No. _____

IN THE
Supreme Court of the United States

MATTHEW D. NORWOOD,
MACHINIST'S MATE NUCLEAR PETTY OFFICER FIRST CLASS,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER K. RIEDEL, LCDR, JAGC, USN
Counsel of Record
U.S. Navy-Marine Corps Appellate Defense Division
1254 Charles Morris St, SE
Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7292
christopher.riedel@navy.mil

QUESTIONS PRESENTED

To rehabilitate a child witness after an allegation of coaching, a trial judge admitted a video recording of the child forensic interview of the complaining witness as a prior consistent statement. The jury watched the video in open court and took the video into deliberations as an admitted prosecution exhibit.

On appeal, the Court of Appeals for the Armed Forces affirmed admission of the video recording under Military Rule of Evidence 801(d)(1)(B)(i), holding that coaching is an allegation of improper influence. The lower court's opinion endorsed not only playing the statement in open court, but also permitting the jury to retain and review the video during deliberations.

The Question Presented is:

1. Whether admission of a recorded hearsay statement as a physical exhibit, permitted to be reviewed during deliberations, is a fair application of the exclusions and exceptions to the prohibition of hearsay.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

PETITION FOR A WRIT OF CERTIORARI 2

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

I. The complaining witness, EN, accused MMN1 Norwood of abusive sexual contact a month after visiting him in Hawaii. 4

II. At trial, the military judge admitted the child forensic interview video into evidence to rehabilitate EN's credibility after the defense alleged prosecutorial coaching on cross-examination. 4

III. The court below found error in the ruling, but no prejudice because the prior consistent statement was admissible on other grounds. The majority and concurring opinion had different opinions on the risk of prejudice from improper bolstering by repetition. 5

REASONS TO GRANT REVIEW 6

I. Even if properly admitted as a prior consistent statement, the admission of the video as a prosecution exhibit allowed repeated viewing by the members, which was substantially prejudicial to MMN1 Norwood because repetition creates the illusion of truth. 6

A. This Court has noted the important considerations leading to the narrow use of prior statements as substantive evidence. 8

B. The illusory truth effect is well established by modern psychology, which exacerbates the "principal evil" of *ex parte* evidence at trial. 9

II. Without new guidance on balancing the risks of mere repetition, criminal defendants are left to the mechanical balancing of prior consistent statement factors. 11

CONCLUSION 13

APPENDIX 1a

10 U.S.C. § 836 ..... 1a

Military Rules of Evidence, Section VIII, HEARSAY ... 1a

Published Opinion of the United States Court of Appeals for the Armed Forces, Feb. 24, 2021 ..... 4a

Published Opinion of the United States Court Navy-Marine Corps Court of Criminal Appeals, Aug. 9, 2019 ..... 33a

TABLE OF AUTHORITIES

United States Constitution
U.S. CONST., amend. V. 3

Supreme Court of the United States
Crawford v. Washington,
541 U.S. 36 (2004) 7
Ortiz v. United States,
138 S. Ct. 2165 (2018) 3
Tome v United States,
513 U.S. 150 (1995) 7-8, 10-11

United States Court of Appeals for the Armed Forces
United States v. Norwood,
xx M.J. xxx, 2021 CAAF LEXIS 204 (C.A.A.F. 2021).....passim

United States Navy-Marine Corps Court of Criminal Appeals
United States v. Norwood,
79 M.J. 644 (N-M. Ct. Crim. App. 2019)..... 3

Statutes and Legislation
10 U.S.C. § 836..... 3
10 U.S.C. § 1259(3) 4

Military Rules of Evidence (2012)
MIL R. EVID. 801..... 1, 7
MIL R. EVID. 802..... 1, 7

Federal Rules of Evidence
FED R. EVID. 801 ..... 1, 7
FED R. EVID. 802 1

Other Authorities

Lisa K. Fazio, David G. Rand & Gordon Pennycook, *Repetition Increases Perceived Truth Equally for Plausible and Implausible Statements*, 26 Psychonomic Bull. & Rev. 1705 (2019) 1, 9

Alice Dechêne, Christoph Stahl, Jochim Hansen & Michaela Wänke, 14 PERS. SOC. PSYCHOL. REV. 238 (2010); Wesley G. Moons, Diane M. Mackie & Teresa Garcia-Marques, *The Impact of Repetition-Induced Familiarity on Agreement With Weak and Strong Arguments*, 96 J. PERSONALITY & SOC. PSYCHOL. 32 (2009) 1, 9-10

Kimberlee Weaver, Stephen M. Garcia, Norbert Schwarz & Dale T. Miller, *Inferring the Popularity of an Opinion From Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92 J. PERSONALITY & SOC. PSYCHOL. 821 (2007) 1

Ian Maynard Begg, Ann Anas & Suzanne Farinacci, *Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCHOL.: GEN. 446 (1992) 1

Lynn Hasher, David Goldstein &Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107 (1977) 1

INTRODUCTION

Repetition is an effective method of persuasion. Experimental psychologists have found that after hearing a statement repeated, the listener becomes more confident that the statement is true, whether or not it actually is plausible or implausible.[1]

Hearsay is not admissible unless an exception or exclusion applies.[2] A prior consistent statement is excluded from definition of hearsay when the declarant testifies and the statement is introduced to rebut an express or implied charge of improper influence.[3]

---

[1] *See, e.g.*, Lisa K. Fazio, David G. Rand & Gordon Pennycook, *Repetition Increases Perceived Truth Equally for Plausible and Implausible Statements*, 26 PSYCHONOMIC BULL. & REV. 1705 (2019); Alice Dechêne, Christoph Stahl, Jochim Hansen & Michaela Wänke, 14 PERS. SOC. PSYCHOL. REV. 238 (2010); Wesley G. Moons, Diane M. Mackie & Teresa Garcia-Marques, *The Impact of Repetition-Induced Familiarity on Agreement With Weak and Strong Arguments*, 96 J. PERSONALITY & SOC. PSYCHOL. 32, 42-44 (2009); Kimberlee Weaver, Stephen M. Garcia, Norbert Schwarz & Dale T. Miller, *Inferring the Popularity of an Opinion From Its Familiarity: A Repetitive Voice Can Sound Like a Chorus*, 92 J. PERSONALITY & SOC. PSYCHOL. 821, 832 (2007); Ian Maynard Begg, Ann Anas & Suzanne Farinacci*, Dissociation of Processes in Belief: Source Recollection, Statement Familiarity, and the Illusion of Truth*, 121 J. EXPERIMENTAL PSYCHOL.: GEN. 446, 446 (1992); Lynn Hasher, David Goldstein &Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107 (1977)

[2] MIL. R. EVID 802 (*see also*, FED. R. EVID. 802).

[3] MIL. R. EVID 801(d)(1)(B)(i) (*see also*, FED. R. EVID. 801(d)(1)(B)(i)).

But out of court statements, admitted in evidence as excluded from hearsay or an exception to hearsay rule, create a risk of improper bolstering by repetition. Despite the legitimate purpose to rebut cross-examination or rehabilitate the witness, modern psychology demonstrates that the form and presentation of repetitive statements can overwhelm listeners' judgments of reliability. By substituting mere repetition for reliability, the hearsay statements are not rebutting the charge of improper influence, but instead improperly bolstering the witness.

This Court should provide appropriate guidance on the balancing of legitimate admissions of hearsay evidence with the real dangers of improper bolstering. By setting reasonable limits on form of admission, the rules of evidence will continue to permit reasonable admission, while limiting risks of mere repetition overwhelming the finder of fact.

PETITION FOR A WRIT OF CERTIORARI

Machinist's Mate Nuclear First Class Petty Officer Matthew D. Norwood, United States Navy, respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Armed Forces (CAAF) appears at pages 4a through 32a of the appendix to this petition. It is pending Military Justice Reporter numbering, and is currently available at 2021 CAAF LEXIS 204 or 2021 WL 786088. The published

opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) appears at 33a through 71a of the appendix. It is available at 79 M.J. 644.

JURISDICTION

The United States Court of Appeals for the Armed Forces issued its decision on February 24, 2020. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).[4]

CONSTITUTIONAL PROVISION INVOLVED

The military judge's erroneous admission of this evidence deprived MMN1 Norwood of the protections of due process.[5]

STATUTES INVOLVED

10 U.S.C. § 836 – authority of President to prescribe rules for courts-martial
Military Rule of Evidence 801
Military Rule of Evidence 802
Appear at pages 1a through 3a of the appendix to this petition.

---

[4] *See also Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018) ("[T]his Court has jurisdiction to review decisions of the CAAF, even though it is not an Article III court.").
[5] U.S. CONST. amend V.

STATEMENT OF THE CASE

I. The complaining witness, EN, accused MMN1 Norwood of abusive sexual contact a month after visiting him in Hawaii.

In 2015, MMN1 Norwood arranged for his niece, EN, and his nephew to visit him while he was stationed in Hawaii.[6] His niece and nephew stayed for a week over their school winter break and returned home on January 4, 2016.[7] A month later, EN told a friend that her uncle touched her inappropriately.[8]

The local police opened an investigation and arranged a child forensic interview for EN, who was fifteen years old at the time.[9] A video recording was made of the interview.[10]

II. At trial, the military judge admitted the child forensic interview video into evidence to rehabilitate EN's credibility after the defense alleged prosecutorial coaching on cross-examination.

The defense theory was that EN fabricated the allegation in February 2016.[11] On cross-examination, trial defense counsel asked EN about her preparations with the government to testify.[12] The government

---

[6] R. at 287.
[7] R. at 296.
[8] R. at 297.
[9] R. at 314.
[10] R. at 314.
[11] R. at 285.
[12] R. at 302.

moved to admit the child forensic interview as a prior consistent statement.[13]

The military judge ruled that trial defense counsel implied the government coached EN's testimony.[14] The military judge admitted the video to "rehabilitate this witness" under MRE 801(d)(1)(B)(ii) from an attack on another ground.[15] The military judge permitted the entire substantive portion of the video to be shown in open court and admitted it as a prosecution exhibit for the members to review in deliberations.[16]

III. The court below found error in the ruling, but no prejudice because the prior consistent statement was admissible on other grounds. The majority and concurring opinion had different opinions on the risk of prejudice from improper bolstering by repetition.

On appeal, the Court of Appeals for the Armed Forces (CAAF) agreed the defense counsel implied prosecutorial coaching.[17] But the lower court found the military judge admitted the video under the wrong

---

[13] R. at 339.
[14] R. at 345.
[15] R. at 346.
[16] R. at 354. The military judge excluded the initial rapport building phase and an extended period of silence when the forensic interviewer left the room.
[17] *United States v. Norwood*, xx M.J. xxx, 2021 CAAF LEXIS 204, 9* (C.A.A.F. 2021) (all five judges agreed the proper clause was MRE 801(d)(1)(B)(ii); Judge Sparks dissented on the separate issue of improper argument by the government.).

clause of M.R.E. 801(d)(1)(B).[18] The CAAF found that the coaching was a "recent improper influence," therefore, the video was admissible under clause (i), not clause (ii).[19] The lower court affirmed admission of the entire substantive portion because "[t]he coaching claim was an attack on EN's entire testimony."[20]

In his concurring opinion, Judge Ohlson emphasized the "very close question" in ruling on admissibility of the entire substantive portion of the video.[21] He noted that "a fundamental evil to be avoided in situations such as this one is the 'impermissible bolstering' of the witness."[22] And also noted "repetition can be confused with reliability."[23] While he ultimately agreed the "military judge *did not abuse his discretion*,"[24] he cautioned military judges to be mindful of the peril in admitting prior consistent statements "*in its entirety*."[25]

REASONS TO GRANT REVIEW

I. Even if properly admitted as a prior consistent statement, the admission of the video as a prosecution exhibit allowed repeated viewing by the members, which was substantially prejudicial to MMN1

---

[18] *Id*. at 10*.
[19] *Id*.
[20] *Id*. at 10-11*.
[21] *Id*. at 28*.
[22] *Id*. at 27*.
[23] *Id*.
[24] *Id*. at 29* (emphasis in original).
[25] *Id*. at 28-29* (emphasis in original).

Norwood because repetition creates the illusion of truth.

The Sixth Amendment is concerned with testimonial hearsay.[26] "The principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[27]

Examinations by the police are testimonial hearsay.[28] And while modern hearsay rules may allow some *ex parte* examinations to be admitted, "the Framers certainly would not have condoned them."[29]

Hearsay is not admissible, absent an exception or exclusion from the rule.[30] In the Federal Rules of Evidence, Congress adopted a narrow exclusion from hearsay for prior consistent statements of a witness.[31] The President then enacted an identical narrow exclusion in the Military Rules of Evidence.[32]

"[A]ny prior statement by a witness concerning the disputed issues at trial would have some relevance in assessing the accuracy or truthfulness of the witness's in-court testimony."[33] But the rule requires

---

[26] *Crawford v. Washington*, 541 U.S. 36, 50 (2004).
[27] *Id.*
[28] *Id*.
[29] *Id*.
[30] Mil. R. Evid. 802.
[31] Fed. R. Evid. 801(d)(1)(B).
[32] Mil. R. Evid. 801(d)(1)(B).
[33] *Tome v. United States*, 513 U.S. 150, 159 (1995).

rebutting an alleged improper influence, "not bolstering the veracity of the story told."[34]

A. This Court has noted the important considerations leading to the narrow use of prior statements as substantive evidence.

In *Tome*, the facts illustrated how bolstering the complaining witness with prior consistent statements is concerning, especially in criminal trials.[35] In response to a weak charge that the child victim fabricated the allegation of abuse, the "Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount [the child's] out-of-court statements."[36] But while the prior consistent statements might have been probative of what occurred, they shed minimal light rebutting the alleged motive to fabricate.[37]

As in *Tome*, admission of the child forensic interview video here relied on the narrow exclusion from hearsay of prior consistent statements. But like *Tome*, the admission of the entire substantive video did little to address the alleged improper influence. As Judge Ohlson stated in his concurrence, the government redirect may have adequately addressed the alleged improper motive.[38] Therefore, the excessive admission of the entire substantive portion resulted in substantial prejudice to MMN1 Norwood

---

[34] *Id*. at 158.
[35] *Id*. at 165.
[36] *Id*.
[37] *Id*.
[38] *Norwood*, 2021 CAAF LEXIS 204, at 27-28*.

by merely bolstering the veracity of the complaining witness's story.

This does not directly implicate the Confrontation Clause because EN testified and was subject to cross-examination. But it is the modern danger regarding substantial the "principal evil" of allowing *ex parte* interrogations by the government as evidence in criminal prosecutions.

B. The illusory truth effect is well established by modern psychology, which exacerbates the "principal evil" of *ex parte* evidence at trial.

"Over three decades of research indicate that repeated statements are more likely to be judged true than novel statements."[39] The illusory truth effect has been observed under many conditions.[40] Repetition of statements can cause the effect regardless of mode (audio or written) or time between the repetitions.[41] It occurs equally for actually true and actually false statements.[42] It even occurs for both plausible and implausible statements.[43]

The illusory truth effect is robust. The only constraint appears to be that the listener must be uncertain about the statement's truthfulness.[44] If a listener had prior knowledge to rely upon, then they

---

[39] Fazio, *supra* n. 1, at 1710 (citing Dechêne, *supra* n. 1).
[40] Dechêne, *supra* n. 1, at 252.
[41] *Id*.
[42] *Id*.
[43] Fazio, *supra* n. 1, at 1710.
[44] Dechêne, *supra* n. 1, at 253.

are not likely to substitute fluency, or repetition, for that knowledge.[45] Thus, a criminal charge based solely on the word of the victim creates the perfect conditions for the illusory truth effect to take hold.

Here, the government's case was centered on the accusation of the complaining witness. As is typical in child abuse cases, there was no other eye witness.[46] There was no forensic evidence, no confession, and no other direct evidence. The case was fundamentally limited to "she said" because MMN1 Norwood declined to make any statements to investigators.

Therefore, the members were presented with allegations of perfect "uncertainty" because they had no prior knowledge or outside information with which to judge if the conduct actually occurred. Their judgment of EN's credibility was paramount in determining MMN1 Norwood's guilt. And the crucible of in-court testimony and cross-examination is the system by which her credibility should have been tested and a judgment rendered.

However, by admitting the entire substantive portion of the child forensic interview, the military judge placed an invisible thumb on the scale of judgment. The insertion of repetition, without any counterbalancing "knowledge" source, was likely push the members' judgment based on familiarity of hearing EN's allegations repeated, not an assessment of the plausibility or implausibility.

---

[45] *Id*.
[46] *See Tome*, 513 U.S. at 166.

II. Without new guidance on balancing the risks of mere repetition, criminal defendants are left to the mechanical balancing of prior consistent statement factors.

In *Tome*, this court reemphasized that a prior consistent statement must precede the date of a particular fabrication, influence, or motive.[47] But further guidance is necessary regarding the method of presentation. Thus creating a balance between the government's need to rebut an allegation of recent fabrication, improper influence, or motive, and the scientifically proven risk that repetition will trigger the illusory truth effect.

Here, once the military judge ruled determined that the defense had alleged coaching and admitted the child forensic video interview, he deferred to the government on presentation method. Permitting the government to play the video in open court and allowing the video as a prosecution exhibit for review in the members' deliberations. There were no limits on the number of times the members could repeat EN's allegations.

But there could have been a better balancing of the risks of repetition and the reasonable opportunity to rebut the defense. In his concurrence, Judge Ohlson proposed that the redirect examination of EN may have been enough to rebut the allegation of improper

---

[47] *Tome*, 513 U.S. at 166.

influence.[48] But still found the military judge "*did not abuse his discretion*."[49]

Limiting the government to mere redirect ignores the clear language in MRE 801(d)(1)(B)(i) that the prior consistent statements are admissible. Instead, the additional assessment of the method of presentation balances the admission of prior consistent statements with the risks of repetition's improper influence on human psychology. Creating a step-by-step process:

> (1) Has defense alleged a recent fabrication, improper influence, or motive?
> (2) Does the prior consistent statement precede the date of fabrication, improper influence, or motive?
> (3) What method of presentation rebuts the allegation without creating undue risk of mere repetition?

For example, the military judge could have limited the video of EN's prior consistent statement to a single viewing in open court. Allowing EN's own statements to rebut the allegation of coaching, but limiting it to a single repetition. Whereas admitting the video or transcript as an exhibit would substantially increase the risk of repetition overwhelming the assessment.

---

[48] *Norwood*, 2021 CAAF LEXIS 204, at 27-28*.
[49] *Id*. at 29* (emphasis in original).

By formalizing assessment of the method of presentation, this Court will provide necessary guidance for modern application of the hearsay rules in light of the substantial scientific evidence on how humans assess "uncertain" statements. Ensuring the trial courts make reasonable efforts to limit the illusory truth effect will ensure that all criminal defendants continue to be fairly judged by their peers, instead of convicted by uncontrolled psychological tricks.

CONCLUSION

Accordingly, MMN1 Norwood respectfully asking this Court to grant his petition for certiorari.

Respectfully submitted,

Chris Riedel LCDR, JAGC, USN

CHRISTOPHER K. RIEDEL, LCDR, JAGC, USN
U.S. Navy-Marine Corps Appellate Defense Division
1254 Charles Morris St, SE Bldg. 58, Suite 100
Washington Navy Yard, D.C. 20374
(202) 685-7292
christopher.riedel@navy.mil