IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	
Private First Class (E-3) **DONTE M. BROWN** United States Army, Appellant	)	Crim. App. Dkt. No. ARMY 20230168 USCA Dkt. No. 25-0181/AR

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Index

Index

U.S. Court of Appeals for the Armed Forces

Service Courts of Criminal Appeals

U.S Supreme Court

Federal Circuit Courts of Appeal

Uniform Code of Military Justice

Military Rules and Regulations

Miscellaneous Sources

Issues Presented

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 Statutory Jurisdiction

The Army court of Criminal Appeals [the Army court] had jurisdiction over this matter pursuant to Article 66(b)(3), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866(d) 2022. This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 3 October, 2022, 14 February, 2023, and 28–31 March, 2023, an enlisted panel sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of aggravated assault with a dangerous weapon upon an

intimate partner, in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b. (JA 017–19).[1] The military judge sentenced Appellant to confinement for forty months, reduction to the grade of E-1, and a dishonorable discharge. (JA 019). On May 9, 2025, the Army court affirmed the findings and sentence in a memorandum opinion. (JA 017–19). On August 20, 2025, this Court granted Appellant's petition for grant of review and ordered briefing on three issues. (JA 017–19).

Statement of Facts

On July 2, 2022, the Appellant stabbed his wife, KB, in the back with a switchblade during an argument about running errands. (JA 48, 055–56). Directly before Appellant stabbed her, KB heard the knife slide across the dresser then felt the Appellant stab her in the back. (JA 055–56). Appellant then "took it out . . . [and] stabbed [her] a second time in [KB's] shoulder." (JA 056). "It was down to the handle of the knife . . . the blade was completely in." (JA 196).

The stabbing occurred during a lengthy argument between Appellant and KB. (JA 054–56). Before the stabbing, KB attempted to leave the bedroom and end the argument, telling Appellant, "I'm just going to go to these errands. You do

[1] The military judge dismissed Specification 2 (strangulation) after findings were announced due to the panel's use of exceptions and substitutions which created multiplicity concerns. (JA 396–413, 476).

whatever you want to do with our marriage." (JA 048). KB worked as a DoorDash driver and kept a firearm with her for protection. (JA 046, 050).

Before departing, KB retrieved her loaded handgun from the dresser and, facing away from Appellant, cleared it by dropping the magazine and a round on the bed. (JA 053). Appellant responded, "You should have kept those bullets in the gun because you're going to have to shoot me," to which KB replied, "I don't want to shoot you. I don't want to harm you. I don't even want to argue with you right now." (JA 055). Appellant then stabbed KB the first time, and she backed out of the bedroom with Appellant following her towards the top of the staircase. (JA 056–57). As she backed further from the bedroom towards the stairs, Appellant stabbed her a second time, then "grabbed ahold of [KB's] necklace as [she] was trying to get down the stairs [to] yank her back." (JA 57-58). After the second stabbing, KB briefly lost consciousness. (JA 058, 60).

KB recalled regaining consciousness at the base of the stairs with Appellant on top of her, strangling her and repeating, "Look what you made me do. Look what you made me do." (JA 060, 076). KB yelled for her 9-year-old daughter to get help from a neighbor. (JA 058). When the neighbor arrived, Appellant stated "She tried to shoot me." (JA 061). At the house immediately after the stabbing, both the victim and her neighbor testified that, while Appellant was saying

otherwise, the victim claimed she never pointed the gun at his face. (JA 053, 061, 131, 161).

A. July 2nd: Statement to EMTs/First Responders (at the scene).

During the trial, JI, the responding EMT, testified to KB's state in the back of the ambulance and to what she told first responders. (JA 198) "[T]he patient was telling us about how she had fallen down some stairs that day. She was not very clear about how that happened or, kind of, the story leading up to that; she was not very clear about that." (JA 198). JI further testified, "She kind of bounced around, so the storyline itself was kind of hard to follow. We assumed that there was a lot of adrenaline and that's kind of where we were coming up with it." (JA 199).

In this state, JI recalled "she admitted that she pulled an unloaded firearm and pointed it at his face. She did report to us that it was unloaded . . . and it was at that time she had gone to turn to either put [the firearm] in or on the nightstand." (JA 199, *see also* 333–34, 339). At trial, defense counsel sought to impeach KB by highlighting the differences in each of her three statements —whether she pointed the firearm at Appellant. (JA 081–86).

B. July 3rd: Informal Statement to CID (at the hospital).

The day after the stabbing, two Army Criminal Investigative Division (CID) Special Agents (SA) interviewed KB "in a hospital bed with an IV attached." (JA 232). The SAs were "mainly there to introduce [themselves] and explain . . . why

her children were taken into police protective custody." (JA 234). The SAs took only written notes during the 15-minute interview. (JA 232, 234).

At trial, SA GC testified to the statement KB gave while in the hospital bed. "She began to get herself ready, which included retrieving her pistol from her nightstand, clearing it, placing it on the bed . . . after she cleared it, PFC Brown said 'You should have kept those bullets in the gun. You're going to have to shoot me.'" (JA 233). "She said that she didn't want to shoot him. PFC Brown then grabbed a knife that was open on the dresser next to him and stabbed her once. They then struggled down the hallway, and she woke up on the bottom of the stairs." (JA 234)

SA GC further testified, "[KB] said that she did not point the pistol at him. She kept it in a low ready position." (JA 234). While the interview was not recorded, SA GC took notes during the 15-minute hospital interview which he used to refresh his recollection during his testimony. (JA 233–34).

C. July 8th: Formal, Recorded Statement (at CID).

On July 8, 2022, the same CID agents who visited KB in the hospital conducted a recorded interview at the Fort Riley CID Office. (JA 235–36). During this interview, KB provided more details of the events surrounding her stabbing, "including that she did not point the gun at Appellant." (JA 235, 009).

"During both his opening statement and on cross-examination, defense counsel highlighted and questioned [KB] about her inconsistent statements as to whether she pointed the gun at Appellant." (JA 009, 032–33, 081–84). In response, the government offered Prosecution Exhibit 26, [hereinafter Pros. Ex.] which contained "two brief snippets from the second recorded CID interview wherein the victim stated she *did not* point the gun at Appellant." (JA 009, 254). The government also offered Pros. Ex. 27, wherein KB recalls the details of Appellant's strangulation at the base of the stairs. (JA 267, 058–60).

Outside the presence of the members, the military judge reviewed Pros. Ex. 26[2] and 27[3] on the record and heard argument regarding its admissibility. (JA 237–55, 264–67).

After both written and oral argument, the military judge "set forth [MRE 801(d)(1)(B)'s] applicable standard, explained his analysis for the (B)(ii) prong, and admitted the statements as prior consistent statements under both the (B)(i) and (B)(ii) hearsay exceptions." (JA 009, 237–55, 264–67). In reaching his conclusion, the military judge "did not provide any analysis or explanation for his ruling that the statements were admissible under the (B)(i) exception, nor did he analyze

[2] Pros. Ex. 26 contains two short clips. (Clip 1, 1:52 seconds includes how KB oriented her gun and what appellant said during the argument.) (Clip 2, 1:53 seconds; KB again walks through the moments leading up to the stabbing and how she oriented her gun.

[3] Pros. Ex.27 contains one clip (3:16 seconds).

whether the prior consistent statements were admissible under Mil. R. Evid. 403." (JA 009–10)

Summary of Argument[4]

AE III. This Court should not adopt *Pierre* but instead clarify *Finch's* MRE 801(d)(1)(B)(ii) "*Relevant to Rehabilitate*" standard against *Pierre's* "*significant rebutting force.*"

This Court should decline to import the Second Circuit's *Pierre* standard. Instead, it should provide a narrowly tailored clarification of "relevant to rehabilitate," grounded in *Finch*, *Ayala*, and *Ruiz*—while observing the limitations established in *McCaskey*, *Frost*, and *Tome*. The current state of the Military Rules of Evidence already requires that the rehabilitative relevance of a prior consistent statement be tied to a discrete impeachment inference. Thus, *Pierre*'s "rebutting force" gloss adds little, and adopting it would not assist trial courts in applying this Court's precedent. Rather, it risks confusing the doctrine by layering an unnecessary standard onto a framework that already balances probative value against improper bolstering. *United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986). Lastly, the rigid, binary nature of the *Pierre* standard would exclude legitimate prior consistent statements—such as the one admitted in *Ruiz*—from reaching the factfinder. By demanding "significant rebutting force" in every

[4] This brief addresses AE III first because the Court's resolution of whether to adopt *Pierre's* "significant rebutting force" informs AE I and AE II.

instance, *Pierre* risks foreclosing statements that are genuinely relevant to rehabilitate credibility but do not neatly rebut each specific omission.

AE I. The military judge erred in his admission of Pros Ex. 26 but not 27.

The military judge erred when he admitted Pros. Ex. 26 under both Mil. R. Evid. 801(d)(1)(B)(i) and (ii) contrary to this Court's clear directive in *Ayala*, that a prior consistent statement may be admitted under either subsection "but not both." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021).

This error, however, was harmless. The statement was properly admissible under subsection (B)(ii), as the government originally sought. In weighing admissibility under M.R.E 801(d)(1)(B)(ii), the military judge properly applied *Finch's* five factors, and only admitted those statements that were relevant to rehabilitate the inconsistencies highlighted by defense.

Although the military judge admitted Pros. Ex. 27 under both prongs, the three-minute video only pertained to Appellant "unlawfully touch[ing] [KB] by grabbing her neck with his hands." (Charge Sheet; JA 15). This statement became immaterial to the trial when the panel excepted that language on the findings and acquitted Appellant of the words, "neck with his hands . . ." (JA 401, 453). As the panel did, this Court should conclude the evidence from Pros. Ex. 27 had no effect on the proceedings. (JA 453).

AE II. The Army Court did not disregard the plain language in *Ayala* and *Finch*.

The Army court faithfully applied this Court's precedent in *Finch* and *Ayala* when reviewing the admission of KB's prior consistent statements. Although *Ayala* clarified that such statements may be admitted under either M.R.E. 801(d)(1)(B)(i) or (B)(ii), but not both, the Army court correctly determined that KB's CID interview statements satisfied the five-factor *Finch* test for admission under subsection (B)(ii). The court found the statements consistent with KB's trial testimony, found them relevant to rehabilitate her credibility against defense attacks on inconsistency, and properly admitted them under the "another ground" prong of Rule 801(d)(1)(B)(ii). In addressing Appellant's claim of inconsistency, the Army court properly relied on this Court's language in *Norwood, Finch, and Ayala* to conclude that minor differences did not undermine the overall consistency of KB's accounts. Because defense counsel's impeachment centered on alleged inconsistencies, the CID statements directly rehabilitated KB's credibility on that basis. The Army court also acknowledged *Ayala*'s limitation on dual admission, but reasonably determined that Appellant was not prejudiced because KB's statements were admissible under M.R.E 801(d)(1)(B)(ii).

The Army court's explanation was legally sufficient, firmly grounded in the record, and consistent with this Court's precedent. Accordingly, this Court should affirm the Army court's ruling and uphold the findings and sentence.

Argument

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

Standard of Review

"This Court reviews questions of statutory interpretation de novo." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). This Court "interpret[s] words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." *Id.* This Court "should . . . give meaning to each word" of the statute. *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007).

Only where "the statute [remains] unclear, [does this Court] look next to the legislative history." *Sager*, 76 M.J. at 161 (citing *United States v. Falk*, 50 M.J. 385, 390 (C.A.A.F. 1999)).

Law

Before the 2016 Amendment to M.R.E 801(d)(1)(B),[5] the 2nd Circuit held that a prior consistent statement must have "rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986).

[5] Executive Order No. 13,730, 3 C.F.R. § 492 (2016). Federal Rule of Evidence 801(d)(1)(B) was amended identically on 1 December 2014. FED. R. EVID. 801 advisory committee's note to 2014 amendment.

A. Prior Consistent Statements under the Military Rules of Evidence.

"As a general rule, hearsay, defined as an out of court statement offered into evidence to prove the truth of the matter asserted, is not admissible in courts martial." *Ayala*, 81 M.J. at 28 (citing M.R.E. 801(c), 802); M.R.E. 801(d)(1)(B). "However, M.R.E. 801(d)(1)(B) provides that certain out of court statements are excluded from the prohibition on hearsay" if certain criteria are met. *United States v. Ruiz*, No. 24–0158, 2025 CAAF LEXIS 656, at *8–9 (C.A.A.F. Aug. 8, 2025).

First, prior consistent statements are admissible as non hearsay when the proponent of the evidence meets the admissibility requirements: "(1) the declarant of the out of court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, and (3) the statement must be consistent with the declarant's testimony." *Finch*,79 M.J. at 394–95 (citing M.R.E 801(d)(1)(B)).

A declarant witness's prior consistent out of court statement is not hearsay if offered "(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground." M.R.E. 801(d)(1)(B)(i)–(ii).

The party seeking admission of the prior consistent statement bears the burden of proving its admissibility. *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021).

1. Admissibility under 801(d)(l)(B)(i)—rebut *fabrication, influence,* or *motive*.

In addition to the admissibility requirements outlined above, this Court "has recognized two additional guiding principles as governing admission:"

> (1) the prior statement . . . must precede any motive to fabricate or improper influence that it is offered to rebut; and;
> (2) where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut.

United States v. Frost, 79 M.J. 104, 110 (C.A.A.F. 2019).

"Mere repetition . . . [of an out-of-court statement] while still under the improper influence . . . does nothing to "rebut" the charge. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true." *United States v. McCaskey*, 30 M.J. 188, 192 (C.A.A.F. 1990). "The applicable principle is that the prior consistent statement has no relevancy to refute the charge *unless* the consistent statement is made *before* the source of the bias, interest, influence or incapacity originated." *Tome v. United States*, 513 U.S. 150, 156 (1995) (quoting E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972)). "A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive." *Id*. at 158.

2. Admissibility under MRE 801(d)(l)(B)(ii)—rehabilitate *on another ground*.

Finch establishes the five elements for admission under romanette (ii):

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

Ruiz, No. 24-0158, at 9 (citing *Finch*, 79 M.J. at 395–96.)

Finch's third and fifth foundational elements continue to reinforce that admissibility requires both genuine consistency and rehabilitative relevance. *Finch* continued to build upon this Court's interpretation in *McCaskey*, which rejected admission of prior statements that amounted to mere repetition or improper bolstering. *See McCaskey*, 30 M.J. at 192.

3. Admissibility under MRE 403.

Lastly, "to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403." *Finch*, 79 M.J. 389, 396, (quoting *Manual for Courts-Martial, United States*, Analysis of the Military Rules of Evidence app. 16 at A22–61 (2016 ed.)). "The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue

delay, wasting time, or needlessly presenting cumulative evidence." *Finch*, 79 M.J. at 396 (quoting MRE 403).

Argument

This Court should decline to adopt the "*Pierre* standard" and instead reaffirm and refine this Court's existing precedent in line with *Ayala*'s "relevant to rehabilitate."

A. This Court has consistently refused to admit prior consistent statements that amount to nothing more than improper bolstering.

As the Court explained in *Finch*, statements admitted under (B)(ii) "must actually be relevant to rehabilitate" and not simply cumulative. 79 M.J. at 396. Likewise, in *Ayala*, the Court held that "statements admitted under (B)(ii) must be relevant to the grounds of attack," and that "[t]he proponent bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred." *Ayala*, 81 M.J. at 28. Most recently, in *Ruiz,* this Court reaffirmed "*Finch* factor five[']s" requirement that the proponent must demonstrate a clear connection between the prior statement and the specific impeachment ground it seeks to rebut. *Ruiz,* 2025 CAAF LEXIS 656, at *15–16.

Pierre is nothing groundbreaking. Nearly forty years have passed since the Second Circuit announced *Pierre*'s 1986 "significant rebutting force" standard. In that time, military jurisprudence has steadily developed its own doctrine. The

Supreme Court's decision in *Tome* (1995) clarified the "temporal limits" of prior consistent statements, and the 2016 amendment to M.R.E 801(d)(1)(B) codified the "relevant to rehabilitate" requirement. *Tome* 513 U.S. at 156.

Since then, this Court has repeatedly reinforced that that mere repetition of a prior statement is not enough. *See e.g. McCaskey*, 30 M.J. at 192. Building on that principle, *Frost* reaffirmed that when a prior consistent statement is offered to rebut a charge of recent fabrication or improper influence or motive under M.R.E. 801(d)(1)(B)(i), the statement must precede the alleged motive or influence it is offered to rebut. 79 M.J. at 110. *Finch* established that "only those portions of a witness's prior statement that are consistent with the witness's courtroom testimony may be deemed admissible at trial." 79 M.J. at 391. The *Ayala* Court clarified that M.R.E. 801(d)(B)(i) and (ii) are separate and distinct, and that "prior consistent statements may be eligible for admission under either (B)(i) or (B)(ii) but not both." 81 M.J. at 28. Lastly, *Ayala* emphasized the importance for military judges to identify the proponent's "relevancy link . . . to the particular type of impeachment that has occurred." *Id.*

Collectively, these cases eliminate the concerns addressed in *Pierre* while equipping military judges with a flexible five-factor framework to guide admissibility determinations. The "*Pierre* standard," perhaps novel for its time, has since been incorporated through the common-sense application of the evolving

rules of evidence. Ignoring the fact that *Pierre* was written before the Supreme Court issued *Tome*, this Court has already addressed the risks posed by the introduction of prior consistent statements and provided adequate safeguards to assist military judges in applying *Finch*'s five-factor test. *McCaskey*, 30 M.J. at 192; *see also Frost* 79 M.J. at 110.

This Court should decline Appellant's invitation to import an interpretation of prior consistent statements grounded in the Second Circuit's 1986 understanding of the Federal Rules of Evidence. Instead, this Court should resolve the issue raised by the Army court in this case—whether *Ayala* requires treating the two prongs of MRE 801(d)(1)(B) as "*separate and distinct*, as opposed to foreclosing any scenario which a prior statement could be admissible under both exceptions if the criteria for each exception were individually satisfied." (JA 010–11).

In August 2025, *Ruiz* reaffirmed this Court's precedent in *Frost*, *Ayala*, and *Finch*, underscoring the continued applicability of M.R.E. 801(d)(1)(B). In his brief, Appellant argues "counsel are piecemealing *Ruiz*'s dicta" to expand admissibility of prior consistent statements beyond precedent. (App. Br. 42); *see also* (JA 495–502). That contention misreads both the opinion and the governing law. *Ruiz* did not announce a new rule; instead, this Court applied correctly *Finch*, *Ayala*, and *Frost*, to the facts before it.

B. *Ruiz* was correctly decided and provides no basis for importing *Pierre*.

Appellant challenges this Court's holding in *Ruiz* to justify adoption of the Second Circuit's *Pierre* standard. (Appellant's Br. 22, 27,36, 39–43, 54). In furthering his misinterpretation, Appellant states "*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.'" (Appellant's Br. 43). *Ruiz* was not a departure from precedent, but a straightforward application of this Court's established framework under M.R.E 801(d)(1)(B)(ii). Appellant's claim that *Ruiz* was wrongly decided misrepresents the opinion and overlooks the safeguards this Court has already imposed.

1. Appellant mischaracterizes *Ruiz* as dicta.

In *Ruiz*, the victim's intoxication left her with broken, "fragmented" memories of the abusive sexual contact. *Ruiz*, 2025 CAAF LEXIS 656, at *2. "On cross-examination, [the victim] acknowledged there were significant gaps in her memory of the night of the assault. She acknowledged it was "possible" she had made statements to law enforcement and the SAFE nurse soon after the incident, but at the time of trial she did not remember what she told them." *Id.* at *4. On appeal to the CAAF, *Ruiz* continued to challenge the victim's "inconsistent

statements" despite the Navy-Marine Corps Court of Criminal Appeals' rejection of this argument.[6] *Ruiz,* 2025 CAAF LEXIS 656, at *13.

Despite the victim's failure to remember her statement to law enforcement, this Court concluded it "was admissible under M.R.E. 801(d)(1)(B)(ii) as a prior consistent statement to rehabilitate her credibility regarding her expression of nonconsent to the charged conduct." *Id.* at *12.

2. *Pierre*'s rigid standard would have improperly excluded admissible evidence.

Applying the rigid "significant rebutting force" requirement from *Pierre* to *Ruiz* would have led to the exclusion of the victim's statement to law enforcement altogether, even though it provided legitimate rehabilitative context for the factfinder. *Pierre* raises the 'consistency' typically required by this Court, then asks military judges to ensure the "rebutting force" of the prior consistent statement—one-for-one—rehabilitates the damage caused by the impeachment. Applying *Pierre* to the facts of *Ruiz* would have enabled defense counsel to exploit the victim's inability to recall her blackout statement while simultaneously foreclosing the government's opportunity to rehabilitate her credibility.

[6] On appeal, "[Ruiz failed in] argu[ing that] Ms. Sierra's statement to Deputy Frank that she said "[n]o" when Appellant touched her buttocks and vaginal area [was] inconsistent with a fact of central importance to the trial— specifically, her testimony that she said "[n]o" when Appellant tried to kiss her." *Ruiz,* No. 24-0158, at 13.

Pierre elevates form over substance and risks excluding statements that, in context, are highly probative of honest recollection—disproportionately disadvantaging victims whose earliest reliable statements were informal or made to confidants. Such a binary approach ignores the current state of the rule, and how courts have interpreted the word "consistent."[7] Had *Pierre* been applied, the statement would not have reached the factfinder, leaving the panel with an incomplete picture of her credibility. By reaffirming its own precedent in *Ruiz*, this Court ensured that probative, rehabilitative evidence was properly considered, while maintaining safeguards against abuse.

The flexible military framework—grounded in *Finch*, *Ayala*, *Frost*, and *McCaskey*—strikes the right balance, and there is no need to import a decades-old gloss from another circuit.

> Cross-examination is an important tool for exposing potential biases. But the M.R.E. are not one-sided. If counsel for a party insinuates during cross-examination that the other side has recently coached the witness, the insinuation may open the door for rebuttal by the

[7] The language of M.R.E. 801(d)(1)(B) is identical to the corresponding federal rule, and as such, the interpretation of the term "consistent" by other federal courts of appeals is instructive. *Drafters' Analysis*. Regarding "consistency", the Third Circuit has held "the rule allows the use of earlier statements that are generally consistent with the testimony at trial." *United States v. Muhammad*, 512 F. App'x 154, 166 (3d Cir. 2013) Similarly, the United States Court of Appeals for the First Circuit has explained, "a prior consistent statement need not be identical in every detail to the declarant's . . . testimony at trial." *United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988). Rather, the prior statement need only be "for the most part consistent" and in particular, be "consistent with respect to . . . fact[s] of central importance to the trial." *Id*.

> introduction of a prior consistent statement. Under the text of M.R.E. 801(d)(1)(B)(i), a relevant prior consistent statement is excluded from the definition of hearsay not only when counsel alleges a recent fabrication but also when counsel alleges that the witness acted from any other recent improper influence or motive.

Ayala, 81 M.J. at 32.

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.

Additional Facts

The two statements at issue are found within Pros. Ex. 26 and 27 (Pros. Ex.). In its written motion, the government sought to introduce Pros. Ex. 26 under Mil. R. Evid. 801(d)(1)(B)(i), arguing that defense introduced two motives to fabricate: the children were placed in protective custody and the defense cross-examination concerning the divorce. (JA 243, 245, 250; App. Ex. XXXI). Although the government's written motion only included admission under (B)(i); government counsel orally argued KB's recorded interview could also be introduced under (B)(ii). (JA 244–45; App. Ex. XXXI–XXXII).

During the defense cross examination of KB, the defense placed control of the children as a motivating factor for KB to fabricate her allegations. (JA 034–37, 098–101). As part of this strategy, the defense counsel cross-examined KB on her divorce filing and petition for custody, both of which occurred *after* every prior consistent statement. (JA 107).

Later, the Government called SA GC to testify about his work in the investigation, particularly his multiple interviews of KB. (JA 222, 232–36). Special

Agent GC testified—without objection from defense—to KB's statements during the July 3rd and later July 8th interviews with CID. (JA 233–36). Specifically, when describing the July 3rd interview, SA GC testified that "Ms. [KB] said that she did not point the pistol at him. She kept in in low ready position." (JA 234).

When the government attempted to introduce segments of "Prosecution Exhibit 7 for identification"[8] as a prior consistent statement, the defense initially objected on the basis that the video was cumulative—correctly noting that the agent already testified to most of the contents within the video. (JA 236–38). The military judge then excused the panel and called an Article 39(a) hearing. During the session, the military judge articulated this Court's holding in *Finch*:

> The government wants to, as a prior consistent statement, put into evidence segments [of KBs interview] . . . Now, that's an appropriate way to do it under the case law . . . They [the proponent] must show exactly . . . what it is that this prior consistent statement is rehabbing the witness on. For example, a loss of memory, or something along those lines, and the case law is also very clear that . . . you can't just put the whole statement in. You have to break it down into segments *and talk* about how that segment is rehabbing the witness on a prior consistent statement on a ground that that witness was attacked on.

(JA 239).

The military judge continued, stating "we'll get the proffer, but if we're going to go through the whole process . . .we have to all watch it and I have to

[8] Pros. Ex. 7 contained the video of KB's complete CID interview on July 8, 2022, which was bifurcated into Pros. Ex. 26 and 27.

make sure that whatever the segments are, are rehabilitating the witness on the grounds challenged in the manner the government says that it is." (JA 240).

Only later in the session did defense object on the basis of hearsay. (JA 249–50). In response, the government proffered that protective custody was one motive, but the divorce and custody battle were separate motives the defense introduced. (JA 250). Before ruling, the military judge watched the videos, limited the evidence to only sections that actually "rehabbed" the declarant, recognized the statement "does not have to be perfectly consistent and therefore its consistent enough for a foundational requirement to meet this prong of *Finch.*" (JA 252). The military judge ultimately ruled that the "government ha[d] satisfied the foundational requirements under 801(d)(1)(B)(i) *and* . . . (ii)." (JA 251).

Standard of Review

"This Court reviews a military judge's decision to admit evidence for abuse of discretion." *Finch*, 79 M.J. at 394. (quoting *Frost*, 79 M.J. at 109). "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *Finch*, 79 M.J. at 394 (quoting *Frost*, 79 M.J. at 109).

Law

The applicable law as it relates to hearsay and prior consistent statements is addressed in AE III. "For [preserved] nonconstitutional evidentiary errors, the test for prejudice is whether the error had a substantial influence on the findings." *Ayala*, 81 M.J. at 29 (quoting *Frost*, 79 M.J. at 11).

Argument

While the military judge erred by admitting Pros. Ex. 26 under both Mil. R. Evid. 801(d)(1)(B)(i) and (ii), the error was harmless and this Court should affirm the findings and sentence. Although the military judge admitted Pros. Ex. 27 under both prongs in violation of *Ayala*, Pros. 27 only corroborated Appellant ""unlawfully touch[ing] [KB] by grabbing her neck with his hands." (Charge Sheet; JA 15). This statement became immaterial to the trial when the panel excepted that language on the findings and acquitted appellant of the words, "neck with his hands . . ." (JA 401, 453). As the panel did, this Court should conclude the evidence from Pros. Ex. 27 had no effect on the proceedings. (JA 453).

A. The military judge correctly admitted Pros. Ex. 26 and 27 under Mil. R. Evid. 801(d)(1)(B)(ii).

KB's statement was admissible under (B)(ii) as government trial counsel initially motioned to admit the statement. (JA 244).

For statements admitted under Mil. R. Evid. 801(d)(1)(B)(i), the statement must be offered "to rebut an express or implied charge that the declarant recently fabricated [the in-court testimony] or acted from a recent improper influence or motive in so testifying." *Id*. at 395 (quoting Mil. R. Evid. 801(d)(1)(B)(i)) (brackets in original). For Mil. R. Evid. 801(d)(1)(B)(ii), the statement is admissible when it rehabilitates "the declarant's credibility as a witness when attacked on another ground." *Id*. (quoting Mil. R. Evid. 801(d)(1)(B)(ii)).

For statements that fall under the first exception, the statement does not need to predate every improper influence or motive to fabricate, but only the one it is intended to rebut. *Frost*, 79 M.J. at 110. For the second exception, "another ground," indicates the statement must rehabilitate the witness's credibility when attacked in a way other than by a motive to fabricate or improper influence. *Finch*, 79 M.J. at 395.

Finally, as this Court reiterated in *Ayala*, the prior consistent statement must be "relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch*, 79 M.J. at 396. Here, the government's original motions found in App. Ex. XXXI and XXXII, in combination with the defense cross of KB, provided a valid basis for introduction of the prior consistent statements in Pros. Ex. 26 and 27. For both exhibits, the first three requirements of the rule were met: (1) KB testified, (2) she was subject to cross-examination, (3) and the statements

within Pros. Ex. 26 and Pros. Ex. 27 were consistent with her in-court testimony.

"[B]oth at trial and on appeal [A]ppellant argues that the motive to fabricate arose when the CID agent informed the victim at the first interview at the hospital that her children were in protective custody." *United States v. Brown*, ARMY 20230168, 2025 CCA LEXIS 213, at *17 (A. Ct. Crim. App. May 9, 2025); (JA 234).[9] Appellant argues this as one of two potential motives, yet, as the Army court correctly determined, this was in fact one larger "motive."

The Army court "acknowledge[d] that when there is an assertion of multiple motives . . . or multiple improper influences, the statement at issue need not precede all such motives or inferences, but only the one it is rebutting." *Id.* at *18. However, the Army court "questioned whether there were truly two separate motives to fabricate in this case." *Id*. Despite Appellant's argument, defense's cross-examination of KB was in line with the Army court's interpretation, as defense focused on every instant where KB could lose her children, suggesting one overarching motive to fabricate to the panel. The defense made child custody a central theme, arguing this "core motivation" in their opening, cross-examinations, and closing statement. (JA 034–37, 098–101, 103–05, 107, 371–73).

[9] Appellant again argues to this Court "[t]he motive for custody arose the second KB was told she could not obtain custody if she was potentially an aggressor on 3 July before talking to SA GC. So, both statements afterwards to CID were inadmissible, but especially the July 8 video-recorded interview." (App. Br. at 54–55).

"Moreover, except for a few questions at the end of his cross-examination about the divorce, the focus of defense counsel's cross-examination was how the victim's story changed after she learned her children were in protective custody." *Brown*, 2025 CCA LEXIS 213 at *18.

However, if the military judge considered the divorce as a separate motivating factor, the requirements under M.R.E 801(d)(1)(B)(i) were likely satisfied after defense's opening and cross. Therefore, it may have been reasonable to conclude that KB's statement could have also, independently, been admissible under M.R.E 801(d)(1)(B)(ii). Even if, *arguendo*, the military judge erred in determining KB's statement predated any potential motive to fabricate and KB's motive to fabricate somehow began the moment she was stabbed, defense attacked KB's version of events on "another ground"—inconsistency. This permitted the government to introduce KB's prior consistent statement under M.R.E 801(d)(1)(B)(ii). *Finch*, 79 M.J. at 396 ("The rule itself does not specify what types of attacks a prior consistent statement under Mil. R. Evid. 801(d)(1)(B)(ii) is admissible to rebut, but the [MCM] Analysis of the [M.R.E's] lists "charges of inconsistency or faulty memory" as two examples.").

Despite the potential admissibility of KB's statement under M.R.E 801(d)(1)(B)(i), the military judge's dual admission did disregard this Court's plain language in *Ayala*. 81 M.J. at 28 ("We made it clear in *Finch* that prior consistent

statements may be eligible for admission under either (B)(i) or (B)(ii) but not both."). Nevertheless, the military judge's analysis was sufficient to meet this Court's admissibility requirements under M.R.E 801(d)(1)(B)(ii).

B. Even if the military judge erred in admitting the prior consistent statements, it would not change the ultimate outcome, as Appellant was not prejudiced.

This Court should find the error harmless and affirm the findings and sentence in this case. First, while the military judge erred on his analysis for Pros. Ex. 26, the statement should still have come in, and, therefore, "there could not be prejudice when the [statements] still [were] admissible." *Norwood*, 81 M.J at 18.

Second, even if the judge should not have admitted Pros. Ex. 26 and 27, the evidence did not substantially influence the findings, and the error was harmless. *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (providing a test for non-constitutional error).

"In conducting the prejudice analysis, this Court weighs: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Frost*, 79 M.J. at 111 (quoting *Kohlbek*, 78 M.J. at 334.)

1. The government had the stronger case.

First, the government's case was strong—KB's testimony provided the narrative of facts the government relied on and independent evidence

corroborated that narrative. KB convincingly testified about Appellant's attack, falling down the stairs, and waking up with Appellant's hands around her neck and then yelling to her children to get help. (JA 051).

Both neighbors, RM and LM independently testified that KB's children arrived outside their home and screamed, "He's trying to kill her." (JA 153). "He's trying to kill her. He's choking her. He's trying to kill her." (JA 129). This corroborates KB's testimony, "I remembered seeing [my 8-year-old daughter] and I told her—she started screaming and I told her to 'Go get Mrs. [RM]. Go get Mrs. [RM].'" (JA 058). This also corroborated KB's statement that Appellant choked her at the base of the stairs. (JA 051).

"Although the victim was inconsistent in her statements, it is significant that immediately after the assault, and before she had any idea of what would happen to her children, she denied pointing the gun at Appellant's face." *Brown*, 2025 CCA 213, at *23. Further, "[A]ppellant's self-defense claim is undermined by his admissions that when he stabbed the victim the gun was already on the bed, and that he "thinks" the victim had already dropped the magazine." *Id*.

Although Appellant did not testify, his CID interview was substantively admitted into evidence. *Id.* at *3.

> Per [A]ppellant, after he confronted the victim about sending pictures of herself to another man, she pointed her gun at his face and he froze, telling her to "shoot me." Appellant claimed that he took advantage of the moment when the victim looked away from him to grab the knife

> off the dresser and stab her in self-defense. Appellant also admitted, however, that the gun was already on the bed and that he "thinks" the victim had dropped the magazine when he stabbed her. Appellant stated that in the ensuing struggle, the knife accidentally lodged in the victim's shoulder [a second time] as they were falling down the stairs.

Id. at 3–4.

Further evidence corroborated KB's testimony. Both neighbors, RM and LM independently testified that Appellant stated, "why'd you have to point the gun at me?" (JA 131, 161). Both RM and LM testified Appellant said this as soon as they arrived outside their home while LM was calling 911. (JA 134, 161). KB's immediate reaction was, "I didn't point a gun at you. You stabbed me." (JA 131). Finally, the CID photos and evidence of the bedroom support KB's explanation of events and undermined Appellant's description, as described below. (JA 416–49).

2. The defense's case was weak and did not support self-defense.

The defense presented a case of self-defense, acknowledging that the Appellant stabbed KB at least once. Through cross-examination, the defense alleged that KB's desire for access to the children, and to deny the Appellant access, led her to exaggerate his culpability and deny her own. However, this theory is fundamentally flawed due to independent sources of information, which directly contradict Appellant's narrative and render it implausible, particularly in comparison to KB's testimony. Specifically, when SA IR asked if the Appellant

saw the magazine, he replied, “I didn’t really pay attention.” (JA 415, Pros. Ex. 1a, video 1, 56:50–56:55).

Appellant’s claim that he did not know whether there was a magazine in the weapon was self-serving and did not make sense in light of the evidence. CID found the pistol separated from the magazine and the bullet on the bed, consistent with KB’s testimony that she cleared the weapon, removed the magazine, and was stabbed in the back. (JA 053, 272). Even the EMT’s testimony, where KB is claimed to have said she pointed the gun at Appellant’s, face contradicted Appellant’s self-defense claim. (JA 199, 333–34, 339) (“she admitted that she pulled an unloaded firearm and pointed it at his face. . . and it was at that time she had gone to turn to either put [the firearm] in or on the nightstand.”). Further, during his CID interview, Appellant agreed with SA IR that the gun was on the bed when he struck KB. (JA 415, Pros. Ex. 1a, video 1, 57:29–57:38). Finally, while Appellant claimed he was involved in a “tussle” with KB, no marks are visible on his shirtless body in the hours after the incident. (JA 415, Pros. Ex. 1a, video 1, 1:15:30).

Overall, the defense never convincingly presented evidence that Appellant, “on reasonable grounds,” apprehended that death or serious bodily harm would occur had he not stabbed KB. To the contrary, Appellant claimed that he was not scared—he told her, “If you want to shoot, shoot.” (JA 415, Pros. Ex. 1a, video 1,

41:45). “That’s when she kind of put the gun down,” and Appellant stabbed her in the back. (JA 415, Pros. Ex. 1a, video 1, 41:55–42:00). While the defense attempted to impeach KB’s claim that she never pointed a weapon at Appellant, again, KB’s initial denials to Mrs. RM contradict this evidence. (JA 084, 206, 334). Even viewing these facts from Appellant’s perspective, the defense presented an unpersuasive case.

3. The evidence was not material to the trial and of minimal value to the prosecution.

For the final two factors of the prejudice analysis under *Kohlbek*, this Court considers the materiality and quality of the evidence in question. *United States v. Jones*, 85 M.J. 80, 85 (C.A.A.F. 2024). This Court looks to “how much the erroneously admitted evidence may have affected the court-martial.” *Id.* (quoting *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020)). In this case, the Court should determine the evidence did not affect the results of the trial.

a. Pros Ex. 26—SA GC had already testified to its content.

In the first contested statement, KB describes to SA GC the sequence of events leading to the stabbing. (Pros. Ex. 26, JA 452). Before the introduction of the video to the panel, the government introduced most of what KB would eventually tell SA GC (in her 8 July interview) through SA GC’s recitation of the July 3, 2022, informal hospital interview. (JA 232–35). SA GC’s recital of KB’s

hospital statements came in unopposed by defense. (JA 232–35).[10] Defense then objected to the video's admission, arguing "it's our position that the agent has already testified to what [KB] stated . . . and so we're not sure what this video adds to that testimony." (JA–238).

"When a 'fact was already obvious from . . . testimony at trial and the evidence in question 'would not have provided any new ammunition,' the erroneous admission of the evidence is likely to be harmless." *Jones*, 85 M.J. at 85 (quoting *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

Even if this Court determines that the evidence was more than simply cumulative to SA GC's unobjected testimony, the evidence was still of minimal value to the trial. The defense appropriately cross-examined KB on this issue and argued it strongly during their closing.[11]

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[10] In the Article 39(a) immediately following SA GC's testimony, the military judge acknowledged, "Where I'm at is, I'm sitting here and I'm hearing blatant hearsay being testified to. Now, that's a tactical call by defense counsel. Maybe you want all that to come in, so you didn't object . . . Unless, of course, you're not objecting to it, and you want it to come in." (JA 237–38).

[11] "One question you might have, why would [KB] change her story?" (JA 370). "But [KB] didn't just lose control of her emotions on July 2nd. When [KB] was being treated at Irwin Army Community Hospital and again at Stormont Vail Trauma Center, CID made a decision that took away her control. She lost her children." (JA 372).

Despite defense's arguments, questioning KB's credibility and motive, the panel already heard SA GC's testimony. Ultimately, SA GC's statement alongside other corroborating testimony lessened the materiality of Pros. Ex. 26. (JA 452).

b. The panel's findings rendered Pros. Ex. 27 immaterial.

The final part of this Court's *Kohlbek* analysis looks at "the quality of the evidence in question." 78 M.J at 334. Here, the consistent statement was even less material to the trial. (Pros. Ex. 27, JA 453). In Pros. Ex. 27, KB described Appellant choking her. However, the panel did not convict Appellant of the allegation that he "unlawfully touch [KB] by grabbing her neck with his hands." (Charge Sheet; JA 15). The panel excepted that language on the findings. (JA 401). The panel's verdict made Pros. Ex. 27 immaterial to the trial. (JA 453). As the panel acquitted appellant of the words, "neck with his hands," this Court should conclude the evidence from Pros. Ex. 27 had no effect on the proceedings. (JA 453).

4. The military judge mentioned on multiple occasions that he would not admit material that he did not find relevant.

"One aspect of this case weighing against prejudice relates to the military judge's comments on the record." *Ayala*, 81 M.J at 30. The military judge limited the government from admitting the entire CID interview and only admitted those portions he identified as "rehabilitating the witness on the grounds challenged in the manner the government says that it is." (JA 240). Based on the arguments

above, even if this Court determines the military judge erred in admitting Pros. Ex. 26 and 27, the Court should determine the error harmless.

Granted Issue 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.

Additional Facts

In its opinion, the Army court noted the limitations this Court placed on admitting prior consistent statements; "[w]e made it clear in *Finch* that prior consistent statements may be eligible for admission under either (B)(i) or B(ii) but not both." (JA 010–11), *Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) (citing *Finch*, 79 M.J. at 396).

The Army court then interpreted the plain language in both *Ayala* and *Finch* to reason, "*Finch* does not state that the two prongs are mutually exclusive," therefore, "a reasonable interpretation of the language in *Ayala* is that the CAAF was reiterating that the two prongs *are separate and distinct*, as opposed to foreclosing *any scenario* in which a prior [consistent] statement could be admissible under both exceptions if the criteria for each exception were individually satisfied." (JA 010–011) (emphasis added). Ultimately, the Army court determined KB's "prior consistent statements [to CID] were admissible

under the (B)(ii) exception . . . [and] to the extent the military judge erred in admitting the statements under both exceptions, any such error was harmless." (JA 010–11). In discussing this question,[12] the Army court "recognized that only the CAAF can overrule its own precedent, which [the Army court] would respectfully urge it to do, or to at least provide clarity on this issue." (JA 011).

Standard of Review

A Court of Criminal Appeals' actions under Article 66, UCMJ are reviewed for an abuse of discretion. *United States v. Guinn*, 81 M.J. 195, 199 (C.A.A.F. 2021). Questions of law are reviewed de novo. *United States v. Mays*, 83 M.J. 277, 279 (C.A.A.F. 2023). Factual findings are reviewed for clear error. *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020). The ultimate evidentiary ruling is reviewed for abuse of discretion. *United States v. Frost*, 79 M.J. at 109.

Law and Argument

The Army court did not disregard *Ayala* or *Finch*. First, the Army court cited and applied *Finch*'s five-factor test to the statements KB made to CID. (JA 010, 012–13). The Army court found the statements consistent and rehabilitative

[12] Whether *Ayala* holds that the two prongs of MRE 801(d)(1)(B) "are *separate and distinct*, as opposed to foreclosing any scenario which a prior statement could be admissible under both exceptions if the criteria for each exception were individually satisfied." (JA 010-11); *see, e.g.*, *United States v. Begay*, 116 F.4th 795, 801 n.2 (8th Cir. 2024) ("Only when a party impeaches a witness on a ground '[]other' than-*or in addition to*-a motive to lie does the second category kick in") (emphasis added) (citation omitted).

against a targeted attack on inconsistency. (JA 012). Further, the court acknowledged *Ayala*'s language on dual admission, noting that "a reasonable interpretation of the language in *Finch*" raised the question of whether dual admission is permissible, but ultimately treated any (B)(i) error as harmless. (JA 010). Its explanation was legally sufficient and firmly grounded in the record. This Court should therefore affirm the Army court's ruling that the prior consistent statements were admissible under Mil. R. Evid. 801(d)(1)(B)(ii), and that any error under (B)(i) did not prejudice Appellant.

A. The Army court correctly applied *Finch* to admit the prior consistent statements under (b)(ii).

The Army Court of Criminal Appeals expressly applied the governing framework from *Finch*. 79 M.J. at 389. In its analysis, the court conducted the required five-factor test for admission under Mil. R. Evid. 801(d)(1)(B)(ii). The court confirmed that: (1) the declarant testified at trial; (2) she was subject to cross-examination; (3) and that her CID statements were consistent with her in-trial testimony. The court found (4) KB's "testimony [was] attacked "on another ground" other than the ones listed in (B)(i) [recent fabrication or recent improper influence or motive]"—namely, inconsistency. (JA 010, 012). Lastly, the Army court determined (5) KB's prior consistent statements were relevant to rehabilitate credibility on that ground. The Army court's express citation and application of the five-factor *Finch* framework demonstrated adherence to precedent rather than any

disregard. The court's reasoning reflects this Court's established approach: prior consistent statements may be admitted when they directly respond to an impeachment and serve a rehabilitative purpose, rather than functioning merely as repetitive evidence.

1. The Army court properly applied *Finch* and *Norwood* to find consistency.

In addressing *Finch*'s third "consistency" [13] element, the Army court rejected Appellant's claim that KB's CID interview conflicted with her trial testimony. (JA 012). The Army court found that the victim's CID interview statements were consistent with her trial testimony, notwithstanding minor differences such as whether she "flagged" appellant while turning toward the bed. (JA 012).

As this Court has explained, a prior statement need not be identical in every detail to the declarant's testimony; it is sufficient that the statement is "for the most part consistent" and, in particular, "consistent with respect to . . . fact[s] of central importance to the trial." *Norwood*, 81 M.J. at 18 (quoting *Vest*, 842 F.2d at 1329). Accordingly, the Army court's determination was firmly grounded in this Court's

[13] The Army court found KB's statements to "CID [that] she might have briefly "flagged" or inadvertently pointed the gun at appellant while she was turning towards the bed . . . to be a distinction without a difference. Put another way, on the whole, the victim's statement to CID was consistent with her testimony at trial that she never intentionally pointed the gun in anger at appellant." (JA 012).

precedent, concluding that KB's CID interview was consistent as *Finch*'s third foundational element requires.

Because defense counsel's cross-examination focused on alleged inconsistencies in the victim's accounts, the CID snippets directly rehabilitated her credibility on that precise ground, satisfying *Finch*'s requirement that the prior statement be relevant to the basis of impeachment.

2. The Army court expressly found that KB's testimony was attacked "on another ground" within the meaning of Mil. R. Evid. 801(d)(1)(B)(ii)—namely, inconsistency.

In his opening,[14] cross-examination, and closing argument, defense counsel highlighted KB's prior accounts of whether she pointed the gun at appellant. (JA 033–38, 098–101, 103–05, 107, 371–73).

After reviewing the proffered CID interview statements outside the presence of the panel, the military judge applied the *Finch* framework and concluded that the defense's impeachment was based on inconsistency rather than recent fabrication or improper motive. The Army court affirmed, holding that "because

[14] "She's going to tell you that she tried to get away . . . The gun is no longer in play . . . that is what I expect [KB] to tell you here in this court room . . . First, is she going to tell you that she ever pointed the pistol at PFC Brown, even accidently so? No" (JA 033). "I want you to pay close attention to her answer in this courtroom, if it's consistent with that." "Is the story that [KB] tells you in this court room 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?" (JA 034, 038)

the victim's testimony was attacked on 'another ground' of 'inconsistency attacks by defense counsel,' the prior statements rehabilitated her trial testimony and were admissible under the (B)(ii) exception." (JA 012).

3. The Army court acknowledged *Ayala* and properly addressed dual admission.

The Army court did not ignore *Ayala*, rather, it expressly recognized this Court's instruction that prior consistent statements "may be eligible for admission under either (B)(i) or (B)(ii) but not both," and engaged with the question of dual admission. *Ayala*, 81 M.J. at 28.

In doing so, the Army court applied the same "less colorful appellation of "right result, wrong reason" or "tipsy-coachman"[15] reasoning this Court endorsed in *Robinson*—that although the military judge erred in admitting the CID snippets under both (B)(i) and (B)(ii), any such "error was harmless, because the military judge reached the correct result, albeit for the wrong reason." *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003); *see also United States v. Carista*, 76

[15] "The principle is sometimes referred to as the 'tipsy coachman' doctrine . . . Georgia Supreme Court Justice Bleckley quoted Oliver Goldsmith's 1774 poem, *Retaliation*, to illustrate the concept." *Carista*, 76 M.J. at 515 (A. Ct. Crim. App. 2017); *See, e.g.*, *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) ("This long-standing principle of appellate law, sometimes referred to as the 'tipsy coachman' doctrine, allows an appellate court to affirm a trial court that 'reaches the right result but for the wrong reasons' so long as 'there is any basis which would support the judgment in the record.'") (citation omitted). (*See* Oliver Goldsmith, *Retaliation: A Poem* (London: G. Kearsley, 1774).

M.J. 511, 515 (A. Ct. Crim. App. 2017) (stating “however, '[I]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.’”) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154, 82 L. Ed. 224, 1938-1 C.B. 300 (1937)).

The Army court’s careful analysis demonstrates an acknowledgement of the gap between *Ayala* and *Finch*—leaving the question of dual admission up to this Court.

B. The Army court’s explanation was legally sufficient.

The Army applied the correct standard, grounded its conclusion in the record, and articulated why the CID statements rehabilitated the victim’s credibility against inconsistency attacks. This Court has never required exhaustive commentary when the legal test is met; rather, it requires that the proponent establish the *Finch* factors and that the trial or appellate court confirm those elements are satisfied. The Army court did exactly that. Its opinion reflects a faithful application of precedent and a reasoned conclusion that the statements were admissible under (B)(ii).

Conclusion

The United States respectfully request this Court deny appellant's Petition for Grant of Review.

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1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 10,872 words.

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

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 20th day of November, 2025.

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