IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Private First Class (E-3) **TRENTON W. ORR** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20220547 USCA Dkt. No. 25-0041/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED BY NOT ALLOWING DEFENSE TO IMPEACH THE VICTIM WITH HER PRIOR INCONSISENT STATEMENTS

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866 (2021). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867 (a)(3) (2021).[1]

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

Statement of the Case

On October 28, 2022, an enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas, of two specifications of abusive sexual contact in violation of Article 120, UCMJ (2019) (R. at 816; Charge Sheet). The panel acquitted appellant of one specification of attempted sexual assault and one specification of sexual assault. (R. at 816). The military judge sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, twenty-six months of confinement, and a dishonorable discharge.[2] (R. at 884). On November 18, 2022, the convening authority approved the findings and sentence. (Action). On November 28, 2022, the military judge entered judgment. (Judgment).

On August 26, 2024, the Army Court affirmed the findings and sentence. *United States v. Orr*, ARMY 20220547, 2024 CCA LEXIS 366 (Army Ct. Crim. App. Aug. 26, 2024) (contained in App'x A).[3] Appellant was notified of the Army Court's decision. In accordance with Rule 19 of this Court's Rules of Practice and Procedure, on November 29, 2024, appellate defense counsel filed a Petition for

[2] The military judge sentenced appellant as follows:

Charge II, Specification 1	12 months
Charge II, Specification 2	14 months

Terms of confinement were to run consecutively. (R. at 884).

[3] On September 24, 2024, appellant requested reconsideration because the Army Court did not acknowledge whether it considered appellant's *Grostefon* matters. On October 1, 2024, the Army Court denied appellant's motion and issued a corrected decision reflecting consideration of appellant's *Grostefon* matters.

Grant of Review, while seeking leave to file the Supplement to the Petition for Grant of Review separately. Additionally, appellate defense counsel filed one motion for extension of time, which this Court granted, granting until January 7, 2025, to file the Supplement. The undersigned counsel hereby file the Supplement to the Petition for Grant of Review under Rule 21.

Statement of Facts

On June 18, 2021, appellant and Ms. MM were living as guests at the off-post residence of another soldier. That night, they and their hosts danced and drank heavily, MM to the point of vomiting. (R. at 353-56, 657-59).

A. MM's Statements to Military Police and SANE

A defense exhibit not admitted at trial revealed the following information. (Def. Ex. C for ID, which is also App. Ex. VIII-A). On the morning of June 19, 2021, MM told a military police investigator she vomited several times during the night and that appellant brought a trashcan into her bedroom so she could vomit into it. Appellant began to "fondle" her while she vomited. She lost consciousness after that, but she regained it when appellant put his penis in her mouth. After she regained consciousness, she rolled away, and appellant began to "digitally penetrate" her vagina. MM said nothing about appellant touching her vagina while she was asleep. (Def. Ex. C for ID, p. 1).

The same defense exhibit revealed that on the afternoon of June 19, 2021, another military police investigator spoke to the sexual assault nurse examiner (SANE) who treated MM. MM told the SANE that while she vomited, appellant touched her vagina. She pushed him away and fell into a "deep sleep," but she awoke when she felt something on her mouth that she believed to be appellant's penis, and that she felt his "hand on her stomach." Again, MM said nothing about appellant touching her vagina while she was asleep, only that he touched it before she fell asleep. (Def. Ex. C for ID, p. 2).

B. MM's Statement to CID

Six months later, in January 2022, MM gave a statement to CID. This statement was neither admitted at trial nor marked as an exhibit, but it served as the basis for two specifications at the Article 32 preliminary hearing. (Article 32 Report, pp. 2-3, referencing Pros. Ex. 6, Bates # US v. Orr000071). MM told CID she never saw appellant come into the room when she was vomiting, but she felt a hand touch her vagina. She said she was "in and out of consciousness" and that "every time she felt someone touch her, she would open her eyes but not see anyone." As in her earlier statements, MM never said she was asleep when her vagina was touched.

C. MM's Inconsistent Testimony at Trial

Nine months later, in October 2022, MM testified at trial in a manner inconsistent with her earlier statements. On direct, she repeated that appellant touched her vagina while she vomited, and that she fell asleep. But this time she said she fell asleep with appellant's hand on her vagina, and that she woke up because appellant was rubbing her vagina. (R. at 617-20). MM further testified that she fell asleep a second time, and that she woke up after that with appellant's penis touching her mouth while his other hand was "still" touching her vagina. (R. at 623-25). In response to a leading question from the Special Victim Prosecutor (SVP), MM agreed that appellant touched her vagina while she slept. (R. at 650).

D. The Military Judge Prevented Defense from Impeaching MM

On cross, defense counsel confirmed the details of MM's allegations, including when she was asleep and when appellant touched her vagina. (R. at 660-62). Then, defense counsel attempted to impeach MM with her prior inconsistent statements. (R. at 662). The SVP objected on the grounds of hearsay. (R. at 662-63). The military judge sustained the objection, stating "I'm not sure you can offer hearsay for impeachment in that method. I understand what you're trying to say. The objection is sustained based on your method." (R. at 663). The panel was never allowed to hear about MM's prior inconsistent statements, in which she said appellant touched her mouth and stomach while she slept, but not her vagina.

E. The Panel Returned Mixed Findings

The panel convicted appellant of two specifications of abusive sexual contact (hand touching vulva while incapacitated and asleep), but it acquitted him of one specification of attempted sexual assault (penis to mouth) and one specification of sexual assault (penis to mouth). (R. at 816).

Reasons to Grant Review

The military judge erroneously applied Military Rule of Evidence (Mil. R. Evid.) 613(a), imposing upon defense counsel a "method" not required by the rule and not specified by the military judge. This error prevented defense from impeaching MM with her prior inconsistent statements. In a case like this one, where the panel's mixed findings indicate it did not believe everything MM said, there is a reasonable possibility the wrongfully excluded impeachment contributed to the findings of guilty.

Additionally, this court should grant the petition because, despite Mil. R. Evid. 613(a)'s common use at trial, there is little case law interpreting it. It does not appear that this Court has interpreted Mil. R. Evid. 613(a)'s foundational requirements since its predecessor did so in *United States v. Callara*, 21 M.J. 259 (C.M.A. 1986). In *Callara*, this Court's predecessor analyzed the common law's requirement that the witness's attention be directed to the time and place of the statement, and the person to whom it was made, before confronting the witness

with the inconsistency. *Id.* at 624 (quoting S. Saltzburg, L. Schinasi, and D. Schlueter, *Military Rules of Evidence Manual* 311-12 (1981)). This Court's predecessor then recognized that the current version of Mil. R. Evid. 613(a) abandons the common law foundational requirements. *Id.* at 625.

Standard of Review

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. *United States v. Sullivan*, 70 M.J. 110, 114 (C.A.A.F. 2011) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)). An abuse of discretion occurs when the military judge erroneously applies the law. *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (quoting *United States v. Donaldson*, 58 M.J. 477, 482 (C.AA.F. 2003)).

Law and Argument

The military judge erred by preventing the defense from doing what Mil. R. Evid. 613(a) allows, impeaching MM with her prior inconsistent statements. This error was not harmless because, as evidenced by its mixed findings, the panel did not believe everything MM alleged. Additional doubt about MM's credibility may have resulted in additional findings of not guilty.

A. Mil. R. Evid. 613(a) Does Not Impose a Particular Method

At trial, MM testified that appellant touched her vagina while she was awake and vomiting, that he woke her up by continuing to touch it after she fell asleep,

and that when she woke up, he was still touching it while he touched her mouth with his penis at the same time. (R. at 617-20, 623-25).

This testimony did not match MM's prior statements to military police and the SANE, in which she reported appellant touching her vagina while she was awake, and touching her mouth with his penis while she was asleep, but which said nothing about him touching her vagina while she was asleep. (Def. Ex. C for ID, pp. 1-2). This testimony also did not exactly match her statement to CID, in which she said she was "fading in and out of consciousness" while appellant touched her vagina, but in which she did not claim to have fallen asleep outright or to have been awakened by a touch to her vagina. (Article 32 Report, pp. 2-3, referencing Pros. Ex. 6, Bates # US v. Orr000071).

On cross, defense counsel attempted to impeach MM with her prior inconsistent statements, but the military judge did not allow it, disapproving of defense's "method." (R. at 662-63).

Mil. R. Evid. 613 governs impeachment by prior inconsistent statement. "When examining a witness about the witness' prior statement, a party need not show it or disclose its contents to the witness." Mil. R. Evid. 613(a). The military judge erred because Mil. R. Evid. 613(a) allows counsel to question a witness about a prior statement as long as the contents of the statement are disclosed to

opposing counsel upon request; the rule does not require counsel to show the statement to the witness.

"Impeachment of a witness during cross-examination with a prior inconsistent statement is a tool of a skillful questioner and is recognized as a basic rule of evidence to challenge the credibility of a witness." *United States v. Damatta-Olivera*, 37 M.J. 474, 477 (C.M.A. 1993) (citing *United States v. Hale*, 422 U.S. 171 (1975)). The rationale of Mil. R. Evid. 613 "is to permit the examiner to use a prior statement of a witness . . . to expose the liar." *Id.* (citing Fed. R. Evid. 613, Commentary, J. Weinstein & M. Berger, 3 *Weinstein's Evidence* P 613[02] at 613-10).

Contrary to the military judge's belief, Mil. R. Evid. 613(a) does not impose any "method" beyond what defense counsel did, which is to ask the question. While some counsel may choose to lay more of a foundation as a matter of trial tactics, "it will no longer be a condition precedent to admissibility to acquaint a witness with the prior statement and to give the witness an opportunity to either change his or her testimony or to reaffirm it." *Manual for Courts-Martial, United States* (2016 ed.), Mil. R. Evid. 613 analysis at A22-58 (noting that the current version of M.R.E 613(a) "eliminates the foundation requirements" found in the 1969 Manual).

B. The Error Was Not Harmless Beyond a Reasonable Doubt

This Court reviews the prejudicial effect of the erroneously excluded evidence de novo. *United States v. Jasper*, 72 M.J. 276, 282 (C.A.A.F. 2013) (quoting *United States v. Tearman*, 72 M.J. 54, 62 (C.A.A.F. 2013)). When a military judge improperly limits an accused's opportunity to present exculpatory evidence through cross-examination, that error is constitutional, and the question is whether the error was harmless beyond a reasonable doubt. *Jasper*, 72 M.J. at 282 (quoting *United States v. Collier*, 67 M.J. 347, 355 (C.A.A.F. 2009)). The government must show that "there is no reasonable possibility that the error contributed to the contested findings of guilty." *Id.*

The military judge's error was not harmless beyond a reasonable doubt. The panel never learned that MM had not always alleged appellant touched her vagina while she slept. There is a reasonable probability this contributed to the findings of guilty. Despite any perceived strength in the government's case, the panel did not accept everything MM alleged as truth, as evidenced by the mixed findings. The panel doubted the mouth touch occurred, acquitting appellant of both mouth touch specifications. Given the opportunity to further evaluate MM's credibility through her prior inconsistent statements, the panel may have acquitted appellant of further specifications.

Conclusion

Appellant respectfully requests this Court grant his petition for review.

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Appendix A: Army Court Decision

CORRECTED COPY

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, PENLAND, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class TRENTON W. ORR
United States Army, Appellant

ARMY 20220547

Headquarters, 1st Armored Division and Fort Bliss
Robert L. Shuck, Michael E. Korte and Matthew S. Fitzgerald, Military Judges
Colonel Andrew D. Flor, Staff Judge Advocate

For Appellant: Sean C. Timmons, Esquire (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Kalin P. Schlueter, JA; Captain Patrick S. Barr, JA (on brief).

26 August 2024

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant*, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

James W. Herring, Jr.

JAMES W. HERRING, JR.
Clerk of Court

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*Corrected

Appendix B: Matters Submitted Pursuant to *United States v. Grostefon*

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 matters:

I. WHETHER THE MILITARY JUDGE ERRED BY ORDERING THE SENTENCES OF CONFINEMENT TO RUN CONSECUTIVELY WHEN EACH SPECIFICATION INVOLVED THE SAME VICTIM AND THE SAME ACT OR TRANSACTION

II. WHETHER THE CONVICTION OF SPECIFICATION 1 OF CHARGE II IS LEGALLY SUFFICIENT WHEN THE GOVERNMENT DID NOT PRESENT EXPERT TESTIMONY ABOUT MM'S INCAPACITY

III. WHETHER THE SPECIAL VICTIM PROSECUTOR MADE IMPROPER ARGUMENT

During closing argument, the SVP did the following: (1) the SVP vouched for the victim's credibility by arguing "The victim came up here, walked over the witness stand, raised her right hand under penalty of perjury, and swore to you her version of events." (R. at 761); (2) the SVP injected his personal beliefs into the trial by arguing "If you believe what I'm saying, then the government's satisfied that element of the offense." (R. at 764); (3) the SVP misrepresented the law by arguing "A vomiting victim is incapable of appraising the nature of the conduct at hand. A vomiting victim is physically incapable of declining participation." (R. at 764.); and

(4) the SVP inflamed the passions of the panel by comparing attempted sexual assault to attempted murder when he argued "I can make multiple analogies, but I'll just give you a really quick one. If someone attempts to murder someone. Shoots them in the body but that person just doesn't die, it doesn't mean that they're not free and clear. They're still guilty of a very serious offense. They're just guilty of attempted murder versus actual murder. It's the same analogy that applies here." (R. at 769).

IV. WHETHER APPELLANT WAS DENIED A FAIR TRIAL WHEN A PANEL MEMBER FELL ASLEEP DURING THE PRESENTATION OF EVIDENCE

LTC RM, a panel member, fell asleep during the presentation of evidence. (R. at 510).

V. WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN LAW ENFORCEMENT FAILED TO COLLECT RELEVANT EVIDENCE

RD, a registered nurse and SANE, collected DNA evidence from appellant pursuant to a court order. (R. at 448, 481). RD did not take swabs of appellant's hand or collect scrapings of appellant's fingernails even though she knew appellant was alleged to have touched MM's vagina with his hand. (R. at 488). This evidence could have been exculpatory if MM's DNA was not found on appellant's hands or nails.

Certificate of Filing and Service

I certify that a copy of the foregoing in the case of *United States v. Orr*, Crim. App. Dkt. No. 20220547, USCA Dkt. No. 25-0041/AR, was electronically filed with the Court and Government Appellate Division on January 7, 2025.

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