UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40496**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Jerin P. MENARD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) JERIN P. MENARD United States Air Force, *Appellant*	**NOTICE OF APPEARANCE OF COUNSEL** Case No. ACM 40496 Before Panel No. 3 12 September 2023

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

COMES NOW, Mr. Peter Kageleiry, Jr., pursuant to rule 12.1 of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. In addition, counsel hereby informs this Court that:

(1) his business mailing address is: 4445 Corporation Lane, Suite 173, Virginia Beach , VA 23462;

(2) his phone number is: (202)297-2482

(3) his business email is: pete@ucmjlaw.com; and

(4) He is admitted to practice before this Court's bar.

Respectfully submitted,

[redacted]

4445 Corporation Lane, Suite 173,
Virginia Beach , VA 23462
(202)297-2482
pete@ucmjlaw.com

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 3 No. ACM 40496 12 September 2023

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **22 November 2023.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 12 September 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

13 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 September 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40496**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jerin P. MENARD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 20 September 2023, counsel for Appellant submitted a Motion to Examine and Transmit Sealed Materials. Specifically, counsel seeks to examine Appellate Exhibits VIII, IX, and XVIII as well as transcript pages 86–107. Counsel for Appellant also requests permission to transmit the sealed material to Mr. Peter Kageleiry, Jr., Appellant's civilian defense counsel.

The Government does not oppose the motion with regards to the viewing of the sealed material as long as its counsel may also examine the same sealed materials as necessary to respond to any assignments of error referencing those materials. However, the Government avers that Mr. Kageleiry is located in Virginia Beach, Virginia, and therefore opposes the transmission of the materials to Mr. Kageleiry.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2019 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 22d day of September, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials and to Transmit Sealed Materials to Appellant's civilian defense counsel is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibits VIII, IX, and XVIII** as well as **transcript pages 86–107**, subject to the following instructions: To view the sealed materials, counsel will coordinate with the court. Except as specified below, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Appellant's request to create and transmit digital copies of the requested sealed exhibits and transcript pages to Appellant's civilian defense counsel is **GRANTED.** Appellant's military counsel is permitted to scan a hardcopy of the requested sealed materials; transfer scanned copies of sealed materials to a password-protected or encrypted DVD; email scanned sealed materials using encryption to the email address provided by civilian appellate defense counsel, Mr. Peter Kageleiry, Jr., and transmit files containing sealed materials encrypted or password-protected to Mr. Kageleiry via DoD SAFE. Appellant's military counsel must label any DVD copies with Appellant's name, ACM number, the date, and the language "CUI – sealed materials under R.C.M. 1113" and place it in a sealed envelope containing the same identifying information. Appellant's military counsel is also permitted to send sealed materials to Mr. Kageleiry via U.S. mail, Federal Express, or by similar secure means of shipment.

It is further ordered:

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted to Mr. Kageleiry. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MOTION TO EXAMINE AND TRANSMIT SEALED MATERIAL**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	20 September 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following materials sealed by the military judge:

1. Appellate Exhibits VIII, IX, and XVIII**.** These exhibits include a Government Mil. R. Evid. 412 motion, a victim's counsel's response to the Mil. R. Evid. 412 motion, and the military judge's ruling on the issue.

2. Transcript pages 86-107. These pages are a closed session related to the Mil. R. Evid. 412 motion.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether the military judge erred in allowing, or

disallowing, evidence under Mil. R. Evid. 412. All parties to the trial had access to the appellate exhibits and were present during the closed sessions. (R. at 14, 112.)

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill her duty of representation under Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870, without first reviewing these exhibits and related transcript portions.

Appellant is represented by undersigned counsel as well as civilian appellate defense counsel, Mr. Peter Kageleiry, Jr. Appellant, therefore, further requests this Court's permission for undersigned counsel to create and transmit digital copies of the sealed materials (Appellate Exhibits VIII, IX, and XVIII, and transcript pages 86-107) to Appellant's civilian counsel to facilitate counsel's preparation of Appellant's Assignments of Error.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 20 September 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

20 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE AND TRANSMIT SEALED MATERIALS ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine and Transmit Sealed Materials. The United States does not object to Appellant's counsel reviewing any transcript pages or exhibits that were released to both parties at trial (as these materials appear to have been), so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that references the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

At this time, the United States opposes Appellant's requests to transmit sealed materials to civilian appellate defense counsel. Civilian appellate defense counsel apparently has an office in Virginia Beach, Virginia. Appellant has not identified any circumstances that would prevent civilian defense counsel from travelling to the Court to view the sealed documents in person at some point before filing a brief. Absent Appellant demonstrating such circumstances, this Court should decline to allow another copy of these sensitive and sealed materials to be made.

WHEREFORE, the United States respectfully responds to Appellant's motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 20 September 2023.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	13 November 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **22 December 2023.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018). (Record (R.) at 119, 482; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 9531; EOJ, ROT Vol. 1.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action,

13 Apr. 2023.)

The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. SrA Menard is not currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 13 November 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

15 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)	ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 November 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) JERIN P. MENARD United States Air Force, *Appellant*	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL** Case No. ACM 40496 Before Panel No. 3

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

Pursuant to Rules 12(b), 12.4, and 23.3(h) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully requests to withdraw as counsel in the above-captioned case. Appellant has released undersigned counsel after Appellant determined he no longer wishes to bear the expense of civilian representation.

Major Matthew L. Blyth was previously detailed as appellate defense counsel and has previously filed two motions pertaining to this case. Major Blyth is available to complete review of the record as part of his normal case load. Appellant has been advised of this motion to withdraw as counsel and consents to undersigned counsel's withdrawal. A copy of this motion will be delivered to Appellant following its filing.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

PETER KAGELEIRY, Jr.
Civilian Appellate Defense Counsel

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 14 November 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	13 December 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **21 January 2024.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018). (Record (R.) at 119, 482; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 9531; EOJ, ROT Vol. 1.) The convening authority

took no action on the findings or sentence. (Convening Authority Decision on Action, 13 Apr. 2023.)

The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. SrA Menard is not currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 13 December 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

13 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 December 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	11 January 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **20 February 2024.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018). (Record (R.) at 119, 482; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 9531; EOJ, ROT Vol. 1.) The convening authority

took no action on the findings or sentence. (Convening Authority Decision on Action, 13 Apr. 2023.)

The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. SrA Menard is not currently confined.

Counsel is currently assigned 24 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. There are three pending cases before this Court with higher priority:

1. *United States v. Williams*, ACM 40410. The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. Counsel has reviewed approximately one half of the record.
2. *United States v. Moore*, ACM 40423. The record of trial consists of 5 prosecution exhibits, 1 defense exhibit, 11 appellate exhibits, and 1 court exhibit. The transcript is 88 pages. Counsel has begun review of this record.
3. *United States v. Moore*, ACM 40442. The record of trial consists of 11 prosecution exhibits, 9 defense exhibits, 40 appellate exhibits, and 1 court exhibit. The transcript is 674 pages. Counsel has not yet begun review of this record.

Additionally, since the last requested enlargement of time, counsel has served for three weeks as the fill-in Director of Staff at JAJ. This was due to an unforeseen medical situation.

Through no fault of SrA Menard, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Menard was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Menard's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 11 January 2024.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

16 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 January 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	9 February 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **21 March 2024.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 199 days have elapsed. On the date requested, 240 days will have elapsed.

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018). (Record (R.) at 119, 482; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 9531; EOJ, ROT Vol. 1.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action,

13 Apr. 2023.)

The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. SrA Menard is not currently confined.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has not yet begun review in this case. There are three pending cases before this Court with higher priority:

1. *United States v. Williams*, ACM 40410. The record of trial consists of 10 prosecution exhibits, 15 defense exhibits, and 73 appellate exhibits. The transcript is 1,769 pages. Counsel has reviewed the record and completed most of the brief.
2. *United States v. Moore*, ACM 40423. The record of trial consists of 5 prosecution exhibits, 1 defense exhibit, 11 appellate exhibits, and 1 court exhibit. The transcript is 88 pages. Counsel has completed the brief and will file shortly.
3. *United States v. Moore*, ACM 40442. The record of trial consists of 11 prosecution exhibits, 9 defense exhibits, 40 appellate exhibits, and 1 court exhibit. The transcript is 674 pages. Counsel has not yet begun review of this record.

Through no fault of SrA Menard, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Menard was specifically informed of his right to timely appeal, was consulted with regard to

this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Menard's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 9 February 2024.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

9 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 February 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force	)	No. ACM 40496
Appellant	)	11 March 2024

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **20 April 2024.** The record of trial was docketed with this Court on 25 July 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018). (Record (R.) at 119, 482; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 9531; EOJ, ROT Vol. 1.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action,

13 Apr. 2023.)

The record of trial consists of 9 prosecution exhibits, 10 defense exhibits, and 31 appellate exhibits, and 1 court exhibit. The transcript is 531 pages. SrA Menard is not currently confined.

Counsel is currently assigned 22 cases, with 6 pending initial briefs before this Court. Counsel has reviewed more than half of the record in this case. There is one pending case before this Court with higher priority:

United States v. Moore, ACM 40442. The record of trial consists of 11 prosecution exhibits, 9 defense exhibits, 40 appellate exhibits, and 1 court exhibit. The transcript is 674 pages. Counsel has completed the brief but cannot yet file because this Court has issued a show-cause order to the Government regarding ROT deficiencies. The response from the Government is due 19 March 2024. Counsel plans to file a brief shortly thereafter if this Court does not remand that case.

Through no fault of SrA Menard, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. SrA Menard was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review SrA Menard's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770

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 Appellate Operations Division on 11 March 2024.

[redacted]LYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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(240) 612-4770

12 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) JERIN P. MENARD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40496 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 March 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force *Appellant*	)	No. ACM 40496 17 April 2024

Assignments of Error

I.

WHETHER SENIOR AIRMAN MENARD'S INDECENT VIEWING CONVICTION IS FACTUALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED SEXUAL MISCONDUCT UNDER MIL. R. EVID. 404(b).

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED RH TO DISCUSS THE IMPACT OF UNCHARGED MISCONDUCT IN HER UNSWORN STATEMENT.

IV.[1]

WHETHER SENIOR AIRMAN MENARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

V.

WHETHER SENIOR AIRMAN MENARD'S INDECENT VIEWING CONVICTION IS LEGALLY SUFFICIENT.

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[1] Assignments of error IV and V (AOE) are raised in the appendix pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Statement of the Case

On 20-23 March 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c (2018).[2] (R. at 119, 482[3]; Entry of Judgment (EOJ), 25 Apr. 2023.) A military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. (R. at 531; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 13 Apr. 2023.)

Statement of Facts

An On-Again, Off-Again Relationship

SrA Menard and then-SrA RH met on the dating application Tinder in February 2020 and began dating soon thereafter. (R. at 278.) They experienced trust issues from the start of their relationship, and things were "not well" when SrA Menard deployed in March 2020. (R. at 279, 334.) Still, the couple signed a lease together while SrA Menard was deployed. (R. at 336.) Upon his return, the sometimes couple decided to get a labrador puppy. (*Id.*) During the course of their relationship, they broke up and reunited approximately five to ten times. (R. at 356.)

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[2] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the version in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

[3] The record contains two pages labeled "29." This brief uses the numbers in the transcript and does not adjust for the improper page count.

Breakup in July 2021

After SrA Menard returned from a trip in July 2021, RH saw a video of another woman on his phone with whom SrA Menard conceded he was in an "emotional relationship." (R. at 293.) RH claimed she was done at this point and called her father to explain that SrA Menard "cheated," which was a significant step because her "protective" father would not "allow [her] to go back into the relationship." (R. at 294.) Around that time, RH sent a video or photo of her breasts to another male. (*Id.*) SrA Menard found out RH sending the picture or video. (R. at 295.)

A Camera in RH'S Bedroom

After this breakup, SrA Menard and RH worked opposite shifts. (R. at 299.) He would sleep on the couch and then transfer to the bed when RH left for work. (*Id.*) On 15 August 2021, RH was speaking with her father and sent him an image. (R. at 303–04.) She received a message from SrA Menard, who was walking the dog at the time, saying "snapping guys again I see." (R. at 305; Pros. Ex. 3.) She thought perhaps he saw a flash from her camera, so she closed the blinds and curtains. (R. at 306–07.)

Later that week, while SrA Menard was away in Pennsylvania at a softball game, RH claimed she took a shower, entered the master bedroom, and then masturbated on the bed. (R. at 308.) She was nude and stated that someone in the room would be able to observe her genitalia. (R. at 309.) According to her testimony, she received the following text from SrA Menard seconds after she finished: "Did you make any videos today?" (*Id.*; Pros. Ex. 3 at 5.) After she responded—"what?"—he texted, "Any videos? Bring the toys out?" (Pros. Ex. 3 at 5.) RH claimed SrA Menard

knew that she used sex toys when masturbating. (R. at 310.) An acrimonious exchange followed. (Pros. Ex. 3 at 5–6.)

Shortly thereafter, RH began trying on clothes that a friend gave her. (R. at 311.) She put on a blue top and blue pants and took a photograph of herself. (*Id.*) SrA Menard then texted RH: "You want to take pics of your butt in your blue outfit. Yea okay[.]" (Pros. Ex. 3 at 6.) RH testified she became confused and scared, as SrA Menard was away and would have no way of knowing what she was doing. (R. at 312.) She called her friend on Facetime, who suggested she check various places in the room, such as behind the mirror. (R. at 313.) RH picked up a "stuffed cupcake-shaped toy" and it snagged on a wire. (R. at 314.) She noticed the right eye of the stuffed creature (from the perspective of the viewer) was cut out and it contained a camera. (R. at 315; Pros. Ex. 1 at 3.) After she unplugged the camera, SrA Menard texted "Oh look you caught on[.] Bravo[.]" (Pros. Ex. 3 at 7.)

RH claimed the line of sight from the camera to the bed was direct. (R. at 317.) However, her testimony did not establish where she was on the bed, how the bed was oriented relative to the camera, whether any obstructions were in the way to the spot where she was masturbating, or where she was when trying on the blue outfit. One picture from an earlier text message conversation, admitted as Prosecution Exhibit 1, shows an angle from the TV stand where the cupcake toy rested to one part of the bed, but fails to provide a broader perspective of the room. (Pros. Ex. 1.)

Mil. R. Evid. 404(b) Evidence

Following several litigated motions *in limine* pursuant to Mil. R. Evid. 404(b), *see* Assignment of Error (AOE) II, *infra*, the military judge allowed the prosecution

to admit the following evidence. In response to SrA Menard's demands, RH gave him passwords for several social media sites, while SrA Menard provided RH with one of his. (R. at 282–83.) SrA Menard would check RH's social media account, specifically Snapchat, to see who she communicated with. (R. at 284–85.) Because Snapchat only allows login at a single location per account, RH would notice that she was logged out of her account regularly. (R. at 285.) She claimed SrA Menard would block people or remove friends from her accounts. (R. at 286.) They would regularly argue when RH confronted SrA Menard about this. (R. at 287.) SrA Menard would also take her cell phone when she slept and review it. (R. at 288–89.)

SrA Menard's Interview with the Air Force Office of Special Investigations (OSI)

SrA Menard interviewed with OSI in October 2021. (R. at 374.) He admitted placing the camera in the bedroom to see if she was still sending pictures to other men. (Pros. Ex. 5, Clip 2 at 0:00-1:07.) He explained that when RH told him she was dropping off some clothes, he checked the camera and saw she was taking pictures in a blue outfit. (*Id.*, Clip 2 at 1:07-3:30.) He said:

> Obviously what I did was wrong. I'm wrongful for it. I shouldn't have done that. I didn't know it was a law. We're allowed to have cameras in our own house in Louisiana. It's different in New Jersey I guess you could say. Yes, the video . . . was videoing her without her knowledge, I'm aware of that.

(*Id.*, Clip 2 at 5:05-5:32.) He also admitted having checked the camera earlier in the week (when RH said he texted her about Snapping with guys). (*Id.*, Clip 3 at 00:50-2:15.)

SrA Menard acknowledged that RH accused him of watching her masturbate in her complaint to the local police. (*Id.*, Clip 3 at 4:22-4:40.) He denied ever having seen her naked through the camera. (*Id.*)

Court-Martial

The Government charged SrA Menard with indecent viewing of RH's private area under Article 120c, UCMJ. The evidence consisted largely of RH's testimony, their text messages, SrA Menard's interview, and a photograph showing the cupcake toy's location a week before the alleged indecent viewing. The members convicted SrA Menard of indecent viewing. (R. at 482.)

ARGUMENT

I.

SRA MENARD'S CONVICTION FOR INDECENT VIEWING IS FACTUALLY INSUFFICIENT.

Standard of Review

Neither this Court nor the Court of Appeals for the Armed Forces (CAAF) has set forth the standard of review under the revisions to Article 66, UCMJ, 10 U.S.C. § 866 (2021), applicable to this case.[4] *But see United States v. Harvey*, No. 23-0239, 2024 CAAF LEXIS 13 (10 Jan. 2024) (granting review of a Navy-Marine Corps Court of Criminal Appeals decision on this very issue). SrA Menard asserts the standard of review for factual sufficiency should remain de novo despite these statutory changes

[4] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283, § 542, 134 Stat. 3388, 3612–13 (2021) (setting the effective date of changes to Article 66, UCMJ, for every offense occurring after the date of the law's enactment, which was 1 January 2021).

explained below. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

1. This Court maintains robust factual sufficiency review despite changes to Article 66, UCMJ.

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ (2021). Upon such showing, this Court may weigh controverted questions of fact with "appropriate deference" to "the fact that the trial court saw and heard the witnesses and other evidence" and "to findings of fact entered into the record by the military judge." Article 66(d)(1)(B)(ii), UCMJ (2021). This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021).

SrA Menard will make the requisite showing of deficiency below. While Article 66, UCMJ, has changed to require affirmative steps from an accused on appeal, the changes do not hollow factual sufficiency review. However, the statutory changes do raise several questions. The first question relates to the "appropriate deference" to the factfinder. The prior version of factual sufficiency review required CCAs to evaluate the evidence "recognizing that the trial court saw and heard the witnesses." Article 66(d), UCMJ (2018). This is a distinction without a meaningful difference. This Court has always shown deference to the fact that it does not hear the witnesses. The statutory revision adds "and other evidence," but this means little because non-testimonial evidence is fully captured in the record of trial—it is only

the nuances of trial testimony that could escape full comprehension on appellate review.

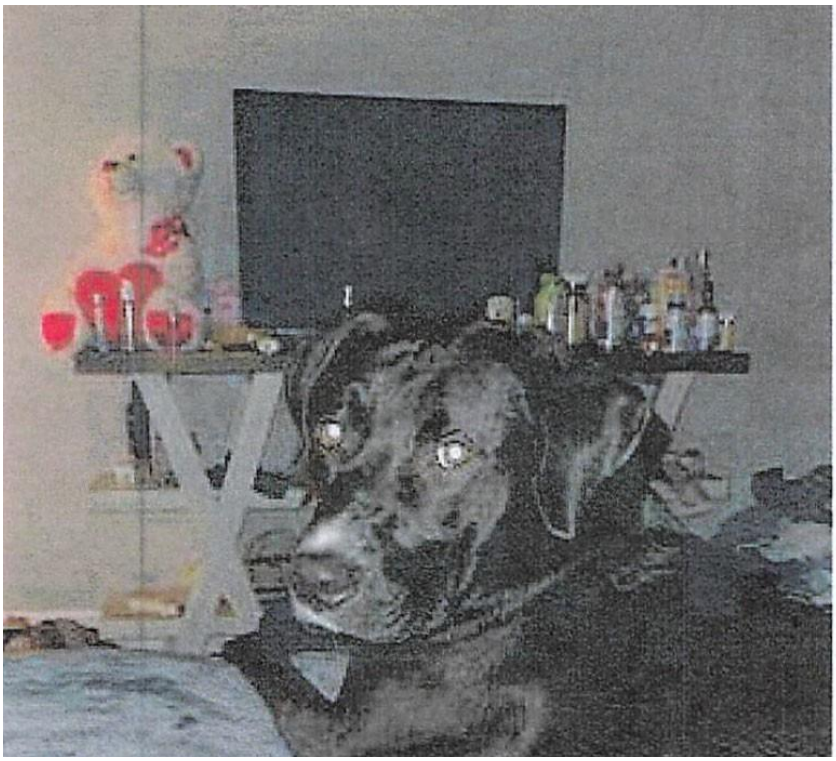
The second question is whether this Court is "clearly convinced that the finding was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ (2021). The prior version of Article 66(d), UCMJ, empowered the Courts of Criminal Appeals (CCAs) to approve findings that are "correct in law and fact and [that it] determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ (2018). The Court of Military Appeals (CMA) interpreted this language to require that members of a CCA "are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324–25 (C.M.A. 1987). This requirement stems from case law alone; neither the old nor the new statute explicitly requires the CCAs believe the accused's guilt beyond a reasonable doubt. Because the standard is as yet undetermined by the CAAF, this Court should hesitate before interpreting revisions to strip an accused of a key substantive aspect of an appeal. Where this Court is not convinced beyond a reasonable doubt that the evidence is sufficient, this should suffice to clearly convince this Court that the finding was against the weight of the evidence.

In short, the statutory revisions should not meaningfully affect the standard of review in this case except for the requirement that SrA Menard make a specific showing of deficiency. But even if this Court interprets the burden on appellants as greater than under the prior version of Article 66, UCMJ, SrA Menard still prevails.

2. Loose circumstantial evidence is the only link between SrA Menard and the offense.

As charged, the Government had to prove that SrA Menard: (1) knowing and wrongfully viewed the private area of RH; (2) that he did so without her consent; and (3) that he did so under circumstances when RH had a reasonable expectation of privacy. (R. at 442; *MCM,* pt. IV, ¶ 63.b.(1).) Private area "means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." Art. 120c(d)(2), UCMJ. If he viewed her private area, the second and third elements are met. Thus, this case turns completely on whether he viewed RH's private area.

On this crucial point, the evidence is remarkably thin. Begin with the objective evidence. Prosecution Exhibit 1—from an unrelated text message chain a week before the incident—shows a picture of the stuffed cupcake from the perspective of the bed. (Pros. Ex. 1.) The image follows:



The image is grainy and hard to see—as the trial counsel recognized during direct examination—but it appears the television may be obstructing the view of the right eye, which is where the camera was located. (*Id.*; R. at 328.) This may well have prevented the camera from capturing RH's private area. And the evidence did not establish that the camera remained in that position during the week; indeed, it could have moved to a position with even less visibility.

Given this limited evidence on this point, this Court should remain unconvinced that the camera captured RH masturbating on the bed. RH gave minimal description of her bedroom and failed to establish how the camera had visibility of the bed, or where she was located on what appears to be a king-sized bed. (R. at 307–08.) The Government did not introduce pictures of the room beyond the grainy offerings in Prosecution Exhibits 1 and 3, leading the Defense to introduce a better copy in Defense Exhibit A. But even that could not clarify the arrangement. The record is simply lacking evidence on this crucial matter. Moreover, it is unclear that the TV stand was directly in front of the bed and whether it would have full perspective of the bed. From Prosecution Exhibit 1, it would seem the view would be obstructed by the television.

Additionally, the missing spatial evidence raises the question of how the camera captured RH in her blue outfit. RH's testimony does not establish where she was and how the camera was positioned. Indeed, the first time she interacted with the cupcake was to pick it up—which would change the positioning. (R. at 314.) She said there was a direct line of sight to the bed, but how could she know for certain

when she moved the cupcake before checking? All of this is extremely weak evidence of viewing.

Thus, the case relies almost exclusively on the temporal alignment between SrA Menard's message—"Did you make any videos today?"—and when RH masturbated. SrA Menard explained that he placed the camera to see if she was lying about sending videos or photos to other men. (Pros. Ex. 5, Clip 2 at 0:00-1:07.) His text messages to her echo this concern. (Pros. Ex. 3 at 5–7.) It is unsurprising that he would ask her such a question when his primary concern was whether RH was sending other sexual videos. The Government could have pursued logs on when the camera was accessed, but it failed to do so.

Against this circumstantial evidence stands SrA Menard's firm denial that he saw her naked. Of course, the factfinder is free to disbelieve his statement to OSI. But consider what he admitted in the interview. He came clean and acknowledged that what he was doing was against the law in New Jersey. He did not believe it was against the law in Louisiana, rightly or wrongly. This is not a mistake of law defense. Rather, it raises the question of why SrA Menard would admit to one crime, but not the specific crime that he was later charged with. Indeed, his admissions alone could have led to a different charging scheme. This Court should weigh that fact heavily when assessing the credibility of his denial.

Taken together, the evidence fails to show whether SrA Menard saw RH's private area. The Government simply did not put on the evidence required to confirm what SrA Menard could have seen. As such, the evidence is factually insufficient.

3. What may have affected the members should not sway this Court.

The Mil. R. Evid. 404(b) evidence may have impermissibly clouded the members' judgment, but this Court should review the record free of such undue prejudice. Both the admitted evidence and resulting argument painted SrA Menard as a bad boyfriend, or manipulative, or controlling. The excess focus on his character, and the character of their relationship, obscured the crucial question of whether he viewed the video. Whatever unsavory or controlling behaviors that RH alleged, none of them illuminate that central question. This Court can take a hard, clinical look at the evidence and conclude, despite the fog of Mil. R. Evid. 404(b) evidence, that SrA Menard's conviction is against the weight of the evidence.

4. Conclusion

Everything RH said could be true and SrA Menard would still not be guilty. The Government failed to present sufficient evidence that SrA Menard viewed RH's private area, and thus the conviction should not stand.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED ACTS UNDER MIL. R. EVID. 404(b).

Additional Facts

The Government provided notice of intent to introduce evidence pursuant to Mil. R. Evid. 404(b), including the following: (1) SrA Menard demanded RH give him her social media passwords, including Snapchat and Instagram; (2) SrA Menard

would take her phone during the night while she slept and go through her messages, sometimes locking himself in the bathroom while doing so; and (3) SrA Menard would access RH's social media and block male friends and ex-boyfriends. (App. Ex. XIX at 1–2.) The Defense filed motions *in limine* regarding this and other Mil. R. Evid. 404(b) evidence, which the Government opposed.[5] (App. Ex. IV–VII.)

RH testified during a motions hearing. (R. at 31–64.) Her testimony mirrored her trial testimony on the Mil. R. Evid. 404(b) evidence. *See supra* p. 5. In its response to the Defense's supplemental motion *in limine*, the Government provided the OSI interview with SrA Menard. (App. Ex. VII, Attachment 3.[6]) The Government specifically noted SrA Menard's admission that he hid the camera in RH's bedroom to see if she was lying about what she was doing in the bedroom. (App. Ex. VII, Attachment 3.) During argument on the motion, the trial counsel said he expected the members would hear evidence that SrA Menard hid the camera and watched it on at least two occasions. (R. at 67.)

The military judge ultimately denied the Defense motion to exclude the three pieces of evidence above. (App. Ex. XIX at 7–9.) The military judge began his analysis by stating that this Court's "decision in *Moore*, and other cases like it, establish that the introduction of controlling behaviors in a case involving crimes committed against

[5] The military judge excluded other evidence the Government noticed under Mil. R. Evid. 404(b). (App. Ex. XIX at 8–10.)

[6] The video attachments are missing from Appellate Exhibits V and VI. However, this Court need not remand to correct the record because the same files are contained in PHO Exhibits 4 and 6.

an intimate partner is permissible under M.R.E. 404(b) to establish a motive, plan or intent to dominate and control on the part of the accused." (App. Ex. XIX at 7 (footnote omitted) (citing *United States v. Moore*, 78 M.J. 868 (A.F. Ct. Crim. App. 2019)).) He also wrote that these decisions may also explain the lack of action on the part of the "victim." (*Id.*) He generally found the admissible evidence was "probative of a motive to monitor [RH] without her consent." (*Id.* at 8.)

The ruling contained a second "analysis" section that was tailored to the actual evidence offered. Regarding SrA Menard demanding that RH give him her social media passwords, the military judge found this probative of his plan or scheme to monitor RH. (*Id.* at 9.) For the allegation that SrA Menard would take her phone while she slept and got through messages, the military judge similarly found this probative of SrA Menard's "plan or scheme" to monitor RH. (*Id.*) Finally, concerning SrA Menard accessing RH's social media and blocking males, he likewise found this probative of the plan or scheme to monitor RH. (*Id.*)

Standard of Review

A military judge's decision to admit evidence pursuant to Mil. R. Evid. 404(b) is reviewed 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 or her discretion when: "(1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly

unreasonable; or (4) the military judge fails to consider important facts." *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

Law and Analysis

The military judge admitted RH's allegations of controlling behavior to show plan or scheme. But in so doing he failed to consider that SrA Menard *admitted* placing the camera and watching it on different occasions. This was an abuse of discretion that yielded prejudice in the case.

1. Legal landscape for admitting evidence under Mil. R. Evid. 404(b).

The general rule for character evidence, set forth in Mil. R. Evid. 404(a), states: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The CAAF has "consistently stated that evidence of uncharged bad acts may not be introduced solely to show that an accused has a propensity to commit crimes of the type charged." *Morrison*, 52 M.J. at 121 (citations omitted). Under Mil. R. Evid. 404(b)(1), evidence of a crime, wrong, or other act is inadmissible to "prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." A court may admit such evidence for another purpose, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2).

Courts apply the three-part *Reynolds* test to review admissibility under Mil. R. Evid. 404(b): (1) "Does the evidence reasonably support a finding by the court members that appellant committed other crimes, wrongs or acts?"; (2) "What fact of consequence is made more or less probable by the existence of this evidence?"; and (3)

"Is the probative value substantially outweighed by the danger of unfair prejudice?" *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

2. Plan and scheme, the military judge's justifications for admitting the evidence, are inapplicable here.

The military judge's written ruling specifically allowed admission of each relevant item because of a plan or scheme to monitor RH. There are two flaws to this analysis.

First, the CAAF and the CMA require significant similarity between charged and uncharged acts to use as evidence of a plan or scheme. 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 (citing *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984)). The standard for a scheme is "significantly similar conduct." *Reynolds*, 29 M.J. at 110.

The offered evidence meets none of these thresholds, and thus fails the second *Reynolds* prong. Neither obtaining passwords, nor accessing RH's phone, nor deleting and blocking her contacts can meet the stringent requirements of "significantly similar conduct." The conduct is not similar at all. The commonality is the allegation of impropriety, which is another way of saying propensity to do wrong. At issue is whether SrA Menard committed improper viewing; the value of this plan or scheme, if any, does not relate to a plan or scheme to commit improper viewing.

The first point links to the second: not only is the offered evidence dissimilar, but, for the purpose that the military judge allowed its use, it is cumulative and should fail a Mil. R. Evid. 403 analysis. The military judge had evidence before him that SrA Menard admitted to placing the camera without RH's knowledge. The Government acknowledged that it planned to introduce such evidence. In that context, why is evidence of plan or scheme to monitor RH not cumulative of SrA Menard's admission? It was, and the military judge abused his discretion in deciding otherwise. Indeed, he did not seem to register anywhere in his written opinion that SrA Menard's interview would come before the members. (App. Ex. XIX.) He thus failed to consider important facts, further underscoring the abuse of discretion. *Rudometkin*, 82 M.J. at 401.

3. The military judge's general analysis, untethered from the facts here, cannot justify admission regarding motive, plan, or intent to dominate and control.

The military judge's ruling has two "analysis" sections: one specific to the charged conduct that addresses plan and scheme, and one general that speaks about the case law and general implications for this case. As a starting point, scrutinizing the first analysis section is challenging because the military judge speaks in platitudes and talks about what cases such as *Moore* hold without applying those cases to the facts. It is also difficult because the justifications for admitting the evidence in the specific section do not match the general. Still, this brief will address the possibility that the military judge admitted the evidence as motive or intent to dominate and control.

The military judge chiefly cites *Moore* in the first analysis. In *Moore*, the appellant was a 22-year-old adult at the time of the charged conduct while the victim was a minor. *Id.* at 871. The military judge permitted her to testify about the appellant's behavior in their relationship at trial, including limiting her time with family and friends, restricting access to her phone, monitoring eating and exercise habits, using demeaning language, requiring frequent check-ins, and attempting to have her get pregnant to avoid entering the Marine Corps. *Id.* at 871–73. This Court found the evidence of controlling behavior made two facts of consequence less probable: whether she consented and whether the appellant had a mistake of fact as to consent. *Id.* at 874. The circumstances, this Court held, were important to consider on the question of consent. *Id.*

Given the admissions, Consent was not at issue. And the military judge erred in construing *Moore* as license to introduce broadly sweeping evidence of "motive and intent to control or dominate." The crucial requirement—in every *Reynolds* analysis—is what fact of consequence is made more or less probable through the evidence. And, once again, the key fact is that SrA Menard admitted to placing the camera in the room without RH's knowledge. Where the military judge was directly told that this evidence would come in at trial, what fact in controversy is made more or less probable by a motive or intent to control or dominate? This case always came down to whether or not SrA Menard was watching at the moment RH masturbated (or if that was even possible based on the camera position). The behaviors falling under the umbrella of an unhealthy relationship add nothing to this question while

bearing a significant danger of unfair prejudice. If the military judge were using *Moore*—which is hard to decipher—it was nonetheless an abuse of discretion when applying the law to the facts here.

4. The erroneous admission prejudiced SrA Menard.

This Court evaluates prejudice by weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). Applying these factors demonstrates clear prejudice.

First, the Government's case had substantial holes. As explained in more detail above related to factual insufficiency, the Government's evidence of actual viewing—the *sine qua non* of indecent viewing—was deficient. Second, the Defense built a strong case that highlighted the minimal evidence presented on this point.

Third, the evidence was immaterial, because it should have played no role in deciding the ultimate question of whether SrA Menard saw RH masturbating. But that weighs in favor of SrA Menard here. That is because the uncharged bad behavior serves only to demonize SrA Menard on a collateral point that does not advance the case.

Fourth, the quality of the evidence was substantial. RH testified at length about the problems in their relationship and SrA Menard's behaviors. (R. at 281–92.) The Government's emphasis on the evidence at argument—calling his uncharged behaviors "abuse"—further indicates its quality. (R. at 457–58.)

Taken together, the factors weigh in favor of prejudice. The military judge's abuse of discretion injected prejudicial evidence into the trial and invited the members to adjudge guilt based on SrA Menard's alleged deficiencies in the relationship, not on whether he viewed RH's private area.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

III.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED RH TO DISCUSS THE IMPACT OF UNCHARGED MISCONDUCT IN HER UNSWORN STATEMENT.

Additional Facts

During presentencing, RH provided a written unsworn victim impact statement. (Ct. Ex. A.) Defense counsel objected to various statements, including the following: "I spent just short of 2 years of my early adulthood in the tumultuous relationship I had with SrA Menard. The relationship was overshadowed by his jealousy, accusations, overwhelming insecurity, constant invasion of privacy, and emotional and mental abuse, that I did not, and do not deserve." (*Id.*) Defense counsel argued that such matters were not "course of conduct" for the actual offense of indecent viewing. (R. at 499.)

The military judge ruled that RH could discuss those matters. He reasoned that the evidence came in under his Mil. R. 404(b) ruling, and that such evidence is normally admissible as continuous course of conduct evidence when offered as evidence in aggravation. (R. at 509 (citing *United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990)).) The military judge found the "broad victim's rights contained in

R.C.M. 1001(c)" allowed these matters because they were "directly related to or arising from" the offense. (*Id.*)

Standard of Review

This Court reviews a military judge's decision to accept a victim impact statement for an abuse of discretion. *United States v. Cunningham*, 83 M.J. 367, 371 (C.A.A.F. 2023).

Law and Analysis

1. Relationship struggles are not victim impact of this offense.

A crime victim may present matters as "victim impact," which "includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2). Here, the military judge abused his discretion when he considered the full unsworn victim impact statement. The prior issues in RH and SrA Menard's relationship should have played no role in the military judge's sentence. As noted above, it was error to admit this evidence under Mil. R. Evid. 404(b). *See* AOE II, *supra*. The military judge compounded the problem by explicitly considering this same evidence when it became part of the victim impact statement.

The military judge justified his conclusion through a flawed two-step process. (R. at 509.) First, he concluded that such evidence would be admissible as evidence in aggravation under *Mullens*. While he recited a quotable line from the opinion—"evidenced a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community"—he failed to heed the facts of *Mullens* when considering its scope. (*Id.*) *Mullens* involved identical acts

with the same victims. 29 M.J. at 399. While the CMA did say "same or similar crimes," SrA Menard's acts do not qualify. They were neither crimes nor were they the same or similar. The Mil. R. Evid. 404(b) evidence, if true, falls under the umbrella of bad or manipulative behaviors in a relationship. But he was convicted of improper viewing. His punishment should rest on the convicted offense, not the tangential matters that RH found particularly impactful. The first step in the analysis is wrong because *Mullens* would not permit admission of this evidence as aggravation.

The second step was to adopt this Court's holding in the unpublished *Goldsmith* case, wherein this Court held that the military judge did not abuse his discretion by admitting "course of conduct" evidence under R.C.M. 1001(c). *United States v. Goldsmith*, No. ACM 40148, 2023 CCA LEXIS 8, at *21–22 (A.F. Ct. Crim. App. 11 Jan. 2023) (unpub. op.). But if *Goldsmith* is premised on the idea that "directly relating to or resulting from" (the R.C.M. 1001(b)(4) standard) is similar to "directly relating to or arising from" (the R.C.M. 1001(c)(2) standard), then evidence that fails one standard fails the other. Matters in aggravation must be directly related "to the offenses "of which the accused has been found guilty" and may not consist of "'general evidence of . . . uncharged misconduct.'" *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (quoting *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001)). This represents a "higher standard" than "mere relevance." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (quoting *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)). To show a direct link, the matters in

aggravation must be "closely related in time, type, and/or often outcome, to the convicted crime." *Hardison*, 64 M.J. at 281. Under the controlling case law, this evidence was inadmissible under R.C.M. 1001(b)(4) as aggravation evidence.

Because the evidence was inadmissible under *Mullens*, the military judge should have ruled these matters impermissible under R.C.M. 1001(c)(2). While this Court found no abuse of discretion in *Goldsmith*, that case is distinguishable on the facts. 2023 CCA LEXIS 8 at *23. In *Goldsmith* the objected-to reference, "[a]t the most . . . hint[ed] at other 'incidents,' but provides no detail." *Id.* Here, the matters at issue are crystal clear, as the military judge had already admitted them under Mil. R. Evid. 404(b).

2. This erroneous admission prejudiced SrA Menard.

When there is error regarding the presentation of victim statements under R.C.M. 1001(c), the test for prejudice "is whether the error substantially influenced the adjudged sentence." *See United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018) (quoting *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)). This Court considers the following factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Id.* (quoting *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)).

On the first factor, the Government provided no sentencing case beyond routine evaluations and a low-level letter of counseling. (Pros. Exs. 6–9.) On the second factor, the Defense presented a compelling case on behalf of SrA Menard. This

included character letters from senior noncommissioned officers and noncommissioned officers who stood by him despite the misconduct. (Def. Exs. B–F.)

Concerning the third factor, the evidence was material to the sentence—it reinjected the troubled relationship into the sentencing proceeding as a basis for enhanced punishment. Even though this was a military judge-alone case, the fact that the military judge incorrectly believed this evidence was admissible in the first place indicates that he would weigh this evidence when deciding on SrA Menard's sentence. (R. at 510 ("Now, I feel based on evidence that was presented at trial, I will be able to give the proper weight to any such instances through the presentation of evidence.").) Finally, the quality of the matters is significant. RH personally delivered her unsworn statement, which directly implicated her extensive testimony on their relationship. It is no surprise that one of her first statements was not about the crime, but about the surrounding relationship. While this was important to her, it was an impermissible basis for SrA Menard's sentence.

WHEREFORE, SrA Menard respectfully requests this Honorable Court reassess his sentence.

Respectfully submitted,

[redacted]

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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matters:

IV.

SRA MENARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

SrA Menard elected trial by officer members. (R. at 119.) His panel consisted of eight members, and the military judge instructed them that "[t]he concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty." (R. at 239, 476.) It is unknown whether the members convicted SrA Menard by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-

unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, Amn Moore was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's guarantee of equal protection.

There is no way of knowing whether a nonunanimous verdict secured SrA Menard's conviction. But that is a problem for the Government, not SrA Menard. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . .").

SrA Menard recognizes that the CAAF's recent decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court. However, he continues to raise the issue in anticipation of further litigation on the matter.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

V.

SRA MENARD'S INDECENT VIEWING CONVICTION IS LEGALLY INSUFFICIENT.

Standard of Review

Legal sufficiency is reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)).

For the reasons discussed in the main brief in AOE I, SrA Menard's conviction for indecent viewing is legally insufficient. No reasonable factfinder could conclude that the Government met its burden to prove his guilt beyond a reasonable doubt.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

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 Appellate Operations Division on 17 April 2024.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **JERIN P. MENARD**, USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 3 No. ACM 40496 17 May 2024

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 3
Senior Airman (E-4) **JERIN P. MENARD** United States Air Force *Appellant.*	)	No. ACM 40496 17 May 2024

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

ISSUES PRESENTED

I.

WHETHER SENIOR AIRMAN MENARD'S INDECENT VIEWING CONVICTION IS FACTUALLY SUFFICIENT.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED MISCONDUCT UNDER MIL. R. EVID. 404(B).[1]

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ALLOWED R.H. TO DISCUSS THE IMPACT OF UNCHARGED MISCONDUCT IN HER UNSWORN STATEMENT.

[1] Appellant's brief erroneously uses the words "sexual misconduct" in Issue II; no uncharged sexual misconduct was ever admitted at trial.

IV.[2]

WHETHER SENIOR AIRMAN MENARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

V.

WHETHER SENIOR AIRMAN MENARD'S INDECENT VIEWING CONVICTION IS LEGALLY SUFFICIENT.

STATEMENT OF CASE

On 23 March 2023, a general court-martial composed of a panel of officers convicted Appellant, contrary to his plea, of one specification of indecent viewing in violation of Article 120c, UCMJ. (R. at 482.) The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for six months, and a bad-conduct discharge. (R. at 531.) After considering the post-trial submissions, the convening authority took no action on Appellant's case. (*Convening Authority Decision on Action*, ROT, Vol. 1.)

STATEMENT OF FACTS

"I'll see what you're doing."

In early 2020, Appellant and SSgt RH began a relationship after matching on a dating application. (R. at 277.) Shortly after they began dating, Appellant obtained SSgt RH's phone password and began accessing her device. (R. at 288.) When SSgt RH caught him doing so, Appellant did not give SSgt RH a "straight answer" about why he had her phone. (R. at 289.)

Several months later, Appellant asked SSgt RH for the passwords to her social media accounts. (R. at 281-82.) Appellant wanted to see who SSgt RH was talking to and with whom she was connected: "I'll see what you're doing." (R. at 284; Pros. Ex. 5 at Video File 1, 12:09-

[2] Appellant raises Issues IV and V pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

12:10.) Appellant threatened to break up with SSgt RH if she did not comply. (R. at 282.) SSgt RH, who wanted to maintain the relationship, obliged. (Id.)

Over the ensuing year, Appellant used SSgt RH's passwords to access her phone and monitor her social media accounts. (R. at 286, 291.) Using what he learned from surveilling SSgt RH's accounts, Appellant questioned SSgt RH about old friends, current friends, and past relationships. (R. at 285.) Appellant also used his access to block various male friends from SSgt RH's social media, without SSgt RH's knowledge. (R. at 286, 291.)

By mid-2021, the relationship between Appellant and SSgt RH was "not well." (R. at 292.) In July 2021, Appellant—who frequently accused SSgt RH of cheating on him—admitted to SSgt RH that he had started a relationship with another woman while on vacation. (R. at 292.) After Appellant acknowledged "there was something physical" between him and the other woman, SSgt RH told Appellant she was "done" and broke up with him. (R. at 293.)

"Snapping guys again I see."

After breaking up, SSgt RH and Appellant continued to cohabitate while SSgt RH looked for another place to live. (R. at 299.) One evening after their break-up, SSgt RH was lying in bed exchanging pictures with her father via text and took a picture using the flash. (R. at 305-307.) SSgt RH then received a message from Appellant: "Snapping guys again I see." (R. at 305-307; Pros. Ex. 2.)

SSgt RH, who was alone in her bedroom, was confused as to how Appellant knew she was on her phone. (R. at 305.) She "got off the bed and went to the windows" to see whether Appellant—who had taken the dog for walk—was on the hill by their apartment. (R. at 305.) Seeing no one, SSgt RH closed the blinds and curtains. (R. at 306.)

SSgt RH told Appellant she was "literally texting [her] dad," to which Appellant replied: "Yea didn't know you take pictures to text your dad." (Pros. Ex. 2.) SSgt RH emphasized that she was "not doing anything," and Appellant responded, "Sure." (Pros. Ex. 2.)

"Did you make any videos today?"

A week later, SSgt RH was home alone while Appellant attended a softball tournament in Pennsylvania. (R. at 307.) Throughout the morning, Appellant and SSgt RH texted each other. (Pros. Ex. 3.) Shortly after noon, SSgt RH stopped replying so she could take a shower. (R. at 363-64.) After getting out of the shower, SSgt RH removed her towel, laid on her bed, and masturbated in the nude. (R. at 308-309.) Seconds after SSgt RH stopped masturbating, Appellant texted SSgt RH: "Did you make any videos today?" (R. at 309; Pros. Ex. 3.) Confused, SSgt RH asked Appellant "what?" (Pros. Ex. 3.) Appellant pressed SSgt RH further: "Any videos? Bring the toy out?" (Pros. Ex. 3.)

SSgt RH then ceased responding to Appellant and began to get dressed. (R. at 310.) SSgt RH tried on several outfits, including one consisting of a blue top and blue pants. (R. at 310-11.) In the process, SSgt RH took several photos to send to her friend. (R. at 311.) While SSgt RH was taking pictures, Appellant texted her again: "You want to take pictures of your butt in your blue outfit. Yea okay." (R. at 311; Pros. Ex. 3 at 6.)

By this point, SSgt RH was "confused" and "scared." (R. at 312.) Appellant had never seen the blue outfit before, and she had never sent him any pictures of the outfit. (R. at 311; Pros. Ex. 5 at Video File 2, 01:33-01:34.) Appellant was also "four hours away" in Pennsylvania and should have had "no way" of knowing what SSgt RH was doing. (R. at 307, 312.) Frightened and in need of someone to talk to, SSgt RH left her bedroom and FaceTimed her friend, SSgt BS, to tell her what was happening. (R. at 312.) SSgt BS agreed there was no way

Appellant should know what SSgt RH was doing and expressed her belief that "there was something there" in SSgt RH's bedroom. (R. at 312-13.)

"Oh look you caught on. Bravo."

At SSgt BS's urging, SSgt RH returned to her bedroom and began to inspect it to see if "there was something there." (R. at 313.) After examining the windows, curtains, and mirror, SSgt RH began scrutinizing the plush toys on her TV stand. (R. at 314.) First, she checked the teddy bear on the edge of the TV stand. (R. at 314; Pros. Ex. 2.) Finding nothing, she moved on to a cupcake-shaped plush toy that was between the teddy bear and the TV. (R. at 314; Pros. Ex. 1.) As she picked up the toy, it "snagged" and got "caught on the wall." (R. at 314.) When SSgt RH turned the toy over, the reason it "caught on the wall" became apparent—coming out of the back was a wire, which connected to the wall. (R. at 315.)

Upon checking the front of the toy, SSgt RH realized that one of the eyes had been cut out. (R. at 315; Pros. Ex. 1.) She then reached into the toy and pulled out what was inside—a camera. (R. at 315.) SSgt RH began to cry. (Id.) She recognized the camera. (R. at 316.) Her parents had gifted it to her so she could use it while crate-training her dog, but she had never set it up. (R. at 316, 339.) Unbeknownst to SSgt RH, Appellant had set it up in SSgt RH's room so he could see what she was doing. (Pros. Ex. 5 at Video File 2, 00:11-00:30.)

As SSgt RH cried, SSgt BS told SSgt RH to unplug the camera. (R. at 315.) As soon as SSgt RH did so, Appellant texted her: "Oh look you caught on. Bravo." (R. at 315-316; Pros. Ex. 3 at 7.)

"Obviously what I did was wrong."

After SSgt RH reported the incident to her leadership and the local police department, the Office of Special Investigations (OSI) began investigating Appellant. (R. at 368-369.) As part

of their investigation, OSI brought Appellant in for an interview. (R. at 374.) After being advised that he was being investigated for indecent viewing in violation of Article 120c, Appellant waived his Article 31 rights and admitted that he hid the camera inside a "stuffed cupcake" on the TV stand in SSgt RH's room "without her knowledge." (R. at 379, 391-92; Pros. Ex. 5 at Video File 2, 5:28-5:30; Video File 3, 06:58-07:31.) Appellant stated that he did so after looking through SSgt RH's Snapchat account and discovering that SSgt RH had sent a video of herself masturbating to another male. (Pros. Ex. 5 at Video File 1, 2.)

> So obviously after the situation with me finding the video of her, you know, where she was exchanging naked videos to another guy. Uh, yeah, I decided to hook up a doggy cam in her room. And I wanted to see if she was still doing this behind my back...

(R. at 393; Pros. Ex. 5 at Video File 2, 00:11-00:30.)

Appellant explained that the camera was connected to an application on his phone, which he would use to check the live camera feed. (R. at 379-380; Pros. Ex. 5 at Video File 4, 00:58-01:37.) He first checked the camera while walking the dog, at which point he saw SSgt RH's phone camera flash. (Pros. Ex. 5 at Video File 3, 1:26-1:36.)

According to Appellant, the second time he checked the camera, he saw SSgt RH trying on "some blue outfit" and taking pictures. (R. at 382; Pros. Ex. 5 at Video File 2, 01:45.) Appellant, who did not receive any of those pictures from SSgt RH, assumed they were "obviously unsolicited pictures to someone else." (Pros. Ex. 5 at Video File 2, 01:29-01:34.) Appellant stated that he became upset and "called [SSgt RH] out." (Id. at 03:01-03:15.) According to Appellant, he "wasn't even trying to hide it" and did so to send a message: "I see what you're doing." (Id.) Appellant conceded that his comments would have alerted SSgt RH to the presence of a camera: "Obviously everything that I said, she would have known that there was a camera in the room." (Pros. Ex. 5 at Video File 2, 03:44-03:48.)

Appellant denied seeing SSgt RH masturbating earlier the same day or ever seeing her naked and claimed he "would have just called her out" if he had. (R. at 387.) Appellant claimed that he only asked SSgt RH if she "brought out the toy today" because she was not responding to his earlier messages and alluded to the video that SSgt RH had sent to the other male, which depicted her masturbating:

> Appellant: So I had sent her two texts, like, did you like bring out the toy today? Like, you're like-- what are you doing? Because she wasn't responding. And she was like, the fuck you talking about? Like, no, blah, blah, blah, all this. And I was like, well, last time I was gone, that's what you were doing. So I'm just asking.
>
> OSI: What do--what do you mean by that?
>
> Appellant: Because the weekend-- the weekend prior was in PA. And she was telling me that she loved me and she wanted this to work, blah, blah, blah. And she was doing all these things in person. But like the same exact night, literally around the same timeframe, she was on Snapchat sending naked videos of herself to another guy, so that's why.
>
> OSI: Did that involve a toy of some sort? You mentioned a toy.
>
> Appellant: Well yeah. She was, you know, masturbating in the video. And she was sending it to another guy. So yeah, that's why I asked her like, yo, is this what you're doing while I'm gone? Because you're not fucking texting back. Yeah. That's-- that was the reason for those two questions.

(Pros. Ex. 5 at Video File 3, 5:15-6:16.)

Of his conduct generally, Appellant said: "Obviously what I did was wrong." (R. at 398; Pros. Ex. 5 at Video File 2, 5:08-5:09.)

The remaining facts necessary for disposition of the issues are set forth below.

ARGUMENT

I.

APPELLANT'S CONVICTION FOR INDECENT VIEWING IS FACTUALLY SUFFICIENT.

Additional Facts

Appellant was charged with one specification of indecent viewing in violation of Article 120c, UCMJ. The specification, as stated on the charge sheet used at trial, read as follows:

> In that SENIOR AIRMAN JERIN P. MENARD, United States Air Force, 305th Aerial Port Squadron, Joint Base McGuire-Dix-Lakehurst, New Jersey, did, within the continental United States, between on or about 15 August 2021 and on or about 21 August 2021, without legal justification or lawful authorization knowingly and wrongfully view the private area of Senior Airman [RH], [3] without her consent and under circumstances in which she had a reasonable expectation of privacy.

(*Charge Sheet*, ROT, Vol. 1.)

The prosecution's case-in-chief consisted of testimony from SSgt RH, SSgt BS, and the investigating OSI agent; screenshots of the text messages between Appellant and SSgt RH; photos of the camera, stuffed cupcake toy, and SSgt RH's TV stand as seen from her bed; and portions of Appellant's recorded interview with OSI. (R. at 275-365; Pros. Ex. 1-5.) The defense did not present a case-in-chief. (*See* R. at 425-430.)

Standard of Review

"The Court may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B)." 10 U.S.C. § 866(d)(1)(A). Factual sufficiency is

[3] By the time of trial, RH had promoted to Staff Sergeant. (*See* R. at 276.)

reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[4]:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> >
> > (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B).

The new standard—which makes it more difficult for an appellant to prevail on appeal—has been addressed by three service courts so far, to include this one. United States v. Harvey, 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023), *rev. granted*, __M.J.__, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024); United States v. Scott, 83 M.J. 778, 779-80 (A. Ct. Crim. App. 2023), *rev'd on other grounds*, __M.J.__, No. 24-0063/AR, 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024); United States v. Csiti, No. ACM 40386, 2024 CCA LEXIS 160, at *19-20 (A.F. Ct. Crim. App. Apr. 29, 2024) (unpub. op.).

In Harvey, the Navy-Marine Corps Court of Criminal Appeals (NMCCA.) held that the new standard was more deferential to the trial court than the prior standard. 83 M.J. at 692-93.

[4] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

First, the N.M.C.C.A. held that to make a "specific showing of a deficiency in proof," an appellant was required to "identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." Id. at 691. Second, the NMCCA. determined that "'appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence' is a higher standard than the prior 'recognizing that the trial court saw and heard the witnesses.'" Id. at 692. The NMCCA interpreted the new standard to mean that "Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty." Id., 83 M.J. at 693.[5]

In Scott, the Army Court of Criminal Appeals (ACCA) agreed with most of the NMCCA's analysis and that "the new burden of persuasion with its required deference makes it more difficult for one to prevail on appeal," but disagreed with the proposition that the new standard created a rebuttable presumption of guilt. 83 M.J. at 779-80.

Most recently, in Csiti, this Court also agreed that the new standard requires more deference to the trial court when weighing the evidence. 2024 CCA LEXIS 160, at *19. But like the ACCA, this Court declined to apply the rebuttable presumption of guilt from Harvey: "In the absence of clearer guidance, we infer Congress intended the beyond reasonable doubt standard to continue to apply in questions of factual sufficiency." Id. at *21-22. This Court then held that "in order to set aside a finding of guilty we must be *clearly convinced* that the weight of the evidence does not support the conviction beyond a reasonable doubt." Id. at *23 (emphasis added).

[5] The Court of Appeals for the Armed Forces has granted review on the issue of whether there is, indeed, a rebuttable presumption of guilt; as of this filing, the case is undecided.

Law & Analysis

To sustain a conviction for indecent viewing in violation of Article 120c, UCMJ, the evidence must show:

> (1) That within the continental United States, between on or about 15 August 2021 and 21 August 2021, Appellant, without legal justification or lawful authorization, knowingly and wrongfully viewed the private area of SSgt RH;
>
> (2) That the accused did so without the consent of SSgt RH; and
>
> (3) That said viewing took place under circumstances in which SSgt RH had a reasonable expectation of privacy.

See Manual for Courts-Martial, United States part IV, para. 63.b(1) (2019 ed.) (MCM).

A person has a reasonable expectation of privacy under circumstances where a reasonable person would believe that (A) "he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured," or (B) that a private area of the person would not be visible to the public." 10 U.S.C. § 920c(d)(3). "Private area" means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple. 10 U.S.C. § 920c(d)(2).

"While the Government has a heavy burden of persuasion, it need not prove its case to a mathematical certainty." United States v. Kloh, 27 C.M.R. 403, 406 (U.S. C.M.A. 1959). The Government may meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Such is the case here. As set forth below, the combination of direct and circumstantial evidence "produced at trial" is factually sufficient to affirm Appellant's conviction for indecent viewing. United States v. Dykes, 38 M.J. 270, 272 (C.M.A. 1993).

A. The weight of the evidence establishes beyond a reasonable doubt that Appellant could see SSgt RH while she was in bed and viewed her private area.

Appellant alleges that his conviction is factually insufficient because the "evidence fails to show whether [Appellant] saw RH's private area." [6] (App. Br. at 11.) In so contending, Appellant relies on a skewed interpretation of the evidence that this Court should decline to adopt, as appellate courts are not required to accept an appellant's view of the record of trial or the inferences which might be reasonably drawn therefrom. United States v. Rounds, 30 M.J. 76, 80 (C.M.A. 1990).

First, there is ample evidence that the camera's position allowed Appellant to see SSgt RH while she was in bed. Prosecution Exhibit 1 demonstrates that the stuffed cupcake—in which Appellant hid the camera—was on SSgt RH's nightstand and visible from the bed. (Pros. Ex. 1.) Appellant discounts Prosecution Exhibit 1 as "grainy," and suggests that "it would seem the [camera's] view would be obstructed by the television." (App. Br. at 10.) But this is baseless speculation that is directly contradicted by Appellant's own words—both in his text messages and in his confession to OSI. (Pros. Ex. 2, 5.)

By his own admission, Appellant first watched SSgt RH through the hidden camera while he was walking her dog. (R. at 305-307; Pros. Ex. 5.) At the time, SSgt RH was on her bed—at some point, she took a picture to send to her father. (R. at 306-307.) Appellant saw the "flash" from SSgt RH's phone camera through the camera feed and promptly texted SSgt RH: "Snapping other guys I see." (Pros. Ex. 2, 5.) SSgt RH then told Appellant she was "literally texting [her] dad," but did not mention taking a picture. (Pros. Ex. 2.) Rather, it was Appellant who brought it up: "Yea didn't know you *take pictures* to text your dad." (Id.)

[6] Appellant concedes that the factual sufficiency of his conviction "turns completely on whether [Appellant] viewed RH's private area," and does not contest the other elements of the offense. (App. Br. at 9.)

As evidenced by his text messages, Appellant clearly knew SSgt RH took a picture. However, given that SSgt RH did not tell Appellant she did so, the only way he could have known is because he saw it himself. Appellant could have not seen SSgt RH taking a picture if she and her bed were not visible through the camera. Taken altogether, the evidence establishes that the camera captured SSgt RH taking a picture while she was in bed. This leaves no *reasonable* doubt that the camera—and by extension, Appellant—had a direct line of sight to the bed. And if Appellant could see SSgt RH when she was in bed taking pictures, he would have been able to see her masturbating while naked on top of the covers a week later.

Appellant, for his part, attacks the evidence's alleged failure to "establish that the camera remained in that position during the week," and suggests that it "could have moved to a position with even less visibility." (App. Br. at 10.) But there is no evidence suggesting that the camera was moved. Had SSgt RH attempted to move the cupcake toy prior, she would have discovered the camera sooner. And unless the camera took on a life of its own and "moved [itself] to a position with even less visibility," it would have remained in the same position that Appellant set it up. Considering the above, this Court should recognize Appellant's argument for the red herring that it is.

Similarly, the absence of "logs" documenting Appellant's access to the hidden camera is inconsequential, given the "temporal alignment" between SSgt RH's masturbation and Appellant's messages. (App. Br. at 11.) The prosecution presented uncontradicted evidence that Appellant texted SSgt RH "seconds" after she finished masturbating. (R. at 309; Pros. Ex. 2.) The text messages in question—"Did you make any videos today? Any videos? Bring the toy out?"—alluded to masturbation. (Pros. Ex. 5.) As Appellant himself admitted to OSI, he asked SSgt RH about videos and toys because of a video that SSgt RH allegedly sent to another male,

which involved masturbation and the use of a toy. (Pros. Ex. 5.) Put simply, Appellant texted SSgt RH about masturbation mere seconds after she finished masturbating. Appellant wanted OSI—and now this Court—to believe it was simply fortuitous timing. This Court should be unconvinced. The timing was no coincidence. The above-described circumstantial evidence establishes beyond a *reasonable* doubt that Appellant could—and did—see SSgt RH masturbating through the hidden camera. And because SSgt RH was naked while she did so, this Court can "reasonably infer" that Appellant saw her private area—her exposed genitalia, buttocks, areola, nipple, or a combination thereof. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judge's Benchbook*, para. 7-3 (29 February 2020).

Of course, Appellant denied ever seeing SSgt RH's private area or watching her masturbate. (Pros. Ex. 5.) Appellant contends that his "firm denial" contradicts the prosecution's proof, which he describes as "loose circumstantial evidence." (Pros. Ex. 5; App. Br. at 11.) But the fact that the Government's proof on this point consists of circumstantial evidence does not render it any less reliable. Military jurisprudence has long held that "direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence); *see also* United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998) (finding sufficient evidence of premeditation based on circumstantial evidence of intent). And the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003); *see* Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence … is intrinsically no different from testimonial evidence."). This is because "the ability to rely on circumstantial evidence is especially

important in cases … where the offense is normally committed in private." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019). Such is the case here. Using the hidden camera and its connection to an application on his phone, Appellant secretly invaded SSgt RH's privacy and viewed her private area through what amounted to an electronic peephole. As Appellant himself said, "No one knew that [he] even had it." (Pros. Ex. 5 at Video File 4, 01:35-01:36.)

Considering the above, the fact that Appellant denied committing the crime after getting caught is neither surprising nor dispositive. And as Appellant concedes, "the factfinder is free to disbelieve his statement to OSI." (App. Br. at 11.) Using their common sense and knowledge of human nature, the factfinder—and now, this Court—would be justified in finding Appellant's denial implausible under the circumstances. This is especially true given that the self-serving denial of culpability was made under conditions where Appellant could not be cross-examined under oath. *See* D.A. Pam. 27-9, para. 2-5-23.[7]

Nevertheless, Appellant implies that he was being truthful when he denied seeing SSgt RH's private area and leans on the fact that he "acknowledged that what he was doing was against the law in New Jersey." (App. Br. at 11.) Appellant asks this Court to consider "why he would admit to one crime, but not the specific crime that he was later charged with." (App. Br. at 11.) The answer is simple: Appellant knew exactly what OSI was investigating him for, and it was not for a violation of New Jersey law. He knew he was under investigation for indecent viewing in violation of Article 120c, UCMJ. (R. at 391-92.) It is not unheard of for criminals to deny committing the crime they are being investigated for. *See, e.g,* United States v. Young, 49 M.J. 265, 266 (C.A.A.F. 1998) (where appellant denied involvement with a robbery until his co-

[7] When an accused makes an unsworn statement, members are instructed that "[a] person making an unsworn statement cannot be cross-examined," and that they "may consider that the statement is not under oath" when weighing its evidentiary value. D.A. Pam. 27-9, para. 2-5-23. It logically follows that the same considerations apply to unsworn, out-of-court statements.

conspirator confessed); United States v. Delarosa, 67 M.J. 318, 323 (C.A.A.F. 2009) (where appellant denied any involvement in infant son's death during pre-polygraph interview). Some perpetrators go even further than mere denials, which is why the instruction about false exculpatory statements exists:

> If an accused voluntarily offers an explanation or makes some statement tending to establish [his] innocence, and such explanation or statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt. You may infer that *an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish [his] innocence.* The drawing of this inference is not required.

D.A. Pam. 27-9, para. 7-22 (emphasis added); *but see* United States v. Colcol, 16 MJ 479 (C.M.A. 1983) (noting that the instruction is not appropriate if the alleged false statement is a general denial of guilt). In this context, Appellant's denial mattered little to the court-martial's "truth-seeking function." United States v. Custis, 65 M.J. 366, 371 (C.A.A.F. 2007).

Ultimately, Appellant's self-interested, out-of-court denial is not nearly enough to tip the scales in his favor. This Court cannot set aside Appellant's conviction unless it is "clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." Csiti, 2024 CCA LEXIS 160, at *23. The weight of the evidence admitted at trial—both direct and circumstantial—establishes beyond a reasonable doubt that Appellant wrongfully viewed SSgt RH's private area without her consent, under circumstances where SSgt RH had a reasonable expectation of privacy. Appellant's conviction is factually sufficient, and he is therefore unentitled to relief.

B. The Mil. R. Evid. 404(b) evidence is inessential to a factual determination that Appellant viewed SSgt RH's private area.

Next, Appellant contends that the Mil. R. Evid. 404(b) evidence admitted at trial—testimony about Appellant's controlling behavior—"may have impermissible clouded the

members' judgment." (App. Br. at 12.) But as demonstrated by the discussion *supra*, the factfinder did not need to consider any Mil. R. Evid. 404(b) evidence to conclude that Appellant viewed SSgt RH's private area. Appellant's confession, text messages, and SSgt RH's testimony about the offense are sufficient to independently establish every element of the offense.

Moreover, as discussed in the next issue, the Mil. R. Evid. 404(b) evidence was properly admitted as evidence of Appellant's intent and motive to control SSgt RH, and of his scheme to monitor her. The members were properly instructed that they could only consider it for that purpose, and that they could not "conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." (R. at 444.) "Members are presumed to follow a military judge's instructions to consider evidence for a proper purpose, such as bias or motive to misrepresent, and not let personal beliefs or feelings affect their determinations about witness credibility." United States v. Collier, 67 M.J. 347, 355 (C.A.A.F. 2009) (citing United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000)). There is no indication the presumption should not stand in this case, and this Court should not let Appellant force it to presume otherwise. The new standard for factual sufficiency requires Appellant to "explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." Csiti, 2024 CCA LEXIS 160, at *18 (citing Harvey, 83 M.J. at 691). Appellant cannot point to anything in the record that would leave this Court "clearly convinced" that the factfinder gave the Mil. R. Evid. 404(b) evidence undue weight, such that it tipped the scales towards a conviction. *See* Csiti, 2024 CCA LEXIS 160, at *23. Accordingly, Appellant's factual sufficiency claim fails on this ground and he is unentitled to relief.

WHEREFORE, the United States respectfully requests this Honorable Court affirm Appellant's conviction and sentence.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ADMITTED UNCHARGED MISCONDUCT UNDER MIL. R. EVID. 404(B).

Additional Facts

Prior to trial on the merits, the prosecution notified the defense that it intended to introduce six items of evidence regarding Appellant's controlling behavior pursuant to Mil. R. Evid. 404(b). (App. Ex. IV, Atch. 2.) The defense moved to exclude all the evidence. (App. Ex. IV-VII.)

After receiving evidence and hearing argument, the military judge suppressed three of the proffered items, and ruled that the following items were admissible: (1) evidence that Appellant demanded that SSgt RH give him the passwords to her social media accounts; (2) evidence that Appellant sometimes took SSgt RH's phone into a locked bathroom or went through it while she was asleep; and (3) evidence that Appellant accessed SSgt RH's social media applications and blocked male friends and ex-boyfriends. (App. Ex. XIX at ¶¶ 39-44.) The military judge found that the evidence was probative of Appellant's "plan or scheme to monitor R.H." (Id.) The military judge also found that the evidence would support a finding that Appellant "had an intent and motive to dominate and control R.H.," which he noted was a permissible theory of admissibility pursuant to United States v. Moore, 78 M.J. 868, 871-875 (A.F. Ct. Crim. App. 2019).

In finding that the probative value of this evidence was not outweighed by the danger of unfair prejudice "or any other fact that might be considered under that [Mil. R. Evid. 403]," the military judge noted:

> To force the Government to present evidence of the charged offenses involving R.H. in a vacuum would likely mislead the

> finder of fact in this case. Panel members individually will enter this case with their own understanding of what a serious dating relationship typically looks like. To deprive the members of evidence that might inform them as to what [Appellant's] relationship with R.H. was like in this case would deprive the members of critical context that might serve to explain the motivations and intent of [Appellant] and R.H. The Court views this evidence, subjective to appropriate limitations as described below, as having significant probative value for the members as they attempt to evaluate the credibility of various witnesses.

(App. Ex. XIX at ¶ 36.)

Standard of Review

A military judge's decision to admit evidence under Mil. R. Evid. 404(b) will not be disturbed except for a clear abuse of discretion. United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999). Reversal for an abuse of discretion requires "far more than a difference in . . . opinion." United States v. Johnson, 49 M.J. 467, 473 (C.A.A.F. 1998) (internal quotation marks omitted) (citations omitted). To be invalidated on appeal, "[t]he challenged action must . . . be found to be "arbitrary, fanciful, clearly unreasonable," or "clearly erroneous." Id. "A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008).

Law & Analysis

Pursuant to Mil. R. Evid. 404(b), "[e]vidence of a crime, wrong, or other act" is inadmissible to prove a person's propensity for wrongdoing but may be admitted to prove things such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989).

Such evidence is admissible if: (1) the evidence "reasonably support[s] a finding by the court members that the appellant committed the prior crimes, wrongs, or acts"; (2) a "fact of consequence" is made more or less probable by the existence of the evidence; and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

As a preliminary matter, SSgt RH's testimony and Appellant's pre-trial admissions reasonably support a finding that Appellant committed the uncharged acts at issue. (*See generally* R. at 276-365; Pros. Ex. 5.) Appellant does not contest this. Instead, he takes issue with the military judge's application of the second and third prongs of the Reynolds test. (App. Br. at 15-20.) Specifically, Appellant contends that the military judge erroneously concluded the evidence was indicative of a "plan or scheme to monitor RH," or "intent and motive to dominate and control RH," and that no "fact of consequence" was made more or less probable by the evidence. But as discussed below, the military judge's decision was "within the range of choices reasonably arising from the applicable facts and the law," Miller, 66 M.J. at 307, and therefore should not be disturbed.

A. The uncharged misconduct was admissible as evidence of Appellant's plan and scheme to monitor SSgt RH based on common factors.

According to Appellant, the military judge erred by admitting the uncharged acts because they are "not similar at all" to the charged misconduct. (App. Br. at 16.) Citing Morrison, 52 M.J. at 122, Appellant contends that the uncharged acts must be "almost identical" to be admissible as evidence of a common plan or scheme. (App. Br. at 16.) But as this Court recently noted, our superior Court's decision in United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019), implicitly rejected the "almost identical" standard. United States v. Greene-

Watson, No. ACM 40293, 2023 CCA LEXIS 542, at *28 n.13 (A.F. Ct. Crim. App. Dec. 27, 2023) (unpub. op.).

In Hyppolite, the appellant argued that evidence he took advantage of airmen who were asleep could not be used to show a "plan or scheme" to take advantage of an airman who was awake, given the factual difference in the misconduct at issue. 79 M.J. at 163-66. The Court of Appeals for the Armed Forces disagreed. 79 M.J. at 166-67. The Court cited Reynolds as an example, in which evidence of an uncharged sexual assault was admitted under Mil. R. Evid. 404(b) to show "a plan or design of the accused to achieve sexual intercourse with or without the consent of the other party," even though there were differences in the way the charged and uncharged assaults were perpetrated. Id. (citing Reynolds, 29 M.J. at 107-111). Applying the same logic to Hyppolite, the Court held that military judge properly admitted similar acts as evidence of a common plan based on "common factors," despite factual variances:

> The motions judge recognized *common factors* in the evidence proffered for each specification: "the relationship of the alleged victims to the accused (friends), the circumstances surrounding the 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 motions judge then identified a specific "common plan," namely, a plan "to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep."

79 M.J. at 166 (emphasis added).

Thus, under the Hyppolite framework, uncharged acts need not be "almost identical" to the charged misconduct to be admissible as evidence of a common plan or scheme. Id. at 166-67. Instead, military courts consider the "common factors" between the charged and uncharged acts. Id. at 166. Such factors include the relationship of the alleged victim(s) to the accused, the circumstances surrounding the commission of the acts, and the nature of the misconduct. Id.

Here, those "common factors" justify the military judge's admission of Appellant's uncharged misconduct as evidence of a plan or scheme to monitor SSgt RH. The first and most obvious commonality is the relationship of the victim to the accused. The victims of the charged and uncharged misconduct are the same person—SSgt RH, who was romantically involved with Appellant. The relationship between SSgt RH and Appellant was directly tied to the second common factor: the circumstances surrounding the commission of both the charged and uncharged misconduct. Across the board, Appellant's actions—obtaining SSgt RH's passwords, accessing her phone, blocking male friends, and watching her masturbate through a hidden camera—were driven by his jealousy and concern that SSgt RH might have other men in her life. In fact, information that Appellant learned from accessing SSgt RH's phone led him to set up the hidden camera in the first place.

The nature of Appellant's actions is the third and most significant common factor. "Nature" means the "inherent character or basic constitution of a person or thing."[8] At the core, the "inherent character" of Appellant's charged and uncharged misconduct was the same: both the cellphone snooping and indecent viewing represented invasions of SSgt RH's privacy. In the modern age, people "store much more personal information on their cell phones than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers." United States v. Wurie, 728 F.3d 1, 8-9 (1st Cir. 2013). Accordingly, servicemembers have a reasonable expectation of privacy in their cellphones and are protected from unreasonable searches and seizures of the same. United States v. Wicks, 73 M.J. 93, 99 (C.A.A.F. 2014). And if SSgt RH had a reasonable expectation of privacy in her cellphone in the law enforcement context, it logically follows that she had that same expectation of privacy in an everyday context as well.

[8] *Nature Definition*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/nature (last visited May 12, 2024).

Appellant invaded that privacy by accessing SSgt RH's phone in secret while she slept and taking it into locked bathrooms where its owner, SSgt RH, could not access it. By demanding SSgt RH's passwords and blocking or deleting her friends without telling her, Appellant encroached even further and betrayed a fundamental lack of respect for SSgt RH's autonomy and privacy.

These intrusions culminated in the crime of which Appellant stands convicted today: surreptitiously viewing SSgt RH's private area without her consent, through a camera he hid in her room. Based on the "common factors"—both the uncharged and charged misconduct were intentional, jealousy-driven invasions of SSgt RH's privacy—it was neither arbitrary, capricious, nor clearly erroneous for the military judge to conclude that the evidence was indicative of a plan or scheme to monitor SSgt RH. Johnson, 49 M.J. at 473.

Appellant, for his part, contends that evidence of such a plan or scheme is cumulative of his pretrial admissions, in which he admitted to hiding the camera. (App. Br. at 17.) But Appellant could not be more wrong. United States v. Whitner, 51 M.J. 457 (C.A.A.F. 1999) is instructive in this regard. The accused in Whitner was charged with several crimes involving homosexual conduct toward a fellow servicemember. Id. at 460. The military judge admitted evidence that homosexual materials were found in the accused's room, on the basis that it was relevant to the appellant's motive and intent to engage in sexual acts with junior enlisted men. Id. In asserting error, the accused contended that (1) the evidence had low probative value because he had acknowledged his bisexuality, and (2) it was cumulative of his pretrial statement to law enforcement—which was introduced into evidence—about being bisexual, owning homosexual materials, and finding the victim attractive. Id. at 458. Our superior Court held that the challenged evidence was admissible even though the accused admitted his bisexuality

because "[t]he defense's failure to specifically contest these intent issues did not remove the Government's burden of proof on these elements of the offenses or render this evidence unduly prejudicial." Id. at 461. Further, the Court held that the evidence was not unnecessarily cumulative, given that the accused's pre-trial admissions were "undermined by [his] repeated protestations that he was too drunk to remember his actions and intentions on the night in question." Id. at 462.

Such is the case here. Despite Appellant's admission that he hid the camera to watch SSgt RH, the uncharged misconduct evidence is admissible because the Government retains the burden of proof. It is not unnecessarily cumulative for purposes of Mil. R. Evid. 403 because standing alone, Appellant's pretrial admissions—in which he denied viewing SSgt RH's private area—fail to establish the degree of his disregard for SSgt RH's privacy. If the "logical inference to be drawn" from the similar acts in Reynolds was that the appellant had "worked out a system to put his victim into an unsuspecting and vulnerable position whereby he could engage in sexual intercourse with or without consent," 29 M.J. at 110, then the inference to be drawn from the uncharged acts here is that Appellant had worked out a system to put SSgt RH into a position whereby he could invade her privacy with or without her consent. Appellant's overarching plan or scheme to monitor SSgt RH makes a fact of consequence—whether Appellant would have *knowingly and wrongfully* viewed SSgt RH's private area without her consent—more likely than it would be without the evidence.

Considering the above, the military judge's decision to admit the uncharged acts as evidence of Appellant's plan or scheme or monitor SSgt RH was "within the range of choices reasonably arising from the applicable facts and the law," Miller, 66 M.J. at 307, and should not be disturbed.

B. The evidence was also properly admitted as proof of Appellant's motive and intent to dominate or control SSgt RH.

In addition to finding that the uncharged acts reflected a plan or scheme, the military judge correctly determined that it was probative of Appellant's motive and intent to dominate or control SSgt RH, based on Moore. (App. Ex. XIX.) In Moore, this Court held that evidence the appellant had engaged in a variety of controlling behavior—such as dictating the victim's dress and diet, restricting access to her phone and inhaler, and demanding frequent check-ins and livestreams of her workouts—was properly admitted to prove motive, intent and lack of mistake or accident with respect to the two charged sexual assault offenses. Id. at 871-72. In so concluding, this Court observed that the challenged evidence made two facts of consequence more or less probable: lack of consent and the appellant's mistake of fact as to consent.

> Appellant's controlling behavior demonstrated that he had the motive and intent to repress, instead of respect, her personal autonomy and thus was probative of her lack of consent. His conduct also made it much less probable that Appellant was mistaken that AC consented to the sexual acts when she had not. Consequently, the evidence the Government offered under Mil. R. Evid. 404(b) made the fact that Appellant intended to penetrate AC when she did not consent more probable and Appellant's ignorance or mistake that AC did consent less probable.

Id. at 875.

The same rationale applies here. Appellant's uncharged behavior—snooping through SSgt RH's phone, taking it into locked bathrooms, deleting and blocking her friends without consulting her—demonstrates that he intended to "repress, instead of respect," SSgt RH's privacy. Id. The fact that Appellant hid the camera based on what he learned while accessing SSgt RH's phone because he "wanted to see if she was still doing this" (Pros. Ex. 5) evinces a continuation of that same intent. Appellant maintains that this evidence lacks probative value because he admitted to hiding the camera, therefore there is no "fact in controversy." (App. Br.

at 18.) But Appellant was not on trial for the mere act of hiding the camera—he was on trial for wrongfully viewing SSgt RH's private area under circumstances where she had a reasonable expectation of privacy. And the uncharged misconduct made clear what Appellant's statements, standing alone, could not: his unabashed intent to infringe on SSgt RH's privacy and personal autonomy. Just as the controlling behavior in Moore made it "more probable that [the appellant] would disregard [victim's] wishes with respect to her willingness to engage in sexual acts on the charged occasions," 78 M.J. at 874, the controlling behavior in this case made it much more probable that Appellant would disregard SSgt RH's privacy and knowingly view her private area without her consent—his self-serving denials notwithstanding.

That this uncharged misconduct evidence was unfavorable to Appellant does not mean it is unfairly prejudicial *per se*. The term "unfair prejudice," for purposes of Mil. R. Evid. 403, "addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness." Collier, 67 M.J. 354. Evidence is unfairly prejudicial if it has the capacity to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Id. No such danger existed in this case. (*See* App. Ex. XIX. at ¶ 36.) The testimony, text messages, and Appellant's own pretrial admissions established a nearly airtight timeline on their own. But as the military judge noted, "[t]o force the Government to present evidence of the charged offenses involving R.H. in a vacuum would likely mislead the finder of fact in this case." (App. Ex. XIX at ¶ 36.) The challenged evidence provided "critical context that might serve to explain the motivations and intent of [Appellant] and R.H." (App. Ex. XIX at ¶ 36.) Because Appellant's motivations and intent were "important or viable issues in this case," Whitner, 51 M.J. at 461, it was not an abuse of discretion for the military judge to admit the evidence, and the analysis should end here.

C. Even if the evidence was admitted in error, it did not unfairly prejudice Appellant.

Assuming *arguendo* that this Court disagrees with the Government and reaches the issue of prejudice, Appellant's claim still fails. "For nonconstitutional evidentiary errors, the test for prejudice 'is whether the error had a substantial influence on the findings.'" United States v. Kohlbek, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting United States v. Fetrow, 76 M.J. 181, 187 (C.A.A.F. 2017)). This Court evaluates prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. United States v. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999). Here, application of these factors shows that the challenged evidence did not have a substantial influence on the findings.

First, contrary to Appellant's assertions, the prosecution case did *not* have "substantial holes." In calling the prosecution's case weak, Appellant once again cites "deficient" evidence that he viewed SSgt RH's private area. (App. Br. at 19.) Admittedly, the prosecution did not have Appellant's voice saying, "I viewed her private area." But between SSgt RH's testimony, the text messages, and Appellant's own admissions, the prosecution had plenty of circumstantial evidence proving that he did. The uncontradicted evidence establishes that the first time Appellant texted SSgt RH after observing her through the camera, he could see her as she was taking a picture on the bed. (R. at 302-307; Pros. Ex. 5.) That is, the camera had a direct line of sight to the bed. A week later, Appellant—by his own admission—sent SSgt RH text messages alluding to masturbation. According to SSgt RH, she received the texts mere seconds after she stopped masturbating. This alignment of both time and subject matter is strong circumstantial evidence that Appellant texted SSgt RH about masturbation because he had just watched her masturbate while naked—during which he viewed her private area. The prosecution case against

Appellant was "strong and conclusive," and therefore weighs against a finding of prejudice. United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

By comparison, the defense case was "feeble [and] implausible." Id. The trial defense presented no evidence to directly contradict SSgt RH or any of her testimony. Instead, the defense mounted a disjointed attack that relied on "suggestion and insinuation." Kerr, 51 M.J. at 405. First, the defense leaned on Appellant's self-serving denial to OSI and asked the factfinder to believe the improbable theory that the timing and content of Appellant's text messages was simply fortuitous. (R. at 467-68.) Then the defense suggested that the camera may not have had a line of sight to the bed, even though SSgt RH and Appellant's accounts established that it did. (R. at 468.) The defense then pivoted again and used the existence of SSgt RH's dog to insinuate that she was lying about masturbating on top of the covers: "She has a black lab that sleeps on the bed so it doesn't make sense that she would actually go on top of the covers and masturbate." (R. at 469.) Then the defense switched course again and took issue with the prosecution's failure to present the cupcake toy as physical evidence. (Id.) This was not a strong defense case—it was grasping at straws. Accordingly, this factor weighs in favor of the Government.

The materiality and quality of the challenged evidence also weigh against a finding of prejudice. In examining materiality and quality of erroneously admitted evidence, this Court assesses "how much the erroneously admitted evidence may have affected the court-martial." United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020). This assessment considers the "particular factual circumstances of each case":

> For example, we have previously considered such things as the extent to which the evidence contributed to the government's case; the extent to which instructions to the panel may have mitigated the error; the extent to which the government referred to the evidence in argument; and the extent to which the members could weigh the evidence using their own layperson knowledge.

Id.

Here, the factual circumstances demonstrate that the challenged evidence, while probative, would not have decisively "affected the court-martial." Id. To start, the extent to which the evidence contributed to the prosecution's case was minimal. None of the uncharged misconduct served as the sole evidence of a key fact—Appellant's access to SSgt RH's phone and his willingness to invade her privacy were facts that could be gleaned from Prosecution Exhibit 5, Appellant's recorded interview with OSI. Nor did the evidence serve as the only corroboration for SSgt RH's testimony, given that Appellant's admissions to OSI corroborated most of her account. *Cf.* United States v. Giambra, 38 M.J. 240, 242-43 (C.A.A.F. 1993) (objected-to evidence serving as sole corroboration for victim's account was of material quality because there was no substitute for it and victim's testimony was "heart of the prosecution's case.").

After the evidence's admission, the military judge limited its material effect through his instructions, in which he discussed the limited permissible uses of the evidence and reminded the members that they could not "conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." (R. at 444.)

Further offsetting the materiality of the challenged evidence is the prosecution's minimal use of it in closing argument. In an argument spanning 14 pages consisting of approximately 296 lines of the record, trial counsel's comments about the uncharged acts comprised only 14 lines—a negligible 4% of his argument. (R. at 450-463.)

Finally, none of the evidence in this case was complex. Expert testimony was neither required nor presented. In other words, the members would have been fully capable of weighing all the evidence using their layperson knowledge—that is, their common sense and knowledge of

the ways of the world. *See* D.A. Pam. 27-1, para. 8-3-12. Members using their common sense would not have convicted Appellant of indecent viewing simply because he had been a controlling boyfriend in the past. Instead, they would have relied on their knowledge of human nature and the ways of the world to conclude that Appellant's theory of the case was "feeble [and] implausible." Weeks, 20 M.J. at 25. Taken altogether, these circumstances support a conclusion that the alleged error did not "substantially influence the findings." Kohlbek, 78 M.J. at 334. Accordingly, even if this Court finds that the military judge erred, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE ALLOWED R.H. TO MENTION UNCHARGED MISCONDUCT IN HER UNSWORN STATEMENT.

Additional Facts

After the panel of members found Appellant guilty, he elected sentencing by military judge alone. (R. at 482, 485.) During the presentencing proceedings, the prosecution presented Appellant's service data, performance evaluations, and a letter of counseling. (Pros. Ex. 6-9.) Afterwards, SSgt RH indicated her intent to be heard. (R. at 496.) The defense then objected to several portions of SSgt RH's prepared victim impact statement, including:

> It is hard to understand living in fear until you have experienced it and I spent just short of two years of my early adulthood in a tumultuous relationship I had with Senior Airman Menard. The relationship was overshadowed by his jealousy, accusations, overwhelming insecurity, constant invasion of privacy and emotional and mental abuse that I did not and do not deserve.

(Court Ex. A; R. at 497-508.)

The defense argued that the matters were not a "continuous course of conduct." (R. at 498-508.) The military judge disagreed:

> [T]he broad victim's rights contained in RCM 1001(c) include permitting a victim to discuss a continuous course of conduct of an accused when such course of conduct is directly related to or arising from an offense against that victim of which an accused has been found guilty. The charged offense did not occur in isolation. The incidence of monitoring were part and parcel of course of conduct on the part of the accused to monitor the victim.

(R. at 509.)

Based on the military judge's ruling, SSgt RH delivered her victim impact statement as it was written in Court Exhibit A. (R. at 511-12.) Subsequently, the defense presented their sentencing case, which consisted of five character letters, a decoration, a written unsworn statement, and a verbal unsworn statement. (Def. Ex. B-I; R. at 515-16.)

The maximum punishment Appellant faced for his crime was reduction to the grade of E-1, total forfeitures, confinement for one year, and dishonorable discharge.[9] The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for six months, and a bad-conduct discharge. (R. at 511; *Statement of Trial Results*, ROT, Vol. 1.)

Standard of Review

This Court reviews a military judge's decision to accept a victim impact statement for an abuse of discretion. United States v. Cunningham, 83 M.J. 367, 371 (C.A.A.F. 2023).

Law & Analysis

Pursuant to Article 6b, UCMJ, a crime victim has the right to be reasonably heard at a sentencing hearing relating to the offense of which she is a victim. 10 U.S.C. § 806b(4)(B). In exercising that right, a victim may make a sworn or unsworn impact statement to the court.

[9] Manual for Courts-Martial, United States, part IV, para. 63.d(1) (2019 ed.) (MCM)

R.C.M. 1001(c). Victim impact includes "any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(A).

Appellant contends that the military judge abused his discretion by considering the full victim impact statement because "[r]elationship struggles are not victim impact of the offense." (App. Br. at 21.) But SSgt RH's statements were about evidence that had already been properly introduced during trial on the merits. Thus, it was already evidence for purposes of sentencing, *see* United States v. Figura, 44 M.J. 308, 310 (C.A.A.F. 1996), and could be considered by the court-martial, even though the uncharged misconduct had been introduced for a limited purpose. R.C.M. 1001(g)(2). But even if this evidence had not been introduced, the military judge reasonably concluded that those matters fell within the scope of R.C.M. 1001(c).

A. SSgt RH's impact statement referenced a continuous course of conduct that was admissible to show the full impact of Appellant's crime.

"[W]hen uncharged misconduct is part of a continuous course of conduct involving similar crimes and the same victims, it is encompassed within the language 'directly relating to or resulting from the offenses of which the accused has been found guilty.'" United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001); *see also* United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1988) ("[U]ncharged misconduct will often be admissible as evidence in aggravation."). Thus, uncharged misconduct that evinces a continuous course of conduct may be admissible in sentencing to demonstrate the "full" or "true" impact of an appellant's crime. Nourse, 59 M.J. at 232; United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990). Uncharged misconduct need not be identical to the charged misconduct to be considered a continuous course of conduct—it may be the "same *or similar*." Mullens, 29 M.J. at 399 (emphasis added); *see* United States v. Erickson, 63 M.J. 504, 507-08 (A.F. Ct. Crim. App. 2006) (where appellant's uncharged

misconduct in a child sexual assault case ranged from kissing and fondling the child to attempting to have the child perform oral sex on him).

Here, the military judge properly applied Mullens in concluding that SSgt RH's statements regarding Appellant's uncharged misconduct were about a continuous course of conduct that was admissible in aggravation. (R. at 509.) Both the charged and uncharged acts involved a singular victim—SSgt RH. And contrary to Appellant's belief, the uncharged misconduct at issue in this case *is* similar to the charged conduct—both represent intentional invasions of SSgt RH's privacy. The fact that Appellant perpetrated those invasions in different ways does not mean his conduct was discontinuous. *See* Erickson, 63 M.J. at 507-08.

Indeed, this Court has held that evidence of a variety of uncharged physical and emotional abuse perpetrated by an appellant over the course of his marriage was properly admitted as a continuing course of abuse "aimed at controlling [the victim's] behavior." United States v. Millhausen, No. ACM 39273, 2018 CCA LEXIS 387, at *10 (A.F. Ct. Crim. App. Aug. 15, 2018) (unpub. op.). This Court opined that such evidence "provid[ed] the context for the military judge to appreciate the impact of the charged offense." Id. Such is the case here. SSgt RH's statement regarding Appellant's "jealousy, accusations, overwhelming insecurity, constant invasion of privacy, and emotional and mental abuse," (Court Ex. A.) was about a continuous course of conduct that would "assist the sentencing authority in assessing the full impact of the crime on the victim by placing the charged crime into the proper context." United States v. Turner, 62 M.J. 504, 507 (A.F. Ct. Crim. App. 2005); *see also* United States v. Goldsmith, No. ACM 40148, 2023 CCA LEXIS 8, at *23 (A.F. Ct. Crim. App. Jan. 11, 2023) (unpub. op.). Given that such evidence would be admissible in aggravation, it was reasonable for the military

judge to find that SSgt RH's victim impact statement was within the scope of R.C.M. 1001(c). Accordingly, the military judge did not abuse his discretion, and the analysis should end here.

B. Even if the victim impact statement was error, there is no prejudice because it did not substantially influence the adjudged sentence.

Even if this Court finds that portions of SSgt RH's victim impact statement were error, Appellant's claim fails. When sentencing evidence is erroneously admitted, the test for prejudice "is whether the error substantially influenced the adjudged sentence." United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018) (citing United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)). In determining whether an alleged error had a substantial influence on a sentence, this Court considers the following four factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." Barker, 77 M.J. at 384 (citing United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017)). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." Barker, 77 M.J. at 384. As discussed below, all four factors weigh against a finding of prejudice.

First, the prosecution's sentencing case was stronger than Appellant would have this Court believe. Appellant, who characterizes the prosecution case as "routine evaluations and a low-level letter of counseling," (App. Br. at 23), fails to recognize that all the evidence admitted during the findings phase may be considered during sentencing. Figura, 44 M.J. at 310. Thus, the prosecution's sentencing evidence included the circumstances of the offense and aggravating factors such as Appellant's lack of remorse, as demonstrated by his immediate reaction to SSgt RH finding the hidden camera: "Oh look you caught on. Bravo." (Pros. Ex. 2.) If the findings evidence proved that Appellant's egregious behavior warranted severe punishment, then the

documentary evidence presented at presentencing proved that he did not deserve leniency. Appellant's record revealed that he was an unremarkable servicemember with prior disciplinary history. (Pros. Ex. 6-9.) In other words, it confirmed that Appellant was neither a hero who had engaged in any "particular acts of good conduct or bravery," nor an Airman who had a reputation or record of traits that are "desirable in a servicemember." R.C.M. 1001(d)(1)(B).

The defense sentencing case was inferior in comparison. The defense presented five character letters, a decoration, and Appellant's unsworn statements—none of which constituted any compelling matters in extenuation or mitigation. It was the kind of defense sentencing case that our superior Court characterizes as "weak":

> Appellant's sentencing case was *weak* relative to the Government's case. Appellant did not introduce any particular matters in extenuation or mitigation, but instead offered letters and statements that generally portrayed Appellant in a positive light, including four character letters, a letter of appreciation, statements from his family and friends, and a personal statement.

United States v. Edwards, 82 M.J. 239, 247 (C.A.A.F. 2022) (emphasis added).

When it comes to materiality, a comparison to Edwards quickly reveals that SSgt RH's statements come nowhere near the level of materiality that would weigh towards a finding of prejudice. At issue in Edwards was a seven-minute-long video—produced by the prosecution—that included a slideshow and an interview with the deceased victim's parents, set to acoustic background music. 82 M.J. at 247-48. In concluding that the evidence was material, our superior Court cited the fact that much of the video's content was not in evidence:

> The challenged video contained a slideshow of pictures accompanied by background music, including pictures of the victim as a child, throughout his life, and finally, of his gravestone. *All but one of these pictures had not been admitted into evidence* and would not have been seen by the panel members but for the military judge's error in allowing the video to be shown and taken into the panel deliberations.

Edwards, 82 M.J. at 247-48 (emphasis added).

By contrast, the uncharged misconduct discussed in SSgt RH's victim impact statement was already in evidence and available for the sentencing authority's consideration, given that SSgt RH testified about it during findings. *See* Figura, 44 M.J. at 310. Further, the emotionality of SSgt RH's one-page statement pales in comparison to the video in Edwards, which featured "heart-wrenching" content such as the victim's father crying in his deceased son's uniform. 82 M.J. at 247-48. But even if SSgt RH's statements had potential to "evoke a strong emotional response," id., the fact that Appellant was sentenced by a military judge diminishes the material effect that the statements may have had. *See* Barker, 77 M.J. at 384 (holding that it is "highly relevant" to prejudice analysis that appellant was sentenced by a military judge, who is presumed to know the law). "A military judge understands that emotions cannot enter the final determination of the sentence, and a military judge is far less likely to be influenced by the emotional aspects of a victim impact statement even if it were designed to explicitly invoke emotion." Cunningham, 83 M.J. 373. Here, there is no indication that the military judge allowed SSgt RH's victim impact statement to "affect him to a point that he departed from his duty to determine an appropriate sentence in a fair, objective, and unbiased manner." Id.

Finally, the quality of the challenged evidence was unexceptional. In asserting that the quality was "significant," Appellant points to the fact that SSgt RH "personally delivered her unsworn statement." (App. Br. at 24.) But the procedures governing victim impact statements "contemplate the actual participation of the victim, and the statement being offered by the victim or through her counsel." Barker, 77 M.J. at 383. Thus, the fact that SSgt RH personally delivered her impact statement was unremarkable in terms of both quality and procedure. *Cf.* Edwards, 82 M.J. at 248 (finding quality weighed towards finding prejudice given that the

prosecution used its resources to edit photos, interviews, and music into an "emotionally moving video"). Further underscoring the nonprejudicial quality of the challenged evidence is its absence from the prosecutions' sentencing argument. *See* id. (noting that quality and materiality of challenged evidence depends on the way it is used). In an argument spanning 88 lines of the record, trial counsel alluded to SSgt RH's unsworn statement only once, and it was not even about the uncharged misconduct: "In her own words, what happened and what was done to me hasn't gone away and never will. 580 days later and you can still hear the pain in her voice." (R. at 518.)

"[T]here is a broad spectrum of lawful punishments that a [sentencing authority] might adjudge." Edwards, 82 M.J. at 247. Here, Appellant received only half the maximum confinement and a lesser punitive discharge than was authorized for the crime of which he was convicted. The prosecution's case demonstrated why Appellant was deserving of severe punishment, and the defense case failed to give the sentencing authority compelling reasons to mitigate any such punishment. The statements with which Appellant takes issue were references to evidence that was already before the sentencing authority, therefore their re-introduction through SSgt RH's unsworn statement was immaterial. And the quality of SSgt RH's impact statement was typical of most victim impact statements, and therefore unnoteworthy from a prejudice standpoint. There is no indication that the alleged error substantially influenced Appellant's sentence, therefore he is unentitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's sentence.

IV.[10]

APPELLANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

Prior to trial, Appellant's trial defense counsel filed a motion for appropriate relief requesting a unanimous verdict. (App. Ex. I.) The military judge denied the defense motion based on United States v. Anderson, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. Mar. 25, 2022), *aff'd,* 83 M.J. 291 (C.A.A.F. 2023), in which this Court held that the requirement for unanimous verdicts was inapplicable to courts-martial. (App. Ex. III.)

At trial, the military judge advised Appellant that "three-fourths of the members must agree before [he] could be found guilty of any offense." (R. at 9.) Appellant indicated that he understood his forum rights and elected trial by a panel of officer members. (R. at 10, 119.)

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law & Analysis

"Nonunanimous verdicts have been a feature of American courts-martial since the founding of our nation's military justice system." Anderson, 83 M.J. 294. To find an accused guilty of an offense under the Code, only three-fourths of the panel members must vote to convict. Article 52, UCMJ. By contrast, unanimous verdicts are required for convictions in *civilian* criminal proceedings. Ramos v. Louisiana, 140 S. Ct. 1390 (2020). In Ramos, the

[10] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Supreme Court held that the Sixth Amendment right to a jury trial included the right to a unanimous verdict in both federal and state criminal proceedings. 140 S. Ct. at 1396-97.

The Supreme Court did not, however, state that the unanimity requirement extended to military courts-martial—no doubt because its own cases dictate that the Sixth Amendment right to a jury trial does not apply to courts-martial. *See* Ex parte Milligan, 71 U.S. 2, 107 (1866); Ex parte Quirin, 317 U.S. 1, 40 (1942); Whelchel v. McDonald, 340 U.S. 122, 127 (1950). In line with the cases, the Court of Appeals for the Armed Forces recently held that there was no right to a unanimous verdict in courts-martial. Anderson, 83 M.J. at 302.

In nevertheless claiming error, Appellant asserts that he is "rais[ing] the issue in anticipation of further litigation on the matter." (App. Br. Appx. at 2.) While "[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal," United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019), that benefit cannot be extended to the mere possibility there *might* be a change to the law. Yet that is effectively what Appellant is asking this Court to do. Appellant's position is premised on a nebulous future possibility that the Supreme Court might one day depart from a "century of [its own] consistent guidance… about the applicability of the Sixth Amendment to military trials." Anderson, 83 M.J. at 296.

As Appellant concedes, Anderson controls in the absence of Supreme Court action on this issue. (App. Br. Appx. at 2.) As of this filing, Anderson remains good law and Article 52, UCMJ, remains constitutional. Appellant was not—and still is not—entitled to a unanimous verdict. Accordingly, Appellant is not entitled to relief.

WHEREFORE, the United States respectfully requests this Honorable Court affirm Appellant's conviction and sentence.

V.[11]

APPELLANT'S INDECENT VIEWING CONVICTION IS LEGALLY SUFFICIENT.

Standard of Review

Issues of legal sufficiency are reviewed de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The test for legal sufficiency is whether, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Robinson, 77 M.J. 294, 297-298 (C.A.A.F. 2018). This test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). The legal sufficiency assessment "draw[s] *every* reasonable inference from the evidence of record in favor of the prosecution." Robinson, 77 M.J. at 297-298 (emphasis added) (quoting United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015)). Thus, "the standard for legal sufficiency involves a very low threshold to sustain a conviction." King, 78 M.J. at 221 (citation omitted).

Analysis

Appellant asserts that his conviction is legally insufficient "[f]or the reasons discussed in the main brief in AOE I." (App. Br., Appx. at 3.) In his first assignment of error, Appellant asserted there was insufficient proof that he viewed SSgt RH's private area. (*See* App. Br. at 9-

[10] Appellant raises this issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

11.) But as discussed in Section I, *supra*, Appellant's conviction is supported by legally sound evidence and should not be disturbed.

SSgt RH credibly testified about receiving text messages from Appellant that indicated he knew what she was doing in her bed—despite being nowhere near her—and finding the hidden camera after he texted her about her "blue outfit." (R. at 304-316.) This was corroborated by the actual text messages as well as Appellant's recorded confession, in which he admitted to hiding the camera, monitoring SSgt RH, and texting her in real time about the things she was doing. (Pros. Ex. 2, 5.) Further, SSgt RH's testimony about being naked and receiving texts from Appellant mere "seconds" after she stopped masturbating was uncontradicted by any other evidence. (R. at 309.) Although Appellant denied seeing SSgt RH naked, he admitted to OSI that the texts sent at 12:50 and 12:51—"Did you make any videos today?" and "Any videos? Bring the toy out?"—were references to masturbation. (Pros. Ex. 2, 5.)

Viewing this evidence in the light most favorable to the prosecution, any rational trier of fact could find that Appellant used the hidden camera to view SSgt RH's private area when she was masturbating while naked on her bed. To conclude otherwise would require the factfinder to suspend disbelief and draw counterintuitive inferences instead of reasonable ones. But the legal sufficiency assessment permits no such thing. Drawing every reasonable inference in favor of the prosecution, Robinson, 77 M.J. at 297-298, any rational factfinder would conclude that: (1) Appellant surreptitiously hid the camera in SSgt RH's bedroom, where she had a reasonable expectation of privacy; (2) the hidden camera had a direct line of sight to the bed; (3) the camera remained in the same position until SSgt RH found it; (4) Appellant texted SSgt RH about masturbation because he watched her masturbate through the camera; (5) since SSgt RH was naked, Appellant saw her private area; (6) Appellant never had consent to monitor SSgt RH or

view her private area; and (7) Appellant falsely denied viewing SSgt RH's private area in an attempt to evade accountability. In other words, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. Accordingly, Appellant's conviction is legally sufficient, and he is unentitled to relief.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm Appellant's conviction and sentence.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 17 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
	)	Before Panel No. 3
v.	)	
	)	No. ACM 40496
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force, *Appellant.*	)	22 May 2024

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

Appellant, Senior Airman (SrA) Jerin P. Menard, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 17 May 2024 (Ans.). In addition to the arguments in his opening brief, filed on 17 April 2024 (App. Br.), SrA Menard submits the following arguments.

I.

SENIOR AIRMAN MENARD'S CONVICTION FOR INDECENT VIEWING IS FACTUALLY INSUFFICIENT.

At trial, the Government *could* have clarified the spatial arrangement of the room and whether the camera was capable of viewing RH where she masturbated. But it did not. Given this deficiency, the Government leans heavily on SrA Menard's words to prove he viewed her private area, but it has a problem. It needs this Court to believe only *some*, but not all, of his statements. This dual evidentiary problem—failure to prove what the camera saw and internally inconsistent treatment of SrA Menard's statements—should leave this Court convinced that the conviction is against the weight of the evidence.

1. Argument on appeal cannot illuminate whether the camera could have viewed RH when she masturbated.

The Government attacks SrA Menard for engaging in "baseless speculation" when he highlighted the failure of proof on what the camera could see. (Ans. at 12.) Nonetheless, the Government on appeal cannot compensate for the failure at trial to clarify the gaps in the case. Start with Prosecution Exhibit 1 (taken a week before the allegation), which is the only image showing what the camera might have seen. The Government argues that it would not have moved before the allegation arose unless it "took on a life of its own." (Ans. at 13.) Even if true, the Government still cannot explain why the television would not inhibit or obstruct the view. It appears that, at most, the camera would capture part of the bed. Understandably, the Government does not even try to defend RH's testimony that the camera could view the bed because the first thing she did when discovering the camera was to move it. (R. at 317.) Nor does it attempt to explain how the camera could capture a photograph of RH in a blue outfit moments later (which SrA Menard admitted viewing) and also view the bed in the spot where she masturbated. This is noteworthy, as SrA Menard said he viewed her "taking pictures of herself [in the blue outfit] in the mirror." (Pros. Ex. 5, clip 2; R. at 383.)

The Government next seeks support from the incident a week earlier when SrA Menard texted RH after she took a picture in the bedroom and sent it to her father. (Ans. at 12–13.) In the Government's telling, RH was on the bed when she took the picture and, because SrA Menard admitted to viewing her at this time, he must have been able to view the bed later. (Ans. at 12.) But the problems with the

evidence on this point are reflective of the Government's failure to cement its case at trial. RH did not say she was on the bed when she actually took the picture (R. at 305–07); the Government reads certainty into an ambiguous record. She only says she was on her bed when she received the message from SrA Menard about sending photographs. (R. at 306.) The Government also reads into the record that the text message came "promptly" after the picture, yet when this Court reads the record, it will see such promptness is not RH's testimony. (R. at 305–07.)

The Government asks this court to "reasonably infer" that he viewed her private area. (Ans. at 14.) But the evidence failed to show that the camera was positioned to capture RH masturbating. Or what the lighting would allow him to see. Or that he would have seen the specific private areas required: genitalia, buttocks, areola, or nipples. These are more than reasonable inferences; these are logical leaps unsupported by the record, and the Government cannot overcome on appeal the weight of the actual evidence it presented at trial.

2. SrA Menard's statements cannot compensate for the failure to prove he could view RH while she masturbated.

The Government on appeal, just like at trial, attempts to massage SrA Menard's words to be both credible (when admitting to elements of the offense) and incredible (when providing exculpatory information). As argued, SrA Menard's text messages and statements plaster over the holes in the Government's case, so they are credible. (*See* Ans. at 12–14.) But his denial of seeing RH masturbate is "self serving" and deserves no weight. (*See* Ans. at 14–16.) The Government requires

such selective credibility to prevail; SrA Menard does not. And there are solid reasons to credit all of SrA Menard's statements to law enforcement. (App. Br. at 11.)

In addition to the problematic selective crediting of SrA Menard's words, several specific points in the Government's position invite scrutiny. First is the notion that this Court should provide less credit to his statements because, during the interview, he "could not be cross-examined under oath." (Ans. at 15 & n.7.) As an initial matter, this argument is irreconcilable with the Government's position elsewhere in the brief that his admissions during the interview are potent evidence. (*See, e.g.*, Ans. at 12.) SrA Menard's text messages are also not subject to cross-examination, yet this poses no obstacle to believability. But a deeper problem lurks. The Government compares SrA Menard's interview—*which was a prosecution exhibit*—to an unsworn statement that receives lesser evidentiary weight. (Ans. at 15 n.7.) This Court should reject the Government's effort to upend the rules of evidence in a footnote.

Second is the argument that SrA Menard's denial that he saw RH masturbate "mattered little to the court-martial's 'truth-seeking function.'" (Ans. at 16 (citing *United States v. Custis*, 65 M.J. 366, 371 (C.A.A.F. 2007)).) Of course it mattered. The factfinder must reconcile all of the evidence and make a determination. Adding a quote from an unrelated case about privileges does not change this requirement. And this Court, reviewing the evidentiary deficiencies, should recognize the conviction stands against the weight of the evidence.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED ACTS UNDER MIL. R. EVID. 404(b).

The military judge's abuse of discretion in admitting Mil. R. Evid. 404(b) evidence served only to parade unfavorable acts before the members without a valid evidentiary purpose. In defending the ruling, the Government errs in: (1) articulating the proper test; (2) comparing the case with *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019); and (3) dismissing the cumulative nature of the evidence.

1. The Government invites this Court to apply a novel test.

In the opening brief, SrA Menard argued that the acts here—monitoring RH's contacts and taking her phone for a period—were not "substantially similar" to the charged acts, and thus were not evidence of plan or scheme. (App. Br. at 16–17 (citing *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999); *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)).) The Government counters that this Court in *United States v. Greene-Watson* found that *Hyppolite* implicitly rejected the standard from *Morrison*. (Ans. at 20–21 (citing ACM 40293, 2023 CCA LEXIS 542, at *28 n.13 (A.F. Ct. Crim. App. 27 Dec. 2023) (unpub. op.)).[1]) The Government then argues that *Hyppolite* sets a test that looks at "common factors" between the charged and uncharged acts, including the "relationship of the alleged victim(s) to the

[1] The Court of Appeals for the Armed Forces (CAAF) has granted review of this case on the Mil. R. Evid. 404(b) analysis, although not on this specific question. No. 24-0096/AF, 2024 CAAF LEXIS 253 (C.A.A.F. 7 May 2024).

accused, the circumstances surrounding the commission of the acts, and the nature of the misconduct." (Ans. at 21 (citing *Hyppolite*, 79 M.J. at 166).) For several reasons, this Court should pause before accepting the Government's invitation.

First, "overruling by implication is disfavored." *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019) (quoting *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007)). No court before *Greene-Watson* held that *Hyppolite* implicitly rejected *Morrisson*. Tension between standards is not a license to ignore an opinion.

Second, the Government, like this Court in *Greene-Watson*, reads *Hyppolite* as refashioning the test for plan or scheme under Mil. R. Evid. 404(b). (Ans. at 20–21.) But this misapprehends what the CAAF did in *Hyppolite*. It did not establish a new test. Instead, it simply found the military judge who used those factors did not abuse their discretion. That is a profound difference. For instance, in a case like *United States v. Pease*, the CAAF explained why the lower court applied a correct standard. *See* 75 M.J. 180, 185–86 (C.A.A.F. 2016). Nothing like that happened in *Hyppolite*. Perhaps that is why there are no citing reference, other than *Greene-Watson*, to the "common factors" test the Government advances.

2. **Hyppolite *does not support admission.***

Hyppolite involved two sets of sexual offenses. Specifications 1-3 related to allegations that the accused touched the victims after they consumed alcohol and then fell asleep. 79 M.J. at 163. Specifications 4 and 5 also involved alcohol but the victim was awake for parts of the abusive sexual contact and sexual assault. *Id.* The CAAF ultimately concluded 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 [the victim in Specifications 4 and 5] was not asleep when Appellant began the assault." *Id.* at 167.

To draw its parallel to *Hyppolite*, the Government frames the commonality as between the charged and uncharged misconduct as "intentional, jealousy-driven invasions of SSgt RH's privacy." (Ans. at 23.) This framing misses the mark. First, because the actual acts are so different, the Government must create an extremely broad umbrella for all acts to fit under. Second, the military judge did not embrace the novel *Hyppolite* framework the Government advances here, and in fact rejected the Government's attempts at trial to introduce evidence of his "jealousy." App. Ex. XIX at 8–10 (rejecting Government's attempt to introduce evidence of SrA Menard's jealousy about specific males and accusations of RH's infidelity). Third, the Government's own language shows the drift into propensity. It says, "At the core, the 'inherent *character*' of Appellant's charged and uncharged misconduct was the same: both the cellphone snooping and indecent viewing represented invasions of SSgt RH's privacy." (Ans. at 22 (emphasis added).) This says too much. At heart, this is indeed character evidence of SrA Menard's alleged bad behavior as a boyfriend which fails the second prong of the *Reynolds* analysis.

3. The Mil. R. Evid. 404(b) evidence was cumulative of SrA Menard's clear statements to law enforcement.

Whether admitted as plan or scheme evidence, or as evidence of motive and intent, the Mil. R. Evid. 404(b) evidence at issue here was cumulative. The Government's arguments to the contrary cannot withstand scrutiny. First, the Government entirely omits that the military judge *never mentioned* SrA Menard's

recorded interview where SrA Menard admitted to wrongfully placing the camera without RH's consent. At a minimum, this was an abuse of discretion because it failed to consider important facts. *See United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

Second, the Government claims that *United States v. Whitner*, 51 M.J. 457 (C.A.A.F. 1999) forecloses the argument on cumulativeness. (Ans. at 23.) But reading the case closely shows more nuance than the Government acknowledges. *Whitner* involved the introduction of homosexual pornographic materials in a case of forcible sodomy by a male servicemember against another male servicemember. *Id.* at 459.

The CAAF addressed whether the appellant's pretrial admissions of homosexuality lowered the probative value of the evidence or rendered it cumulative. *Id.* On the first question, the prosecution bore the burden to "show appellant's state of mind or intent during the charged acts and the nature of his sexual desires at those times." *Id.* at 461. Unlike *Whitner*, in SrA Menard's case these were not required elements of the offense. Additionally, the CAAF found the defense theory in *Whitner* was not a clear consent defense, thus the evidence still had probative value to prove the forcible sodomy. *Id.* at 461–62. Again, by contrast, no such lack of clarity was present here. The only issue in this case is whether SrA Menard viewed RH masturbate. Despite *Whitner*, the probative value of the evidence in this case remained limited.

Whitner also addressed the cumulativeness of the evidence and found, on those facts, that it was not cumulative. But CAAF's analysis is important, and the Government only quotes part of it. (Ans. at 24 (citing *id.* at 462).) CAAF wrote that the pretrial admissions in *Whitner* "were more generic in nature and undermined by appellant's repeated protestations that he was too drunk to remember his actions and intentions on the night in question." 51 M.J. at 462. There was nothing generic about SrA Menard's comments. With crystal clarity, he told OSI that he placed the camera in RH's room without her knowledge and that what he did was wrong. (Pros. Ex. 5, clips 2, 3.)

Third, in an attempt to square the circle, the Government claims that the evidence "is not unnecessarily cumulative for purposes of Mil. R. Evid. 403 because standing alone, Appellant's pretrial admissions—in which he denied viewing SSgt RH's private area—fail to establish the degree of his disregard for SSgt RH's privacy." (Ans. at 24.) The degree of disregard for RH's privacy is not an element of the offense. Everything required to prove the offense—except whether SrA Menard viewed the camera at the right time—was established in the pretrial interview.

Moreover, the Government's position here that the evidence was not cumulative stands in tension with its position throughout the rest of the brief. (Ans. at 17 ("[T]he factfinder did not need to consider any Mil. R. Evid. 404(b) evidence to conclude that Appellant viewed SSgt RH's private area."), 26 (when arguing a lack of unfair prejudice from the Mil. R. Evid. 404(b) evidence, stating that "[t]he testimony, text messages, and Appellant's own pretrial admissions established a nearly airtight

timeline on their own"), 29 (when arguing against prejudice from the admission, stating "None of the uncharged misconduct served as the sole evidence of a key fact—Appellant's access to SSgt RH's phone and his willingness to invade her privacy were facts that could be gleaned from Prosecution Exhibit 5").) SrA Menard agrees with these other statements on the Mil. R. Evid. 404(b) evidence—they demonstrate that the evidence had low probative value and did not meaningfully advance the Government's case. Instead, it allowed the prosecution to develop an inappropriate theme through RH's lengthy testimony about SrA Menard's alleged bad behaviors and the trial counsel's subsequent framing of those behaviors as "abuse." (R. at 281–92, 457–58.)

The military judge, who may not even have considered cumulativeness at all, abused his discretion when he admitted the cumulative Mil. R. Evid. 404(b) evidence.

WHEREFORE, SrA Menard respectfully requests this Honorable Court set aside the finding and sentence.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
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(240) 612-4770

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 Appellate Operations Division on 22 May 2024.

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(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**NOTICE OF APPEARANCE**
	)	Before Panel No. 3
v.	)	No. ACM 40496
Senior Airmen (E-4) **JERIN P. MENARD** United States Air Force *Appellant*	)	2 October 2024

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

Pursuant to Rule 12 of this Court's Rules of Practice and Procedure, undersigned counsel files this written notice of appearance as counsel for Appellant, Senior Airmen Jerin P. Menard, U.S. Air Force.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 October 2024.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40496**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Jerin P. MENARD	)	**PANEL CHANGE**
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 7th day of October, 2024,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge
WARREN, CHARLES G., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40496**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jerin P. MENARD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

Oral argument is hereby ordered on the following issue:

> **WHETHER THE MILITARY JUDGE ABUSED HIS DISRETION WHEN HE ADMITTED UNCHARGED ACTS OF APPELLANT PURSUANT TO MILITARY RULE OF EVIDENCE 404(b) UNDER THE THEORY THAT IT WAS PART OF A PLAN OR SCHEME FOR APPELLANT TO MONITOR, AND/OR EVIDENCE APPELLANT HAD AN INTENT AND MOTIVE TO DOMINATE AND CONTROL THE NAMED VICTIM.**

Accordingly, it is by the court on this 9th day of October, 2024,

ORDERED:

Oral argument in the above-captioned case will be heard at **1430 hours** in the Dick Bell Courtroom at the **Oklahoma University College of Law**, 300 West Timberdell Road, Norman, Oklahoma, on **Tuesday, 19 November 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40496**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jerin P. MENARD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

In view of the court's selection of the above-captioned case to be heard as part of the court's oral argument outreach program at Oklahoma University College of Law on 19 November 2024, the court invites the filing of *amicus curiae* briefs on the specified issue in support of Appellant or Appellee by law students from Oklahoma University College of Law and Oklahoma City University School of Law acting under supervising attorneys. *See* JT. CT. CRIM. APP. R. 22(a); A.F. CT. CRIM. APP. R. 14.1(c). Such *amicus curiae* briefs will be filed in accordance with this court's Rules of Practice and Procedure. A.F. CT. CRIM. APP. R. 13, 17.

Supervising attorneys will be deemed admitted *pro hac vice*, subject to filing an application setting forth required qualifications as directed by the court. A.F. CT. CRIM. APP. R. 9(c). The Clerk of Court will provide the application to expedite the process.

Further, law students are invited to present oral argument relating to their briefs on the date specified above. *See* JT. CT. CRIM. APP. R. 25.

Accordingly, it is by the court on this 10th day of October, 2024,

ORDERED:

Any *amicus curiae* briefs filed in support of Appellant or Appellee shall be filed with the court **not later than 12 November 2024**.

Students will restrict their briefs solely to the question of whether the specified evidence was admitted in error and will not address whether any erroneous admission pursuant to Mil. R. Evid. 404(b) resulted in prejudice.

Students are reminded that names of victims and witnesses will be identified by initials in both their briefs and during oral argument.

While the court allots counsel of record for each side 30 minutes to present oral argument, A.F. CT. CRIM. APP. R. 25.2(b), the court affords law students **10 minutes** for each side to present oral argument on the specified issue.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF APPEARANCE OF**
Appellee	)	**GOVERNMENT COUNSEL**
	)	
v.	)	Before Panel No. 3
	)	
Senior Airman (E-4)	)	No. ACM 40496
JERIN P. MENARD,	)	
United States Air Force	)	21 October 2024
Appellant	)	

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

The undersigned hereby enters appearance as counsel for the United States in the above captioned case pursuant to Rule 12, Air Force Court of Criminal Appeals Rules of Practice and Procedure. The undersigned counsel will appear as co-counsel for the United States.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
Military Justice & Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 21 October 2024.

KATE E. LEE, Capt, USAF
Appellate Government Counsel
Government Trial & Appellate Operations Division
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(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force, Appellant.	**NOTICE OF APPEARANCE** Before Special Panel No. ACM 40496 28 October 2024

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

COMES NOW, Major Frederick Johnson, pursuant to Rule 12(a) of this Court's Rules of Practice and Procedure, and hereby files this written notice of appearance. Major Johnson will sit second chair to Captain Joyclin Webster at oral argument. Major Johnson is assigned to the Appellate Defense Division, and his contact information is in the signature block below.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 October 2024.

Respectfully submitted,

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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**Brief of Amicus Curiae in Support of Appellant**
v.	)	Special Panel
Senior Airman (E-4) **JERIN P. MENARD,** United States Air Force *Appellant.*	)	No. ACM 40496 12 November 2024

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CASES

RULES

Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED ACTS OF APPELLANT PURSUANT TO MILITARY RULE OF EVIDENCE 404(b) UNDER THE THEORY THAT IT WAS PART OF A PLAN OR SCHEME FOR APPELLANT TO MONITOR, AND/OR EVIDENCE APPELLANT HAD AN INTENT AND MOTIVE TO DOMINATE AND CONTROL THE NAMED VICTIM.

Statement of the Case

Appellant's Statement of the Case is accepted.

Statement of Facts

Appellant's Statement of Facts is accepted.

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ADMITTED UNCHARGED ACTS UNDER MIL. R. EVID. 404(b).

Standard of Review

A military judge's ruling under Mil. R. Evid. 404(b) will not be disturbed except for a clear abuse of discretion. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999). 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)).

Law and Analysis

The military judge abused his discretion by admitting evidence of JM's uncharged acts—obtaining passwords, accessing R.H.'s phone, and blocking contacts—under

Mil. R. Evid. 404(b) ("Rule 404(b)") to show a "common plan scheme" and "intent" or "motive." Specifically, the admitted evidence did not sufficiently demonstrate a connection to the alleged "common plan scheme," nor did it meet the requirements for showing "intent" or "motive." Therefore, the finding and sentence should be set aside.

Rule 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion and cannot be used to show predisposition toward crime or criminal character. *United States v. Moore*, 78 M.J. 868, 873 (A.F. Ct. Crim. App. 2019). However, "such evidence may be admissible for another purpose, including to show . . . motive, intent, plan, absence of mistake, or lack of accident." *Id.* (citing *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010)).

Additionally, courts apply the three-part *Reynolds* test to review admissibility under Rule 404(b): (1) "Does the evidence reasonably support a finding by the court members that appellant committed other crimes, wrongs or acts?"; (2) "What fact of consequence is made more or less probable by the existence of this evidence?"; and (3) "Is the probative value substantially outweighed by the danger of unfair prejudice?" *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

I. The Military Judge Abused His Discretion in Concluding the Evidence Established a Fact of Consequence under the "Common Plan or Scheme" Exception.

The military judge erred by admitting character evidence under Rule 404(b)'s "common plan or scheme" exception because the uncharged acts—obtaining passwords, accessing R.H.'s phone, and blocking contacts—do not make any fact of consequence more or less probable in relation to the charged act, thus failing the second prong of *Reynolds*.

For evidence of uncharged acts to be admissible under Rule 404(b)'s "common plan or scheme" exception, the "uncharged acts must be almost identical to the charged acts." *U.S. v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (internal quotations omitted). Particularly, "the common plan analysis considers whether the uncharged acts in question establish a 'plan' of which the charged act is an additional manifestation, or whether the acts *merely share some common elements*." *U.S. v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (emphasis added). The Government's reliance on *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), suggesting that uncharged acts need not be "almost identical," but instead need only satisfy a more lenient "common factors" test, is flawed for two reasons. First, while *Hyppolite* does not reference *Morrison* directly, it certainly does not overrule it—and "overruling by implication is disfavored." *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019). Second, even under the novel "common factors" test that the Government urges this Court to adopt, the uncharged acts must still share a level of similarity in order

to make any fact of consequence more or less probable under this exception, which is simply not present in this case.

Although *Hyppolite* does not explicitly cite *Morrison*, its application aligns with *Morrison*'s fundamental principle: the admissibility of evidence under Rule 404(b)'s "common plan or scheme" exception requires significant similarity between the charged and uncharged acts. In other words, while *Hyppolite* considered various factors—such as (1) the relationship between the alleged victims and the accused, (2) the circumstances surrounding the acts, and (3) the nature of the misconduct—these factors still necessitate a strong degree of similarity between the charged and uncharged conduct. *Hyppolite*, 79 M.J. 161. Focusing specifically on the third factor, the "nature of the misconduct" itself requires that the uncharged acts closely resemble the charged offenses. This requirement is consistently reflected in the case law, with no precedent allowing for the level of dissimilarity present in this case. Thus, where uncharged acts significantly differ in nature from the charged conduct, they fail to demonstrate a "common plan or scheme."

For instance, in *Hyppolite* and *United States v. Greene-Watson*, 2023 WL 8943232 (A.F. Ct. Crim. App., 2023)—the very case the Government cites as implicitly rejecting the "almost identical" standard—the admitted evidence of uncharged acts significantly resembled the charged conduct. Specifically, in *Hyppolite*, the court held that the trial judges did not abuse their discretion when they admitted evidence of three Article 120 UCMJ offenses as evidence of a "common plan" to commit two other Article 120 offenses. *Hyppolite*, 79 M.J. at 163. Similarly, in *Greene-Watson*, evidence

of an uncharged violent altercation with a significant other was admitted because it was "substantially similar" to the charged conduct involving another violent altercation with the same person. *Greene-Watson*, 2023 WL 8943232, at *13.

The Government, however, misinterprets *Hyppolite*, suggesting that it should allow for an unprecedented degree of dissimilarity between charged and uncharged conduct, permitting admissibility where the acts "*merely share some common elements*." Put simply, this position is not supported by existing precedent. In fact, every case cited within *Hippolyte* itself in articulating the proper application of Rule 404(b)'s "common plan or scheme" exception involved factual circumstances where the admitted evidence of uncharged acts *closely* resembled the charged conduct. *See, e.g., United States v. Munoz*, 32 M.J. 359, 360-64 (C.M.A. 1991) (admitting evidence of the appellant's prior sexual abuse of one daughter because it was probative of a plan involving sexual abuse of another daughter); *United States v. Johnson*, 49 M.J. 467, 468-75 (C.A.A.F. 1998) (ruling that evidence that the appellant previously had sexually abused his older daughter showed a "design or system[]" involving the sodomy of his younger daughter); *United States v. Reynolds*, 29 M.J. 105, 105-10 (C.M.A. 1989) (permitting evidence of a prior rape to demonstrate the accused's plan to achieve sexual intercourse with or without the consent of the woman involved in the charged offense).

In this case, the uncharged acts—obtaining passwords, accessing R.H.'s phone, and blocking contacts—lack the sufficient similarity to the charged offense: wrongful viewing via hidden camera. The only commonality between the uncharged acts and

the charged offense is a vague idea of "control," which falls short of the similarity required to meet Rule 404(b)'s "common plan or scheme" exception established by the relevant precedent. Unlike the highly similar acts in *Hyppolite* and *Greene-Watson*, the uncharged acts here lack the close resemblance necessary to make any specific fact of consequence in this case more probable.

By failing to apply this well-established standard and admitting uncharged acts that did not meet the requisite level of similarity,[1] the military judge abused his discretion in admitting the evidence as a common plan or scheme, as it fails *Reynolds*' second prong.

II. The Military Judge Abused His Discretion by Failing to Properly Apply the "Intent" and "Motive" Exceptions to the Evidence.

The military judge erred by admitting character evidence under Rule 404(b)'s "intent" and "motive" exceptions because the evidence of the uncharged acts—obtaining passwords, accessing R.H.'s phone, and blocking contacts—does not make "a fact of consequence more or less probable," and the probative value of the uncharged acts is "substantially outweighed by the danger of unfair prejudice," thus violating the second and third *Reynolds* prongs. In fact, the military judge failed to

[1] Appellant maintains that the requisite level of similarity should still be the standard established in *Morrison*: that the uncharged acts should be "almost identical" to the charged acts. *Morrison*, 52 M.J. at 122. However, if this Court rejects the *Morrison* standard, Appellant submits that the precedent requires that the level of similarity be at least "substantially similar." *Greene-Watson* at *13.

apply the "intent" and "motive" exceptions to the specific items of evidence at issue altogether.

Under Rule 404(b), "motive and intent evidence are distinct from one another." *United States v. Wilson*, 84 M.J. 383, 394 (C.A.A.F 2024). Accordingly, "the probative value and prejudicial effect of the evidence may diverge based on the reason for its admission," and "each ground of admissibility should be evaluated separately." *Id.* at n.9. If not, "cases may arise where evidence is properly admissible for only a single purpose under [Rule] 404(b)(2) . . . but the military judge improperly instructs the panel members that the evidence can also be considered for a host of other [improper] reasons under [Rule] 404(b)(2)." *Id.*

Specifically, "[m]otive evidence is used to demonstrate that the accused committed the criminal acts with which he is charged" by suggesting that the accused had a motive or reason to do so, while "intent evidence is used to demonstrate the accused's state of mind when he committed those acts." *Id.* "This distinction may have consequences when a military judge conducts his or her M.R.E. 403 analysis" because "the probative value and/or the prejudicial effect of the *same* evidence at the *same* trial may vary significantly based on whether that evidence is being examined on motive grounds or on intent grounds." *Id.* at 394. Thus, "[a]bsent a separate analysis of the probative value and prejudicial effect of the evidence under each Rule 404(b)(2) purpose instructed upon by the military judge," the court cannot "discern under which basis the evidence was properly admitted, and as a result, could

not fully assess whether the military judge's error materially prejudiced the substantial rights of the accused." *Id.* at 394 n.9.

In *Wilson*, the court expressed concern that without separate analyses, evidence could be admitted for multiple purposes under Rule 404(b)(2), but in ways that might unduly prejudice the accused. *Wilson*, 84 M.J. at 394. Accordingly, this approach requires that, for each distinct purpose under Rule 404(b)—such as intent and motive—the probative-prejudicial balance under *Reynolds* should be examined individually. *Id.* This distinction is important because the potential prejudicial effect of evidence may vary significantly depending on whether it's examined under motive or intent grounds.

In this case, the military judge failed to separately analyze the distinct purposes of "intent" and "motive" under Rule 404(b) as applied to the specific items of evidence. Instead, he relied on broad, conclusory statements, asserting that the "evidence . . . might serve to explain the motivations and intent of the accused" to "dominate and control R.H." (Ruling – Def. Motion to Exclude Evidence ¶¶ 34, 36). However, "domination and control" was never a charge against the Appellant, and this vague characterization sidesteps *Wilson*, which explicitly held that "[m]otive evidence is used to demonstrate that the accused *committed the criminal acts with which he is charged*." *Wilson*, 84 M.J. at 394 (emphasis added). By doing so, the judge failed to establish how the evidence at issue specifically supported an "intent" or "motive" to commit the *charged act* of wrongful viewing or demonstrated that a fact of consequence was made more or less probable.

In fact, the judge's analysis wholly lacked any individualized evaluation of the "intent" and "motive" exceptions when he addressed the specific evidentiary items at issue—items "b," "c," and "d." Specifically, in denying the Appellant's motion to exclude these items, the military judge ultimately concluded that each item was "probative to the Accused's *plan or scheme* to monitor R.H." *Id.* at ¶¶ 40-42 (emphasis added). Notably, the judges reasoning rested solely on the "common plan or scheme" exception and did not explain how the evidence, individually or collectively, established either "intent" or "motive" commit the charged act. By focusing solely on the "common plan or scheme" exception, the military judge failed to provide any specific analysis regarding the "intent" and "motive" exceptions, leaving this Court unable to "discern under which basis the evidence was properly admitted," and as a result, it cannot "fully assess whether the military judge's error materially prejudiced the substantial rights of the accused." *See Wilson*, 84 M.J. at 394 n.9. By substituting specific evidentiary analyses with broad conclusions about Appellant's general behavior, the military judge risked confusing the members, who may have improperly applied the evidence for purposes other than those intended. This failure to limit the evidence to its proper purpose under Rule 404(b) caused substantial prejudice by allowing the panel to infer that the Appellant was simply a "bad person," rather than focusing on how each piece of evidence related to the charged offense.

Finally, the military judge's ruling relies on generalized case law without properly applying it to the specific facts of this case. The judge cites *Moore* to justify admitting evidence of "motive" and "intent" to control or dominate, but this reliance is

misplaced. In *Moore*, the court admitted evidence of controlling behavior because it made specific facts of consequence more or less probable, particularly, whether the victim consented and whether the appellant had a mistake of fact as to consent. *Moore*, 78 M.J. at 871. In this case, however, consent is not at issue because SrA JM explicitly admitted to placing the camera without R.H.'s knowledge. In fact, the Government even conceded that "the factfinder did not need to consider any Mil. R. Evid. 404(b) evidence to conclude that Appellant viewed R.H.'s private area," and further acknowledged that "the extent to which the evidence contributed to the prosecution's case was *minimal*." (Ans. at 17, 25.) (emphasis added). This concession highlights that the uncharged acts neither made any fact of consequence more or less probable nor added probative value, but instead only served to unfairly prejudice the members, rendering the use of *Moore* inapplicable, as the evidence of general controlling behavior does not assist in determining whether SrA JM wrongfully viewed R.H.

Accordingly, the judge's failure to conduct distinct evidentiary analyses under the "intent" and "motive" exceptions prevents this Court from determining the actual basis for admissibility under those exceptions, leaving this Court no basis on which to assess whether the probative value truly outweighed any prejudicial impact for each item of evidence at issue. In combining these exceptions without separate analyses specific to the items of evidence at issue, the judge violated *Reynolds*'s second and third prongs.

Conclusion

WHEREFORE, Amicus respectfully requests this Honorable Court set aside the finding and sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court, the Air Force Appellate Defense Division, and the Government Trial and Appellate Operations Division on 12 November 2024.

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No. ACM 40496

IN THE
AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee,

v.

SENIOR AIRMAN (E-4)
JERIN P. MENARD,
UNITED STATES AIR FORCE

Appellant.

AMICUS BRIEF

IN SUPPORT OF APPELLEE

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GRANTED ISSUE

Whether the military judge abused his discretion when he admitted uncharged acts of Appellant pursuant to Military Rule of Evidence 404(b) under the theory that it was part of a plan or scheme for Appellant to monitor, and/or evidence Appellant had an intent and motive to dominate and control the named victim.

INTEREST OF AMICI

Amici curiae are law students with a passion for fair and just administration of military justice who aim to bring clarification to contentious evidentiary issues in military courts. Specifically, they wish to demonstrate how the historical purpose and context of the Military Rules of Evidence should form the foundation for the analysis of admissibility, with a focus on cases of unique and often factually difficult natures: sexual offense and intimate partner violence cases.

Amici have no personal stake in the outcome of the proceedings, have not consulted either party on the contents of this brief, and are only interested in improving the military justice system and its processes.

SUMMARY OF THE ARGUMENT

This Court should find the military judge did not abuse his discretion when he admitted uncharged misconduct under Mil. R. Evid. 404(b) for two main reasons. First, applying the purpose, context, and historical application of Mil. R. Evid. 404(b) and *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), to the facts of this case demonstrates the evidence was properly admitted under Mil. R. Evid. 404(b). The legislative history shows the purpose of this rule to be one of inclusion, only excluding evidence of uncharged acts offered solely to prove character.
The *Reynolds* test supports this purpose by providing a workable framework to determine admissibility of uncharged acts. Additionally, military courts are historically more permissive in admitting evidence under Mil. R. Evid. 404(b) in sexual offense and intimate partner violence cases, because they recognize the unique nature of the relationship between the victim and the accused.

Second, in light of the context and historical application of Mil. R. Evid. 404(b) and *Reynolds*, the evidence in this case was properly admitted as proof of the Appellant's plan or scheme to monitor RH. The evidence reasonably supported a finding that the Appellant committed the uncharged acts, and the uncharged acts made it more probable that he committed the charged offense as part of a plan or scheme. The probative value of this evidence was not substantially outweighed by the prejudicial effect of its admission because the uncharged acts were neither identical in such a way that would show propensity, nor *per se* misconduct, but instead provided critical context for the fact finder. Finally, the military judge did

not abuse his discretion as his analysis was not arbitrary, clearly unreasonable, or clearly erroneous.

ARGUMENT

I. Determining whether evidence was properly admitted under Mil. R. Evid. 404(b) requires consideration of the purpose, context, and historical application of Mil. R. Evid. 404(b) and *Reynolds*.

Military Rule of Evidence 404(b)(1) prohibits the admission of other crimes, wrongs, or acts if they are admitted as "evidence of a person's character . . . to prove that on a particular occasion the person acted in accordance with [that] character." However, evidence of uncharged acts *may* be admissible for other purposes, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2).

This rule was incorporated in the Military Rules of Evidence in 1980 as a mirror of its federal counterpart, Fed. R. Evid. 404(b). Congress intended Fed. R. Evid. 404(b) to be one of inclusion—i.e., for a greater emphasis to be placed on admissibility. H.R. Rep. No. 93-650, p. 7 (1973). The Senate committee report added that "the use of the discretionary word 'may' with respect to admissibility of evidence of crimes, wrongs, or other acts is not intended to confer any arbitrary discretion on the trial judge." S. Rep. No. 93-1277, p. 24 (1973). The combination of these two statements was recognized by the Supreme Court as proof that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." *Huddleston v. United States*, 485 U.S. 681, 688-89 (1988).

In determining when Mil. R. Evid. 404(b) evidence will be admissible, military courts have developed their approach over the years. Between 1984 and 1989, the Military Court of Appeals worked to adopt a test for the lower courts to apply when considering the admissibility of Mil. R. Evid. 404(b) evidence. These efforts culminated in the *Reynolds* test:

> (1) Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts;
>
> (2) What fact of consequence is made more or less probable by the existence of this evidence; and
>
> (3) Is the probative value substantially outweighed by the danger of unfair prejudice?

United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).

Military courts have seemingly been more willing to admit evidence under Mil. R. Evid. 404(b) in cases of sexual assault and intimate partner violence given the unique nature of the relationship between the victim and the accused. *United States v. Munoz*, 32 M.J. 359 (C.A.A.F. 1991) (Cox, J. concurring). This trend has historically centered around the similarities between the conduct involved in the charged and uncharged acts. *Id.* Other considerations have included patterns of behavior of the accused and common factors. *United States v. Johnson*, 49 M.J. 467 (C.A.A.F. 1998); *see also United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019).

This is not an indication that courts are improperly admitting unfairly prejudicial evidence under Mil. R. Evid. 404(b). Instead, it reflects courts embodying the purpose of Mil. R. Evid. 404(b) to allow court members to have the necessary context of the relationship between the victim and the accused to come to a correct

conclusion. This approach is not only appropriate, but it is crucial to achieving a just result considering the rule's intended purpose as enacted by Congress.

A. Both Fed. R. Evid. 404(b) and Mil. R. Evid. 404(b) are rules of inclusion, only excluding evidence of uncharged acts offered solely to prove character.

The plain language of Military Rule of Evidence 404(b)(1) prohibits admission of evidence of other crimes, wrongs, or acts for the purpose of proving a person's character to show that person acted in the same way on a particular occasion. However, evidence of uncharged acts "*may be admissible* for another purpose such as proving motive . . . intent . . . [or] plan." Mil. R. Evid. 404(b)(2) (emphasis added). Mil. R. Evid. 404(b) is identical to Federal Rule of Evidence 404(b). Federal Rule of Evidence 404(b) was originally adopted by the Supreme Court in 1972, and its language was amended by Congress and enacted in 1975. The Military Rules of Evidence largely mirror the Federal Rules of Evidence. However, some alterations were made to accommodate the unique position of the military and its members. For example, Mil. R. Evid. 412, 201A, and 501 are worded differently from their federal counterparts. Robinson O. Everett, *Military Rules of Evidence Symposium: An Introduction*, 130 Mil. L. Rev. 1, 2 (1990). In fact, several provisions of the Military Rules of Evidence are more favorable to the accused than federal and common law offer. Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 Mil. L. Rev. 5, 27 (1990). This suggests that drafters of the Military Rules of Evidence specifically intended to adopt Fed. R. Evid. 404(b) as it was enacted by Congress in 1975.

The legislative history of Fed. R. Evid. 404(b) indicates the purpose of the rule is to include admissible evidence. At the time of drafting and enactment, the advisory committee noted that Fed. R. Evid. 404(b)(2) was originally submitted to Congress with the words, "[t]his subdivision *does not exclude* the evidence when offered" but was amended by Congress to read, "[it] *may, however, be admissible*" on the ground that this formulation placed greater emphasis on admissibility than the version originally submitted to Congress by the Court. H.R. Rep. No. 93-650, p. 7 (1973). Compounding this purpose, the Senate stated it had no reason to amend the rule as written. It anticipated that the use of the discretionary word "*may*" was included so as to render evidence excludable by a trial judge *only* on the basis of considerations set forth under the Rule 403 balancing test: prejudice, confusion, or waste of time. S. Rep. No. 93-1277, p. 24 (1973).

The Supreme Court rejected any argument that Fed. R. Evid. 404(b) was intended as a rule of exclusion in *Huddleston*, where it evaluated the plain text and legislative history of the rule. In that case, the Court stated that Congress was more concerned with preventing restrictions on the admission of such evidence and less with the potential prejudicial effect of it. *Huddleston*, 485 U.S. at 688-89. As a result, the Court held that requiring the government to prove the uncharged act by even a preponderance of the evidence is not required for admissibility. *Id.* at 689. Instead, it required a much lower standard of proof in the Fed. R. Evid 404(b) context. *Id*. All that is required for admissibility is relevancy, and similar act evidence is relevant if "the jury can reasonably conclude that the act occurred and

that the defendant was the actor." *Id.* Notably, the Court was still somewhat concerned with unfairly prejudicial evidence being admitted under this standard, but it felt there were sufficient protections provided. *Id.* It specifically noted Fed. R. Evid. 404(b)'s requirement that evidence be admitted for a proper purpose, Fed. R. Evid. 402's relevancy requirement, Fed. R. Evid. 403 balancing test to determine prejudicial effect versus probative value, Fed. R. Evid. 105's requirement that, upon request, the trial court must instruct the jury that similar acts evidence "be considered only for the proper purpose for which it was admitted." *Id.* at 691–92.

The purpose of Fed. R. Evid. 404(b)—as evidenced by the legislative history and legal analysis by the Supreme Court—is to be a permissible rule of inclusion. The only exception is which the uncharged acts are so enormously prejudicial to the accused that their admission substantially outweighs any probative value to court members. Exclusion is not the automatic or default result, but rather the opposite. Evidence shall be admissible unless the prejudicial effect cannot be overcome. This analysis applies equally to Military Rules of Evidence given the subsequent mirroring of Fed. R. Evid. 404(b)'s language by Mil. R. Evid. 404(b).

B. The *Reynolds* test provides a workable framework for determining admissibility of Mil. R. Evid. 404(b) evidence.

Military Courts of Appeal have developed a framework to effectively apply the inclusionary purpose of Mil. R. Evid. 404(b) without unduly prejudicing defendants. Any time uncharged acts are introduced at trial, the accused party may reasonably fear that "jurors may perceive the uncharged conduct as immoral and consequently react adversely to the accused." Edward J. Imwinkelried: *The Use of*

Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition, 130 Mil. L. Rev. 41, 51 (1990). This threat is recognized by both defendants and the judiciary alike. "Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules." *Id.* at 43. "In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most common ground for appeal in criminal cases." *Id*.

In an effort to abide by the plain text of the rule and the Congressional intent to favor admissibility of uncharged acts evidence, while remaining mindful of the potential unfair impacts and constitutional violations of the accused, Military Courts of Review sought to develop a consistent framework for applying Mil. R. Evid. 404(b) over the course of several years.

In 1984, preceding the Supreme Court's ruling in favor of admissibility in *Huddleston*, the Court of Military Appeals first applied Mil. R. Evid. 404(b). *United States v. Brannan*, 18 M.J. 181, 183-85 (C.M.A. 1984). It held that when determining the admissibility uncharged acts, a three-step test should be applied. *Id.* That test required courts to: (1) "identify the evidence . . . that ended to show that the appellant had engaged in other offenses;" (2) "identify the particular purposes for offering the evidence;" and (3) apply a balancing test to determine if the prejudicial effect of that evidence substantially outweighs the probative value of the evidence. *Id*. The court evaluated whether Mil. R. Evid. 404(b) permitted evidence to be admitted for the purpose of proving the appellant's plan or scheme

and required the uncharged offenses to be almost identical to the charged offenses to be relevant. *Id.* at 183.

Two years after *Brannan*, the Court of Military Appeals heard a factually similar case and relaxed the standard for admissibility of 404(b) evidence. *United States v. Brooks*, 22 M.J. 441, 444 (C.M.A. 1986). The *Brooks* court implied that the previous requirement—that the government show a strict nexus in time, place, and circumstance between the uncharged acts and the charged crime—had been relaxed. *Id*. The court briefly referenced the previously required strict nexus test before instructing that for evidence to be admissible, "[t]he Government must first demonstrate that the [uncharged] acts are relevant to *some* aspect of its case." *Id.* (emphasis added). The court went on to elaborate that this was true even if that aspect was just the proper purpose for which it had been admitted under 404(b). *Id.*

In *United States v. White*, 23 M.J. 84, 86-87 (C.M.A. 1986), the court slightly reworded the first step in *Brannan*'s three-step test to address "prior crimes, wrongs, or acts" rather than "other offenses." While not a significant alteration to the framework, this language change clarified the broad scope of the first requirement for admitting evidence Mil. R. Evid. 404(b).

Two years later, the Supreme Court in *Huddleston* clarified that prior offenses under the Federal Rules of Evidence need not be established with *proof* by a preponderance of the evidence. Instead, the Court only required that a jury *could reasonably* find the prior offense to be show by that standard.

> [I]n determining whether the Government has introduced sufficient evidence . . . the trial court neither weights credibility nor makes a

> finding that the Government has proved the conditional fact by the preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

Huddleston, 485 U.S. at 690. In response, the Court of Military Appeals yet again reworded the first prong of the three-prong test to reflect *Huddleston*'s lowered standard of proof. *United States v. Mirandes-Gonzalez*, 26 M.J. 411, 414 (C.M.A. 1988). Under the new test, courts were to ask "whether there is sufficient evidence for a reasonable court member to believe that the accused in fact committed the extrinsic offense." *Id.*

Subsequently, the Court of Military Appeals established that a factor in determining relevance once a permissible purpose has been identified is "similarities" or "close parallels" between the evidence and the charged offense. *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989). The language "similarities" or "close parallels" showed that the court was implicitly rejecting a strict nexus in time, place, and circumstances in favor of a looser threshold that allowed relevancy to established by a logical link between the acts.

The development of these standards culminated in *Reynolds*, 29 M.J. at 109. *Reynolds* did not alter the landscape of 404(b) evidence admissibility, but it clarified the standard and provided much needed context. This test requires an evaluation of the following:

> (1) Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs, or acts;
>
> (2) What fact of consequence is made more or less probable by the existence of this evidence; and

(3) Is the probative value substantially outweighed by the danger of unfair prejudice?

Id. In the event that the evidence presented by the government fails to meet any one of the three enumerated standards, it will be inadmissible. *Id.*

The *Reynolds* court also provided some context as to the required similarity scale between the uncharged and charged offenses. "If the prior acts of appellant are significantly similar to the charged acts and thus evidence a particular 'design' or 'system,' and are relevant to prove or disprove a fact in issue, the uncharged conduct may be admitted to prove such a design or purpose." *Id.* at 110 (citation omitted). Further, evidence of "[u]sing the very same method to accomplish his . . . [purpose] on other occasions [is] extremely probative . . . of . . . mens rea." *Id.* at 109. Specifically, "whether uncharged acts are admissible is dependent upon the issue in controversy—until the issue is clearly in controversy, the evidence should not be admitted." *Id.* at 110.

The *Reynolds* test is the result of years of legislative development, incorporation of the exact text of the federal rules into the military rules, and judicial efforts to clarify when evidence of uncharged acts is admissible. From *Brannan* to *Reynolds*, the requirements for admissibility were not only clarified, but also relaxed. Uncharged acts need not be "almost identical" or even demonstrate a strict nexus in time, place, or circumstance, to be admissible. The only requirements are that the uncharged acts (1) can reasonably be proved to a jury, (2) are relevant evidence to an issue in controversy, and (3) have probative value that is not substantially outweighed by the prejudicial effect to the accused. This framework

embraces the intent of Congress and of the drafters of the Military Rules of Evidence, that Mil. R. Evid. 404(b)—just like Fed. R. Evid. 404(b)—is a rule of admissibility rather than exclusion.

C. Military courts are historically less restrictive in prohibiting evidence under Mil. R. Evid 404(b) in sexual offense and intimate partner violence cases due to the unique nature of the relationships involved.

Long before the development of Fed. R. Evid. 404(b) and Mil. R. Evid. 404(b), federal courts were sensitive to the nature of sexual offense and intimate partner violence cases in determining the admissibility of evidence of uncharged acts. Over 100 years ago, the Supreme Court noted that evidence of uncharged acts is particularly important in cases of intimate partner violence where there is a common victim between the uncharged and charged acts. *Thiede v. Utah*, 159 U.S. 510, 518 (1895). In *Thiede*, a husband was accused of murdering his wife. Prior domestic violence was found to be *crucial circumstantial evidence* for a jury to hear in determining the truth with respect to the nature of the relationship between the defendant and the victim. *Id*. The Court held that "where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be." *Id.* (quoting *Holmes v. Goldsmith*, 147 U.S. 150, 288 (1893)).

This same premise has been implicitly embedded in the decisions of military courts examining evidentiary challenges in cases involving sexual offenses and intimate partner violence. While initially, the Court of Appeals for the Armed Forces required that uncharged acts evidence be almost identical or significantly

similar to the charged offense for that evidence to be admissible, subsequent decisions relaxed that standard. *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999); *see also Reynolds*, 29 M.J. at 110.

Since *Reynolds*, rules and considerations, all but eliminating the "strict nexus" requirement, have emerged in several cases. For instance, prior acts are admissible where the acts could reasonably be viewed as "the expression and effect of the existing internal emotion" and "the same motive is shown to have existed in appellant at the time of the subsequently charged acts." *United States v. Watkins*, 21 M.J. 224, 227 (C.MA. 1986). A pattern or behavior of the accused can be considered a "design or system" and common factors in the patterns of abuse between charged and uncharged acts support affirming the military judge's admission of evidence. *Johnson*, 49 M.J. at 468. The relationship of the alleged victim or victims to the accused, the circumstances surrounding the alleged commission of the offenses, and the nature of the misconduct are all to be considered in evaluating admissibility under Mil. R. Evid. 404(b). *Hyppolite*, 79 M.J. at 162-63. "Evidence of intent . . . may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *United States v. Wilson*, 84 M.J. 383, 394 (C.A.A.F. 2024). An appellant's intent in committing an act becomes "a necessary and contested issue" anytime the appellant pleads not guilty and provides trial testimony. *Id.*

This trend towards admissibility of evidence under Mil. R. Evid. 404(b)—particularly in intimate partner violence situations—is also demonstrated by how

courts evaluate the probative weight of the uncharged acts evidence in such cases. "The more significant the charged misconduct, the less threat of 'unfair prejudice' posed by admission of the uncharged misconduct because 'any prejudicial impact based on the shocking nature of the evidence was diminished by the fact the same conduct was already before the court members .....'" *United States v. Greene-Watson*, No. ACM 40293, 2023 CCA LEXIS 542, *29 (A.F. Ct. Crim. App. Dec. 27, 2023) (unpub. op.) (citing *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993)).[1] While *Greene-Watson* involved evidence of subsequent uncharged acts, C.A.A.F. and seven of the twelve federal circuit courts[2] have affirmed the admissibility of subsequent acts as 404(b) evidence. This suggests that courts are increasingly willing to admit evidence of the facts and circumstances of an intimate relationship to provide context of the relationship between the accused and the victim to court members. *Id.*

Uncharged offenses that are part of the facts and circumstances of the charged misconduct are distinguishable from other uncharged acts. In *United States v. Lizana*, No. ACM 39280, 2018 CCA LEXIS 348 (A.F. Ct. Crim. App. Jul. 13, 2018) (unpub. op.), this Court considered the admissibility of prior acts of an appellant

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[1] Petition for review granted by the United States Court of Appeals for the Armed Forces, *United States v. Greene-Watson*, No. 24-0096, 2024 CAAF LEXIS 253 (May 7, 2024).
[2] The following federal circuit courts have affirmed the admissibility of subsequent acts under Fed. R. Evid. 404(b): *United States v. Peterson*, 244 F.3d 385, 392 (5th Cir. 2001); *United States v. Crowder*, 141 F.3d 1202, 1208 (D.C. Cir. 1998); *United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997); *United States v. Buckner*, 91 F.3d 34, 36 (7th Cir. 1996); *United States v. Procopio*, 88 F.3d 21, 29 (1st Cir. 1995), *cert. denied*, 519 U.S. 1046 (1996); *United States v. Morsley*, 64 F.3d 907, 911 (4th Cir. 1995), *cert. denied*, 516 U.S. 1065 (1996); *United States v. Young*, 906 F.2d 615, 620 (11th Cir. 1990); *United States v. Bridwell*, 583 F.2d 1135, 1140 (10th Cir. 1978).

against the same victim of the charged offense. The appellant was charged with placing the victim's hand on his penis after touching her vaginal area during a hotel room incident prior to the charged offense. *Id.* While this case involved charged and uncharged acts which occurred during a single encounter, this Court found that the uncharged acts evidence was properly admitted even though the uncharged acts demonstrated a significantly more egregious act of abusive sexual conduct. *Id.* at *27.

Cases involving intimate partner violence frequently involve Mil. R. Evid. 404(b) evidence admitted for the purpose of proving a pattern of controlling behavior, plan, or scheme. Such uncharged acts are very frequently part of the facts and circumstances of the relationship between the accused and the victim, providing the crucial circumstantial evidence to court members that was referenced in *Thiede*.

Moreover, uncharged conduct does not need to be "almost identical" to be relevant and admissible. In *Hyppolite*, 79 M.J. at 162 (C.A.A.F. 2019), the defendant was charged with unlawfully penetrating a victim. The defendant sought to exclude evidence of prior incidents where he had touched the genitals of other victims. *Id.* The court cited *Reynolds* in holding that evidence of uncharged conduct can be admitted under Mil. R. Evid. 404(b) to show a plan or design to achieve the goal of the accused, even where there are differences in the way the charged and uncharged offense were perpetrated. *Id.* at 166-67 (citing *Reynolds*, 29 M.J. at 110-11). The court further held that the judge did not abuse his discretion by admitting

evidence of a common plan based on "common factors." *Id.* The majority was not persuaded by the dissent's argument that "evidence of other acts 'must be *almost identical* to the charged acts to be admissible as evidence of a plane or scheme." *Id.* at 167 (J. Olson, dissenting) (citing *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (emphasis added in original quote).

Following *Hyppolite*, this Court has regularly affirmed military judges' decisions to admit Mil. R. Evid. 404(b) evidence in sexual offense and intimate partner violence cases. In *United States v. Knarr*, 80 M.J. 522, 536 (A.F. Ct. Crim. App. 2020), statements by the accused admitting to uncharged acts of previously engaging in indecent communications with minors were deemed properly admitted for impeachment and consciousness of guilt. This Court reasoned that "[t]he relevance of the evidence did not hinge specifically on it being evidence of a sexual offense." *Id.* In the same year, this Court found that the military judge properly admitted evidence of prior communications with other minors, both sexual and non-sexual in nature. *United States v. McCall,* No. ACM 39548, 2020 CCA LEXIS 97, *15 (A.F. Ct. Crim. App. Mar. 26, 2020) (unpub. op.). It reasoned that the appellant's willingness to engage in non-criminal communication with minors in the same time frame that he engaged in other sexually explicit conversations had some tendency to demonstrate that the charged acts were intentional. *Id.*

This Court has expressly rejected invitations to return to *Brannan*'s stricter "almost identical" standard. In *Greene-Watson*, 2023 CCA LEXIS 542, at *6, the appellant was charged with making a threat against his spouse. At trial, the

Government sought to introduce evidence of a subsequent uncharged domestic violence incident in February 2022. *Id.* at *23. The appellant argued his conduct was not "almost identical" to the charged conduct. *Id.* at *27 n.13. (quoting *Brannan*, 18 M.J. 181). This Court "decline[d] appellant's suggestion [it] employ that 'almost identical' standard implicitly rejected in *Hyppolite*." *Id.*

In terms of cases involving intimate partner violence, special note has been made of uncharged acts of controlling behavior. "Evidence of [a]pellant's acts of controlling behavior was probative of these facts of consequence—lack of consent . . . ." *United States v. Moore*, 78 M.J. 868, 875 (A.F. Ct. Crim. App. 2019). "Appellant's controlling behavior demonstrated that he had the motive and intent to repress, instead of respect her personal autonomy and thus was probative of her lack of consent." *Id.*

Uncharged acts that provide context for the relationship between the accused and victim, and context about how an accused behaves in an intimate relationship have been deemed admissible. *United States v. Lull*, 2020 CCA LEXIS 301 at *4, *6-7 (A.F. Ct. Crim. App. Sept. 2, 2020) (unpub. op.). In *Lull*, the appellant was charged with sexual assault, stalking, and assault consummated by battery against his girlfriend. *Id.* at *8-9. The charged assault involved strangulation. *Id.* at *9. The military judge admitted uncharged acts including his girlfriend's testimony that he had strangled her on a separate occasion, made threats on her life, and made "spoofed" phone calls to her. *Id*. at *10-11. The government also sought to introduce evidence from a previous relationship, where the appellant "would strangle her

when they were sexually intimate" and "often would enter [her] residence without her knowledge or permission." *Id.* at *62. The military judge found these acts provided context to how the appellant acted in intimate relationships and in his specific relationship with the victim to control and dominate her. *Id.* at *66–69. Even though some uncharged acts like the strangulations were similar, and would likely elicit strong emotions from jurors, any prejudicial effect was found to not "'substantially outweigh the strong probative value of the evidence.'" *Id.* at *68. This Court found no error in admission of the mentioned acts under Mil. R. Evid. 404(b). *Id.* at *69, *77, *83-84.

Additionally, this Court found that the military judge correctly applied the third prong of the *Reynolds* test because the evidence of uncharged acts was admitted for the limited purpose of showing motive or intent to dominate or control his victim, or to show a common plan. *Id.* at *69. The probative value of introducing the appellant's uncharged act of making false statements that he and the victim were married was found not to be substantially outweighed by a prejudicial effect to the defendant if there was "*even modest* relevance of the evidence." *Id.* at *72 (emphasis added). This act did "not constitute a crime and for many people would not even be considered per se 'misconduct.'" *Id.* This result follows logically from *Moore*, where this Court determined that when uncharged acts are "not particularly aggravating," or substantially less serious than the charged offense, the potential of prejudicial effect due to the admission is limited. *Moore*, 78 M.J. at 875.

Further, this Court has previously held that evidence of uncharged acts, "demonstrated a basis for admissibility under 404(b), [where] the one thing the appellant's acts had in common was that a factfinder could conclude they were done to exert control over the victim and to repress, instead of respect, the victim's personal autonomy." *Lull*, 2020 CCA LEXIS 301 at *85. Additionally, this Court found that "the appellant's prior acts were similarly designed to repress the autonomy of an intimate partner." *Id.* The result of this conclusion was a finding that the military judge did not err in determining that the probative value of the appellant's motive, intent, and plan to dominate and control his intimate partners was strong and not substantially outweighed by the danger of unfair prejudice. *Id.* at *83; *see also Moore*, 78 M.J. at 875.

Military courts of review, and military judges alike, have historically been sensitive to the unique nature of cases involving an accused with either a singular victim or a class of victims, and tend to permit Mil. R. Evid. 404(b) evidence for the permissible purposes enumerated in Mil. R. Evid. 404(b)(2). Such evidence is crucial circumstantial evidence for a reasonable court member to understand the context surrounding the relationship between an accused and the victim. In the context of a defendant who is or has been in an intimate relationship with the victim, the uncharged acts have little risk of tempting court members to convict on an *improper* basis. The uncharged acts in these cases are often—but not always—substantially less serious, non-criminal in nature, and not *per se* misconduct for which a court member would convict. They simply represent an escalation in behavior

culminating in the charged offense, which may be properly considered. Under *Reynolds*, and in line with the purpose of Mil. R. Evid. 404(b), evidence of this conduct should be admitted so long as the prejudicial effect of evidence admitted for a permissible purpose does not substantially outweigh this probative value. Given the context of these crimes it is critical that this evidence be admitted so that court members have the information they need to make an informed decision and come to a just result.

II. In light of the context and historical application of Mil. R. Evid. 404(b) and *Reynolds*, the evidence in this case was properly admitted as proof of the Appellant's plan or scheme to monitor RH.

The military judge's analysis and admission of the evidence of uncharged acts is consistent with C.A.A.F and this Court's precedent. Uncharged acts are admissible where (1) "the evidence reasonably support[s] a finding . . . that appellant committed prior crimes, wrongs, or acts," (2) a "'fact…of consequence' is made 'more' or 'less probable' by the existence of this evidence," and (3) "the 'probative value substantially outweigh[s] the danger of unfair prejudice.'" *Reynolds*, 29 M.J. at 109.

In this case, the evidence reasonably supported a finding that the Appellant committed the uncharged acts. Second, the uncharged acts made it more probable that the Appellant committed the charged offense as part of a plan or scheme to monitor RH. Third, the probative value of this evidence was not substantially outweighed by the prejudicial effect of its admission. The prejudicial effect of the uncharged acts evidence here was limited because the acts were neither identical in

such a way that would show propensity, nor were they *per se* misconduct, but rather provided context for the fact finder.

Finally, the military judge did not abuse his discretion as his analysis was not arbitrary, clearly unreasonable, nor clearly erroneous. The military judge's careful consideration, application of relevant and current legal principles, and detailed analysis when issuing his written ruling on the defense's motion in limine does not suggest any lack of reasonableness and does not support the conclusion there was an abuse of discretion.

A. The military judge's analysis and admission of the evidence in this case is consistent with C.A.A.F. and AFFCA precedent.

The military judge's analysis and admission of the evidence in this case is consistent with precedent established by C.A.A.F. and this Court for the following three reasons. The evidence admitted in this case reasonably supported a finding that the Appellant committed the uncharged acts because circumstantial evidence that supports an inference is enough to satisfy the first requirement of the *Reynolds* test. In this case, the evidence, based on a first-hand witness account, allows a court member the room to not only infer but to reasonably find the Appellant committed these prior uncharged acts.

Additionally, these uncharged acts made it more probable that he committed the charged offense as part of a plan or scheme to monitor RH. These acts are relevant and demonstrate a similar pattern of controlling behavior that satisfies the second prong of the *Reynolds* test.

The third prong of this test is also met because the prejudicial effect of the evidence did not substantially outweigh the probative value to the court members. These acts are neither identical in a manner in such a way that would show propensity, nor are they *per se* misconduct. The uncharged acts evidence in this case provided critical context for the fact finder with respect to the relationship between the Appellant and RH.

1. The evidence reasonably supported a finding that the Appellant committed the uncharged acts.

Circumstantial evidence that supports an inference that an appellant committed the uncharged acts is enough to satisfy the first prong of the *Reynolds* test. "[T]he task for the military judge is to determine whether there is sufficient evidence for a reasonable court member to believe the accused in fact committed the extrinsic offense." *Mirandes-Gonzales*, 26 M.J. at 414. In *Mirandes-Gonzalez*, the appellant was tried by general court-martial and found guilty of assaulting his significant other's child. *Id.* at 411. During the trial, the defense argued that the appellant had injured the child in an accident. *Id.* To show the appellant's intent "at the time of the offense at issue," the trial counsel presented evidence of uncharged acts through the testimony of a next-door neighbor. *Id.* The neighbor testified she had heard "sounds like something being thumped against the bathtub," the appellant shouting to "get in the tub," and a child screaming "as if in pain." *Id.* at 412. The next day, she observed a "black and blue knot the size of a golf ball" on the child's head. *Id.* While the military judge considered the evidence admissible under Mil. R. Evid. 404(b) and the balancing test of Rule 403, the appellant argued the

evidence was inadmissible because it did not "establish by clear and convincing evidence" that he did commit the uncharged acts. *Id*. at 413.

The court determined the military judge did not abuse his discretion in admitting the aforementioned evidence. *Id*. at 414. It found that "the circumstantial evidence support[ed] an inference that appellant injured the child on that occasion." *Id*. The court cited *Huddleston v. United States*, in holding that the Government need not prove by clear or convincing evidence that the appellant committed the uncharged acts. *Id.* at 413. All that was required was for the court to examine the evidence and determine whether the court members could reasonably find the conditional fact by a preponderance of the evidence. *Id.* at 413-14.

That court members can infer from the evidence that the appellant committed the uncharged acts is enough to satisfy the first prong of the test. Here, however, inference is not necessary because RH—the proponent of the testimony—made a first-hand witness account of the prior uncharged acts. RH testified that the Appellant specifically demanded she provide him with passwords to her social media. (RH Testimony at 35, lines 9-22; 36, lines 1-2)[3]. This is much more direct than the neighbor in *Mirandes-Gonzalez,* who only inferred that the thumping she heard was the child's head hitting the tub. RH also testified to waking up in the middle of the night, unable to find her phone, and then realizing that the Appellant had locked himself in the bathroom with the phone. (RH Testimony at 47, lines 9-22; 48, lines 1-8). While this requires RH to make some inference of what the

[3] Cites to the record reference page numbers based on the limited record provided to Amici.

Appellant was doing on her phone, there is significantly less ambiguity than in *Mirandes*-Gonzalez. According to RH's testimony, no one other than the Appellant had access to her social media accounts so it could only have been the Appellant blocking individuals he did not want RH to associate with. (RH Testimony at 37, lines 1-6; 45, lines 1-19). In contrast, in *Mirandes*-Gonzalez, any number of intervening causes could have caused the observed knot on the child's head between when the neighbor heard the argument and the next day when she saw the child.

It is not unreasonable to infer that an individual willing to demand another adult's passwords to his or her social media accounts may also be bold enough to access that adult's phone while they were sleeping. Given that the Appellant was the only other person with access to RH's phone, it is likely he was the person who blocked or deleted contacts in her phone. The evidence in this case—RH's testimony—goes far beyond inference and leaves little doubt that a reasonable court member could find that the evidence supported a finding that the Appellant committed these prior uncharged acts.

2. The uncharged acts made it more probable that the Appellant committed the charged offense as part of a plan or scheme to monitor RH.

That the Appellant had monitored RH throughout the duration of his relationship by requiring her to share her social media passwords, observing her social media activity, and deleting and blocking contacts from those accounts made it more probable that he committed the charged offense as part of a plan or scheme to monitor RH. These acts are relevant and demonstrate a similar pattern of controlling behavior that satisfies the second prong of the *Reynolds* test.

Uncharged offenses are not required to be identical in order to be considered relevant. In *Greene-Watson,* the appellant was convicted of communicating a threat against their spouse. 2023 CCA Lexis 542, at *7. During the trial, the military judge admitted evidence of uncharged misconduct that the appellant had contested on appeal. *Id.*at *23. The appellant and his spouse had an "intense verbal argument" after his spouse accused him of attempting to suffocate their infant son. *Id.* at *1. A physical altercation between the couple ensued, and the appellant attempted to his spouse but missed and grazed the top of his son's head. *Id.* at *1-2. In the course of this dispute, the appellant threatened his spouse's life if she returned back to their home after leaving and threatened to harm her if she continued to "try" him. *Id*. at *2. The prosecution sought to admit uncharged misconduct where the appellant balled his fists to pretend to hit his spouse, threw his spouse's phone, placed his foot behind the wheel of a vehicle to prevent her from leaving, pounded on the windows of her car, deactivated their credit cards, and removed cash from their joint bank account. *Id*. at *23. Additional past incidents involved shutting off the utilities in her home, turning off all credit cards and taking his spouse's car keys after arguments. *Id.*

This Court, in reviewing the analysis of the military judge, found that the charged offenses and uncharged acts were "substantially similar in terms of their surrounding circumstances so as to qualify as a 'common plan or scheme.'" *Id*. at *31. This Court acknowledged the rejection of the older standard that evidence of a common plan or scheme must be "almost identical" to the charged offense and

referred to the use of the "substantially similar" test as set out in *Hyppolite*. *Id.* at *34.

Here, Appellant's counsel contends that the uncharged acts in this case do not meet the stringent requirements of "significantly similar conduct." (App. Br. at 16). However, like in *Lull*, the Appellant's uncharged acts of exhibiting or attempting to exhibit control over RH by monitoring her contacts and social media is similar to the charged offense in that a fact finder could conclude that they were all "done to exert control over the victim and to repress, instead of respect, the victim's personal autonomy." 2020 CCA LEXIS 301 at *85; *see also Moore,* 78 M.J. at 875. These cases show that where an appellant's uncharged acts follow a similar pattern of behavior to the charged events, that evidence is sufficiently similar to satisfy the second prong of the *Reynolds* test. Here, we have just that.

The Appellant's uncharged acts—demanding RH's social media passwords, accessing her accounts, and deleting or blocking male contacts with whom the Appellant did not want RH associated—all show a pattern of behavior of monitoring RH regardless of her knowledge or consent. After hiding the camera in RH's bedroom, the Appellant admitted that he would watch her through the camera to see if she was lying to him. (Pros. Ex. 5). The commonalities of the Appellant's uncharged acts create a reasonable inference that the charged offense was part of a larger plan, scheme, or system to monitor RH. Such a plan or scheme to monitor RH makes it more probable that the Appellant committed the charged offense of

knowingly and wrongfully viewing RH's private area without her knowledge or consent by monitoring her through the hidden camera.

3. *The probative value of this evidence was not substantially outweighed by the prejudicial effect of its admission because the uncharged acts provided critical context for the fact finder.*

The probative value of demonstrating the Appellants prior history of monitoring and controlling RH was not substantially outweighed by any danger of unfair prejudice against the Appellant. "Mil. R. Evid. 403 empowers a military judge to include relevant evidence 'if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *United States v. Shover*, 45 M.J. 119, 122 (1996)).

Where the uncharged acts are less egregious than the charged offense, the risk of prejudice is limited, especially where the uncharged offenses wouldn't be considered misconduct *per* se. *Moore*, 78 M.J. at 875. *Moore* involved a relationship between an appellant in his twenties and his girlfriend who was under the age of 18. *Id.* at 868. The appellant was charged with sexual assault offenses, and the government introduced uncharged acts centered around the appellant's control of the victim. *Id.* at 874. These included him dictating his girlfriend's appearance, monitoring her weight, dictating the food she could consume, "demanding" she exercise and provide him "proof of doing so," demanding she not speak to other males, "forcing her to end conversations with friends," taking her phone away from her, and demanding she check in with him when she was out of town. *Id.* The

appellant argued the uncharged acts would create a danger of unfair prejudice and the fact finder would "convict [him] for being a bad boyfriend." *Moore*, 78 M.J. at 873. The government argued admission was required to "overcome the hurdle of the presumption that a boyfriend would not physically or sexually harm his girlfriend." *Id.* at 873. The military judge found the evidence was admissible under Mil. R. Evid. 404(b) and had met the *Reynolds* test. *Id.* at 873. The court found the uncharged acts had "relevance to the charged offenses for their tendency to prove [a]ppellant's 'motive, intent, and lack of mistake or accident with respect to the two charged sexual offenses.'" *Id.* at 874.

Uncharged acts that provide context for the relationship between the accused and victim, and context in how an accused behaves in an intimate relationship are admissible. *Lull*, 2020 CCA LEXIS 301 at *4, *6-7. In *Lull*, the appellant was charged with sexual assault, stalking, and assault involved strangulation. *Id*. at *9. The military judge admitted uncharged acts including his girlfriend's testimony that he had strangled her on a separate occasion, made threats on her life, and made "spoofed" phone calls to her. *Id.* at *10-11. The government also sought to introduce evidence from a previous relationship, where the appellant "would strangle her when they were sexually intimate" and "often would enter [her] residence without her knowledge or permission." *Id*. at *62. The military judge found these acts provided context to how the appellant acted in intimate relationships and in his specific relationship with the victim to control and dominate her. *Id.* at *66-69. Even though some uncharged acts like the

strangulations were similar, any prejudicial effect was not found to "substantially outweigh the strong probative value of the evidence." *Id.* at *68. This Court found no error in admission of the mentioned acts under Mil. R. Evid. 404(b). *Id.* at *69, *77, *83-84.

Notably, this Court has occasionally found the probative value of evidence of more aggravating uncharged acts to not be substantially outweighed by its prejudicial effect—evidence that on the surface level would seem highly prejudicial due to its provocative nature. In *United States v. Edwards*, No. ACM 40349, 2023 CCA LEXIS 518, *11 (A.F. Ct. Crim. App. Dec. 11, 2023) (unpub. op.), this Court affirmed the military judge's decision that evidence of coercive control and intimate partner violence had probative value not outweighed by unfair prejudice under the balancing test of Mil. R. Evid. 403. In *Edwards*, substantially unfair prejudice was not found regarding evidence of uncharged actions that included intimate partner violence of assault and battery, aggravated assault against a former spouse, and sexual assault against his second spouse. *Id.* at *3. This evidence was permissible in that it supported the theory that the appellant had engaged in behavior of coercive control during his relationships. *Id.*

Similarly, in *United States v. Zimmermann*, this Court found the military judge did not abuse his discretion when he found admissible the evidence of sensitive photographs of the underaged victim's injuries and uncharged acts of sexual assault against others he had relationships with, as the probative value was not substantially outweighed by any danger of unfair prejudice. No. ACM 40267,

2023 CCA LEXIS 429, *3 (A.F. Ct. Crim. App. Oct. 11, 2023) (unpub. op.). The photographs depicted the sexual assault on the victim committed by the appellant, and "although the government likely could have proved penetration without the photographs, they provided additional information to the court members and were not merely cumulative." *Id.* at *30. This evidence was not found to be unfairly prejudicial. Additionally, evidence of uncharged acts of sexual assault of two other victims were admitted to show appellant's plan and intent to commit sexual assault. *Id.* at *33-35. This Court did not find this evidence to be unfairly prejudicial, and it affirmed the military judge's decision. *Id.* at *36-37.

The evidence in this case tends to fall more towards the contextually relevant, less prejudicial realm of *Lull* and *Moore* and is substantially less egregious than the evidence affirmed to be admissible in *Edwards* and *Zimmermann*. The Appellant's acts of demanding RH's passwords, taking RH's phone to go through it, and blocking male contacts from her accounts are substantially less flagrant than the charged offense of indecent viewing. These acts were not criminal in nature and are acts which a reasonable court member would not consider *per se* misconduct. Therefore, these acts have limited prejudicial effect. Here, the evidence merely provided critical context for the fact finder of the nature of the relationship between the Appellant and RH and were admitted for such purpose. As the military judge noted:

> "To force the Government to present evidence of the charged offenses involving R.H. in a vacuum would likely mislead the finder of fact in this case. Panel members individually will enter this case with their own understanding of what a serious dating relationship typically looks like.

> To deprive the members of critical context that might serve to explain the motivations and intent of the accused and R.H."

(App. Ex. XIX at ¶ 36).

It was not unreasonable for the military judge to determine that the "significant" probative value of this evidence, as context for the specific circumstances of the Appellant and RH's relationship, substantially outweighed the prejudicial effect of its admission. The military judge's analysis and findings are a direct reflection of years of C.A.A.F.'s precedent and decisions of this Court.

B. The military judge did not abuse his discretion because his analysis was not arbitrary, clearly unreasonable, or clearly erroneous.

In evaluating the evidence's admissibility, the military judge in this case did not abuse his discretion because his analysis was not arbitrary, clearly unreasonable, nor clearly erroneous. "To reverse for an abuse of discretion involves far more than a difference in . . . opinion..... " *Johnson*, 49 M.J. at 473. "A military judge abuses their discretion when: (1) the findings of fact upon which they predicate their 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) (citation omitted).

The military judge in this case didn't violate any of these three possible pitfalls. His findings of fact which predicating his ruling were supported directly by RH's testimony. Her testimony was likely to convince a reasonable finder of fact that the uncharged offenses were committed by the Appellant and that the evidence

demonstrated the Appellant had an intent and motive to dominate and control RH throughout their relationship. (App. Ex. XIX at ¶ 34). Further, the legal principles upon which the military judge relied were currently accepted principles in military courts of review as demonstrated by both recent and long-standing decisions of both C.A.A.F. and this Court. Finally, his application of these legal principles was not clearly unreasonable because many of the legal principles he applied were born out of, to some extent, factually similar cases where both similar and more provocative evidence was admitted.

Notably, C.A.A.F has enumerated on more than one occasion that the more detailed analysis a military judge provides in their decision to admit Mil. R. Evid. 404(b) evidence, the more deference their ruling will receive from a court of review. Where judges are required to engage in a Mil. R. Evid. 403 balancing assessment and fail to sufficiently articulate their balancing on the record, their decision will receive less deference from a court of review. *United States v. Berry*, 61 M.J. 91, 96 (C.A.A.F. 2005). Inversely, just this year, C.A.A.F noted that because the military judge had provided "an admirably detailed written analysis," the military judge's ruling was entitled to *full deference* by the Court under the abuse of discretion standard. *Wilson,* 84 M.J. at 391 (*citing United States v. St. Jean*, 83 M.J. 109, 113-14 (C.A.A.F. 2023)).

As Appellant's counsel notes, this military judge wrote two separate analysis sections, spanning three single-spaced pages. The first of those sections is specific to the charged conduct with respect to plan and scheme, with the second focusing on

implications of precedent to this case. (App. Br. at 17). Throughout this lengthy analysis, the military judge thoroughly considered the proffered evidence's probative value in light of the unique nature of the relationship between the Appellant and RH under the guidance of prior case law, and then weighed it properly against the prejudicial effect to the Appellant.

The potential prejudicial effect of the evidence the Government sought to admit was not simply glossed over by the military judge. In *United States v. Munoz*, the appellant was accused of indecent acts with his minor daughter. 32 M.J. at 360. The government offered uncharged acts evidence under Mil. R. Evid. 404(b) that the appellant had previously committed sexual misconduct against his two other daughters for the purpose of showing the appellant's common plan or scheme. *Id*. The military judge in *Munoz*, after hearing the testimony of both prior victims, chose to exclude the testimony of one of the two additional daughters due to the potential for unfair prejudice. *Id.* at 361-62. On appeal, the appellant contended that none of the uncharged acts should have been admitted under the Mil. R. Evid. 403 balancing test. The Military Court of Appeals found no legal error in the military judge's ruling under Mil. R. Evid. 404(b). *Id.* at 364. In concurrence, Judge Cox took special note of the military judge's sensitivity to his duties demonstrated by his exclusion of other highly probative uncharged acts evidence. *Id.* at 365-66 (Cox, J., concurring).

Like the military judge in *Munoz*, the judge here excluded other probative evidence pursuant to Rule 403. (App. Ex. XIX at ¶¶ 39, 43-44). The exclusion of

three of the six uncharged acts offered as evidence by the government signifies that the military judge heavily considered the prejudicial effect to the Appellant and was not unreasonable. Such a thorough analysis accompanied by a fair and reasonable ruling to the defense's motion to exclude 404(b) evidence is entitled to full deference from this Court.

The military judge's careful consideration, application of relevant and current legal principles, and thorough analysis when issuing his written ruling on the defense's motion *in limine* does not suggest any lack of reasonableness and in no way amounts to an abuse of discretion.

CONCLUSION

This Court should find the military judge did not abuse his discretion when he admitted evidence of uncharged acts under Mil. R. Evid. 404(b). Applying the purpose, context, and historical application of Mil. R. Evid. 404(b) to the facts of this case leads to the finding that the evidence was properly admitted under Mil. R. Evid. 404(b). This purpose is evidenced by legislative history, legal analysis by the Supreme Court, the mirror-like implementation of Fed. R. Evid. 404(b) into the Military Rules of Evidence. The *Reynolds* test supports this purpose in providing a framework to determine admissibility, requiring that uncharged acts are relevant evidence that makes an issue in controversy more or less probable, and ensuring the probative value is not substantially outweighed by unfair prejudice against the accused. Due to the unique nature of the relationship between the victim and the accused, military courts are historically less restrictive in prohibiting 404(b) evidence in sexual offense and intimate partner violence cases.

In consideration of the purpose, context, and historical application of Mil. R. Evid. 404(b) and *Reynolds*, the evidence in this case was properly admitted as proof of the Appellant's plan or scheme to monitor RH. The military judge's analysis and admission of the uncharged acts remains consistent with C.A.A.F. and this Court's precedent. The evidence admitted reasonably supported a finding that the Appellant committed the uncharged acts, and the uncharged acts made it more probable that he committed the charged offense as part of a plan or scheme to monitor RH. The probative value of this evidence was not substantially outweighed by the prejudicial effect of its admission because the uncharged acts were not identical in such a way that would show propensity, were not criminal in nature nor were they *per se* misconduct. Instead, they provided context for the fact finder about the nature of the relationship between the parties.

Finally, the military judge did not abuse his discretion because his analysis was not arbitrary, clearly unreasonable, nor clearly erroneous based on precedent where an abuse of discretion was found. The military judge's careful consideration of facts, application of relevant and current legal principles, and detailed analysis when issuing his written ruling on the defense's motion *in limine* does not suggest any lack of reasonableness. When the military judge admitted evidence of the uncharged acts under Mil. R. Evid. 404(b), he did not abuse his discretion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 17.3 as it contains 9,759 words not including indices, tables, attachments, appendices, the certificate of compliance, and the certificate of filing and service. This brief complies with the typeface and typestyle requirements of Rule 17.1 because it was prepared using Century Schoolbook 12-point font, typed and double-spaced with margins not exceeding one inch on all four sides.

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I certify that a copy of the foregoing was transmitted by electronic means on 12 November 2024, to the Clerk of the Court, Government Appellate Division, and Counsel for Appellant.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	MOTION TO CITE SUPPLEMENTAL AUTHORITIES
v.	)	Before Special Panel
Senior Airman (E-4) **JERIN P. MENARD** United States Air Force *Appellant.*	)	No. ACM 40496 12 November 2024

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

Pursuant to Rules 23.3(d) and 25.2(e) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to cite supplemental authorities because (1) additional relevant law has come to the Government's attention, and (2) new relevant law was issued after the submission of briefs. The below cases are relevant for this Court to consider when deciding Issue II: Whether the military judge abused his discretion when he admitted uncharged acts of Appellant pursuant to Military Rule of Evidence 404(b) under the theory that it was part of a plan or scheme for Appellant to monitor, and/or evidence Appellant had an intent and motive to dominate and control the named victim.

1. **United States v. Munoz, 32 M.J. 359 (C.M.A. 1991).**

In Munoz, at an accused's trial for sexual abuse of his minor daughter, the accused's uncharged abuse of another daughter 15 years prior was admitted as evidence that the accused had plan or scheme to abuse his children. Id. at 360. The Court of Military Appeals held that judge did not abuse his discretion in admitting the evidence for this purpose given the "common factors" between the charged and uncharged misconduct—"the age of the victim, the situs of the offenses, the circumstances surrounding their commission, and the fondling nature of the

misconduct." Id. at 363. Munoz demonstrates that, contrary to Appellant's assertions, the practice of examining "common factors" is neither novel nor a misapprehension of our superior Court's decision in United States v. Hyppolite, 79 M.J. 161 (C.A.A.F. 2019).

2. United States v. Berckmann, 971 F.3d 999 (9th Cir. 2020).

In Berckmann, the Ninth Circuit Court of Appeals described uncharged misconduct involving the same victim and perpetrator as "textbook examples of evidence admissible under Rule 404(b)," based on such evidence's utility in assessing the accused's motive, intent, and mindset during the charged crime. Id. at 1002. The Ninth Circuit observed that courts have admitted such evidence "as a 'critical part of the story' that clarifies the motive behind the charged crimes," or "to illustrate the 'history of [the] relationship' between the defendant and victim." Id. (citations omitted). The Court's analysis demonstrates that an accused's relationship to the victim(s) of the charged and uncharged misconduct can be a commonality that (1) tips the scales when it comes to the admission of uncharged misconduct, and (2) warrants contextualization, as in this case.

3. United States v. Wilson, 84 M.J. 383 (C.A.A.F. 2024).

In Wilson, our superior Court reviewed a military judge's decision to admit an appellant's journal entries—which contained graphic descriptions of sexual acts between children and adults—as evidence of motive and intent at his trial for sexual offenses against young girls. Id. at 387. In examining the military judge's application of the three-part test from United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989), the Court agreed with the military judge's determination that the journal entries were relevant for their tendency to make facts of consequence (motive and intent) more probable. Id. In its analysis, the Court emphasized that "intent is always at issue in a criminal case," and that evidence of intent "may be admitted

regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." Id. at 393-94. This principle supports that the uncharged misconduct was admissible as evidence of Appellant's intent to monitor and control RH, his failure to contest such intent notwithstanding.

WHEREFORE, the United States respectfully requests that this Honorable Court grant its motion to submit supplemental citations of authority.

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I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 12 November [redacted]

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