IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. MATTHEW D. NORWOOD Machinist's Mate (Nuclear) First Class Petty Officer (E-6) U.S. Navy, Appellant	APPELLANT'S REPLY BRIEF USCA Dkt. No. 20-0006/NA Crim.App. No. 201800038

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

Chris Riedel
LCDR, JACG, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-7389
christopher.riedel@navy.mil
USCAAF Bar Number 37257

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING, OVER DEFENSE OBJECTION, THE ENTIRE VIDEO-RECORDED INTERVIEW OF THE COMPLAINING WITNESS UNDER MRE 801(D)(1)(B)(ii) AS A PRIOR CONSISTENT STATEMENT.

II.

WHETHER THE GOVERNMENT TRIAL COUNSEL'S ARGUMENTS AMOUNTED TO PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF.

Argument

I

The trial defense counsel did not allege coaching by the prosecution.

Trial defense counsel did not argue the prosecutors coached E.N. Instead, trial defense counsel's theory was E.N. fabricated her initial report and the government witnesses conspired to conceal her real motive.[1] Trial defense counsel asked E.N. about her meeting with prosecutors leading up to trial to show how witnesses were not cooperating with the defense, not to imply the government coached her.[2] Trial defense counsel specifically argued that coaching would have led to E.N. giving consistent testimony, not inconsistent testimony.[3] Therefore, this

[1] JA at 59.
[2] JA at 77, 117.
[3] JA at 61.

case is distinguished from *United States v. Frazier*[4] and *United States v. Campo Flores*,[5] which the government cites to support the implication of coaching.[6]

In *Frazier*, the Third Circuit recognized there is a fine line between the defense alleging faulty memory and a conscious motive to fabricate.[7] The defense counsel implied the police officer fabricated his testimony at trial to get a guilty verdict.[8] The fabrication line of inquiry "was sustained longer than any other in Frazier's counsel's cross-examination."[9] The Third Circuit found the number of questions implied a recent motive to fabricate. Due to the dozens of questions the defense counsel asked along those lines, the officer's prior consistent statement could rebut the recent motive to fabricate.[10]

In *Campo Flores*, the Second Circuit affirmed admissibility of a DEA agent's notes based off the defense counsel's opening statement.[11] The defense counsel specifically attacked the agent, directly alleging he would fabricate his testimony because the government botched their investigation and learned

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[4] 469 F.3d 85 (3d. Cir. 2006).
[5] 945 F.3d 687 (2d. Cir. 2019).
[6] Appellee's Br. at 16-17.
[7] *Frazier*, 469 F.3d at 89. *See also*, *Gaines v. Walker*, 986 F.2d 1438, 1444 (D.C. Cir. 1993) (stating "in some cases, an attorney may be implying only that the witness has a faulty memory, not that he has willfully altered his account of events.").
[8] *Id*. at 90.
[9] *Id*. at 91.
[10] *Id*. at 94.
[11] *Campo Flores*, 986 F.2d at 705.

"literally right before this trial began" they needed to arrest two other individuals.[12] The Second Circuit found the defense opening statement made it clear that cross-examination would imply recent fabrication, and agreed the government could use prior consistent statements during the agent's direct examination to rebut the allegation.[13]

Unlike *Frazier* and *Campo Flores*, MMN1 Norwood's trial defense counsel made only a passing comment that E.N. met with the prosecutors. His opening statement did not imply prosecutorial coaching or a recent motive to fabricate, like *Campo Flores*. And then trial defense counsel focused throughout the cross-examination on alleged inconsistencies in her statements through faulty memory, and did not launch a sustained attack on prosecutorial coaching as in *Fletcher*. Here, the brief questions supported the overall defense that E.N. was hiding something and had fabricated her entire story. They did not imply prosecutors coached her to consciously change her testimony at trial.

II

Trial counsel asked the member's to sentence MMN1 Norwood based on their personal fears that others would negatively judge them, not for general deterrence.

[12] *Id.*
[13] *Id*. at 706.

In *United States v. Akbar*, the trial counsel asked members to "send a message about the value of life, liberty and the bond among the band of brothers."[14] This Court held it was not improper for trial counsel to make this kind of general deterrence argument.[15]

But unlike *Akbar*, here trial defense counsel altered the general deterrence sentencing factor. Instead of referencing the "band of brothers" or asking the members to "send a message," the trial counsel asked the members to imagine how they would personally feel when confronted about their sentence.[16] The prosecutor's argument might have been proper if he had asked the members to reflect on the message the sentence would send to the Fleet. Instead, the trial counsel did not ask them to send a message to all Sailors, but focused on specific personal interactions of how other Sailors would view the members if they gave a low sentence. This was not a general deterrence argument, and trial counsel asked the members to weigh their own potential shame in facing their colleagues, not onpermissible general deterrence of misconduct.

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[14] 74, M.J. 364, 394 (C.A.A.F. 2015).
[15] *Id*.
[16] JA at 206-07.

Prayer for Relief

For the reasons set forth above and stated in Appellant's Brief, MMN1 Norwood respectfully requests this Court reverse the lower court and set aside the conviction.

Chris Riedel LCDR, JAGC, USN

Chris Riedel
LCDR, JACG, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-7389
christopher.riedel@navy.mil
USCAAF Bar Number 37257

CERTIFICATE OF FILING AND SERVICE

I certify that on May 19, 2020, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

Chris Riedel LCDR, JAGC, USN

Chris Riedel
LCDR, JACG, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE

Bldg. 58, Ste. 100
Washington Navy Yard, DC 20374
Appellate Defense (Code-45)
Tel: 202-685-7389
christopher.riedel@navy.mil
USCAAF Bar Number 37257

CERTIFICATE OF COMPLIANCE WITH RULES 24(c) AND 37

The undersigned counsel hereby certifies that: 1) This reply complies with the type-volume limitation of Rule 24(c) because it contains 1070 words; and 2) this reply complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Chris Riedel LCDR, JAGC, USN

Chris Riedel
LCDR, JACG, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
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Washington Navy Yard, DC 20374
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