IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Specialist (E-4) **NICHOLAS L. FROST** United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20160171 USCA Dkt. No. 18-0362/AR

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

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING HEARSAY STATEMENTS AS PRIOR CONSISTENT STATEMENTS UNDER MIL. R. EVID. 801(d)(1)(B)(i) WHERE THE DEFENSE THEORY POSITED THE IMPROPER INFLUENCE OR MOTIVE PRECEDED THE ALLEGEDLY CONSISTENT STATEMENTS.

Statement of the Case

On November 29, 2018, this Court granted review of this case. Appellant filed his Brief on Behalf of Appellant on January 22, 2019, and the Appellee responded on February 21, 2019. This is Appellant's reply.

Argument

1. The government erroneously concludes the trial defense team attempted to show or implied that Dr. Landry had an *improper* influence on DF's testimony.

The government alleges that "[A]ppellant proffered that Dr. Landry's counseling served to prepare Ms. DF for trial rather than provide a medical benefit. Appellant therefore… assert(ed) that the counseling sessions had in improper influence on Ms. DF's trial testimony." (Gov. Br. 12). This is a non-sequitur—the trial defense team's effort was to show that Dr. Landry was not providing medical diagnosis or treatment, and so she should not be allowed to testify about what DF told her. It was based entirely on Military Rule of Evidence 803(4), not improper influence, and they argued this to the military judge who acknowledged their argument as being "that it was not actually for medical treatment . . . and that it was primarily to make [DF] comfortable with coming in to court." (JA 52). Prior consistent statements are admissible to rebut an allegation that a witness *altered* the content of his testimony, rendering it false in some aspect. *United States v. McCaskey*, 30 M.J. 188, 191 (C.A.A.F. 1990). The government cannot identify anything the defense alleged that Dr. Landry (as opposed to Jennifer Moore) did or said to tamper with DF's testimony. Nowhere in the record of trial did the defense allege that Dr. Landry coached DF, utilized suggestive interview techniques, or did

anything at all to change the content of DF's testimony during their meetings. The defense merely alleged that Dr. Landry's purpose in meeting with DF was to gather evidence and help DF get comfortable with testifying at trial, and the defense's sole intent was to establish that Dr. Landry's repetition of what DF told her was inadmissible hearsay. The government's allegation is therefore baseless, as it cannot identify just what the Defense asserted that Dr. Landry did that was unprofessional or suggestive.

2. Trial preparation is not *improper* influence, and the trial defense team did not argue or imply it was.

The government alleges that trial investigation or preparation equates to improper influence. This court should unambiguously reject such a rule—the consequence of accepting this interpretation would greatly expand the admissibility of unreliable hearsay evidence. Courts must guard "against the importation of otherwise inadmissible hearsay statements into evidence under the guise of prior consistent statements, when a charge of recent fabrication or improper influence is neither intended nor substantial." *United States v. Hood*, 48 M.J. 928, 933 (A. Ct. Crim. App. 1998). Here, the trial defense team's examination of Dr. Landry's investigative purpose was not an intended nor implied allegation of improper influence. If preparing for trial or participating with the law enforcement apparatus equates to improper influence, then every time defense counsel solicits testimony

about whether a purported victim met with CID agents, consented to a SANE examination, or answered the questions of a chain of command during an R.C.M. 303 inquiry, that defense counsel has opened the door to every previous retelling of the incident. "Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true." *McCaskey*, 30 M.J. at 192. This court should decline the government's invitation to open the gates of evidence to a flood of unreliable hearsay.

Even if an allegation of forensic purpose were an allegation of influence, it is not alone an allegation of *improper* influence directed towards the alteration or falsification of testimony. Therefore, DF's outcry was not within the parameters of Mil. R. Evid. 801(d)(1)(B). In order for a prior consistent statement to be admissible, defense counsel must allege an "*improper* influence." Mil. R. Evid. 801(d)(1)(B)(emphasis added). An allegation of *improper* influence is "a suggestion that the witness changed his story in response to some threat or scheme or bribe." *McCaskey*, 30 M.J. at 192 (*citing* Weinstein and M. Berger, Weinstein's Evidence § 801-150 to 805-151 (1988)). Here, the government cannot cite to any Defense allegation the Dr. Landry engaged in *impropriety* which altered DF's testimony. Defense counsel did not allege the Dr. Landry engaged in unethical behavior or violated the applicable professional standard as a means of changing

DF's testimony. Rather, as the Government acknowledges, the military judge distilled the "essence of the objection down to the idea that Dr. Landry's counseling was…primarily to make DF comfortable with coming to court." (Gov't Br. 5). There is nothing *improper* about using a third party to assist a child's emotional management of a life event as significant as testifying in open court against a parent. Instead, Defense was clearly attempting to do two things: (1) preclude Dr. Landry from testifying about what DF told her, because Dr. Landry was not involved in DF's "medical treatment or diagnosis," Mil. R. Evid. 803(4); and (2) reiterate that the *improper* motive and influence was, and always was, coming from Jennifer Moore.

The record does not support the military judge's holding that the improper influence which the Defense alleged postdated Miss DF's initial allegation. Therefore, this court should find that the military judge abused his discretion in admitting DF's prior statement through Jennifer Moore and Sam Casey, because the improper influence alleged predated the statements.

3. The appellant was prejudiced by this testimony.

Appellee both overstates the strength of the government's case, and understates the importance of this particular evidence. DF did testify that the appellant touched her in a sexual manner, (JA 36), and Dr. Landry did testify that

after several sessions of helping DF prepare for trial that DF eventually told her something similar. (JA 97). Nevertheless, considering trial defense's argument that Jennifer Moore planted this allegation in DF, Dr. Landry's repetition of what DF told her merely compounds the problem, as it is repeating the false claim of another. Her testimony, under the prejudice analysis, means nothing where the trial defense team established Jennifer Moore's scheme to coach DF to testify against her father for a crime he did not commit. The trial defense team provided clear evidence that Jennifer Moore had the motive to coach DF's story—she had previous issues concerning the custody and visitation of her children with the appellant, (JA 142). Further, the trial defense team confronted Jennifer Moore with her Facebook message, clear evidence that she had actively *done* something to fix a problem on the exact day that DF "outcried" in her car, (JA 149), and provided clear evidence that DF routinely denied that anything happened to her prior to trial. (JA 199-203). By admitting Sam Casey's and Jennifer Moore's hearsay testimony that DF spontaneously alleged a heinous crime against the appellant in the car, the military judge essentially doubled the amount of testimonial evidence against the appellant. This is prejudicial in a case without any corroborating physical evidence.

Conclusion

The appellant respectfully requests this court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Frost*, USCA Dkt. No. 18-0362 AR, was delivered to the Court and Government Appellate Division on March 4, 2019.

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