IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Private (E-4) **DAVID M. FINCH** United States Army, Appellant	Brief on Behalf of Appellant Crim. App. Dkt. No. ARMY 20170501 USCA Dkt. No. 19-0298 / AR

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

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

ISSUES PRESENTED

I.

THE MILITARY JUDGE ERRED IN ADMITTING OVER DEFENSE OBJECTION THE VIDEO-RECORDED INTERVIEW OF AH BY CID BECAUSE IT WAS NOT A PRIOR CONSISTENT STATEMENT UNDER MIL.R.EVID. 801(d)(1)(B).

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. §866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. §867(a)(3)(2012).

STATEMENT OF THE CASE

Appellant was tried at Fort Bragg, North Carolina, on June 28, 2017, and September 19-21, 2017 before a general court-martial convened by the commanding general, 82nd Airborne Division. Appellant was charged with one specification of violation of a lawful general regulation under Article 92, UCMJ; one specification of committing lewd acts upon a child under Article 120b, UCMJ; and three specifications of committing a sexual act upon a child under Article 120b, UCMJ.

Appellant pleaded not guilty to all Charges and specifications. (JA 30). He elected to be tried by military judge alone. The military judge found Appellant guilty of all Charges and specifications. (JA 369). Appellant was sentenced to reduction to E-1, confinement for six years, and to be dishonorably discharged from the service. (JA 370).

SUMMARY OF THE ARGUMENT

AH, the appellant's thirteen-year-old stepdaughter and complaining witness, gave a recorded interview to the Army Criminal Investigation Command (CID) on March 12, 2016. The interview was almost two hours long.

The trial defense team argued that AH had many motives to fabricate the allegation, but most related to her desire to move out of her house. The trial

defense team argued that all AH's motives to fabricate the allegation preceded the March 12, 2016 interview with Army CID.

Further, the interview contained numerous statements that were directly inconsistent with her trial testimony orwere neither consistent nor inconsistent with her trial testimony. After the trial defense team's cross-examination of AH, the government moved to admit her recorded CID interview in its entirety. The statements, for the reasons stated above,were inadmissible hearsay. The military judge, *without personally reviewing the video*, admitted it in its entirety over defense objection. (JA 250).

ARGUMENT

I.

THE MILITARY JUDGE ERRED IN ADMITTING OVER DEFENSE OBJECTION THE VIDEO-RECORDED INTERVIEW OF AH BY CID BECAUSE IT WAS NOT A PRIOR CONSISTENT STATEMENT UNDER MIL.R.EVID. 801(d)(1)(B).

Standard of Review

The military judge's decision to admit evidence of a prior consistent statement is reviewed for an abuse of discretion. *United States v. Frost,* __ M.J. __, CAAF LEXIS 561, *23 (C.A.A.F. 2019). Where the military judge "places on the record his analysis and application of the law to the facts, deference is clearly warranted." *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014). If the

military judge fails to place his findings and analysis on the record, less deference is accorded. *Id.*

Facts

During the government's case-in-chief the government called Special Agent John Boerner of Army CID to testify. Special Agent Boerner interviewed AH, Appellant's stepdaughter and purported victim in this case, and made a video recording of the interview. (JA 247). The government offered Prosecution Exhibit 3, a copy of the interview, into evidence. The defense objected, stating, "Admitting the CD is basically allowing massive amounts of hearsay. It's the entire interview including all of AH's statements. We have no problem if he wants to use it to refresh somebody's recollection. But right now admitting it allows hearsay in." (JA 249). The defense also argued that it was cumulative, and not relevant given that AH had already testified. (JA 249).

Trial counsel argued that the defense had attacked AH's credibility and her timeline of events, attacked her memory and raised potential motives to fabricate, and so the interview qualified as a prior consistent statement. (JA 249-50).

The defense, citing *United States v. Adams*, 63 M.J. 691 (A.Ct. Crim. App. 2006), argued, "if it's just repetition, it is not allowed as a prior consistent statement. They asked AH about the timeline when she's on her – the stand.

Therefore it is cumulative and if that's all it's for, it doesn't meet the standards of prior consistent statement under *Adams*, it's just repetitive." (JA 250).

Prosecution Exhibit 3 consists of two different videos, comprising a total of a little less than two hours of interview of AH by CID agents. Without reviewing the video, and without discussing the specific requirements of Mil.R.Evid. 801(d)(1)(B)(i) or (ii), the military judge ruled,

> And cumulative doesn't just mean repetitive, it means basically needlessly repetitive information that we've received over and over again, but there are certainly other means of receiving evidence that may be similar from different avenues. Just because it's a statement about something that's already been talked about doesn't necessarily make it cumulative.
>
> I find that it is – well, on the basis of the defense's hearsay objection that objection is overruled. I find it is admissible under M.R.E. 801.

(JA 250).

Law and Argument

Military Rule of Evidence 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Mil.R.Evid. 801(d)(1)(B) provides that a statement is not hearsay if it is consistent with the declarant's testimony and is offered "(i) to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive in so testifying," or "(ii) to rehabilitate the declarant's credibility as a witness when attacked on

another ground." Statements admitted under Mil.R.Evid. 801(d)(1)(B) are admitted as substantive evidence. *See Tome v. United States*, 513 U.S. 150, 161 (1995); *United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017) ("intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness.").

Other than addressing the notion that "cumulative doesn't just mean repetitive," the military judge made no findings of fact or conclusions of law, and his decision therefore is entitled to little deference in evaluating whether the admission of the evidence was an abuse of discretion. As this Court has noted,

> When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord to a trial judge's factual findings because we have no factual findings to review. Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion . . . .

Flesher, 72 M.J. at 312 (quoting *United States v. Benton*, 54 M.J. 717, 725 (A.Ct.Crim.App. 2001).

1. To the extent that any of the statements contained within the CID interview were consistent with her trial testimony, they nevertheless did not qualify as prior consistent statements under Mil.R.Evid. 801(d)(1)(B)(i) because the motives to fabricate arose before AH ever gave the interview to CID.

The Court of Military Appeals held, in *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990), that there is a timing requirement before a prior statement can be admitted as evidence:

> In the usual case where a prior consistent statement is offered -- one in which the witness has been charged by the adversary with having recently fabricated the trial testimony or with testifying while under an improper influence or motive -- the prior statement is offered to show that the same story as that given during trial testimony was given earlier by the declarant. However, to be logically relevant to rebut such a charge, the prior statement typically must have been made *before* the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, 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.

(emphasis in original). This Court reiterated that for a prior statement to be admitted as substantive evidence, it must "precede any motive to fabricate or improper influence that it is offered to rebut." *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998). Where multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or influences, but only the one it is offered to rebut. *Id*.

As this Court noted in *United States v. Faison,* 49 M.J. 59, 61 (C.A.A.F. 1998), "The focus . . . is not *when* or even *if* a recent fabrication, improper influence, or improper motive occurred. The rule is concerned with rebutting the express or implied *charge*, *i.e.*, accusation by a party opponent, that some impropriety occurred." And, this Court noted, "Often, the very fact of improper motive, etc., will be vigorously disputed, much less ascertainable as to the precise moment of origination." *Faison*, 49 M.J. at 61. Therefore, "the point in time to be

ascertained for purposes of rebuttal is the fair implication of the charge, not the arguable underlying event." *Id.*

Most recently, this Court has reiterated those principles. In *United States v. Frost*, __ M.J. __, 2019 CAAF LEXIS 561, *10-11 (C.A.A.F. 2019), this Court discussed the requirements for admission of a prior consistent statement under Mil.R.Evid. 801(d)(1)(B)(i). This Court noted that in addition to the criteria for admission derived from the plain language of the Rule[1], that there are

> two additional guiding principles as governing the admission of a prior consistent statement: (1) the prior statement, admitted as substantive evidence, 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.

Frost, 2019 CAAF LEXIS 561 at *11 (citing *United States v. Allison*, 49 M.J. 54, 57 (C.A.A.F. 1998); *United States v. Faison*, 49 M.J. 59 (C.A.A.F. 1998); *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996); *United States v. Morgan*, 31 M.J. 43, 46 (C.M.A. 1990); *United States v. McCaskey*, 30 M.J. 188, 192 (C.M.A. 1990)).

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[1] (1) the declarant of the statement must testify and must be subject to cross-examination about the prior statement; (2) the statement must be consistent with the declarant's testimony; and (3) the statement must be offered "to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in testifying. *Frost*, 2019 CCA LEXIS 561 at *11.

Appellant acknowledges that there may have been multiple motivations for making a false allegation against Appellant. AH may have been angry because her mother did not pay enough attention to her; she may have been jealous that her mother and Appellant were having a baby of their own; she may have wanted to garner sympathy from her friends. As noted, the defense cited to *United States v. Adams*, 63 M.J. 691, for the proposition that mere repetition does not convert a prior statement into a prior consistent statement under the Military Rules of Evidence. Quoting *McCaskey*, 30 M.J. at 191, the Army Court of Criminal Appeals stated in *Adams*, at 697, "[e]vidence which merely shows that the witness said the same thing on other occasions *when his motive was the same* does not have much probative force for the simple reason that mere repetition does not imply veracity." (emphasis added). It has always been the defense's contention that these motivations all arose *before* AH ever gave this interview to CID.

The Army Court of Criminal Appeals, in evaluating whether the recording of the interview was admissible under Mil.R.Evid. 801(d)(1)(B)(i), concluded that it was admissible because

> The questions (and answers) elicited by the defense implied that AH's testimony in court was influenced by her present desire to no longer live with her parents. AH wanted to live with 'her friend,' not her parents. The obvious inference that the defense wanted the court to draw was that AH's testimony was motived by a desire to be removed from the home, a goal that would be furthered by appellant's conviction.

Finch, 78 M.J. at 790.

With respect to this conclusion, AH testified on cross-examination:

Q. Did you tell CID that your mom only cares about herself?

A. Yeah.

Q. And she only wants to live in a perfect, little world with her perfect, little child?

A. Yes, ma'am?

Q. That's a yes? And you don't want to live with her right now? [Affirmative response by the witness.]

Q. At the time you were talking with CID you didn't want to live with your parents?

A. I *still* don't really want to now.

Q. And you want to live with your friend?

A. I don't know where I want to live at this moment.

Q. So you then ran away to your boyfriend's house after you told your mom?

A. Yes, ma'am.

(JA 120) (emphasis added).

The defense asked additional questions about running away:

Q. Is that the only time you've ever run away?

A. No.

Q. You've ran away since then.

A. Recently, but it doesn't have anything to do with this case.

Q. And did you run away because your mom took away your phone?

A. No.

Q. And did you run away to your current boyfriend's house?

A. Yes, ma'am.

(JA 122).

Respectfully, none of this testimony about motive or influence opens the door to admissibility of the recorded interview. The defense contention is that AH always wanted to get Appellant out of the house, and that her present desire at trial was no different from her desire at the time she made the initial allegation. In this regard, it is worth noting that the Army Court, in discussing a long-held bias in the context of rehabilitation, stated, "[C]onsider a witness whose credibility has been attacked because the witness has *always been biased* against the accused. A prior consistent statement, made while the witness was still biased against the accused, would offer little in rehabilitation of the witness' credibility." *Finch*, 71 M.J. at 788 (emphasis in original). That, of course, is the exact situation present in this case. The defense's contention is that AH has always been biased, and nothing elicited by the defense suggested that there was any new motive. For the same reason such evidence is not rehabilitative of a witness' credibility, it does not rebut a charge of recent fabrication or improper influence or motive.

The Army Court went on to conclude in this case:

> the defense also impeached AH by pointing out facts asserted in her testimony were not included in her interview with CID. The defense also questioned AH about how she had recently run away. And the defense theory of the case was that AH had fabricated the claim of sexual assault, this line of attack clearly implied that AH had fabricated new facts after the CID interview.

78 M.J. at 790. But the Army Court is wrong; the colloquy in trial was:

> Q. . . . do you remember your CID interview with CID Agent Burner [sic]?
>
> A. I watched the video yesterday.
>
> Q. Okay. And you didn't tell him anything in that interview about alcohol?
>
> A. Some things I did forget to mention and I understand that ----
>
> Q. Right.
>
> A. ---- I should have.
>
> Q. But in that interview you didn't say anything about alcohol?
>
> A. No, ma'am.
>
> Q. And you also said that Specialist Finch put his fingers in your mouth?
>
> A. Yes, ma'am.
>
> Q. And you didn't tell that to Special Agent Burner [sic] either?
>
> A. No, ma'am.
>
> Q. And in that interview Special Agent Burner [sic] said multiple times, "Was there anything else you'd like to add?"

A. I couldn't think of those at the time. I don't know why.

Q. But Specialist [sic] Burner [sic] did say, multiple times, "Is there anything else you'd like to add?"

A. I did try to think of any, but at that time I did not think of those.

(JA 116-17).

Even assuming that the defense was making a charge that AH fabricated new facts after the interview, that still does not open the door to admitting the interview. The interview does nothing to rebut the inference of recent fabrication because it is not, *as a factual matter*, a prior consistent statement as it relates to those omitted facts. Indeed, because she omitted these facts in the interview, the interview is a prior *inconsistent* statement. *See Jenkins v. Anderson*, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances where that fact naturally would have been asserted."). Although AH had ample opportunity to provide these details during the interview, she did not. Nothing in this video supports the Army Court's conclusion that the interview somehow rebuts a defense charge of recent fabrication of new facts relating to those details AH did not disclose.

<u>2. The Army Court of Criminal Appeals erred in concluding that the defense's cross-examination of AH rendered the video admissible under Mil.R.Evid. 801(d)(1)(B)(ii).</u>

Appellant largely agrees with the Army Court's discussion of the reach and

limitations of Mil.R.Evid. 801(d)(1)(B)(ii); as the Army Court appears to recognize, Mil.R.Evid. 801(d)(1)(B)(ii) does not provide the government *carte blanche* in admitting the prior statement of a witness merely because the witness' credibility has been attacked. For example, Appellant agrees that Mil.R.Evid. 801(d)(1)(B)(ii) does not necessarily have a temporal component, although the timing of the prior statement is a relevant consideration in determining admissibility. And Appellant agrees that a prior consistent statement must actually rehabilitate the credibility of the witness "for 'another ground' other than mere repetition." *Finch*, 78 M.J. at 787-88. Appellant disagrees, however, with the Army Court's application of the Rule in this case.

In this case the Army Court concluded, "In the video, AH's description of the assault was broadly consistent with her in-court testimony. That is, the defense implication that AH's testimony was inconsistent with what she told CID was factually rebutted by watching the interview." *Finch*, 78 M.J. at 791. As discussed, the defense's cross-examination of AH as it relates to the CID interview was extraordinarily limited. Other than eliciting that AH failed to disclose the two specific details about alcohol and the finger in the mouth (JA 116-17), the defense did not ask AH a single question about what she told SA Boerner about the

assault.[2] Thus, whether her in-court testimony about the assault was "broadly consistent" with her interview with CID is irrelevant because, other than those two specific details, the defense did not, in fact, imply that AH's testimony about the assault was inconsistent with what she told CID. If it is true that for a prior consistent statement to be rehabilitative it must "address the manner in which the witness' credibility was attacked," 78 M.J. at 787, it is not enough to say that because the defense asked AH about the interview the entire interview comes in. The "manner" in which AH's credibility was attacked was not by eliciting what AH actually *did* say to CID, but by attacking what she *did not* say. The video is simply not rehabilitative of that.

A. AH made a number of statements in the interview that were actually *inconsistent* with her trial testimony, and were therefore hearsay.

As noted, without ever looking at it, the military judge admitted the entire CID interview as a prior consistent statement. The videos were almost two hours in length and included hundreds of statements. Any statement in the interview that is inconsistent with AH's trial testimony cannot be considered a prior consistent statement. AH made a number of statements in the interview that were

[2] The defense did ask a few questions about what she told SA Boerner about her mother taking her phone away, but those questions were unrelated to the details about the assault. (JA 122-23).

inconsistent with her trial testimony, yet they were admitted as substantive evidence against Appellant.

AH testified at trial that she was not sore the next morning, and that it did not hurt to walk. (JA 116). AH said in the interview that it "hurt" when Appellant penetrated her with his fingers and penis. She said she felt pain "down there," and although she did not see or feel anything unusual the next day when she went to the bathroom, she felt pain the next morning. (Pros. Ex. 3, Video 1, beginning at 02:06:55 PM[3]). AH said it hurt to walk the next morning and she felt pain "around here," gesturing to her hips and stomach. (Pros. Ex. 3, Video 1, beginning at 02:06:55 PM).

AH testified at trial that the very first person she told was her friend AC. (JA 59). AH testified that the next person she told was her mother, because AC suggested that she should. (JA 59). In the interview, AH said that the first person she told about the assault was her mother, then her boyfriend BM, then a school counselor whose name she could not recall (although she did provide a description), and "that's it." (Pros. Ex. 3, Video 1, at 12:12:25).

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[3] There are two video interviews of AH contained within Pros. Ex. 3, labelled VTS_01_1 and VTS_01_2. In the bottom left of each video is a time stamp reflecting the time. For ease of reference, throughout this submission Appellant refers to VTS_01_1 as "Video 1" and VTS_01_2 as "Video 2", and cites the approximate time a particular statement begins.

These are but a few examples of inconsistencies between AH's trial testimony and her interview with CID. They were admitted as substantive evidence against Appellant as "prior consistent statements" when they were anything but consistent. And since they were not prior consistent statements, they were hearsay. The government did not offer these statements as anything other than prior consistent statements; the military judge did not rule that these statements were admissible as anything other than prior consistent statements, and Appellant is aware of no basis for admission of any statements in the video.

B. Many of the details of the incidents that AH provided during the interview are neither consistent nor inconsistent with her trial testimony; they were not addressed at all in her trial testimony, and were therefore hearsay.

There are many examples of details told during the CID interview that AH never testified to at trial, and since they are not prior consistent statements, but were admitted as substantive evidence, they are hearsay. For example, AH told CID that the zipper on her sleeping bag was broken, so she left it unzipped. (Pros. Ex. 3, Video 1, at 01:42). She said that Appellant was able to get his arm inside her sleeping bag because the zipper to her sleeping bag was broken, and only zips to the knee. (Pros. Ex. 3, Video 2, at 02:28:10). AH told the CID agents that the zipper to her sleeping bag was on the "wall side" of the tent, and that Appellant had taken the sleeping bag off of her, although her feet were still inside. (Pros. Ex. 3, Video 2, at 02:28:10). AH never testified at trial about the location or condition

of the zipper on her sleeping bag; she said only that she was in her sleeping bag with her arm over it, and there was no blood on it. (JA 114-16). She never testified that Appellant removed the sleeping bag from her body in order to assault her.

AH told the CID agents that sometimes her girlfriends come to spend the night, and since the incidents that formed the basis of the allegation occurred, AH's mother required Appellant to go stay somewhere else. AH told CID there are never times when girls stay over and Appellant also stays. (Pros. Ex. 3, Video 2, at 02:34:13). AH said there was one time that BT spent the night and her mother allowed Appellant to remain in the house, and AH heard her mother say words to the effect of, "make sure you don't go in her room; leave them alone." (Pros. Ex. 3, Video 2, at 02:34:13). AH never testified to any of this at trial.

AH told the CID agents that when she told the school counselor that her mother did nothing about the allegation and let AH decide what happened, the counselor's response to her was that her mother was wrong, and should not have done that to her. (Pros. Ex. 3, Video 2, 02:26:10). AH never testified to anything the school counselor said to her; she only said that she told the school counselor and nothing was done about the allegation. (JA 135).

AH said in the interview that her mother told Appellant's parents about the allegation, and although AH did not hear the phone conversation, she did see some

text messages between her mother and Appellant's mother, in which Appellant's mother was yelling at AH's mother, saying words to the effect of, "it's happening to my son too; he's my son; it's going to be bad on us." (Pros. Ex. 3, Video 1, 02:13:57).

Special Agent Boerner asked AH, "What would happen when you tried to push his hand away?" (Pros. Ex. 3, Video 1, 02:04:47). AH responded, "I watch a lot of *Criminal Minds* and stuff. What happens when people try to push them away they get hurt or something. And if he figured out that I knew what he was doing that I would report him or something." (Pros. Ex. 3, Video 1, 02:04:47). There was no testimony about AH watching *Criminal Minds*, or her speculation about what might have happened if she had tried to push his hand away.

Since none of these details were prior consistent statements under Mil.R.Evid. 801(d)(1)(B), and they were neither offered nor admitted for any other purpose, they are hearsay and thus inadmissible.

3. Appellant was prejudiced by the admission and consideration of this evidence.

Initially, Appellant notes that because the Army Court of Criminal Appeals concluded that the video was admissible, it tested for prejudice under Mil.R.Evid. 403 rather than Article 59(a), UCMJ. The Court went on to say, "Here, appellant's only objection to the video was that it was hearsay. But even assuming that a Mil.R.Evid. 403 objection was preserved on appeal, and after having reviewed the

entire record and having watched the entire video, we do not find error let alone clear and obvious error." *Finch,* at 792. It is obvious from the defense objection that the statements contained in the video were inadmissible in their entirety because the video contained "massive amounts of hearsay," and that the evidence was "cumulative." (JA 249).

This Court held, in *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005), an objecting party is not required to cite the Rule chapter and verse; instead, the party is required "to provide sufficient argument to make known to the military judge the basis of his objection and, where necessary to support an informed ruling, the theory behind the objection." Given that Mil.R.Evid. 403 includes a proscription on "needlessly presenting cumulative evidence," it can hardly be said that the defense failed to preserve a Mil.R.Evid. 403 objection. Even if evaluated under Mil.R.Evid. 403, the probative value of the videos is substantially outweighed by the danger of unfair prejudice flowing from the introduction of countless hearsay statements having the net effect of bolstering the credibility of an otherwise noncredible witness.

With respect to prejudice flowing from an evidentiary error under Article 59(a), UCMJ, this Court has held that "it is the Government that bears the burden of demonstrating that the admission of erroneous evidence is harmless," and "the test for prejudice is whether the error had a substantial influence on the findings."

Frost, 2019 CCA LEXIS 561, *16 (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019). In making this determination, the Court weighs the strength of the government's case; the strength of the defense case; the materiality of the evidence in question; and the quality of the evidence in question. *Id*.

A. The government's case was weak.

There was no physical evidence. Although AH testified that Appellant assaulted her, the credibility of that allegation was called into question. As discussed, she made a number of statements to the investigators that were inconsistent with her trial testimony.

There were also inconsistencies between AH's trial testimony and what she told other people. For example, AH testified at trial that the time between when he "stuck it in" and the time they saw a light was "a minute, maybe. I don't know." (JA 153). She told Dr. Thomas-Taylor, the physician conducting a physical examination, that it lasted "for like ten seconds." (Pros. Ex. 10, p. 4). According to Dr. Thomas-Taylor, AH said that since Appellant never penetrated her a second time, "That's why I don't understand why they want me go get checked." (Pros. Ex. 10, p. 4). AH told Dr. Thomas-Taylor that his "'thing (penis) was only insider [sic] her for a short amount of time, that it did 'hurt but there was no blood.'" (Pros. Ex. 10, p. 4). AH ultimately refused to permit Dr. Thomas Taylor to conduct a genital exam. (JA 280-81; Pros. 10, p. 7).

AH's claim that she reported the abuse to a school counselor was refuted by the school counselor. (JA 287, 289).

AH's testimony was inconsistent with that of her friends. For example, her friend BM said that AH told him that Appellant had come into her room and forced himself on her. (JA 303). BM also said that AH told him that when she was at the lake with Appellant, he dragged her from a vehicle and forced her to the ground. (JA 306, 308). AH testified that her friend, HB, had told her that she, HB, had been raped by her grandfather. (JA 134). HB testified that she never talked with AH about any of that. (JA 322, 329). Although AH said the only time she was abused by Appellant was the two incidents at Mott Lake, HB testified that AH told her that Appellant assaulted her in her bedroom when her mother was not home. (JA 329).

BT testified that AH made a disclosure to her while they were both in Middle School at Lewis Chapel, that the disclosure was made in the band room closet between March and May of 2014, and after Lewis Chapel she and AH did not attend the same school. (JA 167). BT also said that band was going on, the disclosure was made on a weekday, and AH's mother was not pregnant at the time. (JA 168).

Both AH's mother and her maternal grandfather testified that AH had a bad character for truthfulness. Her mother said, "She's not shown me that she's been

truthful at all throughout her life. She's also been pretty dishonest with me." (JA 336). AH's paternal grandfather characterized her as "AH: A fabricating liar." (JA 352).

And, as previously discussed in detail, AH had motive to fabricate the allegations against Appellant.

B. The defense case was strong.

For the same reasons the government's case was weak, the defense case was strong. As the Army Court of Criminal Appeals noted,

> The defense cross-examination of AH was both long and far-reaching. The defense impeached AH by implying that she was motivated to fabricate a claim of sexual assault because she did not like her family and wanted to get out of the home. The defense cross-examined AH on her prior statements to her mother, CID, her boyfriend, her friends, and a school counselor. The defense cross-examined AH on being disciplined by her parents and having her phone and electronic devices taken away. The defense asked AH whether she had run away from home, to include a recent instance. The defense also impeached AH by pointing out that her testimony included new facts that were not part of her initial report.

Finch, at 789-90. In the Army Court's view, this "far-reaching" attack on AH's credibility justified the admission of the video interview. But, as noted, under either Mil.R.Evid. 801(d)(1)(B)(i) or (ii), specific criteria must be met before a statement may be admissible as a prior consistent statement, and impeachment alone will not suffice.

C. The materiality and quality of the evidence was substantial.

The materiality and quality of the evidence was substantial because, as in *Frost*, at *19, "it went to the heart of the matter in dispute," that is, whether Appellant committed the charged offenses. The government was permitted to bolster AH's credibility with inadmissible hearsay. It is obvious that the government wanted to get AH off the witness stand as quickly as possible, then fill in the gaps in her testimony under the guise of a "prior consistent statement."

As noted, there are three categories of statements contained within the video, each presenting its own unique issue relating to prejudice. First, there are statements that are consistent with AH's trial testimony. The defense did not ask AH about any statements she made to CID that were consistent with her trial testimony, and those statements are therefore necessarily merely repetitive of her trial testimony. The obvious prejudice there is, as the defense argued at trial, bolstering through repetition.

Second, there are statements that are inconsistent with her trial testimony, and while the defense sought to point out some of the inconsistencies between AH's trial testimony and her interview, it did not point them all out. While it may be tempting to conclude that there is no prejudice because the video contains many inconsistent statements, and is thus impeaching in its own right, it must be recalled that the video is nearly two hours long and is exceptionally damning. The defense

obviously believed that the video was harmful to the defense case, despite the fact that it contained inconsistent statements.

Third, there are statements that are neither consistent nor inconsistent with her trial testimony because AH did not testify to those things at trial, but their admission was nevertheless prejudicial because it permitted the government to bolster AH's credibility through hearsay. Those statements include additional details about the assault itself that were never testified to at trial, including how Appellant managed to get inside AH's sleeping bag (the zipper was broken), that Appellant took the sleeping bag off of her, although her feet were still inside, and how AH and Appellant were positioned inside the tent relative to the tent wall. The statements also include details that tended to paint Appellant in an exceptionally bad light and lend credibility to the allegation, including a statement that AH's mother required Appellant to sleep elsewhere when AH had friends over. It also included her mentioning that the one time Appellant was permitted to stay in the home when a friend was over, AH's mother said something to the effect of "make sure you don't go in her room; leave them alone." The statements include details of what AH claimed to have told the school counselor, and the school counselor's response that her mother was wrong for not doing anything about the allegation. These are but a few of the statements contained in the videos that were neither consistent nor inconsistent with AH's testimony. The obvious

prejudice flowing from this type of statement is that it permitted the government to bolster AH's testimony through inadmissible hearsay.

The video was inadmissible in its entirety, but was exceptionally strong evidence against Appellant. It cannot therefore be said that the error in admitting the video did not have a substantial influence on the findings.

CONCLUSION

When Appellant elected trial before a military judge alone, he did not waive his right to a fair trial based on legal and competent evidence. Although, pursuant to *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997) the military judge is presumed to know and follow the law, this Court should decline to apply the presumption where the military judge admitted the video without even looking at it – an action the Army Court of Criminal Appeals described as "premature." *Finch*, 78 M.J. at 789, n. 15; *see also United States v. Wuterich*, 67 M.J. 63, 79 (C.A.A.F. 2008) (decided in the context of the necessity for in camera review, held, "The military judge could not make an evaluation of necessity under the specific circumstances of this case without reviewing the outtakes for content and context."). There is no reason to believe the military judge did not consider the videos in this case. He admitted them into evidence, said he was going to consider them in his deliberations, and there is simply no reason to believe that he did not.

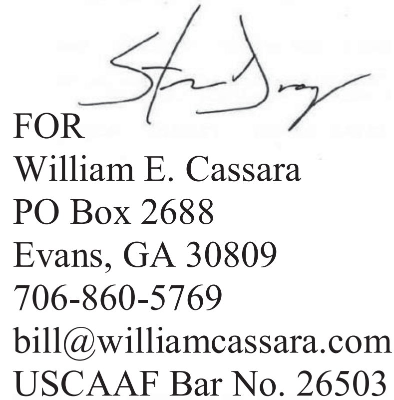
The Army Court in this case also stated,

> When admitting a lengthy video, it may be that portions of the video survive the Mil.R.Evid. 403 balancing test whether other portions are irrelevant and a waste of time, confusing, or most importantly, contain unfairly prejudicial matter that the military judge needs to excise from the admitted exhibit. Or, in other instances, it might be that the prior statement can only be understood within the context of the entire video. Yet, in other instances the statement might not come in at all.

78 M.J. at 790.

The military judge is the evidentiary gatekeeper, "[bearing] the primary responsibility for ensuring that only admissible evidence finds its way into the trial." *United States v. Rivas*, 3 M.J. 282, 286 (C.M.A. 1977). The military judge in this case could have avoided this issue by requiring the government to identify which statements in the video were, in its view, consistent with AH's trial testimony; requiring the government to identify which theory of admissibility under Mil. R. Evid. 801(d)(1)(B) the government believed applied to each statement; and admitted only those statements found to be admissible under the rule (although, in Appellant's view, none of the statements in the video were admissible as prior consistent statements). Instead, he admitted the entire video without even looking at it, and without making any findings of fact or conclusions of law.

Appellant respectfully requests this Court set aside the findings and sentence. WHEREFORE Appellant so prays.



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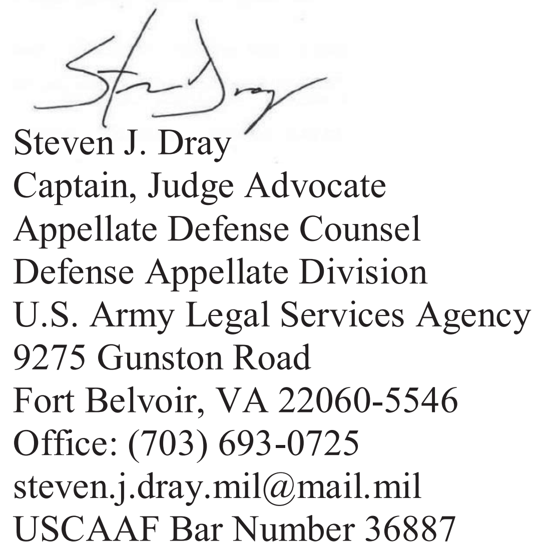

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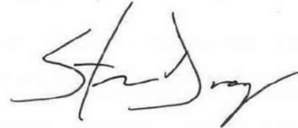
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was mailed to the Court and delivered to opposing counsel on September 9, 2019.



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