IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Sergeant First Class (SFC) **PATRICK H. HATFIELD, Jr.** United States Army, Appellant	BRIEF ON BEHALF OF APPELLEE **Docket No. ARMY 20200410** Tried at Fort Bliss, Texas, on 28 October and 13 December 2019, 11 February and 20–24 July 2020 before a general court-martial convened by Commander, Fort Bliss, Colonel Steven Henricks and Colonel Michael Devine, Military Judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error I[1]

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENT TO CID.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING STATEMENTS MADE BY THE COMPLAINING WITNESS DURING A PRETRIAL "FORENSIC" INTERVIEW AS A PRIOR CONSISTENT STATEMENT.

[1] The government reviewed the matters submitted by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and respectfully submits that they lack merit. Should this court consider any of those matters meritorious, the government requests an opportunity to respond to appellant's additional briefing on the claimed error.

PANEL NO. 2

Assignment of Error III

WHETHER THE MILITARY JUDGE'S ERRONEOUS INSTRUCTION ON APPELLANT'S FORUM RIGHTS WAS JURISDICTIONAL ERROR.

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Statement of the Case

On 23 July 2020, a panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of three specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10 U.S.C. § 920b (2012) [UCMJ].[2] (R. at 842; Statement of Trial Results). On 24 July 2020, the panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for eighteen months, and a dishonorable discharge. (R. at 1271; Statement of Trial Results). The convening authority granted appellant's request for a deferral of automatic and adjudged forfeitures but otherwise approved the adjudged sentence on 3 September 2020. (Action). The military judge entered judgment on 8 September 2020. (Judgment).

Statement of Facts

I. Appellant repeatedly sexually abused his "niece."

Appellant was a longtime friend to NG and his wife, HG. (R. at 572). He visited their home in Hamilton, Ohio, so frequently while on leave from the Army that HG's daughter, [redacted] called appellant "Uncle Pat" and the family designated

[2] The convening authority withdrew and dismissed one specification of sexual abuse of a child in violation of Article 120b, UCMJ. (Statement of Trial Results). The panel acquitted appellant of two specifications of aggravated sexual contact with a child and one specification of indecent liberties with a child, in violation of Article 120, UCMJ, 10 U.S.C. § 920 (2008).

the living room couch as appellant's "bedroom."[3] (R. at 423–25, 574). Appellant often treated [redacted] and her sister [redacted] to rides in his blue Mustang, as well as lunch and movies during "Uncle Patrick time." (R. at 449, 458, 519).

Despite his trusted and beloved role in the family, appellant began sexually abusing [redacted] when she was approximately 12 years old.[4] (R. at 429–30, 487, 509, 576). The first incidence of sexual abuse occurred between 28 June 2012 and 27 November 2013: appellant rubbed [redacted] inner thigh, and on a separate occasion, squeezed her buttocks the day after [redacted] family threw a party to celebrate appellant's redeployment.[5] (R. at 428–29).

II. While driving to a post-Thanksgiving family dinner, appellant propositioned [redacted] for sex as he cupped her genitalia and stroked her inner thighs.

Appellant's post-deployment leave extended through Thanksgiving 2013. (R. at 432, 511). [redacted] biological uncle, DK, invited appellant, [redacted] HG, and [redacted] younger sister, [redacted] to a family dinner at his home a few days after Thanksgiving 2013. (R. at 432–33). HG and [redacted] traveled together while appellant drove [redacted] to the dinner in his blue Mustang. (R. at 433, 518).

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[3] Appellant called [redacted] his niece despite not being a blood-relative. (R. at 895).
[4] [redacted] was born on [redacted]. Appellant returned from deployment in late October 2013. (R. at 509). Thus, [redacted] was approximately twelve-years-old at the time appellant began sexually abusing her.
[5] This incident of child sexual abuse forms the basis of Specification 2 of Charge III.

Approximately twenty minutes from the family dinner, appellant stroked [redacted] inner thigh, cupped her vagina, and asked, "Do you want to have sex?" (R. at 433–34). [redacted] attempted to "deflect" and told appellant that they could not have sex because "[her family] would smell it."[6] (R. at 435). This incidence of sexual abuse felt different for [redacted] because this time she was trapped and could not simply leave appellant's car. (R. at 439). Although [redacted] was upset and crying upon her arrival to the family dinner, she did not mention the sexual abuse. (R. at 462, 518). [redacted] did not ride back home with appellant. (R. at 519, 606).

III. A troubled [redacted] reports the sexual abuse to civilian law enforcement.

[redacted] became a difficult child after appellant sexually abused her. (R. at 445, 465, 563). She stole from her parents and lied about her whereabouts and with whom she visited. (R. at 446–47). [redacted] struck NG and [redacted] and the resultant restraining order caused [redacted] to shuffle between extended families' homes. (R. at 445, 465). In May 2018, when [redacted] stayed with her cousin, IS, [redacted] disclosed that appellant sexually abused her.[7] (R. at 467). IS shared [redacted] disclosure with her own her mother, who then informed HG. (R. at 474, 559, 623, 629). [redacted] never intended for IS to mention the sexual abuse to anyone else, refused to answer HG's

[6] At the time, [redacted] was virgin who "knew nothing about sex," and a popular song by the artist Rihanna led her to infer that sexual intercourse would generate a detectable scent. (R. at 435).

[7] [redacted] while potentially under the influence of alcohol and an unknown drug, vaguely disclosed the sexual abuse to IS in 2016. (R. at 467).

ensuing questions, and instead ran away from home. (R. at 475–77). Civilian law enforcement apprehended [redacted] approximately one month later. (R. at 478). In September 2018, [redacted] officially disclosed appellant's sexual abuse during a forensic interview, shortly after she was released from juvenile detention. (R. at 735; Pros. Ex. 14 at 12:46–13:29, 18:20–19:05, 22:55–23:00).

Assignment of Error I

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS APPELLANT'S STATEMENT TO CID.

Additional Facts

I. Special Agent [redacted] advised appellant of his Article 31, UCMJ, rights.

[redacted] a police detective from Hamilton, Ohio, witnessed [redacted] forensic interview and was the lead detective assigned to the case. (R. at 735, 737). Detective [redacted] coordinated with Fort Bliss Criminal Investigation Command [CID] Special Agent (SA) [redacted] to interview appellant.[8] (R. at 641). Special Agent [redacted] prepared for appellant's 19 October 2018 interview by reviewing a short investigative summary sent to him by the Hamilton Police Department (PD). (R. at 655).

[8] The investigation into appellant's misconduct began as a joint investigation with Hamilton PD as the lead investigative agency. (R. at 641).

After recording appellant's biographical data, SA [redacted] said, "[b]efore I can talk to you about what I brought you down here for today, I have to advise you of your rights." (Pros. Ex. 13 at 27:31). Special agent [redacted] then handed appellant a Department of the Army [DA] Form 3881 and asked appellant to read along as SA [redacted] read the rights warning aloud. (Pros. Ex. 12; Pros. Ex. 13 at 27:36 to 29:03). Special Agent [redacted] notified appellant that he was suspected of committing aggravated sexual contact. (Pros. Ex. 12; Pros. Ex. 13 at 28:36). Appellant verbally confirmed that he understood his rights, declined to speak with an attorney, and signed the rights waiver. (Pros. Ex. 12; Pros. Ex. 29:42–30:11). The first question SA [redacted] asked appellant was, "Do you know [redacted] (Pros. Ex. 13, at 31:21). During the interview, appellant highlighted that [redacted] had been in and out of jail, and he denied ever inappropriately touching [redacted] or being alone with her, either in his car or at her home. (Pros. Ex. 34:55, 40:12–40:35; 42:43, 1:01:30–1:01:42, 1:02:11; 1:04:41).

II. The military judge denied appellant's suppression motion.

Immediately prior to arraignment—and 252 days after the military judge's pretrial deadline for motions—appellant moved to suppress his statements to CID. (R. at 234; App. Ex. II, p. 3). Appellant argued that age is an element of child sexual abuse, and, thus, SA [redacted] failure to inform appellant that he was suspected of committing an offense against a child rendered SA [redacted] rights warning

ineffective. (R. at 333, 338). The military judge then held an Article 39(a) session to hear evidence and argument on appellant's suppression motion.[9] (R. at 332–44). The military judge, after considering the evidence and arguments overnight, denied appellant's suppression motion the following morning. (R. at 405–06).

The military judge first noted neither party submitted written motions and the parties asked him to rely solely upon Prosecution Exhibits 12 and 13 to make his findings of fact. (R. at 406). The military judge found that SA [redacted] advised appellant of his Article 31(b), UCMJ, rights prior to interviewing him, and the rights warning included notice that appellant was suspected of committing aggravated sexual contact. (R. at 407). The military judge further found that the government believed that [redacted] had not yet turned sixteen at the time of the allegations and that appellant's previous pleadings indicated he knew of [redacted] allegations prior to his CID interview.[10] (R. at 407–08).

Next, the military judge reiterated the holding from *United States v. Simpson*, 54 M.J. 281 (C.A.A.F. 2000):

> "[T]he purpose of informing a suspect . . . of the nature of the accusation is to orient him to the . . . incident in which

[9] Appellant's trial defense counsel admitted that their motion violated the deadlines set by the military judge's pretrial order, and the military judge noted that trial counsel only received notice of appellant's motion to suppress on the morning of trial. (R. at 234, 334).

[10] Appellant filed two motions to compel expert assistance that mentioned, "an Ohio grand jury heard evidence and ultimately refused to indict [appellant]." (App. Ex. VI, p. 2, para. 2; App. Ex. VIII, p. 2, para. 2).

> he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety."

(R. at 408). Further, the military judge noted that a rights advisement "need not be spelled out with a particularity of a legally sufficient specification on a charge sheet. It is enough if, from what is said and done, the accused knows the general nature of the charge." (R. at 408). Lastly, the military judge remarked "it is, importantly, not necessary that an accused or suspect be advised of each and every possible charge under an investigation, nor that the advice include the most serious or any lesser-included charges being investigated." (R. at 409).

The military judge noted, "aggravated sexual contact with a child is generally considered more serious than aggravated sexual contact," and that such notice "falls squarely within the law's flexibility that the advice need not include the most serious or any lesser-included charges being investigated." (R. at 410). Accordingly, the military judge found that appellant received an adequate Article 31(b), UCMJ, rights warning despite CID's failure to advise appellant of each element of child sexual abuse. (R. at 409–10).

Finally, appellant's defense counsel challenged the military judge's finding that appellant knew of the civilian investigation prior to his CID interview. (R. at 410). Appellant's defense counsel acknowledged that his pleadings warranted the military judge's inference, but clarified that defense counsel did not mean to

convey that appellant knew of the civilian investigation. (R. at 411). The military judge declared that he did not rely upon appellant's prior knowledge in ruling against appellant's suppression motion, and he struck the errant finding of fact. (R. at 411–12).

Standard of Review

This court reviews a military judge's ruling on a suppression motion for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)).

Law and Argument

A military judge abuses his discretion when, "his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) (quoting *United States v.Frost, 79 M.J. 104, 109 (C.A.A.F. 2019).* "The abuse of discretion standard calls 'for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). "In reviewing a ruling on a motion to suppress, [appellate courts] consider the evidence in the light most favorable to the prevailing party." *Monroe*, 52 M.J. at

330 (citing *United States v. Reister*, 44 M.J. 409, 419 (C.A.A.F. 1996) (internal quotations omitted)).

I. The military judge did not abuse his discretion when he denied appellant's motion to suppress his statements to CID.

The military judge did not abuse his discretion in denying appellant's suppression motion because his findings of fact were not clearly erroneous, nor were his findings of law based upon an erroneous view of the law.

A. The military judge's findings of fact were not clearly erroneous.

Despite the military judge's unequivocal declaration that "[he] did not rely on [appellant's knowledge of the civilian investigation prior to the CID interview] *at all* for purposes of [his] ruling," (R. at 411) (emphasis added), appellant insists that the military judge "relied heavily on defense counsel's alleged assertions in other motions' fact sections . . . ." (Appellant's Br. 11). Appellant further contends that striking the errant finding of fact "gutted" the factual basis for the military judge's conclusions of law. (Appellant's Br. 10). However, this court should not be swayed by appellant's attempt to transform the military judge's reference to "the manifest awareness of the [appellant]"—essentially dicta because the military judge did not rely on any finding of appellant's prior knowledge—into an abuse of discretion. (R. at 411). The remaining findings of fact, that SA [redacted] Article 31 rights advice included notification that appellant was suspected of aggravated sexual contact and that appellant signed a DA Form 3881 rights waiver,

(Pros. Ex. 12), amply support the military judge's conclusions of law. These findings were not clearly erroneous because they are supported by documentary evidence that neither party disputed at trial. (R. at 341–42, 406).

B. The military judge properly applied the correct law to the facts.

Appellant's contention that "the military judge correctly stated the law" but nevertheless misapplied the facts fails because appellant ignores the requirements of Article 31(b), UCMJ, and instead advocates that rights advice be given with a level of specificity that is simply unsupported by case law. (Appellant's Br. 9). Article 31(b), UCMJ, states, in pertinent part: "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the *nature* of the accusation . . . ." UCMJ art. 31(b) (emphasis added). Article 31(b), UCMJ does not require that rights advice apprise a suspect of every element of an offense, as appellant's trial defense counsel suggested. (R. at 338).

Indeed, courts have repeatedly held that "[a]dvice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge." *Simpson*, 54 M.J. at 284 (quoting *United States v. Davis*, 8 U.S.C.M.A. 196, 198, 24 C.M.R. 6, 8 (1957)). Moreover, it is "not necessary that an accused or suspect be advised of each and every possible charge

under investigation, nor that the advice include the most serious or any lesser-included charges being investigated." *Id.* Rather, "the accused or suspect must be informed of the general nature of the allegation, to include the area of suspicion that focuses the person toward the circumstances surrounding the event." *Id.* *Simpson* set forth three factors that courts consider when determining the sufficiency of rights advice: "whether the conduct is part of a continuous sequence of events, whether the conduct was within the frame of reference supplied by the warnings, or whether the interrogator had previous knowledge of the unwarned offenses." 54 M.J. at 284 (internal citations omitted).

Here, all three *Simpson* factors favor the government. Appellant was accused of conduct that was relatively isolated, and thus part of the same sequence of events. (R. at 668–69). Also, aggravated sexual contact of a child was "within th[e] frame of reference" of aggravated sexual contact because "that advice clearly oriented him to the fact that" some type of inappropriate, sexual touching "was the object of the investigation." *United States v. Quintana*, 5 M.J. 484, 487 (C.M.A. 1978) (finding that an Article 31, UCMJ rights warning for larceny was sufficient to orient the appellant to the greater offense of misuse of funds). Turning to the third factor, there was no unwarned offense: appellant was suspected of committing an aggravated sexual contact, and SA [redacted] warned him that the questioning was in regards to an aggravated sexual contact. (Pros. Ex. 12).

Simply put, the nature of the victim of the aggravated sexual contact does not change the nature of the underlying conduct. He would always be questioned about an offensive, sexual touching.

Additionally, courts do not, as appellant seemingly asserts on appeal, limit their consideration to incriminating responses when gauging whether an appellant was sufficiently oriented to the suspected offense. (Appellant's Br. 15). Rather, "[t]he legal sufficiency of advice on the nature of the charge is determined on the basis of the totality of the circumstances." *United States v. Erie*, 29 M.J. 1008, 1011 (A.C.M.R. 1990); *see also United States v. Gardner*, ARMY 20110916, 2012 CCA LEXIS 39, at *11 (Army Ct. Crim. App. Jan. 31, 2012) (mem. op.) (noting "military judges must decide whether, under the totality of the circumstances of that particular case, the government establishe[d] by a preponderance of the evidence that CID special agents, for example, complied with that rights warnings requirement under Article 31(b)"). While the *Simpson* factors are informative, they "are not exhaustive, but are 'among the possible factors' to be considered. Necessarily, in questions of this type, each case must turn on its own facts." *United States v Pipkin*, 58 M.J. 358, 361 (C.A.A.F. 2003) (quoting *United States v. Nitschke*, 12 U.S.C.M.A. 489, 492, 31 C.M.R. 75, 78 (1961)).

Here, SA [redacted] informed appellant that he was suspected of aggravated sexual contact, and then his first question was "[d]o you known [redacted] (Pros. Ex.

13 at 31:21). Appellant knew that [redacted] was a child at the time of the suspected offenses because of his lifelong friendship with NG and his interaction with [redacted] over the years. (R. at 572; Pros. Ex. 4–6). "Accordingly, the [appellant] was clearly oriented to that offense." *Davis*, 8 U.S.C.M.A. at 198, 24 C.M.R. at 8. Appellant's repeated and unequivocal denial of inappropriate contact with [redacted] or even being alone with her is not evidence that he "did not know what the investigator was talking about." (Pros. Ex. 13 at 40:12, 40:20, 40:37, 40:41, 42:43, 43:47; Appellant's Br. 16). Rather, appellant's denials, coupled with his repeated attempts to undermine [redacted] credibility during the interview, evince appellant's tacit understanding that SA [redacted] suspected appellant had sexually abused a child.[11]

Importantly, courts may examine whether the warned and charged offenses are "sufficiently related so that the warning oriented appellant toward the nature of the accusations against him." *Simpson*, 54 M.J. at 284. This court's predecessor found a sufficient relationship existed where the appellant was warned about the wrongful use of hashish but convicted of the wrongful use and distribution of methamphetamine and cocaine. *Erie*, 29 M.J. at 1010. Likewise, the Court of Appeals for the Armed Forces (CAAF) found a warning about the sexual assault of one victim encompassed a completely different victim's rape allegations, *United*

[11] Appellant mentioned that [redacted] was sent to jail multiple times and that she had been getting into trouble. (Pros. Ex. 13 at 34:55, 35:59)

States v. Rogers, 47 M.J. 135, 138 (C.A.A.F. 1997), and that indecent acts or liberties with a child was sufficiently related to sodomy that a warning for the former offense oriented the appellant to the nature of the latter offense. *Simpson*, 54 M.J. at 284.

Thus, this court, viewing the evidence in the light most favorable to the prevailing party — the government—, should find that the military judge did not abuse his discretion in denying appellant's suppression motion because "[t]he offenses [of child sexual abuse] and [aggravated sexual contact] are sufficiently related so that the warning oriented appellant toward the nature of the accusations against him." *Id.*

C. Assuming arguendo that the military judge erred, appellant suffered no prejudice from the admission of his CID interview.

Courts employ the non-constitutional prejudice test established in *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999), when, as here, an alleged Article 31(b), UCMJ, violation is purely statutory in nature. *United States v. Evans*, 75 M.J. 302, 303 (C.A.A.F. 2016). The *Kerr* prejudice factors are: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Kerr*, 51 M.J. at 405. Appellant concedes that the quality of the disputed evidence is low (Appellant's Br. 21), and thus this factor weighs in the favor the government. Likewise, two of the three remaining factors also weigh in favor of the government

and support a finding that appellant was not prejudiced by any purportedly erroneous admission of his CID interview.

First, the government's case was strong. [redacted] credible testimony was corroborated by multiple witnesses, none of whom had any motive to lie. For instance, [redacted] testified that the last incidence of child sexual abuse occurred when appellant transported her—alone—to the post-Thanksgiving family dinner in his blue Ford Mustang. (R. at 433). Both HG and DK corroborated this testimony. (R. at 518, 594–95). Additionally, appellant sent a text message to NG approximately three days after his CID interview that mentioned "everything [appellant is] about to lose," which is powerful, independent evidence of appellant's consciousness of guilt. (Pros. Ex. 8; R. at 577).

In contrast, appellant offered an anemic defense consisting of wistful attempts to characterize his unequivocal denials during his CID interview as the confused product of an inexperienced and poorly prepared investigator, as well as attacks on [redacted] a troubled but truthful child. (R. at 564, 591, 808, 815–18). Admittedly, the government made several references to appellant's CID interview during its opening and closing arguments, (R. at 417, 794–803, 828), and thus this factor favors appellant.[12] However, three of the four *Kerr* factors favor the

[12] The fact that the panel declined the opportunity watch appellant's CID interview again during their deliberations, despite expressing difficulty hearing the interview, further undercuts the interview's materiality and quality. (R. at 679–80).

government and thus this court should find that appellant was not prejudiced by the allegedly erroneous admission of his CID interview.

Assignment of Error II

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING STATEMENTS MADE BY THE COMPLAINING WITNESS DURING A PRETRIAL "FORENSIC" INTERVIEW AS A PRIOR CONSISTENT STATEMENT.

Additional Facts

At the conclusion of IS's testimony—and after [redacted] testimony—the government requested an Article 39(a), UCMJ, session and moved to admit specific portions of [redacted] forensic interview into evidence under Military Rule of Evidence [Mil. R. Evid.] 801(d)(1)(B)(ii). (R. at 631–32). The government sought to introduce [redacted] video-recorded statements that she felt trapped in appellant's car, and that appellant bit her thigh, kissed her by cupping her face, pinched her buttocks, asked whether she wanted to have sex, and cupped her vagina. (R. at 632). The government argued that appellant attacked [redacted] credibility "on other grounds," specifically regarding the effects of [redacted] drug and alcohol use on her ability to accurately remember the sexual abuse and her allegedly counterintuitive behavior towards appellant following the sexual abuse. (R. at 633). Prior to issuing his ruling, the military judge heard arguments from both sides consisting of thirty-four pages of the transcribed record of trial, and he reviewed in court only

the parts of [redacted] forensic interview that the government sought to admit. (R. at 631–38, 700–27).

The military judge found: (1) [redacted] had testified; (2) she was subject to cross examination; and (3) each of the "five short discreet" video segments the government sought to introduce were consistent with [redacted] in-court testimony. (R. at 729). Further, the military judge found that appellant's cross-examination attacked [redacted] credibility on "grounds other than the ones listed in Military Rule for Evidence 801(d)(1)(B) subpart i." (R. at 730). First, the military judge found that the juxtaposition of [redacted] detailed in-court testimony and her vague disclosure to IS, made while under the influence of alcohol and an unknown drug, raised the inference that "[redacted] in-court testimony is not to be trusted." (R. at 730). Additionally, the military judge found that appellant's attempt to highlight [redacted] pre-disclosure "hallucinatory drug use . . . could lead a reasonable panel member to infer [redacted] in-court testimony was possibly based upon past hallucinations and not factual events." (R. at 730). Finally, the military judge found that appellant's cross-examination emphasized the inconsistency between [redacted] testimony that she felt trapped while being sexually abused in appellant's car with the fact that she did not mention the sexual abuse at the post-Thanksgiving family dinner immediately following. (R. at 730).

Lastly, the military judge found that the video segments tended to rehabilitate [redacted] credibility by refuting the implication that her detailed in-court testimony should not be trusted because her initial disclosure to IS lacked the same level of detail. (R. at 730–31). The military judge also found that the video segments tended to refute appellant's assertion that [redacted] past hallucinatory drug use impaired her ability to distinguish between fact and fiction. (R. at 731). Finally, the military judge found that [redacted] forensic interview rehabilitated her credibility relative to the potential discrepancy between her testimony that she felt trapped in appellant's car, yet she did not disclose the abuse during the family dinner. (R. at 731). The military judge then engaged in a Mil. R. Evid. 403 balancing test, finding that the probative value of [redacted] forensic interview was not substantially outweighed by "any concern listed in [Mil. R. Evid.] 403," prior to ruling that [redacted] forensic interview was admissible under Mil. R. Evid. 801(d)((1)(B)(ii). (R. at 732).

Standard of Review

Military courts "review[] a military judge's decision to admit evidence for an abuse of discretion." *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020) (quoting *Frost*, 79 M.J. at 109). "'A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is

outside the range of choices reasonably arising from the applicable facts and the law.'" *Frost*, 79 M.J. at 109 (quoting *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013)). "This standard requires more than just [this court's] disagreement with the military judge's decision." *United States v. Bess*, 75 M.J. 70, 73 (C.A.A.F. 2016) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)).

Law and Argument

Under Mil. R. Evid. 801(d)(1)(B)(ii), a prior consistent statement must be offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." "'[A]nother ground' refers to one other than the grounds listed in M.R.E. 801(d)(1)(B)(i)." *Finch*, 79 M.J. at 395. "The rule itself does not specify what types of attacks a prior consistent statement under M.R.E. 801(d)(1)(B)(ii) is admissible to rebut, but the Drafters' Analysis lists 'charges of inconsistency or faulty memory' as two examples." *Id.* (quoting *Manual for Courts-Martial*, Analysis of the Military Rules of Evidence [Drafters' Analysis] app. 22 at A22-61 (2016 ed.)). As to the credibility attacks covered by this scenario, *Finch* cited to federal circuit courts that have applied the rule "by ascertaining the type of impeachment that has been attempted, and then evaluating whether the prior consistent statements offered for admission would actually rehabilitate the declarant's credibility as a witness." *Id.* at 396. The CAAF outlined five criteria

that must be met for a statement to be admissible under this scenario: (1) the declarant must testify, (2) be subject to cross-examination about the prior statement, (3) the prior statement must be consistent, (4) the declarant's credibility must have been attacked "on another ground," and (5) "the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Id.* "The proponent of the prior consistent statement must articulate the 'relevancy link between the prior consistent statement and how it will rehabilitate' the witness's in-court testimony 'with respect to the particular type of impeachment that has occurred.'" *United States v. Butler*, No. ARMY 20180385, 2020 CCA LEXIS 188, at *9 (Army Ct. Crim. App. May 29, 2020) (mem. op.) (quoting *Finch*, 79 M.J. at 396).

I. The military judge did not abuse his discretion when he allowed the government to use statements from [redacted] forensic interview to rehabilitate her credibility.

Appellant does not appear to contest that the government satisfied the first four *Finch* factors. (Appellant's Br. 27–30). Thus, the remainder of this analysis focuses upon the fifth *Finch* factor: whether the contested evidence is "relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked." *Finch*, 79 M.J. at 396.

The military judge found as fact that appellant attacked [redacted] credibility on several grounds, including that [redacted] in-court testimony was untrustworthy

because it contained a level of detail noticeably lacking in [redacted] initial disclosure to IS. (R. at 730). In other words, her testimony was inconsistent with her outcry. Indeed, during cross-examination, appellant elicited testimony from [redacted] that she did not provide IS with "any details." (R. at 472). Appellant's cross-examination of IS yielded analogous testimony—she agreed that [redacted] "didn't go into any kind of detail [about her sexual abuse allegations]."[13] (R. at 623, 626). Based upon this these statements, the panel could infer that [redacted] detailed in-court testimony could not be trusted. *See United States v. Norwood*, 81 M.J. 12, 18 (C.A.A.F. 2021) (finding that the military judge could, based upon the defense counsel's questions, infer grounds for challenging the witness's testimony other than the ones endorsed by the appellant). [redacted] prior, detailed statements during her forensic interview rebutted the inference that her testimony could not be trusted because it unequivocally demonstrated that [redacted] in-court recollection of appellant's sexual abuse was not the first time she disclosed the attacks in such detail. Even appellant's own closing argument showed the relevance of [redacted] prior statements to rebut his attacks: "As I mentioned, her story evolved with time. It went from no details to no details to suddenly she has this elaborate story of Thanksgiving and

[13] Additionally, appellant's cross-examination of HG and [redacted] elicited similar testimony that [redacted] initial disclosure to HG lacked detail. (R. at 476, 551).

over events." (R. at 812). Simply put, consistency rebuts charges of inconsistency.

Lastly, the military judge appropriately found "the probative value of [redacted forensic interview] is not substantially outweighed by any concern listed in Military Rule for Evidence 403." (R. at 732). "Where a military judge properly conducts the balancing test under Mil. R. Evid. 403, we will not overturn his decision unless there is a clear abuse of discretion." *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (quoting *United States v. Ruppel*, 49 M.J. 247, 251 (C.A.A.F. 1998)). Consequently, the military judge did not abuse his discretion when he admitted [redacted] forensic interview under Mil. R. Evid. 801(d)(1)(B)(ii).

II. Even if it was an abuse of discretion for the military judge to admit [redacted] prior statements under Mil. R. Evid. 801(d)(1)(B)(ii), there was no prejudice.

This court reviews "the prejudicial effect of an erroneous evidentiary ruling de novo." *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011) (quoting *United States v. Toohey*, 63 M.J. 353, 358 (C.A.A.F. 2006)). Appellate courts will not reverse a conviction for an error of law "unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ; *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998). "[T]he government bears the burden of demonstrating that the admission of erroneous evidence was harmless." *Finch*, 79 M.J. at 398. "'For preserved nonconstitutional evidentiary errors, the test for prejudice is 'whether the error had a substantial influence on the findings.'" *Id.*

(quoting *Frost*, 79 M.J. at 111). When reviewing prejudice, this court balances: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *Frost*, 79 M.J. at 111 (quoting *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019)).

As stated above, the government's case was strong. *Supra* pp. 15. The strength of the government's case was the in-court testimony of [redacted] who credibly testified about appellant's sexual abuse against her when she was a child. *See Ayala*, 81 M.J. at 30 (finding the victim's consistent testimony credible despite her checkered past). As trier of fact, the panel saw and heard her testimony and was able to determine her credibility in the face of defense counsel's attacks. The panel was "best situated to assess the defense efforts to impeach [redacted] and concluded those efforts were insufficient" in light of the government's stronger case. *Frost*, 79 M.J. at 113 (Sparks, J., concurring in part and dissenting in part).

Antithetically, appellant's fragile defense centered upon casting [redacted] allegation of sexual abuse as a troubled child's desperate effort to regain entrance into the family home—an assertion irreconcilable with appellant's repeated emphasis upon [redacted] resentment towards her stepfather, tumultuous relationship with her mother, and her memorialized desire for her parents to die. (R. at 443–44, 809, 823). Moreover, [redacted] forensic interview was not material to the

government's case.[14] The government did not mention the interview during its opening argument and only made a single passing reference to the interview during its closing argument, which spanned eleven pages of transcript.[15] (R. at 804); *see United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020) (noting "the extent to which the government referred to the evidence in argument" as one of the factors to consider when "assessing materiality and quality of the evidence").

Finally, the quality of the contested evidence was low. First, the panel acquitted appellant on Charges I and II despite viewing portions of [redacted] forensic interview, which discussed the conduct underlying those charges. (R. at 736–37; Statement of Trial Results). Appellant's acquittal on those charges undermines his assertion that "[r]epetition has the effect of making a claim appear to be more credible, whether it is or not." (Appellant's Br. 32); *see Ayala*, 81 M.J. at 30 (finding, in part, appellant's acquittal on one of the three charge specifications indicated that the military judge "pa[id] close attention to the evidence he considered"). Furthermore, the three minutes of excerpted video were merely cumulative to [redacted] vastly more detailed testimony. (R. at 429–30, 432–35).

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[14] As with appellant's CID interview, the panel also declined the opportunity to watch [redacted] forensic interview again during their deliberations, further diminishing the interview's purported materiality and quality. (R. at 836–37).

[15] In contrast, appellant's made several references to [redacted] forensic interview during his closing argument and even attempted to portray [redacted] lack of tears during the interview as evidence of the untrustworthiness of her allegations. (R. at 811–12, 825).

Accordingly, the quality of the evidence was low. *See United States v. Lovett*, 59 M.J. 230, 234–35 (C.A.A.F. 2004) (noting the court is reluctant to find reversible error from the erroneous admission of hearsay evidence when the "challenged information is simply cumulative of the victim's own in-court testimony") (citing *United States v. Gunkle*, 55 M.J. 26, 30 (C.A.A.F. 2001); *see also Ayala*, 81 M.J. at 30–31 (finding that the disputed evidence "w[as] not significant" because it merely repeated the victim's testimony).

Despite appellant's comparison, the present case is easily distinguishable from *United States v. Moore*, ARMY 20190764, 2021 CCA LEXIS 24 (Army. Ct. Crim. App. 25 Jan. 2021) (mem. op.). (Appellant's Br. 32). Most importantly, the record reflects that military judge in this case did not err because he: (1) determined which statements were relevant to rehabilitating [redacted] credibility; (2) sufficiently explained how [redacted] interview statements rehabilitated her credibility; and (3) considered only the parts of [redacted] forensic interview that were consistent with her in-court testimony. *See Moore*, 2021 CCA LEXIS 24, at *18 (finding that the military judge erred because she failed in each of the three aforementioned aspects). Further, unlike *Moore*, [redacted] three-minute forensic interview was not "the only evidence corroborating [her] trial testimony." *Moore*, 2021 CCA LEXIS 24, at *21. Rather, HG, DK, NG, and IS each corroborated parts of [redacted] testimony. (R. at 518–19, 575–76, 594–95, 599, 606, 612, 623). Additionally,

appellant's own text message to NG, sent days after discovering that he was suspected of sexually abusing [redacted] evidenced his consciousness of guilt. (Pros. Ex. 8).

Consequently, each of the four factors weighs in the government's favor, and if this court finds error, it should determine that the evidence did not have "'a substantial influence on the findings.'" *United States v. Clark*, 79 M.J. 449, 455 (C.A.A.F. 2020) (quoting *Kohlbeck*, 78 M.J. at 333).

Assignment of Error III

WHETHER THE MILITARY JUDGE'S ERRONEOUS INSTRUCTION ON APPELLANT'S FORUM RIGHTS WAS JURISDICTIONAL ERROR.

Additional Facts

Appellant was convicted of three specifications of child sexual abuse, none of which occurred later than 1 December 2013. (Statement of Trial Results). During the arraignment, the military judge informed appellant of his right to be tried by a panel of military members and that the panel would also sentence him should he elect trial by panel. (R. at 9). Additionally, the military judge notified him that he could choose to be tried by military judge alone, and the military judge would determine appellant's sentence in the event of his conviction. (R. at 9). Appellant confirmed that he understood the difference between trial before

members and trial before a military judge alone, as well as his choice between forums. (R. at 9–10).

On 13 November 2019, appellant submitted a written notice of forum and pleas, where he elected to be tried by a panel consisting of at least one-third enlisted members. (App. Ex. III). On 17 July 2020, the military judge reminded appellant of his right to elect trial by panel or by military judge alone.[16] (R. at 181–82). Appellant again confirmed that he understood his choices and elected to be tried by a panel. (R. at 183). Furthermore, appellant's defense counsel confirmed that since "all specifications of alleged offenses were committed prior to 1 January of 2019," the sentencing proceedings would be governed by "option 1."[17] (R. at 182). Thus, the military judge informed appellant that "if you are found guilty in a trial by members, you will also be sentenced by the members." (R. at 182).

[16] On 13 December 2019, Colonel [COL] Steven Henricks replaced COL Michael Devine as the military judge presiding over appellant's court-martial. (R. at 14).
[17] The Military Judges' Benchbook lists three options, of which the military judge must select one, when advising the accused of his sentencing forum rights. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-1-3 (22 Feb. 2020) [Benchbook]. Paragraph 2-1-3 of the Benchbook states, "OPTION 1" is "[t]o be used if all specifications allege offenses committed prior to 1 January 2019." (emphasis in original).

Standard of Review

"The interpretation of UCMJ and R.C.M. provisions and the military judge's compliance with them are questions of law, which we review de novo." *United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012).

Law and Argument

This court should deny appellant's request for relief because amendments to the UCMJ and developments in case law subsequent to the filing of appellant's brief have rendered appellant's claims meritless.

I. Executive Order 13,825 is undoubtedly valid.

Appellant mistakenly asserts that the date of the "UCMJ action" or the preferral of charges, as opposed to the date upon which the offenses were committed, dictates whether he may avail himself of the National Defense Authorization Act for Fiscal Year 2017[18] amendments to the sentencing procedures in Articles 25 and 53, UCMJ. (Appellant's Br. 35). In support, appellant cites the CAAF's finding that Executive Order No. 13,825 §6(b), 83 Fed. Reg. 9889, 9890 (Mar. 1, 2018), was "inconsistent with [MJA 16] to the extent it orders convening authorities to apply pre-MJA post-trial procedures to cases in which no *UCMJ action* was taken before the MJA's effective date, January 1, 2019." *United States*

[18] Pub. L. No. 114-328, §§ 5001-5542, 130 Stat. 2000, 2894-2968 (2016) [MJA 16].

v. Brubaker-Escobar, __ M.J. ___, 2021 CAAF LEXIS 508, at *8 (C.A.A.F. 4 June 2021) (emphasis added) [*Brubaker-Escobar I*].[19] Appellant argues that Exec. Order No. 13,825, § 10, which governs the application of the MJA 16 amendments, "appear[s] to suffer the same infirmity" that the CAAF identified in *Brubaker-Escobar I*. (Appellant's Br. 35). Thus, appellant concludes that, pursuant to Article 25(d)(1), UCMJ, he should have been able to elect to be sentenced by a military judge after being convicted by panel of members. (Appellant's Br. 36).

However, appellant's argument fails because the CAAF subsequently vacated its decision in *Brubaker-Escobar I*. *Brubaker-Escobar*, 2021 CAAF LEXIS 683 (C.A.A.F. 19 July 2021). Indeed, the C.A.A.F. now holds that "Exec. Order No. 13,825 was a valid exercise of the President's rulemaking authority." *Brubaker-Escobar*, __ M.J. ___, 2021 CAAF LEXIS 818, at *4 (C.A.A.F. 7 Sept. 2021). Furthermore, the CAAF confirmed:

> In the [MJA 16], Congress gave the President the authority to designate the effective date of its provisions, as well as the duty to 'prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in

[19] The government acknowledges that appellant filed his brief on 24 April 2020 and that the CAAF issued its final opinion on *Brubaker-Escobar* on 7 September 2021.

> which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.'

Brubaker-Escobar, __ M.J. ___, 2021 CAAF LEXIS 818, at *4 quoting MJA 16 § 5542(c)(1), 130 Stat. at 2967, as amended by NDAA 2018, § 531(n)(1), 131 Stat. at 1387 (emphasis in original). Appellant committed all of his child sexual abuse offenses prior to 1 January 2019. (Statement of Trial Results). Thus, appellant was properly sentenced under the pre-MJA 16 rules because Exec. Order No. 13,825, § 10—which governs the amendments to Articles 25 and 53, UCMJ, as well as the rules implementing those changes—"applies only to cases in which all specifications allege offenses *committed* on or after January 1, 2019." (emphasis added).

II. Appellant suffered no prejudice because he was properly advised of his forum rights.

In the alternative, appellant contends that assuming Exec. Order No. 13,825, § 10 is valid, "then the MJA [2016] version of Article 25(d)(1), UCMJ, was in effect for *all* cases on 1 January 2019." (Appellant's Br. 37) (emphasis added). Thus, appellant avers that the military judge committed jurisdictional error by failing to inform appellant of his right to be sentenced by the military judge, pursuant to Articles 25(d)(1) and 53, UCMJ. (Appellant's Br. 38).

Appellant's secondary claim of error, which conflates the concepts of effect and affect, is equally as meritless as his first. While Exec. Order No. 13,825 was

undoubtedly in *effect* during the pendency of appellant's court-martial, it is likewise indisputable that the order did not *affect* appellant's sentencing-forum rights. Executive Order Number. 13,825, § 10, clearly states that the changes to Articles 25(d)(2) and (3) and Article 53, as well as "the rules implementing those articles, applies only in cases in which all specifications allege offenses committed on or after January 1, 2019." Here, all of appellant's child sexual abuse offenses occurred prior to 1 January 2019. (Statement of Trial Results). Thus, appellant was properly sentenced under the pre-MJA 16 sentencing rules.

Consequently, appellant's allegation that the military judge was required to inform appellant of his right to be sentenced by the military judge after his conviction by panel is inaccurate. The military judge complied with Article 16, UCMJ, and R.C.M. 903 when he twice informed appellant of his rights to elect trial and sentencing by a panel of military members or to have a military judge alone determine his guilt and sentence. (R. at 9, 181–82). Furthermore, appellant had 266 days from his arraignment to the entry of his forum selection on the record to consider his options. (R. at 10, 183). Appellant, after "having been advised of his rights and choices regarding pleas and forums," submitted a written notice of forum and pleas wherein he elected to be tried by a panel of military members. (App. Ex. III). Additionally, appellant confirmed that "[a]s all alleged offenses are alleged to have occurred prior to 1 January 2019, there is no sentencing election to

be made under RCM 902A." (App. Ex. III). Appellant unequivocally elected trial by enlisted panel, both in writing and orally on the record. (R. at 10, 183; App. Ex. III). Thus, the military judge properly advised appellant of his pre-MJA 2016 forum rights when he informed appellant that he would be sentenced by the panel that he elected to be tried by. (R. at 182; App. Ex. III).

Lastly, appellant's claim of prejudice that he would have elected sentencing by the military judge in hopes of securing a more lenient sentence, (Defense. App. Ex. A), is entirely speculative and thus should be summarily disregarded. *See United States v. Alexander*, 61 M.J. 266, 270 (C.A.A.F. 2005) ("We will not order relief absent a showing of prejudice."). Appellant has failed to prove that the military judge erred; accordingly, there is no defect—jurisdictional or otherwise—to warrant relief.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence.

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CERTIFICATE OF FILING, U.S. v. HATFIELD (20200410)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [redacted] [redacted] on the 26th day of October, 2021.

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