

June 17, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JERIN P. MENARD,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 25-0173/AF

Crim. App. Dkt. No. ACM 40496

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Issues Presented

I.

Whether the Air Force Court erred by applying the *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), “common factors” test too broadly, while also declining to apply this Court’s “almost identical to the charged acts” standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999), thereby improperly admitting propensity evidence.

II.

Whether this Court should reassess its holding in *United States v. Anderson*.¹

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d). This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On March 20-23, 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

¹ *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Appellant raises this issue for preservation purposes.

Article 120c, UCMJ, 10 U.S.C. § 920c (2018).² R. at 119, 482³; Entry of Judgment (EOJ). The 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.

On March 23, 2025, the Air Force Court affirmed the findings and found no error was materially prejudicial to SrA Menard's substantial rights. Appendix at 29.

Statement of Facts

SrA Menard and then-SrA RH met on an online dating application in February 2020 and began a relationship marked by repeated breakups and reconciliations, with both parties acknowledging trust issues from the outset. R. at 278-79, 334, 356. Despite these problems, they signed a lease together while SrA Menard was deployed and later adopted a dog. R. at 336. The relationship finally ended in July 2021 after RH discovered SrA Menard was involved with another woman, and RH herself had sent a photo or video of her breasts to another man, which SrA Menard also discovered. R. at 293-95.

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.

After the breakup, SrA Menard and RH worked opposite shifts and shared the same residence, with SrA Menard sleeping on the couch and moving to the bed when RH left for work. R. at 299. On August 15, 2021, while SrA Menard was out walking the pair's dog, he texted RH, "snapping⁴ guys again I see," after she had sent an image to her father. R. at 304-05; Pros. Ex. 3. RH closed the blinds and curtains, suspecting she was being watched. R. at 306-07.

Later that week, while SrA Menard was away at a softball game, RH testified that she took a shower, entered the bedroom, and masturbated on the bed while nude. R. at 308-09. RH stated that she believed she was on top of the covers while she masturbated. R. at 308. Some seconds after RH finished masturbating, she received a text from SrA Menard: "Did you make any videos today?" followed by "Any videos? Bring the toys out?" R. at 309-10; Pros. Ex. 3 at 5. RH testified that SrA Menard knew she used sex toys when masturbating. R. at 310. After an acrimonious exchange, RH tried on a blue outfit and took a photo of herself, only to receive another text from SrA Menard referencing her "blue outfit." R. at 311-12; Pros. Ex. 3 at 6. RH became worried, called a friend, and began searching her room. R. at 313-14. She discovered a "stuffed cupcake-shaped toy" with a cut-out eye containing a camera, which snagged on a wire when she picked it up. R. at 314-15;

⁴ "Snapping" involves the sending of Snapchat messages.

Pros. Ex. 1 at 3. After unplugging the camera, SrA Menard texted, “Oh look you caught on[.] Bravo[.]” Pros. Ex. 3 at 7.

RH claimed the camera had a direct line of sight to the bed, but her testimony did not establish her exact location on the bed, the bed’s orientation, or whether anything obstructed the camera’s view during the alleged incident. R. at 307-08, 317. The only photographic evidence, Prosecution Exhibit 1, was grainy and did not clarify the room’s layout or the camera’s field of view. Pros. Ex. 1. The photo suggests that the television may have obstructed the camera, and there was no evidence that the camera’s position was unchanged during the relevant period. R. at 328; Pros. Ex. 1.

SrA Menard was interviewed by investigators from the Air Force Office of Special Investigations (OSI) in October 2021 and admitted to placing the camera in the bedroom to see if RH was sending pictures to other men. R. at 375, 379; Pros. Ex. 5, Clip 2 at 0:00-1:07. He explained that he checked the camera when RH said she was dropping off clothes and saw her taking pictures in a blue outfit (Pros. Ex. 5, Clip 2 at 1:07-3:30). Specifically, SrA Menard stated,

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.

Pros. Ex. 5, Clip 2 at 5:05-5:32. He admitted to checking the camera earlier in the week but denied ever seeing RH naked through the camera. Pros. Ex. 5, Clip 3 at 00:50-2:15, 4:22-4:40.

The government charged SrA Menard with indecent viewing under Article 120c, UCMJ. 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 to her Snapchat and Instagram accounts; (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. In response to a supplemental motion, the Government provided the OSI interview with SrA Menard. 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.

The military judge found the government's evidence illustrated SrA Menard's motive to dominate and monitor RH within their relationship. App. Ex. XIX at 9-10. He found that the government's evidence—SrA Menard demanding social media

passwords, accessing RH's phone without her permission, and blocking male contacts—was enough for a reasonable fact finder to conclude these incidents happened and that they reflected a pattern of controlling behavior. *Id.*

The military judge then determined that these acts were relevant to show SrA Menard's motive and intent to monitor RH without her consent, which he found to be a proper, non-propensity purpose. *Id.* The military judge weighed the probative value of this evidence against the risk of unfair prejudice under Mil. R. Evid 403. *Id.* He concluded that the probative value was not substantially outweighed by any danger of unfair prejudice, reasoning that excluding the context would mislead the members about the nature of the relationship and the motivations. *Id.* The military judge stated the acts in question were much less severe than the charged conduct, would not take significant time to present, and would not confuse the panel. *Id.* at 9. As a result, he denied the defense motion to exclude the items. *Id.*

Based on the military judge's ruling, the government was allowed to introduce evidence under Mil. R. Evid. 404(b) of SrA Menard's prior conduct, including demanding RH's social media passwords, checking her accounts, blocking some of her male contacts, and reviewing her phone while she slept. R. at 282-89.

The evidence at trial consisted largely of RH's testimony, text messages, SrA Menard's OSI interview, and a photograph showing the cupcake toy's location a week before the alleged incident. R. at 482; Pros. Ex. 1. The defense emphasized

the lack of objective evidence showing that SrA Menard actually viewed RH's private area, highlighting the uncertainty about the camera's position, the room's layout, and SrA Menard's consistent denial of seeing RH nude. R. at 307-08, 328; Pros. Ex. 1; Pros. Ex. 5, Clip 3 at 4:22-4:40.

SrA Menard raised on appeal⁵ the issue of whether his constitutional rights were violated by being convicted of an offense with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt. Br. on Behalf of Appellant at 1. 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, and unknowable, whether the members convicted SrA Menard by a unanimous verdict.

Reasons to Grant Review

Overview

As the lower court noted, there is an irreconcilable inconsistency in this Court's Mil. R. Evid. 404(b) case law. Appendix at 14 nn.11-12. This Court should grant review of this case to resolve that conflict. Additionally, as Judge Hardy, joined by Judge Sparks, recently noted, "In a future case, I believe that the Court should

⁵ This issue was preserved pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

reconsider [this Court’s precedent broadly interpreting the scope of the Mil. R. Evid. 404(b)(2) exception] to prevent the common scheme or plan exception from swallowing [Mil. R. Evid.] 404(b)(1)’s general rule prohibiting the admission of propensity evidence.” *United States v. Greene-Watson*, __ M.J. __, No. 24-0096, 2025 CAAF LEXIS 186, at *26-27 (C.A.A.F. Mar. 11, 2025) (Hardy, J., joined by Sparks, J., concurring in part and in the judgment). This is that case.

Reasons and Support

This Court should grant review to clarify the proper limits of Mil. R. Evid. 404(b). This case presents substantial questions of law and fact that warrant this Court’s intervention.

In *Hyppolite*, this Court stated that “common plan or scheme” evidence need only share “common factors.” *United States v. Hyppolite*, 79 M.J. 161, 166-67 (C.A.A.F. 2019). That contradicted this Court’s previous holding in *Morrison* that evidence of other acts “‘must be almost identical to the charged acts’ to be admissible as evidence of a plan or scheme.” *United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999) (quoting *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984)).

In *Greene-Watson*, this Court unanimously affirmed based on the absence of prejudice in a judge-alone forum, but did not resolve the underlying tension between *Morrison* and *Hyppolite*, thus leaving open the question of how those precedents

should be reconciled in future cases. *Greene-Watson*, 2025 CAAF LEXIS 186, at *20-21.

As noted in Judge Hardy’s concurrence in *Greene-Watson*, the currently state of the law has shifted away from the “almost identical” standard articulated in *Morrison*, instead embraced the less demanding “common factors” test for admitting uncharged acts as evidence of Mil. R. Evid. 404(b) evidence. *Greene-Watson*, 2025 CAAF LEXIS 186, at *29. (Hardy, J., joined by Sparks, J., concurring in part and in the judgment). However, this Court has not overturned *Morrison*. This evolution in the law has created tension in the law as noted in the Air Force Court’s decision in this case. Appendix at 14 & nn.11-12.

In this case, the Air Force Court, relying on this Court’s decision in *Greene-Watson*, applied the *Hyppolite* “common factors” test while expressly acknowledging but rejecting *Morrison*’s “almost identical to the charges acts” standard. Appendix at 14 & nn.11-12, 17-18. In applying the “common factors” test, the Air Force Court’s Mil. R. Evid. 404(b) analysis focused on the parties being the same, the proximity in time between the charged and uncharged acts, and the purported similarity in the nature of the misconduct and uncharged acts. *Id.* at 18. The Air Force Court found that the military judge did not abuse his discretion in his

ruling regarding the “surreptitious surveillance,”⁶ and assumed that even if the “permissive surveillance” evidence was improperly admitted, the admission was harmless. *Id.* at 17-20.

The military judge’s Mil. R. Evid. 404(b) ruling and the Air Force Court’s affirmance reflect a significant expansion of the “common plan or scheme” exception under Mil. R. Evid. 404(b). The government was permitted to introduce evidence of prior acts that were not in line with the “common factors” test from *Hyppolite*, much less the “almost identical” standard from *Morrison*. The result was a blurring of the line between a permissible non-propensity use and impermissible character evidence, with the government’s theory inviting the panel to convict based on SrA Menard’s alleged controlling nature rather than proof of the charged offense itself.

Further, the Air Force Court’s reasoning relied on character evidence as it found that SrA Menard was someone “who wanted and needed to know everything about what he suspected were RH’s sexually explicit activities and communications, [therefore, he was someone who] would not turn his head to avoid seeing her

⁶ The Air Force Court distinguished the evidence as either “surreptitious surveillance” or “permissive surveillance.” The former consisted of instances of SrA Menard reviewing messages on RH’s phone and deleting some as she slept. The latter consisted of Appellant threatening to break up with RH if she did not give him the passwords to her social media accounts as well as accessing her social media accounts and blocking male friends and ex-boyfriends. Appendix at 11. For the sake of uniformity, this filing will adopt the same naming convention.

engaged in just the type of activity he had installed that camera to transmit.” Appendix at 19. This is precisely the type of character inference that Mil. R. Evid. 404(b) is designed to prevent. The government’s use of this evidence, and the military judge’s endorsement of it, risked encouraging the panel to convict based on SrA Menard’s character, rather than on evidence that he actually viewed RH’s private area as required by Article 120c, UCMJ.

This is what Judge Hardy’s concurrence in *Greene-Watson* foretold; the tension between *Hyppolite* and *Morrison* has led the Air Force Court to a holding where the common scheme exception has swallowed the rule. *See Greene-Watson*, 2025 CAAF LEXIS 186, at *26-27. Given the practical and doctrinal confusion now facing both military trial and appellate courts and litigators, this Court’s intervention is necessary to clarify the proper limits under *Hyppolite* and *Morrison*. The absence of such guidance will continue to cause confusion and the misapplication of *Hyppolite* and *Morrison* throughout the field.

As such, and as addressed in issue I, the Air Force erred by applying the *Hyppolite* “common factors” test too broadly, while also declining to apply this Court’s “almost identical to the charged acts” standard from *Morrison*, thereby improperly admitting propensity evidence. Further, as discussed in issue II, this Court should reassess its holding in *Anderson*. Accordingly, this Court should grant the petition.

I.

Whether the Air Force Court erred by applying the *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), “common factors” test too broadly, while also declining to apply this Court’s “almost identical to the charged acts” standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999), thereby improperly admitting propensity evidence.

Standard of Review

Piercing a Court of Criminal Appeal’s (CCA) decision, this Court reviews a military judge’s decision to admit Mil. R. Evid. 404(b) evidence at trial for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024) (citing *Hyppolite*, 79 M.J. at 164). Military judges abuse their discretion when: (1) the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) incorrect legal principles are used; or (3) the application of the correct legal principles to the facts are clearly unreasonable. *Id.* (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010)).

This Court reviews issues of law de novo. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019) (citations omitted).

Law and Analysis

This Court utilizes the *Reynolds* test when assessing a military judge’s decision to admit evidence under Mil. R. Evid. 404(b). *Wilson*, 84 M.J. at 391 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The three-prong test asks: (1) whether the evidence reasonably supports a finding that the accused

committed the act(s); (2) whether the evidence of the act(s) makes a fact of consequence more or less probable; and (3) whether the evidence of the act(s)'s probative value is substantially outweighed by the danger of unfair prejudice? *Id.* at 390. All prongs of the *Reynolds* test must be met for the evidence to be admitted. *Id.* (citing *Reynolds*, 29 M.J. at 109). The Air Force Court erred by applying the *Hyppolite* "common factors" test too broadly, thereby improperly allowing in propensity evidence that should have been excluded under *Reynolds*.

A. Admission of the Mil. R. Evid. 404(b) evidence was an error.

In *Hyppolite*, the appellant was charged with multiple sexual offenses involving different victims, all of whom were friends or acquaintances. 79 M.J. 161. The incidents generally occurred after drinking, and most of the alleged assaults took place when the victims were asleep or falling asleep. *Id.* at 162. The government sought to admit evidence of each incident to show a "common plan" or "scheme" under Mil. R. Evid. 404(b), rather than to prove propensity. The motions judge concluded that the evidence was admissible under Mil. R. Evid. 404(b)(2) because "each specification is probative as to the other specifications on the issue of a common plan on the part of the accused" and applied the three-part test from *Reynolds*: (1) whether the evidence supports a finding that the accused committed the prior acts, (2) whether a fact of consequence is made more or less probable by

the evidence, and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice. *Id.*

The court reiterated that, under Mil. R. Evid. 404(b)(1), evidence of other acts is not admissible to prove propensity, but under Mil. R. Evid. 404(b)(2), such evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* at 165. This Court found that the commonalities among the offenses—namely, the relationship between the accused and the victims (friends), the circumstances (after drinking, when the victims were asleep or falling asleep), and the nature of the misconduct (touching the alleged victims’ genitalia), *id.* at 162, —were sufficient to support a finding of a common plan. This Court held that the military judge did not abuse their discretion in admitting the evidence for this purpose, emphasizing that the evidence was not used to show propensity but to establish a plan or scheme. *Id.* at 167.

However, this case stands in stark contrast to *Hyppolite*. In *Hyppolite*, the presence of multiple victims allowed the court to identify a recurring pattern in the appellant’s actions. *See id.* at 163, 166. That collection of data made it easier for the government to argue, and for the court to find, a “common plan or scheme” under Mil. R. Evid. 404(b). Here, by contrast, there is only one alleged victim. While the number of victims is not dispositive, this Court should find the absence of multiple

complainants makes it much more difficult to discern any meaningful pattern in SrA Menard's behavior. As a result, the focus necessarily shifts to the relationship history between SrA Menard and RH.

The record shows that SrA Menard and RH had a tumultuous relationship, marked by mutual demands for cell phone passwords and repeated access to each other's phones—sometimes with, sometimes without, express permission. SrA Menard was also known to delete male contacts from RH's phone. R. at 282-89, 356. However, after the relationship ended, there is no evidence that SrA Menard continued to access RH's phone or delete her contacts. The conduct at issue after the breakup, placing a camera in a shared bedroom without RH's consent, differs fundamentally from the prior acts. The earlier behavior involved digital communications, while the charged offenses dealt with the alleged viewing of RH's nude body without her consent. The nature and circumstances of the alleged misconduct are thus materially different, undermining any argument that the prior acts establish a "common scheme" akin to what was found in *Hyppolite*. Instead, the evidence here points to isolated incidents rather than a unified scheme—or the type of intent required for a scheme—and the lack of multiple victims or closely linked acts makes clear the government did not meet its burden under Mil. R. Evid. 404(b). If evaluated under *Morrison's* "almost identical to the charged acts" standard, 52 M.J. at 122, the evidence's inadmissibility is even starker.

In *Greene-Watson*, the appellant was charged with communicating a threat to kill his wife and assault his child. 2025 CAAF LEXIS 186 at *3. The government sought to admit evidence of uncharged acts that occurred approximately seventeen months after the charged conduct, including physical assault, threats, and controlling behavior toward his wife. *Id.* at *7. In allowing the admission, the military judge emphasized that the evidence would be considered only for the limited purpose of establishing a common scheme or plan, not for propensity purposes. *Id.* at *8-9. This Court concluded that the military judge did not abuse his discretion in admitting the evidence, and even if there was error, it did not materially prejudice the appellant's substantial rights as the case was before a military judge alone, affirming the conviction. *Id.* at *18.

Unlike *Greene-Watson*, where the conviction was rendered by a military judge sitting alone, SrA Menard was convicted by an officer panel. This distinction is significant. In military judge-alone trials, the law presumes that military judges are able to compartmentalize evidence, apply the law correctly, and avoid improper reliance on propensity evidence. *See United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). The risk of unfair prejudice is considered minimal in such settings, and appellate courts afford considerable deference to the military judge's evidentiary rulings, especially when the judge articulates a clear rationale for admitting evidence under Mil. R. Evid. 404(b) and conducts a thorough balancing under Mil. R. Evid.

403. *See Greene-Watson*, 2025 CAAF LEXIS 186 at *22 (Sparks, J., concurring in part and in the judgment). In *Greene-Watson*, the military judge explicitly stated that the uncharged acts would be considered only for the limited purpose of establishing a common scheme or plan, not for propensity, and the appellate court found this limiting language and the judge-alone context to be critical in minimizing prejudice. *Id.* at *18.

By contrast, when a case is tried before a panel of members, the same presumption does not apply. Members are laypersons, not trained to filter out improper inferences or to disregard evidence that may be highly prejudicial. The risk that members might convict based on a belief that the accused has a propensity to commit the charged offense is much greater. Therefore, the need for a careful, critical application of the common factors analysis under Mil. R. Evid. 404(b) is heightened.

1. SrA Menard’s actions did not constitute a common scheme.

The government introduced evidence that SrA Menard, during his relationship with RH, engaged in “surreptitious surveillance,” Appendix at 11, by taking her phone while she slept and reviewing or deleting messages without her knowledge, and “permissive surveillance” by demanding her social media passwords and blocking her male friends. R. at 282-89.

The military judge found the various acts of “surreptitious surveillance” sufficiently similar to the charged act of indecent viewing to support a common scheme. App. Ex. XIX at 7-9. The Air Force Court agreed. Appendix at 18 (“The monitoring of her actions in her bedroom, vice the monitoring of her communications, is a difference merely in type, not a difference in kind.”). However, that was an overly broad connection. The acts differ in kind: digital monitoring of messages is not equivalent to the physical, sexual invasion of privacy involved in hidden camera surveillance. The former is an invasion of informational privacy, the latter, of intimate bodily privacy.

In this case, the only true common factor was a general desire to monitor RH’s action, but the means, scope, and privacy interests implicated are materially different.

The Air Force Court’s application of the “common factors” test in this case stretches the logic of *Hyppolite* beyond its breaking point. Here, the prior acts and the charged conduct differ in both kind and degree: the earlier acts involved digital or social control, while the charged offense was a physical invasion of privacy in an intimate setting. The only real link is a broad, abstract notion of “monitoring,” which should not be enough to justify admission under the common scheme exception. Such stretching demonstrates the benefit of the easily applied *Morrison* standard,

which results in greater logical relevance of the Mil. R. Evid. 404(b) evidence, thereby guarding against slippage into propensity evidence.

The Air Force Court's approach dilutes the *Reynolds* test and the protections of Mil. R. Evid. 404(b). The "common factors" here are so attenuated that they risk turning any pattern of bad relationship behavior into admissible evidence of a scheme, regardless of whether the acts are truly related in a meaningful way. As Judge Hardy warned in his *Greene-Watson* concurrence, a capacious application of this Court's precedent, including *Hyppolite*, risks the common scheme or plan exception "swallowing [Mil. R. Evid.] 404(b)(1)'s general rule prohibiting the admission of propensity evidence." *Greene-Watson*, 2025 CAAF LEXIS 186, at *26-27 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment).

2. SrA Menard's and RH's breakup was an intervening event severing the causal link between circumstances of the prior acts and the charged misconduct.

In *Hyppolite*, the motions judge found a common plan by the accused "to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep." 79 M.J. at 165-66. *Hyppolite* involved five charged offenses spanning two years when the appellant was assigned to the same unit as all five alleged victims. *United States v. Hyppolite*, No. ACM 39358, 2018 CCA LEXIS 517, *3 (A.F. Ct. Crim. App. Oct. 25, 2018), *aff'd*, 79 M.J. 161 (C.A.A.F. 2019). Here, the placement of the camera occurred after SrA Menard and RH broke up, and

the breakup itself was a meaningful intervening event that broke any arguable continuous pattern.

This breakup was not just a change in status—it marked a clear shift in the nature of their interactions and undermines any claim that the prior acts of monitoring or control were part of a unified, ongoing scheme. The government’s attempt to link pre-breakup conduct to the charged post-breakup offense relies on a much looser, more attenuated connection than what was present in *Hyppolite*. In this case, the breakup stands as a significant intervening event that disrupts any supposed “common scheme.” Further, there was no evidence of the same conduct occurring consistently or a scheme between the charged offense and the uncharged acts. This is different from the case in *Hyppolite*, where the circumstances surrounding the events were the same although the victims were different.

3. The Air Force Court’s rational rested on an improper character inference.

The Air Force Court reasoned the Mil. R. Evid. 404(b) evidence “made it much more likely that the man who wanted and needed to know everything about what he suspected were RH’s sexually explicit activities and communications, would not turn his head to avoid seeing her engaged in just the type of activity he had installed that camera to transmit.” Appendix at 19. This language invites the inference that SrA Menard possess a predisposition towards viewing RH’s nude body because he had previously demanded her cell phone and social media

passcodes, went through her phone, and blocked males on her phone. This is precisely the type of propensity inference Mil. R. Evid. 404(b) is designed to prevent.

4. The Mil. R. Evid. 404(b) evidence should not have been admitted under *United States v. Reynolds*.

A proper Mil. R. Evid. 403 analysis from the military judge required a careful balancing of the probative value of the prior acts evidence against the risk of unfair prejudice. While the military judge conducted a Mil. R. Evid. 403 balancing test, the application of the law to the facts was clearly unreasonable. Therefore, the Air Force Court erred by concluding the military judge did not abuse his discretion in conducting the Mil. R. Evid. 403 balancing test. The key question was whether the evidence that SrA Menard previously accessed RH's phone and deleted contacts and engaged in controlling digital behavior was sufficiently probative of a material fact in dispute—such as intent, knowledge, or absence of mistake—regarding the charged conduct of surreptitiously recording RH without her consent, and whether that probative value was substantially outweighed by the danger of unfair prejudice. *See Reynolds*, 29 M.J. at 109, 111.

Here, the probative value of the prior acts was limited. The earlier conduct—demanding passwords, accessing RH's phone, and deleting contacts—occurred during a tumultuous romantic relationship and was focused on digital privacy and control. After the breakup, there is no evidence that SrA Menard continued this

behavior. The charged offense, by contrast, involves a fundamentally different act: placing a hidden camera to record RH's nude body without her consent, after the relationship had ended. The lack of continuity in the conduct, the change in the nature of the acts, and the absence of evidence that the prior digital snooping continued post-breakup all diminish the logical connection between the prior acts and the charged offense. This weakens the argument that the prior acts are probative of a common plan, intent, or absence of mistake in the charged conduct.

On the other side of the scale, the risk of unfair prejudice is significant. Introducing evidence of SrA Menard's prior controlling or invasive behavior in the relationship could easily lead the factfinder to infer that he is the type of person who invades RH's privacy and therefore must have committed the charged offense—a classic propensity inference that Mil. R. Evid. 404(b)(1) and Mil. R. Evid. 403 are designed to guard against. The danger was that the factfinder would punish SrA Menard for being a bad partner, rather than focus on whether he committed the specific act charged. Given the limited probative value and the substantial risk of unfair prejudice, a straightforward Mil. R. Evid. 403 analysis would favor the exclusion of the prior acts evidence. Therefore, the Air Force Court erred by finding the military judge did not abuse his discretion in admitting the Mil. R. Evid. 403 evidence.

The circumstances here are fundamentally different from cases like *Hyppolite*, where a clear pattern across multiple victims supported a non-propensity purpose; in SrA Menard’s case, the prior acts and the charged conduct were too dissimilar, and the risk of unfair prejudice substantially outweighed any probative value. Thus, the Air Force Court erred by finding the military judge did not abuse his discretion in admitting the Mil. R. Evid. 404(b) evidence.

B. The erroneous admission of the Mil. R. Evid. 404(b) evidence prejudiced SrA Menard.

In determining prejudice arising from non-constitutional evidentiary errors, this Court weighs: “(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. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

The government’s case on the critical element—whether SrA Menard actually viewed RH’s private area—was circumstantial and not, despite the Air Force Court’s contention, incontrovertible and strong. Appendix at 10 & n.10. The only strong fact in the government’s case was that SrA Menard admitted to placing the camera in the bedroom. However, there was no direct evidence of an indecent viewing. Instead, for that critical element, the government’s case rested on SrA Menard’s text messages. Absent the Mil. R. Evid. 404(b) evidence, these messages are significantly less powerful. Instead, they would simply paint a picture of an ex-boyfriend who

knew when and how his ex-girlfriend preferred to masturbate. As RH herself noted, SrA Menard knew that she used sex toys when masturbating. R. at 310.

Ultimately, the Mil. R. Evid. 404(b) evidence served primarily to paint SrA Menard as a controlling partner rather than to establish any element of the offense. The government had and used other evidence—SrA Menard’s confession—to prove that SrA Menard placed the camera in the bedroom. As such, the materiality of the Mil. R. Evid. 404(b) evidence was low. Yet, the prejudice resulting from the evidence’s improper admission was substantial. The Government’s emphasis on the evidence at argument—calling SrA Menard’s uncharged behaviors “abuse”—indicated its power. R. at 457-58. Taken together, the *Kohlbeke* factors weigh in favor of prejudice.

Conclusion

The military judge’s ruling on the admission of the Mil. R. Evid. 404(b) evidence was an abuse of discretion, as the acts were not sufficiently similar to the charged conduct under the *Hyppolite* “common factors” analysis. The Mil. R. Evid. 404(b) evidence’s inadmissibility was even starker under the *Morrison* standard, which this Court should make clear still constitutes binding precedent for the military justice system.

Further, the Air Force Court’s finding that the military judge did not abuse his discretion was in error. Thus, the Air Force Court’s reasoning countenanced

improper character inferences and failed to appreciate the prejudicial impact of the evidence. Under both *Hyppolite* and *Morrison*, SrA Menard's prior acts were qualitatively different and should not have been admitted as evidence of a common scheme.

The danger invited by the Air Force Court's actions is clear: if the "common factors" test is applied as loosely as it was here, there is a risk of the term becoming a talismanic incantation for admitting otherwise inadmissible Mil. R. Evid. 404(b) evidence. *See Brannan*, 18 M.J. at 185 (disapproving the use "of broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil.R.Evid. 404(b)"). The field needs clear guidance on how similar uncharged acts must be to the charged offense before they can be admitted as part of a "common plan or scheme." Right now, as the lower court noted, the law is unsettled. This current landscape risks turning the exception into the rule, letting in character evidence that should be excluded. *See Greene-Watson*, 2025 CAAF LEXIS 186, at *26-27 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment). A decision from this Court can establish a clear, workable standard.

Accordingly, this Court should grant the petition.

II.

This Court should reassess its holding in *United States v. Anderson*.

The standard for determining whether this Court should grant an appellant's petition for review is "good cause shown." Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). SrA Menard raises this issue for preservation purposes.

Conclusion

This case presents an important question concerning and conflict within the law governing Mil. R. Evid. 404(b) and an issue previously denied certiorari by the Supreme Court of the United States, but which SrA Menard maintains that the Court should reconsider. Accordingly, this Court should grant the petition.

Respectfully Submitted,



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Certificate of Filing and Service

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on June 17, 2025 and that a copy was also electronically served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filing.workflow@us.af.mil on the same date.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joyclin N. Webster", with a long horizontal flourish extending to the right.

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Certificate of Compliance

This brief complies with the type-volume limitation of Rules 21(b) and 21(6) of no more than 9,000 words because it contains approximately 6043 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Joyclin N. Webster", with a long horizontal flourish extending to the right.

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Appendix

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40496

UNITED STATES
Appellee

v.

Jerin P. MENARD
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary
Decided 28 March 2025¹

Military Judge: Michael A. Schrama.

Sentence: Sentence adjudged 23 March 2023 by GCM convened at Joint Base McGuire-Dix-Lakehurst, New Jersey. Sentence entered by military judge on 25 April 2023: Bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand.

For Appellant: Captain Joyclin N. Webster, USAF (argued); Major Matthew L. Blyth, USAF; Major Frederick J. Johnson, USAF.

For Appellee: Major Katie E. Lee, USAF (argued); Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Mary Ellen Payne, Esquire.

Amicus Curiae for Appellant: Alexis H. Garner (law student, argued); Philip J. Novak (law student); Homer S. Pointer, Esquire (supervising attorney)—Oklahoma City University School of Law, Oklahoma City, Oklahoma.

Amicus Curiae for Appellee: Christina Kelly (law student, argued); Cheyene Perez-Bailey (law student); Zachary Schmook, Esquire

¹ The court heard oral argument in this case on 19 November 2024 at University of Oklahoma, College of Law, Norman, Oklahoma, as part of this court's Project Outreach Program.

(supervising attorney)—University of Oklahoma College of Law, Norman, Oklahoma.²

Before JOHNSON, KEARLEY, and WARREN, *Appellate Military Judges*.

Judge WARREN delivered the opinion of the court, in which Chief Judge JOHNSON and Judge KEARLEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

WARREN, Judge:

At a general court-martial, a panel of officer members convicted Appellant, contrary to his pleas, of one specification of indecent viewing of the private area of his ex-girlfriend and fellow Airman, RH, in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c.³ Following his conviction, Appellant elected to be sentenced by the military judge, who in turn sentenced Appellant to a bad-conduct discharge, confinement for six months, reduction to the grade of E-1, and a reprimand. Notably, the adjudged reprimand was omitted from the entry of judgment despite the convening authority issuing reprimand language in his Convening Authority Decision on Action Memorandum, dated 13 April 2023. Ultimately, the convening authority took no action on the findings or sentence.⁴

Appellant raises five assignments of error which we have reworded as follows: (1) whether Appellant’s conviction for indecent viewing is factually sufficient; (2) whether the military judge abused his discretion when he admitted

² Both supervising attorneys for *amicus curiae* students representing Appellant and Appellee were properly admitted *pro hac vice* to practice before this court.

³ Unless otherwise noted, all references in this opinion to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

⁴ Neither party requested we remand the case for additional post-trial processing to correct the entry of judgment to include the reprimand. Accordingly, because we may only affirm the portions of a sentence codified in the entry of judgment, we do not affirm the reprimand, and we take appropriate action in our decretal paragraph to disapprove the reprimand. See Article 66(d)(1)(A), 10 U.S.C. § 866(d)(1)(A), *Manual for Courts-Martial, United States* (2024 ed.) (“[T]he court may only act with respect to the findings and sentence as entered into the record under . . . [Article 60c, UCMJ, 10 U.S.C. § 860c, i.e., the entry of judgment].”).

Appellant’s uncharged acts pursuant to Mil. R. Evid. 404(b) under the theory that it was part of a plan or scheme for Appellant to monitor the crime victim, or evidence Appellant had an intent and motive to dominate and control the crime victim;⁵ (3) whether the military judge abused his discretion in not excluding portions of the crime victim’s unsworn statement where she referenced a continuing course of conduct involving jealousy and control in her relationship with Appellant; (4) whether Appellant was denied a constitutional⁶ right to a unanimous verdict; and (5) whether Appellant’s conviction for indecent viewing is legally sufficient.⁷

We have carefully considered issues (4) and (5), and find no discussion or relief is warranted. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)). Finding no error that materially prejudiced a substantial right of Appellant in any of the assignments of error, we affirm the findings and sentence.

I. BACKGROUND

Appellant was convicted of indecently viewing the nude private area of RH without her consent, via a surreptitiously hidden camera he had placed in a stuffed cupcake-shaped toy he previously gave her as a present. This indecent viewing of RH came on the heels of the final breakup of their tumultuous on-again, off-again dating relationship, that began in February 2020. In July 2021, RH ended the relationship for good after she discovered a picture of another woman on Appellant’s phone, leading Appellant to admit he was in an “emotional relationship” with another person. Following the end of the relationship, Appellant and RH continued to live in separate bedrooms in the same house while RH began looking for housing elsewhere. During this brief post-relationship housemate phase, Appellant rigged a surveillance camera out of a dog-monitoring camera already in the house. As he later admitted to law enforcement, Appellant cut open the back of the cupcake stuffed toy he had previously gifted RH, placed the camera inside it, carved out one of the eye sockets of the cupcake toy so that the camera would have an inconspicuous line of sight, and then placed the toy on RH’s TV stand with a direct line of sight to her bed.

During the week of 15–21 August 2021, RH began to suspect that Appellant was spying on her after receiving a series of text messages where he described to her the exact actions she had just taken in the privacy of her room. On 15

⁵ We granted oral argument on this particular issue.

⁶ U.S. CONST. amend. VI.

⁷ Appellant raises issues (4) and (5) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

August 2021, Appellant texted RH—while he was out walking her dog—“snapping guys^[8] again I see.” Because their shared apartment was on the third floor, it would have been impossible for Appellant to peer into RH’s window from outside and see her phone camera flash from his vantage point on the ground.

On 21 August 2021, Appellant, while out of state attending a softball tournament, texted RH, “[D]id you make any videos today[?]” RH received this text within moments of engaging in a private and intimate act while lying nude and alone on her bed. Appellant then asked RH if she had “brought out any toys?” RH responded, “[U]m no,” and “why the f[**]k are you asking me that?” Appellant responded, “Just figure that’s what you’d be up to with me gone.” Confused and scared, RH left the bedroom, and called her friend, SSgt BS, over FaceTime. SSgt BS convinced her to reenter the bedroom and investigate. After searching her room, RH discovered and unplugged the camera hidden in the eye socket of the stuffed cupcake toy. Within moments after RH unplugged the hidden camera from its power source, Appellant texted her, “Oh look, you caught on[.] Bravo[.]”

Thereafter, RH reported Appellant’s actions to military law enforcement and Appellant voluntarily submitted to an interview with the Air Force Office of Special Investigations (AFOSI) personnel. Following a proper rights advisement, Appellant waived his rights and admitted to placing the camera in RH’s room without her knowledge and that he used it to surreptitiously monitor her, even conceding: “I admit, I am wrongful for it. I shouldn’t have done that.” He explained he could view the camera footage via an app on his phone, but that the camera could only broadcast and had no recording capability. However, Appellant denied ever seeing RH nude or engaging in an intimate act through use of the hidden camera, as alleged. When pressed by AFOSI agents as to what motivated him to place the camera, he responded, “[I]t was videoing her without her knowledge, I am aware of that, but this was for me to get my—to *get the truth that I needed.*” (Emphasis added). Asked what he would have done had he seen her engaging in sexually intimate acts while viewing her on camera, Appellant asserted to the agents, “I never saw her naked that day. I wasn’t watching her masturbate. I wasn’t doing any of that. If she did, then *I would have just would have [sic] called her out.* Plain and simple. I called her out for—I would call her out or whatever.” (Emphasis added).

⁸ Based upon common parlance, and finding no countervailing positions in the briefs of the parties, we construe “snapping guys” to involve sending Snapchat messages to males.

The Government admitted Appellant’s video-recorded interview into evidence at trial.

At trial, Appellant’s trial defense team echoed and argued Appellant’s version of events, conceding that he embedded a hidden camera into RH’s cupcake toy, but denying he ever used it to surreptitiously view RH nude. Because the camera within the toy had only a broadcasting function and not a recording function, Appellant argued that the Government’s evidence was insufficient to prove he ever viewed her “private area” as alleged.⁹ Instead, the Defense argued that RH was lying in claiming to have been masturbating just prior to Appellant’s otherwise unsolicited remarks such as “make any videos today . . . bring the toys out?” made via text messages.

To bolster circumstantial evidence that Appellant actually sought to and succeeded in viewing RH’s private area, the Government successfully admitted, over defense objection, three pieces of Mil. R. Evid. 404(b) evidence for the limited purpose of demonstrating a purported common scheme by Appellant to monitor and control RH:

- Appellant demanded that RH give him the passwords to her social media accounts, including Snapchat and Instagram;
- Appellant took RH’s phone during the night while she was asleep and went through her messages (RH knew Appellant had gone through her messages because she would periodically discover entire conversations were deleted after she awoke); and
- Appellant accessed her social media applications (apps) and blocked male friends and ex-boyfriends.

During findings instructions, the military judge instructed the court members they could consider this evidence for the limited purpose of “whether [Appellant] engaged in a course of conduct with [RH] that establishes a scheme to monitor her for the limited purposes of its tendency, if any, to prove a common scheme of [Appellant] to commit the alleged misconduct.”

Trial counsel then briefly referenced the admitted Mil. R. Evid. 404(b) evidence as part of the Government’s closing argument, asserting,

[Y]ou can absolutely consider that [Appellant] didn’t care about [RH’s] expectation of privacy. He has been invading her privacy

⁹ In the pertinent part, the specification of the charge alleged that Appellant “without legal justification or lawful authorization knowingly and wrongfully view[ed] the private area of [RH] without her consent and under circumstances in which she had a reasonable expectation of privacy.”

throughout the relationship. He wants to know who her friends are. He wants to know who she is talking to. He wants to monitor who she is talking to. And beyond that, it's not just enough to monitor, he wants to control that because she told you how he blocked her friends on social media and they weren't females. That's control.

Trial counsel also briefly referenced the Mil. R. Evid. 404(b) evidence once more in the rebuttal argument: "[Trial defense counsel] also said well this case comes down to two text messages. No, it doesn't. It comes down to a year and a half relationship. It comes down to a scheme to monitor her. It comes down to control. It comes down to abuse."

II. DISCUSSION

A. Factual Sufficiency—Indecent Viewing

Appellant does not dispute that he surreptitiously placed a camera in RH's bedroom to view her without her knowledge. Rather, he asserts the Government failed to prove beyond a reasonable doubt that he viewed her nude "private area" with the camera he placed. For the reasons set forth below, we are persuaded that the Government's proof, buttressed by Appellant's own admissions, established all elements of the offense beyond a reasonable doubt.

1. Law

a. Factual Sufficiency

We review questions of factual sufficiency when an appellant asserts an assignment of error and shows a specific deficiency in proof. *United States v. Harvey*, ___ M.J. ___, No. 23-0239, 2024 CAAF LEXIS 502, at *5 (C.A.A.F. 6 Sep. 2024) (citing Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i) (*Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*))). The current version of Article 66(d)(1)(B), UCMJ, governs factual sufficiency review for cases where all offenses were committed on or after 1 January 2021. It states:

- (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
- (ii) After an accused has made 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) (2024 *MCM*).

“[T]he requirement of ‘appropriate deference’ when a [Court of Criminal Appeals (CCA)] ‘weigh[s] the evidence and determine[s] controverted questions of fact’ . . . depend[s] on the nature of the evidence at issue.” *Harvey*, 2024 CAAF LEXIS 502, at *8 (third and fourth alterations in original). It is within this court’s discretion to determine what level of deference is appropriate. *Id.* (footnote omitted).

“[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial.” *Id.* at *10 (internal quotation marks omitted).

For this court “to be ‘clearly convinced that the finding of guilty was against the weight of the evidence,’ two requirements must be met.” *Id.* at *12. First, we must decide that evidence, as we weighed it, “does not prove that the appellant is guilty beyond a reasonable doubt.” *Id.* Second, we “must be clearly convinced of the correctness of this decision.” *Id.*

b. Proof Beyond a Reasonable Doubt

Proof beyond a reasonable doubt does not require proof that overcomes every possible doubt. *See United States v. McClour*, 76 M.J. 23, 24 (C.A.A.F. 2017) (citation omitted). It is enough that the evidence firmly convinces the trier-of-fact of the accused’s guilt. *See id.* Furthermore, the Government is free to meet its burden of proof with circumstantial evidence. *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954) (observing that “[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence.”)); *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citations omitted) (holding that “[G]overnment is free to meet its burden of proof with circumstantial evidence,” and observing that “the ability to rely on circumstantial evidence is especially important in cases . . . where the offense is normally committed in private”). In accessing the evidence for factual sufficiency, we, like the trier of fact at trial, are free to use our common sense and knowledge of the ways of the world. *See, e.g., United States v. Green*, 52 M.J. 803, 805 (N.M. Ct. Crim. App. 2000) (applying the court’s own “common sense and knowledge of human nature and the ways of the world” in evaluating witness credibility as part of factual sufficiency review).

c. Indecent Viewing—Article 120c, UCMJ

Appellant was convicted of indecent viewing in violation of Article 120c, UCMJ, which required the Government to prove the following three elements beyond a reasonable doubt: (1) that Appellant knowingly and wrongfully viewed the private area of RH; (2) that the viewing was without RH's consent; and (3) that the viewing took place under circumstances in which RH had a reasonable expectation of privacy. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 63.b.(1). The term "private area," means "the naked or underwear clad genitalia, anus, buttocks, or female areola or nipple." Article 120c(d)(2), UCMJ, 10 U.S.C. § 920c(d)(2); *MCM*, pt. IV, ¶ 63.a.(d)(2). The term "reasonable expectation of privacy" means "circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured." Article 120c(d)(3), UCMJ, 10 U.S.C. § 920c(d)(3); *MCM*, pt. IV, ¶ 63.a.(d)(3).

2. Analysis

Appellant's argument essentially boils down to an assertion that the Government's proof that he viewed RH's private area is deficient because it is circumstantial. We disagree. What Appellant would have us view as coincidental, we find culpable. In sum, we find the evidence conclusively demonstrates, beyond a reasonable doubt, seven facts which together satisfy all elements of the charged offense: (1) the Appellant—by his own admission—surreptitiously hid the camera in a cupcake toy in RH's bedroom; (2) RH had a reasonable expectation of privacy in her own bedroom; (3) the camera was placed on RH's TV stand where it had a direct line of sight to her bed; (4) that on 21 August 2021 RH masturbated alone while nude and on her bed while her private area was facing towards the camera; (5) Appellant texted RH shortly after she completed the above-referenced activity, and made not-so-veiled references to her masturbating; (6) Appellant never had consent to monitor RH with that camera; and (7) RH never discovered or repositioned the camera until after Appellant viewed her private area, as Appellant confirmed in his taunting text, "Oh look you caught on. Bravo."

Appellant offers two main arguments as to the contrary: (a) that the camera angle may have been obstructed; and (b) that the timing of his text messages to RH was coincidental. We address and dismiss each of these, in turn.

a. Angle of the Camera

We turn first to Appellant's assertions that the camera angle could have excluded a view of RH's bed. RH's sworn testimony avers otherwise, and the picture admitted into evidence at trial depicting the positioning of the holstered-out cupcake toy clearly establishes that the camera embedded within it

would have had a clear line of sight to RH's bed. Moreover, Appellant's arguments directly contradict his statements to AFOSI wherein he admitted the camera enabled him to view RH on multiple occasions that week. Moreover, during that interview, Appellant never asserted that the view from the camera to the bed was obstructed, or that his view was otherwise impeded.

b. Timing of Text Messages

Appellant observes that because the camera lacked recording capabilities and thus no footage from the hidden camera is available, the Government is forced to rely upon circumstantial evidence to prove that the camera captured, and Appellant saw, RH's private area. We agree that in a case such as Appellant's, circumstantial evidence is likely to be the only evidence available to the Government. However, merely because factual necessities oblige the Government to rely upon circumstantial evidence does not make that proof insufficient. Thus, while Appellant correctly asserts that the Government failed to secure time logs documenting when he accessed the camera app to view footage from RH's bedroom, that alone does not create reasonable doubt as to whether Appellant indecently viewed her private areas as alleged.

Here, Appellant's contemporaneous and patently incriminating text messages to RH, including "make any videos today" and "pull the toys out," admitted without defense objection at trial, prove Appellant was sending his text messages to RH in a clear reference to observing her use those toys in a private intimate act. On appeal, as at trial, Appellant continues to claim that the timing of the text messages was merely a *coincidence*, and that those text messages just happen to coincide with RH's testimony that she received them just moments after engaging in a private intimate act on her bed. It strains the bounds of credulity to find these statements merely coincidental. Unfortunately for Appellant, in Shakespeare's proverbial phrase, he is ultimately "hoisted by his own petard" in his self-serving denial to AFOSI agents. During that interview, Appellant was adamant that he had not seen RH nude because, if he had, he would have "call[ed] her out on it." Yet, that is *exactly* what he did. In his text message exchange with RH from 21 August 2021, Appellant, in his own parlance, "called her out" by insinuating that she had just masturbated.

While it is conceivable that RH was brazenly lying under oath when she testified that she engaged in this activity, considering the totality of the circumstances, we do not believe that is a "real possibility." In our factual sufficiency review, we, like the trier of fact, are permitted to draw reasonable inferences based upon our common sense and knowledge of the ways of the world. *See Green*, 52 M.J. at 805. Here, it defies common sense that RH would fabricate personally embarrassing details about a private, sexually intimate moment, when the cost of such a fabrication to her would include—at a

minimum—having to repeatedly expose that moment to a succession of investigators and tribunals.

Instead, here, the evidence incontrovertibly demonstrates that Appellant hid the camera in RH’s bedroom in direct line of sight of her bed. It further demonstrates he did so motivated by jealousy and frustration at the demise of his relationship with RH and wracked with an irresistible curiosity to confirm if his suspicions about her messaging other men were true. In Appellant’s own words, “[he] needed the truth,” and, by his own words, he got it—taunting RH with a tongue firmly planted in cheek in a text asking her “make any videos today . . . bring the toys out?” In the end, we find that the timing of Appellant’s texts to RH was no coincidence.

Accordingly, after fully reviewing all evidence and testimony admitted at trial and giving the appropriate deference to the trier of fact, we are not clearly convinced the finding of guilty was against the weight of the evidence. Therefore, we find Appellant’s conviction factually sufficient.¹⁰

B. Admissibility of Uncharged Misconduct

Appellant claims the military judge abused his discretion by admitting the evidence of Appellant’s pre-offense monitoring of RH’s social media communications and phone communications. We hold that the military judge did not abuse his discretion in admitting evidence of prior uncharged acts of surreptitious surveillance of RH that took place during their dating relationship. Furthermore, any error arising from the military judge admitting prior uncharged acts of “permissive surveillance” was harmless.

1. Additional Background

In support of RH’s testimony as to the timing of Appellant’s text messages and her activities at the time of those messages, the Government sought and ultimately gained admission of three pieces of evidence under Mil. R. Evid. 404(b) offered to demonstrate that Appellant had a “plan or common scheme” to monitor RH or “intent and motive to dominate and control RH”: (1) evidence that Appellant threatened to break up with RH if she did not give him the

¹⁰ The reader will note that while we reference the disputed Mil. R. Evid. 404(b) evidence in the Background section *supra*, we do not rely upon it as part of our factual sufficiency analysis—this is intentional. For the reasons explained *infra*, we conclude that even if we were to assume *arguendo* that some of the disputed Mil. R. Evid. 404(b) evidence was erroneously admitted, Appellant suffered no prejudice. Relatedly, as a matter of factual sufficiency, even if we entirely sever the Mil. R. Evid. 404(b) evidence (in an abundance of caution) from our consideration of the case, we conclude the Government’s evidence was particularly strong, and we remain unconvinced that the verdict was against the weight of the evidence.

passwords to her social media accounts; (2) evidence that Appellant sometimes took RH's phone while she was asleep and reviewed (and occasionally deleted) her text messages; and (3) evidence that Appellant accessed RH's social media applications and blocked her male friends and ex-boyfriends. For ease of reference in the forthcoming analysis, we will refer to items (1) and (3) as evidence of "permissive surveillance" and item (2) as evidence of "surreptitious surveillance." We use the term "permissive" to indicate those acts of surveillance done with RH's knowledge and acquiescence, whereas we use the term "surreptitious" for those instances where Appellant's acts of surveillance were accomplished without RH's knowledge or consent.

During its oral argument on the Defense's motion in limine, the Government argued Appellant was motivated by jealousy when he hid the camera in RH's bedroom, and his act was "essentially just the last act of that common scheme; of this monitoring, of this checking her social media, of this jealousy over who her friends are, blocking her friends on social media. This is just the final act in that scheme." Trial counsel argued the scheme went directly towards proving whether RH had a reasonable expectation of privacy, and whether Appellant would respect that privacy. Further, trial counsel argued the evidence in question—Appellant's control and monitoring of RH's social media accounts—tended to show it was Appellant who was looking for "evidence" of RH engaging in sexually explicit messaging with men, and thus more likely that he installed the camera and was monitoring its broadcasts for that purpose.

The Defense argued the evidence of the parties "sharing of passwords happened early on in the relationship, [and was] not tied to the offense that happened in August of 2021." Further, trial defense counsel argued that the incidents when Appellant viewed RH's social media accounts and blocked male profiles were not correlated with the charged offense because those uncharged acts all occurred with RH's (at least tacit) knowledge. In general, the Defense asserted that the purported bad acts were not relevant to the charged offense and were merely propensity evidence submitted under the guise of Mil. R. Evid. 404(b)(2).

In a ten-page written ruling, the military judge ultimately admitted all three pieces of the Mil. R. Evid. 404(b) evidence contested in this appeal. The military judge reasoned,

Taken as a whole, the evidence presented on the motions in regard to [the noticed Mil. R. Evid. 404(b) evidence] generally supports a finding by a reasonable finder of fact that the incidents occurred and that the accused had *an intent and motive to dominate and control [RH] as part of his domestic relationship with her*.

The offered acts . . . are probative of Appellant’s desire to monitor [RH]. They are *probative of a motive to monitor [RH] without consent*. Accordingly, there are multiple, non-propensity reasons why evidence that the accused engaged in a pattern of behavior designed to monitor [RH] within the context of their relationship is relevant to the finder of fact.

(Emphasis added). The military judge’s Mil. R. Evid. 403 analysis focused on the context the evidence provided to the charged offense drawing from Appellant and RH’s relationship in the months preceding to the charged offense. The military judge found it to have “significant probative value,” concluding, “To deprive the members of evidence that might inform them as to what the Accused’s relationship with [RH] was like in this case would deprive the members of critical context that might serve to explain the motivations and intent of the [Appellant] and [RH].”

2. Law

a. Standard of Review

We review a military judge’s decisions to admit evidence pursuant to Mil. R. Evid. 404(b) for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024) (citing *United States v. Hyppolite*, 79 M.J. 161, 164 (C.A.A.F. 2019)). Military judges abuse their discretion (1) “[if] the findings of fact upon which [they] predicate [their] ruling[s] are not supported by the evidence of record;” (2) if they use incorrect legal principles; or (3) if their “application of the correct legal principles to the facts is clearly unreasonable.” *Id.* at 390 (citation omitted). “To reverse for an abuse of discretion involves far more than a difference in . . . opinion The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal.” *Hyppolite*, 79 M.J. at 166 (omissions in original) (citation omitted).

b. Permissible Non-Propensity Uses of Mil. R. Evid. 404(b), Generally

Military Rule of Evidence 404(b)(1) provides that evidence of a crime, wrong, or other act by a person is generally 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. However, such evidence may be admissible for another purpose, including, *inter alia*, proving motive, plan, intent, or the absence of mistake. Mil. R. Evid. 404(b)(2). 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) (footnote omitted). Military Rule of Evidence 404(b) “is a rule of inclusion rather than exclusion,” *United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000) (internal quotation marks omitted),

authorizing admission of the proffered evidence so long as it has a legitimate, non-propensity use at trial. Relatedly, this court recognized in *United States v. Moore*, 78 M.J. 868, 876 (A.F. Ct. Crim. App. 2019), and in *United States v. Lull*, No. ACM 39555, 2020 CCA LEXIS 301, *69, 84–85 (A.F. Ct. Crim. App. 2 Sep. 2020) (unpub. op.), that an accused’s controlling or manipulative behavior over a crime victim may, in appropriate cases, be used for a non-propensity purpose.

c. Common Plan/Scheme Evidence

Pertinent to this case, evidence of a common plan or scheme has long been recognized as a legitimate, non-propensity purpose under Mil. R. Evid. 404(b). *See, e.g., United States v. Johnson*, 49 M.J. 467, 474–75 (C.A.A.F. 1998); *United States v. Munoz*, 32 M.J. 359, 363–64 (C.M.A. 1991) (citations omitted); *United States v. Reynolds*, 29 M.J. 105, 110 (C.M.A. 1989). However, our superior court’s caselaw on this issue appears to have evolved over time. In *United States v. Morrison*, a case upon which Appellant relies, the United States Court of Appeals for the Armed Forces (CAAF) held that to qualify as common plan or scheme type evidence the uncharged acts “must be *almost identical* to the charged acts and each other.” 52 M.J. 117, 122 (C.A.A.F. 1999) (emphasis added) (quoting *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984) (reasoning that the near identity is necessary “so as to naturally suggest that all these acts were results of the same plan” (citation omitted))).

Twenty years later in *Hyppolite*, the CAAF revisited the parameters of common plan or scheme evidence, and, notably, the majority opinion neither cited to *Morrison* nor mentioned the “almost identical” evidentiary standard. Instead, the CAAF endorsed the *Reynolds* “common factors” test, used by the military judge to assess whether the evidence of uncharged misconduct qualified as a common plan or scheme. *Id.* at 166–67. Applying that analysis, the court affirmed the trial judge’s ruling that the evidence of uncharged acts was admissible due to the substantial similarity (1) in the relationship between the alleged victims and the accused; (2) in the surrounding circumstances preceding each instance of the misconduct; and (3) in the nature of the alleged misconduct. *Hyppolite*, 79 M.J. at 166–67 (citing *Johnson*, 49 M.J. at 468–69, 474–75; *Munoz*, 32 M.J. at 360–61, 363–64). Noting the congruence between the analysis undertaken at the trial level in the appellant’s case and the court’s seminal Mil. R. Evid. 404(b) analysis in *Reynolds*, the majority opinion emphasized that in both cases “the facts of the charged offense and the facts [related

to the uncharged misconduct] *were not exactly the same.*” *Id.* (emphasis added) (citing *Reynolds*, 29 M.J. at 107).¹¹

Recently, in *United States v. Greene-Watson*, our superior court did not directly resolve the potential tension between the *Morrison* and *Hyppolite* decisions, deciding instead to unanimously affirm our court’s decision construing the scope of “common plan/scheme” evidence based upon the absence of any prejudice to the appellant given the judge-alone forum. *United States v. Greene-Watson*, __M.J. __, No. 24-0096, 2025 CAAF LEXIS 186, at *20–21 (C.A.A.F. 11 Mar. 2025). Nonetheless, a close reading of the majority and concurring opinions indicates that our superior court still regards *Hyppolite*’s embrace of a “common factors” test as the current governing standard for “common plan or scheme evidence.” *Cf. id.* at *17 (“We also reject [a]ppellant’s argument that uncharged conduct must be virtually identical to the charged conduct to be admissible as evidence of a common plan or scheme under [Mil. R. Evid.] 404(b)” (Johnson, J., delivering the opinion of the Court, joined by Maggs, J.)); *id.* at *26 (“I also agree that the military judge did not abuse his discretion by admitting that evidence.” (Hardy, J., joined by Sparks, J., concurring in part and in the judgment)).¹²

d. The 3-Prong Reynolds Test

We apply a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

¹¹ The court acknowledges that the CAAF’s earlier decision in *Morrison*, 52 M.J. 117, upon which Appellant relies, might be viewed as incongruous with *Hyppolite*. Indeed, that appears to be Chief Judge Ohlson’s opinion. *See Hyppolite*, 79 M.J. at 167 (Ohlson, J., dissenting) (citation omitted) (“I believe the military judges’ ruling in this case ran directly afoul of this Court’s holding in *United States v. Morrison*”).

¹² The only caveat is Judge Hardy voices a concern in his concurrence that the Court’s recent precedents may be becoming too permissive, *vis a vis* common plan/scheme evidence, and that he is open to reconsidering them. *Greene-Watson*, 2025 CAAF LEXIS 186, at *26–27 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment) (“In a future case, I believe that the Court should reconsider that precedent to prevent the common scheme or plan exception from swallowing [Mil. R. Evid.] 404(b)(1)’s general rule prohibiting the admission of propensity evidence.”). We defer to our superior court as to whether reconsideration of *Hyppolite* is necessary and/or to determine whether *Hyppolite* was a departure from or an implementation of *Morrison*’s rationale. As an intermediate appellate court, our job is simply to follow the binding precedent of our superior court. Thus, we deem it our duty to follow our superior court’s precedent in *Hyppolite* unless and until the precedent is overruled.

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?
3. Is the “probative value . . . substantially outweighed by the danger of unfair prejudice”?

Id. at 162 (alterations in original) (quoting *Reynolds*, 29 M.J. at 109) (additional citations omitted).

As discussed above, the third prong of the *Reynolds* test essentially involves applying a Mil. R. Evid. 403 balancing test. “Ordinarily, appellate courts ‘exercise great restraint’ in reviewing a [military] judge’s decisions under Rule 403.” *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997) (citation omitted). “When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a ‘clear abuse of discretion.’” *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (1998)). However, when a military judge does not, on the record, conduct the balancing inquiry required by the third prong of the *Reynolds* test, we afford that ruling less deference. *United States v. Barnett*, 63 M.J. 388, 396 (C.A.A.F. 2006) (quoting *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005)).

The term “unfair prejudice” for purposes of the Mil. R. Evid. 403 balancing test “addresses prejudice to the integrity of the trial process, not prejudice to a particular party or witness.” *United States v. Collier*, 67 M.J. 347, 354 (C.A.A.F. 2009). Thus, within the context of Mil. R. Evid. 403, “‘unfair prejudice’ . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Id.* (quoting Fed. R. Evid. 403 Advisory Committee’s Note). “Members are presumed to follow a military judge’s instructions to consider evidence for a proper purpose . . . and not let personal beliefs or feelings affect their determinations” *Id.* at 355 (citation omitted).

e. Prejudice Test for Non-Constitutional Error

If we find that the military judge erred in admitting Mil. R. Evid. 404(b) evidence, “[w]hether [that] error is harmless is a question of law we review de novo For non-constitutional errors, the Government must demonstrate that the error did not have a substantial influence on the findings.” *United States v. Bowen*, 76 M.J. 83, 87 (C.A.A.F. 2017) (quoting *United States v. McCollum*, 58 M.J. 323, 342 (C.A.A.F. 2003)). To determine whether an error was thus prejudicial, military appellate courts weigh “(1) the strength of the Government’s case, (2) the strength of the [d]efense case, (3) the materiality of

the evidence in question, and (4) the quality of the evidence in question.” *Greene-Watson*, 2025 CAAF LEXIS 186, at *19 (internal quotation marks omitted) (quoting *United States v. Kohlbeck*, 78 M.J. 326, 334 (C.A.A.F. 2019)) (additional citations omitted). In assessing the “materiality” of any erroneously admitted evidence, reviewing CCAs consider a list of the following non-exhaustive factors: (a) “the extent to which the evidence contributed to the [G]overnment’s case;” (b) the degree to which “instructions to the panel may have mitigated the error;” (c) the frequency with which the Government referred to the evidence in its argument; and (d) “the extent to which the members could weigh the evidence using their own layperson knowledge.” *United States v. Washington*, 80 M.J. 106, 111 (C.A.A.F. 2020) (citations omitted).

3. Analysis

Appellant’s counsel argues that the military judge abused his discretion because admission of the contested Mil. R. Evid. 404(b) evidence failed the second prong of the *Reynolds* analysis in that it failed to make an act of consequence more or less probable insofar as: (1) Appellant’s pretrial admission to placing the camera and watching the footage on different occasions obviated any need for the Government to prove a “common plan or scheme” to place the camera; and (2) that the putative Mil. R. Evid. 404(b) evidence was not sufficiently similar to the charged misconduct to qualify for admission. Appellant further argues that the evidence fails the third prong of *Reynolds* because any probative value was substantially outweighed by the danger of unfair prejudice that the court members would draw a forbidden propensity inference that Appellant was generally a controlling person and therefore likely committed the act as charged.

Before we reach any of these arguments, our threshold inquiry is determining upon which theory the military judge admitted the evidence. His written ruling suggests his analysis explored two theories of admissibility: (1) Appellant’s motive and intent to monitor and control RH; and (2) Appellant’s common plan or scheme to monitor RH. However, the military judge’s findings in instructions to the members delineated only the common scheme Mil. R. Evid. 404(b) theory, directing the court members that they may only consider the evidence of previous monitoring for the limited purpose of determining “whether [Appellant] engaged in a course of conduct with [RH] that establishes *a scheme to monitor her* for the limited purposes of its tendency, if any, *to prove a common scheme of [Appellant] to commit the alleged misconduct.*” (Emphasis added). Despite the longstanding precedent that CCAs may affirm an

evidentiary ruling of a trial court on any theory presented at trial,¹³ in Appellant’s case, given the military judge’s self-imposed limits on his own ruling, and the appellate briefs of the parties which confined themselves to the limits the military judge functionally imposed upon his ruling in issuing his findings instructions, we will likewise limit our analysis to the theory on which the military judge instructed the court members—common scheme.

Applying the abuse of discretion standard, we conclude the military judge’s findings of facts were supported by the record; his conclusions of law utilized correct legal principles, prominently relying upon CAAF’s then most-recent precedent in *Hyppolite* for construing common plan or scheme evidence; and his application of the facts to the law was not arbitrary, fanciful, or clearly unreasonable in reference to what we identified *supra* in the additional background subsection as the uncharged acts of “surreptitious surveillance.” See *Hyppolite*, 79 M.J. at 166. As for the acts we identified *supra* as “permissive surveillance” evidence, even assuming without deciding that evidence was improperly admitted, their admission was harmless.

Turning first to whether the military judge identified proper legal principles in his ruling, we do not agree with Appellant’s assertion that *Morrison* and its “almost identical” standard is the proper filter to evaluate Mil. R. Evid. 404(b) for common plan or scheme evidence. Cf. *Morrison*, 52 M.J. at 122 (citations omitted). As we explained in our recent decision in *United States v. Greene-Watson*, we construe our superior court’s much more recent guidance on the subject in *Hyppolite* as the controlling precedent. No. ACM 40293, 2023 CCA LEXIS 542, at *28 n.13 (citing *Hyppolite*, 79 M.J. at 165–66) (additional citations omitted), *aff’d on other grounds*, 2025 CAAF LEXIS 186, at *20–21 (C.A.A.F. 2025). The majority opinion in *Hyppolite* did not utilize the “almost identical” standard previously endorsed by the court in *Morrison*, and, indeed, did not cite to *Morrison* at all. See *Hyppolite*, 79 M.J. at 165 (citing *Munoz*, 32 M.J. at 360, 360–61, 363); *id.* at 166 (citing *Johnson*, 49 M.J. at 474, 475; *Reynolds*, 29 M.J. at 109). Only the dissent cited approvingly to *Morrison*. See *id.* at 167 (Ohlson, C.J., dissenting). Understanding that our superior court has cautioned the CCAs not to presume that it has overruled one of its precedents *sub silentio*, see *United States v. Alberry*, 44 M.J. 226, 228 (C.A.A.F. 1996) (citations omitted), it appears even if *Hyppolite* did not overrule *Morrison*, then the majority of the CAAF, at a minimum, considers the *Hyppolite* common factors test as the governing Mil. R. Evid. 404(b) analysis. All of which is to say, the

¹³ See *United States v. Bess*, 80 M.J. 1, 11–12 (C.A.A.F. 2020) (holding, *inter alia*, that CCAs may affirm a military judge’s ruling when the military judge reaches “the correct result, albeit for the wrong reason” (quoting *United States v. Robinson*, 58 M.J. 429, 433 (C.A.A.F. 2003))).

semantic debate about whether *Hyppolite* departs from or implements *Morrison* is a distinction without a difference for our purposes. Our mandate as an intermediate appellate court is clear—to follow binding precedent of our superior court. In a case such as this, where one might perceive a tension between older and newer precedent, we deem it prudent to follow our superior court’s most recent precedent in *Hyppolite*, so long as that precedent stands.

Second, in his analysis of “surreptitious surveillance,” the military judge properly utilized the roadmap laid out in *Hyppolite* for application of *Reynolds* factors to the common scheme evidence because: (1) the parties were the same; (2) the timeframe was proximate and with no major intervening events which changed any motivations to implement the scheme to monitor RH; and (3) the similarity of the invasions of privacy in the charged and uncharged misconduct were substantially similar.

Third, we conclude that, at a minimum, the act of taking RH’s phone—without her knowledge, while she slept, for the purpose of reviewing and sometimes deleting her messages—shares significant common factors to the surreptitious surveillance at the heart of an Article 120c, UCMJ, indecent viewing offense and thus satisfies the *Hyppolite* standard. The gravamen of each action is the same: an invasion of privacy without the knowledge or consent of the victim. While an Article 120c, UCMJ, offense obviously involves physical privacy (*i.e.*, viewing of intimate parts of the body), whereas the surreptitious monitoring of cell phone activity invades *inter alia* private conversations, the similarity between the two acts—a gross invasion of privacy—provides a logical nexus to the fact of consequence in this case: whether Appellant engaged in an ongoing scheme to monitor RH without her knowledge.

While Appellant’s brief asserts that no fact of consequence was made more or less likely by allowing the testimony that Appellant surreptitiously scrolled through RH’s cell phone as she slept, we conclude that the military judge did not abuse his discretion in discerning that the fact of consequence was whether Appellant had a scheme to surreptitiously monitor RH. The monitoring of her actions in her bedroom, vice the monitoring of her communications, is a difference merely in type, not a difference in kind. The existence of a common scheme by Appellant to monitor RH is at the core of the indecent viewing offense wherein the Government had to prove that Appellant viewed RH without her consent under the circumstances where she enjoyed a reasonable expectation of privacy. Axiomatically, actions taken without RH’s knowledge are without her consent because without knowledge she is not afforded an opportunity to enter into a freely given agreement to the conduct at issue.

Appellant’s arguments that admission of such evidence lacked probative value because he already admitted to placing the camera are also unavailing. In fact, “the [D]efense’s failure to specifically contest [that] issue[] did not

remove the Government’s burden of proof on these elements of the offense or render this evidence unduly prejudicial.” See *United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999) (citations omitted). Appellant’s common scheme to surreptitiously monitor RH made it more likely that the sole contested element for this charge occurred to wit: that Appellant actually saw RH’s private area after he specifically installed a camera in her room in order to monitor her every action. As part of their burden of proof on the indecent viewing offense, the Government had to demonstrate not only that Appellant viewed RH generally, but that he viewed at least one of her private areas specifically. Here a straightforward application of the *Hyppolite* factors supports the military judge’s conclusion that the evidence had probative value insofar as it involved Appellant’s surreptitious monitoring of the same victim during a proximate time frame leading up to the charged misconduct. In this context, it is certainly probative to whether Appellant ended up viewing her private area because it demonstrates the depth of his contemporaneous desire and commitment to continuously monitor her during the charged timeframe. In other words, it made it much more likely that the man who wanted and needed to know everything about what he suspected were RH’s sexually explicit activities and communications, would not turn his head to avoid seeing her engaged in just the type of activity he had installed that camera to transmit.

Applying this logic, we will assume without deciding that the two other pieces of contested Mil. R. Evid. 404(b) evidence— Appellant compelling RH to give him her social media passwords and Appellant logging into RH’s social media accounts to, *inter alia*, block her male friends in an effort to monitor and control her behavior—constituted instances of what we call “permissive surveillance” by Appellant of RH. From there, we will assume without deciding that the dissimilarity between permissive and surreptitious surveillance renders those acts insufficiently similar to the charged offense to qualify as common plan or scheme evidence.¹⁴

¹⁴ We limit our analysis to the “common scheme” rubric of Mil. R. Evid. 404(b) because while the military judge’s ruling included analysis of under the motive, intent, and common scheme theories of admissibility, his ultimate findings instructions to the member did not. Instead, his findings instructions focused solely on the “common scheme” theory. Thus, we express no opinion as to whether these instances of “permissive surveillance” might qualify as “motive” or “intent” evidence under Mil. R. Evid. 404(b) for purposes of demonstrating Appellant’s jealous motivation to intentionally and surreptitiously view RH in what he expected would be her engaging in sexually explicit photo and video messaging with other men. Cf. *Wilson*, 84 M.J. at 393.

Accordingly, having assumed without deciding that the admission of the “permissive surveillance” type evidence might have been in error, we proceed to a prejudice analysis for those items—and we find none. Here, as recounted in this court’s analysis, *supra*, of the factual sufficiency of Appellant’s conviction, the Government’s case was strong whereas the Defense case was weak. The Prosecution was armed with admissions from Appellant that he placed the camera where it was found, plus Appellant’s admissions of the jealous motives and suspicions that led him to do so, and his real-time taunting texts with RH wherein he was essentially providing commentary of her actions as he observed them. By contrast, the Defense was saddled with the same implausible and unpersuasive argument that Appellant initially offered law enforcement, namely, that his quip of “make any videos today . . . pull the toys out,” by an unhappy coincidence, just happened to fall moments after RH had engaged in a nude physically intimate act on her bed in full view of Appellant’s hidden camera. Viewed in this light, the Mil. R. Evid. 404(b) evidence here, while probative to Appellant’s plan and scheme to monitor RH generally, was *not necessary* to prove that he indecently viewed RH. By his own admissions to law enforcement and contemporaneous texts to RH, he essentially demonstrated that he did.

We acknowledge that our decision in [*Morrison*] may have muddied the waters

To the extent that *Morrison* may be viewed as standing for the proposition that (a) intent is not “in issue” in those sexual assault cases where the underlying conduct, standing alone, is overtly sexual in nature, and (b) under such circumstances “intent evidence” automatically fails to survive a [Mil. R. Evid.] 403 analysis to meet the second prong of the *Reynolds* test, that conclusion is not supported by our other case law.

Id. In *Hyppolite*,

[the a]ppellant also argues that the Government, at trial, only sought to use the evidence . . . as proof of a common plan or scheme, and that the Government did not seek, nor did the military judges permit, the evidence to be used as proof of [a]ppellant’s intent. The Government responds that the common plan and scheme evidence was intent evidence because mistake of fact was the only issue in controversy. We agree with the Government [P]roof of a common plan or scheme showed that [a]ppellant “knew what he was doing” when he committed the charged offenses.

79 M.J. at 167; *see also Moore*, 78 M.J. at 875 (“Appellant’s controlling behavior demonstrated that he had the motive and intent to repress, instead of respect, her personal autonomy”).

Moreover, the Mil. R. Evid. 404(b) evidence was not “material” in that it was not a significant focus of either the trial counsel’s case in chief or their closing argument. Indeed, references to the Mil. R. Evid. 404(b) evidence comprised only 14 lines of trial counsel’s 296-line closing argument (that is less than 5 percent) as transcribed in the record of trial. Taken as a whole, trial counsel’s case and closing argument overwhelmingly relied upon direct evidence of the charged misconduct—RH’s testimony concerning her activities on 21 August 2021 and her discovery of the camera and Appellant’s admissions to law enforcement—in urging the court members to convict Appellant. Considering all the other compelling evidence in the case, we are convinced that any erroneously admitted Mil. R. Evid. 404(b) evidence “did not have a substantial influence on the findings.” *See Bowen*, 76 M.J. at 87 (citation omitted).

C. Victim Unsworn Statement

Appellant asserts that the military judge abused his discretion in overruling a defense objection to the portions of RH’s victim unsworn statement that allegedly impermissibly referenced uncharged misconduct (including the Mil. R. Evid. 404(b) evidence admitted at trial) and did not qualify as “victim impact” evidence within the meaning of R.C.M. 1001(c)(2)(B). Over the Defense’s objection, the military judge permitted passages referring to a continuous course of conduct concerning Appellant’s emotional and mental abuse to remain in the statement.

Relying upon R.C.M. 1001(g)(2) and *United States v. Figura*, 44 M.J. 308, 310 (C.A.A.F. 1996), the Government counters that “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.” Even if we were to assume, without deciding, that the military judge erred in overruling Appellant’s objections at trial because the limited use evidence admitted under Mil. R. Evid. 404(b) at findings does not automatically qualify as R.C.M. 1001(c)(2)(B) “victim impact” at sentencing, here we find no prejudice in this judge-alone sentencing context.

1. Additional Background

The parties at trial framed this issue as one of whether the emotionally controlling tactics by Appellant during his relationship with RH constituted a “continuous course of conduct” such that they were permissible for comment as “victim impact” during RH’s unsworn statement delivered in pre-sentencing proceedings at trial. Over defense objection, the military judge ruled the following passage from RH’s victim unsworn statement qualified as “victim impact” within the meaning of R.C.M. 1001(c)(2)(B):

It’s hard to understand living in fear until you have experienced it and I just spent just short of two years of my early adulthood

in a tumultuous relationship I had with [Appellant]. *The relationship was overshadowed by his jealous accusations, overwhelming insecurity, constant invasion of privacy and emotional and mental abuse* that I did not and do not deserve.

(Emphasis added).

The military judge provided an oral ruling on the record, specifically concluding that the statements were admissible:

The second and third sentences [of the RH victim impact statement synopsis, *supra*] *I will consider in regard to the charged offense and the evidence that was presented under [Mil. R. Evid.] 404(b) that was consistent with my [Mil. R. Evid.] 404(b) ruling.* Uncharged misconduct is part of a continuous course of conduct involving the same or similar crimes, the same victims and a similar status within the military community may be admitted as evidence in aggravation because such evidence is directly related to the conduct which resulted in conviction. That's from *United States v. Mullens*, 29 M.J. 398 [(C.M.A. 1990)].

Similarly, [*United States v. Goldsmith*, No. ACM 40148, 2022 CCA LEXIS 8, at *20 (A.F. Ct. Crim. App. 11 Jan. 2022) (unpub. op.)] applied this standard, finding that the “directly . . . relating to or arising from” language in [R.C.M.] 1001(c)(2)(B) is nearly identical to “directly relating to or resulting from” which results to aggravation evidence in [R.C.M.] 1001(b)(4).

I conclude similarly that the broad victim's rights contained in [R.C.M.] 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 incident[s] of monitoring were part and parcel of course of conduct on the part of the accused to monitor the victim. 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.

(Emphasis added).

Following the admission of the victim unsworn statement, trial defense counsel presented their sentencing case which included five character letters from noncommissioned officers and family members and both a written and oral unsworn statement by Appellant which included a brief, perfunctory apology to RH. The Government's sentencing case consisted of Appellant's enlisted

performance reports and a Letter of Counseling for a minor disciplinary infraction.

Trial counsel’s sentencing argument made no direct mention of RH’s victim impact statement and only passing reference to RH’s victim impact at all. Instead, trial counsel spent all but two sentences of a sentencing argument that covers 88 lines of trial transcript focusing on the severity of the offense and Appellant’s taunting text messages to RH while he was surreptitiously surveilling her. In contrast, trial counsel’s brief commentary on other victim impact evidence covers just two brief sentences:

Your judgment should weigh the impact of [RH] what it will take to ensure that the [a]ccused does nothing like this—nothing like this again . . . [RH] who is one of our own, has lived with the repercussions and pain of what the accused has done for the last year and a half and she will continue to do so for the indefinite future.

2. Law

We review a military judge’s admission of victim impact statements in presentencing for an abuse of discretion. *United States v. Campos*, __ M.J. __, No. 23-0138, 2025 CAAF LEXIS 141, at *8 (C.A.A.F. 19 Feb. 2025) (citing *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019)). “Abuse of discretion occurs when the military judge: (1) bases a ruling on findings of fact that are not supported by the evidence; (2) uses incorrect legal principles; (3) applies correct legal principles in a clearly unreasonable way; or (4) does not consider important facts.” *Id.* (citations omitted).

For preserved objections, if an error occurs in the admission of sentencing matters the test for prejudice is “whether the error substantially influenced the adjudged sentence.” *United States v. Edwards*, 82 M.J. 239, 246 (C.A.A.F. 2022) (footnote and citation omitted). Reviewing courts utilize four factors to assess prejudice: “(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.* at *9–10 (citation omitted).

Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 806b(a)(4)(B), grants victims of offenses under the UCMJ the right to be reasonably heard at a sentencing hearing related to the offense. 10 U.S.C. § 806b(a)(4)(B). A victim afforded this right is one “who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ].” Article 6b(b), UCMJ, 10 U.S.C. § 806b(b).

Pursuant to R.C.M. 1001(c)(3), victim unsworn statements “may only include victim impact and matters in mitigation.” 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)(B). “Although the unsworn victim statement is not subject to the Military Rules of Evidence, this does not mean that the military judge is powerless to restrict its contents.” *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). “[T]he military judge has an obligation to ensure the content of a victim’s unsworn statement comports with the parameters of victim impact or mitigation as defined by [R.C.M. 1001(c)].” *Id.* (citation omitted).

This court has previously ruled that caselaw interpreting “victim impact” within the context of R.C.M. 1001(b) aggravation evidence is an appropriate framework to construe the scope of R.C.M. 1001(c) “victim impact” given the similarity of definitions. *See United States v. Goldsmith*, No. ACM 40148, 2023 CCA LEXIS 8, at *20–21 (A.F. Ct. Crim. App. 11 Jan. 2023) (unpub. op). Applying this lens, neither R.C.M. 1001(b) nor, by extension, R.C.M. 1001(c), “authorize the introduction of general evidence of . . . uncharged misconduct.” *See United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (alteration in original) (quoting *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001)) (additional citation omitted). However, “when uncharged misconduct is part of a continuous course of conduct involving similar crimes and similar victims, it is encompassed within the language ‘directly relating to or resulting from the offenses of which the accused has been found guilty’” *Nourse*, 55 M.J. at 232; *see also United States v. Mullens*, 29 M.J. 358, 340 (C.M.A. 1990) (holding “a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community” constituted admissible aggravation evidence under R.C.M. 1001(b)(4)). The purpose of such evidence is to demonstrate the “full” or “true” impact of an appellant’s crime. *Nourse*, 55 M.J. at 232 (footnote and citations omitted). In determining whether evidence is “directly related” to the offenses which an appellant was convicted of, we assess whether the evidence is both direct and “closely related in time, type, and/or often outcome, to the convicted crime.” *Hardison*, 64 M.J. at 281–82.

However, recently in *Campos*, a decision released roughly two years after conclusion of Appellant’s court-martial, the CAAF for the first time declared that its continuing course of conduct theory for admission of victim impact evidence is inapplicable to R.C.M. 1001(c)(2)(B) victim impact. *Campos*, 2025 CAAF LEXIS 141, at *15. In so doing, the court explicitly held that “[a]lthough we recognize similarities between this case and [*United States v. Mullens*, 29 M.J. 398 (C.M.A. 1990)], we decline to extend the holding of *Mullens* with respect to evidence in aggravation under R.C.M. 1001(b)(4) (1984 ed.) to apply to victim impact statements under R.C.M. 1001(c) (2019 ed.).” *Id.*

R.C.M. 1001(g)(2) generally permits the trier of fact to consider: “[a]ny evidence properly introduced on the merits before findings, including:

... [e]vidence of other offenses or acts of misconduct even if introduced for a limited purpose ...” However, there is a distinction between evidence admitted for a limited purpose during findings under Mil. R. Evid. 404(b), and the use to which that same evidence may be considered as victim impact type evidence at sentencing. See *United States v. Tanner*, 63 M.J. 445, 448 (C.A.A.F. 2006). “[Mil. R. Evid.] 404(b) does not provide a basis for admission of evidence during sentencing that is not otherwise admissible under R.C.M. 1001(b)(4).” *Id.* (citing *Nourse*, 55 M.J. 229; *United States v. Wingart*, 27 M.J. 128, 135–36 (C.M.A. 1988)).¹⁵

Finally, as the sentencing authority, a military judge is presumed to know the law and apply it correctly, absent clear evidence to the contrary. *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citations omitted). We also “presume[] a military judge follows [his] own rulings.” *Id.* (citations omitted). A military judge is also presumed to “distinguish between proper and improper arguments.” *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted).

3. Analysis

Here the military judge overruled the defense objections to the unsworn statement with a key caveat: that he would consider the evidence only for the limited purpose of similar “course of conduct” involving Appellant’s systematic monitoring of RH to contextualize the convicted misconduct of Appellant’s indecent viewing her via surreptitious monitoring. While that rationale was sound under our prior decision in *Goldsmith*, our superior court’s decision in *Campos* now dictates otherwise. The Appellant is entitled to benefit from

¹⁵ While not itself a source of law, we note that the *Military Judge’s Benchbook* captures this concept and cautions military judges to be wary during presentencing proceedings of misapplication of limited use evidence admitted during findings:

When evidence has been admitted on the merits for a limited purpose raising an inference of uncharged misconduct by the accused, there is normally no sua sponte duty to instruct the court members to disregard such evidence in sentencing, or to consider it for a limited purpose. Although the court in sentencing is ordinarily permitted to give general consideration to such evidence, *it should not be unnecessarily highlighted. Evidence in aggravation must be within the scope of RCM 1001(b).* The military judge must ensure that the [G]overnment does not invite the members to sentence the accused for uncharged misconduct.

Dep’t of the Army Pamphlet 27-9, at 1788 (29 Feb. 2020) (emphasis added); see also *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) (“[T]he Benchbook is not binding as it is not a primary source of law, the Benchbook is intended to ensure compliance with existing law.”).

changes in the law decided during the course of his appeal. *See United States v. Rose*, 71 M.J. 138, 144 (C.A.A.F. 2012) (citation omitted); *see also Johnson v. United States*, 520 U.S. 461, 468 (1997) (holding that “where the law at the time of trial was settled and clearly contrary to the law at the time of appeal--it is enough that an error be ‘plain’ at the time of appellate consideration”). Accordingly, while the military judge did not have the benefit of *Campos* at the time of trial, as a matter of law, *Campos* obliges us now on appeal to find plain error in the military judge’s decision to admit this “course of conduct” evidence.

However, as our superior court did, we take pains now to point out that our decision here should *not* be read as an invalidation of the “continuing course of conduct” caselaw vis a vis R.C.M. 1001(b)(4) victim impact evidence. *See Campos*, 2025 CAAF LEXIS at *15–16 n.5. The court in *Campos* grounded its decision in due process concerns for admission of this type of information in the context of a victim impact statement where the Military Rules of Evidence do not apply and where an unsworn statement is not subject to adversarial testing via cross-examination. *Id.* at *15. Axiomatically, those concerns do not pertain to witness testimony adducing R.C.M. 1001(b)(4) “continuing course of conduct evidence” because in that instance an accused would have the ability to cross-examine the witness.

Because *Campos* compels us to find error in the admission of “continuing course of conduct” information within RH’s victim impact statement, we proceed to a prejudice analysis. Here, we are convinced that the erroneous portion of RH’s unsworn victim impact statement did not substantially impact the sentence adjudged and therefore find no prejudice in the context of this judge-alone sentencing case.

As to the first and second factors, as recounted in the factual sufficiency analysis of Appellant’s conviction, *supra*, the strength of the Government’s evidence in this case was high, compared to the Defense. Adding to the strength of that evidence from a sentencing perspective was the mocking tone Appellant adopted in his taunting texts of RH as he prodded her towards panic in his real-time veiled references to her activities in what was supposed to be the privacy of her own bedroom. We find his concluding jab of “Oh look you caught on. Bravo,” to be a particularly aggravating fact and circumstance of the convicted misconduct.

Third, the materiality of the challenged portions of the victim unsworn statement were low where neither side referred *directly* to these brief passages in their sentencing arguments. That modest mention limited any possibility the military judge would accord any undue weight to this evidence. Moreover, trial counsel’s brief, oblique reference to the victim impact RH suffered primarily referenced the emotional pain she had endured from the charged misconduct alone.

Fourth, evaluated in light of *Campos*, the “quality” of RH’s brief reference to the continuous course of emotional and mental abuse she experienced at the hands of Appellant was “low” because, as CAAF explained in *Campos*, “[t]he accusations were not sworn and were not tested by cross-examination . . . were very brief and contained little or no detail about the harm they may have caused.” *Campos*, 2025 CAAF LEXIS 141, at *17.¹⁶

Finally, the relative severity of Appellant’s misconduct—surreptitiously placing a camera in his ex-girlfriend’s bedroom which he used to monitor her, view her nude, and brazenly taunt her while doing so—compared with the military judge’s decision to impose only half of the maximum confinement available for this offense, are some indicia that the military judge did not ascribe significant weight to these passages from RH’s unsworn victim impact statement. In a case where trial counsel requested ten months of confinement and a bad-conduct discharge, the military judge sentenced Appellant to six months’ confinement and a bad-conduct discharge. Under the circumstances, we are convinced that any erroneously admitted portions of RH’s unsworn victim impact statement had no substantial impact on the sentence, and thus, hold that their admission was harmless.

D. Excessive Post-Trial Delay

1. Additional Background

Appellant’s record of trial was originally docketed with this court on 25 July 2023. Appellant requested and was granted six enlargements of time, amounting to 270 days or 9 months of total delay, to file his assignments of error before filing his brief on 17 April 2024. The Government filed its answer brief on 17 May 2024. Appellant then filed his reply brief on 22 May 2024. Thereafter, with the consent of both parties, on 19 November 2024, this court held oral argument on issue (2). In sum, with the additional time allotted by this court to facilitate the oral argument, a little under 21 months elapsed between the docketing of Appellant’s case and the issuance of this opinion.

2. Law

“[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.” *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006) (citation omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay “where appellate review is not

¹⁶ This is not to denigrate or question the sincerity of RH in offering these impacts in her victim unsworn statement. Rather, our assessment of the “quality” of these statements in her victim unsworn statement as “low” utilizes the legal construct our superior court has mandated in assessing the likelihood that these particular statements had a substantial impact on the military judge’s sentencing determination.

completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals.” 63 M.J. at 142. Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): “(1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to timely review and appeal; and (4) prejudice [to the appellant].” *Moreno*, 63 M.J. 135 (citations omitted).

The CAAF identified three types of cognizable prejudice for purposes of an appellant’s due process right to timely post-trial review: (1) oppressive incarceration; (2) “particularized” anxiety and concern “that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;” and (3) impairment of the appellant’s grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to “adversely affect the public’s perception of the fairness and integrity of the military justice system.” *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). We review de novo an appellant’s entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

3. Analysis

Over 18 months have elapsed since Appellant’s record of trial was originally docketed with this court. Therefore, under *Moreno*, there is a facially unreasonable delay. Although we note the 18-month threshold was exceeded by roughly five weeks, under similar circumstances where that delay was primarily occasioned by extended periods of defense-requested delay we have held that such delays are not “excessively long.” See, e.g., *United States v. Washington*, No. ACM 39761, 2021 CCA LEXIS 379, at *109 (A.F. Ct. Crim. App. 30 Jul. 2021) (unpub. op.) (holding that 23 months from case docketing to issuance of the court’s opinion was “not excessively long” in a five assignment of error case resulting in three separate opinions from the panel).

Accordingly, we have considered the *Barker* factors and find no violation of Appellant’s due process rights. Appellant has not specifically alleged cognizable prejudice, and we do not find any. Appellant has already completed his term of confinement and has lodged no claims that he suffered any oppressive conditions of incarceration while confined. To date, Appellant has also not entered any request for speedy appellate review nor raised any particularized anxiety or concern as a consequence of the pendency of appellate proceedings before this court. Accordingly, we find no prejudice from any unreasonable delay. Absent prejudice, we find the delay involved in Appellant’s case has not been so egregious as to adversely affect the perception of the military justice system. In sum, we find no violation of Appellant’s due process rights.

Furthermore, recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in this case even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 742 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is warranted.

III. CONCLUSION

The findings are correct in law and fact. We affirm only so much of the sentence as provides for a bad-conduct discharge, six months of confinement, and reduction to the grade of E-1. As modified, the sentence is correct in law and fact. No error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and modified sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court