IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. MATTHEW D. NORWOOD Machinist's Mate (Nuclear) First Class Petty Officer (E-6) U.S. Navy, Appellant	APPELLANT'S BRIEF USCA Dkt. No. 20-0006/NA Crim.App. No. 201800038

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

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Issues Presented

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, THE ENTIRE VIDEO-RECORDED INTERVIEW OF THE COMPLAINING WITNESS UNDER MRE 801(d)(1)(B)(ii) AS A PRIOR CONSISTENT STATEMENT.

II.

WHETHER THE GOVERNMENT TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Statement of Statutory Jurisdiction

The statutory basis for the jurisdiction of the Navy-Marine Corps Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for this Court's jurisdiction is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

Statement of the Case

A panel of officers sitting as a general court-martial convicted Machinist's Mate (Nuclear) First Class Petty Officer (MMN1) Matthew Norwood, contrary to his plea, of one specification of sexual abuse of a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b. The panel sentenced MMN1 Norwood to eighteen months' confinement, reduction to E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered the sentence executed.

On August 9, 2019, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside the finding of guilty to the language "groin" and "inner" in the charge on the basis of factual insufficiency.[1] The NMCCA did not grant sentencing relief.[2] The NMCCA affirmed the findings and sentence for the sole specification of the sole Charge without the excepted language.[3]

On October 7, 2019, MMN1 Norwood petitioned this Court for review. This Court granted review on the two issues presented and ordered briefing by counsel.[4] This Court granted two enlargements of time for MMN1 Norwood to file by March 23, 2020 and this brief is timely.[5]

Statement of the Facts

1. E.N. visited MMN1 Norwood, her paternal uncle, for a week in Hawaii.

E.N's biological father is MMN1 Norwood's brother. In December 2015, E.N. and her brother, R.J., lived in Idaho with their mother, G.B., their stepfather, and several half-siblings.[6] Mrs. G.B. had a friendly relationship with E.N's

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[1] *United States v. Norwood*, 79 M.J. 644, 661 (N-M. Ct. Crim. App. 2019); Joint Appendix (hereinafter JA) at 14.
[2] *Id*. at 662; JA at 15.
[3] *Id*. at 666-67; JA at 22.
[4] *United States v. Norwood*, No. 20-0006/NA, 2020 CAAF LEXIS 28 (C.A.A.F. Jan. 21, 2020).
[5] *United States v. Norwood*, No. 20-0006/NA, 2020 CAAF LEXIS 59 (C.A.A.F. Feb. 7, 2020); *United States v. Norwood*, No. 20-006/NA, 2020 CAAF LEXIS 131 (C.A.A.F. Mar. 6, 2020).
[6] JA at 63.

biological father and his family. And MMN1 Norwood had previously spent time with E.N., R.J., and other cousins when he was stationed in Washington State.[7]

In 2016, MMN1 Norwood was stationed in Hawaii and was facing a lengthy deployment. He and Mrs. G.B. arranged a trip for E.N. and R.J. over Christmas break.[8] E.N. was fifteen years old at the time.[9] E.N. and R.J. stayed with MMN1 Norwood for a week, returning on January 4, 2016.[10]

2. After returning home, E.N. waited a month before accusing MMN1 Norwood of abusing her.

In February 2016, a month after her visit with MMN1 Norwood, E.N. called her friend and alleged that MMN1 Norwood had touched her inappropriately while she was in Hawaii.[11] The next day, her friend told her own mother what E.N. said and word quickly spread to E.N's mother and step-father.[12]

Mrs. G.B. confronted E.N. about the allegation and called the police.[13] A few days later, E.N. was forensically interviewed on video.[14]

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[7] JA at 64.
[8] JA at 64.
[9] JA at 64.
[10] JA at 73.
[11] JA at 74.
[12] JA at 75.
[13] JA at 75.
[14] JA at 91.

3. The defense theory of the case was that E.N. lied and her family closed ranks to support her accusation.

During his opening statement, MMN1 Norwood's trial defense counsel stated that "none of the government witnesses would talk to the defense counsel."[15] He described the government witnesses as having a "sinister lens" and argued they were biased by "trying to maybe support something that you think is true."[16] Trial defense counsel characterized the government witnesses as thinking, "Hey, what can we do to back [E.N.] up? What can we do to back this up?"[17] He elaborated that trial counsel's opening laid the ground work that the witnesses would not be fully consistent, even though trial counsel wanted people to tell the story the same way.[18] Trial defense counsel concluded "somebody is hiding something here."[19]

4. The military judge determined cross-examination of E.N. implied a recent improper influence.

While cross-examining E.N., trial defense counsel confirmed E.N.'s mother prevented her from speaking with him.[20] Trial defense counsel also asked E.N. if the prosecutors had taken her into the court room and told her to "Just tell the

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[15] JA at 59.
[16] JA at 59.
[17] JA at 55.
[18] JA at 61.
[19] JA at 62.
[20] JA at 78.

truth."[21] Trial defense counsel asked E.N. if this was the first time she "had to practice to tell the truth."[22]

The Government later moved to admit the forensic interview because defense counsel attacked E.N.'s credibility. The trial defense counsel maintained that he was not "attacking everything she said in [court] because she met with the prosecutors."[23] Trial counsel argued that the cross-examination implied "that we coached her to tell the truth."[24] The military judge admitted the majority of the video interview under Military Rule of Evidence (MRE) 801(d)(1)(B)(ii) because the trial defense counsel attacked her on the ground "that the prosecution has been coaching this witness."[25]

5. The military judge's erroneous admission of the video interview was determined to be harmless by the lower court.

On appeal, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) held that the military judge erred by admitting the video under MRE 801(d)(1)(B)(ii) because "the implication that E.N. was coached in preparation for testifying is an implied charge of recent fabrication or recent improper influence,"

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[21] JA at 78.
[22] JA at 79.
[23] JA at 117.
[24] JA at 117.
[25] JA at 118. The military judge excluded the initial rapport building phase between E.N. and the forensic interview. Trial counsel and defense counsel agreed to start the video at 14:14 (JA at 131). This corresponds to "So it is very important" in the forensic interview transcript (JA at 232).

not "another ground" under MRE 801(d)(1)(B)(ii).[26] But the lower court found no prejudice in the error because the statements were otherwise properly admissible under MRE 801(d)(1)(B)(i).[27]

6. Trial counsel vouched for E.N.'s credibility.

In opening, trial counsel vouched for E.N. as an "innocent 15-year-old girl who has absolutely no reason to lie about what happened."[28] Trial counsel assured the members E.N. had "no reason to lie about what her uncle did to her" and as soon as the members "realize that [E.N.] is telling you the truth, the government will have proven its case to you beyond a reasonable doubt and it will be your duty to find the accused guilty."[29]

In closing, trial counsel referred to E.N. as "an innocent child with no reason to lie."[30] He emphasized that "[E.N.] told you the truth" and "you got to see the truth" and "you know [E.N] told you the truth" and "It's not a fabrication. It's not a lie. It's the truth. You know it's the truth."[31]

The trial defense counsel objected to the government vouching that E.N.'s family believed her accusation.[32] The military judge overruled the objection, but

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[26] *Norwood*, 79 M.J. at 655-56; JA at 4.
[27] *Id*; JA at 4.
[28] JA at 52.
[29] JA at 54.
[30] JA at 154, 159, 163.
[31] JA at 156, 157, 161, 162.
[32] JA at 189.

gave a curative instruction.[33] The lower court found that the curative instruction should have been stronger.[34]

7. Trial counsel labelled MMN1 Norwood a "child molester."

The government counsel called MMN1 Norwood a "child molester" numerous times in closing argument.[35] The language intensified during rebuttal when assistant trial counsel stated:

> But what defense is asking you to do by saying that there are reasonable doubts in this case, defense is asking you to give child molesters a license to commit these crimes, because if you can't find the accused guilty in this case, the only way--the only way a child molester could ever be convicted if he is literally caught in the act.[36]

The assistant trial counsel went on to exhort the members to "hold this child molester accountable."[37] In addition, he referred to the behaviors and understanding of child molesters as a group:

> Child molesters don't commit their crimes in public. They don't molest kids while other people are watching. There's not going to be DNA evidence. Child molesters know their victims won't report right away.[38]

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[33] JA at 190 ("It is your exclusive province, the court members, to determine the credibility of the witnesses . . . .").
[34] *Norwood*, 79 M.J. at 664 ("The military judge should have sustained the objection and given the members a stronger instruction . . . ."); JA at 19.
[35] JA at 183-84, 189.
[36] JA at 184.
[37] JA at 184
[38] JA at 183

8. Trial counsel asked the members to consider what other Sailors would think of them if they did not punish MMN1 Norwood sufficiently.

During sentencing, the trial counsel stated:

> Defense counsel may also argue that the conviction in and of itself is enough punishment, that you shouldn't award any additional punishment to the accused, but that argument is insulting. It's insulting to [E.N.] and the struggles that she has gone through as a result of this crime, and it's insulting to the military justice system as a whole. When defense counsel asks you to do that, I want you to think about tomorrow when you all return to your normal duties. You get back to work and someone asks where you've been this week. You tell them that you had court-martial duty and you tell them the facts of this case. You tell them that you convicted a first class petty officer of molesting his 15-year-old niece. The person you're telling this to is going to turn to you and they're going to ask, "Wow, what did he get for that?" Do you really want your answer to be "nothing at all"? Will you be comfortable telling them that the accused is back at work as though nothing ever happened?[39]

Summary of Argument

In a trial that hinged on E.N.'s credibility, the defense cross-examination of her was critical. Turning that cross-examination into a doorway that opened the court to all her prior consistent statements substantially impaired the adversarial process's fairness.

Here, the military judge erred in admitting the entire forensic interview as a prior consistent statement under MRE 801(d)(1)(B)(ii). The military judge determined that defense's cross-examination implied a recent improper influence,

[39] JA at 206-07.

but only because the military judge focused on a few limited questions of cross-examination to determine the defense opened the door. The lower court found the military judge clearly erred, but found harmless error because it found the entire video was admissible under MRE 801(d)(1)(B)(i) to rebut a recent improper influence.

However, the defense did not imply a recent improper influence—it's theory was that the initial allegations were fabricated. The defense did attack the complaining witness on "other grounds" of MRE 801(d)(1)(B)(ii). But only portions of the forensic interview might "rehabilitate" the witness from these attacks. Admitting the entire forensic interview was mere repetition to improperly bolster the government's case. MMN1 Norwood was unfairly prejudiced by the military judge erroneously allowing the government to present the complaining witness' testimony twice, both on the witness stand and the forensic interview.

The trial counsel committed prosecutorial misconduct by vouching for E.N. and placing the prestige of the government behind her testimony. Trial counsel used inflammatory language, asking the members to convict MMN1 Norwood because a not-guilty finding would be a license all child molester actions. Trial counsel finally asked members to punish MMN1 Norwood based on the members' fear of judgment from other Sailors, not the evidence at trial. The trial counsel's

repetitive and insistent misconduct convinced the members to vote for a finding of guilt and more severe punishment without regard to the facts of the case.

Argument

I

The military judge erred in admitting, over defense objection, the entire video-recorded interview of the complaining witness under MRE 801(d)(1)(b)(ii) as a prior consistent statement.

Standard of Review

The military judge's decision to admit evidence of a prior consistent statement is reviewed for an abuse of discretion.[40] A military judge's findings of fact are reviewed for clear error.[41]

Analysis

Hearsay is generally not admissible.[42] A statement is not hearsay if it "is consistent with the declarant's testimony and is offered: i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground[.]"[43]

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[40] *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990).
[41] *United States v. Martin*, 56 M.J. 97, 105 (C.A.A.F. 2001).
[42] MIL. R. EVID. 802.
[43] MIL. R. EVID. 801(d)(1)(B).

A. Only portions of E.N.'s forensic interview were admissible, not the entire interview.

A witness's prior consistent statement may be deemed admissible at trial, but "the prior consistent statement must serve one of the express purposes cited by MRE 801(d)(1)(B)."[44]

Only a limited selections of E.N.'s interview had express purposes related to specific portions of the cross-examination:

- Defense counsel implied E.N. said she asked for the back rub.[45]
  - But E.N. told interviewer that MMN1 Norwood asked her if she wanted a back rub.[46]
- Defense counsel implied E.N. was inconsistent at trial about which hands touched her.[47]
  - E.N.'s statement was consistent to interviewer because she said it was "both and then the other hand would go further."[48]
- Defense counsel said E.N. added new fact about MMN1 Norwood asking if she had a boyfriend back home.[49]
  - E.N. did tell the interview MMN1 Norwood asked how far she had been with a boy.[50]

The interview did not have any other consistent statements that specifically rehabilitated E.N.'s credibility based on defense counsel cross-examination. On cross-examination, defense alleged E.N. added

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[44] *United States v. Finch*, NO. 19-0298/AR, 2020 CAAF LEXIS 136, __ M.J. ___ (C.A.A.F. Mar. 3, 2020); JA at 258.
[45] JA at 84.
[46] JA at 232.
[47] JA at 86.
[48] JA at 244-45
[49] JA at 92.
[50] JA at JA at 250-51.

two other new facts: (1) MMN1 Norwood apologized to her after the alleged assault;[51] and (2) the trip was awkward after the alleged assault, but she did not mention it in the interview.[52] The forensic interview did not have any consistent statements to support either fact.

E.N. testified and was subject to cross examination. But the military judge erred by finding the defense cross-examination implied that the government coached the witness. The lower court further erred in adopting the military judge's finding, which led to their conclusion that it was harmless error. The forensic interview, in its entirety, was not a consistent prior statement that had the express purpose to rebut a defense attack or rehabilitate E.N.'s credibility. So if any portion of MRE 801(d)(1)(B) applies, only portions of her interview should have been admitted.

B. The military judged clearly erred by finding the defense alleged improper coaching of the witness. The lower court erred by adopting his findings. MRE 801(d)(1)(B)(i) is inapplicable.

An appellate court may conclude that findings of fact are clearly erroneous when the court "is left with the definite and firm conviction that a mistake [by the trial judge] has been committed."[53]

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[51] JA at 91.
[52] JA at 95.
[53] *Martin*, 56 M.J. at 106.

In *Frost*, this Court found that the military judge erroneously admitted a prior consistent statement under MRE 801(d)(1)(B)(i).[54] The defendant's theory of the case was that the accuser's mother had improperly influenced her claim of abuse.[55] The government offered the accuser's statements to a psychologist, which the military judge found predated an implied motive to fabricate.[56] This Court held that finding was clearly erroneous when "reading the record in its entirety."[57] The defense counsel's "sole theory and line of approach during opening statement, questioning, and closing argument" was that the improper influence of the mother started at the initial allegation.[58]

Similarly, here, MMN1 Norwood also did not imply a recent improper influence when cross-examining E.N. Rather, trial defense counsel established the theory that E.N. fabricated her initial report and the government witnesses conspired to conceal her real motive.[59] He surmised the government witnesses had a "sinister lens" and were biased to support E.N. from the very start.[60] Like in *Frost*, any improper influence or motive began right when E.N. first alleged Appellant abused her.

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[54] *United States v. Frost*, 79 M.J. 104, 111 (C.A.A.F. 2019).
[55] *Id.* at 109.
[56] *Id.*
[57] *Id.* at 111.
[58] *Id.*
[59] JA at 59.
[60] JA at 59.

During cross-examination, trial defense counsel developed the theory that E.N. was hiding something from the defense team. The trial defense counsel accused her of refusing to meet with the defense, and instead met with the prosecutors leading up to trial.[61] During the follow-on 39(a) session, trial defense counsel maintained that he was not "attacking everything she said in [court] because she met with the prosecutors."[62] But the military judge narrowly focused on the cross-examination about meeting with the prosecutors in the days before trial. The lower court also analyzed the defense's cross-examination questions in isolation when it adopted the military judge's finding of fact that trial defense counsel implied trial counsel coached E.N.

However, in context to the entire case, the defense's limited questions about E.N.'s meeting with the prosecutors did not imply coaching. As trial defense counsel stated, if trial counsel had coached E.N., then she would have been more consistent, not inconsistent.[63] Considering the cross-examination and trial defense counsel's opening, the defense counsel tried to shed light on E.N.'s motive to hide things from the defense, but did not insinuate the government told her what to say.

[61] JA at 77.
[62] JA at 117.
[63] JA at 61.

When reviewed in its entirety, the defense did not allege a recent improper influence during cross-examination of E.N. The military judge clearly erred by finding the defense alleged E.N. was coached.

C. Portions of the forensic interview might have been admissible under MRE 801(d)(1)(B)(ii). But even under that theory, it was error to admit the whole video.

The other grounds of attack in MRE 801(d)(1)(B)(ii) include: (1) to place a purported inconsistent statement in context;[64] (2) to support the denial of making an inconsistent statement;[65] and (3) to refute an attack of faulty memory.[66] A prior consistent statement is admissible under MRE 801(d)(1)(B)(ii) to "rehabilitate the declarant's credibility."[67] The "mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true."[68]

This Court established a five part test for MRE 801(d)(1)(B)(ii) in *Finch*:

> (1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, (3) the statement must be consistent with the declarant's testimony, (4) the declarant's credibility as a witness must have been "attacked on another ground" other than the ones listed in M.R.E. 801(d)(1)(B)(i), and (5) the prior consistent statement must actually be

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[64] *United States v. Adams*, 63 M.J. 691, 696 (A. Ct. Crim. App. 2006) (citing *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001)).
[65] *Id.* (citing *United States v. Castillo*, 14 F.3d 802, 805-07 (2d Cir. 1994)).
[66] *Id.* at 696-97 (citing *United States v. Keller*, 145 F. Supp. 692, 697 (D.N.J. 1956)).
[67] MIL. R. EVID. 801(d)(1)(B)(ii).
[68] *McCaskey*, 30 M.J. at 192.

relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked.[69]

1. Only portions of the forensic interview are prior consistent statements that rehabilitate E.N.'s credibility.

During defense cross-examination, trial defense counsel implied that E.N. told the forensic interviewer she was complaining of a sore back before MMN1 offered her a massage.[70] But E.N. denied she made the inconsistent statement.[71] A small portion of the forensic interview shows that she was consistent and trial defense counsel was inaccurate.[72] Therefore, this portion was admissible.

Similarly, trial defense counsel asked some confusing questions about MMN1 Norwood allegedly using "both hands" or "one hand" that implied E.N. was inconsistent.[73] But the forensic interview was consistent in that E.N. said "it would start out with both and then the other hand would go further."[74] Therefore, this portion was also admissible.

Third, the defense counsel implied that E.N. added a new fact in-court about MMN1 Norwood asking about her prior experience with boys back home.[75] But E.N. told the interviewer MMN1 Norwood asked if she had done anything with a

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[69] *Finch*, 2020 CAAF LEXIS 136, at *18-19; JA at 268.
[70] JA at 84.
[71] JA at 84.
[72] JA at 232.
[73] JA at 86-87.
[74] JA at 244-45.
[75] JA at 92.

boy before.[76] At most, E.N. added the name of the town at trial, but not any substantive facts. Therefore, this was also admissible.

Only these limited portions of the forensic interview tended to rehabilitate E.N.'s credibility. The substantial majority of the forensic interview was not relevant to rehabilitate her.

2. The forensic interview does not address other facts E.N. added at trial.

In *Brennan*, the Second Circuit approved use of prior consistent statement to address an attack that the witness left out details in the prior statement.[77] The witness testified that the defendant accepted bribes.[78] The cross-examination implied the witness did not implicate the defendant during his prior grand jury testimony.[79] The government was allowed to introduce portions of the grand jury testimony to prove the witness actually did implicate the defendant, which was consistent with his testimony, not inconsistent.[80]

Unlike *Brennan*, E.N.'s forensic interview does not include the alleged omissions to show that she was consistent. On cross-examination, the trial defense counsel brought out that E.N. never told the interviewer that the MMN1 Norwood

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[76] JA at 250-51.
[77] *United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986).
[78] *Id.* at 586.
[79] *Id.* at 588-89.
[80] *Id.* at 586.

apologized.[81] Or that the rest of E.N.'s visit was awkward.[82] At no point does E.N. ever tell the interviewer about either of these facts she testified to on direct. Therefore, there was no prior consistent statement in the interview that would rehabilitate this attack.

D. The majority of E.N.'s forensic interview video was inadmissible hearsay.

In *Finch*, this Court held a prior consistent statement admitted under MRE 801(d)(1)(B)(ii) "must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked."[83] "The proponent of the 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."[84]

The majority of E.N.'s forensic interview does not logically rehabilitate her credibility. The interview, as a whole, does not tend to repair E.N.'s credibility on the grounds for which she was impeached. Only small portions of the forensic interview, as noted *supra*, are even arguably rehabilitative. The military judge should have admitted only those portions, and not the whole video. The entirety of the video was not admissible based on the relevancy of only minor portions.

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[81] JA at 91.
[82] JA at 95.
[83] *Finch*, 2020 CAAF LEXIS 136, at *18; JA at 268.
[84] *Id*.

E. The inadmissible hearsay improperly bolstered E.N.'s testimony and materially prejudiced MMN1 Norwood's substantial rights.

"When hearsay is admitted in violation of the Military Rules of Evidence, the ordinary rule is that we can affirm only if we do not find 'material prejudice.'"[85] "'For [preserved] nonconsitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings.'"[86] "In conducting the prejudice analysis, this Court weighs: (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."[87]

In *Frost*, this Court held the improperly admitted prior consistent statement prejudiced the appellant.[88] The government's case was weak because it relied on the testimony of the victim —who denied the abuse to a series of people—and presented no forensic evidence, no other direct witnesses, and no evidence of previous "grooming behavior" by the appellant.[89] The defense's case was fairly robust.[90] And the materiality and quality of the hearsay evidence was substantial because the psychologist's testimony went to the heart of the matter in dispute.[91]

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[85] *United States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018) (citations omitted).
[86] *Frost*, 79 M.J. at 112 (brackets in original, quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)).
[87] *Id*.
[88] *Id*., at 111-12.
[89] *Id*.
[90] *Id*. at 112.
[91] *Id.*

"Indeed, the Government made it clear that it introduced the improperly admitted evidence in order to bolster the credibility of the allegations."[92] The balance of factors supported that the appellant was prejudiced because the improperly admitted evidence had a substantial influence on the guilty findings.[93]

Here, the government's case was weak as well. The government presented no forensic evidence, no direct witnesses other than E.N., and no evidence of "grooming behavior" by MMN1 Norwood. The government's case relied on E.N.'s credibility. The defense provided a forceful theory that E.N. lied and her family was covered for her. And the hearsay evidence's materiality and quality was substantial because the forensic interview went to the heart of E.N.'s credibility. The entire purpose of admitting the entire forensic interview was to bolster E.N.'s in-court testimony.

The improperly admitted hearsay evidence had a substantial influence on the guilty finding. Because E.N. testified twice, once on the stand and once in the interview, the evidence created the impression that she was more credible through mere repetition of the same story. The erroneously admitted evidence allowed the government to bolster a weak case and was substantially prejudiced MMN1 Norwood.

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[92] *Id*.
[93] *Id.*

II

The trial counsel's arguments repeatedly overstepped the bounds of propriety and fairness. The misconduct prejudiced MMN1 Norwood and warrants relief.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo.[94] If proper objection is made and the error preserved, the review is for prejudicial error.[95] If no objection is made, the misconduct is reviewed for plain error.[96] "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused."[97] Both preserved error and plain error "culminate with an analysis of whether there was prejudicial error."[98]

Analysis

"Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[99] A trial counsel may not offer his

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[94] *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citation omitted).
[95] *Id*.
[96] *Id*.
[97] *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).
[98] *Andrews*, 77 M.J. at 401.
[99] *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citations and internal quotes omitted).

personal opinions or inflame the members' passions or prejudices.[100] Asking the panel to perform a role beyond evaluating the evidence is impermissible.[101] These principles apply to arguments given both on the merits and in sentencing.[102] "Disparaging comments are also improper when they are directed to the defendant himself."[103] It is improper when trial counsel's words serve as "more of a personal attack on the defendant than a commentary on the evidence."[104]

In this case, both trial counsel and assistant trial counsel repeatedly inserted their personal opinions into arguments, vouched for Government witness, and used inflammatory language to argue for MMN1 Norwood's conviction and sentence.

A. The trial counsel vouched for witnesses and placed the prestige of the government behind the testimony.

In *United States v. Voorhees*, this Court rejected rhetoric similar to the government's language here.[105] This Court found many of the statements in *Voorhees* to be clear and obvious error. The chart below illustrates the striking similarities between the *Voorhees* argument and the government's highly improper statements here.

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[100] *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000).
[101] *United States v. Young*, 470 U.S. 1, 18 (1985).
[102] *United States v. Frey*, 73 M.J. 245 (C.A.A.F. 2014).
[103] *Fletcher*, 62 M.J. at 182.
[104] *Id*. at 183.
[105] 79 M.J. 5 (C.A.A.F. 2019).

Language from *Voorhees*.[106]	**Language from MMN1 Norwood's case**
Referring to a Government witness's testimony: "That was his perception. That was the truth."	In closing, trial counsel explained "[E.N.] told you the truth" and "you got to see the truth" and "you know [E.N] told you the truth" and "It's not a fabrication. It's not a lie. It's the truth. You know it's the truth."[107]
"And if there is any doubt in your mind as to that point or the quality of the United States evidence on this charge, rely entirely on Senior Airman [HB's] credibility. Hang your hat there, because you can. Because that airman is credible. She testified credibly; she told you what happened to her."	• In opening trial counsel vouched for E.N. as an "innocent 15-year-old girl who has absolutely no reason to lie about what happened."[108] • In opening, the trial counsel assured the members that E.N. had "no reason to lie about what her uncle did to her" and that as soon as the members "realize that [E.N.] is telling you the truth, the government will have proven its case to you beyond a reasonable doubt and it will be your duty to find the accused guilty."[109] • In closing, trial counsel referred to E.N. as "an innocent child with no reason to lie."[110]

In opening statements the trial counsel preemptively vouched for E.N.'s credibility.[111] Trial counsel bookended their vouching in closing by again claiming E.N. was credible.[112] Despite the similarities between the rhetoric in this case and

[106] *Id.* at 11-12.
[107] JA at 156, 157, 161, 162.
[108] JA at 52.
[109] JA at 54.
[110] JA at 154, 159, 163.
[111] JA at 52, 54.
[112] JA at 154, 156, 157, 159, 161, 162, 163.

Voorhees, the lower court found no error.[113] However, the trial counsel repeatedly told the members that they vetted E.N. and found her trustworthy.

Trial defense counsel objected when trial counsel said E.N. was credible because the other government witnesses believed her.[114] And even though trial defense counsel did not object to the other improper vouching, the misconduct was plain and obvious, as in *Voorhees*. Trial counsel's vouching for E.N. created the impression that she was credible merely because the government and her family already believed her. This unfairly placed of the prestige of the government behind her testimony.

B. The trial counsel used inflammatory language to focus member's attention outside the courtroom, instead of the evidence admitted at trial for their consideration.

"It has long been held that a court-martial must reach a decision based only on the facts in evidence."[115] Trial counsel may comment on "contemporary history or matters of common knowledge within the community."[116] But counsel "are

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[113] *Norwood*, 79 M.J. at 662 ("A fair reading of the arguments of counsel show that the trial counsel did not offer substantive comments or interject her personal opinion, view, or beliefs regarding the truth of EN's testimony.").
[114] JA at 189.
[115] *Fletcher*, 62 M.J. at 183 (citing *United States v. Bouie*, 9 C.M.A. 228, 233 (C.M.A. 1958)).
[116] *Id*. (citing *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994)).

prohibited from making arguments calculated to inflame the passions or prejudices of the jury."[117]

1. Trial counsel called MMN1 Norwood a "child molester" and preyed upon the members' dislike of child molesters as a group.

In *Fletcher*, this Court found that it was plain and obvious error for trial counsel to refer to facts not in evidence.[118] The defendant was charged with drug offenses, and trial counsel referred to celebrity drug use for sensational value.[119] The trial counsel was not drawing reasonable inferences from the evidence in *Fletcher*, but "inviting the members to accept new and inflammatory information" into their deliberations.

The government counsel used inflammatory language in closing argument by calling MMN1 Norwood a "child molester" numerous times. The government then connected MMN1 Norwood to "child molesters" as a group, with no evidence on the record regarding group behaviors or knowledge of "child molesters."[120] The inflammatory language intensified during the government's rebuttal closing. The assistant trial counsel eventually told the members that a finding of not guilty for

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[117] *Id.* (citing *United States v. Barrazamartinez*, 58 M.J. 173, 176 (C.A.A.F. 2003)).
[118] *Id.* at 184.
[119] *Id.* at 183-84.
[120] JA at 183.

MMN1 Norwood was tantamount to giving child molesters a license to commit these crimes.[121]

This inflammatory language encouraged the members to decide the case based upon the nature of the offense charged and a disdain for "child molesters," as a group. Like *Fletcher*, the government shifted the members focus outside the court, and away from the specific evidence at trial. Implying that an acquittal was the equivalent of licensing the actions of child molesters and improperly inflamed the members to vote for guilt based on societal revulsion.

2. At sentencing, trial counsel focused on external judgment of the members, not the evidence admitted in the courtroom.

Trial counsel may "recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution."[122]

Here, the government inappropriately asked members to consider how others might judge their decision if they found out the members gave a low sentence.[123] The lower court found this was an unartful "attempt to help the members give weight to the government evidence."[124] But the question focused the members on

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[121] JA at 184.
[122] R.C.M. 1001(g).
[123] JA at 206-07.
[124] *Norwood*, 79 M.J. at 663.

their own personal fears of negative judgment from other Sailors. The government did not ask them to think abstractly about general deterrence. Instead, the trial counsel told the members to imagine being judged by their peers for their sentencing decision. This changed the focus of the sentencing from the evidence at trial to the members' personal concerns about how their actions would reflect upon them and was improper argument.

C. The errors prejudiced MMN1 Norwood.

United States v. Fletcher provides a balancing test for determining whether prosecutorial misconduct merits relief: 1) severity of misconduct, 2) curative measures, and 3) weight of the evidence against the accused. [125] The lower court's *Fletcher* analysis was incorrect, and trial counsels' arguments warrant relief.

1. The repeated improper arguments were severe.

The lower court erred by approving of many of the government's improper arguments, vouching, and name-calling. The court held that "each [improper] comment was made only one time."[126] But as discussed *supra*, the government made improper argument a dozen times under *Voorhees*, not just the two arguments the lower court found impermissible.

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[125] 62 M.J. at 178.
[126] *Norwood*, 79 M.J. at 664.

The improper arguments were present in all stages of the trial, from opening statements through sentencing argument. The government counsel repeatedly vouched for the credibility of the sole witness to the alleged offenses. Government counsel repeated their name calling and improper vouching throughout the trial. The government's phrasing was intentional and consistent, and it permeated each of the prosecutors' arguments to the members. The misconduct was severe.

2. The military judge did not take any curative measures for the majority of the improper argument.

All military judges have a "*sua sponte* duty to insure that an accused receives a fair trial.'"[127] "Military judges are neither 'mere figurehead[s]' nor are they 'umpire[s]' in a contest between the Government and accused."[128] "[T]here is a point at which prosecutorial misconduct is so pervasive that instructions from the bench are insufficient to counter the prejudicial effect to the Appellant. In other words, at some juncture multiple 'limiting instructions' can no longer be considered 'curative instructions.'"[129]

The military judge took no action to stop or cure trial counsel's repeated name calling or improper sentencing argument. When defense counsel objected to

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[127] *Andrews*, 77 M.J. at 403 (citing *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999)).
[128] *Id*.
[129] *United States v. Short*, 77 M.J. 148, 153 (C.A.A.F. 2018) (Ohlson, J., dissenting).

trial counsel's improper vouching for E.N., the military judge overruled the objection.[130] By overruling the objection, the military judge implied that trial counsel's argument was not improper and limited any effect of the follow-on instruction. This sole attempt to cure the misconduct, combined with the number of times he failed to intervene in other instances of misconduct, failed to cure the improper argument.

3. The weight of the evidence against MMN1 Norwood was low.

With delayed reporting and significant inconsistencies in E.N.'s testimony, the government's case hinged on E.N.'s credibility. As the lower court held, E.N.'s credibility was "critical to both sides."[131] E.N. was the only witness who could, and did, testify that a crime allegedly occurred. The government's impermissible arguments were influential on the members as they strengthened the central evidence in support of a conviction.

Without the prosecutors personally vouching for her, E.N. may not have appeared credible to the members. Without the prosecutors repeatedly calling MMN1 Norwood a child molester, and asking the members to vote guilty because they should not give child molesters license to commit crimes, MMN1 Norwood may have been acquitted. There was no independent evidence outside her

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[130] JA at 190.
[131] *Norwood*, 79 M.J. at 664.

testimony to support the conviction of MMN1 Norwood. Therefore, the weight of the evidence was not strong, and favors MMN1 Norwood.

The lower court erred in finding "no cause to question the fairness or integrity of the trial."[132] The *Fletcher* factors balance out in MMN1 Norwood's favor. Therefore, trial counsel's misconduct created a substantial cause to question the fairness of the trial, and the convictions should be set aside.

Prayer for Relief

For the reasons set forth above, MMN1 Norwood respectfully requests this Court reverse the lower court and set aside the conviction.

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 23, 2020, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Director, Appellate

[132] *Id*. at 665.

Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This supplement complies with the type-volume limitation of Rule 24(c) because it contains 7,298 words; and 2) this supplement complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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