IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re:	)	**PETITION FOR EXTRAORDINARY**
RALPH J. HYPPOLITE, II,	)	**RELIEF IN THE FORM OF A WRIT**
Petitioner	)	**OF HABEAS CORPUS**
	)	
v.	)	
	)	Before Panel No.
	)	
UNITED STATES,	)	Misc. No. ACM
Respondent.	)	
	)	USCA Dkt. Nos. 19-0119 & 19-0197
	)	
	)	4 March 2021

TO THE HONORABLE, JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

WILLIAM E. CASSARA, Esq.
[redacted]

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Ralph J. Hyppolite II, is unlawfully detained due to a general court-martial conviction and sentence, and requests, pursuant to Rule 19 of this Honorable Court's Rules of Practice and Procedure, dated 23 December 2020, that this Court issue a writ of habeas corpus, vacate the findings and sentence approved by the convening authority, order his immediate release from confinement, and restore all rights, property, and privileges to Petitioner. Finally, pursuant to Rule 19(b)(2)(I) of this Court's Rules of Practice and Procedure, Petitioner requests the appointment of appellate counsel under Article 70, UCMJ, 10 U.S.C. § 870.

STATEMENT OF THE CASE

On 28 March, 5 May, and 5-8 June 2017, Petitioner was tried at Kadena Air Base, Japan, before a military judge sitting as a general court-martial. Contrary to his pleas, Petitioner was convicted of abusive sexual contact (three specifications) and sexual assault, in violation of Article 120 of the Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. § 920.[1] On 17 October 2017, the convening authority approved the adjudged sentence of reduction to airman basic, total forfeitures of pay and allowances, confinement for seven years, and a dishonorable discharge. (Action).

Pursuant to Article 66, UCMJ, 10 U.S.C. § 866, Petitioner appealed his conviction to this Court. He raised three issues. First, Petitioner argued that the military judge erred in denying Petitioner's motion to dismiss Specifications 1 and 5 of The Charge where the Staff Judge Advocate advised the convening authority that the specifications were warranted by the evidence despite the preliminary hearing officer's finding that there was no probable cause for those

[1] The military judge acquitted appellant of abusive sexual contact of [redacted] SAK in Specification 2 of The Charge. (Promulgating Order).

offenses. Second, Petitioner argued that the evidence was legally and factually insufficient to support the findings of guilty for the abusive sexual contact and sexual assault of [redacted] JD in Specifications 4 and 5 of The Charge. Third, Petitioner argued that the military judges erred in allowing the Government to introduce the charged offenses as evidence of a scheme against the other charged offenses under Mil. R. Evid. 404(b). Finally, Petitioner personally raised two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

This Court issued its decision on October 25, 2018. *United States v. Hyppolite*, ACM 39358, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. 25 October 2018) (unpublished) (Appendix A). This Court set aside and dismissed with prejudice the finding of guilty for abusive sexual contact of [redacted] RW in Specification 1. *Id*. at *45.

This Court unanimously found that the military judges erred in ruling that evidence of a common plan or scheme under Mil. R. Evid. 404(b) was relevant and probative for all specifications. *Id*. at *3. This Court determined that there was no common plan or scheme because in Specifications 1-3, Petitioner acted secretively while his friends slept but that in Specifications 4-5, Petitioner initiated sexual contact with [redacted] JD while [redacted] JD was awake and aware of Petitioner's presence and Petitioner communicated his desire to engage in sexual activity with [redacted] JD. *Id*. at *20-21.

While this Court unanimously agreed that the military judges erred in admitting the evidence, the panel split regarding the harmlessness of the error. The majority determined that the military judge's error was harmless after applying the factors in *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). *Id*. at *37. Judge Huygen dissented from both the harmlessness of the military judge's error and the factual sufficiency of Petitioner's conviction for sexual assault in Specification 5. *Id*. at *46.

This Court affirmed the remaining convictions and reassessed the sentence to reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for six years, and a dishonorable discharge. *Id*. at *45-46.

On 20 December 2018, Petitioner petitioned the Court of Appeals for the Armed Forces [CAAF] for a grant of review of three issues: whether the military judge erred in denying Petitioner's motion to dismiss Specification 5 where the Staff Judge Advocate improperly advised the convening authority that the specification was warranted by the evidence despite the preliminary hearing officer's determination of no probable cause; whether the evidence was legally sufficient to support the findings of guilty for abusive sexual contact in Specification 4 and of sexual assault in Specification 5; and whether the military judges' erroneous admission of evidence regarding Specifications 1-3 as a common plan or scheme for Specifications 4-5 was harmless.

On 29 January 2019, the CAAF granted review of the third issue. *United States v. Hyppolite*, 2019 CAAF LEXIS 49 (C.A.A.F. 29 January 2019) (order) (Appendix B).

On 28 February 2019, the Government filed a certificate of review pursuant to 10 U.S.C. § 867(a)(2). In the certificate of review, the Air Force Judge Advocate General [hereinafter JAG] requested that the CAAF consider whether this Court erred when it found that the military judge abused his discretion by ruling that the evidence regarding Specifications 1-3 could be considered as evidence of a common plan or scheme for Specifications 4-5.

On 5 March 2019, Petitioner moved to dismiss the cross-appeal because a) it violated the Air Force Judiciary's unwritten policy that the appellate defense counsel are to be afforded an opportunity to provide input to the JAG prior to the filing of a certificate of review and b) because the CAAF lacked jurisdiction where the Government failed to comply with the statutory

requirement in 10 U.S.C. § 867(a)(2) that the JAG provide notice to the other services' JAGs prior to ordering that an issue be sent to this Court for review. The CAAF denied the motion on April 25, 2019. *United States v. Hyppolite*, 2019 CAAF LEXIS 305 (C.A.A.F. 25 April 2019) (order) (Appendix C).

On 1 August 2019, a divided CAAF answered the certified issue in the affirmative but did not answer the granted issue. *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019). (Appendix D). The CAAF concluded that the military judges did not abuse their discretion in deciding that Petitioner had a common plan to take advantage of his sleeping friends even though it turned out that [redacted] JD was not asleep when Petitioner began the assault. *Id*. at 167. The CAAF also concluded that the military judges did not abuse their discretion in deciding that the common plan and scheme evidence was intent evidence because mistake of fact was the only issue in controversy. *Id*. In reaching these conclusions, the CAAF decided that it had no need to consider the prejudicial effect of the military judges' rulings. *Id*. at 162, 167. The CAAF affirmed the findings and sentence as approved by the Air Force Court. *Id*. at 167.

Judge Ohlson dissented. He concluded that the Air Force Court correctly decided that the trial judges abused their discretion and that the charged conduct in Specifications 1-3 served as nothing more than impermissible propensity evidence for Specifications 4-5 under *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), which prohibits the admission of charged conduct to be used as propensity evidence against other charged conduct. *Id*. Judge Ohlson analyzed the prejudicial effect of the military judges' error as a constitutional error pursuant to *Hills* and concluded that the Government could not demonstrate that there was no reasonable possibility that the military judges' error contributed to the guilty verdict. *Id*. at 168. Accordingly, he would have answered the certified issue in the negative by holding that the military judges' Mil.

R. Evid. 404(b) ruling constituted an abuse of discretion. *Id*. He would have answered the granted issue in the affirmative by holding that Petitioner was prejudiced by this error. *Id*.

Petitioner is presently confined at Naval Consolidated Brig, Marine Corps Air Station Miramar [NAVCONBRIG Miramar] and his minimum release date is December 2021. Petitioner avers that no other action involving these issues is pending in this or any other court of competent jurisdiction.

JURISDICTION

"The All Writs Act, 28 U.S.C. § 1651(a), grants this court authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction. *In re Neis*, Misc. Dkt. No. 2019-02, 2020 CCA LEXIS 66 (A.F. Ct. Crim. App. 27 February 2020) (quoting *United States v. Chapman*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016) (citing *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005) (citation omitted)). The Act does not enlarge this Court's jurisdiction and the writ must be in aid of this Court's existing statutory jurisdiction. *Id*. (citing *Clinton v. Goldsmith,* 526 U.S. 529, 534-35 (1999)). "The 'essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.'" *Neis*, 2020 CCA LEXIS 66 at *2 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). The writ of habeas corpus is the "'traditional remedy for unlawful imprisonment.'" *Id*. (quoting *Waller v. Swift*, 30 M.J. 139, 142 (C.M.A. 1990) (citations omitted)).

In *Cheney v. U.S. Dist. Ct. for D.C*., the Supreme Court held that a petitioner must satisfy three conditions before a court provides extraordinary relief: (1) the petitioner must show that the "right to issuance of the writ is clear and indisputable;" (2) the petitioner must have "no other adequate means to attain the relief;" and (3) "even if the first two prerequisites have been met,

the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." 542 U.S. 367, 380-81 (2004) (quotation marks omitted).

Petitioner has satisfied the three conditions for this Court to grant extraordinary relief. First, the right to issuance of the writ is clear and indisputable. The acts in Specifications 1-3 were not almost identical to the acts in Specifications 4-5, such that the military judges abused their discretion in admitting the evidence of other acts to prove Petitioner's common plan or scheme, and the CAAF erred in failing to adhere to its own precedent that evidence of other acts must be almost identical to the charged acts. The CAAF also erred in finding that the evidence was proof of Petitioner's intent when that theory was not presented at trial or on appeal to this Court. Because the evidence was inadmissible for a proper purpose, it amounted to propensity evidence in sheep's clothing and the Government cannot prove that the erroneous admission was harmless beyond a reasonable doubt.

Next, Petitioner has no other adequate means to attain the relief. He is confined at NAVCONBRIG Miramar and not in a civilian confinement facility. The CAAF erred in answering the certified question in the affirmative. Moreover, the CAAF did not address the granted issue, such that this issue did not receive full and fair consideration. Only this Court can address the granted issue in Petitioner's favor and grant Petitioner the relief requested.

Finally, this Court may be satisfied that the writ is appropriate under these circumstances, to wit: that the CAAF failed to adhere to its own precedents and deprived Petitioner of the due process of law guaranteed by the Fifth Amendment. Accordingly, this Court is compelled to grant the Petition for Extraordinary Relief in the form of a Writ of Habeas Corpus.

STATEMENT OF FACTS

Following tech school, Petitioner, [redacted] RW, [redacted] SAK, and Mr. STK[2] were assigned to Seymour Johnson Air Force Base [AFB], North Carolina. (R. at 219). This group of friends, except for STK, lived together in an off-base house until Petitioner transferred to Kadena Air Base in 2014. (R. at 220, 241, Pros. Ex. 4).

Evidence of Abusive Sexual Contact of [redacted] RW in Specification 1

In August 2012, Petitioner and [redacted] RW were on a temporary duty assignment at Mountain Home AFB, Idaho. (R. at 221). After a night of drinking with friends, Petitioner and [redacted] RW returned to their adjacent rooms. (R. at 225-26, 254). [redacted] RW fell asleep and soon woke from a "very oddly realistic" dream that he was having sex with a woman. (R. at 227-28, 255). His penis was partly exposed but still tucked under the waistband of his underwear. (R. at 229, 258, 265). He sensed movement at the end of the bed and followed the unknown assailant into the hallway. (R. at 228, 229, 236, 256). [redacted] RW saw Petitioner, clad in his underwear, enter the room next door. (R. at 229-30, 257-58).

The military judge convicted Petitioner of abusive sexual contact of [redacted] RW in Specification 1, however, this Court found this conviction factually insufficient because there was reasonable doubt about whether Petitioner had touched [redacted] RW—much less made sexual contact with his penis—while [redacted] RW slept. *Hyppolite*, 2018 CCA LEXIS 517 at *25.

[2] By the time of Petitioner's court-martial, [redacted] STK had separated from the Air Force, but for the sake of consistency with the Charge Sheet, all references to him throughout this petition are without his rank.

Evidence of Abusive Sexual Contact of [redacted] SAK in Specification 2

One night in October 2013, Petitioner and [redacted] SAK returned to their house after a night of drinking. (R. at 337-38). [redacted] SAK fell asleep on the couch. (R. at 339-42). When he woke the next morning, his zipper was undone and his genitalia was exposed through his underwear's opening. (R. at 342-43).

The military judge acquitted Petitioner of abusive sexual contact of [redacted] SAK in Specification 2. (Promulgating Order).

Evidence of Abusive Sexual Contact of STK in Specification 3

After a night shift sometime between December 2013 and March 2014, Petitioner and STK returned to Petitioner's house. (R. at 283-84, 286, 309, 310). Between 0300 and 0400, STK fell asleep in his uniform on the living room couch. (R. at 287, 294). Less than ten minutes later, he woke to see Petitioner's hand reach over the back of the couch to touch his penis over his pants. (R. at 287-88, 289, 311). He swatted Petitioner's hand away several times. (R. at 290, 293, 311, 312). Petitioner ran to his bedroom. (R. at 290, 292, 313).

The military judge convicted Petitioner of abusive sexual contact of STK in Specification 3. (Promulgating Order).

The "Intervention"

Sometime in early 2014, [redacted] RW, [redacted] SAK, and STK discussed what they called their "similar" stories with Petitioner. (R. at 244-45, 344-45). They conducted an "intervention" with Petitioner in which [redacted] RW told him, "We know what you've been doing to us while we're passed out sleeping," or words to that effect. (R. at 247, 267, 297-98, 300, 345). Petitioner seemed nervous and replied, "I know it's a problem. It's something I do when I drink," or words to that effect. (R. at 248, 299, 301, 346, 353). The group threatened to report Petitioner if a

similar incident occurred. (R. at 249, 300, 316). Petitioner moved out of the house several months later. (R. at 249, 250, 304, 317).

Evidence of Abusive Sexual Contact of [redacted] JD in Specification 4

In August 2014, [redacted] JD attended a party at Petitioner's house. (R. at 367, 418-19). [redacted] JD felt more intoxicated than he had ever been. (R. at 369, 370, 423). He told Petitioner that he was really drunk and did not know where he should sleep. Petitioner offered his own bed to [redacted] JD. (R. at 370, 428).

[redacted] JD quickly fell asleep and woke some unknown time later to the sound of Petitioner entering the bedroom and getting into bed. (R. at 373-74, 408, 411, 429). He did not want to kick Petitioner out of his own bed and he knew that the bed was big enough for two people, so [redacted] JD did not say anything. (R. at 374).

Petitioner turned toward [redacted] JD, who lay face-up on the bed, and asked if he had ever considered experimenting with guys. (R. at 375, 409). [redacted] JD said "no" and said he wanted to sleep. (R. at 375, 409). Petitioner asked again several times and massaged [redacted] JD's penis over his pants with his hand. (R. at 375-76, 409, 412, 445). [redacted] JD did not verbally or physically resist, nor did he manifest a lack of consent. (R. at 376, 409-11, 467).

The military judge convicted Petitioner of abusive sexual contact of [redacted] JD in Specification 4. (Promulgating Order).

Evidence of Sexual Assault of [redacted] JD in Specification 5

[redacted] JD had zero recollection of how much time passed or what had transpired after Petitioner touched his genitalia. He testified, "[t]he next thing I remember is, being naked and kind of in an inverted position where my feet are now towards the head of the bed and my head is positioned over his groin and his penis is going into and out of [my] mouth." (R. at 377, 412,

445-46). Though he did not remember whether he kneeled or lay over Petitioner's crotch, [redacted] JD remembering holding his own head up. (R. at 452). [redacted]JD did not physically or verbally manifest a lack of consent; indeed, he testified that he did not tell Petitioner to stop, nor did he physically resist or attempt to leave. (R. at 379, 450-51).

[redacted] JD testified that Petitioner moved him into a "chest-to-chest position where I was over the top of him." (R. at 380-82). Petitioner penetrated [redacted]JD's anus. [redacted] JD scrunched up his face and Petitioner stopped, rolled away, and masturbated. (R. at 384, 455, 464, 472). [redacted] JD fell asleep in Petitioner's bed. (R. at 385, 454, 464, 465). He woke, found his clothes next to the bed, dressed, and lay on the family room couch for approximately two hours even though his anus hurt and he felt nauseated. (R. at 385-87, 388, 433, 432-35, 465, 470). After Petitioner and his roommate left the house, [redacted]JD drove to his dorm room. (R. at 387-88, 436, 492). He felt concerned that he had sent Petitioner mixed signals the previous night. (R. at 421, 468).

[redacted]JD told his girlfriend about the alleged incident that morning. (R. at 388, 438, 474). On 20 September 2014, Petitioner messaged [redacted]JD. (R. at 393, 395). He said, "I just want you to know that yes I do take full responsibility for what happened that night. We were drunk and one thing lead [sic] to another. If I could take that night back I definitely would." (R. at 393-94, 441, Pros. Ex. 4). [redacted]JD did not report the alleged incident until May 2016 when he arrived at Kadena AFB and reported to his unit, to which Petitioner was also assigned. (R. at 388, 390-92, 447).

The military judge convicted Petitioner of sexual assault of [redacted]JD in Specification 5. (Promulgating Order).

The Military Judge's Mil. R. Evid. 404(b) Ruling

Before trial, the parties litigated the defense motion to sever Specifications 1-3 from Specifications 4-5. (App. Ex. I). The Government argued that the offenses could be used under Mil. R. Evid. 404(b) as evidence of a pattern or common plan of engaging in sexual conduct with friends after they had been drinking alcohol and were asleep or trying to fall asleep. (App. Ex. II).

To decide the severance motion, the military judge applied the three-part test in *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989) and determined that the evidence of each offense alleged in Specifications 1-3 was evidence of a common plan or scheme under Mil. R. Evid. 404(b) for the offenses alleged in Specifications 4-5 and vice versa.[3] (App. Ex. VI). In *Reynolds*, the Court of Military Appeals established a three-part test to determine the admissibility of evidence under Mil. R. Evid. 404(b): 1) Does the evidence reasonably support a finding by the factfinder that Petitioner committed other crimes, wrongs, or acts?; 2) Does the evidence of the other act made a fact of consequence to the instant offense more or less probable?; and 3) Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? *Id*. at 109. Finally, the evidence is inadmissible if it fails to meet any of these three standards. *Id*.

The military judge found that the evidence satisfied all three prongs. (App. Ex. VI). Regarding the second prong, the military judge stated that the evidence could be used to show a common plan. *Id*. He explained:

> In this case, the common factors were the relationship of the alleged victims to the accused (friends), the circumstances surrounding the

[3] A change in military judge occurred between the pretrial Article 39(a) sessions and the trial. (R. at 134).

> alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep), and the nature of the misconduct (touching the alleged victims' genitalia). The nature of the misconduct alleged in specification 5 is different than the other allegations but is alleged to have occurred in connection with the alleged touching of [redacted] [JD]'s genitalia. This court finds that each specification is relevant and probative as to the other specifications regarding the accused's common plan to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep.

Id.

During an Article 39(a), UCMJ, session to discuss instructions on findings, Petitioner's defense counsel [DC] asked the second military judge to reconsider the first military judge's ruling on Mil. R. Evid. 404(b) evidence. (R. at 526). The trial counsel [TC] opposed the DC's request and maintained that the charged acts were evidence of a common scheme or plan. (R. at 528). The military judge declined to disturb the previous judge's ruling because of "finality of rulings" but stated that, for purposes of Mil. R. Evid. 404(b), he would consider the evidence for a scheme instead of a common plan. (R. at 529).

This Court's Decision

This Court found that the military judge abused his discretion in concluding that the evidence of sexual contact in Specifications 1-3 made more probable a fact of consequence for Specifications 4-5 and vice versa. *Hyppolite*, 2018 CCA LEXIS 517 at *20-21. This court explained:

> In Specifications 1-3, Appellant acted secretively while his friends slept, whereas, in Specifications 4 and 5, Appellant initiated sexual contact with [redacted] JD while [redacted] JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with [redacted] JD. The common factors between Specifications 1-3 and Specifications 4-5 were that Appellant attempted sexual activity with a male Airman after the Airman had been drinking and lain down to sleep. Considering that

> Appellant lived in a house with several male Airmen and regularly socialized and drank alcohol with these and other male Airmen, we find the acts charged in Specifications 1-3 and the acts charged in Specifications 4-5 shared some common factors but were insufficiently similar to prove a common plan or scheme.

Id.

In a footnote, this Court addressed the Government's argument that "'each specification involved Appellant taking advantage of his friends when they were asleep or almost asleep after drinking alcohol.'" *Id*. at n.9. The court explained:

> Indeed, there is commonality in relationship (Airmen who were assigned to the same unit and sometimes worked together), ages of victims (young adult males), circumstances of the acts (nighttime sexual activity after drinking alcohol and sleeping or falling asleep in the same general location as Appellant), and the sexual nature of the acts. However, we caution that many incidents share these common factors but do not result in sexual abuse or assault. And, on these facts, we cannot conclude that the factors were sufficiently distinctive to establish a common plan or scheme under Mil. R. Evid. 404(b) and Mil. R. Evid. 403—particularly when the charged acts were themselves infrequent and the "common" factors were enduring (e.g. friendship) and recurring (e.g. drinking alcohol) over a prolonged period of time (e.g. as long as two years).

Id.

After concluding that the military judge's application of the second *Reynolds* prong to the evidence of each of the five specifications as a plan or scheme common to all five specifications was clearly unreasonable and a clear abuse of discretion, this Court tested the error for prejudice under *Harrow*, 65 M.J. 190, and determined that the error in admitting evidence of sexual conduct for Specifications 1-3 to prove Specifications 4-5 was harmless because it did not have a

substantial influence on the findings or materially prejudice Petitioner's rights.[4] *Id*. at *37. This Court explained:

> As to Specifications 4 and 5, we conclude the erroneous ruling did not have a substantial influence on Appellant's convictions of these offenses. The testimony of [redacted] JD established convincing proof of all the elements of the abusive sexual contact and sexual assault offenses involving [redacted] JD. The Government's case was also supported by Appellant's admission taking "full responsibility" for what happened. The Defense largely conceded that Appellant engaged in sexual conduct with [redacted] JD but sought to show that either [redacted] JD consented or that Appellant labored under an honest and reasonable mistake of fact a to consent. The cross-examination of [redacted] JD challenged his claim of lack of consent and tried to bolster Appellant's mistake of fact as to consent. Because the critical issue was not whether Appellant engaged in the charged acts or, for Specification 4, whether Appellant intended to gratify his sexual desire, the erroneous admission of plan or scheme evidence of Specifications 1-3 was not dispositive for the findings on Specifications 4-5. With respect to the materiality and quality of the evidence of acts underlying Specifications 1-3, they, again, were dissimilar, even if the military judge erred in finding a common plan or scheme, and thus not logically material to the Government's proof on Specifications 4-5. The evidence of Appellant's intent to gratify his sexual desire underlying Specifications 1-3 was of little consequence to litigation of consent and mistake of fact in Specifications 4-5.

Id. at *37-38.

Judge Huygen concurred with the majority that the military judges abused their discretion in admitting the evidence of Specifications 1-3 as evidence of a common plan or scheme for Specifications 4-5 under Mil. R. Evid. 404(b). *Id*. at *46 (Huygen, J., concurring). He dissented from the majority's conclusion that the error was harmless for Specification 5. He wrote:

[4] Because this Court found the evidence factually insufficient in Specification 1 and because the military judge acquitted Petitioner in Specification 2, it tested the prejudice of the erroneous admission of the evidence in Specifications 4-5 only for Specification 3. *Hyppolite*, 2018 CCA LEXIS 517 at n.14.

> Considering the four factors of *Harrow*, I find the Government's case for Specification 5 had a glaring weakness: [redacted] JD had no memory of the period of time during which he went from being clothed to being naked, from having his head at the head of the bed to having his feet there, or from lying on his back to facing downward and holding his head over Appellant's groin while Appellant's lotion-coated penis first moved in and out of his mouth. The Defense's case was strong in that [redacted] JD did not remember Appellant holding [redacted] JD's head during the oral penetration or restraining him during the anal penetration. But [redacted] JD did remember that he did nothing to resist, verbally or physically, the oral penetration. Appellant's re-positioning of his body, or the anal penetration and that, as soon as he winced and may have made a "vocal expression of pain," Appellant stopped the anal penetration. At that point, not only did Appellant stop and roll [redacted] JD or allow [redacted] JD to roll off of Appellant, but he acknowledged [redacted] JD's reaction to the anal penetration and said he would "just finish the rest" himself.
>
> Considering the third and fourth *Harrow* factors, I find the evidence of Specifications 1-3 immaterial and of low quality as evidence of Specification 5. This finding is premised on the charging theory the Government chose for Specification 5, which was charged as bodily harm, or the alleged act being nonconsensual, and not as the alleged victim being asleep or unaware, which was the Government's charging theory of Specifications 1-3. But I note that the difference is one of charging and not of key fact. The evidence was that [redacted] JD, the alleged victim in Specification 5, remembered nothing between the ongoing sexual contact and the ongoing oral penetration and thus was arguably unaware at the time the sexual assault began, as the alleged victims of Specifications 1-3 were asleep or unaware at the time the sexual contact began. Despite the obvious difference in charging theories, the military judge found a common plan or scheme between Specifications 1-3 and Specification 5, and that finding leads me to conclude the evidence of Specifications 1-3 substantially influenced the judge's verdict on Specification 5. Thus, the judge's error to admit, for a Mil. R. Evid. 404(b) purpose, the evidence of Specifications 1-3 was not harmless.

Id. at *49-50 (Huygen, J., dissenting).

The CAAF's Decision

The CAAF held that the military judges did not err in applying the law to the facts to conclude that the evidence of Specifications 1-3 could be used as evidence of a common plan or scheme for Specifications 1-5 and that the trial judge did not abuse his discretion in considering evidence of a common plan or scheme in assessing Petitioner's knowledge and intent. *Hyppolite*, 79 M.J. at 166.

As an initial matter, the CAAF rejected Petitioner's argument that the true nature of the Mil. R. Evid. 404(b) evidence was propensity evidence, in violation of Mil. R. Evid. 413 and *Hills*. The CAAF stated:

> We disagree with Appellant's argument because we see nothing in the record to support his position. As described above, trial defense counsel reminded the trial judge of the prohibition against propensity evidence during arguments on findings. Trial counsel agreed with this prohibition and insisted that the Government was arguing only that the evidence showed a plan or scheme, not propensity. The trial judge adopted the motions judge's written decision regarding M.R.E. 404(b), which repeatedly made clear that the evidence regarding Specifications 1, 2, and 3 could not be considered as evidence of propensity. The trial judge also invited both parties to argue about whether there was in fact a scheme. All of this leads to the straightforward conclusion that the trial judge considered the evidence to the extent that it was proof of a scheme and did not consider the evidence to the extent that it might have been evidence of propensity.

Id. at 165.

The CAAF rejected this Court's conclusion that the facts of Specifications 4-5 were sufficiently different because [redacted]JD was awake and aware of Petitioner's presence and the other alleged victims were asleep. *Id*. The CAAF asserted:

> As the Government points out, the trial judge could have found that, before Appellant entered the room, his scheme or plan was to take advantage of [[redacted] JD] while he was sleeping. But when Appellant realized that [[redacted] JD] was awake, in the Government's words, "he

> did not abandon his plan, he simply adjusted fire" by speaking first to [[redacted] JD].

Id.

The CAAF stated that the facts of Petitioner's case were "similar" to the facts in *Reynolds*, where the accused was charged with raping a woman in his quarters after a date. *Id*. (citing *Reynolds*, 29 M.J. at 105-106). In *Reynolds*, the Government sought to introduce evidence that the accused had committed a similar offense against another woman and that the evidence showed a common, scheme, plan, or design. *Id*. (citing *Reynolds*, 29 M.J. at 107-108). The military judge permitted the testimony of the alleged victim of the uncharged act even though the facts of the charged and uncharged offenses "were not exactly the same." *Id*. Indeed, in *Reynolds*, the alleged victim of the uncharged act fled the accused's room and he followed her in his car, picked her up, and drove her a mile down the road where he stopped and raped her. *Id*. The CAAF stated, "Despite the difference in how the attacks ultimately occurred, this Court found that the military judge did not abuse his discretion in concluding that the accused still had a common plan that was relevant in determining this intent. *Id*. at 167 (citing *Reynolds*, 29 M.J. at 110-11). In reconciling the different fact patterns of Specifications 1-3 and Specifications 4-5, the CAAF declared, "we conclude that the military judges did not abuse their discretion in deciding that Appellant had a common plan to take advantage of his sleeping friends even though it turned out that [[redacted]JD] was not asleep when Appellant began the assault." *Id*.

The CAAF rejected Petitioner's argument that the evidence of Specifications 1-3 was only used as proof of a common plan or scheme and not as proof of Petitioner's intent, as the Government argued. *Id*. The CAAF agreed with the Government that proof of a common plan or scheme was intent evidence because mistake of fact was the only issue in controversy. *Id*. The

CAAF stated, "Indeed, trial counsel's argument on findings makes clear that the position of the Government was that proof of a common plan or scheme showed that Appellant 'knew what he was doing' when he committed the charged offenses." *Id*.

The CAAF answered the certified question in the affirmative. *Id*. at 167. The court continued, "we have no need to consider the issued assigned by Appellant regarding prejudice." *Id*. The court affirmed the findings and sentence as approved by this Court. *Id*.

Judge Ohlson dissented from the majority. *Id*. (Ohlson, J., dissenting). He determined that this Court correctly concluded that the military judges abused their discretion and opined that the error materially prejudiced a substantial right of Petitioner. *Id*.

While Judge Ohlson found "some commonalities" between the charged acts in Specifications 1-3 and the charged acts in Specifications 4-5, he saw two errors on the military judges' reliance on the commonalities as evidence of a common plan of scheme: first, the commonalities "are notably generalized and superficial" and second, there are "important differences between the factual underpinnings of the two sets of specifications, and these differences vitiate any significance attributed to the cited commonalities." *Id*. He referred to this Court's opinion: "In Specifications 1-3, Appellant acted secretively while his friends slept, whereas in Specifications 4 and 5, Appellant [openly] initiated sexual contact with [redacted] JD while [redacted] JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with [redacted] JD." *Id*. (quoting *Hyppolite*, 2018 CCA LEXIS 517 at *20.

Judge Ohlson stated that the majority opinion "ran directly afoul" of the CAAF's holding in *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999), which announced that evidence of other acts "'must be almost identical to the charged acts to be admissible as

evidence of a plan or scheme.'" *Id*. (quoting *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984)). For this reason, Judge Ohlson concluded that the military judges abused their discretion. *Id*.

Next, Judge Ohlson turned to the prejudicial effect of the error. For the reasons he articulated, the evidence of Specifications 1-3 was not admissible as a common plan or scheme or for any other purpose under Mil. R. Evid. 404(b), leaving him to conclude that "the charged conduct in Specifications 1, 2, and 3 served as nothing more than propensity evidence in regard to the charged conduct in Specifications 4 and 5." *Id*. at 168 (citing *United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009) (describing evidence improperly admitted under Fed. R. Evid. 404(b) as "propensity evidence in sheep's clothing")). He continued:

> This is impermissible. As we stated in *United States v. Hills*: "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."

Id. (quoting *Hills*, 75 M.J. at 356).

Finally, Judge Ohlson applied the test for constitutional error to determine whether the Government had established that the error was harmless beyond a reasonable doubt by showing that there was no reasonable possibility that the error might have contributed to the verdict. *Id*. (citing *Hills*, 75 M.J. at 358). He concluded that the error was not harmless beyond a reasonable doubt because the Government did not offer any evidence to rebut Petitioner's mistake of fact for Specifications 4-5 and that the TC "relied on the improperly admitted M.R.E. 404(b) evidence to suggest that Petitioner acted without [redacted]JD's consent and without a reasonable mistake of fact." *Id*. Indeed, the TC argued that the trial judge could "'absolutely use those commonalities" when looking at the fact patterns to decide Petitioner's

guilt. (R. at 582). According to Judge Ohlson, "Therefore, in my view the Government is unable to demonstrate that there was no reasonable probability that the military judge's error in admitting the evidence as a common plan or scheme contributed to the guilty verdict in this case." *Id*.

ISSUE PRESENTED

I.

THE MILITARY JUDGES ABUSED THEIR DISCRETION IN ADMITTING THE CHARGED SEXUAL ACTS IN SPECIFICATIONS 1-3 AS EVIDENCE OF A PLAN OR SCHEME TO COMMIT OTHER CHARGED SEXUAL ACTS IN SPECIFICATIONS 4-5 WHERE THE ACTS WERE NOT "ALMOST IDENTICAL TO THE CHARGED ACTS," SUCH THAT THE IMPROPERLY ADMITTED EVIDENCE SERVED AS IMPERMISSIBLE PROPENSITY EVIDENCE.

Standard of Review

A military judge's ruling under Mil. R. Evid. 404(b) and 403 will not be disturbed except for an abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (citation omitted). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). In reviewing the military judge's decision to admit evidence, the courts consider the evidence in the light most favorable to the prevailing party. *United States v. Rodriguez*, 60 M.J. 239, 256-47 (C.A.A.F. 2004) (citation and quotation marks omitted).

Law

Military Rule of Evidence 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts to prove the "character of a person in order to show action in conformity therewith." Mil. R. Evid. 404(b). Such evidence may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. Evidence must be offered for a valid purpose and not to demonstrate the accused's criminal propensities. *United States v. Jenkins*, 48 M.J. 594, 597 (CA.A.F. 1998) (citations omitted).

In *Reynolds*, the Court of Military Appeals (CMA) adopted a three-part test for determining admissibility of evidence offered under Mil. R. Evid. 404(b):

> (1) Whether the evidence reasonably supports a finding by the court members that appellant committed the prior crimes, wrongs, or acts;
>
> (2) Whether the evidence makes a "fact of consequence" more or less probable; and
>
> (3) Whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403.

29 M.J. at 109.

If the evidence fails to meet any one of these standards, it is inadmissible. *Id*.

The courts have rejected "broad talismanic incantations of words such as intent, plan, or modus operandi, offered to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)." *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010) (citation omitted). *See also United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974) ("We have recognized, however, and we must continue to recognize, that the various categories of exceptions – intent, design or plan, identity, etc. – are not magic passwords whose

mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names. To the contrary, each exception has been carefully carved out of the general rule to serve a limited judicial and prosecutorial purpose.").

In analyzing discrete acts for evidence of a "plan," the courts consider whether the "charged act is an additional manifestation, or whether the acts merely share some common elements." *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citations omitted). Evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." *Morrison*, 52 M.J. at 122 (quoting *Brannan*, 18 M.J. at 183).

Mil. R. Evid. 413 provides that "[i]n a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Mil. R. Evid. 413(a). Such evidence may include *uncharged* sexual assaults to prove that an accused has a propensity to commit sexual assault. *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016) (citation omitted) (emphasis added). The military judge may not, however, admit evidence of charged acts to show an accused's propensity for committing another charged act. *Id*.

Where there are constitutional dimensions at play, the erroneous admittance of evidence must be tested for prejudice under the harmless beyond a reasonable doubt standard. *Hills*, 75 M.J. at 357-58 (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (quoting *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005)); *United States v. Hukill*, 76 M.J. 219, 222 (C.A.A.F. 2017) (citing *Chapman v. California*, 386 U.S. 18, 22-24 (1967)). The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence. *Id.* at 357 (quoting *Wolford*, 62 M.J. at 420) (quotation

marks and citation omitted). An error is not harmless beyond a reasonable doubt when there is a reasonable probability that the error complained of might have contributed to the conviction. *Id*. (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quotation marks omitted).

Argument

This Court correctly concluded that the facts of Specifications 1-3 were insufficiently similar to the facts of Specifications 4-5 to prove that Petitioner had a common plan or scheme to commit the charged acts in Specifications 4-5. The CAAF erred by failing to follow its own precedent in *Morrison* that the facts of other acts must be "almost identical" for admission as a plan or scheme. Thus, the charged acts in Specifications 1-3 were inadmissible for any proper purpose under Mil. R. Evid. 404(b), making this evidence nothing more than propensity evidence for Specifications 4-5. *Hills* and *Hukill* prohibit the use of charged sexual acts to prove an accused's propensity to commit other charged sexual acts. Thus, the CAAF erred in failing to follow its own precedent in *Morrison*, *Hills*, and *Hukill*. Finally, the military judges' error in admitting the evidence of other acts was not harmless beyond a reasonable doubt.

1. The CAAF failed to follow its own precedent that evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme."

In *Morrison*, the CAAF unambiguously held that uncharged acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." 52 M.J. at 121 (quoting *Brannan*, 18 M.J. 181, 183 (C.M.A. 1984)). The CAAF has adhered to this precedent in cases in which the military judge admitted evidence of uncharged acts to prove the accused's plan or scheme to commit the charged acts. *See United States v. Barnett*, 63 M.J. 388 (C.A.A.F. 2006) (The evidence of the accused's uncharged misconduct had only marginal relevance to the

charged conduct and did not tend to show a common plan); *McDonald*, 59 M.J. 426 (The uncharged acts were extremely dissimilar from the charged offenses).

Despite the unambiguous holding that evidence of other acts must be almost identical to the charged acts to prove an accused's plan or scheme, here, the CAAF failed to follow its own precedent. The CAAF dismissed this Court's finding that the military judge erred by admitting the evidence of Specifications 1-3 to find Petitioner guilty of Specifications 4-5. This Court concluded that there were "some common factors," to wit: that Petitioner attempted sexual activity with a male Airman after the Airman had been drinking and lain down to sleep, between Specifications 1-3 and Specifications 4-5 but that these factors were "insufficiently similar to prove a common plan or scheme." *Hyppolite*, ACM 39358, 2018 CCA LEXIS 517 at *20-21. Indeed, as Judge Ohlson correctly observed in his dissent to the CAAF majority opinion, "these commonalities are notably generalized and superficial." *Hyppolite*, 79 M.J. at 167. He added, "there are important differences between the factual underpinnings of the two sets of specifications, and these differences vitiate any significance attributed to the cited commonalities." *Id*. Judge Ohlson highlighted the stark differences between Specifications 1-3 and Specifications 4-5 as described by this Court: "In Specifications 1-3, Appellant acted secretively while his friends slept, whereas in Specifications 4 and 5, Appellant [openly] initiated sexual contact with [redacted] JD while [redacted] JD was awake and aware of Appellant's presence and Appellant communicated Appellant's desire to engage in sexual activity with [redacted] JD." *Id*. (quoting *Hyppolite*, ACM 39358, 2018 CCA LEXIS 157 at *20). Thus, the evidence of other acts in Specifications 1-3 were not "almost identical" to the acts in Specifications 4-5 to be admissible as evidence of a plan or scheme, as required by *Morrison*. The CAAF failed to follow its own precedent.

2. The CAAF erred in concluding that Specifications 1-3 were admissible as proof of Petitioner's intent to commit the charged acts in Specifications 4-5.

At trial, the Government sought the admission of Specifications 1-3 for proof only of Petitioner's common plan to commit the charged acts in Specifications 4-5. (App. Ex. II). The Government did not argue at trial for the use of Specifications 1-3 for proof of Petitioner's intent to commit Specifications 4-5. On appeal, however, the Government argued that the common plan and scheme evidence was intent evidence because mistake of fact was the only issue regarding Specifications 4-5. *Hyppolite*, 79 M.J. at 167. The Government did not, however, offer evidence to rebut Petitioner's mistake of fact defense for Specifications 4-5; rather, the Government relied on the improperly admitted Mil. R. Evid. 404(b) evidence to suggest that Petitioner acted without [redacted]JD's consent and without a reasonable mistake of fact. *Id*. at 168 (Ohlson, J., dissenting).

Although the use of Specifications 1-3 as intent evidence was not litigated at trial, the CAAF agreed with the Government's Hail Mary argument because "trial counsel's argument on findings makes clear that the position of the Government was that proof of a common plan or scheme showed that Appellant 'knew what he was doing' when he committed the charged offenses." *Id*. The Government did not argue that Specifications 1-3 should be used as intent evidence during the motions hearing, nor did the military judge admit the evidence for that purpose. In arguing that Petitioner "knew what he was doing," the TC argued knowledge, not intent. Despite the TC's clear language, the CAAF decoded an intent argument where there was none. Petitioner was not on notice to defend against an intent argument. Therefore, the CAAF's conclusion that the evidence of Specifications 1-3 to prove Petitioner's intent to commit Specifications 4-5 violated due process where that issue was not litigated at trial nor was it the

basis of either the military judge's decision at trial or this Court's decision on appeal. *See United States v. Bennitt*, 74 M.J. 125, 128-29 (C.A.A.F. 2015); *United States v. McCracken*, 67 M.J. 467, 468 (C.A.A.F. 2009); *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Riley*, 50 M.J. 410, 416 (C.A.A.F. 1999).

3. The evidence for Specifications 1-3 amounted to nothing more than propensity evidence for Specifications 4-5.

Because the other acts in Specifications 1-3 were inadmissible as evidence of Petitioner's plan or scheme to commit the charged acts in Specifications 4-5, they were improperly admitted under Mil. R. Evid. 404(b). Thus, the evidence for the first set of charged acts amounted to nothing more than propensity evidence for the second set of charged acts, or, as Judge Ohlson succinctly described it, as "propensity evidence in sheep's clothing." *Hyppolite*, 79 M.J. at 168 (quoting *McCallum*, 584 F.3d at 477). The use of Petitioner's prior bad acts painted a picture of him as a repeat sexual offender, thereby increasing the chance that the factfinder would convict him for being the kind of person who committed sexual offenses. In other words, if he committed sexual misconduct against other Airmen, then he committed sexual misconduct against [redacted] JD. This is impermissible propensity evidence. *See United States v. Scott,* 677 F.3d 72, 79 (2d Cir. 2012); *United States v. Bell*, 516 F.3d 432, 446-47 (6th Cir. 2008).

Because the evidence of Specifications 1-3 served only as propensity evidence to prove that Petitioner committed the charged acts in Specifications 4-5, the situation in Petitioner's case is precisely the situation in *Hills'* and *Hukill's* cases: the military judge improperly admitted evidence of charged sexual acts to prove Petitioner's propensity to commit other charged sexual acts. In *Hills*, the CAAF declared, "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to

have committed other conduct of which he is presumed innocent." 75 M.J. 350, 356 (C.A.A.F. 2016). In *Hukill*, the CAAF clarified that "the use of charged conduct as [Mil. R. Evid.] 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense." 76 M.J. at 222. This is precisely what occurred at Petitioner's court-martial. Thus, the CAAF erred in failing to adhere to its own precedent in *Hills* and *Hukill*.

4. The error was not harmless beyond a reasonable doubt.

In *Hills*, the CAAF held that "While [a Mil. R. Evid. 413] error . . . is usually nonconstitutional in nature, here, the error involved using charged misconduct . . . and violated Appellant's presumption of innocence and right to have all findings made clearly beyond a reasonable doubt, resulting in constitutional error. *Id*. at 356 (citation omitted). As in *Hills* and *Hukill*, here, the factfinder was first tasked to apply a preponderance of the evidence standard to charged conduct of similar crimes in a sexual offense case and then to apply a beyond a reasonable doubt standard to that same charged conduct. Because the error involved Petitioner's presumption of innocence and his right to have all findings made clearly beyond a reasonable doubt, the error was constitutional.

There was a reasonable probability that the military judges' error might have contributed to the conviction. *See Hills*, 75 M.J. at 357-58 (quoting *Moran*, 65 M.J. at 187 (C.A.A.F. 2007) (quoting *Chapman*, 386 U.S. at 24)). The Government did not offer evidence to rebut Petitioner's mistake of fact defense for Specifications 4-5, but during closing argument the TC relied on the improperly admitted Mil. R. Evid. 404(b) evidence to argue that Petitioner orally

and anally penetrated [redacted] JD without [redacted] JD's consent and without a reasonable mistake of fact. The TC urged the military judge to "absolutely use those commonalities" between the first set of charged acts and the second set of charged acts "as you're deciding exactly what happened, as you're deciding if the accused is, in fact, guilty." (R. at 582). Despite the stark differences between the first set of charged acts and the second set, the military judges found a common plan or scheme. Therefore, based on the TC's argument and the insufficiently similar sets of acts, the Government cannot prove demonstrate that there was no reasonable possibility that the military judge's error in admitting the evidence as a common plan or scheme contributed to Petitioner's convictions in Specifications 4-5.

CONCLUSION

Petitioner has been unlawfully detained because of the military judges' error in allowing propensity evidence in sheep's clothing and the Government cannot prove beyond a reasonable doubt that the error contributed to Petitioner's convictions in Specifications 4-5. The CAAF ignored its precedent in *Morrison* and permitted the use of insufficiently similar acts for use as evidence of a common plan or scheme. The CAAF also found a use for the same evidence on a theory not presented at trial or on appeal to this Court. In doing so, the CAAF has weakened the *Reynolds* test and condoned the use of broad, talismanic incantations of plan, scheme, and intent to satisfy the three-prong test. The CAAF failed to recognize that Petitioner's situation is precisely the situation presented in *Hills* and *Hukill*, in which the factfinder is first tasked with applying a preponderance of the evidence standard to charged conduct and then applying a beyond reasonable doubt standard to the same charged conduct. In failing to recognize the issue, the CAAF has sanctioned the use of charged conduct to prove and accused's propensity to commit other charged conduct.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that this Honorable Court issue a writ of habeas corpus, vacate the findings and sentence approved by the convening authority, order his immediate release from confinement, and restore all rights, property, and privileges to Petitioner. Finally, pursuant to Rule 19(b)(2)(I) of this Court's Rules of Practice and Procedure, Petitioner requests the appointment of appellate counsel under Article 70, UCMJ, 10 U.S.C. § 870.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 March 2021.

[redacted]
WILLIAM E. CASSARA, Esq.
Appellate Defense Counsel
[redacted]

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Ralph J. HYPPOLITE II	)	**Misc. Dkt. No. 2021-02**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**NOTICE OF DOCKETING**
	)	
	)	
	)	**Panel 2**

A Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus in the above styled case was filed with this court on 4 March 2021.

Accordingly, it is by the court on this 5th day of March, 2021,

ORDERED:

The case has been assigned Misc. Dkt. No. 2021-02 and has been referred to Panel 2 for review.

FOR THE COURT

[redacted]

T[redacted] B[redacted]
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re: **RALPH J. HYPPOLITE, II, USAF** *Petitioner,*	)	**RESPONDENT'S MOTION FOR LEAVE TO FILE MOTION TO SUBMIT DOCUMENT**
v.	)	Before Panel No. 2
	)	Misc. Dkt. No. 2021-02
UNITED STATES, *Respondent.*	)	5 March 2021

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(d)[1] of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to submit a document in support of its related motion to dismiss Petitioner's Petition for a Writ of Habeas Corpus, dated 4 March 2021:

General Court Martial Order Number 10, dated 8 Dec. 2020

The document memorializes the execution of Appellant's dishonorable discharge and is relevant and necessary to address this Court's jurisdiction with regard to Petitioner's Petition for Writ of Habeas Corpus, dated 4 March 2021.

*****Page Break*****

[1] Rule 23.3(b) permits filing a motion "to attach documents to the record of trial" without requesting leave to file under Rule 23(d). As this is in response to a petition for extraordinary relief, arguably, there is no record of trial to which this document could be attached and this motion has been styled accordingly.

WHEREFORE, the United States respectfully requests that this Court grant this motion to submit.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and civilian defense counsel at [redacted], on 5 March 2021.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re: **RALPH J. HYPPOLITE**, II, USAF *Petitioner*	)	**RESPONDENT'S MOTION FOR LEAVE TO FILE MOTION TO DISMISS**
v.	)	Before Panel No. 2
UNITED STATES, *Respondent.*	)	Misc. Dkt. No. 2021-02 5 March 2021

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to dismiss Petitioner's Petition for a Writ of Habeas Corpus, dated 4 March 2021, based upon lack of jurisdiction.

Petitioner's case has completed direct review under Article 71, UCMJ.[1] The Court of Appeals for the Armed Forces (CAAF) issued it opinion on 1 August 2019. United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019). Thereafter, Appellant did not file a petition for certiorari with the Supreme Court within the 90-day deadline. Rule 13(1), Rules of the Supreme Court of the United States, dated 1 Jul. 2019. Based on the foregoing, Petitioner's case completed direct review on or about 30 October 2019. *See* Article 71(c)(1)(C)(i), UCMJ. Appellant tacitly acknowledges the completion of direct review when he asserted "that no other

[1] Article 71, UCMJ, was repealed in its entirety. National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), Pub. L. No. 114-328, §§ 5302. However, the substantive portions of Article 71, UCMJ, were incorporated into 57(c)(1)(B), UCMJ. Id; *see also* MCM, A2-22, §857 (2019 ed.) This change applied to all cases referred to court-martial after 1 January 2019. FY 17 NDAA, §§ 5542(a). Appellant was convicted in 2017, prior to the effective date of FY 17 NDAA. Appellant's dishonorable discharge was therefore ordered executed under the version of Article 71, UCMJ, contained in the 2016 edition of the MCM.

action involving these issues is pending in this or any other court of competent jurisdiction." (Pet. Br. at 9.)

Furthermore, Petitioner's case became final under Article 76, UCMJ, when the commander of the Air Force District of Washington, Maj Gen Ricky Rupp, ordered the dishonorable discharge to be executed on 8 December 2020. (General Court-Martial Order No. 10, dated 8 Dec. 2020.)

In United States v. Chapman, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016), this Court concluded it lacked jurisdiction over habeas petitions where direct appellate review is complete under Article 71, UCMJ, and the case is final under Article 76, UCMJ. *See also* Sutton v. United States, 78 M.J. 537, 541 (A.F. Ct. Crim. App. 2018) (relying on Chapman to hold this court also lacks jurisdiction over writs of prohibition or mandamus where a case is final under Article 76, UCMJ).

Petitioner fails to address the controlling decision in Chapman and instead argues, without citation to authority, that "[o]nly this Court can address the granted issue in Petitioner's favor and grant Petitioner the relief requested." (Pet. Br. at 10.) Since Petitioner's court-martial has completed direct review under Article 71, UCMJ, and is final under Article 76, UCMJ, this Court lacks jurisdiction to address or grant Petitioner's request for extraordinary relief. There is no authority that suggests an exception to this rule; Petitioner's attempt to re-litigate evidentiary issues that were given full and fair consideration on direct appeal does not create jurisdiction where none exists.

****Page Break****

WHEREFORE, the United States respectfully requests this Court dismiss Petitioner's petition for lack of jurisdiction.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and civilian defense counsel at [redacted], on 5 March 2021.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE COURT OF CRIMINAL APPEALS
1500 WEST PERIMETER ROAD, SUITE 1900
JOINT BASE ANDREWS MD 20762-6604

8 March 2021

MEMORANDUM FOR Appellate Government Counsel (JAJG) (Attn: Major John P. Patera)

FROM: United States Air Force Court of Criminal Appeals

SUBJECT: *In re Hyppolite II*, Misc. Dkt. No. 2021-02

Dear Major Patera,

1. Your 5 March 2021 Motion to Dismiss and Motion to Submit in the above-captioned case was received by this court on 5 March 2021. However, this court will not accept your motions at this time as these motions are not in compliance with Rule 19 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. Specifically, Rule 19(3)(f)(1) states that "[t]he respondent may not file a response to a writ petition unless the Court issues an order directing the respondent to show cause or granting leave to file a response." While you filed motions to dismiss and to submit, this court views these motions as responses to the writ petition.

2. Therefore, until such order has been directed by this court, and pursuant to A.F. CT. CRIM. APP. R. 13.4, your Motion to Dismiss and Motion to Submit is returned with no action.

[redacted]
CAROL K. JOYCE
Clerk of the Court
U.S. Air Force Court of Criminal Appeals

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re: **RALPH J. HYPPOLITE, II**, Staff Sergeant (E-5) U.S. Air Force *Petitioner*	)	**PETITIONER'S MOTION FOR LEAVE TO FILE MOTION TO STRIKE**
v.	)	Before Panel No. 2
UNITED STATES, *Respondent*.	)	Misc. Dkt. No. 2021-02
	)	8 March 2021

TO THE HONORABLE, JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(d) of this Honorable Court's Rules of Practice and Procedure, dated 23 December 2020, Petitioner respectfully moves for leave to file this motion to strike Respondent's Motion for Leave to File Motion to Dismiss, dated 5 March 2021.

Rule 19(f)(1) of this Court's Rules of Practice and Procedure, which applies to petitions for extraordinary relief filed pursuant to 28 U.S.C. § 1651, states:

> The respondent may not file a response to a writ petition unless the Court issues an order directing the respondent to show cause or granting leave to file a response. In such cases, unless otherwise specified, the respondent may file an answer within 20 days of receipt of the order and the petitioner may file a reply to the answer within 7 days of receipt of that answer.

Petitioner moves for leave to move to strike Respondent's motion because this Court has not issued an order directing Respondent to show cause nor has it granted leave to file a response.

MOOT
8 MARCH 2021

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant the requested relief.

MOTION FOR LEAVE TO FILE
MOTION TO STRIKE

GRANTED: _____

DENIED: _____

DATE: _____

[redacted]
WILLIAM E. CASSARA, Esq.
[redacted]

Counsel for Petitioner

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellant Counsel Division on 8 March 2021.

[redacted]
WILLIAM E. CASSARA, Esq.
[redacted]

Counsel for Petitioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Ralph J. HYPPOLITE II	)	**Misc. Dkt. No. 2021-02**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**ORDER**
	)	
	)	
	)	
	)	**Panel 2**

On 4 March 2021, Petitioner, through his civilian appellate defense counsel, filed a petition for extraordinary relief in the nature of a writ of habeas corpus, asking this court to vacate the findings and sentence approved by the convening authority, order Petitioner's immediate release from confinement, and to restore all rights, property, and privileges to the Petitioner. Petitioner also requests, pursuant to Rule 19(b)(2)(I) of the Joint Rules for Appellate Procedure for Courts of Criminal Appeals, that this court order appointment of military appellate defense counsel under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870. The petition, including the request for appointment of military counsel, was docketed with this court on 5 March 2021.

Pursuant to JT. CT. CRIM. APP. R. 19 and this court's Rules of Practice and Procedure, accordingly, it is by the court on this 8th day of March, 2021,

ORDERED:

That the United States shall **SHOW GOOD CAUSE** by **29 March 2021** why the Petitioner's requested relief to include appointment of military appellate defense counsel should not be granted. A copy of the response shall be served on Petitioner's civilian appellate defense counsel, who may file a reply within seven days of receipt.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re: **RALPH J. HYPPOLITE**, II, USAF Staff Sergeant (E-5) *Petitioner*	)	**RESPONDENT'S ANSWER TO SHOW CAUSE ORDER**
v.	)	Before Panel No. 2
UNITED STATES, *Respondent.*	)	Misc. Dkt. No. 2021-02 12 March 2021

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

On 8 March 2021, this Court directed that the United States show good cause as to why Petitioner's request for extraordinary relief in the form of a writ of habeas corpus and appointment of military appellate defense counsel should not be granted. Pursuant to Rule 19(f)(1) of this Court's Rules of Practice and Procedure, the United States files this answer. For the reasons stated below, Petitioner has failed to establish jurisdiction for his habeas claim because direct review was completed under Article 71, UCMJ[1], and his conviction is final under Article 76, UCMJ. Similarly, Petitioner is not entitled to appointment of military appellate defense counsel for a habeas claim after his conviction is final under Article 76, UCMJ.

Direct review of Petitioner's case was completed under Article 71, UCMJ. The Court of Appeals for the Armed Forces (CAAF) issued it opinion on 1 August 2019. United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019). Thereafter, Petitioner did not file a petition for

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[1] Article 71, UCMJ, was repealed in its entirety. National Defense Authorization Act for Fiscal Year 2017 (FY 17 NDAA), Pub. L. No. 114-328, §§ 5302. However, the substantive portions of Article 71, UCMJ, were incorporated into 57(c)(1)(B), UCMJ. Id; *see also* MCM, A2-22, §857 (2019 ed.) This change applied to all cases referred to court-martial after 1 January 2019. FY 17 NDAA, §§ 5542(a). Petitioner was convicted in 2017, prior to the effective date of FY 17 NDAA. Petitioner's dishonorable discharge was therefore ordered executed under the version of Article 71, UCMJ, contained in the 2016 edition of the MCM.

certiorari with the Supreme Court within the 90-day deadline. Rule 13(1), *Rules of the Supreme Court of the United States*, dated 1 Jul. 2019. Based on the foregoing, Petitioner's case completed direct review on or about 30 October 2019. *See* Article 71(c)(1)(C)(i), UCMJ. Petitioner tacitly acknowledges the completion of direct review when he asserted "that no other action involving these issues is pending in this or any other court of competent jurisdiction." (Pet. Br. at 9.)

Petitioner's case is also final under Article 76, UCMJ. This occurred when the commander of the Air Force District of Washington, Maj Gen Ricky Rupp, ordered the dishonorable discharge to be executed on 8 December 2020. (General Court-Martial Order No. 10, dated 8 Dec. 2020.) In United States v. Chapman, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016), this Court concluded it lacked jurisdiction over habeas petitions where direct appellate review is complete under Article 71, UCMJ, and the case is final under Article 76, UCMJ. *See also* Sutton v. United States, 78 M.J. 537, 541 (A.F. Ct. Crim. App. 2018) (relying on Chapman to hold this court also lacks jurisdiction over writs of prohibition or mandamus where a case is final under Article 76, UCMJ).

Petitioner fails to address the controlling decision in Chapman and instead argues, without citation to authority, that "[o]nly this Court can address the granted issue in Petitioner's favor and grant Petitioner the relief requested." (Pet. Br. at 10.) Since Petitioner's court-martial has completed direct review under Article 71, UCMJ, and is final under Article 76, UCMJ, this Court lacks jurisdiction to address or grant Petitioner's request for extraordinary relief. There is no authority that suggests an exception to this rule. And Petitioner's attempt to re-litigate evidentiary issues that were given full and fair consideration on direct appeal does not create jurisdiction where none exists.

Even if we assume, for the sake of argument, that there was military jurisdiction to entertain Petitioner's habeas petition, this Court lacks authority to grant the requested relief. Our superior Court specifically addressed the admissibility of certain charged offenses under Military Rule of Evidence (Mil. R. Evid.) 404(b). Hyppolite, 79 M.J.at 164-68. CAAF affirmed Petitioner's findings and sentence on direct review. Id at 167. These facts notwithstanding, Petitioner asks this Court to effectively overrule our superior Court and "vacate the findings and sentence approved by the convening authority, order [Petitioner's] immediate release from confinement, and restore all rights, property and privileges to Petitioner." (Pet. Br. at 5.) As this Court is no doubt aware, it is "not at liberty to overrule our superior [C]ourt." United States v. Wittman, 2013 CCA LEXIS 932, fn 4 (A.F. Ct. Crim. App. 24 Oct. 2013) (unpub. op.)

Turning to Petitioner's request for appointment of military defense counsel, Article 70(c), UCMJ, states that appellate defense counsel shall represent an accused before the Court of Criminal Appeals, CAAF, or the Supreme Court "(1) when requested by the accused; (2) when the United States is represented by counsel; or (3) when the Judge Advocate General has sent the case to [CAAF]." Indeed, Appellant was already represented by appellate defense counsel on direct appeal. *See* Hyppolite, 79 M.J. at 161; United States v. Hyppolite, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. 25 Oct. 2018) (unpub. op.)

As a threshold matter, this Court has previously concluded that it lacked authority to appoint appellate defense counsel for a pro se petitioner. Chapman, 75 M.J. at 600 ("the authority to appoint appellate defense counsel was vested with The Judge Advocate General.") (citing United States v. Chapman, 2012 CCA LEXIS 374 at*1 (A.F. Ct. Crim. App. 28 Sep. 2012)); *see also* United States v. Miller, 2010 CCA LEXIS 273 at*1 (A.F. Ct. Crim. App. 2 Mar. 2010) (unpub. op.) Furthermore, Appellant has not demonstrated that this request was

previously made to the Air Force Appellate Defense Division and was denied, or even that this request was made personally by Appellant.

Moreover, Appellate seeks appointment of appellate defense counsel after direct review was completed and his conviction became final. This Court has addressed a pro se petitioner's request for such an appointment in support of a writ of coram nobis. In re Juillerat v. United States, 2016 CCA LEXIS 211 (A.F. Ct. Crim. App. 31 Mar. 2016) (unpub. op.) This Court observed:

> Appellate counsel may file writs with this court or with our superior court during their representation of a client seeking review under Articles 66 and 67, UCMJ, 10 U.S.C. § 866, 867. ***However, we find no requirement that the government appoint military counsel to represent a petitioner after review is final pursuant to Articles 71 and 76***, UCMJ, 10 U.S.C. § 871, 876. *See* [Diaz v. JAG of the Navy], 59 M.J. 34, 37 (C.A.A.F. 2003) ("[a]n accused has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of Criminal Appeals and our Court by appellate defense counsel appointed under Article 70, UCMJ, 10 U.S.C. § 870 (2000). ***We deny Petitioner's writ to compel the appointment of military appellate defense counsel. Petitioner may hire civilian counsel at his own expense.***

Id at *7 (emphasis added).

The petitioner in Juillerat arguably had a stronger claim to appointment of appellate defense counsel because this Court retains "jurisdiction over coram nobis petitions even after the proceedings are final under Article 76, UCMJ." Chapman, 75 M.J. at 601 (citing United States v. Denedo, 556 U.S. 904, 916-17 (2009)). Jurisdiction continues because "a coram nobis petition [is] an *extension* of the original proceeding." Id (citing Denedo, 556 U.S. at 912-13) (emphasis in original). The petitioner was nevertheless denied the appointment of military appellate defense counsel when the conviction was final under Article 76, UCMJ, because it was outside the scope of Article 70, UCMJ.

The holding in Juillerat is arguably inconsistent with Rule 11(a) of this Court's Rules of Practice and Procedure, effective 23 Dec. 2020, which states:

> In a case involving a petition for extraordinary relief when the United States is represented by counsel or when an accused has been denominated as the real party in interest by a filing party or by the Court, the Judge Advocate General or his designee shall also designate appellate military counsel to represent the accused. Nothing in this Rule creates a right to counsel beyond that required by regulation or law.

But the rules do not address the appointment of counsel after a conviction is final under Article 76, UCMJ. Furthermore, Petitioner asserts a habeas claim which, rather than being an extension of the original proceeding, "is considered a *separate* civil case and record." Id (citing United States v. Morgan, 346 U.S. 502, 505 (1954) (emphasis in original). For this petition, Petitioner has the "heavy burden of establishing a 'clear and indisputable right to the requested belief.'" In re Best, 79 M.J. 594, 599 (N.M. Ct. Crim. App. 2019) (citing Denedo v. United States, 66 M.J. 114, 126 (C.A.A.F. 2008)). Petitioner has not, and cannot, establish jurisdiction with this Court for this habeas claim because his conviction is final on direct appeal. The appointment of military appellate defense counsel for the purpose of aiding Petitioner, and Petitioner's civilian counsel, in filing a habeas claim that patently lacks jurisdiction or merit is therefore outside the scope of Article 70, UCMJ, and would only waste the time and resources of the Air Force Appellate Defense Division.

****Page Break****

WHEREFORE, the United States respectfully requests this Court dismiss Petitioner's petition for lack of jurisdiction.

[redacted]
JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and civilian defense counsel at [redacted], on 12 March 2021.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In re: **RALPH J. HYPPOLITE, II,** USAF Staff Sergeant (E-5) *Petitioner,*	)	**RESPONDENT'S MOTION FOR LEAVE TO FILE MOTION TO SUBMIT DOCUMENT**
v.	)	Before Panel No. 2
UNITED STATES, *Respondent.*	)	Misc. Dkt. No. 2021-02 15 March 2021

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23(d)[1] of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to submit a document in support of its related Answer to Show Cause Order, dated 12 March 2021:

General Court Martial Order Number 10, dated 8 Dec. 2020

The document memorializes the execution of Appellant's dishonorable discharge and is relevant and necessary to address this Court's jurisdiction with regard to Petitioner's Petition for Writ of Habeas Corpus, dated 4 March 2021.

*****Page Break*****

[1]) permits filing a motion "to attach documents to the record of trial" without ave to file under Rule 23(d). As this is in response to a petition for extraordinary ly, there is no record of trial to which this document could be attached and this een styled accordingly.

GRANTED

29 MARCH 2021

WHEREFORE, the United States respectfully requests that this Court grant this motion to submit.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and civilian defense counsel at [redacted], on 15 March 2021.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial
And Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]