IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Dominic L. RUIZ
Corporal (E-4)
U.S. Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 202300007

USCA Dkt. No. 24-0158/MC

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ISSUE PRESENTED

Whether the Military Judge abused her discretion in admitting the complaining witness's statement to law enforcement as a prior consistent statement under M.R.E. 801(d)(1)(b)(ii).

INTRODUCTION

In 2019, Judge Ryan expressed her concern that the new Military Rule of Evidence (M.R.E.) 801(d)(1)(B)(ii) was susceptible to abuse and if misinterpreted would allow a party to "drive a truck through the hearsay rule."[1] Using the rule, and under the guise of rehabilitating the complaining witness's credibility, the Government admitted hearsay testimony that the complaining witness said "no" in response to the charged conduct.

[1] *United States v. Finch*, 79 M.J. 389 (C.A.A.F. 2020), No. 19-0298, Oral Argument, at 12:45. (https://www.armfor.uscourts.gov/newcaaf/CourtAudio8/20191204B.mp3).

STATEMENT OF STATUTORY JURISDICTION

The sentence entered into judgment includes a punitive discharge. The lower court had jurisdiction under Article 66(b)(3), Uniform Code of Military Justice (UCMJ).[2] This Court has jurisdiction under Article 67(a)(3), UCMJ.[3]

RELEVANT AUTHORITIES

Military Rule of Evidence 801(d)(1)(B)(ii), as amended in 2016, states in relevant part:

> (d) Statements that Are Not Hearsay. A statement that meets the following conditions is not hearsay: . . .
>
> (1) A Declarant-Witness' Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . .
>
> (B) is consistent with the declarant's testimony and is offered: . . .
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground . . . .[4]

[2] 10 U.S.C. § 866(b)(3) (2018).
[3] 10 U.S.C. § 867(a)(3) (2018).
[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d)(1)(B)(ii) (2019) [hereinafter 2019 MCM].

Federal Rule of Evidence 801, Notes of Advisory Committee on 2014 amendments, states in relevant part:

> Rule 801(d)(l)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." . . . .
>
> The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(l)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.
>
> The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.[5]

[5] USCS FED. R. EVID. 801, Notes of Advisory Committee on 2014 amendments.

Analysis of the Military Rules of Evidence, Section VIII, from the 2016 Manual for Courts-Martial, United States, states in relevant part:

> *2016 Amendment*: Rule 801(d)(1)(B)(ii) was added in accordance with an identical change to Federal Rule of Evidence 801(d)(1)(B). The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose. The amendment extends substantive effect to consistent statements that rebut other attacks on a witness – such as the charges of inconsistency or faulty memory. The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously – the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.[6]

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, Appendix 22, Sec. VIII, MIL. R. EVID. 801(d)(1) (2016) [hereinafter 2016 MCM].

STATEMENT OF THE CASE

A panel of members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120(d), UCMJ.[7] The Military Judge sentenced him to a reduction to E-1 and a bad-conduct discharge.[8] The convening authority approved the sentence as adjudged, and the Military Judge entered the findings and sentence into judgment.[9]

The lower court affirmed the findings and sentence on March 20, 2024.[10] Appellant timely petitioned this Court for review, which was granted.

STATEMENT OF FACTS

A. While in town on military orders, Appellant messaged Ms. B.S. and her husband, hoping to meet them for dinner. Ms. B.S. invited him to her house without telling him her husband was not home.

After completing a multi-day trip from Okinawa, Japan, to Camp Lejeune, North Carolina, Appellant reached out to friends stationed in the area to see if they were available to get together for dinner.[11] Two of those friends were Ms. B.S. and her husband; the three, all from New York, had enlisted together and remained friends since enlisting.[12] Ms. B.S. responded to Appellant's text message and invited

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[7] J.A. at 212.
[8] J.A. at 445. Although the Government asked for forty-eight months' confinement, the Military Judge adjudged no confinement. J.A. at 439-43, 445.
[9] J.A. at 447; J.A. at 448.
[10] J.A. at 2.
[11] J.A. at 457.
[12] J.A. at 218.

him to her house.[13] She then messaged her best friend about her excitement to see Appellant:[14]

Ms. B.S.	**Best Friend**
[G]uess who I'm hanging out with later!!	WHO!
Dom [Appellant], like the dom that brought us alcohol to that party at my house	OH he was cute!
He's in town for business and was like wanna hang and I was like lord please	

What Ms. B.S. failed to mention in her response to Appellant was that her husband was not home at that time.[15] When Appellant arrived at her house, Ms. B.S., alone, greeted him.[16] As the two drove to dinner, she explained that the reason her husband was not with them was that he was in prison.[17] The two then got takeout dinner and bought wine on the way back to her house.[18]

[13] J.A. at 457.
[14] J.A. at 228; J.A. at 456.
[15] J.A. at 237-38, 268-69.
[16] J.A. at 457; J.A. at 237.
[17] J.A. at 237-38, 268-69.
[18] J.A. at 238-39.

B. At Ms. B.S.'s house, the two ate dinner, drank alcohol, and watched Netflix.

As the two ate dinner together, they drank nearly two bottles of wine.[19] They then switched to beer and other canned alcoholic beverages, which they began "shotgunning," that is, punching holes in the cans and chugging them.[20] After drinking alcohol for roughly two hours, Appellant put his hands on Ms. B.S.'s shoulders, which led to them watching Netflix on her sofa together.[21] Soon, she was sitting on his lap, a blanket covering them, as they watched Netflix together for roughly fifty minutes.[22] She testified that Appellant pulled her onto his lap, wrapped his arms around her, and "shushed" her.[23]

After Ms. B.S. emotionally complained to him about her marital problems, Appellant escorted her to her bedroom.[24] She testified to their interactions there.[25] She testified that as they lay down on her bed together, Appellant was next to her with her back facing his chest.[26] As she lay on her left side, Appellant caressed her right side, moving his hand up and down, touching her ribs, waist, and buttocks.[27]

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[19] J.A. at 243.
[20] J.A. at 244.
[21] J.A. at 243, 245-46.
[22] J.A. at 246-47, 273-74.
[23] J.A. at 246-47.
[24] J.A. at 457; J.A. at 8.
[25] J.A. at 248-50.
[26] J.A. at 248, 250.
[27] J.A. at 250.

She felt Appellant breathing on her neck and back.[28] He talked to her romantically, saying he "wanted to make [her] feel good" and that her "husband didn't deserve [her,]"as he rubbed his penis against her vaginal and buttocks area.[29]

C. Ms. B.S. testified that she did not resist or voice any non-consent to Appellant touching her vaginal and buttocks area, but that when he tried to kiss her, she said, "No, stop," and pushed his faced away.

Ms. B.S. testified that while Appellant was touching her vaginal and buttocks area, she did not push him away, move away from him, get out of bed, or tell him "no."[30] Rather, she testified the only time she voiced any non-consent was when he attempted to kiss her.[31] During her testimony, in response to the question, "Did you say anything to him [when he rubbed his genitals on your vaginal and buttocks area]?" she responded: "I did when he tried to kiss me, he kept trying to put his hand against my cheek and kept trying to bring my face over to kiss him. And I said, 'No, stop.' And I pushed his face away."[32]

The Trial Counsel then asked if Appellant "continue[d] to grind against [her] buttocks after that," to which she responded, "Yes," and testified she was crying as he did so.[33] But whereas she testified to saying "no" to and physically rejecting (by

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[28] J.A. at 250.
[29] J.A. at 250-51.
[30] J.A. at 251.
[31] J.A. at 251.
[32] J.A. at 251.
[33] J.A. at 251.

pushing his face away) his attempt to kiss her, she never testified to saying "no" to or physically rejecting the charged conduct of touching of her buttocks with his penis (before or after she said "no" to the kiss).[34]

D. To support its theory that Appellant intentionally got Ms. B.S. drunk to take advantage of her, the Government announced and elicited testimony from her about her lack of memory.

During its opening statement, the Government highlighted Ms. B.S.'s intoxicated state of mind and lack of memory.[35] The Trial Counsel stated, "[she] will tell you that her memory [when she was drinking wine] starts to get a little fuzzy," and "[after shotgunning drinks] her memory, for the remainder of the night, is fuzzy."[36]

The Trial Counsel then framed his questions to Ms. B.S. to highlight her lack of memory. On direct examination, he prefaced twenty-two of his questions to her with "do you remember."[37] And in response, she answered twenty-nine of his questions with "I don't remember."[38]

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[34] J.A. at 251.
[35] J.A. at 214-15.
[36] J.A. at 214-15.
[37] *See generally* J.A. at 216-60.
[38] *See generally* J.A. at 216-60. She expressed confusion or uncertainty a dozen more times. *See generally* J.A. at 216-60.

E. After Ms. B.S. testified she said "no" to Appellant kissing her, the Military Judge admitted Ms. B.S.'s statement to law enforcement that she said "no" to Appellant rubbing his genitals against her.

In the wake of Ms. B.S.'s testimony that she said "no, stop" when Appellant tried to kiss her, the Government moved to admit testimony from the responding police officer, Deputy Ford, that Ms. B.S. initially alleged she said "no" when Appellant rubbed his penis against her buttocks.[39] The Defense objected to this testimony on grounds of hearsay.[40]

After first unsuccessfully arguing the prior statement was an excited utterance, the Government changed course and sought its admission as a prior consistent statement under M.R.E. 801(d)(1)(B)(ii).[41] But when asked how Ms. B.S.'s testimony had been impeached (in order to satisfy the rule's requirement to show the prior statement rehabilitated her credibility on that ground), the Trial Counsel told the Military Judge: "The Government's unclear on what exactly was impeached."[42] Instead, the Trial Counsel argued generally that "she's impeached, and we can rehabilitate her credibility because they impeached her credibility."[43] He then argued the Government was permitted to rehabilitate her credibility because the Defense had "opened the door through asking about her story" (even though it was the

[39] J.A. at 367, 375.
[40] J.A. at 367.
[41] J.A. at 367, 370-71; J.A. at 458-59.
[42] J.A. at 370.
[43] J.A. at 370-71.

Government that had opened the door on Ms. B.S.'s lack of memory, to support its theory of the case).[44] Eventually, in a bench brief, the Government argued that the Defense had "attack[ed] . . . her memory of the event," and that it sought to admit the statement "to show that her memory is not faulty and that the most important facts are consistent throughout her statements."[45]

The Military Judge overruled the hearsay objection and admitted Ms. B.S.'s statement to Deputy Ford as a prior consistent statement under M.R.E. 801(d)(1)(B)(ii).[46] She found the Defense had never attacked Ms. B.S.'s testimony that Appellant rubbed his penis against her buttocks and vaginal area; however, citing the lower court's case precedent, she ruled that M.R.E. 801(d)(1)(B)(ii) allows the rehabilitation of memory "even though a particular statement or matter was not directly challenged."[47]

The Military Judge then permitted Deputy Ford to testify that Ms. B.S. told him she said "no" to the charged conduct of Appellant rubbing his genitals against her (as opposed to when he tried to kiss her, as she testified at trial).[48] The Military

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[44] J.A. at 370-71.
[45] J.A. at 458.
[46] J.A. at 393-94.
[47] J.A. at 393 (citing *United States v. Drinkert*, 81 M.J. 540 (N-M Ct. Crim. App. 2021)).
[48] J.A. at 375; J.A. at 251.

Judge subsequently instructed the members to consider this evidence for the truth of the matter expressed.[49]

F. The Government used the prior statement—the only evidence that Ms. B.S. articulated non-consent to the charged conduct—to secure a conviction.

Other than Deputy Ford's third-person recitation of what she said she told Appellant, the Government failed to present any evidence that Ms. B.S. articulated non-consent to the charged conduct of Appellant touching her buttocks with his penis.[50] Deputy Ford's short, direct, and memorable recall testimony was the only time members heard she said "no" to the charged conduct.[51]

The Government then used this crucial hearsay evidence in its closing argument.[52] Without mentioning that this evidence was derived solely from Deputy Ford's testimony, the Government concluded its summation by arguing the statement proved Ms. B.S.'s lack of consent to the charged conduct:

> She felt him grinding his penis against her butt, her vaginal area. She said no. She tried to push his face away. An expression of a lack of consent means there is no consent. While crying for her husband, she said no, he continued. She says no. He doesn't stop. It's fight, flight, or freeze. When he was behind her, she froze. When he fell asleep, she fled. Ultimately, she said no. And that is not what consent looks like.[53]

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[49] J.A. at 427.
[50] J.A. at 251.
[51] J.A. at 396.
[52] J.A. at 429, 438.
[53] J.A. at 429.

The Government then continued to emphasize the hearsay testimony during its rebuttal argument, telling the members that Ms. B.S. "told Deputy Ford what happened."[54]

G. The lower court upheld the Military Judge's ruling.

The lower court found no error in the admission of Ms. B.S.'s statement to Deputy Ford as a prior consistent statement under M.R.E. 801(d)(1)(B)(ii).[55] The court concluded that the Military Judge "correctly found Ms. B.S.'s testimony was attacked on . . . her lack of memory" and that the prior statement was "consistent with [her] . . . testimony that she told Appellant 'no' as he assaulted her."[56]

[54] J.A. at 438.
[55] J.A. at 13-15.
[56] J.A. at 14-15.

SUMMARY OF ARGUMENT

In admitting Ms. B.S.'s prior statement under M.R.E. 801(d)(1)(B)(ii) over Defense objection, the Military Judge abused her discretion for five reasons. First, she predicated her ruling on a clearly erroneous finding of fact—that Ms. B.S. awoke to the charged conduct—when her actual testimony described the sequence of events prior to that point. Second, she applied the law to the facts clearly unreasonably, because in comparison with Ms. B.S.'s testimony, her prior statement was not actually "*consistent* with respect to facts of central importance to the trial."[57] Third, she applied incorrect legal principles by failing to ensure the prior statement actually rehabilitated Ms. B.S's credibility "on the basis on which . . . she was attacked"[58]—as evidenced by the Government's inability to identify either what type of impeachment had occurred or how the prior statement rehabilitated *that* attack. Fourth, contrary to the law, admitting the prior statement, in fact, allowed the Government to walk through a door that they opened.

Fifth, the Military Judge conflated an attack on faulty memory with an attack on Ms. B.S.'s inability to *register* memories due to alcohol-induced blackout. In doing so, she applied incorrect legal principles because the common law temporal priority doctrine remains embedded within M.R.E. 801(d)(1)(B)(ii). This long-

[57] *United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (emphasis added).
[58] *Id.* at 396.

standing common law rule says that a prior consistent statement only becomes admissible if it was made before the source of the alleged incapacity originated. In this case, the prior statement occurred *after* the witness's incapacity's onset—the alcohol-induced blackout—not *before*.

This erroneously-admitted, material hearsay filled a gap in the Government's case that went directly to the "heart of the matter in dispute"[59]—whether Ms. B.S. consented to the charged conduct or Appellant was reasonably mistaken as to her consent. And it prejudiced Appellant, as the Government repeatedly exploited the hearsay in closing, stressing that Ms. B.S. said "no" to the charged conduct (as opposed to Appellant trying to kiss her, as she had testified).[60]

[59] *United States v. Frost*, 79 M.J. 104, 112 (C.A.A.F. 2019).
[60] J.A. at 429.

ARGUMENT

The Military Judge abused her discretion in admitting Ms. B.S.'s prior statement, which was neither consistent with nor rehabilitative of her in-court testimony.

Standard of Review

The decision to admit evidence is reviewed for an abuse of discretion.[61] A military judge abuses her discretion when she: "(1) predicates a ruling on findings of fact that are not supported by the evidence of record[;]" (2) "uses incorrect legal principles[;]" (3) "applies correct legal principles to the facts in a way that is clearly unreasonable[;]" or (4) "fails to consider important facts."[62]

Discussion

Military Rule of Evidence 801(d)(1)(B) governs the admissibility of prior consistent statements.[63] The rule provides that when a witness' credibility is "attacked on another ground," the prior statement must be both "*consistent* with the declarant's testimony," and "actually relevant to rehabilitate the witness's credibility *on the basis on which . . . she was attacked.*"[64]

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[61] *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021).
[62] *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).
[63] 2019 MCM, *supra* note 4, MIL. R. EVID. 801(d)(1)(B).
[64] *United States v. Finch*, 79 M.J. 389, 396 (C.A.A.F. 2020) (citation omitted and emphasis added).

Here, after making factual findings not supported by the record, the Military Judge allowed Deputy Ford to testify to a prior statement that was *in*consistent with Ms. B.S's testimony, did not rehabilitate her credibility, and materially prejudiced Appellant's substantial rights.

A. The Military Judge predicated her ruling on a clearly erroneous finding of fact.

The Military Judge clearly erred in finding as fact that Ms. B.S. testified she "woke up" to Appellant rubbing his penis on her vagina and buttocks area.[65] The record does not support that Ms. B.S. was *either* asleep *or* suffering a memory gap when Appellant began "rubbing his penis on her vagina and buttocks area."[66] The memory gap she testified to occurred when she was sitting on Appellant's lap watching Netflix, *before* any of the activity in her bedroom.[67]

Once the two were in bed together, Ms. B.S. testified to a sequence of events: (1) lying next to Appellant; (2) his hands on her; (3) them both having clothes on; (4) Appellant going to the bathroom; (5) her staying in bed; (6) seeing his face in the bathroom mirror; (7) him returning to the bed; (8) feeling Appellant running his hand up and down her side; (9) feeling him touching her ribs, waist, and buttocks repeatedly; (10) lying on her left side, on the right side of the bed facing a window;

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[65] J.A. at 376 (the Military Judge finding that Ms. B.S. testified that "she woke up and the accused was rubbing his penis on her vagina and buttocks area").
[66] J.A. at 376.
[67] J.A. at 247-52.

(11) feeling Appellant's breath on her neck; and (12) him sensually talking to her as he rubbed his penis against her vaginal and buttocks area.[68]

Nowhere in this sequence did Ms. B.S. testify or even suggest she had fallen asleep or experienced a gap in memory. Thus, the Military Judge's finding of fact that Ms. B.S. "woke up to" Appellant rubbing his penis on her vagina and buttocks area has no basis in the evidence, and is clearly erroneous.

B. The Military Judge applied the law to the facts in a way that is clearly unreasonable and applied incorrect legal principles.

1. Ms. B.S.'s prior statement was not "consistent with respect to facts of central importance to the trial."[69]

Although a prior statement is not required to be identical to the declarant's testimony, it must nevertheless be "consistent with respect to *facts of central importance to the trial*."[70] Indeed, "[t]o the extent a prior statement contains substantive information inconsistent with the declarant's in-court testimony, those material inconsistent aspects of the statement are hearsay and are not admissible under M.R.E. 801(d)(1)(B)."[71]

Here, Ms. B.S.'s statement to Deputy Ford is *not* consistent with her in-court testimony "with respect to the facts of central importance to the trial"—namely, what

[68] J.A. at 248-51.
[69] *Finch*, 79 M.J. at 395 (citation omitted)
[70] *Id.* (citation omitted) (emphasis added).
[71] *Id.* at 398.

conduct she actually said "no" to. Deputy Ford testified that Ms. B.S. told him she said "no" when Appellant touched her buttocks and vaginal area.[72] But that is not what Ms. B.S. testified to at trial. Rather, when asked, "Did you say anything to him [when he was rubbing your buttocks and vaginal area]?" she responded, "I did *when he tried to kiss me* . . . I said, 'No, stop.' And I pushed his *face* away."[73] The Trial Counsel then asked if Appellant continued to "grind against your buttocks after that" and Ms. B.S. responded, "Yes."[74] Thus, she testified to verbally objecting the attempted kiss; she never testified to verbally objecting to the touching that was occurring. And during cross-examination, the Trial Defense Counsel did not ask any questions about this testimony.[75]

Considering the charged offense of abusive sexual contact, it is hard to imagine an *in*consistency with more magnitude "to facts of central importance to the trial."[76] Ms. B.S's testimony of saying "no, stop" when Appellant attempted to kiss her is blatantly different than Deputy Ford's testimony that Ms. B.S. said she said "no" to Appellant rubbing his genitals against her. Her testimony that Appellant was lying next to her in bed, running his hand up and down her body, breathing on her

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[72] J.A. at 396.
[73] J.A. at 251 (emphasis added).
[74] J.A. at 251.
[75] *See* J.A. at 393 (the Military Judge acknowledging that the Defense did not ask Ms. B.S. about the testimony).
[76] *Finch*, 79 M.J. at 395.

neck, and rubbing against her buttocks and vaginal area—all without objection—is, like the prior statement in *Finch*, inconsistent with her prior out-of-court statement purportedly telling him to stop rubbing against her.[77]

Because the prior statement Deputy Ford testified to was starkly inconsistent with Ms. B.S.'s testimony at trial, the Military Judge, in admitting the statement under M.R.E. 801(d)(1)(B)(ii), applied the law "to the facts in a way that is clearly unreasonable."[78] Indeed, this very inconsistency is precisely why the Government clamored to find a hearsay exception to introduce the prior statement into evidence,[79] because the hearsay testimony actually supported the charged offense in a way that Ms. B.S.'s in-court testimony did not.

2. Nor was Ms. B.S.'s prior statement properly offered to rehabilitate an attack on Ms. B.S.'s memory.

As the Military Judge correctly found, the Defense never challenged Ms. B.S.'s testimony that Appellant rubbed his penis against her buttocks and vaginal area.[80] Nevertheless, the Military Judge reasoned that M.R.E. 801(d)(1)(B)(ii)

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[77] *See id.* at 398 ("This statement was not 'consistent' with anything [the victim] testified to at the court-martial [and] it tended to bolster [her] credibility").
[78] *Rudometkin*, 82 M.J. at 401.
[79] After the Government's initial theory of an excited utterance was denied, the Government argued and re-argued its theory under M.R.E. 801(d)(1)(B)(ii) in two Article 39(a) sessions and then in a bench brief. J.A. at 367; J.A. at 369-77; J.A. at 384-97; J.A. at 458-59.
[80] J.A. at 393.

allows the Government to offer evidence to rehabilitate memory, even when "a particular statement or matter was not directly challenged."[81]

This is not a correct view of the law, which states just the opposite: that "the prior consistent statement must be responsive to the attack."[82] It must "actually be relevant to rehabilitate the witness's credibility on the basis on which . . . she was attacked."[83] Indeed, "the party moving to introduce a prior statement has a duty to identify those portions of the statement that are consistent with the witness's testimony, and then to demonstrate the *relevancy link* between the prior consistent statement and how it will *rehabilitate the witness's credibility*."[84] And in demonstrating the relevancy link, the movant must identify "the *particular* type of impeachment that has occurred."[85]

Here, after first arguing unsuccessfully for the statement's admission under a hearsay exception, the Government changed its theory, conceded that the statement was hearsay, and claimed it rehabilitated an attack on Ms. B.S.'s credibility. But when asked how Ms. B.S. was attacked and how the prior statement actually rehabilitated the attack, the Government was stumped. The Trial Counsel initially

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[81] J.A. at 393.
[82] Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 801.02[4][b] (12th ed., 2022).
[83] *Finch*, 79 M.J. at 396.
[84] *Id.* at 398 (emphasis added) (citation omitted).
[85] *Id.* at 396 (emphasis added) (citation omitted).

responded, "The Government's unclear on what exactly was impeached."[86] He then argued, "It's the Government's understanding she's impeached, and we can rehabilitate her credibility because they impeached her credibility."[87] He then tried: "[T]he defense has opened the door through asking about her story."[88] And eventually he settled on the Defense "attack[ed] . . . her memory of the event" and so the Government sought admission of the statement "to show that her memory is not faulty and that the most important facts are consistent throughout her statements."[89]

But cross-examining a witness by simply "asking about her story" does not open the out-of-court statement floodgate. And "Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time [a witness's] credibility or memory is challenged; otherwise, a cross-examination would always transform hearsay notes into admissible evidence."[90] Rather, it was the Government's burden, as the proponent of the evidence, to "demonstrate the relevancy link between the prior consistent statement and how it [would] rehabilitate

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[86] J.A. at 370.
[87] J.A. at 370-71.
[88] J.A. at 370.
[89] J.A. at 458.
[90] *United States v. Bishop*, 264 F.3d 535, 548 (5th Cir. 2001); *see also Finch*, 79 M.J. at 396 (explaining that "[i]t is not the case that under M.R.E. 801(d)(1)(B)(ii), all prior consistent statements are now automatically admissible following impeachment on any ground").

the witness's credibility."[91] Arguing in generalities, being unable to articulate how the witness was impeached or how her memory was attacked, does not demonstrate how a prior statement rehabilitates her credibility. This is especially true when the Defense neither challenged Ms. B.S.'s testimony that Appellant rubbed his penis against her buttocks and vaginal area nor whether, and in response to what conduct, she said "no."

The Government's struggle to articulate a proper basis was predictable because there was no attack that gave rise to rehabilitation. Tellingly, the Trial Counsel's original theory of admissibility reveals why he could not articulate the statement's rehabilitative value. In attempting to admit the statement as an excited utterance, he sought the statement for use as the truth of the matter asserted (after Ms. B.S. had failed to testify that she said no to the charged conduct), rather than for the statement's rehabilitative value.

But after changing his theory of admissibility and admitting the statement under the guise that it rehabilitated Ms. B.S.'s credibility, the Trial Counsel again argued only its substantive value. This was the true reason for the Government's persistent attempt to admit the statement. And the fact that the Government only

[91] *Finch*, 79 M.J. at 398 (citation omitted).

argued the statement's substantive value further highlights its lack of rehabilitative value.[92]

Because the Government was unable to (1) identify "the particular type of impeachment that . . . occurred[,]"[93] and (2) demonstrate how the prior statement rehabilitated *that* attack, the Military Judge abused her discretion in admitting Deputy Ford's hearsay testimony because she "use[d] incorrect legal principles."[94]

3. Admitting the prior statement permitted the Government to walk through the door that they opened.

The premise for the prior consistent statement rule is that "if the *opposite* party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."[95] But here, it was the *Government* that opened the door of Ms. B.S.'s incapacity to remember. On direct examination, in response to the Trial Counsel's "do you remember" questions, she answered, "I don't remember" *twenty-nine* times.[96] She testified to not remembering things like: sending her friend a text message that "[she's] so drunk, bruh[;]"[97] what she did

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[92] J.A. at 429.
[93] *Finch*, 79 M.J. at 396.
[94] *Rudometkin*, 82 M.J. at 401.
[95] USCS FED. R. EVID. 801, Notes of Advisory Committee on 2014 amendments (emphasis added); *see also United States v. Palik*, 84 M.J. 284, 292 (C.A.A.F. 2024) (recognizing that the accused can "open the door" for the government to introduce a prior consistent statement).
[96] *See generally* J.A. at 216-60. She expressed confusion or uncertainty a dozen more times. *See generally* J.A. at 216-60.
[97] J.A. at 236.

when Appellant put his hand on her shoulder;[98] how she got on his lap while watching Netflix;[99] or whether he kissed her while watching Netflix.[100]

This clouded testimony fit squarely into the Government's theme: portraying Appellant as intentionally getting Ms. B.S. intoxicated so that he could take advantage of her. The Trial Counsel focused on this theme in his opening statement: "[she] will tell you that her memory [when she was drinking wine] starts to get a little fuzzy"; "[after shotgunning drinks] her memory, for the remainder of the night, is fuzzy."[101] He then framed his questions to Ms. B.S. in furtherance of the goal. He prefaced his questions, *twenty-two* times, with "do you remember."[102] He then argued in summation (inaccurately) that she "drinks the better part of two bottles of wine and he's there. He sees her do it. He's pouring her glass all the way up to the top. He encourages her to chug it."[103]

But the prior consistent statement rule does not allow the Government to have it both ways. It cannot highlight Ms. B.S.'s lapse of memory to its advantage and then claim the Defense "opened the door" in questioning her along the very same lines. If that were the law, then the Defense would have no choice but to disregard a

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[98] J.A. at 246.
[99] J.A. at 247.
[100] J.A. at 247.
[101] J.A. at 214-15.
[102] *See generally* J.A. at 216-60.
[103] J.A. at 428. Ms. B.S. never testified that Appellant encouraged her to chug any wine. J.A. at 242-43.

witness's proven lack of memory just to prevent the Government from eliciting hearsay testimony to rehabilitate her on the issue it created. And for that reason, that is *not* the law. The Government cannot open its own door.

Thus, cross-examining a witness's recollection of events that occurred while she was intoxicated—after the Government intentionally placed the witness's capacity in issue—does not open the door for hearsay statements not relating to impeached testimony. The Military Judge's ruling, which took the opposite view, was premised on an erroneous view of the law.

4. Regardless of whether the prior statement was offered to rehabilitate an attack on Ms. B.S.'s credibility, the statement was not relevant to rehabilitate such an attack because it did not precede the cause of her incapacity to register memories.

An attack on a faulty memory is different than an attack on a capacity to register memories. The Military Judge's ruling conflates the two. The issue was not whether Ms. B.S. had a faulty memory; it was whether her memory—during an alcohol-induced blackout—ever *registered* the events at all. Failing to draw a distinction between the two types of incapacities conflicts with M.R.E. 801(d)(1)(B)(ii)'s common law roots and the temporal priority doctrine.

In *United States v. McCaskey*, which predated the addition of subsection (ii) of the rule, this Court found that the temporal priority doctrine was engrained in

M.R.E. 801(d)(1)(B).[104] To have relevant rehabilitation value, the prior consistent statement must have been made *before* the declarant's alleged motive to fabricate or improper influence arose.[105] "The *mere* fact that a witness has told the same version on prior occasions is not *itself* probative of whether the witness is telling the truth at trial."[106] Based on the temporal priority doctrine, a prior consistent statement's probative value derives from its timing; the statement must have originated prior to the alleged motive to fabricate or improper influence arose.[107]

Similarly, to be relevant in rebutting an attack on capacity to register memories, a prior consistent statement must precede the alleged cause of such incapacity. *McCormick on Evidence* discusses this common law rule:

> [A]t common law under the prevailing temporal priority doctrine, if the attacker has charged . . . *want of capacity to observe or remember*, the prior consistent statement is deemed irrelevant to refute the charge unless the consistent statement was made *before the source of* the . . . *incapacity originated*.[108]

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[104] *United States v. McCaskey*, 30 M.J. 188, 189 (C.A.A.F. 1990). Four years after *McCaskey*, the Supreme Court held that F.R.E. 801(d)(1)(B) embodied a "premotive requirement." *Tome v. United States*, 513 U.S. 150, 160 (1995). Thus, a prior consistent statement only rehabilitates a witness-declarant if the prior consistent statement was made before the event giving rise to the alleged motive to fabricate. *Id*. at 159-60.

[105] *McCaskey*, 30 M.J. at 190.

[106] *Id*. (emphasis original) (citing J. Weinstein and M. Berger, *Weinstein's Evidence* § 607 at 607-115 (1988)).

[107] *McCaskey*, 30 M.J. at 190. *McCaskey* also addressed the admissibility of a prior consistent statement to rehabilitate an impeachment via a prior inconsistent statement and found the common law form of rehabilitation embodies the same temporal requirement as M.R.E 801(d)(1)(B). *Id.* at 193.

[108] Kenneth S. Broun et al., *McCormick on Evidence* § 47, at 314 (7th ed. 2013).

The Supreme Court echoed this sentiment, writing that a "prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of . . . incapacity originated."[109] Further, subsection (ii) does not change this common law, temporal requirement as the "amendment does not make any consistent statement admissible that was not admissible previously . . . ."[110] "The *only* difference" between the Rule's common law and now-codified form "is that prior consistent statements otherwise admissible for rehabilitation are now admissible *substantively* as well."[111]

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[109] *Tome*, 513 U.S. at 156 (citation omitted); *see also United States v. Finch*, 78 M.J. 781, 787 (A. Ct. Crim. App. 2019), *aff'd*, 79 M.J. 389 (C.A.A.F. 2020); Joshua Vanderslice, Case Comment*, Say "What" again: How Amending Rule 801(D)(1)(B) Made More Evidence Admissible*, 35 REV. LITIG. 161, 162-63 (2016) ("Under the common law temporal priority doctrine, a prior consistent statement was deemed irrelevant unless it occurred before the origination of the source of . . . incapacity used to impeach.").

[110] The Advisory Committee provided: (1) "The amendment retains the requirement set forth in *Tome v. United States*[;]" and (2) "The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." USCS FED. R. EVID. 801, Notes of Advisory Committee on 2014 amendments; s*ee also* 2016 MCM, *supra* note 6, Appendix 22, Sec. VIII, MIL. R. EVID. 801(d)(1) (analysis of the 2016 amendment to the Military Rules of Evidence that codified the same Federal Rule change stating identical intent of the amendment).

[111] USCS FED. R. EVID. 801, Notes of Advisory Committee on 2014 amendments; 2016 MCM, *supra* note 6, Appendix 22, Sec. VIII, MIL. R. EVID. 801(d)(1) (emphasis added).

United States v. Cox, cited by this Court in *United States v. Finch*, provides an example of M.R.E. 801(d)(1)(B)(ii)'s temporal priority requirement.[112] There, the defense counsel challenged a child-victim's memory.[113] Specifically, the defense counsel attempted to show the witness did not remember the accused taking nude photos of him *until being shown the photos*.[114] The defense counsel attacked his recollection of the event and asked, "If you think back about what actually happened that night, though, without the photos, you really don't remember?"[115] To rehabilitate this attack on the witness's faulty memory, the Government called an agent who testified that the witness disclosed that the accused took nude photos of him *before being shown the photos*.[116] The Sixth Circuit found the agent's testimony was admissible under F.R.E. 801(d)(1)(B)(ii).[117]

Additionally, two Kentucky Supreme Court decisions are particularly salient examples of the common law's temporal priority doctrine. In *Lowery v. Commonwealth*, the court held a prior consistent statement could be used to

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[112] *Finch*, 79 M.J. at 396 (citing *United States v. Cox*, 871 F.3d 479, 487 (6th Cir. 2017)).
[113] *Cox*, 871 F.3d at 487.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 486.
[117] *Id.* at 487.

rehabilitate a witness who was impeached with the fact that he had been drinking shortly before testifying.[118] The court reasoned:

> Once the present ability of the witness to recollect and communicate is discredited, consistent statements made before the onset of the malady become relevant and probative. They tend to support the accuracy of the testimony by showing that the story was the same before the fogging of the memory and the thickening of the tongue.[119]

By contrast, in *Bussey v. Commonwealth*, the Kentucky Supreme Court distinguished relevant versus irrelevant prior consistent statements.[120] There, the prosecution admitted a witness' prior consistent statement after the defense challenged his mental capacity, claiming he was mentally disabled.[121] Finding that attack did not open the door for a prior consistent statement, the court noted that the victim suffered from the same diminished mental capacity *at the time he made the prior statement*, and the defense did not challenge whether the witness' "mental condition had become more diminished in the period between the occurrence of the crime and trial."[122]

Taken together, the two state decisions demonstrate how the common law requires the prior consistent statement to have occurred "before the fogging of the

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[118] *Lowery v. Commonwealth*, 566 S.W.2d 750, 750 (Ky. 1978).
[119] *Id.*
[120] *Bussey v. Commonwealth*, 797 S.W.2d 483, 485 (Ky. 1990).
[121] *Id.* at 484.
[122] *Id.*

memory" when the declarant-witness' diminished capacity to recollect is attacked.[123] As *Cox* similarly illustrates, the codified rule of evidence incorporates the temporal priority doctrine as well.[124] Because the defense's attack was that an intervening circumstance impacted the witness' capacity to recollect, a prior consistent statement made *before* that intervening circumstance was then admissible.[125]

A hypothetical example helps illustrate the temporal requirement here. Suppose Ms. B.S. testifies that she said "no" in response to Appellant rubbing his penis against her. Afterwards, the trial defense counsel asks her if she recently remembered her saying "no" to the charged conduct and insinuates that a therapy session helped her remember the testimony, or implies that an intervening head injury impacted her memory. In response to either of those attacks, the Government could properly offer the prior consistent statement that preceded the therapy session or the head injury or any other statement that shows she did not *recently* remember saying "no." And in so doing, the Government could point to a specific attack with a nexus to rehabilitate that attack.

But those hypothetical facts are not the facts in this case. The admitted prior statement had no similar relevant rehabilitative nexus. The Defense never alleged that something helped Ms. B.S. remember, the passage of time diminished her

[123] *Lowery*, 566 S.W.2d at 750.
[124] *See Cox*, 871 F.3d at 487.
[125] *Id.*

memory, nor an intervening injury or disease impacted her memory. Instead, Ms. B.S.'s *capacity to register* memories—formed amidst an alcohol-induced blackout on the night at issue—was called into question (initially by the Government, then by the Defense). The prior statement is not relevant to rehabilitate such an attack and instead its value was solely substantive. This is because the prior statement that the Military Judge allowed to be admitted was made *after* Ms. B.S.'s alcohol-induced blackout, not *before*. Thus, because of the form of the attack and the timing of the prior statement, that statement was irrelevant and inadmissible.

C. The inadmissible hearsay was prejudicial.

Because the Military Judge erred in admitting Ms. B.S.'s prior statement, "the government bears the burden of demonstrating that the admission of that erroneous evidence was harmless."[126] For preserved non-constitutional errors, the government must disprove that the error had a "substantial influence on the findings."[127] The analysis depends on: (1) the strength of the parties' cases; and (2) the materiality and quality of the erroneously admitted evidence.[128]

1. The Strength of the Parties' Cases

Even from the outset of the court-martial, the Government's case was weak. While finding the "low" bar of probable cause was met, the Preliminary Hearing

[126] *Finch*, 79, M.J. at 398 (citation omitted).
[127] *Id.* (citation omitted).
[128] *See id.* at 398-99 (citations and quotation omitted).

Officer recommended that "no further criminal adjudication action be taken" due to insufficient evidence.[129] His recommendation demonstrates the objective weakness of the Government's case from the beginning.[130]

The Government's own witness, a neighbor to whom Ms. B.S. initially made her allegation, described Ms. B.S.—the case-dispositive witness—as acting fearful that her husband would think she cheated on him and then want a divorce.[131] The neighbor also testified that Ms. B.S. scratched her skin as if "gnats or mosquitoes were touching, like biting" her, and she would not sit still or put on clothes.[132] The witness described Ms. B.S. as appearing to be "on drugs . . . ."[133] Major Woodson, a toxicology expert, corroborated the neighbor's suspicion, testifying that Ms. B.S.'s behavior was "frequently more common with drug use."[134]

Major Woodson also provided context to Appellant's statements to the Naval Criminal Investigative Service (NCIS) agents that he did not engage in sexual conduct with Ms. B.S.,[135] and Major Woodson explained Ms. B.S.'s incapacity to

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[129] J.A. at 210-11 (Preliminary Hearing Report).
[130] *See United States v. Hills*, 75 M.J. 350, 352, 358 (C.A.A.F. 2016) (noting that the Article 32, UCMJ, investigating officer "recommended against pursuing a court-martial" before holding an instructional error was not harmless beyond a reasonable doubt).
[131] J.A. at 307, 313.
[132] J.A. at 308.
[133] J.A. at 309.
[134] J.A. at 425.
[135] J.A. at 8.

remember. The expert opined that both Appellant and Ms. B.S. experienced an alcohol-induced blackout.[136] People in a state of blackout "don't remember what happened during that period of time."[137] They have blank spaces in their memory.[138] As Major Woodson explained, when the human mind has blank spaces, it "tr[ies] to fill in the blanks."[139] Consequently, Appellant's answers to the NCIS agents and Ms. B.S.'s testimony were built on blank spaces in their memories. Overall, in considering the relative strength of both parties' cases, this factor weighs in favor of Appellant.

2. The Materiality and Quality of the Erroneously Admitted Evidence

The erroneous hearsay evidence proved to be material to the trial. As discussed above, the hearsay testimony pertained to "facts of central importance" and went to the "heart of the matter in dispute."[140] In *United States v. Finch*, this Court found an erroneously admitted prior statement was not prejudicial because, "and perhaps most importantly, independent evidence in the same vein . . . was admitted at the court-martial without defense objection."[141] Here, by contrast, the only time the members heard that the Government's case-dispositive witness said

[136] J.A. at 422, 425-26.
[137] J.A. at 418-19.
[138] J.A. at 420.
[139] J.A. at 421.
[140] *United States v. Frost*, 79 M.J. 104, 112 (C.A.A.F. 2019); *see* Section B.1., *supra*.
[141] *Finch*, 79 M.J. at 400.

"no" to Appellant rubbing his penis on her buttocks occurred during Deputy Ford's objected-to hearsay testimony. Without this inadmissible prior statement, the Government would have failed to offer any testimony that Ms. B.S. said "no" in response to the charged conduct. Thus, unlike in *Finch*, Deputy Ford's testimony—under the guise of a prior consistent statement— provided new, critical ammunition that filled a material gap in the Government's case.[142] And "where the evidence . . . provide[s] new ammunition, an error is less likely to be harmless."[143]

Additionally, Deputy Ford's pointed, direct testimony demonstrates its materiality. In *Finch*, this Court found that a "mere passing reference in a very lengthy video" was not prejudicial.[144] Here, Deputy Ford's recall elicited far more than a passing reference. Four questions were asked of him. Two of the pointed responses went to the central issue of whether Ms. B.S. said "no" to the charged conduct. And after his limited recall, Deputy Ford exited the witness stand, but not before his testimony tipped the balance in favor of the Government.

Nor did the members merely hear this material hearsay; they were also repeatedly reminded about it. Before summation, the members were instructed that they could consider Deputy Ford's recall testimony "as evidence of the truth of the

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[142] *See id.*
[143] *United States v. Steen*, 81 M.J. 261, 263 (C.A.A.F. 2021) (citation omitted).
[144] *Finch*, 79 M.J. at 399.

matter expressed."[145] The Government then exploited the "new ammunition."[146] Albeit without mentioning Deputy Ford by name, the Government specifically emphasized his testimony during its summation.[147] The Government concluded with:

> She felt him grinding his penis against her butt, her vaginal area. *She said no*. She tried to push his face away. An expression of a lack of consent means there is no consent. While crying for her husband, *she said no*, he continued. *She says no*. He doesn't stop. It's fight, flight, or freeze. When he was behind her, she froze. When he fell asleep, she fled. Ultimately, *she said no*. And that is not what consent looks like.[148]

In rebuttal, the Government reiterated this central issue, this time referencing Deputy Ford by name: "She told Deputy Ford what happened."[149]

In other words, the Government did exactly what the Supreme Court has warned against: "the whole emphasis of the trial []shift[ed] to the out-of-court statements, not the in-court ones."[150] In doing so, the Government "dr[ove] a truck through the hearsay rule"[151] and, unlike in *Finch*, exploited inadmissible hearsay

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[145] *Id.* at 400.
[146] *Steen*, 81 M.J. at 263.
[147] *See United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017) (finding prejudice when the trial counsel "emphasized" inadmissible hearsay by referring to it one time during the closing argument).
[148] J.A. at 429 (emphasis added).
[149] J.A. at 438.
[150] *Tome*, 513 U.S. at 165.
[151] *United States v. Finch*, 79 M.J. 389 (C.A.A.F. 2020), No. 19-0298, Oral Argument, at 12:45 (https://www.armfor.uscourts.gov/newcaaf/CourtAudio8/20191204B.mp3).

pertaining to the heart of the matter in dispute: whether Ms. B.S. consented to the charged conduct or Appellant was reasonably mistaken as to her consent.[152] The materiality of her inadmissible prior statement, and the Government's reliance upon it, prejudiced Appellant.

CONCLUSION

Appellant respectfully requests that this Honorable Court set aside the findings and sentence.

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[152] *See Finch*, 79 M.J. at 399 (finding no prejudice where "the defense points to no instances in the course of the trial where the Government sought to exploit" the erroneously admitted prior statement).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at Ian.D.Pedden.mil@us.navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on December 19, 2024.

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