IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private First Class (E-3) **DONTE M. BROWN** United States Army, Appellant	SUPPLEMENT TO THE PETITION Crim. App. Dkt. No. 20230168 USCA Dkt. No. 25-0181/AR

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

Issues Presented

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INCORRECTLY ADMITTED TWO SUPPOSED PRIOR CONSISTENT STATEMENTS BY MISTATING THE LAW, APPLYING BOTH SUBSECTIONS IN VIOLATION OF *AYALA*/*FINCH*, AND FAILING TO IDENTIFY A STATEMENT THAT PREDATED THE CLEAR AND PERSISTENT MOTIVE TO FABRICATE PURSUED BY APPELLANT.

II. WHETHER THE ARMY COURT ERRED WHEN IT DISREGARDED THIS COURT'S PLAIN LANGUAGE IN *AYALA*/*FINCH* AND FAILED TO EXPLAIN HOW THE PRIOR CONSISTENT STATEMENTS WERE RELEVANT TO REHABILITATE THE WITNESS UNDER (B)(II) BEYOND MERE REPETITION.

III. WHETHER THIS COURT SHOULD ADOPT THE *PIERRE* STANDARD FROM FEDERAL COURTS FOR PRIOR CONSISTENT STATEMENTS DEFINING "RELEVANT TO REHABILITATE."

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Statement of Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this case pursuant to Article 66(b)(3), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2022). This Court has jurisdiction over this case under Article 67(a)(3), UCMJ (2021).

Statement of the Case

Appellant, Private First Class Donte Brown, was tried and convicted by an enlisted panel, contrary to his pleas, of one specification of aggravated assault with a dangerous weapon upon an intimate partner in violation Article 128b, UCMJ, 10 U.S.C. § 928b. (R. 51; Statement of Trial Results (STR)).[1] After electing judge alone sentencing, Appellant was sentenced to reduction to the grade of E-1, forty months confinement, and a dishonorable discharge. (STR; R. 749).

On 23 April 2023, the convening authority approved Appellant's request for waiver of automatic forfeitures but disapproved the request for deferment of reduction in grade. (Convening Authority Action). The judge entered judgment on 2 May 2023. (Judgment of the Court).

On May 09, 2025, the Army Court issued a Memorandum Opinion addressing two of Appellant's Assignments of Error, but ultimately affirmed the

[1] The second specification of domestic violence was dismissed by the judge after findings were announced as the panel made exceptions and substitutions that created a multiplicity/double jeopardy issue. (R. 697).

finding and sentence. On June 9, 2025, Appellant elected to appeal by inadvertently completing the *pro se* election. After requesting and receiving extensions, this is Appellant's Supplement.

Reasons to Grant

This Court should take the opportunity to adopt the *Pierre* standard cited by federal circuits and bring military practice in line with federal practice for a rule that is identical – Prior Consistent Statements ("Prior Statements") under romanette (ii).[2] Under the *Pierre* standard, a prior statement must have rebutting force beyond mere repetition, which happens in limited, well-known circumstances. *United States v. Pierre*, 781 F. 2d 329 (2d Cir. 1986). The trial judge's acknowledged confusion in *United States v. Ayala*, 81 M.J. 25 (C.A.A.F. 2021), and the trial judge's and Army Court's rulings in this case, demonstrate that military practice remains chaotic and practitioners' lack understanding of the 2016 amendment to M.R.E. 801(d)(1)(B)(ii) [hereinafter romanette (ii)]. This is despite a clear body of law in federal practice and even the Army Court previously identifying the correct standard in *Adams* a decade before romanette (ii) was added – a published opinion the Army Court seemingly ignored due to its existence coming before the rule's amendment. *United States v. Adams*, 63 M.J. 691, 696-97

[2] "Romanette" means lower case Roman Numeral.

(A. Ct. Crim. App. 2006) (discussing Supreme Court and federal circuit guidance how prior statements, including the precursor to romanette (ii) can be relevant)

For centuries, the common law treatment of hearsay, and prior statements in particular, has changed dramatically. The inclusion of Rule 801(d)(1)(B) in the federal and military rules increased the turmoil. *See e.g., Tome v. United States*, 513 U.S. 150 (1995). The 2016 amendment added fuel and has been a persistent issue in military cases including at least four petitions in the prior two terms to this Court. Judge Magg's concurrence gives voice to the frustration of military justice practitioners regarding the proper application of romanette (ii).[3] Fortunately, federal cases contain the solution. The *Pierre* standard is easy to understand and contains the principles of the common law's approach to witness rehabilitation.

The need for guidance is bolstered given the Army Court's suggestion that this Court's dictates from *Ayala* **and** *Finch* may be mere "dicta". *See United States v. Brown*, ARMY 20230168, 2025 CCA LEXIS 213, *16 (A. Ct. Crim. App. May 9, 2025) (Mem. Op.). The Army Court "recognize[d] that only the CAAF can overrule its own precedent," and urged this Court to provide "clarity on this issue." *Id.* (analyzing *Ayala*'s holding "[w]e made it clear in *Finch* prior consistent

[3] *Ayala*, 81 M.J. at 31 (Maggs, J. concurring) (noting the need to provide guidance on admissibility due to confusion by practitioners and judges).

statements may be eligible for admission under (B)(i) or (B)(ii) but not both.").[4] This is a persistent issue, and this Court should clarify that a statement cannot be admitted under both romanettes based on the *same method* of impeachment. However, if a witness was impeached on multiple grounds, a statement may qualify for admission under both romanettes, assuming it meets the *Pierre* standard and is relevant to rehabilitate on each specific unique ground – something that did not happen here.

The Army Court's request for clarity highlights that judges and practitioners need guidance. Indeed, this Court has not defined the limits of romanette (ii), leading judges to admit prior statements that have no rebutting force to repair the damage done by impeachment. Too often, the palliative effect is based only on repetition and not whether the statement rehabilitates the damage done – a required *Finch* element. This is incorrect and leads to an over-inclusion problem. *Adams*, 63 M.J. at 696-97; *Pierre*, 781 F. 2d 329. The problem with the Army Court's analysis, like the trial judge's, is that prior statements do not always rehabilitate a witness's credibility when they are impeached by inconsistent statements; in fact,

[4] Given the Army Court chose to question this Court's holding in both *Finch* and *Ayala* while seemingly providing the trial judge more deference despite his violating this Court's framework, the Army Court's opinion decided a question of law in a way that conflicts with federal law, common law, this Court's opinions in *Ayala* and *Finch*, and the published opinion of the Army Court in *Adams*. Thus, this case warrants consideration under Rule 21(b)(5)(B).

they rarely do. As *Adams* and *Pierre* point, under (B)(ii), prior statements rehabilitate the damage from an inconsistent statement when the prior statement shows the inconsistent statement *was not made* or is *not truly inconsistent* (i.e., context) – neither of which the judge or Army Court relied on in this case and *could not* fit the facts here. *Pierre*, 781 F.2d at 331. In *Finch*, the statement did not have any rebutting force under romanette (i), not even the minimal force created by repetition. In this case, the Army Court's reasoning under romanette (ii) did not and cannot rely on any rebutting force created by the prior statements since those statements did not show either the original/earlier statement was not made or not truly inconsistent and provided no context to the original statement. Rather, the Army Court simply relied on repetition – not rehabilitative effect.

Similarly, this Court should provide guidance on what level of deference service courts should provide trial judges when the judges admit a statement under both romanettes based on the *same method* of impeachment. Here, after questioning this Court's holdings in *Ayala/Finch*, the Army Court still analyzed both rules; this violates logic and precedent. Affording trial judges more deference by analyzing both romanettes, especially when doing so is error – seemingly provides a judge more deference for a clear abuse of discretion. This reduces the analytical framework in *Finch*, reiterated in *Ayala*, to a mere formality without any

enforcement mechanism from appellate courts for a knowing violation since here, the judge cited the appropriate precedent, but did not follow it.

While *Finch's* guidance on the foundation for prior statements under romanette (ii) is valuable, guidance is needed to assist trial judges to focus on the prior statement's rebutting force instead of relying only on consistency for consistency's sake. A statement offered to rehabilitate a witness must repair the damage done during impeachment to be relevant. This Court has discussed the rebutting force provided by the temporal requirement in romanette (i), but it has not discussed "relevant to rehabilitate" under romanette (ii). That phrase appears in the fifth foundational element in *Finch* and federal case law. *Finch*, 79 M.J. at 396. This Court should give this phrase the same meaning found in federal cases like *Pierre* and *United States v. Simonelli*, 237 F. 3d 19, 27 (1st Cir. 2001).[5] This case provides this Court the perfect opportunity to settle a persistent issue that is not only unsettled in the military, but where the CCAs are directly asking for guidance and questioning this Court's rulings.

[5] See Appendix C for Federal Circuit examples citing *Pierre* or adopting a similar rationale that a statement must be relevant to rehabilitate the specific attack and must do so beyond mere repetition/consistency.

Statement of the Facts[6]

A. The brandishing of a firearm and a knife in defense

Appellant and KB had been married previously, separated, and then remarried and had children. (R. 231-33, 235). The Specification of The Charge is a result of a single incident where only Appellant and KB were present.

On July 2, 2022, KB testified Appellant woke up upset because he had just learned he had to attend a field exercise, and so instead of running errands with her as she planned, he opted out of all activities. (R. 235-38). While Appellant showered, KB continued to lecture Appellant that he should run errands with her. (R. 237-41). After exiting the shower and getting dressed, KB asked if Appellant would drive. (R. 239). After he declined, KB continued arguing with Appellant about attending. (R. 239-40).

KB testified that when Appellant responded apathetically, she was more upset, kept placing things in her purse (which was on the master bed upstairs), and then Appellant said he no longer wanted to be married – creating potential child custody issues. (R. 240-41). This happened as KB had just yelled at her children to get ready and while she was grabbing her loaded firearm to place it in her purse. (R. 241-42).

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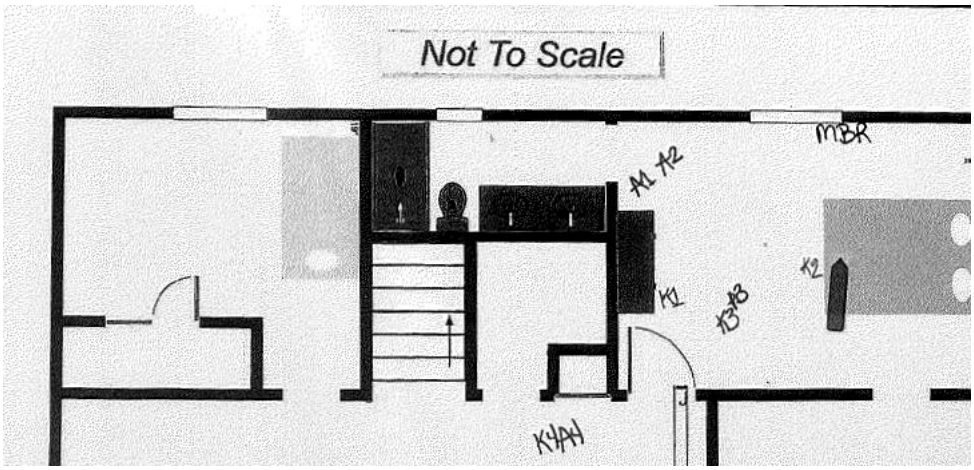
[6] The Statement of the Facts are taken from the testimony of the initial responders and KB's initial statements before the "motive to fabricate" arises. Her later testimony and its inconsistencies are identified below.

KB's firearm was across from the foot of her bed (K1 below) which was loaded *with* a round chambered. (R. 242, 246). KB turned to her right after facing the dresser positioning her facing Appellant who was standing at A1 (below), less than five feet away. (R. 245-47, 266-69). KB was between Appellant and the only exit. (R. 266-69).



Although KB initially omitted this on direct, she admitted on cross that in addition to having custody concerns, Appellant brought up in the argument that KB had recently been sending provocative photos to a male "friend." (R. 283). Having already heard Appellant wanted to separate and being reminded of her indiscretions which may be "for cause", KB pointed the weapon at Appellant's face. (R. 412, line 14-16; 423; 607, line 19-21).[7] Appellant froze.

[7] This is the testimony that later changes after KB is informed that she lost temporary custody of the children. (R. 274, 295-297, 306, 415). This change and the reason and ongoing nature are at issue.

KB then continued the turn towards the bed while still between Appellant and the door. KB *later* testified that she dropped the firearm's magazine and ejected the round, but *simultaneously* was slashed by a knife in her upper left back/shoulder (the area closest to Appellant if she was still in mid-turn). (R. 412, 592). This entire episode from the brandishing to the first knife contact was mere seconds and continuous movement.

KB immediately engaged Appellant and grabbed for the knife. (R. 412). The two struggled, exited the bedroom moving down the hallway, and then fell down the stairs together. (R. 412). In describing the fall to the two Emergency Medical Technicians (EMTs), KB repeatedly said "fall" and not pushed or pulled. (R. 412, 607-615).

During the fall, the knife lodged in KB's shoulder. (R. 251). At the bottom of the stairs, KB ended up on the ground with Appellant splayed on top of her. (R. 253). KB initially told EMTs and CID that Appellant grabbed her by her shirt at this point. (R. 492-93). KB *later* tells CID (in her *second* CID interview), after learning that she could not retain custody and obtaining an attorney, that Appellant's hands were on her neck, but she could breathe and talk (KB could not remember how many hands were used in the recorded CID interview).[8] (R. 494).

[8] The alleged strangulation formed the basis of the specification that the judge later dismissed.

However, during her *first* CID interview, she did not claim to be strangled, and in her immediate statement to the EMTs, she denied being strangled. (R. 497).

B. The neighbors arrived and their testimony impeached KB's about where she was and how Appellant was treating KB

After being alerted by Appellant's children after the fall down the stairs, their neighbor's wife went to Appellant's home. (R. 322). "When I opened the door, [KB] was coming towards the door and she had a knife in her back and back was covered in blood and [Appellant] was behind her. . . he was behind her kind of going into the kitchen area."[9] (R. 322, 335).

The neighbor's wife heard Appellant say, multiple times, "Why'd you have to point the gun at me." (R. 322-327, 363). There is no indication Appellant saw the neighbor's wife while asking about the gun, but he was not holding KB down, strangling her, or restraining her from exiting. (R. 322-327, 363). KB understood, responded, and argued back claiming Appellant stabbed her. (R. 322-327).

The neighbor's wife walked with Appellant and KB to their SUV, and then left to get Appellant/KB's youngest child, who was in Appellant's home. (R. 327). Appellant tended to KB, including holding a cloth against the cut. (R. 327, 363,

[9] The neighbor's wife impeached KB's testimony wherein KB stated she blacked out and awoke on the ground at the foot of the stairs with the neighbor's wife's leg directly next to her face and the neighbor helped her up. (R. 335).

377). Appellant attempted to take KB to the hospital, but the neighbors refused to allow him to do so. (R. 327, 334, 363, 377).

Once the first responders arrive, Appellant was still "tending to [KB]." (R. 387). A military police (MP) questioned the neighbor. The neighbor said that the children told him that Appellant stabbed KB. (R. 388). Simultaneously, a fire-fighter talked to Appellant. Appellant admitted he stabbed KB because she pointed a weapon at him. (R. 389). The fire-fighter then told the MP that Appellant "just admitted it." (R. 389). The MP then questioned Appellant, who stated "she grabbed a pistol and was going to point it at him or was in the process of doing that, and he grabbed a knife and the knife ended up in her." (R. 389).

C. KB's statements to the EMT included that she pointed the gun at Appellant's face and that marks on her neck were from a previous day.

Shortly thereafter, EMTs arrived. While the EMTs were treating KB she told both of them she pointed the gun at Appellant's *face* and then he stabbed her. (R. 256, 408-15, 607-08). There is no claim that Appellant made any comments to KB prior to stabbing her.[10] (R. 408-15, 607-13).

[10] During her *second* CID interview and at trial, KB claimed Appellant said something sinister such as "you shouldn't have ejected the magazine because you're going to need all of those bullets."

While in the ambulance, she also repeatedly asked where their children were and said Appellant cannot have access to them. (R. 255, 415, 607-613). KB was then transported to a military hospital (MTF).[11]

While there, a 1LT attempted to stabilize KB, but could not remove the knife and transferred her to Stonmont Vail. (R. 257-58). After being treated, KB was kept overnight for observation. (R. 492-493). Then Special Agent (SA) GC arrived.

D. KB's first statement to CID, after learning she lost temporary custody, was that she never pointed the weapon at Appellant and Appellant did not choke her.

On July 3rd, SA GC was the primary interviewer. KB told SA GC she was not strangled, and instead, Appellant only grabbed her by her shirt. (R. 492-93). She denied being stabbed a second time, but said the knife became lodged due to the fall down the stairs as they both were grasping for it. (R. 503).

At the end of this interview, SA GC again informed KB that her kids would remain in temporary custody. (R. 293-94); *Brown*, 2025 CCA Lexis 213, *12.

Later, KB obtained an attorney and victim advocate, volunteered for a formal second CID interview (July 8th), where her story had, according to the CID

[11] Both neighbors noted the prolonged time the ambulance was at the residence, and that the neighbor's wife and MP had to go into the residence to get KB's purse, which was on the bed *next to* the gun, to get KB's ID. The MP who enters does not see an ejected magazine which is crucial as discussed in the prejudice analysis. This extended time corroborates the EMTs timeline and discussions.

agent, "significant differences." (R. 493-94). First, KB no longer pointed the gun at Appellant's face, but said she may have flagged him while turning. (R. 493-95).

Second, in the July 8th interview, KB claimed Appellant choked her despite her multiple denials to CID on July 3rd (R. 493-95) and her statements to the EMTs (July 2nd). (R. 428).

Third, now she claimed she slowly and methodically ejected the magazine and bullet, and that Appellant said the sinister "you should have kept those bullets in the gun, because you are going to need all of them." (R. 318).

Fourth, KB now claimed that she wanted their marriage to work and omitted everything about her sending photos to other men or that/divorce was even a topic that morning. KB also claimed she responded to Appellant's threat with, "I don't want to argue, I don't want to even fight." (R. 248).

E. KB receives custody of their children after her "significantly different" statement to CID.

Shortly after the July 8th interview, KB re-acquired custody of their children. (R. 297-98). Appellant was denied custody and the two continued to fight for custody throughout their divorce.

F. The defense's trial theme is clear, KB said she pointed a weapon at Appellant and only altered it when she learned that she lost custody.

The defense's case was two pronged: (1) Appellant acted in self-defense when KB pointed a weapon at his face, and (2) KB admitted she pointed the

weapon at Appellant's face, only changing her story after CID informed her that she lost custody. (*See, e.g.,* R. 496-99, 503). The specific motive to fabricate and the timing was highlighted in the defense's opening statement. ((R. 226-227) ("pay close attention to her answer in this courtroom if it's consistent"); (R. 229-30) ("as long as [KB] is the victim in this case, she gets to see her children").

> And I'm going to ask you now to pay close attention to [KB]' testimony. Is the story that KB tells you in this courtroom consistent with all of the other stories that she just told the EMT, the paramedic, medical professionals at IACH, CID? Or has the story changed? And if it did change, did it change in small ways, as the government would like you to believe, or has it changed in ways that are significant? And if it did change, why?

(R. 230-31). Custody was always the reason and initiation of the change.

Overall, KB gave three statements: (1) her statements to the EMTs (July 2nd) where she admitted she pointed a gun at Appellant's face in anger, (2) after learning that she would not retain custody, a statement on July 3rd to CID saying she did not point the weapon at Appellant and he only grabbed her shirt, and (3) a recorded interview to CID on July 8th where she said she turned passed Appellant with the weapon flagging him and that he strangled her, but she breath and talk. (R. 490-95). The 'consistent statements' the government offered are only *the latter two* CID statements, as they ignored the first one. (R. 471-488).

KB testified that after she talked to the EMTs, she was taken to the hospital (before being transferred to Stonmont Vail), and was told at Stonmont that she

would not regain custody while CID determined if she had also pointed the weapon at Appellant. (*See* R. 292-93).[12] Only after these initial statements and learning that she would not regain custody did she agree to a second CID interview, which are the statements the judge admitted. (R. 278).

On cross, KB admitted that her children are the most important thing to her. (R. 274-75). She admitted that in the ambulance, when she gave her initial statement to the EMTs, she was screaming "Where are my kids." (R. 292). She testified that she "was angry and upset [she] didn't get [her] kids back." (R. 306). KB testified that she *never* said she pointed the gun at Appellant and maintained that she has *always* said she was strangled.

Later, both EMTs were called as witnesses and confirmed that KB said she had pointed the gun at Appellant's face *in anger*. (R. 414, 423, 607-08, 614). The EMTs also noted that she did not say she was strangled when asked. (R. 428, 603-07). The EMTs indicated that KB's primary concern was that she did not want Appellant to have their children. (R. 415).

SA GC, who conducted both the July 3rd and 8th interviews (R. 453) noted that in the July 3rd interview, KB did not indicate she was strangled, only that

[12] KB's unsworn statement highlighted this timeline and the significant effect it still had on her: "Our kids were taken away from me because I was in the hospital and I am still torn up about that, even though they were only away for a few days." (App. Ex. XLV).

Appellant grabbed her shirt. (R. 492). The defense highlighted the key changes including "this interview occurred after she knew that her children were in protective custody." (R. 492-495).

G. The prior consistent statements, objections, and the judge's ruling.

The government then attempted to authenticate two prior consistent statements from the July 8th interview as those statements related to the July 3rd interview; not as it related to the earlier statements at the scene to the EMTs that KB was confronted with repeatedly. The defense objected that the July 8th interview did not predate KB's motive to fabricate when she initially learned of the loss of custody. The defense also stated the statements were not consistent, (R. 471, 483-84), were M.R.E. 404(b) (R. 484), and objected under M.R.E. 403.

The government created Pros. Ex. 26 which contains both statements at issue. (R. 473).[13] The government provided a written appellate exhibit to support its arguments for admission of both statements that appears to have been drafted pretrial/do not capture specific defense questions/attacks. (App. Ex. XXXI-XXXII).

In App. Ex. XXXI, supporting the first excerpt, the government only argued M.R.E. 801(d)(1)(B)(i) and did not address the defense's theory of the lie's timing,

[13] Pros. Ex. 26 came from the longer July 8th interview at time hacks 12:00 to 13:51 (covering the sequence of the events surrounding the gun and where KB pointed it) and 36:25 to 38:18 (same). (R. 473).

but that KB filed for divorce in late July attempting to get full custody and that her July 8th statement took place before the divorce petition. (App. Ex. XXXI). The government did not address that KB wanted custody immediately inside the ambulance or the effect of being told she may not have custody before her July 3rd CID interview (or that Appellant said before the incident he was going to leave the marriage and because of KB's earlier indiscretions with her "friend"). The government could not articulate how the motive for custody was different between the day she was told she could not have custody if she pointed the weapon and the motive for custody in the divorce petition.

Unable to differentiate those motives, the government then verbally offered the first clip under (B)(ii) as well as claiming it rebutted that she was inconsistent. (R. 474, 478-80). This was not faulty memory nor did the government proffer how this rehabilitated KB's statements to the EMTs; it claimed it simply rebutted that she was inconsistent between only the *latter two* statements.

The defense contested the government's proffer. (R. 483). The defense reiterated that the government was attempting to invent a later motive to fabricate when the motive the defense had attacked

> was the children going into protective custody. That occurred less than 12 hours after the incident on 2 July. Then [KB] gave two statements after the fact, so one on July 3rd, and then this statement on July 8th. So the motive to fabricate actually starts before what [the government] allege[s] is the consistent statement.

(R. 483).[14] The defense indicated that the latter two statements were also not consistent because KB admitted to pointing the weapon at Appellant as she turned in the July 8th, but completely denied it in the July 3rd. (R. 483). KB's trial testimony was not that she flagged Appellant, like the July 8th statement, but that she methodically and intentionally pointed the gun at the ground when facing Appellant; she claimed she could not have flagged Appellant.

The government then conceded the defense had offered that KB being informed of losing custody was the defense's theme, but the government believed divorce custody can be a second motive despite it still being custody. (R. 484).

In App. Ex. XXXII, the government only argued (B)(ii). Although the government acknowledged that the defense was trying to show KB was now "embellishing her testimony and attempting to present herself in a light more favorable to the fact-finder," it did not acknowledge the defense's clear theme – that KB fabricated this portion of her story after she learned that she may lose custody. (App. Ex. XXXII). The government did not articulate the "other ground" outside of rebutting the motive to fabricate that is required but added that this statement "plac[es] the purposes inconsistencies in context" and the defense counsel had attacked her based on "faulty memory." (App. Ex. XXXII). The

[14] The defense's cross examination of SA GC lays out the timeline of the two interviews and where they were inconsistent in a short sequence from R. 490-495.

government did not provide a single example of a "faulty memory" attack from the testimony, and the defense verbally disputed any attack on faulty memory indicating the defense believed KB intentionally fabricated for custody.

When asked, the government only argued romanette (ii)'s use was just to show the statements were consistent, in other words, just trying to prove there was no inconsistency in the *latter* two statements – not the EMT statement. (R. 473). The judge ruled that the statements were admissible under *both* romanette (B)(i) and (ii). (R. 485-86). The judge found, without stating the motive or the timing, that it met romanette (i). (R. 485-86). He then found that under romanette (ii), KB was attacked "through inconsistency"; he did not find an attack on faulty memory. (R. 486). The judge did not explain or make any finding of how the either statement rehabilitated KB's statement to the EMTs. The judge did not make a 404(b) ruling, and did not ever mention M.R.E. 403. (R. 486-87).

Standard of Review

This court reviews a judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019). Once error is identified, the government bears the burden of demonstrating the erroneous evidence is harmless. *Id.* at 111 (citing *Flesher*, 73 M.J at 318).

Law and Argument

The judge erred by admitting the prior statements under both romanettes of M.R.E. 801(d)(2)(B). The trial judge failed to identify when KB's motive to fabricate arose and missed the fact that the prior statements were made after the motive to fabricate arose, making the statements inadmissible under romanette (i). The trial judge erred by not linking the two supposed 'consistent' statements to any rehabilitative quality besides mere repetition, recognizing "inconsistency" as a separate "other ground" against the weight of the federal and common law precedent, and failing to conduct an M.R.E. 403 balancing test.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Generally, hearsay is not admissible in courts-martial. Mil. R. Evid. 802. However, a prior consistent statement made by a declarant-witness is not hearsay if certain criteria are met. M.R.E. 801(d)(1)(B).

Of the three foundational criteria under M.R.E. 801(d)(1)(B), the first two (declarant testifying and subject to cross-examination about the prior statement) are met. *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020). However, the third (whether the statement was consistent) was contested at trial. *Id.* at 394-95.

A. The two statements at issue were not consistent and the judge made no findings that they were despite the differences regarding where the firearm was facing.

In this case, the latter two statements were not consistent in the manner purported and the judge made no findings of fact about the differences. I n the first statement to CID *after* the custody motive arose, KB told to SA GC that "at no point in time did she brandish a firearm at [Appellant]" or "anywhere in his general direction." (R. 491). That latter portion is critical. In the recorded second interview that took place five days later, KB stated that she did not point the gun at Appellant's face specifically, but that she did turn facing him with the gun in her hand. (R. 493-94). At trial, KB unequivocally stated she did and could not have "Flagged" Appellant, thus KB's trial testimony was directly contradicted by the July 8th statement making it inconsistent. Since the point of the consistency, according to the government, was that KB never pointed the gun at Appellant (meaning he could not have acted in self-defense as the trial counsel argued in closing), these statements were not consistent in the aspect most important to rehabilitate KB's credibility. The trial judge and the Army Court ignored this discrepancy. "Generally consistent" only goes so far. Thus, the trial judge erred and is owed no deference for failing to make any findings of fact in this area.

B. The judge erred and ignored the plain reading of the rule and *Ayala* by admitting the statements under both subsections – he should be afforded no deference for violating a threshold question

After determining if a statement is consistent, a judge is required to analyze either subsection (B)(i) or (B)(ii) when considering one method of impeachment. *Finch*, 79 M.J. at 95. Importantly, the judge can only admit a prior consistent statement under *one* of the subsections. *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) ("We made it clear in *Finch* that prior consistent statements may be eligible for admission under either (B)(i) or (B)(ii) but not both."); *United States v. Livingston*, ARMY 20190587, 2022 CCA LEXIS 145, at *10 (Army Ct. Crim. App. 8 Mar. 2022) (mem. op.) ("The two prongs are mutually exclusive, therefore, a single statement may not be admitted under both sections."). Thus, as a threshold matter, this Court should begin its analysis with a presumption of error because the judge failed to follow the prerequisites of the legal test. Not only should the judge receive less deference, but the prudential rule suggests the judge should be presumed to have erred, and this Court should only analyze one of the two prongs. To be sure, few areas of the law would allow a judge to ignore the rule's plain wording and clearly repeated dictates of binding precedent, and then somehow get more leeway for committing error. In other words, this Court should not salvage a legally incorrect ruling by analyzing both subsections as that would incentivize

judges to continue to ignore precedent and make "belt and suspenders" rulings, as the judge did here.

However, even if the judge did not violate *Ayala* and applied (B)(i) to the first statement and (B)(ii) to the second, since he did not delineate the separate findings, his findings receive less deference. *Finch*, 79 M.J. at 397.

C. For romanette (B)(i), the judge erred by not identifying the timing of the motive to fabricate or if it was the same "custody" motive the defense attacked

As an initial matter, the 2016 amendment to M.R.E. 801(d)(1)(B) did not affect romanette (i). *Ayala*, 81 M.J. at 28 (citing *Finch*, 79 M.J. at 395) (this Court's precedent regarding (B)(i) still applies "with full force.").

For a statement admitted under (B)(i), there are two additional requirements: (1) the prior statement, admitted as substantive evidence, must predate the motive to fabricate; and (2) where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all, but only the one it is offered to rebut. *Frost*, 79 M.J. at 110. However, in determining the second requirement, even if a *theoretical* motive is mentioned, this Court looks at the defense's cross-examination, opening statement, case-in-chief, and proffer to determine if the "other" motives were truly pursued, or if the government is stretching to smuggle in hearsay under the guise of a prior statement. *Id*. (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)). The best example of this is *Frost*.

In *Frost,* the child victim made an outcry statement in a vehicle to her mother and the mother's friend. 79 M.J. at 110. The victim then denied it multiple times in interviews until she later was forensically interviewed. *Id.* at 110-11. In the forensic interview, she reiterated the same outcry statement. *Id.* The government attempted to offer the first outcry indicating that it pre-dated a motive to fabricate at the forensic interviewer. *Id.* at 109, 110. The defense indicated that the motive to fabricate/influence arose not regarding custody issues that came from the forensic interviewer, but before the child made the first outcry statement when the child's mother knew she wanted custody. *Id.* at 109. The judge found that although there may have been multiple motives that arose both before the outcry and during the forensic interview, the first outcry statement pre-dated the forensic interview. *Id.* at 110.

This Court found the judge's finding left them with "the definite and firm conviction that a mistake" was committed by the trial judge and the CCA. *Id.* at 109, 110. In finding error, even acknowledging some evidence to base the judge's ruling on, this Court stated that in reviewing the opening, closing, cross-examination, and other witnesses, it was clear that the defense's primary argument was that the motive to obtain custody pre-dated the first outcry and continued. *Id.* at 110. ("Defense counsel followed up on that theory by cross-examining [the mother] about the contentious nature of her breakup with Appellant and about the

prior custody issues between them that resulted in [the mother] being found in contempt of court."). This Court noted that although the defense did ask a question about the forensic interviewer, that was only a single time and could not be read to be a different motive or one that was as predominant as the defense's custody theme. *Id.* at 111. "Reading the record in its entirety, it is clear that the defense's sole theory and line of approach during opening statement, questioning, and closing argument at the court-martial was that [the mother], motivated by a desire to obtain sole custody of her children, exerted an improper influence" on the victims. *Id.* Thus, the "statements made after an improper influence arose do not rehabilitate a witness's credibility" and were inadmissible. *Id.* (citing *United States v. McCaskey*, 30 M.J. 188, 192 (C.A.A.F. 1990)).

In this case, the judge did not make a finding as to "what" the motive was or when it arose so his findings of fact should be given no deference. *See Finch*, 79 M.J. at 395. However, even if he had accepted the government's invented theory, like in *Frost*, that the motive arose at the time of the divorce petition, that theory is not supported by the record or different.[15] The motive to gain custody arose, at the

[15] It is noteworthy that the Army Court seemingly agreed the judge erred under romanette (i) noting "we question whether there were truly two separate motives to fabricate in this case. The 'core' motivation at issue appears to be a desire on the part of the victim to maintain custody. . ." *Brown*, 2025 CCA LEXIS 214 at *18. Ultimately, the Army Court held off answering (B)(i), instead choosing to analyze romanette (ii).

absolute latest, at the beginning of the July 3rd interview when KB was told she could not obtain custody if she may be an aggressor. Thus, statements made during both interviews were inadmissible because they post-dated the motive to fabricate. Just like *Frost*, the motive to fabricate was constant and ongoing. The motive may have arisen even earlier, as the defense highlighted with KB's statement to the EMTs that her "primary concern" was to obtain the children and not let Appellant have access. This was on July 2nd, before her statements to CID.

Like *Frost,* the defense's theme was clear in opening, the cross-examination of KB and SA GC, the direct testimony of the two EMTs, and closing. The theme was that KB changed her story regarding pointing the weapon at Appellant because there was a concern about custody. Although the defense brought up divorce, it was only to reinforce the same motive continued. Moreover, like *Frost*, the defense clarified in the Article 39(a) session that they did not cross KB on the divorce or suggest it was a separate motive, but that the government had combined two separate areas of questioning to invent a so-called later motive to smuggle in hearsay. (R. 482).

D. Under romanettes (ii), the judge erred by not identifying the "other ground", misstating the law, and interpreting the law in a way that is at odds with precedent since the statements did not suggest the original statement was not made and did not place the original statement in context given the timing/custody.

Under romanette (ii), the same first three prerequisites are required. In addition, the declarant's credibility as a witness must have been "attacked on another ground" *other than* (B)(i), and (5) the statement must be relevant to rehabilitate the witness's credibility on the basis on which she was attacked. *Finch*, 79 M.J. at 396. The proponent must articulate "the relevancy link between the prior consistent statement and how it will rehabilitate the witness *with respect to* the particular type of impeachment that occurred. *Id.* (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

The drafter's analysis cited in *Finch* makes clear that the rule "does not allow impermissible bolstering of a witness," so it is important for the government and the judge to explain exactly how the statement will rehabilitate on the *specific type* of impeachment. *Id*. (citing the Drafter's Analysis of the analogous Federal Rule). The rule also makes clear the amendment "does not make any consistent statements admissible that was not admissible *previously* – the only difference is that they can now be considered substantively." *Id.* (cleaned up).[16]

[16] This is a simple sentence, but an important one. Since the amendment did not make any statement admissible that was not admissible before, the rich persuasive authority from federal courts that predated the rule change assists in addressing

Likewise, "[w]hile (B)(ii) does not specifically require that a prior statement predate the predicate impeachment evidence, the timing of a statement offered under this section remains 'highly relevant' and 'will often be key to determining' its admissibility." *Livingston*, 2022 CCA LEXIS 145, at *11 (internal citations omitted). The prior statement is relevant only if "it is mostly consistent with the declarant's testimony and sufficiently specific to respond *only* to the grounds upon which the declarant was attacked." *Id.* (emphasis added). "Mere repeated telling of the same story is not relevant." *McCaskey*, 30 M.J. at 192.

In providing examples of "other grounds" and "specific attacks", *Finch* cited the Tenth Circuit, which held that because the defense did not impeach the witness with prior inconsistent statements while testifying or indicate she misremembered, a prior consistent statement would not be permissible to rehabilitate the declarant's credibility. *Id.* (citing *United States v. Magnan*, 756 F. App'x 807, 818 (10th Cir. 2018)). Looking to federal caselaw, romanette (ii) is read to mean "to provide context" to show a prior inconsistent statement is *not inconsistent* or to show that the prior inconsistent statement *was not made*. While there could still theoretically

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this issue. The Army Court correctly summarized all instances that have been recognized in which prior consistent statements of a witness are relevant to rehabilitate the witness's credibility in *Adams*. 63 M.J. at 696-97. *Adams* cited, *Simonelli,* 237 F.3d 19, that adopted the majority view in the federal courts of when prior statements are admissible. *Adams*, 63 M.J. at 696. Given the history contained in *Adams,* the Army Court's error in this case in failing to follow federal cases is more apparent.

be "other grounds," judges should recognize that it is unlikely statements will be admitted under "other grounds" outside of the two noted above. That is because amendment of the rule did not change what was permissible to be admitted and the majority of federal circuits adopted, or used identical reasoning to, the *Pierre* standard. In fact, given the M.R.E.s explicitly inform military courts to follow federal law and the common law when the answer is not contained in military precedent, judges should be applying this standard. *See* Mil. R. Evid. 101(b) (courts-martial shall apply common law rules of evidence when not inconsistent with the FRE and MRE).

In *Livingston*, the victim in a sexual assault was cross-examined on counter-intuitive behavior such as continuing to send nude photographs to the accused. *Id.* at *11. The judge found, in line with the government's proffer, that this was an "attack on another ground" since it went after her character and showed inconsistent behavior with that of a victim. *Id.* The Army Court found the judge erred because the attack was actually an attack under (B)(i) - it was used to show that the victim fabricated the story. *Id.* The Army Court, like *Frost,* analyzed the cross-examination, opening/closings, and entire defense case to find that the specific questions were meant to show the incident did not take place as alleged, so it was for fabrication and not actually "other grounds." *Id.*

In this case, the judge erred, as *Livingston* illustrates, when he did not factor in the timing of the two CID statements that both came *after* the motive to fabricate became clear and how they related to each other or the in-trial testimony. Since both statements post-dated the motive, the timing was "highly relevant" given they both could have been false exculpatory statements. *Livingston*, 2022 CCA LEXIS 145, at *11. Plus, a statement under romanette (ii) can only be admissible for something other than is implicated under romanette (i).

Likewise, the judge erred when he found that the "other ground" was simply to show the *latter* statements were consistent to each other. (R. 473).[17] The "mere repeated telling of the same story is not relevant." *McCaskey*, 30 M.J. at 192. The judge found the other ground was that the latter two statements were an attack "through inconsistency," however, he erroneously failed to look at their relation to the first statement which was completely inconsistent. Most importantly, an attack "through inconsistency" does not explain how later statements actually rehabilitated the earlier impeachment – he missed the key link since it was not (1) to place the original statement in context or (2) to indicate the earlier statement was not made. In fact, it is unclear how a later statement that was alleged to be made

[17] The government's proffer in App. Ex. XXXII that the other ground was "placing the inconsistencies in context" does not hold water since it could not and did not link that to how it would rehabilitate the motive to fabricate or earlier impeachment. However, the judge did not cite that reason in his ruling nor did he find, as the government proffered, an attack on faulty memory.

solely as exculpatory for custody purposes would "place in context" the statement to the EMTs about pointing a gun at Appellant's face.

By the judge's and Army Court's logic, every accused could go to CID and make multiple exculpatory statements as long as they are separated by some time, and then when cross-examined about "inconsistencies," the defense could play both later statements and have them admitted substantively with an instruction to bolster the accused's testimony. Since the statements would not be hearsay, this would be permitted *even if*, as here, there was an earlier admission or confession. It would not matter as long as the judge, like here, found an attack on "inconsistency." That application of the rule has never been allowed, and as *Finch* and *Ayala* made clear, the rule has not changed in that matter.

Moreover, the judge erred, like *Livingston*, when he found that inconsistencies in and of itself was "another ground." The defense's theme/theory was always that KB lied once she learned that she could lose (and did lose) custody. Like *Pierre*, *Adams*, and *Livingston*, this was not another ground, it was still allegations of fabrication while trying to obtain custody. Indeed, they were inconsistent, but that was because KB was fabricating under (B)(i).

E. The judge erred when he did not analyze or cite M.R.E. 403 despite a cumulative objection (and 404(b)) from the defense.

Even if a prior consistent statement passes all the pre-requisites, it must "satisfy the strictures of Rule 403" to be admissible for rehabilitative purposes.

Finch, 79 M.J. at 396. Where a judge conducts no analysis under M.R.E. 403, courts give "no deference to his ruling and must instead examine the evidence anew . . .". *See, e.g., United States v. Lopez*, ARMY 20220642, 2022 CCA LEXIS 46, *14 (Army Ct. Crim. App. 19 Jan. 2022) (mem. op.).

Here, despite the defense making a cumulative objection under M.R.E. 403, other than acknowledging the objection (R. 472), the judge did not cite M.R.E. 403 or do any analysis. (R. 486-87). The Army Court even noted the barren record the judge created. *Brown*, 2025 CCA LEXIS at *18-19.

These two statements fail M.R.E. 403. First, the statements were not consistent with the statements to the EMT, and the latter two were not consistent for the specific point KB testified to at trial where she swore she did not and could not have Flagged Appellant. This makes the probative value lower than two consistent statements. Further, as the defense noted, the government never gave notice of their intent to use this type of evidence (R. 471) in video recordings as the PTO required, which factors into unfair surprise, even though the government's justification appeared to be pre-drafted. Likewise, just admitting the statements took more than thirty minutes and became a longer ordeal than both the EMTs testimony and even SA GC's cross-examination. Thus, the time wasted in connection to the low probative value, especially in light of the "highly relevant" timing of both the statements coming after the motive to fabricate, means the

probative value could not have substantially outweighed the danger of unfair prejudice or misuse – especially when instructed to misuse by the judge.

F. Given the panel's use of exceptions and substitutions and the state of the evidence, the government cannot prove these statements did not prejudice Appellant.[18]

On balance, the government cannot demonstrate the erroneous admission of this evidence did not prejudice Appellant. This is because the government overstated the evidence, omitted virtually any reference to negative aspects of its case, and ignored the judge's instruction and the panel's findings/questions.

As laid out in AE I to the Army Court (factual sufficiency), the government's case was not strong. While the government has the benefit that in virtually any guilty finding it can say its case was 'stronger' than the defense (like the Army Court hand waived in its analysis), its argument to the Army Court highlights how close this case was. In stating the relative strength of its case, the government ignored that the panel altered Specification 2 to **deviate from KB's testimony** and mirrored both Appellant's and KB's original statements (the one where she said she pointed a gun at Appellant's face in anger).

Likewise, the government's brief entirely relied on the CID photograph of the magazine on the bed to claim that since the magazine was out of the weapon, there

[18] Since the government bears the burden to demonstrate no prejudice under the standard of review, this section discusses the government's attempt to do so at the Army Court.

could not be a threat that warranted self-defense. But in doing so, the government purposefully omitted that the *first* MP who saw the gun did not see an ejected magazine and the testimony about the fire-fighter who went into the residence, before *any witness* photographed the gun, specifically to "secure the weapon". "Securing the weapon" means ejecting the magazine, ejecting any chambered round, and placing the weapon on "safe."

This is significant as one of the two pillars of the government's case was that Appellant saw and understood the magazine and round were ejected *before* he defended himself in the simultaneous and overlapping succession of events. (Gov't Br. 39, 42). But the first person in the room, PFC JG (an MP), saw the weapon but no magazine. (R. 400, 402; Gov't Br. 6). He was sent in by the EMTs to find KB's ID card which was in her purse on the bed. (R. 400, 402). From where he retrieved and then placed the purse (both) on the bed, the magazine would have been readily apparent if it had been ejected. (Pros. Ex. 14, p. 19-22) (Compare the purse's location in Pros. Ex. 14 is less than an inch away from the clearly visible magazine (labeled with a "3") that contrasts in color with the bed).

The government's brief jumped from PFC JG straight to CID's documenting the evidence while omitting the fire-fighter who went in with the sole purpose to secure the weapon. (Gov't Br. 6). In fact, Ms. RM (the neighbor), who the government's brief repeatedly cites as credible and a key witness numerous times for

factual sufficiency, testified the fire-fighter went in for that sole purpose–and she held the door for him while he did it. (R. 335-36).

Given the facts Appellant raised in AE I to the Army Court regarding the timeline and fire-fighter's role to secure the weapon prior to any witness observing an ejected magazine/round, it indicates the government cannot respond to that hole in its case. So, as PFC JG, Appellant's statement, and the uncontroverted testimony regarding the fire-fighter show – "one [can] accept that [Appellant] did not know whether the magazine was in or out of the weapon" at the time of the act, especially given the quick succession of events. (Gov't Br. 39).

Highlighting its lack of evidence, the government's opening discussion for the "strength" of its case is a paragraph regarding the strangulation charge which was altered by the panel to not track KB's testimony and ultimately dismissed. (Gov't Br. 31-32). If that is its strongest point, given Appellant's argument in AE I and AE III at the Army Court, it indicates weakness in the case given the dismissed finding.

The second pillar of the government's argument to the Army Court was that the panel observed KB "and made appropriate credibility determinations." (Gov't Br. 40). That undermines the government for two reasons (1) it makes the prior consistent statements more important and (2) the government seems to suggest that KB is not credible when one actually looks at who the government cites for its argument. This was a close case – not only due to the panel deviating from KB's

testimony through its exceptions and substitutions, but also what must have led to that deviation during a four-plus hour deliberation. (R. 689, 692).

Crucially, the panel was instructed to specifically use *both* these erroneously admitted statements substantively *and* in determining credibility. (App. Ex. XLI, p. 10; R. 636-37) ("you may also consider the prior consistent statement as evidence of the truth of the matters expressed therein"). Therefore, if prejudice is being assessed, it means this evidence was erroneously admitted. Therefore, this Court "presume[s] that the members followed the military judge's instruction, and therefore, '[this Court] *must presume* that the court members considered evidence . . . for *an improper purpose*.'" *United States v. Steen*, 81 M.J. 261 (C.A.A.F. 2021) (quoting *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000)) (emphasis added). The Army Court failed to note this standard in its cursory prejudice analysis despite the government's second pillar, where it has the burden, focusing on the panel's assessment of KB's credibility.

When assessing the strength of the defense's case, the government never once acknowledged that KB told both EMTs that she intentionally pointed the weapon at Appellant's face. (R. 414, 423, 607-08, 614). This is despite the panel members asking questions about it including clarifying questions to the EMTs. Why would KB say that she pointed the weapon at his face given it is a clear statement against penal interest if it did not happen? Moreover, the government's argument to the

Army Court purposefully omitted the fire-fighter who went in to secure the weapon, and that KB had been reminded of her infidelity and the potential for divorce giving her a reason to point a weapon at Appellant out of anger and fear – especially given her concerns for custody if Appellant is discussing divorce/for-cause. Since the government did not even acknowledge these facts' existence, even when affirmed by the victim or the neutral EMTs, the government cannot reasonably claim to have demonstrated its burden using the appropriate standard of review.

Turning to the materiality and quality of the statements, the government's argument to the Army Court took a biased view of the video recorded evidence and claimed it was simply equal to two lines of testimony from SA GC – the same two lines the Army Court relied on in its prejudice analysis. Unlike the testimony of SA GC (which was *only* about the July 3rd statement **and not** the July 8th), the video recordings had KB herself saying the words and were not subject to cross-examination as they were in video format. Video recorded interviews are seen as higher quality and more concrete and convincing evidence than repeated hearsay from a government agent who may be biased. *See United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994). They capture emotion and have the reinforcing quality of a crime documentary snippet. Thus, SA GC's two sentence responses from his memory are not the same quality or weight as the long discussions captured on the erroneously admitted videos. Thus, when combined with the presumption that the

panel used this evidence for credibility *and* substance since in accordance with the judge's instruction, the materiality and quality weigh in favor of Appellant.

WHEREFORE, the undersigned counsel respectfully request that this Honorable Court grant this petition.

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[19] Lead counsel is currently assigned as the Regional Defense Counsel for Region IV (formerly "Great Plains" Region) but remained detailed.

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
POND, ARGUELLES[1], and JUETTEN
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class DONTE M. BROWN
United States Army, Appellant

ARMY 20230168

Headquarters, Fort Riley
Steven C. Henricks, Military Judge
Lieutenant Colonel Jesse T. Greene, Staff Judge Advocate

For Appellant: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert D. Luyties, JA (on brief); Lieutenant Colonel Autumn R. Porter, JA; Major Robert D. Luyties, JA (on reply brief).

For Appellee: Colonel Richard E. Gorini, JA; Major Marc B. Sawyer, JA (on brief).

9 May 2025

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

ARGUELLES, Judge:

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of domestic violence upon his spouse in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. §§ 928b (2019) [UCMJ]. The military judge subsequently dismissed Specification 2 after finding it unreasonably multiplied with Specification 1.

The military judge sentenced appellant to a dishonorable discharge, confinement for forty months, and reduction to the grade of E-1. The convening

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[1] Judge ARGUELLEs decided this case while on active duty.

authority approved appellant's request for a waiver of automatic forfeitures but otherwise took no action on the sentence.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises three assignments of error, two of which merit discussion but no relief.[2]

BACKGROUND

The victim testified that on Saturday, 2 July 2022, she was supposed to run errands with her kids and husband/appellant, but that he was in a bad mood because he had just found out unexpectedly that he needed to deploy for a field exercise. The victim and appellant were arguing in the bedroom around midday when the victim attempted to end the argument by telling appellant, "I'm getting ready to go."

The victim had a concealed carry permit and routinely carried her handgun with her while working as a DoorDash delivery driver. The victim knew she could not carry her firearm while loaded on post, so she retrieved the gun from the top drawer of her dresser and turned away from appellant to clear the weapon by dropping the magazine and one round on the bed. The victim testified appellant then told her, "you should have kept those bullets in the gun because you're going to have to shoot me," to which the victim replied, "I don't want to shoot you. I don't want to harm you. I don't even want to argue with you right now." The victim then heard appellant grab a knife off the top of the dresser and felt him stab her in the side for the first time. Per the victim, after she tried backing away, appellant again stabbed her in the left shoulder, after which both parties struggled into the hallway and down the stairs. The victim testified that she woke up on the floor at the bottom of the stairs with appellant strangling her and saying "look what you made me do." On cross-examination, the victim denied that she "pointed a gun at him intentionally during a heated argument."

Appellant did not testify at trial, but his interview with an Army Criminal Investigation Division [CID] agent was admitted into evidence. Per appellant, after he confronted the victim about sending pictures of herself to another man, she pointed her gun at his face and he froze, telling her to "shoot me." Appellant claimed that he took advantage of the moment when the victim looked away from him to grab a knife off the dresser and stab her in self-defense. Appellant also admitted, however, that the gun was already on the bed and that he "thinks" the

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[2] We have also considered the third assignment of error (factual insufficiency), as well as the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

victim had dropped the magazine when he stabbed her. Appellant stated that in the ensuing struggle, the knife accidentally lodged in the victim's shoulder as they were falling down the stairs.

LAW AND DISCUSSION

A. Denial of Defense Expert

1. Additional Facts

Prior to trial, appellant filed a motion seeking to compel production of an expert witness in forensic psychiatry.[3] Per appellant, the purpose of this expert was to explain the mental, psychological, neurological, and hormonal changes that occur in the "fight or flight" response to a lethal threat and how those changes distort an individual's cognitive ability to perceive and respond to threats. Appellant proffered that such testimony was relevant to establish and articulate the merits of his self-defense claim.

At the Article 39(a) motions hearing, the expert testified about the physiological and neurological changes in the body caused by the "fight or flight" response. Although the defense of self-defense has objective and subjective prongs, at the hearing defense counsel made it clear that appellant was only seeking expert testimony on the second subjective prong. When further questioned by the military judge, counsel also confirmed that the defense was "in no way raising *any type* of lack of mental responsibility or infirmity."

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[3] Although entitled "Defense Motion for Appropriate Relief – Compel Expert Witness Production – RCM 906(b)(7) and 703(d)(2)(A)," the relief sought requested the court to "compel *the appointment* and production of defense forensic psychiatrist expert witness." The term 'appointment' typically refers to the appointment of expert consultant, which requires a distinct test from the test applied to a request for an expert witness, and the two tests are often intermingled and confused. *See, e.g. United States v. McGuiness*, ARMY 20071204, 2010 CCA LEXIS 96, at *12 (Army Ct. Crim. App. 19 Aug. 2010) (mem. op.) ("The defense request and the military judge's ruling both blur the distinction between a request for expert assistance and a request for an expert witness to provide testimony at trial."); *United States v. Olahprado*, ARMY 20220200, 2024 CCA LEXIS 170 at *18 (Army Ct. Crim. App. 9 Apr. 2024) (mem. op.) (holding that "a motion [to compel expert assistance] is almost always a precursor for introducing expert testimony at trial"). As the military judge and the parties, however, treated the motion only as a request for an expert witness, we will do the same.

Focusing on the physiological changes of the fight or flight response, the military judge denied the motion: "Instead, self-defense focuses on events external to an accused's body when a trier-of-fact considers the subjective and objective prongs of that defense, not whether an event would likely cause increased respiration, heart rate[,] and similar physical responses within the accused's body." In his written ruling, the military judge also found that Military Rule of Evidence [Mil. R. Evid.] 403 precluded such testimony. Although he did not mention it in his written ruling, during oral argument at the motions hearing, the military judge also questioned the relevance of this testimony and how it might aid the factfinder. The judge posed a hypothetical, asking how if someone pointed a gun at his face, "[d]oesn't everyone understand in that situation that I have a right to defend myself, assuming it's not the police or someone that pointed that gun at my face?"

Relying primarily on Rules for Courts-Martial [R.C.M.] 916(e)(1) and 916(k)(2), as well as a number of non-military cases from other federal and state jurisdictions, appellant now argues that the military judge erred in failing to consider the expert's testimony on how the fight or flight response would impact his state of mind and cognitive ability.

2. Law

In *United States v. Houser*, the CMA set forth six factors a proponent must establish in order to have an expert testify: (1) the qualifications of the expert; (2) the subject matter of the expert testimony; (3) the basis for the expert testimony; (4) the legal relevance of the evidence; (5) the reliability of the evidence; and, (6) whether the evidence passes the Mil. R. Evid. 403 balancing test. 36 M.J. 392, 397 (C.M.A. 1993).

Rule for Courts-Martial 916(e)(1) provides that for assault cases involving deadly force, for self-defense to apply an accused must: (1) have objectively reasonable grounds to apprehend that death or grievous bodily harm is about to be inflicted; and (2) subjectively believe that the force used is necessary for protection against death or grievous bodily harm. The discussion notes following this rule note that because the first test is objective, the emotional instability of the accused is irrelevant. On the other hand, because the second test is entirely subjective, the notes provide that "such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack."

Rule for Courts-Martial 916(k)(2) states only that a mental condition not amounting to a lack of mental responsibility is not an affirmative defense. The discussion following this rule provides, however, that evidence of a mental condition not amounting to lack of mental responsibility may still be admissible to determine whether the accused had the requisite state of mind in a specific intent case.

Finally, we review a military judge's decision regarding the admissibility of expert testimony for abuse of discretion. *United States v. Flesher*, 73 M.J. 303, 311 (C.A.A.F. 2014); *United States v. Bell*, 72 M.J. 543, 552 (Army Ct. Crim. App. 2013) (citing *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999)).

3. Analysis

Appellant's primary challenge to the military judge's ruling is based on the discussion note following R.C.M. 916(e)(1), which states that because the second prong of self-defense is entirely subjective, "such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack." Specifically, appellant claims that the military judge only focused on the physical responses associated with the fight or flight response and ignored the fact that his expert would also testify about how such a reaction impacts a person's mental and emotional state.

The vast majority of cases cited by appellant, almost all of which are from non-military jurisdictions, involve battered woman's syndrome (BWS), in which the self-defense expert explains *counter-intuitive* behavior. Moreover, the few cases cited by appellant not involving BWS pertain to an expert offering testimony about how a specific atypical condition suffered by the accused impacted his or her mental state. Indeed, when asked at the Article 39(a) motions hearing if he could cite a single case wherein an expert was allowed to explain how the flight or fight response impacts self-defense, defense counsel admitted he could not. Not surprisingly, on appeal appellant still cannot point to any such authority.

First, the military judge was correct that physiological changes, such as increased heart rate and breathing, are not directly relevant to appellant's "emotional control" in the context of self-defense. The military judge's reasoning expressed at the motions hearing that the factfinder does not need an expert to explain the basic "fight or flight" response was also not an abuse of discretion. Put another way, unlike BWS, there is nothing counter-intuitive about the fight or flight response, and having an expert explain the physical mechanisms behind such a reaction is not particularly relevant or helpful to the factfinder. *See United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001) (holding the military judge has broad discretion to determine whether the party offering the expert testimony has established an adequate foundation with respect to relevance).

Just because the discussion following R.C.M. 916(e)(1) states that evidence of an accused's emotional state can be relevant to the subjective prong of the self-defense test, that does not automatically mean that expert testimony is necessary on that issue. Indeed, the military judge did not preclude appellant from otherwise offering evidence of how his fight or flight response impacted his perception of the events. Nor was his counsel precluded from making any such arguments.

Appellant also argues for the first time on appeal that the military judge erred in not taking into consideration R.C.M. 916(k)(2), which he claims stands for the proposition that "state of mind" evidence is always relevant to a crime involving specific intent. We reject this argument for three reasons: (1) appellant did not raise it before the military judge below; (2) appellant's skewed interpretation of R.C.M. 916(k)(2) is incorrect; and (3) appellant expressly waived this argument at trial.

First, because appellant did not argue below that state of mind evidence was admissible under R.C.M. 916(k)(2) in support of his motion to compel the expert, we decline to consider this argument for the first time on appeal. *See Lloyd*, 69 M.J. at 100–01 ("We find that the military judge did not abuse her discretion by failing to adopt a theory that was not presented in the motion at the trial level."); *United States v. Carpenter,* 77 M.J. 285, 289 (C.A.A.F. 2018) ("[O]ur review for error is properly based on a military judge's disposition of the motion submitted to him or her—not on the motion that *appellate* defense counsel now wishes *trial* defense counsel had submitted.") (emphasis in original).

More fundamentally, and contrary to what appellant is now claiming, RCM 916(k)(2) is limited to evidence of a mental condition not amounting to a lack of mental responsibility and does *not* make admissible any and all "state of mind" evidence for a specific intent crime. First, R.C.M. 916(k)(1) provides that:

> It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

In its entirety, R.C.M. 916(k)(2) states that "[a] mental condition not amounting to a lack of mental responsibility under paragraph (k)(1) of this rule is not an affirmative defense." The discussion notes following this rule state that "[e]vidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."

Accordingly, the discussion following R.C.M. 916(k)(2) does not open the door to any and all "state of mind" evidence in a specific intent case, but rather only narrowly applies to evidence of an appellant's "diminished capacity." *See United States v. Axelson*, 65 M.J. 501, 514 (C.A.A.F. 2007) (holding that although partial mental responsibility or "diminished capacity" is not an affirmative defense, under R.C.M. 916(k)(2) it can still be offered to negate a required *mens rea* element of an offense). Here, appellant did *not* offer any evidence of diminished capacity or partial mental responsibility at trial. To the contrary, his counsel expressly told the

military judge that the defense was "in no way raising *any type* of lack of mental responsibility or infirmity." As such, appellant has waived any claim based on R.C.M. 916(k)(2).

In sum, for all the reasons stated above, the military judge did not abuse his discretion in finding that the expert's testimony was not legally relevant under the *Houser* test.

B. Prior Consistent Statements

1. Additional Facts

At the house immediately after the stabbing, both the victim and her neighbor testified that in response to appellant saying otherwise, the victim claimed she never pointed the gun at his face. On the other hand, two medical personnel who subsequently transported the victim to the hospital testified that the victim said she pointed the gun at appellant's face. In her first informal interview with law enforcement at the hospital, after learning that her children were in protective custody, the victim said she never pointed the gun at appellant. In a second recorded and more formal CID interview several days later, the victim again reiterated that she never pointed the gun at appellant's face, but further explained that she "flagged" him with the gun while turning towards the bed. About a month later, the victim initiated divorce proceedings in which she was seeking custody of the children. Finally, at trial the victim once again testified that she never pointed the gun directly at appellant, but rather "held it in the low ready position and never flagged [appellant] with it."

During both his opening statement and on cross-examination, defense counsel highlighted and questioned the victim about her inconsistent statements as to whether she pointed the gun at appellant. Although the bulk of cross-examination focused on the fact that the victim's story allegedly changed once she learned her children were in protective custody, counsel briefly touched on the divorce proceedings and the victim's desire to obtain custody of her children.

After the cross-examination, the government moved to admit Prosecution Exhibit (PE) 26 into evidence, containing two brief snippets from the second recorded CID interview wherein the victim stated she did not point the gun at appellant. The government sought to admit these prior consistent statements under both Mil. R. Evid. 801(d)(1)(B)(i) [(B)(i)] and 801(d)(1)(B)(ii) [(B)(ii)]. After reviewing the two snippets outside the presence of the panel in an Article 39(a) session, the military judge set forth the applicable standard, explained his analysis for the (B)(ii) prong, and admitted the statements as prior consistent statements under both the (B)(i) and B(ii) hearsay exceptions. The military judge, however, did not provide any analysis or explanation for his ruling that the statements were

admissible under the (B)(i) exception, nor did he analyze whether the prior consistent statements were admissible under Mil. R. Evid. 403.

2. Law

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019).

In *Frost*, the CAAF held that there were three "criteria" and two "guiding principles" governing the admission of a prior consistent statement under the (B)(i) hearsay exception. *Id.* at 109-10. With respect to the criteria: (1) the declarant must testify and be subject to cross-examination about the prior statement; (2) the prior statement must be consistent with the declarant's testimony; and (3) the statement must be offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying. *Id.* at 110, citing Mil. R. Evid. 801(d)(1)(B)(i). In addition, (1) the prior statement must precede any motive to fabricate or improper influence it is offered to rebut, and (2) 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. *Id.* (citations omitted).

In *United States v. Finch*, the CAAF addressed the criteria for admission of a prior consistent statement under the (B)(ii) hearsay exception. 79 M.J. 389, 396 (C.A.A.F, 2019). In order for a statement to be admissible under this exception; (1) the declarant must testify; (2) the declarant must be subject to cross-examination; (3) the statement must be consistent with the declarant's testimony; (4) the declarant's testimony must be "attacked on another ground" other than the ones listed in (B)(i) [recent fabrication or recent improper influence or motive]; and (5) the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which she was attacked. *Id.* Although the rule itself does not specify what constitutes "other grounds," the CAAF noted that the Drafters' Analysis lists "charges of inconsistency or faulty memory" as two such examples. *Id.* at 395. The same Drafters' Analysis also states "to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403." *Id.* Under either exception, the proponent of the prior consistent statement evidence bears the burden of demonstrating its admissibility. *Id.* at 394.

In *United States v. Ayala*, the CAAF noted that "[w]e made it clear in *Finch* that prior consistent statements may be eligible for admission under either (B)(i) or B(ii) but not both." 81 M.J. 25, 28 (C.A.A.F. 2021) (citing *Finch*, 79 M.J. at 396). First, the passage in *Finch* does not state that the two prongs are mutually exclusive, nor is there any other language in *Finch* reaching that holding. As such, a reasonable interpretation of the language in *Ayala* is that the CAAF was reiterating that the two prongs are separate and distinct, as opposed to foreclosing any scenario

in which a prior statement could be admissible under both exceptions if the criteria for each exception were individually satisfied. *See, e.g. United States v. Begay*, 116 F.4th 795, 801 n.2 (8th Cir. 2024) ("Only when a party impeaches a witness on a ground '[]other' than—*or in addition to*—a motive to lie does the second category kick in") (emphasis added) (citation omitted). Second, given that the CAAF in *Ayala* never actually reached the merits of the prior consistent hearsay exception rulings, but instead decided the case on a prejudice analysis, it is unclear whether the "holding" cited above is actually dicta. *See United States v. Flanner*, 85 M.J. 163, 174 (C.A.A.F. 2024) (holding that the military judge erred in relying on dicta from a prior CAAF opinion).

On the other hand, to the extent the CAAF in *Ayala* did in fact mean to hold that the two prior consistent hearsay exceptions are always mutually exclusive, we recognize that only the CAAF can overrule its own precedent, which we would respectfully urge it to do, or to at least provide more clarity on this issue. *See United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) ("[I]t is for this Court, not the ACCA, to overrule our precedent") (citations omitted); *United States v. Allbery*, 44 M.J. 226, 228 (C.A.A.F. 1996) (holding if a service level appellate court believes the underlying logic of one of the CAAF's decisions has changed, its recourse is "to express that viewpoint and to urge our reconsideration of our precedent"). In any event, as we describe below, because we find that the prior consistent statements were admissible under the (B)(ii) exception in this case, to the extent the military judge erred in admitting the statements under both exceptions, any such error was harmless.

3. Analysis

a. Admissibility under 801(d)(1)(B)(i)

Starting first with the (B)(i) analysis, both at trial and on appeal appellant argues that the motive to fabricate arose when the CID agent informed the victim at the first interview at the hospital that her children were in protective custody. According to appellant, the victim was worried that if she admitted to law enforcement that she had pointed the gun at appellant's face, she might not get her kids back, and therefore, she changed and fabricated her story during the second CID interview. The government counters that the second CID interview took place before the victim filed for divorce, wherein the victim had a motive to seek sole custody of her children. As such, the government argues that because the second CID interview preceded the divorce filing, any statements made during that interview were before the motive to fabricate.

We acknowledge that when there is an assertion of multiple motives to fabricate or multiple improper influences, the statement at issue need not precede all such motives or inferences, but only the one it is rebutting. On the other hand, we

question whether there were truly two separate motives to fabricate in this case. The "core" motivation at issue in this case appears to be a desire on the part of the victim to maintain custody of her children, either in response to their being placed in protective custody or as part of the divorce proceedings. Moreover, except for a few questions at the end of his cross-examination about the divorce, the focus of defense counsel's cross-examination was how the victim's story changed after she learned her children were in protective custody. Finally, and unfortunately, the military judge did not explain or provide any meaningful analysis of his (B)(i) ruling, and as noted above also failed to conduct an analysis under Mil. R. Evid. 403.

Given our holding below that the military judge properly admitted the statements under the (B)(ii) exception, however, we ultimately need not decide the propriety of his ruling admitting the same evidence under the (B)(i) exception.

b. Admissibility under 801(d)(1)(B)(ii)

In both his opening statement and his cross-examination of the victim, defense counsel attacked the inconsistencies in the victim's prior statements pertaining to whether she pointed the gun at appellant. After reviewing the proffered statements outside the presence of the panel, the military judge analyzed all five factors set forth in *Finch*, and concluded that because the victim's prior statements made during the second CID interview were consistent with her trial testimony, and because the victim's testimony was attacked on "another ground" of "inconsistency attacks by defense counsel," the prior statements rehabilitated her trial testimony and were admissible under the (B)(ii) exception.

To the extent appellant argues that the CID interview is not consistent with the victim's trial testimony because the victim told CID she might have briefly "flagged" or inadvertently pointed the gun at appellant while she was turning towards the bed, we find this to be a distinction without a difference. Put another way, on the whole, the victim's statement to CID was consistent with her testimony at trial that she never intentionally pointed the gun in anger at appellant. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) (holding that the prior statement need not be identical in every detail to declarant's testimony at trial and that minor inconsistencies do not change the fact that the interview was for the most part consistent with the facts of central importance to the trial) (citations omitted).

While we recognize the CAAF has held that with respect to the (B)(i) exception "[s]tatements made after an improper influence arose do not rehabilitate a witness's credibility," *Frost*, 79 M.J. at 111, the same limitation does *not* automatically apply to prior consistent statements admitted under the (B)(ii) exception. To the contrary, in order to be admissible under (B)(ii), the declarant's testimony must be attacked on *another ground* than recent fabrication or improper influence or motive. As such, to the extent a declarant might make a prior consistent

statement *after* an alleged motive to fabricate that does not qualify for admission under (B)(i), nothing precludes a party from seeking admission of that same prior consistent statement under the (B)(ii) exception. *See United States v. Finch*, 78 M.J. 781, 787 (Army. Ct. Crim. App. 2019) (holding that while the timing of the prior consistent statement sought to be admitted under the (B)(ii) exception may be relevant when assessing its probative value, "[w]hen a prior consistent statement is offered under Mil. R. Evid. 801(d)(1)(B)(ii), the offering party does not have to per se show the timing of the prior statement"), *aff'd by* 79 M.J. 389 (C.A.A.F. 2020). As such, while we recognize that we may consider the timing of the statements in our (B)(ii) analysis, we reject appellant's argument that, because the victim made the statements at issue *after* she learned her children were in protective custody, the military judge erred in admitting the same statements under (B)(ii) that might not otherwise be admissible under (B)(i). This is especially true given that the statements at issue were also consistent with the victim's first report at the scene that she did not point the gun at appellant.

Citing *United States v. McCaskey* for the proposition that "mere repeated telling of the same story is not relevant," appellant further argues that it was error to admit the statements under the (B)(ii) exception. 30 M.J. 188, 192 (C.A.A.F. 1990). This argument, however, fails for several reasons. First, it ignores the fact that the victim did *not* merely retell the same story before trial and during her testimony. Second, appellant's "repeated telling" argument also ignores the fact trial defense counsel highlighted and attacked these inconsistencies from the outset when he asked the panel in his opening statement to pay close attention to whether the victim's testimony "in this courtroom [*is*] *consistent* with all of the other stories that she just told the EMT, the paramedic, medical professionals at IACH, CID?"

Finally, although the military judge failed to analyze admissibility under Mil. R. Evid. 403, after conducting such an analysis ourselves, we find that he did not abuse his discretion in admitting PE 26 containing the snippets of the victim's CID interview as a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii).[4]

[4] In its opposition, the government also offers a justification for the admission of PE 27, containing the victim's additional prior statements about the alleged strangulation. Because appellant, however, does not challenge the admission of PE 27, we decline to address that issue on appeal. *See, e.g.* Appellant's Opening Brief at p. 45 ("The government made Pros Ex. 26 which contains both statements at issue.").

c. Prejudice

Even if the military judge erred in admitting the prior consistent statements, it would not change the ultimate outcome, as we conclude there was no prejudice. The government bears the burden of demonstrating harmlessness for preserved non-constitutional errors, specifically "whether the error had a substantial influence on the findings." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). In conducting this prejudice analysis, we weigh: (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. *Id.* With respect to the last two factors, we assess "how much the erroneously admitted evidence may have affected the court-martial." *United States v. Jones*, 85 M.J. 80, 85 (C.A.A.F. 2024) *citing United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020).

With respect to the first two prongs of the *Kohlbek* test, we find that the government had the stronger case. Although the victim was inconsistent in her statements, it is significant that immediately after the assault, and before she had any idea of what would happen to her children, she denied pointing the gun at appellant's face. We also note that appellant's self-defense claim is undermined by his admissions that when he stabbed the victim the gun was already on the bed, and that he "thinks" the victim had already dropped the magazine. As to the last two factors, as the government correctly points out, the CID special agent testified at trial to most of the victim's prior consistent statements. *See Jones*, 80 M.J. at 85-86 (holding that when a fact is already obvious from other testimony at trial and the evidence in question "would not have provided any new ammunition," the erroneous admission of the evidence is likely to be harmless) (citations omitted). As such, we find that the materiality and quality of the snippets containing the victim's prior consistent statements to CID were of minimal value, especially when considered in the context of all of the testimony and evidence admitted at trial.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Chief Judge POND and Judge JUETTEN concur.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

APPENDIX B

Appendix B

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following:

WHETHER THE JUDGE ABUSED HIS DISCRETION IN DENYING A DEFENSE EXPERT WITNESS WHEN HE MISTATED THE LAW REGARDING ONLY "EXTERNAL STIMULI," MISQUOTED THE DEFENSE'S RATIONALE, AND THE EXPERT'S TESTIMONY COVERED THE MOST CONTESTED FACTUAL ISSUES AT TRIAL AND APPELLANT'S COUNTER-INTUITIVE STATEMENT

Facts Relevant to the Assignment of Error

Appellant was charged with a specific intent crime in that he committed a violence offense "with the intent to inflict bodily harm." (Charge Sheet).

A. The Expert Requests

Defense filed a request for expert assistance to explain to the panel the mental, physiological, neurological, and hormonal changes that occur in the face of a lethal threat and how those distinct changes affect or distorts an individual's cognitive function, ability to think, perceive, or respond to threats. (App. Ex. II). This is partially known as the "fight, flight, or freeze" response, but would also discuss behavior after the triggering event such as remorse/assisting and how that may impact or be consistent with appellant's interpretation of the events in his CID interview which was admitted at trial. (App. Ex. II).

The crux of the defense's request was three-fold: (1) how an event affects and impact the cognition, decision-making, and perception, (2) the person's ability to recall/explain those events (i.e., Appellant's statement to CID), and (3) how those involved in self-defense act after the fact. (App. Ex. II, II(a)).

The defense called Dr. L as a witness to discuss the basics of what his testimony may cover, however, they had not presented Dr. L the evidence or specified whether he would conduct testing at this early stage of the proceeding. (*See, e.g.,* R. 67-70). Dr. L initially described physiological responses, (R. 68), and how the body intentionally reacts to make one "more impulsive, less reflective, [and] more reactive" to increase reaction time to eliminate threats. (R. 70).

But the focus of the defense's questions was about cognitive responses, reactions, and effects. (R. 68-70). He described in the "milliseconds" when someone is presented a potentially lethal threat, individuals experience "tunnel vision or higher degree of focus on the threat itself." (R. 67). In response to the defense's question about changes affecting a person's perception, Dr. L explained the effects on perception, memory, and that after the fact, they often feel and act remorseful/shameful and it is "dismodulated in PTSD." (R. 69).

Dr. L continued discussing the effect of fight/flight/freeze on cross-examination explaining the impacts on one's cognitive abilities/decision-making,

and importantly, how long that lasts after the threat is removed/neutralized. (*See, e.g.,* R. 70). Dr. L reiterated to the judge that he "would not be offering any ultimate issue opinion, but would be offering opinions as to his mental state on or about the time of the alleged offense." (R. 74). Dr. L also said he also could end up interviewing Appellant, but that it does not necessarily need to happen to render an opinion and would be up to the defense. (R. 74).

In argument, the defense pointed out that while these cognitive responses are a universal experience, most individuals have not experienced a similar situation and likely have misperceptions on what an average person may experience or recall. (R. 78). The defense noted that this is the same evidence the government routinely uses in sexual assault cases to explain counter-intuitive behavior, and then linked it to how most people would find it counter-intuitive to stab one's spouse (especially a male Soldier presented with a female non-Soldier) – so explaining that was necessary for the defense's theory of the case. (R. 78-79).

The judge questioned the defense:

> Why does when a panel is considering that do they need to know about fight, flight, or freeze? Because it's not *internal* to the particular person that's at issue in this case, the accused. It's just would a reasonable person in that--in those shoes see it the same way. So how does internal hormones, how fast you're breathing, play into that?

(R. 80) (emphasis added). The defense attempted to re-focus the judge to the mental/cognitive affects, not the physiological, and discussed that self-defense has two prongs, both a subjective and objective. (R. 80-81). The defense explained that the expert would discuss how events affect "his perception; you heard him talk about amplified perception of a threat. Here's what distorts reality for him under those circumstances. Here's what delays his response [in determining if the threat is neutralized]. Here's what affects his ability to fully appreciate what's going on." (R. 83).

The judge then interrupted asking "But isn't it supposed to be the facts presented to [appellant] (a.k.a. external stimuli), not how you respond to them?" (R. 83). The judge continued to explain that self-defense only allows for one to discuss the facts they observe or the stimulus, not the internal mental reactions. (R. 83-84). The judge continued down his interpretation of the law that, for example, only evidence of a gun being pointed at one's face would be allowed and how a reasonable person would react/interpret that threat would not matter to either the subjective or objective prong: "my point is, isn't the analysis just that the gun got pointed in my face? I don't need to go any deeper than that?" (R. 84).

B. The judge's ruling focused only on physical changes as opposed to psychological changes, stated that only external stimuli is legally allowed as evidence, and completely omitted the potential use to explain post-incident behavior including to help understand Appellant's CID statement

The judge denied the defense's request for expert assistance in a two paragraph ruling. (App. Ex. XIII, p.1). The judge did not make findings of fact, but stated that the defense "posits that the alleged victim pointed a firearm at the accused, presumably resulting in the accused taking actions to defend himself while under the influence of his body's flight/flee/freeze response." (App. Ex. XIII). The judge stated that the defense is only arguing regarding the subjective prong of self-defense. (App. Ex. XIII).

The judge's ruling focused entirely on the physical responses one may experience and not the defense's request regarding the psychological effects on decision-making, interpretation, and post-action behavior. (App. Ex. XIII, 1). The judge, without citing any precedent, stated "self-defense focuses on events external to an accused's body when a trier-of-fact consider the subjective and objective prongs of that defense, not whether an event would likely cause increased respiration, heart rate and similar physical responses within the accused's body." (App. Ex. XIII, at 1). The judge did not cite R.C.M. 916(e)'s discussion.

The judge then found even if those physiological responses were relevant, "for these same reasons the probative value" is "quite low compared to the substantial likelihood such testimony would confuse panel members when considering self-defense." ((App. Ex. XIII, at 1).

The judge did not go over any other *Houser* factor or explain why an instruction could not cure the issue – especially if given before the testimony. In a footnote, the judge noted that the defense is comparing the testimony to similar reactive testimony elicited in sexual assault cases such as "counter-intuitive behaviors", but then stated that "there is nothing counter-intuitive about acting in self-defense when a firearm is knowingly pointed at someone's face or body." The judge did not consider the Appellant's statement which contained counter-intuitive explanations that may need to be explained.

C. The government uses the lack of expert testimony and lingering effects of the incident on Appellant to highlight that as soon as the weapon is not pointed at Appellant, the threat had ceased and Appellant would have subjectively and objectively known there was no threat

After it became clear that the defense was relying on self-defense and was effectively presenting evidence that KB had told multiple first-responders that she pointed the loaded gun at appellant's face, the government strategy then attempted to emphasize that in the milliseconds following the pointed weapon, appellant saw KB turn away and potentially eject the chambered round and drop the magazine. This fleeting moment, they presented and argued, meant that appellant could not have either subjectively or reasonably believed KB was a threat. For example, the

government offered Appellant's CID statement through SA IR. (*See* R. 568-592).[1] This recording had Appellant explain the circumstances, why he acted in self-defense, and showed him acting remorseful. (Pros. Ex. 1). It also contained him saying the counter-intuitive area that he was not in fear.

Multiple times while the video played, the government stopped the video to focus on one major area: any statement or indication that Appellant may have seen KB point the weapon away from him. (R. 575, 579). The prosecution continuously paused the video to have SA IR, over objection, repeat what Appellant said on the video about if KB was facing him when the slash happened. *See* R. 575. The prosecution then played "that portion" for a third time (R. 576) and continued the routine. (R. 576, 577, 579). The government, nor did SA IR, ever clarify if Appellant was testifying about either what he saw/understood at the time, or the multiple discussions he had with KB waiting on the ambulance.

On cross, SA IR made clear that Appellant only said "I think" KB placed the magazine down and that the events happened in quick succession and she may have been just turning away. (*See* R. 586, 590-92). SA IR also confirmed that Appellant immediately attempted to treat KB by grabbing a towel. (R. 593).

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[1] The defense objected to anything SA IR said on the video as hearsay. The judge admitted the video based on the government's proffer that all of his statements/questions were not for the truth of the matter asserted.

D. The Government, on appeal, agreed the judge erred.

There are a six points the Government and Appellant agreed on at the Army Court (discussed in Appellant's Reply Brief at the Army Court), but two that should be dispositive to the analysis.

(1) Having an expert testify about whether Appellant *believed* his response was reasonable in relation to the self-defense prong "is legally relevant." (Gov't Br. 19) ("the government concedes it is *legally* relevant under Mil. R. Evid. 401.").[2] However, this concession, cannot be understated - it means the government conceded that the judge abused his discretion when he found the evidence had no legal relevance under the Fourth *Houser* factor. (App. Ex. XIII) ("is not relevant to a claim of self-defense."). That is enough to set-aside the findings since it does not dispute prejudice for this issue.

The judge only applied the Fourth and Sixth *Houser* factors in his ruling. (App. Ex. XIII; Gov't Br. 13-14, footnote 5). So if the judge erred in the Fourth *Houser* factor (relevance), how could he apply the Sixth factor (403) regarding its probative value? Therefore, the only other factor he considered in his ruling, the 403 analysis, is flawed, meaning every *Houser* factor was incorrect.

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[2] The government then argued that an expert would not be needed and it would infringe on the purview of the fact-finder, something rejected by Federal Courts in this area, and most importantly, not something the judge relied on.

(2) Boths sides agree that Appellant sought an expert to help discuss how he "thinks, and perceive[s]." (Gov't Br. 16 (citing App. Ex II, p. 3)).

Standard of Review

This court reviews a judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citing *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005)). When a judge commits error regarding a defense's expert witness, the government must show that the denial was harmless beyond a reasonable doubt. *United States v. McAllister*, 64 M.J. 248, 252 (C.A.A.F. 2007).

Law

A. Experts for criminal defendants have a liberal standard for admissibility

The discussion of R.C.M. 916(e) states for self-defense "such matters as the accused's emotional control, education, and intelligence are relevant" which are not external stimuli. *Id.* Military court's apply a "liberal standard for admission" for expert testimony. *Flesher*, 36 M.J. at 319 (citing *United States v. Peel*, 29 M.J. 235, 241 (C.M.A. 1989) ("[A]dmissibility of expert testimony has been broadened" and most factors go "to the weight to be given the testimony and not to its admissibility."). M.R.E. 702 tracks with the federal rule where expert testimony is liberally admissible. *Id.* at 319-20 (citing *Daubert v. Merrell Dow Pharms.*, 509

U.S. 579, 588, (1993) ("general approach of relaxing the traditional barriers to opinion testimony").

Criminal defendants have the most need for expert assistance – "the group of litigants [is the] most likely to be disbelieved when they tell their stories unaided by experts. In short, they are the litigants most in need of expert speculation about past mental states." *United States v. Taveras,* 570 F. Supp. 2d 481, 483 E.D.N.Y. 2008). "Accordingly, doubts about the usefulness of an expert's testimony should be resolved in favor of admissibility." *Flesher*, 36 M.J. at 320 (internal citations omitted); *Kaplan v. California*, 413 U.S. 115, 121 (1973).

In determining expert testimony, the judge applies the six *Houser* factors – however here, the judge's two paragraph ruling for both self-defense prongs was based on just two: (4) legal relevance, and (6) the 403 balancing test. However, in considering relevance, other legal principles still apply. First, the judge omitted R.C.M. 916(e)'s discussion about mental states/internal factors, and that Appellant was charged with a specific intent crime, so R.C.M. 916(k)(2) applied. *See* Discussion, R.C.M. 916(k)(2) ("Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an elements of the offense.").

Likewise, the judge did not consider that even when an accused's statement is admitted, M.R.E. 104(e) allows the defense a "right to introduce before the members evidence that its relevant to the weight or credibility" of that statement and its contents. *Id.* Here, that would explain Appellant's actions during the interview, how his brain may have reconstructed the events in the instantaneous moment which could undercut whether Appellant actually saw KB's claimed magazine ejection, how remorse often experienced by those in self-defense could factor into Appellant's statement, or the counter-intuitive nature of him Appellant later saying he was not scared.

B. Federal and military courts repeatedly have found that more than just external stimuli is relevant and ripe for expert testimony in self-defense.

Besides R.C.M. 916(e)'s discussion, both federal and military courts have found that how a person's mental processes respond to external stimuli (such as decision-making ability and perception) are relevant and beyond what ordinary panel members understand. *See, e.g., United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016); *Taveras*, 570 F. Supp. 2d. at 493; *Tourlakis v Morris,* 738 F. Supp. 1128, 1135 (S.D. OH. 1999)(discussing cases where expert testimony from self-defense has been allowed in a *Habeus* review). This is shown in a multitude of defenses including self-defense, or the adjacent "imperfect self-defense" and duress. *See Nwoye*, 824 F.3d at 1138. In self-defense in particular, "the law of

self-defense requires the defendant to swallow the sword of admission of the [injury]. This exercise is dangerous. In considering the evidence, much leeway will be permitted to defendant in proving his *state of mind* without contravening the laws of hearsay." *Taveras*, 570 F. Supp. 2d. at 493 (emphasis added); *United States v. Dobson*, 63 M.J. 1, 11 (C.A.A.F. 2005) (mental health evaluations are relevant to *both* self-defense prongs, but may "have particular import with respect to the second element, which involves the personal, subjective perceptions . . .").

For example in *Dobson,* the Appellant had multiple experts testify regarding a self-defense claim including external events (both present and past), how the accused's brain may have interpreted and reacted to events, and even "exculpatory expert testimony supportive of self-defense, both in terms of Appellant's role in [the death], and in explaining her subsequent fabrications, inconsistencies, and memory lapses." *Dobson*, 63 M.J. at 13; *see also United States v. Rose*, 28 M.J. 132, 135 (C.M.A. 1989). This is because "the law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight." *Tourlakis*, 738 F. Supp. 1136-37 (internal citation omitted); *see also United States ex rel. Ojeda v. Harrington*, (E.D. Ill. 2014) (Mem. Op.) (allowing expert testimony to discuss how people's mental state, both in general and as applied to the defendant, can misperceive threats in a

self-defense situation). This is in line with both R.C.M. 916(e)'s discussion and M.R.E. 104(e).

The analysis on how the brain interprets information when presented with unique life-threatening circumstances is not novel. *See Traxler v. Burt*, 2018 U.S. Dist. LEXIS 63689, *4-5 (W.D. Mich. 2018) (defense's expert's explanation in self-defense about trauma-induced disassociate stated provided the necessary foundation for the jury to conclude petitioner's later description was honest and reasonable). In *People v. Humphrey*, the California Supreme Court concluded that, "[t]he jury must consider [a] defendant's *situation and knowledge*, which makes the evidence relevant, but the ultimate question is whether a reasonable *person*, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm." *Id.* (citing *Humphrey*, 921 P.2d at 9 (emphasis original)); *see also Middleton v. McNeil*, 541 U.S. 433, 434 (2004) (Supreme Court case analyzing jury instructions where the defense called an expert to educate the panel, discuss clinical interviews with the accused, and give an opinion on how the accused's perceptions impacted self-defense). While some of these cases are regarding battered women syndrome or a potential diagnosis, the overall body of the law shows that the trial judge's cabining the defense to just "external stimuli" was erroneous.

Regarding the self-defense adjacent area of duress, "[t]he *Nwoye* decision, authored by now Justice Kavanaugh, explains the importance of "reasonableness" and how expert testimony helps "identify any aspects of the defendant's 'particular circumstances' that can help the jury assess the reasonableness of her actions." *Lopez-Correa v. United States*, 537 F. Supp. 3d 169, 187 (D.P.R. 2020) (quoting *Nwoye*, 824 F.3d at 1137).

In *Dingwall*, the 7th Circuit rejected limiting defense evidence to "only external, concrete factors unique to" the claimant like the military judge ruled in this case. *Id.* The Seventh Circuit concluded that "non-tangible psychological conditions that ostensibly alter the defendant's subjective beliefs or perceptions" were relevant. *Id.*[3] These can include areas like hypervigiliance, flight/fight/freeze, or even PTSD from the event as Dr. L testified.

The Ninth Circuit recently took the same approach rejecting the view that self-defense evidence can only be based on observations. *Lopez*, 913 F.3d at 821

[3] The Court went on to analyze other similar tests with both subjective and objective prongs in hostile-environment employment discrimination cases and civil cases against law enforcement for excessive force finding that those cases also allow for the considering of similar plaintiff/defendant related internal processes/psychological reactions in determining the objective prong. *Dingwall*, 6 F.4th at 756. "In all of these types of cases, expert testimony may inform a jury about the objective reasonableness of a person's response, especially to unusual circumstances beyond the scope of a typical juror's experience." *Id.* at 756-57.

(string cite omitted) (noting that "the vast majority of circuits reject that notion" that only external factors can be considered). While this testimony was covering battered women syndrome (BWS), the overall point was that more than just external observations should be allowed in testimony as the judge stated here. *See id.* Additionally, this type of testimony not only buttresses the elements of the defense, but is "also relevant to the related issue of rehabilitating a defendant's credibility." *Lopez*, 913 F.3d at 823 (citing *Humphrey*, 921 P.2d at 9

Therefore, the judge abused his discretion when he misstated the key reason the defense requested an expert and misstated the law on what the fact-finder could consider, which is more than just external stimuli and observations. Because of those errors and not citing any law on point, his two-paragraph ruling based solely on the evidence's relevance was erroneous. As one court aptly summarized it, "[t]he issue [at trial] was not whether the danger was in fact imminent, but whether, given the circumstances as [Appellant] perceived them, [his] belief was reasonable that the danger was imminent," – this makes expert testimony "more critical" to a defense case. *Paine*, 339 F.3d at 1199 (internal citation omitted). If Appellant had access to this testimony, his statement to CID claiming that he may not have been afraid could have been mitigated and explained in the appropriate context including potential PTSD, remorse, or other common factors.

APPENDIX C

Appendix C contains examples of Federal Circuit Court decisions that cite *Pierre* approvingly or employ a similar rationale (without citation) for *Pierre's* principles: (1) prior consistent statements are admissible if they have a rehabilitative quality relevant to the specific method of attack, and (2) must have relevance beyond mere repetition/showing consistency for consistency's sake.

1st Circuit: *United States v. Simonelli*, 237 F.3d 19 (1st Cir. 2001) (cites *Pierre* and a 7th Circuit cases for the same proposition).

2nd Circuit: *United States v.* Pierre, 781 F. 2d 329 (2d Cir. 1986).

3rd Circuit: *United States v. Frazier*, 469 F.3d 85, 89 (3d Cir. 2006) (string cite omitted) (discussing limiting principles of prior consistent statements and they may not be used "every time a witness's credibility or memory is challenged; otherwise, cross-examination would always transform the prior consistent statements into admissible evidence).

4th Circuit: *United States v. Ellis*, 121 F.3d 908, 920-21 (4th Cir. 1997) (discussion of multiple circuits' precedent that prior consistent statements sought to be used must have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony).

7th Circuit: *United States v. Harris*, 761 F.2d 394, 399-400 (7th Cir. 1985) (discussing *United States v. Juarez,* 549 F.2d 1113, 1114 (7th Cir. 1977) (When

part of an interview or report is used to impeach, "Prior consistent statements which are used in this matter are relevant to whether the impeaching statements really were inconsistent within the context of the interview,…").

9th Circuit: *United States v. Collicott*, 92 F.3d 973 (9th Cir. 1996) (discussion of precedent allowing for prior consistent statements to place the *same* statement into context and that the use must be more than to show consistency or repetition; it must actually rehabilitate the specific attack or assertion). .

10th Circuit: *United States v. Magnan*, 756 Fed. Appx. 807 (10th Cir. 2018) (The amendment adding romanette (ii) does not change the traditional "and well-accepted limits" on bringing prior consistent statements before the factfinder for credibility purposes, and "does not allow impermissible bolstering of a witness. [Appellant] did not attempt to 'attack[] [the witness' credibility] on another ground'—that is, he did not extract inconsistent statements or accuse the victims of misremembering —so admitting the statements would not rehabilitate the declarant's credibility.").

11th Circuit: *United States v. Drury*, 396 F.3d 1303 (11th Cir. 2007) (citing *Pierre* noting that a prior consistent statement can be used in certain instances to rehabilitate an attack "beyond merely showing repetition.")

DC Circuit: *United States v. Washington,* 106 F.3d 983 (D.C. Cir. 1997) (citing *Pierre*, 781 F.2d, at 333) ("prior consistent statements must have some rebutting force 'beyond showing that the witness had at an earlier time been consistent with his trial testimony.'").

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on July 24, 2025.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 8,945 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

3. Appellant's *Grostefon* matters comply with the page limit of Rule 21A because they are no longer than fifteen pages.

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