege she's now recently made up this allegation." (JA 120).

The military judge acknowledged the defense's theory, but posited, ". . . I believe the government's also offering it under 801(d)(1)(B)(ii), which states: 'to rehabilitate the declarant's credibility as a witness on another ground.'" (JA 120). Trial counsel, however, then reiterated his previous argument: "For the record, it's the government's position that defense alleged multiple improper motives; one of them being Sergeant Cavanaugh's statement and the other being---[.]" (JA 122). The military judge responded, "Well, now you're going back to (i)." He continued,

> . . . and this is the problem, especially if we were dealing with a panel, you'd be in a lot of trouble because you can't—we've got a—it's hard to parse all this stuff out to a panel and help them see and understand what they can consider and what they can't consider.

(JA 122).

The military judge then went page by page through Pros. Ex 4 with the trial counsel, identifying which consistent statements comported with SPC AN's in court testimony. (JA 123–30). Despite initially referencing a possible theory of admissibility under Mil. R. Evid. 801(d)(1)(B)(ii), the military judge admitted portions of Pros. Ex. 4 under Mil. R. Evid. 801(d)(1)(B)(i). (JA 120–30).[3]

The military judge excluded certain improper statements as well as portions of the conversation that lacked an improper motive. (JA 119–30).[4] But for some unarticulated reason, and over defense objection, the military judge ruled that he would consider the mother's statement that "YOU KNOW what happened WAS WRONG[.]" (JA 128; JA 260).

2. Defense objects to admission of Prosecution Exhibit 6.

[3] It appears appellant did not object to some sections of Pros. Ex. 4 in for tactical reasons. (JA 126). Appellant waived an objection for statements SPC AN made that were exculpatory to the defense, where she suggested she may have given mixed signals to appellant, and she was not sure what he did was wrong. (JA 126–27). However, appellant maintained his objection to other sections of Pros. Ex. 4. (JA 128–30).

[4] The military judge specifically honed in on the improper motive theory in portions of the conversation that referenced reporting the assault. (JA 129). Trial counsel argued that the implied improper motive was that "[SPC AN] somehow adjusted her testimony in preparation with the meeting." (JA 129). When contradicted by the military judge that the defense had not impeached SPC AN about reporting, trial counsel responded: "Yes, Your Honor. The government is viewing their impeachment of her based on the government's preparation with her as going to her testimony broadly rather than just the specific pieces of it." (JA 129–30). The military judge ultimately excluded this portion of Pros. Ex. 4. (JA 130).

As redirect continued, trial counsel next moved to admit Pros. Ex. 6—SPC AN's written sworn statement—into evidence under Mil. R. Evid. 801(d)(1)(B)(i) and Mil. R. Evid. 801(d)(1)(B)(ii). Trial defense counsel objected, arguing that there was no allegation of a recent motive to fabricate and that the statements were in fact remarkably consistent. (JA 132–34). Trial defense counsel continued, "I think this rule still means prior consistent statement, and the government has to identify for the Court what was the specific inconsistency brought up by the defense and what is the specific consistency we now want to bring in." (JA 135). The military judge withheld his ruling on its admissibility but stated, "'to rehabilitate the declarant's credibility as a witness when attacked on another ground.' That's pretty broad." (JA 136).

3. Defense objects to the admission of Prosecution Exhibit 10.

Redirect continued with the trial counsel next attempting to admit Pros. Ex. 10, an unredacted version of SPC AN's hour long video recorded interview. (JA 137–38). Trial defense counsel raised the same hearsay objection. (JA 138). The military judge deferred ruling until the trial counsel could produce a redacted version, instructing the trial counsel to point him to specific points that would rehabilitate specific inconsistencies. (JA 138).

4. Admission of SPC AN's written statement and interview.

At the close of the government's case, the military judge discussed the exhibits with the parties. (JA 156). Trial counsel again offered SPC AN's written statement, Pros. Ex. 6 for Identification, into evidence under Mil. R. Evid. 801(d)(1)(B)(i) and Mil. R. Evid. 801(d)(1)(B)(ii). (JA 158). The defense again reiterated that they were not attempting to elicit a motive to fabricate with their questions on SPC AN's preparation and that her motive to fabricate commenced before she made any statements to law enforcement or practiced her testimony with the government. (JA 157–66). The military judge, finding no motive of recent fabrication or improper motive and that the statements were merely consistent, concluded that SPC AN's written statement was inadmissible under Mil. R. Evid. 801(d)(1)(B)(i). (JA 174).

However, the military judge also concluded that the practical application of Mil. R. Evid. 801(d)(1)(B)(ii) meant that after the defense attacks a witness' credibility, for any reason, the government can rehabilitate the testimony with any prior consistent statement. (JA 166–67). Without articulating the other grounds upon which SPC AN's credibility had been attacked, the military judge admitted Pros. Ex. 6 into evidence under Mil. R. Evid. 801(d)(1)(B)(ii). (JA 176; JA 220).

Following this ruling, trial counsel then requested to substitute Pros. Ex. 6 with a redacted version of the recorded interview. (JA 176–77). The military judge withdrew Pros. Ex. 6. and stated the recording "is admitted in a format where

you take out all the portions that are not relevant. (JA 177). The military judge concluded, "Maybe you'll get lucky, Government, and the appellate courts will apply the tipsy coachman[5] doctrine to my ruling." (JA 179).

When the prosecution later provided the redacted interview to the court as Prosecution Exhibit 14, trial defense counsel renewed the objection, arguing the video contained material hearsay, including statements that SPC AN never testified to or were inconsistent with her in court testimony. (JA 221). Trial defense counsel also raised a concern as to how the record would reflect the military judge's decisions of what statements he would consider. (JA 221).

The military judge responded that he simply would only consider statements that were relevant as prior consistent statements under Mil. R. Evid. 801(d)(2)(B)(ii), and would not consider anything else for any other purpose. (JA 222). The military judge also noted that he would not have admitted the video into evidence had it been a trial before members. (JA 222). Maintaining their objection to the recording as a whole, trial defense counsel provided the military judge with specific time hacks of the video that they did not want him to consider, as those portions contained statements to which SPC AN had not testified. (JA 223–24; App. Ex. XXII). The military judge admitted Pros. Ex. 14, with the

[5] The Army Court recently applied the "tipsy coachman" doctrine when a military judge improperly admitted purported prior consistent statements. *United States v. Butler*, 2020 CCA LEXIS 188, *11–12 (A. Ct. Crim. App. May 29, 2020).

caveat that he would not "consider any of the time hacks that the defense has objected to; and, I won't consider anything else on Prosecution Exhibit 14 that is not consistent with the purpose for which it's been admitted under 801(d)(2)(B)(ii)." (JA 224). The military judge ultimately considered Prosecution Exhibits 4, 5, and 14. (JA 250).

During closing arguments, defense counsel reiterated their position that SPC AN was a liar, that she immediately fabricated the assault. (JA 225–49). "You can say over and over that something did occur or something didn't occur; and if it's false the first time, it's false the tenth time, it's false the fiftieth time; and, that's the situation in this case." (JA 247).

Argument

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE VICTIM'S PRIOR CONSISTENT STATEMENTS UNDER MIL. R. EVID. 801(d)(1)(B)(i) AND 801(d)(1)(B)(ii).

Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *Finch*, 79 M.J. at 394. "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Kohlbek*, 78 M.J. 326, 333 (C.A.A.F. 2019). "This Court reviews the prejudicial effect of an erroneous evidentiary ruling de novo." *Id*. "[W]here

the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted;" however, "[i]f the military judge fails to place his findings and analysis on the record, less deference will be accorded." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014).

Law and Argument

This Court recently explained the narrow strictures of prior consistent statements. *Finch*, 79 M.J. at 394–95. Such statements must meet three threshold requirements: (1) the declarant of the out-of-court statement testifies at trial, (2) the declarant is subjected to cross-examination concerning the prior statement, and (3) the prior statement must be consistent with the declarant's in court testimony. Mil. R. Evid. 801(d)(1)(B); *see also United States v. Frost*, 79 M.J. 104, 109–10 (C.A.A.F. 2019). Prior statements are not required to be identical in order to be admissible under the rule, they must be "generally consistent with the testimony at trial." *Finch*, 79 M.J. at 395 (citing *United States v. Muhammad*, 512. F. App'x 154, 166 (3d. Cir. 2013)).

A. Prosecution Exhibit 4 is inadmissible under Mil. R. Evid. 801(d)(1)(B)(i).

Although the prior statements were generally consistent, Prosecution Exhibit 4 is inadmissible under part (i) of the rule because the motive to fabricate arose prior to the statements being made. Additionally, some of the statements contained

impermissible hearsay not otherwise admissible under Mil. R. Evid. 801(d)(1)(B)(i).

1. As no express or implied charges of recent fabrication or improper motive or fabrication existed, the admitted statements did not fit within the rule's narrow ambit, and were thus erroneously admitted.

In order for a prior statement to be admitted as substantive evidence, the plain language of the rule itself requires that any such fabrication be *recent*. Mil. R. Evid. 801(d)(1)(B)(i). "Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut." *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 2009). "Statements made *after* an improper influence arose do not rehabilitate a witness's credibility." *Frost*, 79 M.J. at 109 (emphasis in original) (citing *United States v. McCaskey*, 30 M.J. at 188, 192 (C.M.A. 1990)).[6]

In appellant's case, the defense's theory was that SPC AN developed a motive to fabricate the assault as soon as she left appellant's CLU in the wee hours

[6] In *McCaskey*, where the defense's theory was that the alleged victim had lied from the beginning, this Court stated any statements made "after the urge to lie has reared its ugly head, does nothing to 'rebut' the charge." *McCaskey*, 30 M.J. at 192–93. This Court held that the military judge erred when he admitted the purported prior consistent statements at trial, reiterating that the mere repetition of lies is not probative of whether a witness is telling the truth at trial. *Id*. Similarly, in *Frost*, this Court found the military judge erred by admitting the victim's prior out-of-court statements where the improper influence predated the initial outcry. 79 M.J. at 111.

of April 17, 2016—thirteen months *prior* to the beginning of appellant's trial. Defense counsel elicited several bases for her motive to fabricate: (1) a month prior to the alleged assault, SPC AN had been formally counseled for an alcohol-related offense; (2) the evening of the alleged assault, she had purchased more alcohol than was permitted in a twenty-four hour period by Camp Lemmonier policy; (3) that same night, SPC AN had broken curfew in a male's room, and three people knew about it; (4) SPC AN was romantically interested in another Soldier and did not want him to discover that she was flirting and had been intimate with appellant; and (5) after committing this misconduct, she feared her already bad reputation on Camp Lemmonier would be further degraded. (JA 78, 80, 82, 99–100). Because SPC AN did not want to get in trouble for misconduct and worried about her overall reputation on post, she *immediately* fabricated the assault, sheer moments after leaving appellant's room.

In appellant's case, *all* of SPC AN's motives to lie arose *before* she reported the assault to anyone. While the prosecution made much to do about the defense inquiring into her pretrial preparation, the defense never insinuated that her story had changed in that time. Rather, trial defense counsel pointed to the fact that her statements were remarkably consistent. (JA 132–34, 159–60). Furthermore, SPC AN herself told the court that meeting with the prosecutor in no way influenced her testimony. (JA 75). Like *Frost* and *McCaskey*, the defense's theory in appellant's

case was straightforward and never changed: SPC AN began to lie moments after the alleged assault, and her lies continued through trial. Because no basis existed to admit Pros. Ex. 4, or any other prior consistent statement, under Mil. R. Evid. 801(d)(1)(B)(i), the military judge erred when he did so.

Indeed, the military judge himself later eviscerated this theory of admissibility, finding the statements irrelevant to rehabilitating any charges of recent improper influence or motive to fabricate as all of the motives arose prior to SPC AN making any statements. (JA 174).[7] Once the military judge denounced his previous theory of admissibility, he had an obligation to review and reverse his earlier ruling. And yet, he never revisited his previous ruling regarding Pros. Ex. 4. The military judge instead inexplicably considered Pros. Ex. 4 as substantive evidence. (JA 250). As such, this Court should afford his ruling with scant deference.

2. Parts of the statements admitted in Pros. Ex. 4 were not made by the declarant-witness, and therefore do not even meet the threshold admissibility requirements of Mil. R. 801(d)(1)(B)(i).

While the military judge took steps to redact portions of Pros. Ex. 4, he inexplicably admitted pages of Pros. Ex. 4 over defense objection that contained

[7] This realization occurred when the military judge was considering Prosecution Exhibit 6 for Identification.

statements of SPC AN's mother, including that "[SPC AN] KN[E]W what happened was WRONG[.]" (JA 128; JA 160).[8]

This is problematic in two ways: First, one of the initial threshold admissibility requirements is that the *declarant* of the out-of-court statement must testify. Mil. R. Evid. 801(d)(1); *see also Finch*, 79 M.J. at 394 (emphasis added). Specialist AN's mother did not testify at trial, making it is impossible for her to be a declarant-witness.

Additionally, the military judge failed to provide any rationale for his decision. Unlike when considering other portions of the exhibit when he explicitly stated that he did not need the mother's statements for context[9] (JA 125–27), he provided no basis for why he needed to substantively consider SPC AN's mother saying what happened to her was wrong. (JA 128).

The military judge has "the primary responsibility for ensuring that only admissible evidence finds its way into the trial." *United States v. Rivas*, 3 M.J. 282, 286 (C.M.A. 1977). Because these statements do not meet the first prong of

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[8] The redactions followed the military judge's acknowledgement that portions of the discussion were not relevant: "This stuff about her—you know, this sort of discussion with her mother about—you know, 'sex offenders tend to be predators,' that sort of stuff, all of that kind of conversation. That's not relevant and it's not proper." (JA 121).

[9] Such a basis for context may be for a purpose that "is more in accord with the rule of completeness, and statements for that are admissible." *United States v. Simonelli*, 237 F.3d 19, 28 (1st Cir. 2001).

threshold admissibility, they constituted improper hearsay, and were erroneously admitted by the military judge as substantive evidence. His consideration of this improper evidence without explanation should lead this Court to afford his ruling even less deference. *See Flesher*, 73 M.J. at 312.

B. The military judge applied a sweeping interpretation of Mil. R. Evid. 801(d)(1)(B)(ii) to permit the admittance of all prior consistence statements once a witness's credibility had been attacked for any reason. Without articulating any specific grounds, the military judge erroneously admitted Pros. Ex. 4 and 14.

This Court outlined in *Finch* that statements are admissible under Mil. R. Evid. 801(d)(1)(B)(ii) if the statements meet the threshold admissibility requirements of Mil. R. Evid. 801(d)(1)(B); the declarant-witness's credibility has been "attacked on another ground" outside of those delineated in Mil. R. Evid. 801(d)(1)(B)(i); and the statement is in fact relevant to rehabilitating the witness's credibility "on the basis of which he or she was attacked." *Finch*, 79 M.J. at 396.

1. Trial counsel never asserted "another ground" under which Prosecution Exhibits 4 or 14 would be admissible under Mil. R. (801)(d)(1)(B)(ii). As the government failed to meet its burden to establish why the evidence was admissible as non-hearsay, the military judge erred by admitting both exhibits into evidence.

This Court made plain in *Finch* that the rule's reference to "another ground" meant grounds not otherwise listed in Mil. R. Evid. 801(d)(1)(B)(i). *Id*. at 395. While not specified in the rule itself, the Drafters suggested inconsistency or faulty memories as possible other grounds. *Id.* (citing Manual for Courts-Martial

[MCM], App. 22, A22-61). This interpretation mirrors the approach taken by federal courts.[10] "The proponent of evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred." *Finch*, 79 M.J. at 396 (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

In appellant's case, the government failed to identify how SPC AN's credibility was "attacked on another ground," and how the prior consistent statements would specifically rehabilitate her credibility. First, the prosecution consistently conflated the standards of Mil. R. Evid. 801(d)(1)(B)(i) with Mil. R. Evid. 801(d)(1)(B)(ii), repeatedly asserting that the statements were admissible because the defense questioned SPC AN about her pretrial preparation. (JA 119–23). Second, the prosecution argued that if a declarant-witness's credibility was generally attacked, all prior consistent statements could come into evidence in

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[10] *See United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017) (prior consistent statements admissible when a witness' credibility has been attacked on the basis of faulty memory); *United States v. J.A.S., Jr.*, 862 F.3d 543, 545 (6th Cir. 2017) (prior consistent statements admissible when a witness' credibility has been attacked on the basis of faulty memory). *But see also United States v. Magnan*, 756 F. App'x 807, 818 (10th Cir. 2018) (prior consistent statements would not rehabilitate a witness's credibility when there was no targeted attack on inconsistent statement or faulty memory); *United States v. Lacerda*, 2020 U.S. App. LEXIS 14278, *26–27 (3rd Cir. 2020) (prior statements inadmissible to combat impeachment by contradiction).

order to rehabilitate that person's credibility *in general*. This Court invalidated such a rationale in *Finch*. 79 M.J. at 396.

Furthermore, while the government alleged that the defense had attacked the credibility of SPC AN in a variety of ways,[11] they failed to articulate how the statements would specifically rehabilitate her credibility on those grounds. (JA 162; JA 164). For example, the government argued that the defense "alleged that somehow [SPC AN's] SAPR [sexual assault prevention and response] training was an improper motive or influence." (JA 162). Specialist AN testified that she had received the training prior to the alleged assault. (JA 77). The defense did not call into question whether SPC AN received SAPR or victim advocacy (VA) training. (JA 77). Rather, it went to the narrative that she was a liar: SAPR/VA training gave her an insider's look at the system, making her skillfully adept at successfully propagating her lies. Bringing in a statement in which SPC AN acknowledged that she had received the training would do nothing to rehabilitate her credibility on this ground.

Additionally, the government argued that the defense had attacked SPC AN's credibility "by bringing up a past counseling statement for alcohol use." (JA

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[11] Notably, the government did not allege that defense had attacked SPC AN on the basis of faulty memory or inconsistency. On the contrary, trial counsel conceded that SPC AN's testimony was remarkably consistent with her out of court statements. (JA 175).

164). Specialist AN testified that a month prior to the alleged offense, she had received a formal counseling statement for an alcohol-related offense. (JA 77). The defense did not call into question whether she had in fact received a counseling statement. Rather, it established a motive to fabricate—because she had been in trouble a month prior to the alleged assault, and she knew she had violated Camp Lemmonier's alcohol policy on the night in question, she lied. Admitting a statement into evidence in which SPC AN admits that she had been previously reprimanded for an alcohol-related incident would do nothing to rehabilitate her credibility on that ground.

"Prior consistent statements may not be admitted to counter all forms of impeachment to bolster the witness merely because she has been discredited." *Tome v. United States*, 513 U.S. 150, 157 (1995). When the government failed to meet its burden of articulating the nexus of relevance of the prior consistent statements with rehabilitation of the precise "other" grounds upon which SPC AN's credibility was ostensibly attacked, the military judge erred in admitting Pros. Ex. 14.

2. The military judge incorrectly articulated and applied the standard of Mil. R. (d)(1)(B)(ii).

Earlier in the trial, the military judge pointed out to the trial counsel:

> It doesn't do what you want it to do. It is a prior consistent statement, yes. But they're not saying that she's testified differently from her prior consistent statement; they're

> saying that she testified the same as her consistent statement. And showing me her prior consistent statement doesn't rebut that presumption.

(JA 174). When the government failed to meet its burden of articulating how the prior consistent statements were admissible under Mil. R. Evid. 801(d)(1)(B), the military judge fell prey to the same thinking as the trial counsel, asserting that if the victim's credibility is attacked for *any* reason, then *all* prior consistent statements are automatically admissible to salvage her credibility. (JA 166–67). He thus admitted Prosecution Exhibit 14. (JA 176). This enabled the government to improperly fill the record with substantively-considered inadmissible evidence, bolstering SPC AN's claims. Such a broad application of the rule is in direct contravention of this Court's and other federal courts' jurisprudence, and constitutes error. "Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true." *McCaskey*, 30 M.J. at 192.

In so ruling, the military judge merely recited the words in the rule, without articulating the other grounds upon which SPC AN's credibility had been assailed. (JA 176, 222, 224). He simply stated that he would not consider the portions to which SPC AN did not testify, as highlighted by the defense, and "I won't consider anything else on Prosecution Exhibit 14 that is not consistent with purpose for which it's been admitted under 801(d)(2)(B)(ii)." (JA 224). This is the same sort of ruling that this Court found so inadequate in *Finch*.

Not only did the military judge fail to provide any analysis as to Pros. Ex. 14 was admissible under Mil. R. Evid. 801(d)(1)(B)(ii)—he abdicated responsibility for this decision, hoping that the ruling would hopefully be salvaged on appellate review. As such, his ruling should be afforded even less deference. As there was no proper basis upon which to admit the testimony under part (ii) of the rule, the admission of the statement was error.

C. Appellant suffered material prejudice when the improper admission of Prosecution Exhibits 4 and 14 had a substantial influence on the military judge's findings.

When this Court determines that a military judge has erroneously admitted evidence, the government has the burden to establish that the admission of the improper evidence was harmless. *Finch*, 79 M.J. at 399 (citing *Frost*, 79 M.J. at 111 (internal citations omitted). "For preserved nonconstituional evidentiary errors, the test for prejudice is 'whether the error had a substantial influence on the findings.'" *Id*. (quoting *Kohlbek*, 78 M.J. at 334). That analysis requires this Court to assess (1) the strength of the government 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. *Id*. (internal citations omitted).

In appellant's case, the government's case was weak. Specialist AN was the only person to testify as to the sexual assault at appellant's trial. The Government

failed to present any forensic or physical evidence, and no other direct witnesses testified about the assault.

The defense's case, on the other hand, was strong. Trial defense counsel conducted a robust cross-examination of SPN AN, establishing that she had been dishonest in the past, and had clear and compelling reasons to fabricate the assault. Additionally, SSG Cavanaugh, a neutral third party, directly contradicted SPC AN's version of events. He testified that he was present in the CLU for a large portion of the time that SPC AN was present; he testified that she appeared to be in the CLU willingly, as she was flirting and giggling with appellant. (JA 195). Furthermore, he testified that he told her that she could not stay overnight in the CLU. (JA 193).

The materiality and quality of the improperly admitted evidence went to the heart of the matter in the dispute—whether appellant had in fact assaulted SPC AN. Unlike *Finch*, the improperly admitted statements were not "mere passing reference[s]." *Finch*, 79 M.J. 399. Moreover, the statements weren't imprecise—they were unequivocal. Specialist AN repeatedly claimed that appellant had sexually assaulted her. Repetition has the effect of making a claim appear to be more credible, whether it is or not. The government exploited this by bolstering SPC AN's credibility through repetition of her false claims of assault.

As the factfinder, a military judge is not impervious to such a barrage of bolstering. This is enhanced by the fact that the military judge felt uncomfortable enough with the evidence in question that he announced that had appellant's trial been before members, he would not have admitted the statements. (JA 222). Additionally, while the military judge attempted to cabin inadmissible evidence from purportedly admissible evidence, he did so incompletely: he admitted the text from SPC AN's mother stating explicitly that what happened to her daughter was wrong. Compounding the error, he then considered that evidence substantively.

As this Court has made clear, it cannot be presumed that such improperly admitted evidence does not have a substantial influence on the military judge's guilty findings. *See Frost*, 79 M.J. at 112. Furthermore, the military judge abdicated his responsibility for the ruling, quipping that his ruling would hopefully be rescued by a tipsy coachman. (JA 179). Accordingly, appellant was prejudiced as a result of the military judge improperly admitting this evidence.

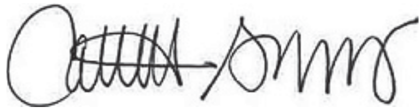
Conclusion

Appellant was entitled to present a defense that SPC AN was a liar. The military judge vitiated this defense by allowing the government to sidestep the general prohibition on hearsay and introduce numerous inadmissible and prejudicial out of court statements into the record. He then considered that

improper evidence in finding the appellant guilty. Due to the government's weak case, SPC AN's statements weighed heavily in the military judge's mind.

While the military judge is presumed to know and follow the law, *Mason*, 45 M.J. at 484, he remains human. When faced with an indiscriminate and overwhelming barrage of emotionally charged claims of sexual assault, he concluded that SPC AN's accusations were more credible, all to the prejudice of appellant. This Court cannot presume this error harmless when the military judge, through his rulings and statements, makes plain that he misapplied the law.

WHEREFORE, appellant respectfully requests this Court set aside the findings and sentence.



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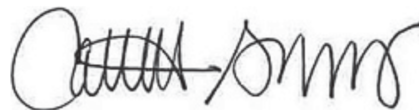
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Ayala*, Crim. App. Dkt. No. 20170336, USCA Dkt. No. 20-0033/AR was electronically filed with the Court and the Government Appellate Division on June 30, 2020.



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