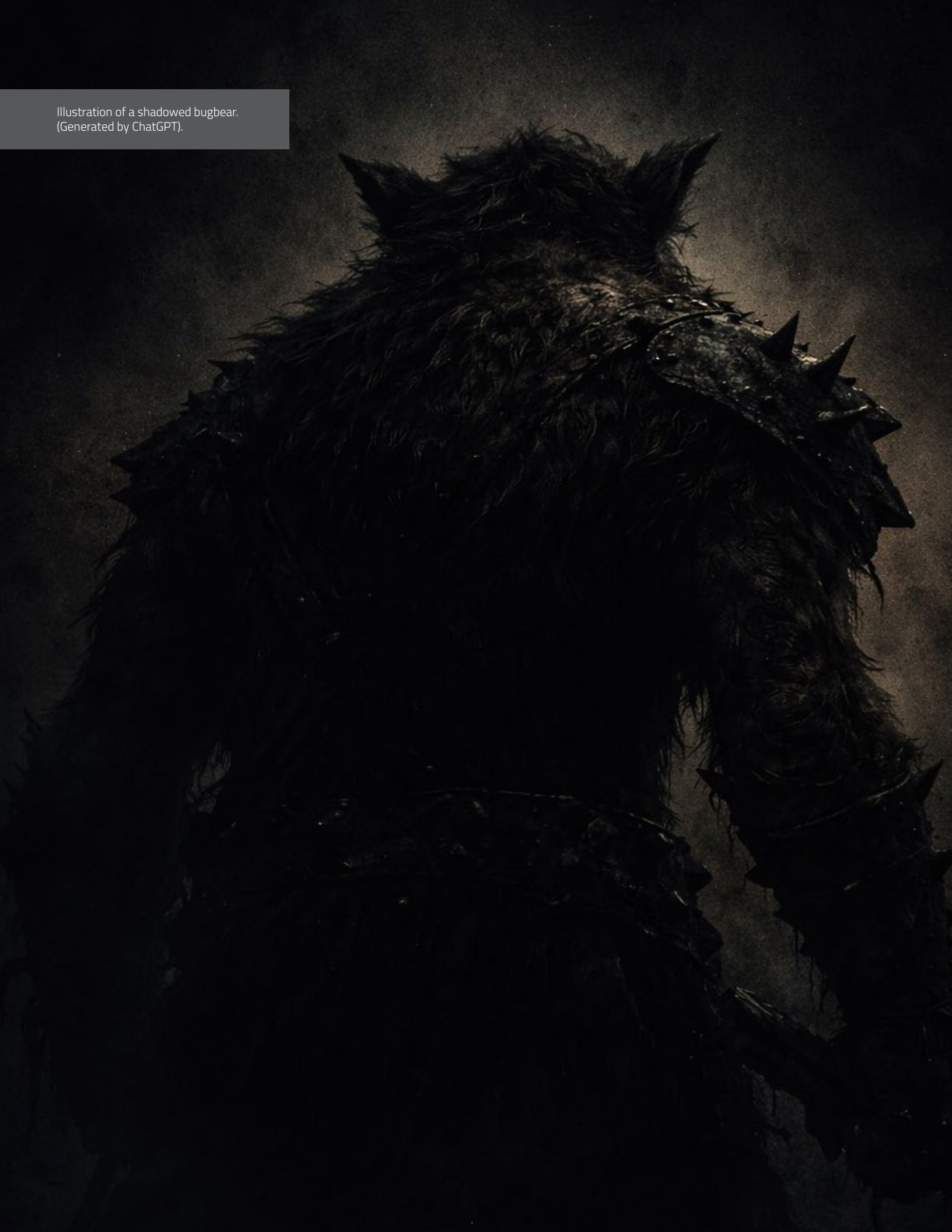


Illustration of a shadowed bugbear.
(Generated by ChatGPT).



Feature

The 2016 Amendment to Rule 801(d)(1)(B) The Bugbear of the Military Rules of Evidence¹

By Mr. Edward J. O'Brien

On 20 May 2016, the President signed Executive Order (EO) 13730, which modified Military Rule of Evidence (MRE) 801(d)(1)(B).² The amended rule reads:

(d) A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

...

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the

declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground³

In subsection (B)(ii) (hereafter referred to as "romanette (ii)"⁴), the amendment added a new category of prior consistent statements that is exempt from the definition of hearsay. Before the amendment of MRE 801(d)(1)(B), all prior consistent statements were admissible for the purpose of rehabilitating the credibility of a witness whose credibility was attacked. However, before the amendment, only the statements now described in subsection (B)(i) (hereafter referred to as "romanette (i)") were admissible for the truth of their contents. This amendment made prior consistent statements

admissible for the truth of the matter asserted, whereas the same statements were previously only admissible for the limited purpose of rehabilitation.⁵

The meaning of romanette (ii) has eluded military justice practitioners. “The military judge expressed some hesitancy about how to interpret (B)(ii) and what kind of evidence was admissible under this new provision.”⁶ This judge is not alone.⁷ The judge’s candid self-assessment perfectly describes military practice when it comes to the bugbear of the MRE. An unawareness of the common law of rehabilitation and the treatment of prior consistent statements before the 2016 amendment has led to excessively broad interpretations of the word “rehabilitate” in romanette (ii) or decisions made without explanation.⁸ Rehabilitation is the “restoration of a witness’s credibility after the witness has been impeached.”⁹ Too often, military judges admit statements that do not restore the witness’s credibility based on the method of impeachment used. As the cases discussed in this article show, judges do not focus on the linkage between the method of impeachment and the prior statement, and, as a result, admit prior statements that have no rehabilitative effect beyond the fact that the witness said something before trial that matches their direct examination. According to the prevailing view in the Federal circuits, this is not enough.

It can scarcely be satisfactory to any mind to say that if a witness testifies to a statement to day [sic] under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath . . . [T]he idea that the mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience that a *falsehood* may be repeated as often as the *truth*.¹⁰

The Drafters’ Analysis for the 2016 Amendment says that the amendment does not change the “traditional and well-accepted limits” on presenting prior consistent statements.¹¹ The Advisory Committee Note for the 2014 amendment to Federal Rule of Evidence (FRE) 801(d)(1)(B) makes the same point.¹² As the cases discussed in this article demonstrate, judges and practi-

tioners proceed as if they are unaware of the traditional and well-accepted limits on prior consistent statements. The body of Federal case law discussing the traditional limits is persuasive authority for military courts because the 2014 amendment to FRE 801(d)(1)(B) and its advisory committee note are identical to the 2016 amendment to MRE 801(d)(1)(B) and its drafter’s analysis.¹³ Fortunately, one can learn all one needs to know about the traditional limits on rehabilitation with prior consistent statements by reading a single case, *United States v. Pierre*.¹⁴

Pierre surveys the messy history of the use of prior statements, distills the important common law principles of rehabilitation, and settles on a standard: a prior consistent statement must have “some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony”¹⁵ (the *Pierre* standard). The *Pierre* standard is followed by nine Federal circuits, and the Court of Appeals for the Armed Forces (CAAF) should follow it as well. If CAAF does, the *Pierre* standard will cause judges to compare a proposed prior consistent statement with the direct testimony to ensure it is consistent, identifying the type of impeachment used, and determining if the prior statement repairs the damage done by the impeachment.

Military judges at the trial and appellate level have struggled to identify prior consistent statements that are admissible under romanette (ii) even after CAAF provided a framework to guide practitioners on the admissibility of prior statements under romanette (ii) in *United States v. Finch*.¹⁶ In *Finch*, the court identified five foundational elements for a prior consistent statement to be admissible under romanette (ii).¹⁷ The fifth foundational element is “the prior consistent statement must actually be relevant to rehabilitate the witness’s credibility on the basis on which he or she was attacked.”¹⁸

This sounds very much like the *Pierre* standard, but CAAF’s foundational element does not explicitly state that mere repetition is not enough. One can legitimately wonder if CAAF means to follow the traditional and well-accepted limits on prior consistent statements after reading its recent opinion in *United States v. Ruiz*.¹⁹ In *Ruiz*, the trial judge admitted prior statements under romanette (ii).²⁰ Even though these statements

had no actual rebutting force, CAAF found no abuse of discretion.²¹ However, admission of these prior statements violated the *Pierre* standard because the prior statement admitted had no relationship to the method of impeachment employed.

While CAAF appears to be satisfied with this result, its reasoning invites reconsideration. CAAF should incorporate the *Pierre* standard into *Finch*’s fifth foundational element. A failure to impose the traditional limits on the admission of prior consistent statements will lead to the absurd result like the one in *Ruiz*: any time a witness is impeached, any prior statement consistent with the witness’s direct testimony will be admitted.

This article reviews CAAF’s opinion in *Finch* and the Second Circuit Court of Appeals’ opinion in *Pierre*. It then reviews *Ruiz* and *United States v. Brown*²² to illustrate the difficulty many military trial and appellate judges have applying the 2016 amendment to MRE 801(d)(1)(B), often leading to incorrect rulings. *Ruiz* is CAAF’s most recent opinion applying romanette (ii), and *Brown* is currently pending before CAAF. Finally, this article discusses other cases from CAAF and the Army Court of Criminal Appeals (ACCA) to illustrate how the *Pierre* standard provides an appropriate limiting principle.

The Traditional and Well-Accepted Limits on Prior Consistent Statements

Before the enactment of the FRE in 1975,²³ the rules of evidence were based on common law. Two guiding principles governed the rehabilitation of a witness at common law: First, a witness could not be rehabilitated until attacked, and second, the rehabilitation must undo the damage to the witness’s credibility caused by the method of impeachment.²⁴ If the opponent of a witness expressly accused a witness of changing his testimony because he was bribed, the proponent of the witness could powerfully rehabilitate the witness by presenting testimony that the witness made statements that were consistent with his direct testimony and were made before he was allegedly bribed.²⁵ The prior statement repaired the damage done by the charge of improper motive by showing the witness said the same thing before the motive to fabricate arose. A prior statement made after the wit-



The U.S. Court of Appeals for the Armed Forces in Washington, D.C. (Credit: Ajay Suresh)

ness was bribed would not repair the damage done because the prior statement was made while under the improper motive of bribery. Before 1975, prior consistent statements were admissible only for rehabilitation of a witness's credibility.²⁶

The common law of evidence is relevant as a source of guidance for interpreting the rules of evidence,²⁷ and it is reflected in the Drafters' Analysis of the 2016 amendment to MRE 801(d)(1)(B):

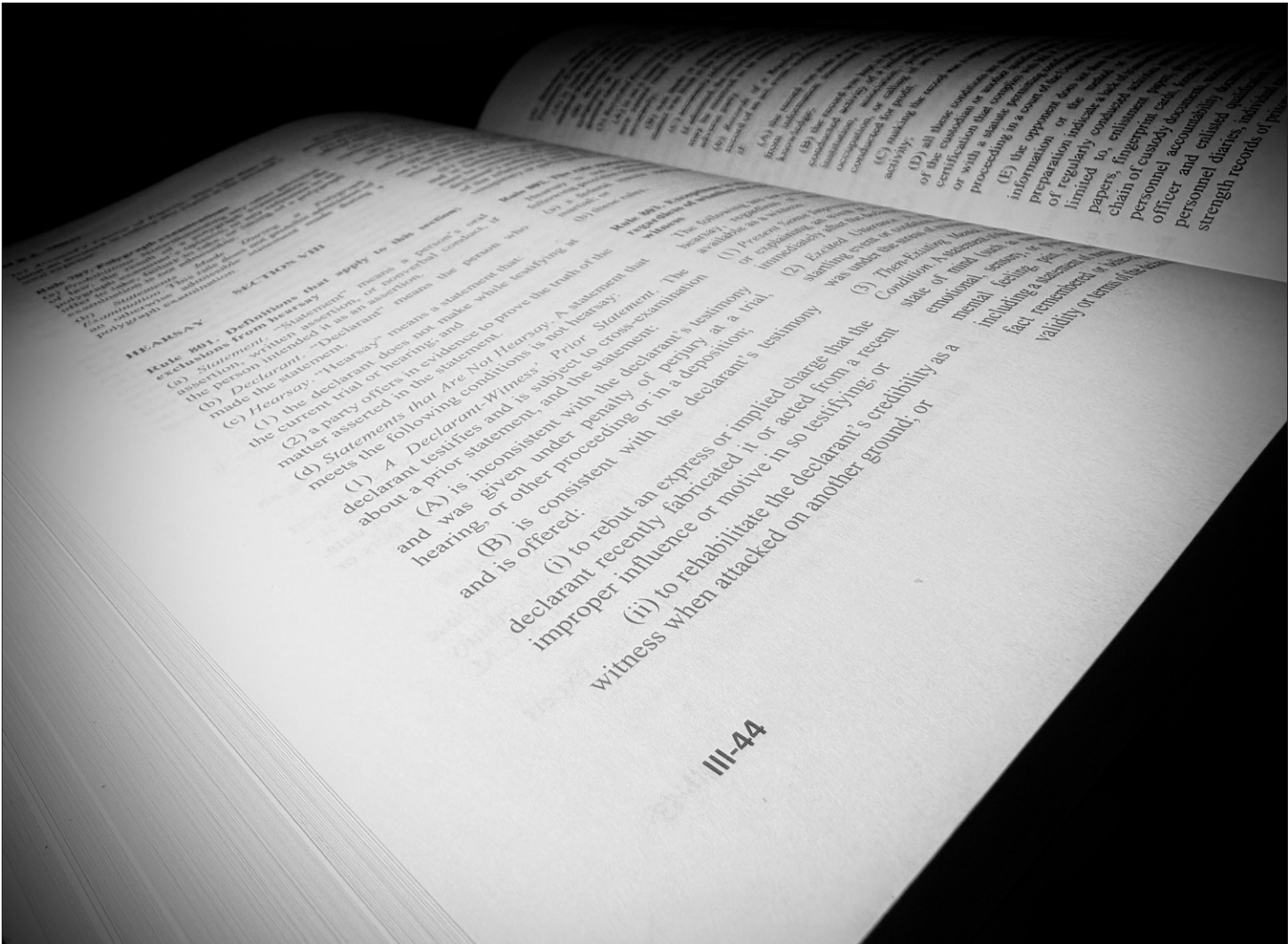
The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked.²⁸

Perhaps the most fundamental common law limitation on the use of prior consistent statements is that they cannot be introduced to rehabilitate a witness after *every* kind of impeaching attack.²⁹ The damage done by impeachment with a prior conviction, bad character for truthfulness, and defective perception (such as bad eyesight) is not rehabilitated by a prior consistent statement because the prior statement does not repair the damage done by these methods of impeachment.³⁰ Even if one considers the prior statement, the witness still has the same number of prior convictions, bad character, and poor eyesight. The damage done by impeachment with a prior inconsistent statement can be repaired by a prior consistent statement in limited circumstances.³¹ *Pierre* discussed the traditional and well-accepted limits on the use of prior consistent statements in the context of impeachment with a prior inconsistent statement.

United States v. Pierre

In *United States v. Pierre*, the Second Circuit considered whether a prior consistent statement by a witness can be used to meet "the impeaching force of the witness's prior inconsistent statement" where the prior inconsistent statement was really impeachment by omission.³² Mr. Michel Pierre was convicted of importing heroin and possession of heroin with intent to distribute.³³ Pierre was arrested at John F. Kennedy International Airport in New York and was immediately interviewed by a Drug Enforcement Administration (DEA) agent.³⁴ Pierre claimed that a friend gave him a suitcase to deliver to a bar in Philadelphia, and he did not know the heroin was in the suitcase.³⁵

At trial, the DEA agent testified that Pierre refused to make a controlled delivery of the suitcase to the bar.³⁶ On cross-examination, the DEA agent admitted that his handwritten notes from the interview



Military Rule of Evidence 801 in the 2019 edition of the *Manual for Courts-Martial*. (Credit: Katherine Hernandez)

contained neither the offer to cooperate nor the refusal to make the controlled delivery.³⁷ On redirect examination, the judge allowed the DEA agent to testify that his formal written report mentioned Pierre’s refusal to make the controlled delivery.³⁸ The written report was prepared three days after the interview.³⁹

The court noted that “[t]he law of our Circuit concerning the permissible use of a prior consistent statement is not exactly a seamless web.”⁴⁰ After reviewing many cases, the court distilled the important aspects of those cases and created a standard that many circuits follow today. The court said,

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.⁴¹

Applying the principles from the cases it reviewed, the court held the trial judge did not err in allowing the DEA agent to testify that his formal report referred to Pierre’s refusal to make the controlled delivery.⁴² The court explained the formal report’s rebutting force:

Here the defense sought to draw from the fact that the agent’s notes omitted reference to the controlled delivery an inference that this proposal had not been mentioned in the post-arrest interview. It was obviously pertinent to

the strength of that inference to show that the agent’s formal report included the proposal for the controlled delivery. The issue for the jury was whether the omission from the notes meant that the topic had not been discussed or only that the agent had not included it among the fragmentary phrases he wrote down during the interview. The defense was entitled to argue the first possibility, but the prosecution was entitled to argue the second possibility and to support that argument with the fact that the controlled delivery proposal was mentioned in the agent’s formal report.⁴³

Omitting any reference to the controlled delivery in the handwritten notes raised an inference that the request to participate in

the controlled delivery was never made, contrary to the DEA agent's direct testimony. The formal report, prepared three days later, tended to rebut that inference by showing the request was made and the agent simply did not think he needed to make a note of the matter at the time of the initial interview.

The *Pierre* standard—that to be relevant to rehabilitate a witness's credibility, a prior consistent statement must have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony—has been adopted, followed or a copied with a similar rationale in the First Circuit,⁴⁴ Second Circuit,⁴⁵ Third Circuit,⁴⁶ Fourth Circuit,⁴⁷ Seventh Circuit,⁴⁸ Ninth Circuit,⁴⁹ Tenth Circuit,⁵⁰ Eleventh Circuit,⁵¹ and DC Circuit.⁵² CAAF should join this group.

In *United States v. Finch*,⁵³ Specialist (SPC) Finch was convicted of one specification of sexual abuse of a child under twelve, three specifications of rape of a child under twelve, and violation of a lawful general regulation by providing alcohol to a minor. SPC Finch was sentenced to a dishonorable discharge, confinement for six years, and reduction in rank to E-1.⁵⁴ ACCA set aside the finding for violating a regulation, affirmed the other findings, and affirmed the sentence.⁵⁵ CAAF reviewed the trial judge's admission of a prior consistent statement.⁵⁶

At trial, the victim, AH, testified that SPC Finch, her stepfather,

draped his arm around her stomach, moved his hands to her vagina and rubbed it on top of her clothing, put his hands inside her underwear, inserted his finger into her vagina, subsequently removed his finger from her vagina and inserted it into her mouth, pulled her pants down, and inserted his penis into her vagina.⁵⁷

The defense launched a complex attack on AH's credibility. In addition to cross-examining AH about her motive to fabricate and calling family members to testify that AH was an untruthful person, the defense impeached AH with prior inconsistent statements to various people to whom she reported the abuse.⁵⁸ Most notably, AH was impeached by omission.⁵⁹ When she was

interviewed by an agent from the Criminal Investigation Division (CID), she failed to tell the agent that her stepfather inserted his finger into her mouth between the digital penetration of her vagina and the penile penetration of her vagina.⁶⁰

Following the cross-examination of AH, the trial counsel offered AH's video-recorded interview by CID as a prior consistent statement.⁶¹ The defense objected. The trial judge admitted the entire statement without explanation and without reviewing the recording.⁶² ACCA held that the trial judge did not commit an error and that the video was admissible under romanettes (i) and (ii),⁶³ but ACCA's reasoning is suspect.

ACCA found the statement was admissible under romanette (i) to rebut a motive to fabricate and an implied charge of recent fabrication.⁶⁴ The problem with ACCA's reasoning regarding the motive to fabricate is that ACCA artificially focused on the motive to fabricate (AH's desire not to live with her mother) on the day of trial when it should have determined when this motive arose, which was before AH spoke to CID.⁶⁵ Unless the prior statement was made before the improper motive arose, the prior statement does not rebut the improper motive.⁶⁶

The problem with using the statement to law enforcement to rebut the implied charge of recent fabrication is that the statement to law enforcement did not contain the new fact revealed at trial—SPC Finch's insertion of his finger into AH's mouth. If AH had told someone, perhaps a friend, that SPC Finch inserted his finger into her mouth before she spoke to CID, the statement to that person would repair the damage done by the charge of recent fabrication, because it would show that the statement was not fabricated after the CID interview. However, it is impossible to rebut a charge of recent fabrication when the prior statement does not contain the omitted fact. In this case, the proposed prior consistent statement was the very statement the defense counsel used to impeach by omission because the declarant omitted the new fact disclosed at trial in the statement to CID.

ACCA also found the video was admissible under romanette (ii) to rehabilitate AH's credibility after she was impeached with prior inconsistent statements.⁶⁷ The problem with ACCA's analysis is that prior

statements do not always rehabilitate a witness's credibility when they are impeached with a prior inconsistent statement. In fact, they rarely do because most prior statements have no rebutting force to repair the damage done by the impeachment. Stated another way, after consideration of the prior consistent statement, the prior inconsistent statement is no less inconsistent.

Decades of appellate opinions have discovered only two situations where prior statements rehabilitate the credibility of a witness impeached with a prior inconsistent statement. They are when the prior statement provides context to show the prior inconsistent statement was not made, or the statement was made but is not truly inconsistent.⁶⁸ Although ACCA cited *Pierre*, it failed to apply *Pierre*'s most critical part. *Pierre* instructs that

[o]f 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.⁶⁹

In *Finch*, the statement to law enforcement had no rebutting force, not even the minimal force created by mere repetition, because the alleged recently fabricated fact was not contained in the recorded statement to CID; there was no repetition. ACCA's tenuous reasoning would have been easy to expose using the *Pierre* standard, but CAAF decided to go another way.

CAAF held the trial judge erred in admitting the entire recorded statement, but the error was harmless.⁷⁰ CAAF focused on the trial judge's methodology rather than whether the interview contained prior consistent statements. There were good reasons to consider the judge's handling of the issue; the judge admitted the entire interview without reviewing it.⁷¹ The trial judge should have reviewed the recorded interview sentence by sentence and only admitted those prior statements that were consistent with the witness's direct examination and were relevant to rehabilitation. "To remain relevant, however,

only those statements or portions of the consistent declaration which specifically address the challenged zone of inquiry—the inconsistent, or omitted details or the concocted account—should be admissible.⁷²

CAAF found an abuse of discretion because the trial judge did not explain his decision to admit the statement; the trial judge did not review the statement before admitting it; and the trial judge did not parse the statement and exclude statements that were not prior consistent statements.⁷³ Although the court eschewed the opportunity to discuss the admissibility of any part of the recorded statement, it provided a template for the foundation of a prior consistent statement under romanette (ii). The court stated,

Thus, in sum, for a prior consistent statement to be admissible under M.R.E. 801(d)(1)(B)(ii), it must satisfy the following: (1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, (3) the statement must be consistent with the declarant’s testimony, (4) the declarant’s credibility as a witness must have been “attacked on another ground” other than the ones listed in M.R.E. 801(d)(1)(B)(i), 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. The proponent of the evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred.⁷⁴

This is helpful, but the court did not discuss what it means to “actually be relevant to rehabilitate” in the fifth foundational element. “The circuit courts that have applied [FRE] 801(d)(1)(B)(ii) have done so 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.”⁷⁵ This is as far as CAAF’s discussion went. CAAF’s formulation falls short in that it does not emphasize that mere repetition is

not enough and that the prior statement must repair the damage done by the type of impeachment used. *Pierre* fills this void: “Prior consistent statements [must have] ‘some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.’”⁷⁶ Had CAAF applied the *Pierre* standard to the statements in the interview, the court would have easily explained the trial judge’s error in admitting the prior statements and established a limiting principle for future cases.

Ideally, CAAF would have applied the *Pierre* standard after comparing AH’s direct testimony with her CID interview to identify consistent statements. AH was impeached by omission, which is a charge of recent fabrication, with a motive to fabricate (wanting not to live with her mother), and prior inconsistent statements. The statement to CID did not rebut the charge of recent fabrication because AH did not tell CID the omitted fact—that her stepfather penetrated her mouth with his finger. The statement would not rebut the motive to fabricate because the motive to fabricate arose before AH spoke to CID. The statements had no rebutting force to repair the damage done by the prior inconsistent statements because the prior statements were not offered to show the prior inconsistent statements were not made, to provide context to show the statements really were not inconsistent, or to provide any context that would repair the damage done by the impeachment. The statements to CID merely proved that the witness made statements before trial that were unrelated to the impeachment and were consistent with her direct testimony.

Instead of this analysis, CAAF found an abuse of discretion in the judge’s mishandling of the evidence, which led to the improper admission of a prejudicial statement within the CID interview.⁷⁷ CAAF missed an opportunity to apply the *Pierre* standard. This discussion would have provided important guidance to the field.

Impeachment by Prior Inconsistent Statement

This section reviews recent decisions by CAAF and ACCA to illustrate the illogic and incoherence of military justice practice when it comes to the admission of prior

consistent statements. Prior consistent statement issues get confusing when the proposed prior consistent statement is completely unrelated to the method of impeachment employed. This usually happens when a witness is impeached with a prior inconsistent statement. Unrelated statements do not rehabilitate the witness’s credibility based on the attack with a prior inconsistent statement because they cannot show the inconsistent statement is any less inconsistent. This situation arose in *United States v. Ruiz*, a case in which the traditional limitations on prior consistent statements were not applied.

United States v. Ruiz

*United States v. Ruiz*⁷⁸ is CAAF’s most recent opinion reviewing admission of a prior consistent statement. The opinion is confusing, and the trial judge appears to have misapplied the law. The trial judge admitted a prior consistent statement that did not satisfy the fifth foundational element from *Finch* or the *Pierre* standard.

Corporal Ruiz was on temporary duty at Camp Lejeune.⁷⁹ He contacted old friends at Camp Lejeune so they could meet and catch up while he was there.⁸⁰ Sierra was a friend of Ruiz, and she responded to Ruiz’s invitation to hang out.⁸¹ When they met, Sierra told Ruiz her husband could not join them because he was in the brig.⁸² Ruiz and Sierra got some food and wine and returned to Sierra’s house to eat dinner and talk.⁸³ Ruiz and Sierra drank the wine, some beer, and more.⁸⁴ Sierra became extremely intoxicated.⁸⁵

Sierra testified that Ruiz helped her move to the kitchen table and sit down.⁸⁶ “The next thing she remembered was sitting on his lap on the couch, trying to pull away while he held on to her and ‘shushed’ her.”⁸⁷ The next thing she remembered was “waking up in her bed with Appellant hovering over her and seeing him go into the bathroom. She believed they were both clothed at that time, although she did not remember clearly.”⁸⁸ There was another gap in her memory. “Her next memory was of Appellant lying in bed with her, running his hand over her body.”⁸⁹ She also testified that Ruiz rubbed his penis on her vaginal area.⁹⁰ She testified that she said, “No, stop” when Ruiz tried to kiss her.⁹¹ Sierra blacked out.⁹² Later, she came to and found



Volumes of *Court-Martial Reports* line the bookshelf in a courtroom. (Credit: A1C Daniel Blackwell)

Ruiz asleep in the bed next to her.⁹³ She left and reported the assault immediately.⁹⁴

On cross-examination, Sierra acknowledged there were gaps in her memory.⁹⁵ She admitted it was possible that she had made statements to a law enforcement officer and the sexual assault forensic exam nurse, but she did not remember at trial what she told them.⁹⁶ The defense counsel was unsuccessful in impeaching Sierra with prior inconsistent statements during cross-examination because Sierra did not remember if she made the inconsistent statements.⁹⁷

The Government called Deputy Frank, a sheriff's deputy who spoke to Sierra at the hospital immediately after the alleged assault.⁹⁸ The Government tried to admit the conversation as an excited utterance, but the judge sustained the defense's objection.⁹⁹ The defense cross-examined Deputy Frank to impeach Sierra extrinsically with prior incon-

sistent statements.¹⁰⁰ Deputy Frank testified that Sierra told him she sat on Ruiz's lap, drank two glasses of wine and shotgunned two beers, and she recalled Ruiz's pants coming off.¹⁰¹ In response, the Government sought to admit additional statements Sierra made to Deputy Frank as prior consistent statements, including that Ruiz rubbed his genitals against her, that she had said no, and that she did not recall how she got to the bedroom.¹⁰²

Initially, the trial judge would not admit these statements as prior consistent statements, "noting, 'I'm not seeing how there has been . . . a general attack on the [witness's] credibility. Period.'"¹⁰³ The judge later changed her mind, even though the consistent statement described what happened in the bedroom and the inconsistent statement addressed what Sierra said happened in the living room. "[The

judge] ruled Ms. Sierra's statements 'that the accused was rubbing her genitals with his penis and that she said, "No" and that Ms. [Sierra] did not know how she got up the stairs' were admissible prior consistent statements because they 'add context to the inconsistent statements that were elicited on cross-examination . . . and . . . they demonstrate that Ms. [Sierra] has a memory of key events and details that have been consistent."¹⁰⁴ CAAF found no abuse of discretion.¹⁰⁵

CAAF found that the prior statement to Deputy Frank was generally consistent with Sierra's in-court testimony.¹⁰⁶

Deputy Frank testified that Ms. Sierra told him Appellant rubbed his genitals against her, and she said "[n]o." Ms. Sierra's [direct] testimony described an ongoing interaction in



A gavel sits atop the judge's bench in the courtroom at Wright-Patterson Air Force Base, OH. (Credit: Jaima Fogg)

which Appellant was “rubbing himself against me from my vaginal area to my buttocks”; he “kept trying to put his hand against my cheek and kept on trying to bring my face over to kiss him. And I said, ‘No, stop.’ And I pushed his face away”; and he continued to rub against her after she pushed his face away.¹⁰⁷

Consistency is required by *Finch*'s third foundational element.¹⁰⁸ Although the prior statement was unclear about what Sierra said “no” to, they were “generally consistent,” and that is all that is required.¹⁰⁹

CAAF was satisfied with the judge's reasoning.

Here, the military judge placed her analysis on the record, finding the prior statement added “context” to inconsistent statements elicited on cross-examination and demonstrated that Ms. Sierra had consistent memories of significant facts and details.

Additionally, the military judge found the prior statement was relevant and probative because it was made “during the same statement to the same agent on the night of the allegation.”¹¹⁰

However, the prior statements do not “add context” to the inconsistent statements in a way that creates “rebutting force” or that repairs the damage done by the inconsistency. The prior statements were that the accused was rubbing her genitals with his penis, that she said “no,” and that Sierra did not know how she got up the stairs.¹¹¹ The prior inconsistent statements were that she told Deputy Franks that she sat on Ruiz's lap, drank two glasses of wine and shotgunned two beers, and she recalled Ruiz's pants coming off. The prior statements do not tend to show the prior inconsistent statements were not made or were not inconsistent, which are the only contexts that might logically provide rebutting force.¹¹² The prior statements merely repeat unrelated parts of Sierra's direct testimony.

It appears the judge's logic was that, although Sierra made some prior inconsistent statements, she also made some prior consistent statements. The problem is the prior consistent statements do not make it less likely that she made the inconsistent statements. Because the prior statements do not provide context to show the prior inconsistent statements were not made or were not inconsistent, they had no rebutting force to rehabilitate the witness properly. The admitted prior consistent statements were merely repetition of unrelated parts of the witness's testimony, bolstering Sierra's credibility improperly.¹¹³

This violated *Finch*'s fifth foundational requirement that the prior statement rehabilitate the witness's credibility based on the attack.¹¹⁴ It also violated *Pierre*'s requirement that the prior statement have rebutting force beyond mere repetition. To the extent the prior statements demonstrated that Ms. Sierra had consistent memories of significant facts and details, the prior statements had no rebutting force beyond mere repetition.

The trial judge had an erroneous view of the law, and she should not have admitted these statements. CAAF should have found error.

To the extent the trial judge admitted the prior statements to rebut the attack on Sierra's memory, the trial judge erred. CAAF's discussion of this decision is confusing.

Appellant argues that Ms. Sierra's statement to Deputy Frank could not rehabilitate her credibility because she was already suffering from alcohol-induced amnesia when she spoke to Deputy Frank. Appellant asserts that Ms. Sierra's statements to Deputy Frank therefore had the same credibility problem as her later testimony in the court-martial. Accordingly, Appellant contends that the consistency of her statements to Deputy Frank and her testimony in the court-martial was irrelevant. Although we understand the logic of this argument, we are unpersuaded that the military judge abused her discretion in viewing Appellant's challenge to Ms. Sierra's credibility and the Government efforts at rehabilitation in a different way.¹¹⁵

The court should have been persuaded by the appellate attorney's argument. The next sentence explains how the trial judge viewed the defense's challenge to Sierra's credibility. CAAF wrote,

The record shows that trial defense counsel extensively attacked differences between Ms. Sierra's testimony at trial and the accounts of the assault that she gave to various law enforcement officials, prosecutors, and medical personnel, and that trial defense counsel did not solely focus on Ms. Sierra's inability to register memories.¹¹⁶

The defense apparently impeached the witness with several prior inconsistent statements. The court only discussed one, and the admitted prior consistent statement had no rebutting force to repair the witness's credibility, as discussed above. We cannot tell if the damage caused by the unreported prior inconsistent statements was repaired by the prior consistent statements. CAAF's

dismissive line that the impeachments with prior inconsistent statements did not solely focus on the witness's inability to create memory because of intoxication conflates an attack with prior inconsistent statements with an attack on memory. They are different.

"[A] prior consistent declaration may rehabilitate a witness's account only if the consistent statement was made at a time when the cross-examination has expressly or impliedly charged that the witness's memory was more accurate."¹¹⁷ In a typical case, a witness's memory may be attacked as faulty based on the passage of time. A prior consistent statement made at the time of the event would certainly rebut the charge that the witness's memory at trial a year later was faulty.

On the other hand, a prior consistent statement made two days before trial might not rebut the charge of forgetfulness.¹¹⁸ In *Ruiz*, the defense did not attack Sierra's memory because it became worse with the passage of time. The defense attacked Sierra's memory as faulty at the time of the alleged assault because of the over-consumption of alcohol. This raises two issues. First, there was no charge that there was a time when the witness's memory was more accurate. Second, prior consistent statements are only admissible to repair an attack on the witness's memory at trial. "[A]dmission of a prior consistent statement is appropriate when recollection is attacked, but *only* when the cross-examiner raises the inference by challenging the *present* memory."¹¹⁹ The prior consistent statements admitted in *Ruiz* have no rebutting force to repair the damage done because of a faulty memory caused by alcohol consumption at the time of the charged offenses.

The court's finding of no abuse of discretion is perplexing when one does the critical analysis to determine the prior statements' rebutting force. One could read *Ruiz* and conclude the fifth element of the *Finch* template is meaningless, because otherwise CAAF would have found an abuse of discretion. The prior statements did nothing to repair the damage done by the methods of impeachment employed by the defense counsel. The statements that were admitted improperly bolstered the witness through mere repetition.

United States v. Brown

In *United States v. Brown*,¹²⁰ ACCA issued an opinion with two rationales. The court held that the trial judge did not abuse his discretion in admitting two prior consistent statements, but in case ACCA was wrong about that, the court held Private First Class (PFC) Brown did not suffer any prejudice. The trial judge admitted prior consistent statements under both romanette (i) and romanette (ii).¹²¹ ACCA affirmed the judge's decision to admit the statements under romanette (ii).¹²² The destination of ACCA's romanette (i) analysis was clearly to find an abuse of discretion, but ACCA could not bring itself to conclude the judge erred.¹²³

PFC Brown was convicted of domestic violence upon his wife and sentenced to a dishonorable discharge and confinement for forty months.¹²⁴ According to the victim, she had an argument in the bedroom with her husband.¹²⁵ She claims Brown stabbed her in the side and then in the left shoulder.¹²⁶ The couple struggled in the bedroom, moved into the hallway and then down the stairs.¹²⁷ The Government offered PFC Brown's statement to CID.¹²⁸ Brown told CID that he stabbed his wife in the side in self-defense and in the shoulder by accident when they tumbled down the stairs.¹²⁹ The victim's prior inconsistent statements related to Brown's claim of self-defense, specifically whether she pointed a gun at Brown in the bedroom.¹³⁰

During cross-examination, the victim denied that she "pointed a gun at him intentionally during a heated argument."¹³¹ However, two medical personnel who transported the victim to the hospital testified that the alleged victim said she pointed the gun at her husband's face.¹³² After the cross-examination of the victim, the Government offered Prosecution Exhibit (PE) 26, which contained two brief segments from the victim's second CID interview (which was recorded), wherein she stated she did not point the gun at her husband.¹³³

The Government offered these two segments under romanette (i) and romanette (ii).¹³⁴ "After reviewing the two snippets outside the presence of the panel in an Article 39(a) session, the military judge set forth the applicable standard, explained his analysis for the (B)(ii) prong, and admitted the statements as prior consistent statements under

both the (B)(i) and (B)(ii) hearsay exceptions [sic].”¹³⁵

The trial judge admitted the two prior consistent statements under romanette (i) but did not explain his reasoning.¹³⁶ The obvious explanation is that the judge thought the two prior consistent statements rebutted the defense’s expressed charge of improper motive. The improper motive was the alleged victim’s desire to keep custody of her children. This motive to fabricate arose at the victim’s first interview with law enforcement; the officer at the first interview told the victim her children were in protective custody.¹³⁷ The victim then said she never pointed the gun at her husband, contradicting what she said to the medical personnel.¹³⁸

The defense’s theory was that she changed her story because she was afraid she would not get her children back if it was established that she pointed her gun at her husband.¹³⁹ In the recorded CID interview several days later, the victim stated she never pointed the gun at her husband, but she said she flagged him with the gun.¹⁴⁰ This means she pointed the gun at him unintentionally.¹⁴¹ At trial, the victim denied flagging her husband with the gun.¹⁴²

Perhaps the trial judge did not explain his rationale because he recognized that the motive to fabricate arose before the victim made the prior consistent statements. As a result, the prior consistent statements did not rebut the motive to fabricate. The Government claimed that the defense made a second charge of improper motive: the alleged victim filing for divorce. The Government claimed this was a separate motive to fabricate that arose after the proposed prior consistent statements were made.¹⁴³ If this was true, the Government’s proffered statements would have been admissible under romanette (i), because, when more than one improper motive is raised, a prior consistent statement only has to rebut one of the motives.¹⁴⁴ After ACCA concluded the “divorce with sole custody” motive was the same motive raised when the alleged victim learned her children were in protective custody, ACCA abruptly moved on to its analysis of romanette (ii).¹⁴⁵

The trial judge admitted the prior consistent statements under romanette (ii) to rebut the “inconsistency attacks by the defense counsel,”¹⁴⁶ but it is not clear how

the prior statements rebutted the inconsistency attacks. As one leading commentator has explained,

[I]f relevant, the prior consistent account becomes so only when it refutes the cross-examiner’s express charge or “intended inference.” If, however, the cross-examiner impeaches with an inconsistent statement in a general attack on credibility without charging the witness with a specific motive to lie, . . . the admission of a consistent statement which either explains the admitted inconsistency or supports the witness’ denial of making the inconsistent statement [would be permitted].¹⁴⁷

A general inconsistency attack is impeachment by prior inconsistent statement where the cross-examiner does not charge improper motive, improper influence, or recent fabrication.¹⁴⁸ General inconsistency attacks are evaluated under romanette (ii), and prior statements are admissible to support a denial of making the inconsistent statement or to provide context to show the inconsistent statement is not inconsistent. Consistent statements do not repair the damage done by a general consistency attack, except in cases not relevant here.¹⁴⁹

In *Brown*, the impeachment with a prior inconsistent statement was accompanied by an expressed charge of improper motive. In this situation, impeachment by prior inconsistent statement is a tool for the cross-examiner to explain why and when the witness has been induced or influenced to lie.¹⁵⁰ In *Brown*, the motive to fabricate arose before the prior statements were made, so the prior statements do not qualify for admission under romanette (i), as explained above. The proposed prior consistent statement should be evaluated under romanette (ii) and admitted only if the prior statement tends to show the inconsistent statement was not made or was not inconsistent.

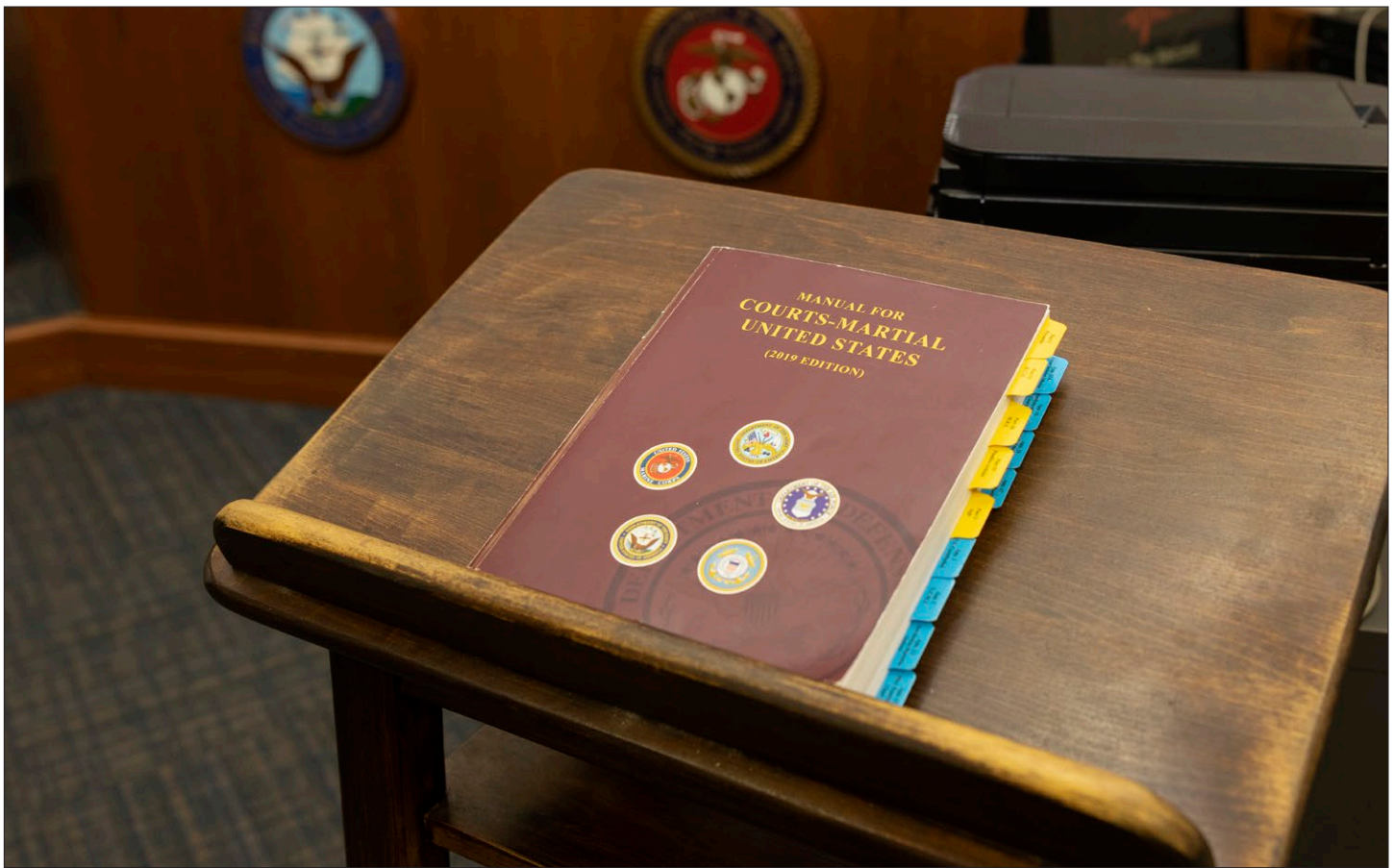
ACCA pointed out that the trial judge considered the five foundational elements from *Finch*, but the opinion took a problematic turn when ACCA refuted arguments posed by Brown’s appellate counsel.

Citing *United States v. McCaskey* for the proposition that “mere repeated

telling of the same story is not relevant,” appellant further argues that it was error to admit the statements under the (B)(ii) exception [sic]. 30 M.J. 188, 192 (C.A.A.F. 1990). This argument, however, fails for several reasons. First, it ignores the fact that the victim did *not* merely retell the same story before trial and during her testimony. Second, appellant’s “repeated telling” argument also ignores the fact trial defense counsel highlighted and attacked these inconsistencies from the outset when he asked the panel in his opening statement to pay close attention to whether the victim’s testimony “in this courtroom [*is*] consistent with all of the other stories that she just told the EMT, the paramedic, medical professionals at [the hospital, and] CID.”¹⁵¹

Here, the appellate counsel is making an argument that the statements failed a standard akin to the *Pierre* standard. ACCA responded with a naked assertion and a non sequitur. ACCA claims the victim did not simply retell the same story before trial that she told during trial without telling readers what she *did* in addition to retelling the same story. ACCA offered no facts or analysis to support that the victim did anything beyond simply retelling the story. Moreover, the court hand waives the MRE 403 analysis even though the military judge was due no deference given he did not articulate his reasoning on the record. Clearly, the statements were not offered to put the prior inconsistent statements in context to show they were not inconsistent or to show they were not made. ACCA’s first response to the appellate counsel’s argument is not persuasive.

ACCA does not explain how the defense counsel mentioning the inconsistent statements during opening statement qualified the two segments for admission. In its opening statement, the defense asked the court members to pay close attention to whether her testimony is consistent with all of her prior statements, but the defense did not state or imply that her testimony was not consistent with any of her prior statements. No one should be surprised that the defense counsel talked about the Government’s main witness’s prior inconsistent statements during his opening statement. The opening



The 2019 edition of the *Manual for Courts-Martial* rests on a podium in the courtroom at Marine Corps Air Station Yuma, AZ. (Credit: LCpl Jade Venegas)

statement may be helpful in determining the nature of the impeachment that follows,¹⁵² but merely pointing out in the opening statement that a witness has made prior inconsistent statements is not a basis for admitting prior consistent statements. Be that as it may, the defense's opening statement, without more, does not explain the rebutting force of the Government's proffered prior consistent statements.

CAAF has granted review in *Brown*.¹⁵³ CAAF's analysis should begin with romanette (i) because the attack on credibility was not a general attack on credibility; it included an express charge of improper motive. The defense counsel made an explicit charge of improper motive and the impeachment by prior inconsistent statement was merely a tool to make that charge. When CAAF evaluates the trial judge's decision under romanette (ii), CAAF should incorporate the principles from the *Pierre* standard. The prior consistent statements admitted in this case fail under either romanette for the reasons explained above.

Brown will be a watershed opinion, one way or the other. CAAF will embrace the *Pierre* standard fully, or it will confirm what was implicit in *Ruiz*. The court arguably implicitly rejected part of the *Pierre* standard in *Ruiz* by holding the trial judge's view of the law was correct. If CAAF intended to imply this, then the court has rejected the *Pierre* standard and the traditional and well-accepted limitations on prior consistent statements. Rejection of the traditional limitations on the admission of prior consistent statements makes military justice practice an outlier among Federal jurisdictions. CAAF seemingly adopted part of the *Pierre* standard in *Finch*'s fifth foundational element. "Based on the method of impeachment employed" reflects the "rebutting force" concept from *Pierre*. CAAF must go further and adopt the rest of the *Pierre* standard: that the probative value that comes from repetition is not enough to warrant admission of a prior statement.

It is impossible to overstate the importance of this choice. Impeachment by prior

inconsistent statement may be the most common method of impeachment. Impeachment by prior inconsistent statement does not automatically trigger rehabilitation with prior consistent statements. Properly understood, a prior inconsistent statement will rarely trigger rehabilitation with a prior consistent statement. This is why embracing the *Pierre* standard fully is crucial when the method of impeachment employed is impeachment by prior inconsistent statement. If a witness testifies that A and B are true on direct examination and is impeached with a prior statement that is inconsistent with A, a prior statement consistent with B has no rebutting force beyond mere repetition; it merely bolsters the witness's credibility. The prior statement consistent with B does not make the prior inconsistent statement any less inconsistent.

The facts in *Ruiz* fit this pattern, and the trial judge admitted the prior consistent statement because it added "context." The judge did not specify the context provided or how the context created rebutting force. The

prior consistent statement did not provide context to show the prior inconsistent statement was not inconsistent or was not made. If anything, the prior consistent statement's only probative value is its repetition with the witness's direct testimony. If the trial judge in *Ruiz*'s view of the law is correct, then any prior statement consistent with any part of a witness's direct testimony is a prior consistent statement under romanette (ii) any time the witness is impeached with a prior inconsistent statement. Such an absurd result allows improper bolstering and violates the traditional and well-accepted limits discussed in *Pierre*.

The facts in *Brown* do not fit the pattern in *Ruiz*. In *Brown*, the witness testified that A was true and was impeached with a prior statement inconsistent with A. The trial judge admitted prior statements consistent with A under both romanettes. The judge did not explain his rationale for admission under romanette (i), and ACCA correctly concluded the prior statement was made after the motive to fabricate arose. The judge admitted the prior statements under romanette (ii) to rebut an "inconsistency attack." This phrase is code for impeachment by prior inconsistent statement. The judge did not explain how the prior statements rebutted the inconsistency attack, and ACCA could not think of a clear explanation on behalf of the trial judge. ACCA affirmed the judge's decision anyway, despite the traditional and well-accepted limits on the admissibility of prior consistent statements. CAAF must reject ACCA's conclusory attempt to justify the trial judge's error and put an end to intellectually empty invocations of "context" as a rationale for admitting prior consistent statements. Like talismanic incantations of non-propensity purposes to justify admission of other acts evidence, a talismanic incantation of "context" is not sufficient to justify admission of prior consistent statements.¹⁵⁴

Impeachment on Other Grounds

This section will discuss two cases involving methods of impeachment other than impeachment with a prior inconsistent statement. This discussion applies the *Pierre* standard to various methods of impeachment to show the proper analysis for improper influences, prior arrests, prior alcohol counseling, failure to communicate

a lack of interest in the perpetrator, a general lack of credibility, and other theories that are offered by proponents based on a misapprehension of the law.

United States v. Ayala

Despite the foundational template in *Finch*, trial judges continued to struggle with the 2016 Amendment to MRE 801(d)(1)(B). *United States v. Ayala*¹⁵⁵ is a good example. Staff Sergeant (SSG) Ayala was convicted of two specifications of aggravated sexual contact and sentenced to a bad-conduct discharge and confinement for eight months.¹⁵⁶ During cross-examination of the victim, AN, the defense counsel asked about AN's preparation with the trial counsel before trial.¹⁵⁷ The questions asked how many times AN and the prosecutors went over her testimony and whether they reviewed text messages or her video-recorded interview.¹⁵⁸ In response, the trial counsel offered AN's text messages to her mother and her videotaped interview with the Naval Criminal Investigative Service (NCIS) as prior consistent statements.¹⁵⁹ The trial counsel argued the text messages and the interview were admissible to rebut the charge of improper influence by the prosecution.¹⁶⁰

The trial judge's handling of the matter created significant confusion. The text messages were marked as PE 4, and the judge admitted them under romanette (i) to rebut the charge of improper influence during the witness's pretrial preparation.¹⁶¹ Later, when considering the admission of the videotaped interview (PE 14), the judge reversed himself and ruled the interview could not be admitted under romanette (i) because the defense counsel's questions about AN's pretrial preparation did not imply an improper influence.¹⁶²

So, the judge admitted the interview under romanette (ii).¹⁶³ However, the judge

did not reconsider his admission of PE 4 under romanette (i) to rebut the implied charge of improper influence. The judge admitted he was confused about what was admissible under romanette (ii), nonetheless, he admitted PE 14 under romanette (ii) without identifying the "other ground" on which the witness's credibility was attacked.¹⁶⁴ Unlike the judge in *Finch*, the judge did not allow the entire interview to be admitted. He did not review the videotaped interview himself before ruling, but he required the parties to agree on which segments were relevant.¹⁶⁵

Neither ACCA nor CAAF attempted to determine if the prior statements were admissible under romanette (i) or romanette (ii). ACCA affirmed the findings and sentence "[p]roviding 'belt-and-suspenders' rationales for its decision."¹⁶⁶ ACCA concluded that the military judge did not abuse his discretion in admitting the evidence, and, if he did, any possible error was harmless.¹⁶⁷ CAAF concluded that even if the judge erred, SSG Ayala was not prejudiced by the error.¹⁶⁸

CAAF could have provided helpful guidance about when an influence on a witness becomes an improper influence. The trial judge struggled with this, admitted PE 4 under romanette (i) to rebut an improper influence, but did not admit PE 14 under romanette (i) because he later determined the impeachment did not imply an improper influence. CAAF seems to agree that there is a difference between an influence on a witness and an improper influence on a witness, but the court did not address the difference.¹⁶⁹ If it turned out PE 4 was properly admitted to rebut an improper influence, then PE 14 would have been admissible under romanette (i) also, and the court could have affirmed the admission of PE 14 on that basis.¹⁷⁰ If CAAF had ex-

CAAF should explicitly incorporate the *Pierre* standard into its prior consistent statement rubric to bring military practice in line with Federal practice.

panded its discussion of when an influence becomes an improper influence, it might have guided the Army court later in *United States v. Alsobrooks*.¹⁷¹

CAAF did not engage on the issue of admissibility under romanette (ii) at all. The trial counsel claimed PE 4 and PE 14 were admissible under romanette (ii) because the defense attacked AN's credibility with a prior civilian arrest, counseling for alcohol use, failure to communicate her lack of sexual interest in SSG Ayala, and motives to fabricate.¹⁷² Of course, if the defense attacked AN with motives to fabricate, the exhibits would be admissible under romanette (i) to rebut the charge of improper motive unless the motives to fabricate arose before the text messages were sent or before the interview with NCIS.

CAAF did not discuss whether PE 4 or PE 14 was relevant to rehabilitate AN's credibility based on being attacked with a prior civilian arrest, counseling for alcohol use, and her failure to communicate her lack of sexual interest in SSG Ayala. PE 4 and PE 14 have no apparent rebutting force to repair the damage caused by AN's impeachment about her civilian arrest,¹⁷³ counseling for alcohol use, or her failure to tell SSG Ayala of her lack of interest in him because AN was no less arrested, counseled for alcohol abuse, or silent about her lack of interest. Application of the *Pierre* standard to the Government's theories of rehabilitation would expose the futility of a trial counsel claiming every way a witness was impeached was "another ground" to argue for the admissibility of a prior statement.¹⁷⁴

In his concurring opinion, Judge Maggs gave voice to the field's frustration caused by a lack of clarity. Judge Maggs wrote that providing guidance to the field was more important than focusing on prejudice.

In my view, addressing the issue of admissibility—which is properly before us—is a higher priority here than deciding the issue of possible prejudice because the issue of admissibility appears to have caused some confusion at trial and because cases involving allegations of coaching are not uncommon. *See, e.g., United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021). Explaining why

the prior consistent statements were admissible in this case may aid counsel and military judges in the future more than assuming error and deciding the hypothetical question of prejudice.¹⁷⁵

Judge Maggs would have affirmed the trial judge's admission of PE 4 and PE 14 under romanette (i) as rebuttal to the defense's charge of improper influence.¹⁷⁶

The trial counsel in *Ayala* appeared to think there is no limitation on the admission of a prior consistent statement after any method of impeachment. The trial judge admitted his uncertainty. Both would have benefitted from the rigorous analysis required by the *Pierre* standard.

United States v. Thomas

In *United States v. Thomas*,¹⁷⁷ Sergeant (SGT) Thomas pled guilty to failure to obey a general regulation and adultery, and he was found guilty of two specifications of cruelty and maltreatment and two specifications of sexual assault of a child.¹⁷⁸ He was sentenced to a dishonorable discharge and confinement for eight years.¹⁷⁹

The victim, Miss AR, testified that appellant had raped and sexually assaulted her.¹⁸⁰ The defense impeached her with prior inconsistent statements from various pretrial statements and interviews during the investigation.¹⁸¹ In response, the Government moved to introduce Miss AR's forensic interview, which occurred the day after the alleged assault, as a prior consistent statement.¹⁸² According to the trial counsel, the defense challenged AR's testimony based on her faulty memory or a general lack of credibility as a witness.¹⁸³

The military judge helped the trial counsel by articulating another theory of how the forensic interview was relevant to rehabilitate the witness.¹⁸⁴ The judge admitted selected portions of the forensic interview to rebut a recent motive to fabricate and the grounds argued by the trial counsel.¹⁸⁵ The judge did not itemize which statements rebutted the motive to fabricate, the attack on memory, or the general lack of credibility.¹⁸⁶ ACCA found the military judge did not abuse her discretion in admitting these parts of the interview.¹⁸⁷

The military judge admitted parts of the interview as prior consistent statements after

finding the defense had suggested a motive to fabricate and "challenged the accuracy of Miss AR's memory and her credibility as a witness."¹⁸⁸ The only method of impeachment described in the opinion's recitation of facts is impeachment with a prior inconsistent statement, which is different from an attack on memory. She admitted the statements without identifying which prior consistent statements rebutted the motive to fabricate (romanette (i)) or which statements rebutted an attack on another ground (romanette (ii)).

Military judges should not skip this step because it drives the analysis.¹⁸⁹ As to romanette (i), the prior consistent statement must have been made prior to the rise of the motive to fabricate; the rebutting force is created by this temporal requirement from *Tome* and *McCaskey*.¹⁹⁰ Under romanette (ii), Federal and military cases recognize three scenarios in which a prior consistent statement has sufficient rebutting force to make it relevant for rehabilitation: (1) those prior statements that put a prior inconsistent statement in context to help clarify its meaning, (2) those that support the denial of making a prior inconsistent statement, and (3) those occurring close in time to the event that demonstrate the lapse in time has not resulted in a faulty memory.¹⁹¹

A "general attack on a witness's credibility" is not a method of impeachment and, therefore, not "another ground" under romanette (ii).¹⁹² For the trial judge to admit parts of this interview under romanette (ii), the parts of the forensic interview must show that the prior inconsistent statements were not inconsistent, that a prior inconsistent statement was not made, or that the witness's memory was not faulty on the day of trial. Those are the situations in which the prior consistent statement has rebutting force beyond mere repetition.¹⁹³

It is hard to evaluate this opinion because the recitation of the facts is opaque. The court tells us the Government "indicated how the prior consistent statement in the forensic interview were relevant to rehabilitate Miss AR's testimony,"¹⁹⁴ but the court does not include the Government's explanation in the opinion. Moreover, the court does not provide any details about the prior statements or defense counsel's impeachment of the witness, except for impeachment with



Maj Szonja Johnson, 341st Missile Wing JA, strikes a gavel against a block at Malmstrom Air Force Base, MT. (Credit: A1C Jack Rodriguez Escamilla)

prior inconsistent statements.¹⁹⁵ Nonetheless, if the prior statements rebutted the motive to fabricate or the claim of a faulty memory, the opinion is correct. To the extent the prior statements only rebutted a general attack on credibility, the opinion is vulnerable.¹⁹⁶ Presenting “a general attack on credibility” as “another ground” sends a dangerous signal to the field.¹⁹⁷

If a “general attack on credibility” is “another ground,” then any statement that is consistent with witness’s direct testimony and not covered by romanette (i) is admissible under romanette (ii). The rule admits prior consistent statements offered “to rehabilitate the declarant’s credibility when attacked on another ground.”¹⁹⁸ Making two simple substitutions shows the absurdity of considering an “attack on credibility” as a ground of attack.

First, substitute “attack on credibility” for “another ground.” This yields that prior consistent statements are admissible when offered to rehabilitate the declarant’s credibility when his or her credibility has been attacked. To impeach means “to discredit the veracity of a witness.”¹⁹⁹ Second, substitute “impeached” for “credibility has been attacked.” This yields, “prior consistent statements are admissible when offered to rehabilitate the declarant’s credibility when they are impeached.” This is patently incorrect. “Prior consistent statements cannot be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.”²⁰⁰ The required analysis is more focused.

An attack on general credibility is not a method of impeachment; it is composed of one or more types of impeachments.

The methods of impeachment include character trait for untruthfulness [Rule 608(a)]; prior convictions [Rule 609]; instances of misconduct not resulting in a conviction [Rule 608(b)]; prior inconsistent statements [Rule 613]; prior inconsistent acts [Doyle v. Ohio, 426 U.S. 610 (1976)]; bias [Rule 608(c)]; and specific contradiction [United States v. Piren, 74 M.J. 24 (C.A.A.F. 2014)].²⁰¹

This list is incomplete. For example, a witness can be impeached on their ability to observe, remember, and communicate.²⁰² The prior consistent statement analysis is driven by the type of attack, so considering a general attack on credibility as “another ground” dooms the analysis from the beginning. Romanette (ii) issues are analyzed by

considering the specific method of impeachment.

Aside from the detour into “general attacks on credibility,” the failure to sort out which statement rebutted which ground of attack, and the failure to employ a standard to give meaning to “relevant to rebut,” the court discussed some important principles. ACCA correctly identified that on cross-examination, the defense counsel impeached Miss AR with multiple prior inconsistent statements from multiple interviews and reports, challenged AR’s memory, and raised a motive to fabricate.²⁰³ These are the grounds that are generally recognized as grounds that can be rebutted with prior consistent statements.

The court also understood that a prior consistent statement must “actually be relevant to rehabilitate the witness’s credibility on the basis on which he or she was attacked.”²⁰⁴ ACCA distinguished this case from *Finch*, noting the trial judge did not admit the entire forensic interview.²⁰⁵ The military judge parsed the interview sentence-by-sentence and only admitted three segments with a total of fifteen statements.²⁰⁶ Focusing on the method of impeachment and the proposed prior consistent statement are steps in the direction of the *Pierre* standard.

Conclusion

CAAF should explicitly incorporate the *Pierre* standard into its prior consistent statement rubric to bring military practice in line with Federal practice. The *Pierre* standard would provide a limiting principle in an area desperately in need of guidance. Military courts would reach more consistent results with a clear standard for determining which statements are relevant to rehabilitate a witness’s credibility under romanette (ii). Military judges will quickly become comfortable comparing a proposed prior consistent statement with the direct testimony to ensure it is consistent, identifying the type of impeachment used, and determining if the prior statement repairs the damage done by the impeachment.

A judge looking for a shortcut that captures the results of decades of appellate opinions could combine MRE 801(d)(1)(B) with *Adams*. This combination yields a rule rewritten as follows:

(d) A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness’s Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(B) is consistent with the declarant’s testimony and is offered:

(i) to rebut an express or implied charge of recent fabrication, improper influence, improper motive, or faulty memory at the time of trial; or

(ii) to provide context to show a prior inconsistent statement is not inconsistent or to show that the prior inconsistent statement was not made; or

(iii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground.

Judges should recognize that it is unlikely statements will be admitted under romanette (iii) because romanettes (i) and (ii) contain all the circumstances recognized to date where a prior statement satisfies the *Pierre* standard. *Pierre* and the cases that follow it are persuasive authorities, and military judges can legitimately rely on them in the absence of guidance from CAAF or the President. As a result, trial judges would not have to confess confusion about what statements fall within romanette (ii). Once one combines the amended rule with the traditional and well-accepted limitations on admitting prior consistent statements, it all becomes clear. **TAL**

Mr. O’Brien is a Senior Counsel, Defense Counsel Assistance Program, U.S. Army Trial Defense Service, at Fort Belvoir, Virginia.

The author is grateful to Mr. Carter Stockbl of Georgetown Law School for his valuable insights and research assistance. Mr. Stockbl was an intern for the Defense Counsel Assistance Program in the summer of 2025.

Notes

1. This title is a play on the title of a leading article on prior consistent statements, Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. REV. 231 (1987)

[hereinafter *Hobgoblin*]. Professor Ohlbaum’s article was cited in *Tome v. United States*, 513 U.S. 150, 157 (1995) and contains an extensive history of the common law of prior consistent statements. A bugbear is a type of hobgoblin. In current usage, a bugbear is a constant source of irritation. See *Bugbear*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bugbear> [<https://perma.cc/YJ5S-VXWF>].

2. Exec. Order No. 13730, sec. 2, 81 Fed. Reg. 33331, 33355 (May 20, 2016). Federal Rule of Evidence 801(d)(1)(B) was amended identically on 1 December 2014. FED. R. EVID. 801 advisory committee’s note to 2014 amendment [hereinafter Advisory Committee’s Note].

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 801(d) (2024) [hereinafter 2024 MCM].

4. A “romanette” is a lower-case Roman numeral.

5. The Drafters’ Analysis of the 2016 Amendment to MRE 801(d)(1)(B) includes: “The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, M.R.E. 801 analysis, at A22-61 (2016) [hereinafter Drafters’ Analysis].

6. *United States v. Ayala*, 81 M.J. 25, 29 (C.A.A.F. 2021).

7. See *United States v. Finch*, 79 M.J. 389, 393 (C.A.A.F. 2020) (revealing the trial judge neither watched a videotaped interview of a witness offered as a prior consistent statement before admitting it nor explained how the videotape was admissible). “The military judge mishandled the issues surrounding the admissibility of the videotaped interview, and as such, his decision merits little deference.” *Id.* at 396.

8. See Laird C. Kirkpatrick & Christopher B. Mueller, *Prior Consistent Statements: The Dangers of Misinterpreting Recently Amended Federal Rule of Evidence 801(d)(1)(B)*, 84 GEO. WASH. L. REV. ARGUENDO 192, 193 (2016).

[A] significant danger remains that the amended rule will be misunderstood by lawyers and judges and applied in an overly-expansive fashion. This risk is not only because Advisory Committee Notes are sometimes overlooked or ignored in the heat of trial, but also because the amended rule does not itself specify when prior consistent statements may be used to rehabilitate witnesses. Instead, it adopts federal common law on the issue of when prior consistent statements are admissible for rehabilitation and merely provides that if a prior consistent statement is admissible for rehabilitation, it is also admissible for its truth. Thus, to apply the amendment properly, attorneys and courts must research and consider law outside FRE 801(d)(1)(B).

Id. (emphasis in original)(citation omitted).

9. *Rehabilitation*, BLACK’S LAW DICTIONARY 1476 (12th ed. 2024).

10. *Hobgoblin*, *supra* note 1, 231 n.2 (quoting *State v. Parrish*, 79 N.C. 610, 612–13 (1878) (emphasis in original)).

11. Drafters’ Analysis, *supra* note 5, at A22-61.

12. Advisory Committee’s Note, *supra* note 2.

13. See also 2024 MCM, *supra* note 3, M.R.E. 101(b) (stating courts-martial will follow the FRE and the cases

interpreting them when the MRE does not provide guidance).

14. 781 F.2d 329 (2d Cir. 1986). One should also read *Tome v. United States*, 513 U.S. 150 (1995). “Litigators and judges would be well advised to consult both common law rehabilitation principles, as well as *Tome*, when seeking to interpret and apply the recently-amended language of FRE 801(d)(1)(B).” Kirkpatrick & Mueller, *supra* note 8, at 197.

15. *Pierre*, 781 F.2d at 331.

16. 79 M.J. 389 (C.A.A.F. 2020).

17. *See id.* at 396.

18. *Id.*

19. No. 24-0158, 2025 CAAF LEXIS 656 (C.A.A.F. 2025).

20. *Id.* at *12–14.

21. *See id.*

22. ARMY 20230168, 2025 CCA LEXIS 213 (A. Ct. Crim. App. May 8, 2025).

23. The FRE became effective in 1975. Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

24. Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 CONN. L. REV. 937, 943–44 (2014).

25. *Id.* at 944.

26. *Id.* at 939.

27. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978) (“In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.”).

28. Drafters’ Analysis, *supra* note 5, at A22-61.

29. “The Supreme Court has made perfectly clear that ‘prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.’” *United States v. Drury*, 396 F.3d 1303, 1316–17 (11th Cir. 2005) (citing *Tome v. United States*, 513 U.S. 150, 157 (1995)).

30. Kirkpatrick & Mueller, *supra* note 8, at 195.

31. *See United States v. Adams*, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006).

32. *United States v. Pierre*, 781 F.2d 329, 330 (2d Cir. 1986).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 331.

42. *Id.* at 334.

43. *Id.*

44. *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001) (“Prior consistent statements still must meet at least the standard of having ‘some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.’” (quoting *Pierre*, 781 F.2d at 331)).

45. *Pierre*, 781 F.2d 329.

46. *United States v. Frazier*, 469 F.3d 85, 89 (3d Cir. 2006) (discussing limiting principles of prior consistent statements and stating they may not be used “every time a witness’s credibility or memory is challenged; otherwise, cross-examination would always transform the prior consistent statements into admissible evidence”).

47. *United States v. Ellis*, 121 F.3d 908, 919–20 (4th Cir. 1997) (discussing multiple circuits’ precedents, including *Pierre*, and that prior consistent statements must have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony).

48. *United States v. Harris*, 761 F.2d 394, 399–400 (7th Cir. 1985) (“Prior consistent statements which are used [to rehabilitate credibility] . . . are relevant to whether the impeaching statements really were inconsistent within the context of the interview, and if so, to what extent.”).

49. *United States v. Collicott*, 92 F.3d 973, 980 (9th Cir. 1996) (“After a witness has been impeached with prior inconsistent statements, we have admitted the entire conversation or document from which the impeachment statements were drawn if it has ‘significant probative force bearing on credibility apart from mere repetition’ . . . by placing the inconsistencies . . . in a broader context, demonstrating that the inconsistencies were a minor part of an otherwise consistent account.” (quoting *United States v. Payne*, 944 F.2d 1458, 1471 (9th Cir. 1991) (quoting *United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (citing *Pierre*, 781 F.2d at 333))).

50. *United States v. Magnan*, 756 F. App’x. 807, 818 (10th Cir. 2018) (“[Appellant] did not attempt to ‘attack[] [the witness’ credibility] on another ground’—that is, he did not extract inconsistent statements or accuse the victims of misremembering—so admitting the statements would not rehabilitate the declarant’s credibility.” (quoting *United States v. Cox*, 871 F.3d 479, 486 (6th Cir. 2017))).

51. *United States v. Drury*, 396 F.3d 1303, 1316 (11th Cir. 2007) (citing *Pierre* and noting that a prior consistent statement can be used in certain instances to rehabilitate if the statement has probative force beyond mere repetition).

52. *United States v. Washington*, 106 F.3d 983, 1001 (D.C. Cir. 1997) (citing the *Pierre* standard).

53. 79 M.J. 389 (C.A.A.F. 2020).

54. *Id.* at 391.

55. *United States v. Finch*, 78 M.J. 781 (A. Ct. Crim. App. 2019).

56. *Finch*, 79 M.J. at 391.

57. *Id.* at 392.

58. *See id.* at 393.

59. *See id.*

60. *Id.*

61. *Id.*

62. *Id.* at 394.

63. *Finch*, 78 M.J. at 789–92.

64. *See id.* at 790.

65. *Finch*, 79 M.J. at 393. On cross-examination, AH was asked, “At the time you were talking with CID you didn’t want to live with your parents?” Her response was, “I still don’t really want to now.” *Id.*

66. *See United States v. McCaskey*, 30 M.J. 188 (C.M.A. 1990); *Tome v. United States*, 513 U.S. 150 (1995).

67. *Finch*, 78 M.J. at 791–92.

68.

Similarly, it has never been the rule that impeachment by prior inconsistent statement automatically opens the door to evidence of prior consistent statements. Proving prior consistent statements does not remove the sting of vacillation raised by the inconsistent statements because the inconstancy remains. Only in certain limited circumstances does a prior consistent statement rehabilitate a witness who has been impeached with a prior inconsistent statement. For example, a prior consistent statement may rehabilitate a witness by clarifying or giving context to the alleged prior inconsistent statement or by supporting a denial that the prior inconsistent statement was ever made.

Kirkpatrick & Mueller, *supra* note 8, at 195 (citations omitted). *See also United States v. Adams*, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (stating prior consistent statements are relevant to rehabilitate a witness’s credibility when the prior statement places the inconsistent statement in context to show that it is not really inconsistent with the trial testimony and to support the denial of making an inconsistent statement). For an example of how a prior statement puts an inconsistent statement in context to show it is not truly inconsistent, *see United States v. Castillo*, 14 M.J. F.3d 802 (2d Cir. 1994).

69. *United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986).

70. *Finch*, 79 M.J. at 391.

71. *Id.* at 393.

72. *Hobgoblin*, *supra* note 1, at 280 (citing *United States v. Blankinship*, 784 F.2d 317, 320 (8th Cir. 1986)).

73. *Finch*, 79 M.J. at 398–99.

74. *Id.* at 396 (citing *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001)).

75. *Id.* at 395 (citing *United States v. Simonelli*, 237 F.3d 19 (1st Cir. 2001)).

76. *Simonelli*, 237 F.3d at 27 (citing *United States v. Pierre*, 781 F.2d 329, 331 (2d Cir. 1986)).

77. *Finch*, 79 M.J. at 398–99.

78. No. 24-0158, 2025 CAAF LEXIS 656 (C.A.A.F. Aug. 8, 2025).

79. *Id.* at *1.

80. *Id.* at *2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at *3.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at *4.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. CAAF mistakenly identified the impeachment as impeachment by contradiction. *See id.* at *5. “Impeachment by contradiction is a line of attack that ‘involves showing the tribunal the contrary of a witness’ asserted fact, so as to raise an inference of a general defective trustworthiness’ or that the [witness] is capable of error.” *United States v. Piren*, 74 M.J. 24, 27 (C.A.A.F. 2014). Impeachment with a prior inconsistent statement strives to show inconsistency by the witness, but the inconsistent statement rarely is admitted for the truth of the matter asserted. *See* 2024 MCM, *supra* note 3, M.R.E. 613, M.R.E. 801(d)(1)(A).
101. *Ruiz*, 2025 CAAF LEXIS 656 at *5.
102. *Id.*
103. *Id.* at *6. A general attack on credibility is not “another ground” under romanette (ii). *See infra* notes 199, 200 and accompanying text.
104. *Ruiz*, 2025 CAAF LEXIS 656 at *6.
105. *Id.* at *7.
- 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. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020).
106. *Ruiz*, 2025 CAAF LEXIS 656 at *14.
107. *Id.*
108. *See Finch*, 79 M.J. at 396.
109. *Ruiz*, 2025 CAAF LEXIS 656 at *13–14.
110. *Id.* at *18–19.
111. *Id.* at *6.
112. *See United States v. Adams*, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (stating prior consistent statements are relevant to rehabilitate a witness’s credibility when the prior statement places the inconsistent statement in context to show that it is not really inconsistent with the trial testimony and to support the denial of making an inconsistent statement).
113. “The assertion that a witness has repeatedly offered inconsistent accounts or different versions of an episode also does not satisfy the preconditions for admission of other statements consistent with the courtroom version.” *Hobgoblin*, *supra* note 1, at 266.
114. *Finch*, 79 M.J. at 396.
115. *Ruiz*, 2025 CAAF LEXIS 656 at *17–18.
116. *Id.* at *18.
117. *Hobgoblin*, *supra* note 1, at 259.
118. Richter, *supra* note 24, at 945.
119. *Hobgoblin*, *supra* note 1, at 260 (citing C. McCORMICK, McCORMICK ON EVIDENCE, sec. 49, at 118 (1984)) (“[I]f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember . . . the prior consistent statement has no relevancy to refute the charge unless [it came] before the source of the bias, interest, influence or incapacity originated.”).
120. ARMY 20230168, 2025 CCA LEXIS 213 (A. Ct. Crim. App. May 8, 2025).
121. *Id.* at *13. While a statement cannot be admissible under both romanettes (i) and (ii) based on the same method of impeachment, the court correctly concluded these statements could potentially be admissible under both romanettes (i) and (ii) because the witness was impeached with a motive to fabricate and with prior inconsistent statements.
122. *See id.* at *22.
123. “Given our holding below that the military judge properly admitted the statements under the (B)(ii) exception [sic], however, we ultimately need not decide the propriety of his ruling admitting the same evidence under the (B)(i) exception [sic].” *Id.* at *19. MRE 801(d)(1)(B) is not a hearsay exception; prior consistent statements are exempt from the definition of hearsay. *See* 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B).
124. *Id.* at *1.
125. *Id.* at *2.
126. *Id.*
127. *Id.* at *2–3.
128. *See id.* at *3.
129. *Id.* at *3–4.
130. *Id.* at *12–13.
131. *Id.* at *3.
132. *Id.* at *12.
133. *Id.* at *13.
134. *Id.*
135. *Id.* Romanettes (i) and (ii) are not hearsay exceptions. Prior consistent statements falling within romanettes (i) and (ii) are exempted from the definition of hearsay. *See* 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B).
136. *See id.* at *18–19.
137. *Id.* at *17–18.
138. *See id.* at *12.
139. *Id.* at *17.
140. *Id.* at *12.
141. “Flagging” is the dangerous and unsafe act of unintentionally pointing the muzzle of a gun at a person or a forbidden direction. *Firearm Store Etiquette: How to Handle the “Handoff”*, SONORAN DESERT INST., <https://sdi.edu/2023/03/23/firearm-store-etiquette-how-to-handle-the-handoff> [<https://perma.cc/5K5J-UP-RD>] (last visited Dec. 3, 2025).
142. *Brown*, 2025 CCA LEXIS 213, at *12.
143. *Id.* at *18.
144. *See United States v. Allison*, 49 M.J. 54 (C.A.A.F. 1998).
145. *Id.* at *18–19.
146. *Id.* at *19. “Where, however, [impeachment by prior inconsistent statements] neither asserts nor implies that the in-court account is the product of an improper motive not present when the consistent statement was made, the consistent statement should not be admissible.” *Hobgoblin*, *supra* note 1, at 269 (citing numerous Federal cases).
147. *Hobgoblin*, *supra* note 1, at 277–78 (citing Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, HASTINGS L.J. 575, 592–604 (1979)) (citations omitted).
148. *Id.* at 267–69. *See also* DAVID H. KAYE ET AL., McCORMICK ON EVIDENCE sec. 34 (2025) (providing an overview of prior inconsistent statements).
149. *See United States v. Adams*, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (describing the two circumstances where prior consistent statements are relevant to rehabilitate a witness’s credibility).
150. *See Hobgoblin*, *supra* note 1, at 271–72.
151. *Brown*, 2025 CCA LEXIS 213 at *21–22.
152. *See United States v. Frost*, 79 M.J. 104 (C.A.A.F. 2019).
153. *United States v. Brown*, No. 25-0181/AR, 2025 CAAF LEXIS 691 (C.A.A.F. Aug. 20, 2025).
154. CAAF has repeatedly disapproved of broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under M.R.E. 404(b). *See United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984).
155. 81 M.J. 25 (C.A.A.F. 2021).
156. *Id.* at 26.
157. *Id.* at 27.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 29.
162. *Id.*
163. *Id.*
164. *See id.* “The trial judge must determine whether an impeaching attack occurred, what type of attack occurred, and whether the proffered rehabilitation is appropriately responsive.” Richter, *supra* note 24, at 944 (citing KENNETH BROUN ET AL., McCORMICK ON EVIDENCE sec. 47, at 307 (7th ed. 2013)).
165. *Ayala*, 81 M.J. at 30.
166. *Id.* at 31 (Maggs, J., concurring).
167. *Id.*
168. *Id.* at 26.
169. “Our statements in this opinion should in no way indicate that it is problematic for the prosecution to prepare a witness for court-martial or that such preparation in and of itself constitutes an improper influence.” *Id.* at 29, n.4 (emphasis added).
170. *See id.* at 31 n.7.
171. ARMY 20200598, 2023 CCA LEXIS 47 (A. Ct. Crim. App. Jan. 30, 2023). In *Alsobrooks*, the trial judge

admitted a prior consistent statement by the alleged victim to her boyfriend under romanette (ii), finding the other ground was an attack on the alleged victim's memory. *Id.* at *16–17. ACCA held that the alleged victim's memory was not rehabilitated by the prior statement to her boyfriend, Sergeant (SGT) JK. *Id.* at *17. The alleged victim told her boyfriend that she had been sexually assaulted by SGT Alsobrooks. *Id.* at *6. However, ACCA, persuaded by its own theory of admissibility, validated the trial judge's decision to admit the statement under romanette (i) to rebut the implied charge that JK was an improper influence. *Id.* at *18. However, the facts recited by ACCA make it clear that JK's influence occurred before the alleged victim made the prior statement. "A few hours later, after encouragement from SGT JK, the victim became emotional, was physically shaking and sobbing and could barely get out the words when she disclosed to SGT JK that appellant had sexually assaulted her earlier that day." *Id.* at *6. So, JK's influence is described as encouragement, and it occurred before the alleged victim disclosed the sexual assault. Nonetheless, ACCA wrote:

Given the additional thrust of the victim's cross-examination in which the defense attempted to have the factfinder infer that the allegation was false and resulted from pressure by SGT JK, the military judge should have analyzed the admissibility of the statement as to whether it rebutted a charge of recent fabrication or recent improper influence. We find that the victim's statement to SGT JK was admissible under this prong of [MRE] 801(d)(1)(B) given the defense's cross-examination of the victim and given that her statement to SGT JK that she was assaulted pre-dated his alleged improper influence to make a report.

Id. at *18–19. Perhaps ACCA is referring to the alleged victim's report to the authorities and not a report to JK. However, the facts recited in the opinion do not mention JK influencing her decision to report the incident to the authorities:

While hesitant at first, the following morning the victim went to the hospital because she "wanted to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination.

Id. at *6. So, since JK's "influence" occurred before the alleged victim disclosed to him that she had been sexually assaulted, the court should not have affirmed the trial judge's decision to admit the disclosure under romanette (i). Be that as it may, the larger issue is whether "encouraging" a girlfriend to disclose what is bothering her makes a boyfriend an improper influence. Footnote 4 of *Ayala* suggests an influence is not necessarily an improper influence. *See Ayala*, 81 M.J. at 29, n.4.

172. *Ayala*, 81 M.J. at 29.

173. *Cf.* Kirkpatrick & Mueller, *supra* note 8, at 194 ("The damage done by impeachment with a prior conviction, bad character for truthfulness, and failure of perception (such as bad eyesight) is not rehabilitated by a prior consistent statement because the statement does not repair the damage done by these methods of impeachment.").

174. *See* United States v. Adams, 63 M.J. 691–97 (A. Ct. Crim. App. 2006) (describing the few circumstances where prior consistent statements are relevant to rehabilitate a witness's credibility).

175. *Ayala*, 81 M.J. at 31 (Maggs, J., concurring). *See*

also United States v. Norwood, 81 M.J. 12, 22 (C.A.A.F. 2021) (Ohlson, J., concurring) (stating the majority should clearly say the trial judge erred when admitting a prior consistent statement under romanette (ii) when it should have been analyzed under romanette (i)).

176. *Ayala*, 81 M.J. at 31.

177. ARMY 20210662, 2024 CCA LEXIS 154 (A. Ct. Crim. App. Mar. 29, 2024).

178. *Id.* at *1.

179. *Id.* at *2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *3.

184. *Id.* A trial judge must be careful not to depart from her neutral role. "The proponent of the evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred." United States v. Finch, 79 M.J. 389, 396 (C.A.A.F. 2020). A trial judge reduces that burden when she suggests additional links to help the proponent. Appellate judges appear to have no scruples against helping the proponent. *See* United States v. Finch, 78 M.J. 781, 789 n.14 and accompanying text (citing United States v. Carista, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) for the proposition that an appellate court will affirm when a trial court reaches the correct result even if the analysis is wrong, calling this principle the "tipsy coachman" doctrine). As applied to prior statements under romanette (ii), the tipsy coachman doctrine conflicts with the idea that the burden is on the proponent. Moreover, this dubious doctrine is often applied on an incomplete record because the parties did not litigate the issue.

185. *Thomas*, 2024 CCA LEXIS 154 at *3. It is not clear why impeachment with prior inconsistent statements is not on this list. The facts recited in the opinion say AR's credibility was challenged by "a number of inconsistencies drawn from her initial reports to a social worker, a subsequent report to Army Criminal Investigation Command (CID), and more recent interviews conducted by government and defense counsel." *Id.* at *2. The opinion does not tell us how the defense challenged AR's memory or credibility. While impeachment with a prior inconsistent statement is an attack on credibility, the opinion appears mistakenly to conflate impeachment with prior inconsistent statements with an attack on memory.

186. *Id.*

187. *Id.* at *4.

188. *Id.* at *3.

189. "The trial judge must determine whether an impeaching attack occurred, what type of attack occurred, and whether the proffered rehabilitation is appropriately responsive." Richter, *supra* note 24, at 944 (citing C. McCORMICK, McCORMICK ON EVIDENCE, sec. 47, at 308 (1984)).

190. *See* Tome v. United States, 513 U.S. 150, 157 (1995); United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990).

191. *See* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (describing the few circumstances where prior consistent statements are relevant to rehabilitate a witness's credibility).

192. *See infra* notes 199–200 and accompanying text.

193. *See Adams*, 63 M.J. at 696–97.

194. United States v. Thomas, ARMY 20210662, 2024 CCA LEXIS 154, at *3 (A. Ct. Crim. App. Mar. 29, 2024).

195. *See id.* at *3–5.

196. "[T]he district court did not abuse its substantial discretion in finding that the statement was inadmissible for rehabilitation purposes because the credibility of Harmon's testimony was subjected only to a 'generalized attack,' and more than this is required for admission [as a prior consistent statement]." United States v. Washington, 106 F.3d 983, 1001 (D.C. Cir. 1997).

197.

In this respect, we instruct district courts to consider the warning from the Fifth Circuit that "Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time a [witness's] credibility or memory is challenged; otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence."

United States v. Frazier, 469 F.3d 85, 89 (3d Cir. 2006) (quoting United States v. Bishop, 264 F.3d 535, 548 (5th Cir. 2001)).

198. 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B)(ii).

199. *Impeach*, BLACK'S LAW DICTIONARY 870 (12th ed. 2024).

200. Tome v. United States, 513 U.S. 150, 157 (1995).

201. United States v. Toro, 37 M.J. 313, 315 (C.M.A. 1993).

202. *See* United States v. Sullivan, 70 M.J. 110 (C.A.A.F. 2011); United States v. Jones, 49 M.J. 85 (C.A.A.F. 1998); United States v. Williams, 40 M.J. 216 (C.M.A. 1994).

203. United States v. Thomas, ARMY 20210662, 2024 CCA LEXIS 154, at *3–4 (A. Ct. Crim. App. Mar. 29, 2024).

204. *Id.* at *4 (citing United States v. Finch, 79 M.J. 389, 396 (C.A.A.F. 2020)).

205. *Id.* at *4–5.

206. *Id.* at *5.