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	BRIEF ON BEHALF OF THE APPELLANT Crim. App. Dkt. No. 20230168 USCA Dkt. No. 25-0181/AR

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

Certified Issues

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INCORRECTLY ADMITTED TWO SUPPOSED PRIOR CONSISTENT STATEMENTS BY MISSTATING 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."

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

An enlisted panel convicted Appellant, Private First Class Donte Brown, contrary to his plea, of one specification of aggravated assault with a dangerous weapon upon an intimate partner in violation Article 128b, UCMJ, 10 U.S.C. § 928b. (JA17-19).[2] At judge alone sentencing, the court sentenced Appellant to be reduced to E-1, forty months confinement, and a dishonorable discharge. (*Id.*).

On April 23, 2023, the convening authority approved Appellant's request for waiver of automatic forfeitures. The judge entered judgment on May 2, 2023.

On May 09, 2025, the Army Court issued a Memorandum Opinion affirming the finding and sentence. This Court granted Appellant's Petition on August 20, 2025 and ordered briefs.

[2] The military judge dismissed Specification 2 (alleged strangulation) after findings were announced due to the panel's use of exceptions and substitutions which created multiple legal concerns. (JA396-413, 476).

Summary of the Statements

Three out-of-court statements are relevant to the Issues:

(1) July 2nd: KB's (victim) first statement provided minutes after the incident to two Emergency Medical-Technicians (EMTs) and a fire-fighter in an ambulance while parked outside the residence. Appellant impeached KB's in-court testimony with this statement in multiple ways regarding Specification 1.

(2) July 3rd: KB's second statement[3] provided to Army CID Agent (SA) GC the next day. This was at the hospital and informal/not-recorded. SA GC informed KB she was denied custody while CID investigated *before* the statement. Appellant impeached KB with this statement for both Specifications.

(3) July 8th: KB's third statement, which the prosecution took excerpts and created Pros. Ex.'s (PE) 26 and 27 ("Exhibits"), are the prior consistent statements. PE 26 addressed Specification 1 and PE 27 addressed Specification 2. This was a formal/recorded CID statement. When KB made the statement, she did not have custody, and volunteered for this statement after retaining a victim advocate and an attorney. After making this statement, KB was awarded given custody.

[3] KB made another statement to a registered nurse (RN) on July 2nd between (1) and (2). (JA560-562). While in the record, neither side used it as a basis for the Certified Issues or relied on it in closing.

Summary of the Argument

As *Tome* and *Finch* make clear, amendments to both the Federal and Military Rules of Evidence did not make any out-of-court statement/hearsay admissible that was not already admissible – the amendments simply changed how those statements could be used as substantive evidence. With that baseline, the 200-years of precedent provides the limits and examples the military judge should have applied in this case. As such, the judge committed a series of errors by misapplying the rules surrounding prior consistent statements.

The military judge erred by not requiring the Government to articulate which specific attack under MRE 801(d)(1)(B) or how PE 26/27 would repair Appellant's attack with the July 2nd EMT statement; he never found what rebutting force the statements had beyond mere repetition. He further erred by admitting the Exhibits under both M.R.E. 801(d)(2)(B)(i) and (B)(ii) based on the same line of attack in violation of *Finch*/*Ayala*. Highlighting this error, he did so while citing *Finch*.

The judge further erred by finding the July 8th Exhibits were actually consistent *given the specific point of attack* to KB's in-court testimony where she denied *any* possibility she pointed a firearm at Appellant; she *testified* she purposefully/intentionally never pointed the loaded handgun in Appellant's direction while telling him she did not want to argue.

The judge erred by never finding *either* initial "refined criteria" regarding relevance or high probative value. He never found the July 8th Exhibits were relevant *to repair the damage done by the July 2nd statement* to the EMTs or how KB's formal/prescheduled CID statement was "highly probative" given its belated timing, KB's motive, and KB obtaining/bringing an attorney and advocate.

Under (B)(i), the judge failed to identify: when KB's motive to fabricate arose; the motive itself; and that a motive can be continuous in light of *Frost's* identical "custody" motive (despite government counsel *repeatedly* stating both motives involved custody). The judge then erred by failing to find the July 8th Statement was crafted after the motive arose, making PE 26/27 inadmissible.

Under (B)(ii), the judge failed to link the Exhibits to any rehabilitative quality beyond repetition since they did not show the July 2nd/EMT statement did not take place. He also erred by not requiring the Government to articulate any example of Appellant employing "another ground" attack. HE erred by recognizing "inconsistency" as a separate "other ground" when the "context" was *not from within the same statement*. Precedent dictates "inconsistency" is generally not "another ground" in itself; inconsistency is usually *the product of* a motive, faulty memory, or the robbing of context. But, even if "inconsistency" could be "another ground," the judge erred by finding any "inconsistency" attack was not part of KB's motive: KB's motive *is why* she was making inconsistent statements.

Statement of the Facts[4]

A. AV brandished a loaded-gun and Appellant responded with a pocketknife

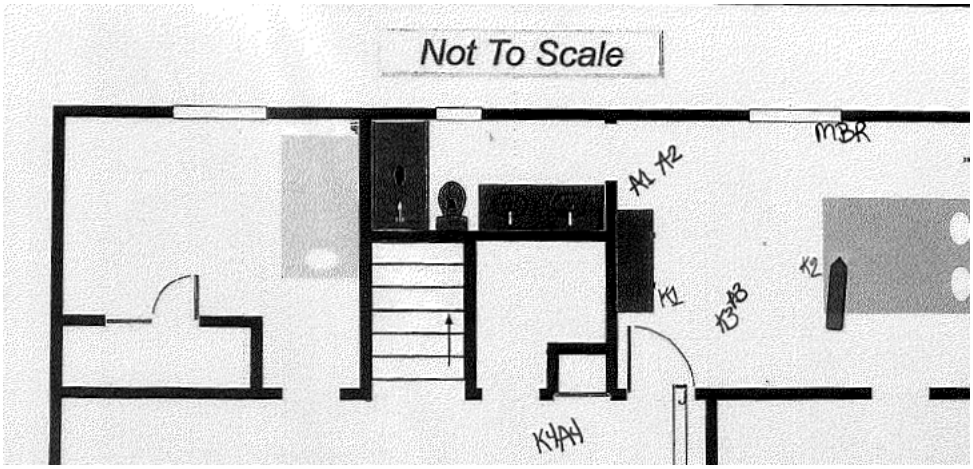
Appellant and KB were previously married, divorced, and then remarried and had children. (JA39-41). The sole specification is a result of a single incident where only Appellant and KB were present in their upstairs bedroom.

On July 2, 2022, KB testified Appellant woke up perturbed because he learned he had to attend a field exercise. Instead of running errands with her as she wished, he opted out of everything. (JA042-50). While Appellant showered in their upstairs master bathroom, KB continued to lecture Appellant about running errands with her/the family and attend July 4th events. (*Id.*).

KB testified that when Appellant responded apathetically as he dressed by their dresser (across from the foot of their bed (JA431)), she became more upset, voiced her displeasure, and started placing items in her purse (located on the bed). She testified Appellant said he no longer wanted to be married – creating child custody concerns. (JA46-49, 54). This happened as KB had yelled at the children, who were in other rooms, to get ready while she was grabbed her gun. (JA49-54).

[4] The Facts are taken from the first-responders' testimony, KB's initial statements before her "motive" and retaining a lawyer, and statements against interest during testimony. Her later exculpatory testimony and inconsistencies are discussed throughout.

KB's firearm was in the same dresser (K1 below (JA430-32)) and was loaded *with* a round chambered. (*Id*; JA052-55, 081-83, 108-09, 116-17). KB then turned to her right after obtaining the gun from the dresser positioning her facing Appellant (located at A1/A2), approximately four feet away. (*Id*; JA451). KB was in-between Appellant and the only exit. (*See id*; JA072-75).[5]



Although KB omitted these details on direct and her July 8th statement, she admitted on cross that in addition to divorce, right before she picked up the loaded pistol, Appellant brought up that KB had recently been caught sending provocative photos to a male "friend." (JA088, 094-97, 124). Having just heard Appellant wanted to separate and reminded of her indiscretions, KB pointed the weapon at Appellant's face (JA199-200, 332-34, 338-39)[6] and accused him of being a

[5] The door's threshold was further restricted as KB placed a mattress-box-spring in it. (JA430, 432, 437).

[6] These are a few of the emphasized points that later changed/were omitted after KB is informed that she lost custody of the children. (JA274, 295-297, 306, 415).

homosexual (JA124). Appellant froze, with his clothing drawer still open (JA431-33, 415), as he was still dressing. (*Id.*).

In rapid succession (JA117-18), KB held the gun at Appellant's face, and then *started* turning towards the bed while using her thumb to hit the release to drop the weapon's magazine, but *simultaneously* was slashed in her upper left back/shoulder (the area closest to Appellant if she was still in mid-turn).[7] Appellant picked a pocketknife that KB had left opened on the same dresser the night before (JA055-56, 69, 85) despite his own gun being in the same dresser (JA314).

After the first contact, KB testified she dropped the firearm on the bed (*see* JA438-40, 442-45), stood still in shock, and then slowly backed up towards the door as Appellant approached and then, after struggling, lodged the knife in her shoulder *before* she exited the bedroom, fought with Appellant, backed into the stair's railing, and awoke at the bottom of the stairs with Appellant. (JA52-58, 120-23). In KB's July 2nd and 3rd statements, KB indicated only the initial/mid-turn slash, the two struggling over the knife immediately, and it ending up lodged in her upper shoulder when the couple both fell down the stairs together. (JA199-200, 232-34, 269-70, 332-34, 338-39).

[7] (JA199-200, 332-34, 338-39). This part of KB's two statements to the EMTs and SA GC (July 3rd) vary significantly from KB's in-court testimony discussed *infra*.

At the bottom of the stairs, KB ended up on the ground with Appellant splayed on top of her. (JA 199-200, 256-258, 261, 269-70, 332-34, 338-39). KB *later* told CID (July 8th) that Appellant's hands were on her neck, but she could breathe and talk.[8] (JA259-61, 269).

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

After being alerted by Appellant's children, the neighbor's-wife went to Appellant's home. (JA126-128). The neighbor's-wife got to the front door as KB was "coming towards the door;" "[Appellant] was behind her kind of going into the kitchen area."[9] (JA130-31, 140-41).

As she was arriving, the neighbor's-wife heard Appellant asking, multiple times, "Why'd you have to point the gun at me." (JA131, 138). No evidence indicated Appellant saw the neighbor's-wife when asking about the gun; Appellant was not holding KB down, strangling her, or restraining her at that time. (*Id.*).[10]

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8 The alleged strangulation specification was dismissed. KB testified at trial that she was strangled.

9 The neighbor's-wife impeached KB's testimony wherein KB stated she blacked out and awoke at the foot of the stairs with the neighbor's-wife's leg directly next to her face and the wife helped her up; not Appellant. (JA60-61).

10 Since the neighbor's-wife indicates Appellant was in the kitchen area, he would have had to seen around/through an exterior wall (*See* JA450, 418) or through KB and the previously closed door to know the neighbor's-wife was approaching the residence when he asked KB why she pointed the weapon.

KB understood Appellant, responded, and argued back stating Appellant stabbed her. (JA130-31, 140-41).

The neighbor's-wife walked with KB and Appellant to their SUV, then left at KB's request, to get Appellant/KB's youngest child, who was still inside. (JA132, 143). Appellant tended to KB, including holding a cloth he grabbed from the kitchen against the cut. (JA133, 147, 177, 186). Appellant later attempted to take KB to the hospital, but the neighbors refused to allow him to do so. (JA133). Both neighbors (and KB's testimony) recalled hearing Appellant ask why she pointed the gun at him. (JA61, 131, 138, 161, 167, 179, 187).

Once first-responders arrived, Appellant was "tending to [KB]." (JA177-78). A military policemen(MP) questioned the neighbor while, a fire-fighter talked to Appellant. Appellant admitted to the fire-fighter, and seconds later, the MP, that he stabbed KB because she pointed a weapon at him. (JA179, 187).

C. The Three Statements: (1) To the EMTs at her home, (2) to CID at the hospital one day later, and (3) to CID in a scheduled statement interview six days later.

1. KB's statements to the EMT on July 2nd included she pointed the gun at Appellant's face but it was unloaded and the cut happened while turning.

The EMTs treated KB and took her account while parked in front of Appellant/KB's residence. The fire-fighter was in the ambulance and took notes. (JA338-39). KB told the EMTs she pointed the gun at Appellant's *face* and then

he cut her. (JA199-200, 332-34, 338-39). Although KB's testimony impeached this fact, KB repeatedly told the EMTs the gun was unloaded when she pointed it at his face. (*Id.*). KB did not claim Appellant made any threats and the cut happened while turning with the gun.[11] (*Id.*).

KB also repeatedly asked where the children were and said Appellant could not have access to them; KB even asked to make a Last Will to ensure her kids were not with Appellant despite reassurances the injury was not life-threatening. (JA99-100, 132,141-43, 171-72, 201-03). One EMT remembers KB also saying she was strangled or choked. (JA199-200, 204-05). Both EMTs described KB as alert, oriented, and responsive. (JA211-13, 340-41).

[11] In trial, KB claimed Appellant something sinister while her back was turned and she was methodically unloading/double-checking the gun such as "you shouldn't have ejected the magazine because you'll need all of the bullets." (JA55, 122). She testified she argued back, claimed she did not want to argue, questioned his sexuality, and after she turned back towards the bed, Appellant drug the knife on the dresser making a dragging noise before attacking her completely from behind. (JA52-58, 120-25). This somewhat matched her recorded July 8th attorney attended interview.

The EMTs then transported KB to Fort Riley's hospital.[12] While there, an RN attempted to stabilize her, but could not remove the knife. (JA219). The RN indicated KB said she woke up with Appellant on top of her, it turned into a fight, and she got stabbed. (JA216-17). KB was then transferred to another Hospital and kept overnight for observation. (JA226). SA GC arrived the next day unannounced.

2. KB's July 3rd statement, after learning she lost custody, was that she never pointed the gun anywhere in Appellant's direction, she was only stabbed once, and Appellant only pulled her shirt, she did not recall being strangled.

The day after the affray, SA GC interviewed KB. This was not scheduled, and SA GC's partial intent was to explain the custody situation to KB. (JA229-30, 234-35, 254-55, 260-62, 270). After being told she would not have access/custody *until CID* determined the aggressor, (*Id.*) and after KB heard from her mother and the neighbor's-wife that the children were removed (JA141-42, 203), KB told SA GC she did not recall being strangled, and instead, Appellant only grabbed her shirt's collar. (JA258-59, 262). She did not describe a second stabbing, but said the

[12] Both neighbors noted the time-length the ambulance was parked, and that the neighbor's-wife and the MP had to go into the residence to get KB's purse, which was on the bed *next to* the gun. (JA140-41, 183-85). The MP did not see an ejected magazine, despite its *later* placement directly next to the purse (JA438-440), which will be discussed in the prejudice analysis. (JA183-85, 187-88, 190) (JA188) ("[JA 438-440] is not the scene as [I] saw it when [I] walked into the bedroom.").

knife ended up lodged in her shoulder after the fall down the stairs. (*Id*; JA234, 269). She denied pointing the gun *anywhere* in Appellant's direction. (JA234).

Later, KB obtained an attorney and victim advocate and volunteered for a second interview which was scheduled for July 8th. (JA84; *see* JA452-53).

3. KB's formal July 8th interview accompanied by both her victim-advocate and an attorney.

According to SA GC, KB's July 8th statement "changed" in "multiple ways." (JA259-60). First, KB said she did not point the loaded gun at Appellant's face, but said she may have in passing[13] him while turning to the bed. (JA259-60, 268-69, 452).[14]

Second, KB claimed Appellant had his hands on her neck, but she could breathe, talk, did talk, and did not need to gasp for air. (JA259-63, 452).

Third, KB claimed she methodically ejected and double-checked the bullet *and* magazine while facing away, Appellant made his sinister threat, and then the two argued even more before the knife came into play. (JA232-234).

[13] "Flagging" is inadvertently pointing the barrel of a weapon at someone. (JA328).

[14] These exchanges, which were in PE26/27, contain demonstrations and significant leading/suggestions from SA GC. SA GC was a first assignment CID agent who deferred on other interviews due to his inexperience. (JA223, 227-28).

D. After her formal statement, KB was awarded sole custody.

Shortly after her July 8th interview, KB re-acquired custody. (JA101-03, 270). Appellant was denied custody and the two continued to fight for custody throughout their divorce. (JA107).

E. The defense's trial theme was clear, KB pointed a gun at Appellant's face and only altered it when she learned it could affect custody.

The defense's case for this Specification was three pronged: (1) Appellant acted in self-defense when KB pointed a loaded/chambered pistol at his face while she was angry because he reminded her of her indiscretions and potential divorce; (2) KB confessed to pointing the weapon at Appellant's face, only changing the gun's details from her July 2nd Statement after learning she lost custody. KB's admission was accurate as no one would admit to pointing a firearm at another's face if it was not true; (3) If Appellant had wanted to kill KB and her back was turned to him (as she testified), Appellant would have stabbed her in the neck/organs with a thrust versus a flailing swipe and she wouldn't have been able to turn and resist (July 3rd statement), or as she testified, pause to reflect, turned towards Appellant, backed-up towards the door, and only then did Appellant re-attack. To the contrary, after the defensive swipe, KB immediately grabbed at the knife since she was only mid-turn, the two struggled for control out the door to the stairs, and fell where the knife became lodged in her shoulder (July 2nd and 3rd statements). This is why there is a lack of significant blood at the top of the stairs

despite testifying she backed up, with two open wounds, until she felt the railing/wall touch her back. (JA122)

Custody was always the reason for the evolution of KB's explanation. (*Compare* R. JA34-37 *with* JA370-71). This was highlighted in the defense's cross-examination of virtually every government witness (JA78-84, 98-100, 103-107, 137, 172, 200-203, 254-255, 318-19) and often was the first topic addressed with each witness. (*See, e.g.,* JA78-84, 254). For instance, KB admitted that in the ambulance to the EMTs she was screaming "Where are my kids." (JA98-99, 201-03).[15]

The government had to adjust its strategy to respond to the custody motive. (JA110-12, 148-51, 201-03, 229-30). Custody was so significant, the government had SA GC explain what he told KB/how the process worked. (JA261-62). In doing so, SA GC admitted that he *personally* was part of the group that would make the recommendation to the judge and had told KB about that. (*Id*.; JA270).

The defense extensively highlighted custody in closing (*see, e.g.,* JA370-374) and opening. (JA31-35); (JA037) ("as long as [KB] is the victim in this case, she gets to see her children")).

[15] KB's unsworn statement highlighted the effect custody still had: "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." (JA478-79).

> And I'm going to ask you now to pay close attention to [KB]'s 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?

(JA37-38). The defense answered that question throughout its case and directly closed the loop/answered that question in closing. (JA370-71).

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

At trial KB testified that she was strangled, and not only did she *not* point the *loaded* gun at Appellant, but that she *never said* to the EMTs that she pointed the gun at Appellant and that she did not tell SA GC that she could not recall being strangled. She was confronted with each impeaching area of the July 2nd and 3rd statements. (JA81-88). She denied ever making those comments.[16] (*Id.*)

On SA GC's Direct, the government authenticated PE 26 which contained two segments from the July 8th video-recorded statement. (JA236-37). During an Article 39(a), the defense attacked both PE 26's probative value and its prejudicial effect in multiple ways. The defense invoked both M.R.E. 403 and the caselaw that the mere repeated telling of story is not relevant and has no probative value. (JA238)) ("its our position the agent has already testified to what KB stated . . . so

[16] The defense's cross of SA GC lays out the timeline of the July 3rd/8th interviews and where they were inconsistent in a short sequence. (JA256-260).

we're not sure what the video adds to that testimony."). After starting its initial objection, the judge re-characterized that point as "only a cumulative objection" and "nothing to do with the prior consistent statements" themselves; it was purely M.R.E. 403. (JA239).

When the defense attempted to explain, the judge interrupted and said the government's method "is an appropriate way to do it under the case law" and provided examples of what the government *might have* been doing *before* the government even made a proffer. (*Id.*) ("For example, a loss of memory or something along those lines, and the case law is also very clear that, again, the government at least on this part is doing it correctly. . ."). [17]

The judge continued probing the defense to explain its objection *before* the government even offered *any* ground for admissibility. (JA239). When the defense asked "to hear the government's proffer on what - -" the judge again interrupted and said the Government "would eventually have to make a proffer" while laying

[17] The judge made efforts to follow the law, but in his effort to get this area correct, ended up repeatedly interrupting, assuming what the government may be doing, and made pronouncements before either side explained its positions. These well-intentioned actions diverted the litigants' conversation and impacted objections and the proponent's proffer. (JA238-39, 242, 249-50). *Cf., United States v. Chancellor*, 2025 CCA LEXIS 443, *10 n.5 (A. Ct. Crim. App. Sept. 12, 2025) (Mem. Op.) (discussing that the appellate court would not penalize an Appellant for not fully explaining his positions when the military judge interrupted); *id.* at *14 n.7 (judges should be careful to not inappropriately shape the case for litigants).

out more of the foundational requirements on his own. (*Id.*). After the government identified PE 26's specific time-hacks, the judge realized he "made a couple of assumptions" and had not heard under what M.R.E the government was offering the hearsay. (JA241).

The government provided an appellate exhibit to support its arguments for the July 8th statement's admission. (AE. XXXI-XXXII)(AE).[18] After the government submitted AE XXXI, but before it could discuss either romanette, the judge again expounded on the state of the law and asked the government "is that your first basis you're seeking to introduce" the statement. (JA242).[19]

When Appellant was asked to explain its objection, Appellant noted the government was "relying on the wrong motive to fabricate" because the motive

[18] AE XXXI is a bench-brief on romanette (i). (JA463-64). AE XXXII is over romanette (ii) but references romanette (i) arguments. (JA465-66). The judge seemingly applied both appellate exhibits to each of the Exhibits since he never asked the SVP to provide an explanation or "other ground" when the government later offered PE 27. (JA264-270).

[19] A similar exchange took place when the government mentioned romanette (ii). The judge *sua sponte* listed "charges of inconsistency or faulty memory as two examples" before the government ever verbally mentioned "another ground." (JA245-46).

was continuous. (JA249).[20] Appellant argued PE 26 was not consistent on the specific points of attack. (*Id*.). The defense confirmed it was "objecting to it coming into evidence as a prior consistent statement" "under both grounds" as well as under M.R.E. 404(b). (JA250).

In App. Ex. XXXI covering M.R.E. 801(d)(1)(B)(i), the government cited *Frost* and argued that KB filed for divorce in late July attempting to get full custody, so the July 8th statement was before the custody petition. (JA463-64).

The government then orally offered PE 26 under (B)(ii) claiming it rebutted that KB was inconsistent. (JA240, 244-246). After the defense countered regarding the government's "wrong motive," the government conceded that KB being informed of losing custody was the defense's theory, but the Government maintained custody from a divorce proceeding was different. (JA244).

The government then provided App. Ex. XXXII covering (B)(ii). (JA246-47). However, even in its written explanation for "another ground," it conflated the "other ground" with recent fabrication: The implication "is KB is *embellishing her testimony* and attempting to present herself in a light more favorable to the

[20] The motive "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." (*Id.*)

fact-finder." (JA465). The government wrote "faulty memory," but did not provide any examples. (*Id*; JA249-50). The government wrote that PE 26 "plac[ed] the purpo[rted] inconsistencies in context." (JA466) (cleaned up). The defense disputed any attack on faulty memory indicating any inconsistency was due to KB intentionally fabricating for custody.

The judge ruled PE 26 admissible under *both* romanettes (i) and (ii). (JA251-52). The judge found, without stating the motive or the timing, that PE 26 met (B)(i). (*Id.*). He found under romanette (ii), KB was attacked "through inconsistency"; he did not find an attack on faulty memory. (JA252). The judge did not explain how PE 26 rehabilitated the attack from KB's EMT statement or made it more likely the EMT statements was not made. The judge did not mention M.R.E. 403. (JA252-53).

After publishing PE 26, the prosecution continued its direct and discussed both the July 3rd and July 8th interviews regarding strangulation. (JA261-264). The prosecution then offered PE 27. (JA264). In another Article 39(a), government counsel proffered "the same basis as the previous discussion as far as prior consistent statements regarding the strangulation only this will be focused more on [romanette] two. But I think both basis would apply in that interview where she did discuss in detail how she was strangled." (*Id*.).

The judge did not ask for any other explanation. (JA265). The defense objected pointing out how the statements were not consistent on the specific line of attack and PE 27 was not even consistent with SA GC's brief testimony about what KB said on July 3rd which is where the inconsistency attack came from regarding strangulation. The judge responded "there's two grounds, right? At least under (ii), inconsistency or bad memory." (JA266). After clarifying that the defense objected under both romanettes, he ruled: "I find that all five prongs, again, have been met . . . it is consistent with her in-court testimony, it has been attack on another ground, *either* by inconsistency *or* fault memory, and it does tend to rehabilitate her on the bases that she was attack." (JA266)(emphasis added).

Standard of Review

This court reviews a judge's decision to admit evidence for an abuse of discretion. *Frost*, 79 M.J. at 109. Once error is identified, the government must demonstrate the erroneous admission was harmless. *Id.* at 111 (citing *Flesher*, 73 M.J at 318).

Law and Discussion

A. Hearsay and Prior Consistent Statements – Relevancy and Probative Value Based on Actual Rehabilitation, Not Repetition.

Hearsay is an out-of-court statement offered to prove the truth of the matter. Mil. R. Evid. 801(c)(1)-(2); *United States v. Ruiz*, 2025 CAAF LEXIS 656, *9, __ M.J.__ (C.A.A.F. Aug., 8 2025). "Unless such a statement meets at least one of the specific and time-tested exceptions, the general rule is that hearsay is inadmissible." *United States v. McCaskey*, 30 M.J. 188, 190 (C.M.A. 1990); Mil. R. Evid. 802.[21] However, a prior consistent statement made by a declarant-witness is not hearsay if certain criteria *and* admissibility requirements are met. *McCaskey*, 30 M.J. at 188-89; *United States v. Adams*, 63 M.J. 691, 696 (A. Ct. Crim. App. 2006); *Finch*, 79 M.J. at 393. Both the criteria and admissibility requirements are necessary because "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been

[21] *McCaskey*, *Tome v. United States*, 513 U.S. 150, 157 (1995), and *United States v. Quinto*, 582 F.2d 224, 232-36 (2nd Cir. 1978) discuss the history of hearsay and prior consistent statements. *See also Uss - Div. of Usx Corp.,* 1995 NLRB LEXIS 226, *48 (N.L.R.B. 1995) (discussing the "200 year" history and use by federal courts noting "reluctance to receive prior consistent statements."). Those cases and the FRE and MRE's commentaries, demonstrate limited admissibility of prior consistent cases. *Quinto*, 582 F.2d at 232 ("the courts have enforced, except in very limited circumstances, a general prohibition against the use of prior consistent statements.").

discredited." *Tome*, 513 U.S. at 157; *Simonelli*, 237 F.3d at 28 (same); *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996) (same); *United States v. Drury*, 396 F.3d 1303, 1316-17 (11th Cir. 2005) (same).

Apart from the admissibility requirements articulated in *Finch* (discussed *infra* in C-E), the two major criteria for prior consistent statements are relevance and 403's balancing test. *McCaskey*, 30 M.J. at 188-89; *Adams*, 63 M.J. at 696. However, those tests mean something slightly different in the prior consistent statement context. *See, e.g., Collicott*, 92 F.3d at 981 (discussing relevance and probative value in the context of prior consistent statements versus the 400 series of the FREs).

The first criterion is the statement must not just be relevant under M.R.E. 401, but "relevant to rehabilitate the witness's credibility." *Adams*, 63 M.J. at 696 (citing *Simonelli*, 237 F.3d at 27); *McCaskey*, 30 M.J. at 189-90, 193; *Tome*, 513 U.S. at 157-58 ("The rule speaks of a party rebutting . . . not bolstering"). The prior consistent statement must "meet the force of the impeachment."[22] The

[22] *See, e.g., Simonelli*, 237 F.3d at 27-28; *United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986); *United States v. Castillo*, 14 F.3d 802, 806 (2d. Cir. 1986); *United States v. Smith*, 328 F.2d 848, 850 (6th Cir. 1964); *United States v. Blankinship*, 784 F.2d 317, 320 (8th Cir. 1986) (same); *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir 1989) (same); *United States v. Payne*, 944 F.2d 1458, 1471 (9th Cir. 1991); *Coltrane*, 418 F.2d at 1140 (D.C. Cir. 1969) (same); *USS - Div. of Usx Corp.,* 1995 NLRB LEXIS 226, *48-51 (same).

relevance is not to bolster, but to respond *and cure* the attack. *State v. Parish*, 79 N.C. 610, 614 (1878) ("He is supported not by putting a prop under him, but by removing a burden from him, if any has been put upon him."); *United States v. Coltrane*, 418 F.2d 1131, 1140 (D.C. Cir. 1969) ("Even where impeachment of the witness is sought by a showing of inconsistency between the two, a previous extrajudicial declaration consistent with his testimony is normally inadmissible for the simple reason that mere repetition does not imply veracity.").

For relevance under M.R.E. 801(d)(1)(B), "more than mere reiteration is required." *Id*; *McCaskey*, 30, M.J. at 191; *Tome*, 513 U.S. 150. "The issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Pierre*, 781 F.2d at 330; *cf., United States v. Nelson*, 21 M.J. 711 (A.F.C.M.R. 1985) (cited approvingly by *McCaskey*) ("the key to these difficult cases is relevance . . . It is logically impossible to rebut allegations of undue influence by introducing a statement produced while the speaker is still living under the influence of the person whose influence the rebuttal seeks to disprove.").

The second refined criterion (403) is the statement needs to be highly probative to counter the *specific* attack on the witness's credibility. *McCaskey*, 30 M.J. at 191 (citing 3 J. Weinstein and M. Berger, *Weinstein's Evidence* § 607[08]

at 607-115 (1988)) ("the *mere* fact that a witness has told the same version on prior occasions is not *itself* probative of whether the witness is telling the truth at trial.") (emphasis in original); *Pierre*, 781 F.2d at 333 ("probative force bearing on credibility beyond merely showing repetition"). Substantive use under Rule 801(d)(1)(B) "is limited to situations where high probative value is most likely." *McCaskey*, 30 M.J. at 192; *Pierre*, 781 F.2d at 333 ("with significant rebutting force"). And just as with relevance, consistency alone is not probative since prior statements "may evidence only that the declarant is a consistent liar." *Div. of Usx Corp*., 1995 NLRB LEXIS 226, at *47-48 (citation omitted).

The reason for refined initial criteria is twofold. First, because of the danger of misuse and overreliance of prior consistent statements. Summarizing the federal sources and commentary, once admitted, prior consistent statements are given extra weight because they receive a specific instruction from the judge; they go back with the jury in the deliberation room *even when* the original inconsistent statement (which is often only allowed for credibility purposes) does not, and it has the prejudicial benefit to the proponent because many times the later "consistent statement" is prepared with assistance and/or time to reflect on the body of evidence. *See Div. of Usx Corp*., 1995 NLRB LEXIS 226, at *47-48 (string cite omitted).

The second reason for the refined criteria is because if the rule was read to allow more liberal admissibility, as the Army Court did here, trials can devolve into a prior statement battle circumventing most hearsay requirements if the witness is now on the stand. *Tome*, 513 U.S. at 162.

> If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness's in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

Id. *Frazier*, 469 F.3d at 89 (3d Cir. 2006) (quoting *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001)) (" . . . otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence."). Allowing broad use of prior consistent statements when the witness is testifying and attacked has been uniformly rejected. *See Tome*, 513 U.S. at 162 (noting Rule 801(d) "expressly contrasted" "with the Uniform Rule of Evidence 63(1) (1953)"); *McCaskey*, 30 M.J. at 191-92 (discussing the rules of evidence rejected "Uniform Rule 63(1) which allow[ed] for any out-of-court statement of a declarant who is present at the trial and available for cross-examination.").

These concerns have grown since the Federal and Military Rules of Evidence were amended to allow substantive use of prior consistent statements while the original inconsistent statement remains only admissible for credibility.

B. The Two Categories of Prior Consistent Statements Remain Unchanged; the Amendments only allowed for their use as Substantive Evidence.

Both prior to and after the adoption of the Federal and Military Rules of Evidence, generally "four instances have been recognized in which prior statements of a witness are relevant to rehabilitate the witness's credibility." *Adams*, 63 M.J. at 696-97; *Coltrane*, 418 F.2d at 1140 ("only in those few exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful); *see also* Edward J. "EJ" O'Brien, *The 2016 Amendment to Rule 801(d)(1)(B)): The Bugbear of the Military Rules of Evidence* (submitted for publication to The Army Lawyer on September 29, 2025)("Bugbear"). As listed in *Adams* and *Tome*, these are:

> (1) To place a purported inconsistent statement in context, usually from within the same statement, to show that it was not truly inconsistent with the trial testimony;[23]
>
> (2) To support the witness's denial of making an inconsistent statement at all;[24]
>
> (3) To refute that the witness's memory is flawed due to reason other than a motive to lie/improper influence;[25] and

[23] *See, e.g., Ruiz*, 2025 CAAF LEXIS 656, *9, __ M.J.__ (both the attempted inconsistent statements and consistent statements were from the same interview). The overwhelming majority of precedent apply "context" as from within the same statement and compare this use to the Rule of Completeness. *See, e.g., Simonelli*, 237 F.3d at 27 (citing *United States v. Holland*, 526 F.2d 284 (5th Cir. 1976)).

[24] *Adams*, 63 M.J. at 696-97 (citing *Castillo*, 14 F.3d at 805-807).

[25] *Adams*, 63 M.J. at 696-97 (citing *Keller*, 145 F. Supp. at 697).

> (4) To refute an allegation of recent fabrication, improper influence, or motive.[26]

Adams, 63 M.J. at 696-97; *Tome,* 513 U.S. at 170 (Breyer, J. dissenting); *Bugbear* at 26, 41, As *Adams* explains, the prior consistent statement adds something "in addition to the context" to support the witness's credibility and is highly probative based on the fact-specific "timing, context, or some other factor." *Id*.[27]

These four recognized categories have been codified into the Federal and Military Rules of Evidence in M.R.E. 801(d)(2)(B). The fourth group is now romanette (i) and the first three are the "other ground[s]" in (B)(ii). *See Finch*, 79 M.J. at 393; *Bugbear*, at 3-15 (summarizing the Drafter's Analysis and precedent's "well-accepted limits on prior consistent statements"). These four categories are codified under these two romanettes because the Drafters' Analysis for the 2016 Amendment states that "[t]he amendment does not make any consistent statement admissible that was not admissible previously – the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E.

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[26] *Tome*, 513 U.S. at 170; *McCaskey*, 30 M.J. 188; Mil. R. Evid. 801(d)(1)(B)(i).

[27] *Adams* analogizes the 'something extra' needed for relevance/high probative value to M.R.E. 404(b) where evidence must be admitted for some "other" purpose than conformity therewith and meet the three *Reynolds* factors. *Id.* at 697, n.5.

801 analysis, at A22-61 (2016); *Finch*, 79 M.J. at 393. [28] The Drafters' Analysis notes the Amendments also did not change the "traditional and well-accepted limits" on presenting prior consistent statements. Drafters' Analysis, at A22-61; *Tome*, 513 U.S. 160-165 (discussing the commentary and drafter's intent to now F.R.E. 801(d)(1)(B)(i)).

C. Prior Consistent Statement's Initial Requirements Under Both Romanettes.

Once the refined criteria are met, this Court has set forth five admissibility requirements under either romanette. The first three are identical. *Finch*, 79 M.J. at 394-95. Of the three admissibility requirements under M.R.E. 801(d)(1)(B), the first two (declarant testifying and subject to cross-examination about the prior statement) are met. *Finch*, 79 M.J. at 394. Therefore, Appellant only discusses the remaining common admissibility requirements as the judge erred on each.

1. Before analyzing the admissibility requirements, the proponent must articulate the specific type of attack *and* the link of how it will rehabilitate the damage done by the inconsistent statement.

Prior to a judge even analyzing the remaining three admissibility requirements, the consistent statement's proponent must identify both (1) the type of attack with specificity, and (2) how it will rehabilitate the damage done. *See,*

[28] This is a simple sentence from *Finch*, but a critical one. Since the amendment did not make any statement admissible that was not admissible at common law, the history cited above like *McCaskey/Adams* that predated the rule changes applies with full force.

e.g., Frazier, 469 F.3d at 89 ("Once the proponent of the prior consistent statement has indicated which questions, statements, or arguments by the cross-examiner suggest . . ."); *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.* (citation omitted).

This Court "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. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021). When, objectively, a witness is attacked with one method of impeachment, the rule's text prohibits admission under the other romanette for the same challenged area. *Id.* at 28; *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.").[29] This is not only

[29] When derived from the same line of attack, a prior consistent statement cannot be admissible under both romanettes not only because the rule's text, but also because romanette (ii) would often be subsumed under a motive to fabricate/improper influence (discussed *infra*). However, if a single witness was impeached on multiple grounds/various statements, a single consistent statement may theoretically qualify for admission under both romanettes, assuming it meets the *Pierre* standard and is relevant to rehabilitate on each unique/separate ground.

based on the rule's text, but because of how a skillful proponent can circumvent the textually more strict (B)(i).

Ensuring the proponent identifies the specific "attack" and "type of attack" is key because he/she could quickly spin an attack that was based on a motive to fabricate by recharacterizing it as an attack on "another ground." *See, e.g., Livingston*, 2022 CCA LEXIS 145 (judge abused his discretion in finding an attack on another ground and credibility when the attack, based on the entire record, was the witness was fabricating); *Cf., United States v. Magnan*, 756 F. App'x 807, 818 (10th Cir. 2018)(cited approvingly in *Finch*)(holding that the defense did not engage in an impeachment with inconsistent statements or indicate she misremembered, therefore, a prior consistent statement was not permissible to rehabilitate the witness's credibility). For example, like here, where the Appellant expressly alleged KB testified inconsistently from her July 2 statement <u>because she had a motive to fabricate</u>, a proponent could attempt to just leave off the words '<u>because she had a motive to fabricate</u>' and then argue romanette (ii) due to an attack on "inconsistency" and a vague need for "context."

Similarly, a cross-examiner could articulate that a witness is feigning a faulty memory *due to* a motive to fabricate. Or, a cross-examiner could accuse a witness of *intentionally* lying and use inconsistent statements/impeachment as the manifestation of that intent. To allow for a prior consistent statement's proponent,

as happened here, to argue vague/overbroad "consistency" or "context" to simply avoid (B)(i)'s premotive requirement, makes the rule's text, purpose, and limited historical use of prior consistent statements meaningless. If, as the Army Court suggested here, the rule is not mutually exclusive when based on the same statement or attack, a proponent could offer previously prepared hearsay, even when its assisted by counsel and an advocate like KB's July 8th statement, by arguing its 'consistent' or adds 'context' to the entire week long timeline.

Thus, even when a proponent alleges a specific type of attack to try and substantively enter what is otherwise inadmissible hearsay, judges still have to *objectively* decide if there was an actual attack (*see, e.g., Magnan*, 756 F. App'x 807), and whether that type of attack took place vis-à-vis another one. In other words, the judge must determine whether the impeaching counsel's tactics could *reasonably* be taken as one of the four above-mentioned categories viewing the record as a whole, not in isolation. *See, e.g., United States v. Londondio*, 420 F.3d 777, 784-85, 785 n.3 (8th Cir. 2005), *United States v. Trujillo*, 376 F.3d 593, 611 (6th Cir. 2004)("[b]ased upon [their] review of the record"); *United States v. Ruiz*, 249 F.3d 643, 648 (7th Cir. 2001); *United States v. Fulford*, 980 F.2d 1110, 1114 (7th Cir. 1992). Simply put, the judge must look at the whole case in context versus one extracted question which an eager proponent is ready to pluck out from hours/days of testimony while holding otherwise inadmissible hearsay at the ready

in pre-written/pre-created exhibits. *See Frost*, 79 M.J. 104; *Cf., United States v. Lozada-Rivera*, 177 F.3d 98, 103-04 (1st Cir. 1999)(a few questions out of a cross-examination that hinted towards a remote ill will from years prior was not objectively an attack that allowed a prior consistent statement's admission).

2. Both romanettes require the statements be consistent for the purpose that rehabilitates the specific attack.

The third admissibility requirement is the judge must find the statements are consistent in a way that meets the force of impeachment. *See, e.g., Collicott*, 92 F.3d at 982(finding not only that the statements were inconsistent, but the statement actually "augment[ed] the inconsistency brought out by [the accused] . . ."). Although consistent statements need not be identical, even the general consistency must address the specific attack's point. *Id.* at 98; *Miller*, 874 F.2d at 1274(district court properly excluded prior consistent statements where "prior statements in no way help to explain or amplify the inconsistent statement with which she was impeached").

This point becomes more significant when the impeachment/inconsistent statement is by omission: the testimony has fact "A" but fact "A" is missing from an earlier statement and its omission is used by the cross-examiner to impeach. *See Bugbear*, at 7-8, 10-11 (discussing *Pierre* and *Finch*)(noting it is difficult to "rebut a charge of recent fabrication when the prior consistent statement does not contain the omitted fact."). If the omitted fact is contained in the supposed consistent

statement (regardless if it was given separately or is contained in the same statement), it is hard to see how entering the statement, which *also does not contain* the omitted fact, would be rehabilitative and in line with the historical limited-use. *Blankinship*, 784 F.2d at 320 (only those statements "or portions of the declaration which specifically address the challenged zone of inquiry-the inconsistent, or omitted details or the concocted account-should be admissible").

D. For (B)(i), the consistent statement must predate the motive/improper influence and be the same motive that was actually attacked.

For a statement admitted under (B)(i), there are two additional admissibility requirements: (4) the prior statement *must* predate the motive to fabricate (*Tome*, 513 U.S. 150); and (5) where multiple motives or improper influences are utilized, the statement need not precede all, but only the one it is offered to rebut. *Frost*, 79 M.J. at 110. In determining the fifth/latter foundational requirement, even if a *theoretical* second motive could be spun by a proponent looking to enter in prepared/perfected hearsay, this Court looks objectively at the entire record instead of the proponent levying every talismanic incantation mentioned in the advisory committee's note. *See id*. (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998)).

In *Frost,* there was a custody battle. *Id.* at 109-110. The child victim made an outcry statement to her mother. 79 M.J. at 110. The victim then denied the claim multiple times in different interviews until she was later forensically

interviewed. *Id.* at 110-11. In the forensic interview, she reiterated the outcry. *Id.* The government attempted to offer the outcry, claiming that it predated any motive to fabricate formed during/before the forensic interview. *Id.* at 109, 110. The defense responded that any motive to fabricate, which still existed at the time of forensic interview, arose before the child made the outcry because the child's mother already knew she wanted custody and was alleged to have influenced the child. *Id.* at 109. The military judge found that although there may have been multiple motives that arose both before the outcry and before the forensic interview, the outcry 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. *Id.* at 109, 110. Importantly, even acknowledging *some evidence* to base the judge's ruling (*Id.* at 111), this Court stated that in reviewing the opening, closing, cross-examination, and other witnesses, it was clear the defense's overarching argument was the motive to obtain custody pre-dated the outcry. *Id.* at 110 ("Reading the record in its entirety, it is clear" that the defense's "line of approach . . ."). Thus, the "statements made after an improper influence arose do not rehabilitate a witness's credibility" and were inadmissible. *Id.* (citing *McCaskey*, 30 M.J. 192).

E. Under (B)(ii), the "other ground" must be relevant to rehabilitate the specific type of attack and not related to a motive, bias, or influence.

Romanette (ii) contains the same first three admissibility requirements. This Court articulated two additional admissibility requirements: (4) the declarant's credibility must have been "attacked on another ground" *besides* romanette (i), and (5) the statement "must actually be relevant to rehabilitate the witness's credibility on the basis on which she was attacked." *Ruiz*, 2025 CAAF LEXIS 656, *9, __ M.J.__ (quoting *Finch*, 79 M.J. at 396).

The proponent (1) must ensure the attack is not actually a romanette (i) attack, and (2) identify one of the three "other grounds" identified in precedent. The greater focus on the proponent, especially under (B)(ii), makes sense because romanette (i)'s text specifically mentions a trigger by "implied" attacks which broadens its coverage where the other three historical exceptions under romanette (ii) traditionally are not found through implication, but specific inconsistencies that are *not* due to any *improper* influence.

As noted in B *supra*, the three well recognized "other grounds" are: (1) to place a purported inconsistent statement in context, usually from within *the same statement*, to show that it was not really inconsistent with the witness's trial testimony; (2) to support the witness's denial of ever making an inconsistent statement; and (3) to refute a flawed memory due to another reason besides a

motive to lie. *Adams*, 63 M.J. at 696-97; *Tome,* 513 U.S. at 170 (Breyer, J. dissenting).

1. "Context" as "Another Ground."

Under both federal and military precedent, (B)(ii)'s "another ground" demonstrates "context" is not some generalized context from the trial/allegations; it is to show an alleged inconsistent statement is *not actually inconsistent* in the manner attacked. *See, e.g., McCaskey*, 30 M.J at 193 (citations omitted); *Simonelli*, 237 F.3d at 28 ("[u]sually, this situation occurred when the other consistent statements came from the same document or transcript and pertained to the same supposedly inconsistent statement. The policies behind Rule 106, the rule of completeness, were used, in part, to justify admissibility."); *Holland*, 526 F.2d at 285 (a statement made in "the same [statement] to correct an earlier misstatement" in the [statement] which had been used to impeach the witness); *United States v. Harris*, 761 F.2d 394, 400 (7th Cir. 1985). "Context" is generally allowed where the impeaching phrase/sentence offered only "limited pieces of information creat[ing] unfairness or potential for misimpression." *Simonelli*, 237 F.3d at 28 (citations omitted). Put another way, this "another ground" "places the inconsistencies in a broader context, demonstrating that the inconsistencies were a minor part of an otherwise consistent account." *Collicott*, 92 F.3d at 980 (quoting

Payne, 944 F.2d at 1471)(cleaned up); *Pierre*, 781 F.2d at 333; *United States v. Baron*, 602 F.2d 1248, 1252 (7th Cir. 1979).

2. Supporting a Witness's Denial of an Inconsistent Statement as "Another Ground"

This category's underlying rationale as "another ground" is similar to the last category and generally found from within the same statement. *See United States v. Colon*, 835 F.2d 27, 31 (2d Cir. 1987). If a cross-examiner attacks a witness about a prior inconsistent statement made in 'statement A' and the witness denies making the inconsistent statement at all, 'statement A' will often be the source that shows whether the inconsistent statement was actually made.

3. "Faulty Memory" as "Another Ground"

Unlike the first two, prior consistent statements that rehabilitate a supposed "faulty memory" are often found both in different statements as well as within the same statement. *See, e.g., United States v. Cox*, 871 F.3d 479 (6th Cir. 2017). In a case where the witness's memory was attacked due to the passage of time or onset of a mental disease, a prior consistent statement made at the time could assist in rebutting the charge that the witness's memory at trial, years later, was faulty due to time/mental disease. *See Bugbear*, at 22 (citations omitted). This is because the earlier statement tends to rebut the attack and is highly probative of the contents *before the onset* of time/incapacity. *Id.* On the other hand, a prior consistent

statement made days before trial might not rebut the charge of forgetfulness or ongoing mental disease.

One often overlooked factor when discussing all three "other grounds," at least as compared to how much it is discussed under romanette (i), is the consistent statement's "timing". *See, e.g., Livingston*, 2022 CCA LEXIS 145, at *11 (internal citations omitted); *Ruiz*, 2025 CAAF LEXIS 656 ("during the same statement to the same agent on the night of the [incident]"). "[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." *Id.* at *11 (internal citations omitted).

For example, in *Cox*, 871 F.3d 479, the defendant attacked a child victim's memory by asserting her testimony was based on reviewing photos and not an actual memory of the events. A law enforcement agent was then permitted to testify the child told him before seeing any photos thus rebutting the claim of faulty/implanted memories. *Id.* at 487; *see also Pierre*, 781 F.2d at 334 (the formal report made days after the interview tended to rebut the allegation the witness had either made-up the fact or had an inaccurate memory).

This Court's recent opinion in *Ruiz* presents what is arguably romanette (ii)'s outer limits. *Id*; *cf., Bugbear*, at 16-23 (questioning *Ruiz's* analysis compared

to precedent). *Ruiz* concerned two series of statements: the first described what took place in the living room (the inconsistent statements to the victim's in-court testimony); the second set described what took place in the upstairs bedroom (the consistent statements to the victim's in-court testimony). 2025 CAAF LEXIS 656.

In *Ruiz*, the victim acknowledged gaps in her memory from intoxication. *Id.* at *4. On cross, she testified it may be possible she made a statement to law enforcement but claimed not to remember what she said. *Id*. The government then called Deputy Frank, who spoke to the victim at the hospital on the same night, and attempted to enter the victim's statements as an excited utterance. *Id.* This rightfully failed. *Id.*

The defense cross-examined Deputy Frank to impeach the victim's testimony where she said that she did not remember the specific events in the *living room*. The defense elicited inconsistent statements that: *in the living room*, the victim sat on the accused's lap, drank two glasses of wine and shot-gunned two beers, and she remembered the accused's pants coming off. *Id.* at *5.

The government, on redirect, had Detective Frank testify about KB's memory/statements from the upstairs bedroom, not the living room. This included the accused rubbing his genitals against the victim; she said no; and she did not recall how she got to the bedroom. *Id.* The statements were offered as prior

consistent statements. Notably, the inconsistent/consistent statements came from the same interview with Deputy Frank made the night of the incident. *Id.* at *5-6.

This Court found the prior consistent statements covered an "ongoing interaction" even though the cross-examiner's attack was about the living room and the consistent statements were about the bedroom (or transition the transition between). *Id.* at *14. Deferring to the military judge's judgment about any potential link or rehabilitative quality, this Court assumed without deciding the statements rehabilitated the specific attack because they added context about the depth/specificity of the inconsistent statements and the witness's memory. *Id.* at *18-19.

This Court emphasized the standard of review and that, based on the *multiple* types of cross-examination employed and the judge's observations/discussions with the parties, "we are unpersuaded that the military judge abused her discretion in viewing Appellant's challenge to [the witness's] credibility and the Government efforts at rehabilitation in a different way." *Ruiz*,

2025 CAAF LEXIS 656 at *17-*18 (emphasis added).[30] In other words, *Ruiz* can be read to say that although the judge did not get it right, she did not get it so incorrect under those facts to "strike with the force of a five-week-old, unrefrigerated dead fish." *United States v. French*, 38 M.J. 420, 425 (C.A.A.F. 1993) (citations omitted).

However, *Ruiz* reasonably raises the question about how those statements were relevant/probative to the specific attack discussed as opposed to other attacks which this Court did not elaborate on. *See Bugbear*, at *20-21. This is significant for judges and practitioners not only because of the specific phrasing used in *Ruiz*, but because arguably what the opinion did not say/expand on. Even in the short window since *Ruiz's* publication (and as suggested by *Bugbear*), counsel are piecemealing *Ruiz's* dicta arguing to trial judge's that the limitations found in 200 years of precedent no longer apply; and they are arguing so by quoting this Court.

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[30] As *Bugbear* questions, this sentence from *Ruiz* indicates Ruiz impeached the witness with several inconsistent statements and methods, but this Court did not expand on the other methods. *See Ruiz*, 2025 CAAF LEXIS 656 at *18 ("the record shows that trial defense counsel extensively attacked differences . . . [the witness] gave to various law enforcement officials, prosecutors, and medical personnel, and that [counsel] did not solely focus on [witness's] inability to register memories). The above quotations suggest Ruize hinted at faulty memory *enough* that this Court believed it was not *unreasonable* for the judge to view it as a separate attack that needed to be rehabilitated, even if done in an improper way (the supposed rehabilitative purpose was "in a different way" than the inconsistent statement's attack). *Id.* at *21 (discussing *Ruiz*, 2025 CAAF LEXIS 656 at *17-18).

Specifically, this Court wrote that prior consistent statements were admissible to provide "context" (romanette ii) even acknowledging the attack with the prior inconsistent statements was an attack (by omission) "in a different way." *Id.* at *17-18. Although the next one line discussed above about the defense attorney's multiple/extensive attacks immediately follows the "in a different way" quote, without the context, the specific inconsistent statements by omission utilized by the defense about the *living* room do not appear to be rebutted by the statements to Deputy Frank about *bedroom* - those 'bedroom' statements can be read to be consistency for consistency's sake and bolstering given the delineation the opinion suggests. Simply put, the *bedroom* statements did not make it more likely that the *living* room statements were not made or were out of context. Therefore, *Ruiz's* phrasing can be argued to just allow counsel to use repetition to bolster the witness's testimony even when attacked "in a different way." *Id.*

Ruiz's "different way" phrasing is allowing counsel to argue that, regardless of the type of attack (including romanette (i)), this Court allows the use of prior consistent statements for "context" even if "a different [attack]" was utilized, and moreso, even if there is no true rebutting force for the specific attack to show the statement was not made/is actually not inconsistent. Although that interpretation may not have been what this Court intended or attempted to communicate, the

specific phrasing used in the opinion can, and is, being broadly interpreted in a way that is contrary to precedent to circumvent hearsay requirements.

ARGUMENT

The judge erred in his analysis and did not utilize *Adams*, *McCaskey*, *Tome*, or consider the purpose of the rule and *Finch's* fifth foundational requirement.

A. The judge erred by failing to make the proponent specifically explain the type of attack or how that attack would not amount to mere repetition.

First, the judge failed to require that the proponent articulate the specific type of attack or how PE 26/27 repaired the damage done by the July 2nd statement. As precedent suggests, an attack on "inconsistency" is generally not a separate ground as the military judge found; an attack on inconsistency is usually *the product of* a motive, faulty memory, or the robbing of context. By failing to make the proponent verbally articulate "another ground" or even provide one example of it from the defense's case (JA250-51), the judge relieved the proponent of articulating not only the specific "other ground," but how it would rehabilitate the damage done by her July 2nd statement wherein she admitted the, later revealed to be loaded, firearm was pointed at Appellant (or the July 3rd where there was only one cutting and the knife became lodged during the fall, exactly what Appellant's CID statement (JA415).

While the proponent attempted to split-hairs to create a second motive in the custody battle to circumvent (B)(i)'s premotive requirement, the proponent never

articulated how the July 8th statement would be highly probative outside of mere repetition.

B. The judge further erred by failing to find two refined criteria: relevance to rehabilitate the damage done by the specific attack and whether the specific statement had high probative value for that relevant purpose.

The judge further erred by never finding *either* initial criterion. He never found the July 8th's statement's relevance to repair the damage done by the EMT statement or how the July 8th statement was highly probative given its belated timing, KB's apparent motive, and KB obtaining an attorney before that statement. By admitting PE 26/27 due to just an attack with a prior inconsistent statement,[31] the judge failed to find the two refined criteria and contradicted both the time-tested limited nature of prior consistent statements and because "[p]rior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Tome*, 513 U.S. at 157. To the contrary, all the July 8th statement arguably did is show KB may have been "a consistent liar" from July 8th to trial. *Div. of USX Corp*., 1995 NLRB LEXIS 226, at *47-48 (citation omitted).

[31] The military judge found: the romanette (ii) "happened through inconsistency attacks by defense counsel." (JA252, 266). However, that is flawed as "another ground" because it is also the second admissibility requirement from *Finch* and should occur in every case in which the issue arises. *Finch*, 79 M.J. at 394-95 ("(2) the declarant must be subject to cross-examination *about the prior statement*.")

Likewise, to find the "relevance to rehabilitate" and highly probative criteria are met because of "an attack through inconsistency" alone (JA252, 256) would "allow the admission of what would otherwise be hearsay every time a [witness's] credibility or memory is challenged; otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence." *Frazier*, 469 F.3d at 89 (quoting *Bishop*, 264 F.3d at 548).

C. An *ab initio* error by admitting the supposed prior consistent statement under both romanettes.

Third, the judge erred by admitting PE 26/27 under both (B)(i) and (B)(ii) based on the same questions/attack. He did so despite citing *Finch*. (JA238, 241). Thus, the rest of the analysis carries a presumption of error because the judge failed to follow the prerequisites while citing the case that dictated it.

Besides violating the rule's text as well as *Finch* and *Ayala*'*s* explicit guidance, the judge's findings highlight the danger of allowing both romanettes based on the same questions and how a skillful litigator could circumvent (B)(i) by simply re-characterizing the attack or making partial arguments.

In this case, the government tossed every "other ground" listed in the Manual's appendix without explaining their application; what is known as "talismanic incantations" in 404(b) context. For instance, the government wrote that the defense made an attack by "faulty memory" (JA465), but never provided an example. The government also claimed the need for "context," but never

articulated how the July 2nd statement to the EMTs was out of context, nor how the July 8th statement added more context to July 2nd or 3rd's statements – other than it mirrored KB's in-court testimony.

In reality, any "attack by inconsistency" or "faulty memory" was due to KB's motive to fabricate. If, as here, a prosecutor could seamlessly walk back-and-forth between romanettes, all prosecutors would need do is remove the language "due to KB's motive to fabricate," and magically a statement that could not be admissible under (B)(i) would now be admissible under (B)(ii) without an underlying reason as to why. But as *Livingston* demonstrates, the "why" is important.

D. The judge erred by finding the statements consistent on the specific point of attack.

The judge further erred by finding the Exhibits were consistent *given the specific point of attack* to KB's in-court testimony. Although consistent statements need not be identical, the consistency must rebut the specific attack. Even without considering KB's motive to lie, KB's trial testimony was that she purposefully pointed the *loaded* firearm towards the ground, said she did not wish to argue and she had a prolonged discussion after the sinister threats, had her back completely turned, and heard the blade drag across the dresser-top. The defense attacked KB with her July 2nd statement to the EMTs where she said she pointed the *unloaded* firearm at Appellant's face and was cut once as she turned away. They reinforced

the single cut and the second knife-wound was due to the stairs in KB's July 3rd statement to SA GC. These mirrored Appellant's unprepared statement to CID.

The defense highlighted KB's continued motive to lie by showing her story continued to change. The change was because she could never admit she pointed a fully-loaded gun at her husband's face since it *did* affect custody.

In her July 8th pre-scheduled statement, KB said she did not point the gun at Appellant's face, but that she could have turned facing him with the gun in her hand (even demonstrating it before SA GC offered an alternative). (JA259-60, 452). This is inconsistent with KB's unequivocal denial that she did not "Flag" Appellant. Thus, KB's trial testimony was contradicted by the July 8th statement, and is therefore inadmissible hearsay. *Collicott*, 92 F.3d at 982 (finding not only that the statements were inconsistent, but the statements actually "augment[ed] the inconsistency brough out by [the accused] . . ."). The judge and the Army Court ignored this discrepancy. Moreover, the trial judge did not make a finding regarding the (in)consistency, and therefore, is owed no deference.

E. The judge erred under (B)(i) by failing to identify KB's motive, when that motive arose, and if it divorce custody was different, objectively "how" it was different.

Fifth, under romanette (i), the judge erred by failing to identify when KB's motive arose, what that motive was, and misunderstood that a motive can be continuous in light of *Frost's* identical motive. This is despite the SVP repeatedly

admitting that even if a second motive existed, it also revolved around custody. (JA244)(The motive is "the filing divorce and requesting full – sole custody of the children"); (JA245)("I believe defense asked the witness 'you would do anything to get custody of your children."); (JA250)("Your Honor, I'd just clarify that I think protective custody is one motive, and then the divorce *and custody battle* filing is a separate motive. And that's why we're offering under prong one as far as - - prior to that particular motive that she was attacked on.").

Here, the judge made no finding as to "what" the motive was or when it arose so he should be given no deference. However, even if the judge had accepted the government's second motive (KB's custody petition), like *Frost*, that theory is not objectively different. The custody motive arose, at the *latest*, at the beginning of the July 3rd Hospital statement when SA GC told KB she could not retain custody while CID, and SA GC specifically, determined the aggressor. But that motive was reasonably raised by the defense's highlighting the discussion of divorce and KB's infidelity prior to the firearm/knife, or at least, when the defense highlighted KB's "primary concern" in ambulance and her telling the EMTs Appellant cannot have access/custody to them (or attempting to create a Last Will for guardianship purposes). Thus, any statement made after leaving the scene of the incident with the EMTs, and more specifically, PE 26/27 that were admitted, was substantively inadmissible because they post-dated the persistent motive.

Like *Frost,* the defense's theme was clear: KB changed her story regarding the weapon at Appellant because she lost custody. Although the defense brought up divorce, divorce custody only reinforced that KB had the *same* persistent motive – permanent custody. Moreover, the defense specifically said this to the judge in the 39(a). (JA250). The Government's admitting KB had a custody motive, including in oral argument (JA250-51), shows the judge's error.

F. The judge erred under (B)(ii) by not identifying a specific "other ground" that was not nested in KB's motive, not explaining how the July 8th statement met the force of the attack on another ground, and that "inconsistency" is itself "another ground"

Sixth, under (B)(ii), the judge erred by not linking the July 8th statement to any probative (much less "highly" probative) rehabilitative quality beyond repetition – especially given the July 8th statement did not tend to show the July 2nd EMT statement was not made. Nor did the proponent provide *any* explanation or example of "another ground" that was attacked and why the July 8th statement would fix the damage done. (JA484-85).

The judge also erred by recognizing "inconsistency" as a *separate* "other ground" when the "context" was, at least in this case, not from within the same statement and did not provide context to the July 2nd EMT statement. But, even if an attack on "inconsistency" could be "another ground," he erred by finding any attack on "consistency" was not derived from the motive that produced that inconsistency: KB's motive is why she was making inconsistent statements. The

judge did not make that connection despite the government's written explanation for (B)(ii) stating "the implication of this cross . . . is that [KB] is *now embellishing* . . ." (JA465). Thus, like *Adams* and *Livingston*, this was not another ground; it was still fabrication.

In this case, the judge also erred when he did not factor in the July 8th statement's timing and surrounding circumstances. *Cf. Payne*, 944 F.2d at 1471 (looking to other circumstances from the record "may give [the consistent statements] significant probative value."). Since the July 8th statement post-dated the persistent motive, the timing is "highly relevant" because it could have been a false exculpatory statement. *Livingston*, 2022 CCA LEXIS 145, at *11. The July 8th statement was after KB started a "GoFundMe" page to raise money for her custody battle(JA101-01,112), retained an attorney, was assigned an advocate, and could reflect/account for facts that contradicted her initial confession.

If admission of a prior statement due to just an "inconsistency attack" alone was endorsed here, then every accused has an incentive to make multiple exculpatory statements to CID if they are separated by some time and could be viewed as "separate" statements. *See United States v. Rodriguez*, 56 M.J. 336 (C.A.A.F. 2006)(discussing what is a different/same statement under the military's three rules of completeness). The accused could then testify, and when cross-examined about any "inconsistency" in *any* statement, the defense could play any

later statement, even if prepared with an attorney's assistance, and have those portions admitted as substantive evidence with an instruction highlighting it. *Cf., United States v. Parry*, 649 F.2d 292, 295 (5th Cir. 1981)(finding error because the judge failed to substantively admit a defendant's prior consistent statement to his mother that took place, arguably, after a motive to fabricate could have arisen).

Since both prior consistent statements and the rules of completeness are not party specific, one need only invert the party's positions in this case to show how problematic the judge's ruling is. If, hypothetically, KB had been prosecuted for assault with a loaded firearm, gave the same three statements on July 2nd, 3rd, and 8th, and then testified in her own defense in the exact same way as she did in this trial about purposefully and intentionally never pointing the weapon at Appellant, the government could/would oppose both the July 3rd and 8th's statement's as substantive evidence. *Cf. Rodriguez*, 56 M.J. 336 (discussing the need for the witness to testify as opposed to using the rule of completeness to try and enter statements from different conversations/days). In this hypothetical, the prosecutor would, like here, cross-examine Accused-KB by confronting her with her confession of assault with a unloaded firearm. Then the prosecutor, through express statements or even implication, could show a motive to fabricate either regarding custody and Accused-KB's statements about the children or that Accused KB knew it was illegal to point loaded guns at her husband given her

concealed carry permit and training (JA123-24)(KB testified she would not point a weapon at anything she did not intend to shoot based on her training). Then, like here, the prosecutor could imply that Accused-KB's later *exculpatory* stories to law enforcement (July 3rd and 8th) remained inconsistent to her first confession showing consciousness of guilt. It would also point out (1) the motive continued, and (2) the same motive still existed at the time of her prosecution.

After cross-examination, the defense on redirect could simply argue, as the judge found here: the attack under romanette (ii) "has happened here through inconsistency attacks by [the prosecutor]." (JA484-85). Then, Accused-KB's exculpatory statements could be substantively admissible to help show consistency, or as the government did in this case, the supposed context between the *different* hearsay statements.

G. The judge erred when he did not analyze M.R.E. 403.

Regardless if the July 8th Exhibit(s) passed the criteria and admissibility requirements, they still 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., Lopez*, ARMY 20220642, 2022 CCA LEXIS 46, *14 (mem. op.)

The Exhibits had low probative value as defined by the precedent. First, the statements were not consistent with KB's testimony. They also were not consistent for the specific point KB testified to where she swore she did not and could not have flagged Appellant. The two excerpts in PE 26 also did not refer or explain away anything KB said to the EMTs like if she described she had mispoke. Each of these, jointly and severely, reduce any probative value that two truly consistent statements have, or at least one that referenced the other. The probative value plummets further because the consistent statements were not from the same overall statement to the EMTs like in *Ruiz*.

Regarding consistent statements that are drawn from within same interview as the inconsistent statements, the majority of cases note those "type" of prior consistent statements have the potential for significant probative value similar to the rule of completeness's use. *See, e.g., id*; *Cf., Harris*, 761 F.2d at 399 (internal citation omitted)("evidence which merely shows that the declarant said the same thing at trial as he did on a prior occasion *is of no probative value* to rebut an allegation of recent fabrication . . . 'for the simple reason that mere repetition does not imply veracity.'"). But here, the statements were not only from different interviews, there was a third statement wedged in between making the July 8th statement even less reliable in terms of assisting the fact-finder in determining KB's veracity. *See McCaskey*, 30 M.J. at 193 ("whatever probative value the

substance of the intervening consistent statement has is rather minimal compared to the danger of unfair prejudice.")

Likewise, between the July 2nd EMT statement and the July 8th statement, KB had (1) already lost temporary custody of her children, (2) retained an attorney, and (3) been assigned/talked with a victim advocate. These three factors reduce the probative value because it makes the exhibit less reliable in assisting the panel's evaluation/rehabilitation of KB's credibility – the purpose of the rule. *Miller*, 874 F.2d at 1274 (trial judges should consider motivation to fabricate as one of several 403 factors, "albeit a crucial factor.").

Additionally, in cross-examining an admittedly inexperienced SA GC to *briefly* discuss KB's inconsistent stories on July 3rd and 8th, the defense was able to demonstrate (1) KB's motive, (2) her willingness to lie to authorities/law enforcement because of that that motive, and (3) the same motive still existed at the time of her trial testimony (i.e., KB would commit a crime/perjure herself for her kids). And by *briefly* addressing the July 8th statement in testimony, any theoretical *additional* probative value The Exhibits may have had for KB's veracity vanished. *Blankinship*, 784 F.2d at 320 (admission not proper where all prior consistent statements related to impeachment were already presented to jury, and therefore, additional statements were mere repetition); *Simonelli*, 237 F.3d at 29 ("at most the evidence was an extra helping of what the jury had heard

before."). Therefore, PE 26 and 27's probative value as to KB's truthfulness/veracity is non-existent.

On the other hand, rather than being merely cumulative, the Exhibits were prejudicial because they were admitted substantively *and* over the key point/most contested issues at trial. *Cf., Parry*, 649 F.2d at 296 (noting that, "rather than being merely cumulative," the consistent statement was some of the only substantive evidence that corroborated the key issue/witness' testimony as to that specific point). Likewise, unlike the inconsistent statements to the EMTs, not only were these statements admitted substantively, the judge's instructions highlighted their importance referring to KB by name (JA474), and both exhibits went into the deliberation room. (JA345). *Cf., Engebretsen v. Fairchild Aircraft Corp*., 21 F.3d 721, 730 (6th Cir. 1994) (items that go into deliberations can be "unduly prejudice[ial]" compared to testimony, which does not).

In addition to the concerns Appellant will address for prejudice in his Reply Brief, in terms of purely M.R.E. 403 concerns, 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. The panel understood the exhibits importance not only from the instruction, but the time it took and need for significant breaks directly after the government had authenticated both discs. The discs immediate

admission after both 39(a) hearings demonstrated that whatever was happening was crucial to the government case/Appellant really feared it.

H. 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.[32]

Conclusion and Prayer for Relief

WHEREFORE, Appellant respectfully requests this Court set aside the Finding and Sentence for The Specification of The Charge and authorize a rehearing.

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[32] As the government bears the burden on prejudice, Appellant's Reply Brief will address prejudice once the government attempts to do so.

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 October 30, 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 12,947words.

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.

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