IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

ROBERT D. LUYTIES
Lieutenant Colonel, Judge Advocate
Appellate Counsel[1]
Defense Appellate Division
1055 Sheridan Ave. Bldg 429
Fort Leavenworth, Kansas 66027
(520) 706-5379
USCAAF Bar No. 37955

PETER ELLIS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
USCAAF Bar No. 38209

FRANK E. KOSTIK JR.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 35108

[1] Currently assigned as the Regional Defense Counsel, United States Army Trial Defense Services.

Table of Contents

Table of Authorities

THE SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

FEDERAL CIRCUIT COURTSs

RULES

COURT OF CRIMINAL APPEALS

OTHER COURT CASES

MISCELLANEOUS SOURCES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Certified Issues

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE INCORRECTLY ADMITTED TWO SUPPOSED PRIOR CONSISTENT STATEMENTS BY MISSTATING THE LAW, APPLYING BOTH SUBSECTIONS IN VIOLATION OF *AYALA*/*FINCH*, AND FAILING TO IDENTIFY A STATEMENT THAT PREDATED THE CLEAR AND PERSISTENT MOTIVE TO FABRICATE PURSUED BY APPELLANT.

II. WHETHER THE ARMY COURT ERRED WHEN IT DISREGARDED THIS COURT'S PLAIN LANGUAGE IN *AYALA*/*FINCH* AND FAILED TO EXPLAIN HOW THE PRIOR CONSISTENT STATEMENTS WERE RELEVANT TO REHABILITATE THE WITNESS UNDER (B)(II) BEYOND MERE REPETITION.

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

Summary of the Argument

The Government's Brief appears to misconstrue *Pierre* and military/federal precedent that track it while confusing Appellant's positions on multiple points. Those actions result in it inadvertently creating straw-man fallacies in an attempt to advance an inconsistent standard for defining *Finch's* Fifth Element. The Government's ultimate position, given the lack of limiting principles or precedent it cites, is if a witness is impeached with a prior inconsistent statement, any consistent statement the witness made may be admissible under (B)(ii). The Government claims that such evidence rehabilitates a witness through "consistency" (Gov't Br. 9, 27, 37, 39), but this misreads (B)(ii)'s requirements, military precedent, and the common law it incorporates. The Government's position is internally inconsistent, positing that mere repetition is not enough but arguing that proposition under the guise of "consistency." (*Id.*). This Court and federal circuits have rejected similar arguments before and should do so again.

Appellant's case demonstrates how prejudice results from the Government's inconsistent approach. The Government's argument that no prejudice occurred/this was not even a close case relies on two pillars at its core: KB's credibility and CID photographed the magazine on the bed. The latter claim was undermined by the MP's uncontested testimony noting the magazine was not present and the CID photo was inaccurate for that purpose, making it rational the

fire-fighter, who "goes looking" for *both* guns before CID arrived, ejected it. For the other pillar, the judge permitted substantive video hearsay, produced with the assistance of counsel, to accompany the panel into the deliberation room with a by-name instruction emphasizing them. The faulty admission's impact is evident in the panel's amendment of Specification 2 to align with PE 27's language (and not KB's in-court testimony). The government mischaracterizes PE 27as immaterial and limited to only "strangling" – both are inaccurate. This was a close-case under a *Kohlbeck* analysis and it appears the panel disregarded KB's in-court testimony in favor of inadmissible hearsay which tipped the scales of prejudice due to Materiality and Quality.

LAW AND ARGUMENT

A. Law and Discussion.

The government misperceives *Pierre*, finds conflicts where none exist in precedent and Appellant's position, and suggests a rift between military and federal precedent that also does not, and should not, exist for an identical rule.

1. For Certified Issue III, the Government misreads Appellant's position, *Pierre*, and the federal/military precedent's consistent overlap for both romanettes.

The Government misconstrues Appellant's position on Issue III. Appellant is not requesting this Court replace *Finch* with *Pierre*; the two cases work in harmony. Appellant is suggesting this Court clarify that *Finch's* Fifth Element aligns with *Pierre* and the circuits' precedent.

Per *Finch's* Fifth Element, "statements under (B)(ii) 'must actually be relevant to rehabilitate;'" mere repetition is not enough to meet that standard. (App. Br. 44); (Gov't Br. 14 (citing *Finch*, 79 M.J. at 396)). *Pierre's* definition of "relevant to rehabilitate" incorporates decades of precedent from the majority of federal circuits. It provides practitioners guidance/examples on *Finch's* Fifth Element, which the Government concedes needs clarification. (Gov't Br. 7).

Pierre and federal circuits that use the same standard (e.g., *Simonelli*) have been homogenous with military precedent for decades – just without formal recognition/attribution. *See, e.g., Adams*, 63 M.J. at 696 (citing *Simonelli* which

"adopt[s] the 'majority view' of the federal courts"); *Finch*, 79 M.J. at 396 (citing *Simonelli*, 237 F.3d 19; *United States v. Ellis*, 121 F.3d 908, 919 (4th Cir. 1997)); *see also Bugbear* (noting precedent that has cited/consistent with *Pierre*.).

The Government claims: since *Pierre*, "military jurisprudence has steadily developed its own doctrine." (Gov't Br. 14). But the Government's Brief ends that sentence too abruptly; that sentence could *also accurately* read "'. . . developed its own doctrine that has been consistent with and quoting from federal precedent including identical standards, the rule's language, and even the advisory committees' notes." (*Id.*)(altered for emphasis). The Government then indicates that military precedent "eliminate the concerns addressed in *Pierre*;" that statement would be more accurate to say, these cases have, thus far, aligned with *Pierre* and the majority of federal circuits while equipping military judges with a flexible framework to guide admissibility and predictability for practioner's preparation; but the Army Court here and Judge Maggs opinion in *Finch* continue to demonstrate the need for guidance on this very issue.

Military precedent should not deviate now, especially when *Pierre*/*Simonelli* helpfully define "relevant to rehabilitate" *and* this Court's precedent aligns within *Pierre's* flexible guidance for "relevant to rehabilitate."[2]

Despite the Government advocating this Court reject *Pierre* (Gov't Br. 16)("This Court should decline . . ."), the Government approvingly cites military precedent that includes *Pierre* saying it employs "common-sense." (Gov't Br. 15-16). The Government recognizes "this Court has repeatedly reinforced that mere repetition of a prior statement is not enough." (Gov't Br. 15)(citations omitted).

The government all but concedes military precedent is aligned with the principles from *Pierre*: "The '*Pierre* standard,' perhaps novel for its time, has since been incorporated through the common-sense application . . ." (Gov't Br. 15-16). *Pierre* was not novel; it tracked decades of precedent citing well-versed authority; *Pierre* is a non-controversial *summary* which other courts now cite. *See*

[2] To deviate, as the government implores, for just the definition of *Finch's* Fifth Element risks further confusing practitioners. Until the Army Court's decision in this case, military precedent nested with the majority of federal circuits. *See Adams*, 63 M.J. at 696-97. Notwithstanding that *Finch's* Elements were created one-paragraph after citing/discussing multiple federal cases as supportive authority, to create an unnecessary rift for an identical rule for just *Finch's* Fifth Element creates a situation where practitioners can accurately rely on federal precedent for the other four Elements *and*(B)(i). But only for (B)(ii)'s final Element, practitioners should deviate. Thus, the Government's position leads to less predictability and consistency (*Cf., Tome*, 513 U.S. at 164-65) while offering no military necessity to justify a drift from federal/past precedent.

generally Bugbear. It could just as easily be called the *Simonelli*, *Quinto*, *Harris*, or *Ellis* standard. *See Simonelli*, 237 F.3d at 26-28 (citing *Pierre*/other consistent circuits and adopting the "majority position" from federal circuits).

Given the Government's concern that *Pierre* was written "nearly forty years" ago and the standard it re-announced aligns with the majority of circuits, they offer no citation for its position that *Pierre* mandates a "one-for-one" "binary" standard. (Gov't Br. 7, 18)(citing no authority). *Pierre* does not say that, nor does its application result in that conclusion. Appellant's Brief points out (App. Br. 22, n.21) the Rule's *history* made prior consistent statements restrictive to avoid trials that transform from in-court testimony to one over out-of-court statements. *See Tome*, 513 U.S. at 157("The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered . . . the same phrase used by the Advisory Committee in its description of the "traditional" common law of evidence, which was the background against which the Rules were drafted.").

The only example the Government provided about how *Simonelli/Pierre could* result in a different outcome for military precedent is a hypothetical where the Government applies a misconstrued standard to interpret *Ruiz.* (Gov't Br. 16-17). Defining the standard that is set forth in *Pierre*, *Simonell*, and other cases is crucial to then apply it.

The Government writes: "Before the 2016 Amendment to M.R.E 801d)(1)(B), the 2nd Circuit held that a prior consistent statement must have 'rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" (Gov't Br. 10)(citing *Pierre*). This correctly states *Pierre's* standard with a caveat: the Government failed to include the word from *Pierre* directly before the first word of its quote ("some"). The Government then replaces "some" with the word "significant" to create its straw-man argument. (*See, e.g.,* Gov't Br. 7)(*"Pierre's significant rebutting force"*)(emphasis original, Bolding removed). But *Pierre* actually says, "Of course, not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has ***some*** rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony." *Pierre*, 781 F.2d at 331(emphasis added).

Pierre does list *multiple examples* with the "significant" language. *See, e.g., id.* (emphasis added)("A clear example of a consistent statement with such *significant rebutting force* is the statement approved for rehabilitative use in *United States v. Corry*, *supra*. . ."). But the Government's deviation from *Pierre's* "some" to "significant" is the difference between citing a holding versus citing the

analysis/dicta that helped a Court reach its holding.[3] It may be that the Government conflated language like "high probative value" or "significant probative value" from Appellant's Brief regarding Relevance and Probative Value/403 (the "initial criteria") with *Pierre's* holding. (*See, e.g.,* App. Br. 25); (*see also* App. Br. 23, 23 n.22 (string cite), 24-25, 31-32, 53)(noting the *Pierre* standard). Therefore, its unsurprising the Government has not provided any citation for its characterization of *Pierre* ("one-for-one" (Gov't Br. 18); "rigid," "binary" (Gov't Br. 7, 18-19)); the Government misunderstood the standard it was looking for in precedent.

The Government's misunderstanding explains why it submits that *Pierre* would overturn *Ruiz* where it would not.[4] The Government misstates: Appellant

[3] *United States v. Collicott*, 92 F.3d 973, 980-81("The [government] may not pick and choose among a prior statement to create an appearance of conflict and then object when this appearance is rebutted by means of a fuller version of the same statement.")(cleaned up)(citations omitted).

[4] Another example of the Government mischaracterizing/conflating Appellant's position is where it cites Appellant's point that *trial* practitioners "are piecemealing" *Ruiz* to circumvent *Tome* and *McCaskey*. The Government claims Appellant's concern "misreads both the opinion and governing law."(Gov't Br. 16). But that's the point; Appellant *agrees* that the interpretation *trial* practitioners are advancing from a quote in *Ruiz* is a misstatement of the law/opinion. Appellant suggested this Court clarify/limit the potential reach of that language/dicta in *Ruiz* regarding "a different way" to cure the issue. (App. Br. 42-44).

"claims *that Ruiz* was wrongly decided" (Gov't Br. 17); it confuses Appellant's position with that of a pending law review article from the Joint Appendix.

Appellant's position is that *Ruiz*: (1) appears to be an example of the "context" exception from *Pierre* on unique facts ((App. Br. 39)("presents what is arguably (B)(ii)'s outer limits")); (2) an example of how the standard of review applies ((App. Br. 41)("This Court emphasized the standard of review . . ."), and (3) offered that *one interpretation* (App. Br. 42)(". . . can be read to say . . .") is the judge did not get the analysis correct like if this Court had conducted a *de novo* review, but did not get it so wrong it's an abuse of discretion under those unique facts. ((App. Br. 42)(citing *French*, 38 M.J. at 425)). The Government intermixes Appellant's position to create an artificial gap where none may exist - *Ruiz* did not create a new rule, it's a unique factual scenario that can [and is] be[ing] misread by savvy *trial* practitioners to circumvent this Court's precedent. This Court can simply cure the concern with a clarification regarding "a different way;" not that *Pierre* results in setting-aside *Ruiz*.

If the trial judge in *Ruiz* had guidance from *Pierre* for *Finch's* Fifth Element, the judge *could* have chosen to admit *or not admit* the supposed consistent statements; *Pierre's* official adoption as *Finch's* "relevant to rehabilitate" language would not have mandated *either* result as the Government falsely asserts. (Gov't

Br. 18-19). *Both* would have been within the "wide range of choices" available to the judge under "abuse of discretion."

2. Certified Issue II, the judge erred in his (B)(ii) analysis when he found "inconsistency", at least *as applied* here, as "another ground."

As a threshold matter, the Government apparently agrees with Appellant's position: The Exhibits did not predate KB's continuous motive to fabricate. (Gov't Br. 9, 26-27). Yet, the Government then confuses Appellant's position with the prosecutor's argument at trial: "Appellant (sic) argues this as one of two potential motives, yet as the Army Court correctly determined, this was in fact one larger 'motive'." (Gov't Br. 26)((*id.*)("Despite Appellant's argument" about "whether there were truly two separate motives . . .")). But, the Army Court recognized *Appellant's* unchanging position: "Both at trial and on appeal, Appellant argues the motive to fabricate arose when the CID agent informed the victim at the first interview at the hospital her children were in protective custody." *Brown*, 2025 CCA LEXIS 213, at *17.

The Government also concedes The Exhibits were never admissible under both romanettes, but argues ACCA was correct to analyze (B)(ii) and The Exhibits were admissible for "another ground"–"consistency"–which it argues under *these* facts, this Court should recognize as a stand-alone "other ground." (Gov't Br. 9, 27, 37, 39).

The Government's position is internally inconsistent: it concedes mere repetition is not enough for a prior consistent statement's admissibility. (Gov't Br. 10, 12-13, 15). It then urges "inconsistency" alone as "another ground" so the fact the July 8th Exhibits were consistent on a key-issue makes them admissible. (Gov't Br. 37-40).

To accept that logic/supposed limiting-principle means any time an attorney impeaches a witness with a prior inconsistent statement, any prior consistent statement is admissible under (B)(ii), regardless of timing, if the statements show "consistency" and survive MRE 403. (Gov't Br 10, 12, 35, 38). "If Rule 801 were read so that the charge opened the floodgates to any prior consistent statement that satisfied Rule 403, the distinction between rejected Uniform Rule 63(1) and Rule 801(d)(1)(B) would all but disappear." *Tome*, 513 U.S. at 162; *McCaskey*, 30 M.J. at 191-92 (same); *see also Frazier*, 469 F.3d at 89(quoting *Bishop*, 264 F.3d at 548)(" . . . otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence.").

Contrary to the Government's position, consistency alone does not rehabilitate a witness who was attacked through inconsistency; the witness still made the inconsistent statement. *Miller*, 874 F.2d at 1274 ("prior statements in no way help to *explain or amplify* the inconsistent statement with which she was impeached."). When the consistency does not explain/amplify that the

impeachment was just the result of a faulty memory or robbing of context from the same statement, then the only rehabilitative quality left is repetition/bolstering; not by rebutting the cross-examiner's attack.

Could there be a case where a witness is solely impeached because they have been inconsistent with no underlying allegation as to a reason for that inconsistency such as fabrication/memory? Theoretically. But that's not *this* case where the defense consistently articulated the motive. If this Court is concerned with theoretical (B)(ii) possibilities despite *Finch's* recognition that only statements which were already admissible before the Rule's change are admissible now, this Court should handle it like *McCaskey* did with a similar concern: "No" Government "Counsel have offered to us in which a prior consistent statement" made on some "other ground" than listed in *Adams*/*Pierre* "[c]ould be probative within the framework of our analysis of Mil. R. Evid. 801(d)(1)(b). However, acknowledging the possibility that such an instance might present itself, we decline to state our holding in absolute terms." 30 M.J. at n.2. But this Court should add, to help guide judges, that any "other ground" outside of the time-tested and historical definitions from *Adams* is unlikely to present themselves given the limitations noted in *Finch* about the Rule's change.

B. The Government cannot prove the erroneously admitted evidence and associated instructions did not affect prejudice Appellant.

Statement of Additional Facts Relevant to Prejudice

1. The Government Omits the: Magazine, Fire-Fighter, MP, and Unsecured Scene.

The gun and magazine's position and unsecured crime-scene were focal disputes in Appellant's case with both parties calling witnesses and panel inquiries (*e.g.*, JA293). After Appellant and KB exited the house(JA133-34; 146-47), the neighbor's wife went into the house to retrieve a child. (JA132).

An MP entered the residence at the EMT's request to get KB's ID. (JA180-85). The MP saw the pistol and single-bullet, but no magazine. (JA 183-85). The MP grabbed the purse off the bed. (JA185). The MP was "careful not to move anything and leave everything the same." (JA183-85). He placed the purse in the same-spot. (*Id.*).

The MP testified there was no magazine on the bed and disputed CID's photos (taken later) *regarding* the magazine. (JA183-85, 187-88, 190). The MP agreed "that is not the scene as [he] saw it when [he] walked into the bedroom" due to the magazine (JA188; 190); the Government never argued the MP was misremembering/incorrect. The MP's written report included "excruciating details as to the position of the gun in relation to the position of the pistol and purse."

(JA191). The *later* photos show the purse practically touching the magazine. (JA442-446).

The neighbor's wife testified the fire-fighter went to ensure the gun was secured. (JA140-41). She confirmed the fire-fighter knew about the gun and it was why he entered. (*Id*; *see* JA143; *see* JA180). Since there were weapons in the residence, the fire-fighter instructed the MP to not allow anyone inside. (JA180-81; 186-89).

Later, SA IR entered the residence (noting the MP stood guard(JA297)) and went into the bedroom. However, unlike earlier observers, SA IR noted that the rightmost dresser-drawer was open (which would have been directly next to Appellant's right hand/side when he grabbed the knife). The dresser-drawer contained Appellant's firearm. (JA314). SA IR also saw a magazine. (JA298). SA IR left when SA HM arrived to document the scene. (JA298).

Special Agent HM took photographs the Government's prejudice analysis relies on. (JA272-281). She testified that when she arrived, she was *only* told about the MP entering the scene and he did not move anything. (JA292-93, 281, 288-89). She testified if *anyone* had moved/touched anything, she would have handled documentation differently. (JA293-95).[5]

[5] SA HM did not know the fire-fighter, SA IR whom she spoke with, or the neighbor's wife also had entered the residence. (JA292-93, 281, 288-89).

In the photos, the formerly-chambered round, *magazine*, and pistol are easily identifiable. (JA438-440, 442-45). Appellant's dresser-drawer with his firearm is open despite Appellant not grabbing for his firearm during the affray. (JA431-33).

Responding to a panel question, SA HM testified she did not test the magazine for fingerprints since no one could have touched it and there was no blood in the bedroom or its wall/doorframes. (JA292-95).

In addition to securing the firearm and instructing the MP to act as security, virtually every witness present while KB and Appellant were at the residence recalled the fire-fighter's involvement including taking notes for the EMTs and interviewing Appellant. (JA 338, 198, 179, 187, 180-81, 163-64).

Law and Argument

If this Court finds nonconstitutional error, it turns to prejudice: "if the error had a substantial influence on the findings." *Frost*, 79 M.J. 104 (citing *United States v. Kohlbeck*, 78 M.J. 326, 334 (C.A.A.F. 2019)(citation omitted)(internal quotation marks omitted)). "Importantly, it is the Government that bears the burden." *Id.*

Prejudice is determined *de novo*. *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020). To determine if the Government carried its burden, this Court weighs four factors: (1) the strength of the Government's case; (2) the strength of the defense's case; (3) the materiality of the erroneous evidence; and (4) the quality

of the erroneous evidence. *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014).

In conducting its *de novo*/fresh look, appellate courts are careful to avoid hindsight/conviction-bias. *See United States v. Lozado-Rivera*, 177 F.3d 98, 105 (1st Cir. 1999); *United States v. Quinto*, 582 F.2d 224, 235 (2d Cir. 1978)(quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946))("only if 'our conviction is sure that the error did not influence the jury or had but very slight effect.'"). This hindsight/conviction-bias avoidance is particularly important in a self-defense case because "the law of self-defense requires the defendant to swallow the sword of admission of the [injury]. This exercise is dangerous" because courts can take microseconds/simultaneous interactions and slow them down over hundreds of pages – artificially slowing the decision-making/knowledge to unrealistic levels. *See United States v. Taveras,* 570 F. Supp. 2d 481, 493 (E.D.N.Y. 2008). Hindsight-bias is stronger in non-homicide self-defense cases because in such a case (1) the other party survived, and (2) the accused survived. Therefore, the risk of hindsight-bias is greater in asking "was the weapon really needed" since arguably, the potential deadly force was not necessary since everyone lived.

"Although four distinct factors, all of them revolve around one single point: namely, the central question at trial was whether" KB was credible and pointed the weapon at Appellant's face allowing for self-defense. *Flesher*, 73 M.J. at 318.

A. Materiality and Quality weigh in favor of prejudice.

Although these are the latter two factors, the materiality and quality of the evidence weigh the analysis in Appellant's favor on what would otherwise be a close-case. *Kohlbek*, 78 M.J. at 334. In examining these factors, this Court is "essentially assessing how much the erroneously admitted evidence may have affected the court-martial." *Washington*, 80 M.J. at 111.[6]

When assessing materiality and quality, this Court considers each case's unique facts. *Id.* It has considered how the evidence contributed to the government's case, *cf., United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001)(harmless error in part because the record was "replete with admissible evidence" that was similar); whether instructions *mitigated* the error, *United States v. Baumann*, 54 M.J. 100, 105 (C.A.A.F. 2000)(harmless error in part because the judge gave "extensive instructions on the proper use" of the evidence); *United States v. Eslinger*, 70 M.J. 193, 196-97 (C.A.A.F. 2011); whether the government referred to the evidence, *United States v. Brooks*, 26 M.J. 28, 29 (C.M.A. 1988)(harmless error in part because it was not a focus of the trial); and how the members may weigh the evidence using their own layperson knowledge/without

[6] Both factors were misapplied by ACCA and the Government since neither factored in the panel's improper use of the evidence *from* the judge's by-name instruction.

instructions, *United States v. Walker*, 42 M.J. 67, 74 (C.A.A.F. 1995). *Washington*, 80 M.J. at 111-112.

First, The Exhibits prejudiced Appellant by showing KB's demeanor, emotion, support from multiple attendees, and her injuries. Unlike *Baumann* where the instructions *mitigated* the inadmissible evidence, here the judge's instructions highlighted the evidence referencing KB by-name (JA350-51). *United States v. Steen*, 81 M.J. 261 (C.A.A.F. 2021)(quoting *United States v. Matthews*, 53 M.J. 465, 471 (C.A.A.F. 2000))(courts presume the panel followed the instructions, and therefore, not only considered the evidence, but did so for an improper purpose).

Second, unlike KB's impeaching statements, The Exhibits accompanied the panel and were sitting in the deliberation room to be repeatedly played. Not only were both Exhibits videos and contained multiple excerpts (making it appear that KB was consistent throughout a prolonged interview), the interview format is akin to how ordinary Soldiers/citizens view crime-documentaries, showing raw emotion and confirming expectations as to what an investigation should look like, helping with cognitive dissonance.

Third, this evidence was reasonably the most material since it covered the two key issues/government's pillars (discussed *infra*): KB's credibility and whether she pointed the weapon at Appellant. These videos were strategically

created to counter the defense's case and went to the heart of the government's case. The panel no longer needed to rely on KB's memory/their own memories/notes; each time it needed something to reference to determine whether KB pointed the weapon at Appellant, it had two discs with three excerpts to dissect, something that cannot be done with testimony. *See generally United States v. Berry*, 61 M.J. 91, 98 (C.A.A.F. 2005)(in a situation where only two people were present for the primary incident, a second corroborating statement on the material issue can "tip the balance of the evidence.").

Fourth, the evidence's quality was high. Unlike SA GC's testimony, which briefly touched on KB's statements, The Exhibits were tailored to key issues. Unlike SA GC's testimony (which had to be refreshed (JA233)) and in-context of him being a new/inexperienced agent (JA222)), the video had KB saying the words/motions and a video cannot be cross-examined. Video interviews are higher quality and more concrete/convincing than repeating hearsay from a junior special-agent who can be argued as biased or as misremembering later. *See United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994). SA GC's two sentence responses from a conversation that happened a year before trial are simply a lesser quality/weight than the minutes of uninterrupted explanations in the videos that show KB and her emotions *while in a sling*.

Additionally, the instructions required the panel to not consider SA GC's testimony of KB's statements substantively. When SA GC's testimonial recap is removed and the government can handpick excerpts to introduce with an emphasizing, by-name instruction to consider substantively, the net-effect is to minimize other evidence like KB's inconsistent statements. Although KB's statements to the EMT's were substantively admissible as statements for medical diagnosis, the judge's instructions about inconsistent statements (JA349-50) likely created a belief that those statements were not admissible for their truth while The Exhibits, and only The Exhibits, were.

Even factoring that ACCA focused on one line of testimony from the neighbor's wife where she believed she heard KB respond "No I didn't, you stabbed me", it is hard to say the single sentence is akin to being "replete with admissible evidence" on the same point. *Cf., Hursey*, 55 M.J. at 36. Moreover, the neighbor's wife's testimony is of lesser quality than the videos–the fallible memory from a witness who, even in transcript form, reads as heavily biased towards KB. Disregarding the neighbor's wife's non-responsive additions about her own history as a domestic-abuse-survivor and knowing patterns as an abuse victim, she admitted to omitting favorable information to Appellant in her sworn-statements. (JA138)(highlighting the neighbor's wife omitted hearing Appellant repeatedly ask "why did she [KB] have point the gun at him"). Moreover, this one

line was not emphasized or highlighted in closing or rebuttal, it had one mention. (JA358-59).

Paraphrasing federal precedent, "although [The Exhibits] largely tracked [KB's] in-court testimony, it essentially provided the jury with an authoritative 'condensation of the government's'" main points on the key issues. *Lozado-Rivera*, 177 F.3d at 105(quoting *Quinto*, 582 F.2d at 236). "[The Exhibits] contained damning [statements] . . . and that it followed the jurors into the jury room are enough to establish that defendant was adversely affected." *Id.*(citing *United States v. Pendas-Martinez*, 845 F.2d 938, 941 (11th Cir. 1988)(erroneously admitted report summarized essential facts of government's case); *United States v. Brown*, 451 F.2d 1231, 1234 (5th Cir. 1971)(prejudice where documents constituted brief recap of crucial aspects of government's case and "accompanied the jury into the jury room.")). When the erroneous evidence is the product of preparation with an attorney's assistance, it is even more problematic: "once admitted in evidence [The Exhibits] might well have weighed heavily with the jury to the prejudice of the other party, *Brady v. United States*, by leaving a jury with a previously prepared version of a witness's point of view." *USS – Div. of Usx Corp.*, 1995 NLRB LEXIS 226, *47-48(citing *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957); *Brown*, 451 F.2d at 1234. "Rather than being merely cumulative, the excluded testimony was the only available evidence that could

match [KB's in-court] story, a story the jury may have found self-serving if not farfetched." *Parry*, 649 F.2d at 296 (citing *United States v. Rubin*, 591 F.2d 278, 283 (5th Cir. 1979). In line with this precedent, KB's in-trial testimony, which did not match her EMT or July 3rd statements, was now corroborated by the substantively admissible July 8th pre-scheduled attorney-attended interview. Without The Exhibits, the panel could have drawn the conclusion that her KB's self-serving testimony was planned for trial. Instead, the panel was provided cherry-picked videos from the interview and directed by a judge to consider them substantively. *Cf., Engebretsen v. Fairchild Aircraft Corp*., 21 F.3d 721, 730 (6th Cir. 1994)(items that accompany the jury may be "unduly prejudic[ial].").

B. Although any Guilty Finding could be seen as making the government's case "stronger" than the defense's, the government's case was average.

In reviewing the government's case-strength, this Court excises any impact of erroneously admitted evidence *and* improper instructions connected to that evidence. This is key as the Court presumes the panel *followed* the judge's instructions and *considered* inadmissible evidence, which here, is for credibility *and* substance. *Matthews*, 53 M.J. at 471.

1. When reviewing the leftovers, the first factor generally only receives great weight when the evidence supporting the conviction is "simply overwhelming." *McCaskey*, 30 M.J. at 193; *Cf., Simonelli*, 237 F.3d at 29.[7]The government's omissions of uncontroverted facts demonstrate its case was not overwhelming.

The Government misstates the contents, and PE27's weight, claiming that it was "immaterial" (Gov't Br. 8, 24, 34) since the panel's amendments (and the judge's later dismissal) meant PE27 was a non-factor. It can only argue this by misstating PE27's content and claiming it solely discussed Specification 2 and strangling, but it does much more. PE27 discusses what took place upstairs including explaining the knife's lodging in KB's shoulder. PE27's *actual* content supports that it heavily factored in the panel's almost four-hour deliberations. (JA395-96).

Pros. Ex. 27 accounts for the panel's substituted language--KB was touched with force. The Government argues that because the panel did not adopt KB's video statement by saying Appellant's hands were on KB's "neck," it means the

[7] The Army Court simply stated the government's case was stronger than the defense's. *Brown*, 2025 CCA LEXIS 213, *23("we find the government had the stronger case"). In any guilty finding, the prosecution's case would have likely strength compared to the defense's since the evidence produced a guilty finding and if prejudice is analyzed, it means the case was not set-aside under a factual sufficiency review. The individual factors donot generally just ask "whose case is stronger" – it discusses each party's case. *See, e.g., Washington*, 80 M.J. at 111(This Court noted the strength of the government's case and corroboration, and then separately the Defense's case as weak when it called no witnesses and "his own text messages ruled out the possibility of [his proffered defense]").

panel found it immaterial. However, in PE27, *after* suggestions from the special-agent, KB described Appellant strangling her *but could not* remember how many "hands" he used, and when asked about the amount of *pressure*/*force* Appellant used (on a scale from one-to-ten with the agent providing examples), KB responded she could not remember the amount of force.

Summarized, KB said in PE27 there was just pressure/force with an unknown number of hands. This is after describing Appellant pushing KB, grabbing her and "popping" off her necklace upstairs (no necklace is found by CID/photos), and other "unlawful force." Thus, in reality, PE 27 supports the panel's exception and substitution since it describes different touching, eliminates the distinction/concern about how many "hands" were used from the Specification's original language, and specifically notes pressure/force was used (just an unknown amount). To be sure, KB *testified* Appellant choked her (JA060-61, JA081-82), so the panel had to use *something* different to make its finding. The portions of PE27 that deal with strangling, as opposed to what took place upstairs (also on PE27), provide the panel's finding's language. Appellant's admissions were that he grabbed KB's shirt, so PE27 supplied that language that they handwrote in (JA477) while PE27 sat in the deliberation room with them.

While the Government relies heavily on the photograph showing the magazine on the bed, it omits all references to the MP and the fire-fighter who

went in to secure the weapon prior to those photographs. (JA140-41). The firefighter's/MP's roles were not contested at trial, so their avoidance in the Government's Brief is revealing about its concerns for its own case.

The Government also overstates the weight of Appellant's statements regarding the magazine and takes them out of context. For instance, realizing the magazine *may* have been ejected after replaying the episode in his mind while in shock to the events is not the same as knowing and processing that information in real-time in the affray. As even the Government's cherry-picked best lines demonstrate, many of Appellant's statements were simple "agreements" to leading statements from CID. (Gov't Br. 31)("Appellant agreed with SA IR . . ."). In fact, the Government admits, regarding the magazine, Appellant told SA IR "I didn't really pay attention" (Gov't Br. 30-31); this is because a rational explanation is Appellant was looking down/away to grab the open pocket-knife and moving forward/swiping simultaneously as KB started her turn; exactly the simultaneous touching/turning KB described to the EMTs.

2. The government's case was middling at best and self-contradicted in areas.

This was a close case not only due to the panel deviating from KB's testimony, but also what must have led to that deviation. For example, the Government's other pillar is that "KB convincingly testified." (Gov't Br. 28). The first two pages of the Government's Facts *only* reference KB's in-court testimony.

But in its prejudice analysis, the Government confuses when KB shouts to the children to run/get-out transmuting it to *after* the alleged strangling/choking (*compare* Gov't Br. 27-28 *with* PE 27 *and* JA251-52) demonstrating the Government cannot even keep KB's testimony straight. Its reliance on KB's "convincing" testimony while misstating it also demonstrates *Appellant's position* on Materiality/Quality since it makes The Exhibits' bolstering of KB's testimony crucial for prejudice.

For example, in its Facts' section, the first other witness's testimony the Government cites as fact is on the last line on p.3; but even the fact it quotes demonstrates that the witness actually impeached KB's supposed "convincing" testimony. KB testified the neighbor's wife entered the residence opening "the screen door", and after the door opened with KB laying immediately to the side/in front of the stairs (JA060, JA419,422), only then did Appellant supposedly "stop choking me and he picked me up, and I, like, made eye contact with her and she put her hand out and I grabbed her hand and she pulled me out the door." (JA61).

The neighbor's wife refuted that timing/observation. The neighbor's wife said when she arrived, KB came out of the door and Appellant was behind the wall towards the kitchen area; she never went in to help. (JA130). Even this simple deviation between KB's testimony and the neighbor's wife's initial observations has an easily deduced rational explanation as to why KB testified incorrectly – her

in-court testimony made Appellant look unremorseful and fit her narrative instead of Appellant's actions mirroring someone in fear, and when the immediate threat was gone, him never attempting to harm KB again. The government has never offered, at any level, an explanation as to why, if Appellant wanted to harm KB so badly he manufactured an argument to allow him to attack with a weapon, he suddenly stopped, helped her up, and rendered aid at the first break.

3. The defense's case had a clear theme and was corroborated by physical evidence including the blood-patterns and KB's statements to the EMTs.

In measuring the defense's case-strength, appellate courts do not simply ask if the defense's case should have resulted in an acquittal as the Government insinuates. (Gov't Br. 31). Rather, this factor looks to see if the defense presented evidence and if it rationally could counter the government's motives or explanations. *Cf., Adams*, 63 M.J. at 699(Government case was strong when there was "no realistic motive for [victim] to lie" and the defense's proffered reason for the victim's actions was supported by "no evidence.");*Cf.*, *Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020)(Defense's case was weak when it called no witnesses and "his own text messages ruled out the *possibility* of [his defense]"). Here, the defense's case had legs. In fact, the government's had to deviate to ask SA GC about custody and what he communicated to KB to fend it off. (JA261-62). But in doing so, SA GC confirmed, demonstrating a junior-agent type of error, that he

explained he *personally* would have input into any later court determination which knee-capped the prosecution's attempt to rehabilitate the custody attack. (*Id.*).

The defense's case-strength is revealed by the prosecution's reactions: the prosecution created and then admitted The Exhibits, specifically covering the pointing of the weapon and the stabbing/actions upstairs (and strangling). If Appellant's statement to CID, the photographs, and KB's credibility were strong enough without it, the prosecution would not have undertaken such efforts, time, and multiple Article 39a's breaking up its own case-flow to a panel to push in multiple excerpts crafted to counter the defense's consistent theme about the weapon. The government felt it needed The Exhibits to secure a conviction and took the time to pen two Briefs to ensure admissibility. And when that looked in jeopardy, the government offered every talismanic incantation in 801(d)(1)(B)'s discussion under both romanettes.

Likewise, by never addressing why KB would make a clear statement against interest about pointing the weapon (with a self-serving caveat it was unloaded), the Government reveals the defense's case-strength. Pointing a gun at one's spouse is not something one errantly misstates, and the EMTs both describe KB as alert and oriented if not full of adrenaline (JA211-213, 340); something very different than the government's describing her as fading out of consciousness during its closing. (JA358-359). Moreover, the Government agrees KB had a

motive to be angry at Appellant to point a weapon at him; she had been reminded about the potential for divorce (Gov't Br. 2-3) and made fun of his sexuality. (JA124).

Not only did the defense articulate KB's motive to point the weapon *and* KB's motive to fabricate about pointing the weapon, the physical evidence impeached KB's testimony and supported Appellant's statement and KB's July 3rd rendition that the knife became lodged during the fall. This is because there is no blood-transfer from KB in the bedroom whatsoever where KB claimed to back up into the wall/door-frame even with a box-spring blocking the door.

However, if after the first defensive/flailing swipe by Appellant, KB was mid-turn and able to drop the weapon and bring up her hands as Appellant's swiping momentum carried him in the turn, she could have grabbed his hands and then the two were just reacting to each other's pulls on the knife. These push/pulls would have angled their bodies. KB then would move towards the stairs until her back touches the stairwell/railing – which is exactly what the blood-transfer evidence, KB's July 3rd, and Appellant's statements corroborate. After the two fell and the knife ended up in KB's shoulder, there is a large stain from both open wounds at the bottom of the stairs/near the front door. This matches Appellant's statement to CID but contradicts KB's testimony.

While Appellant made a few sentences against interest, when viewed considering his mental state/shock/remorse, those statements do not destroy the defense's case when lined up against KB's motive, the corroborating physical evidence, and the MP's 'no-magazine' testimony with the fire-fighter's search for the weapons.

Conclusion and Prayer for Relief

On balance, this was not a slam-dunk government case; there was a viable defensive theme and material defense evidence that countered the government's case. The inadmissible hearsay tipped the balance especially when the weight of the judge (via his instructions) was put on the scales.

Appellant respectfully requests this Court set aside the finding and sentence for The Specification of The Charge and authorize a rehearing.

ROBERT D. LUYTIES
Lieutenant Colonel, Judge Advocate
Appellate Counsel
Defense Appellate Division
1055 Sheridan Ave. Bldg 429
Fort Leavenworth, Kansas 66027
(520) 706-5379
USCAAF Bar No. 37955

PETER ELLIS
Major, Judge Advocate
Branch Chief
Defense Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
USCAAF Bar No. 38209

FRANK E. KOSTIK JR.
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF Bar No. 35108

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Defense Appellate Division and the Government Appellate Division on December, 2 2025.

CERTIFICATE OF COMPLIANCE WITH RULES 21(B) AND 37

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 6,485 words.

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

ROBERT D. LUYTIES
Lieutenant Colonel, Judge Advocate
Appellate Counsel
Defense Appellate Division
1055 Sheridan Ave. Bldg 429
Fort Leavenworth, Kansas 66027
(520) 706-5379
USCAAF Bar No. 37955