

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Aron B. DOWNS
Gunners Mate First Class (E-6)
U.S. Navy

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

USCA Dkt. No. 26-0247/NA

Crim. App. Dkt. No. 202400109

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

Subject Index

Table of Authorities	3
Issues Presented	6
Introduction	8
Statement of Statutory Jurisdiction.....	9
Statement of the Case.....	9
Statement of Facts.....	10
A. Appellant’s confrontation and questioning by a vigilante group that included a Navy servicemember.	10
B. Appellant’s conversation with “Kelsey.”	12
C. NCIS’s advisement of Appellant’s rights.....	15
D. Evidence derived from the NCIS interrogation.....	16
E. Motions to suppress evidence.....	17
F. Sentencing evidence admitted.	19
Reasons to Grant Review.....	20
Under the required considerations of Article 56, UCMJ, a “plainly unreasonable” sentence cannot be held to mean an “obviously unreasonable” sentence.....	20
Federal standards of “reasonableness” in sentencing are inapplicable to military sentences given the substantial differences in federal and military sentencing procedures.....	22
It is not harmless error for a military judge to admit and consider impermissible extrinsic evidence to rebut a recidivism expert’s opinion.	24
Military servicemembers should be required to provide Article 31(b), UCMJ, warnings before requesting incriminatory statements as part of a vigilante sting operation.....	26

A. The lower court’s opinion selectively relies on the holding of <i>United States v. Gibson</i> , 14 C.M.R. 164 (C.M.A. 1954), in a manner that is incompatible with contemporary standards of statutory interpretation. ..	26
B. Under the circumstances, the plain language meaning of Article 31(b) is not absurd.....	29
MRE 304 requires consideration of relevant State law in determining whether a confession or admission was obtained as a result of unlawful influence or inducement.....	31
For an attempt charged under Article 80, UCMJ, the substantial step must firmly indicate the specific criminal intent. Accordingly, extrinsic evidence of other acts should not be permitted to prove that specific intent.....	33
Traveling away from the intended location of a crime, with the specific intent to engage in a <i>lawful</i> activity, does not constitute a substantial step towards an attempted crime under Article 80, UCMJ.....	36
Certificate of Compliance	40

Table of Authorities

Cases

<i>Ardestani v. I.N.S.</i> , 502 U.S. 129 (1991)	30
<i>Azar v. Allina Health Servs.</i> , 587 U.S. 566 (2019).....	26
<i>Food Mktg. Inst. v. Argus Leader Media</i> , 588 U.S. 427 (2019).....	26
<i>Guilder v. State</i> , 899 So. 2d 412 (Fla. Dist. Ct. App. 2005).....	11, 31
<i>State v. Tsavaris</i> , 394 So. 2d 418 (Fla. 1981).....	11, 31
<i>United States v. Avery</i> , 79 M.J. 363 (C.A.A.F. 2020)	26
<i>United States v. Beltran</i> , 2017 CCA LEXIS 96 (N-M. Ct. Crim. App. Feb. 14, 2017).....	37
<i>United States v. Clark</i> , 2004 CCA LEXIS 63 (N-M. Ct. Crim. App. 2004).....	24, 25
<i>United States v. Cohen</i> , 63 M.J. 45 (C.A.A.F. 2006)	28
<i>United States v. Cole</i> , 84 M.J. 398 (C.A.A.F. 2024)	20
<i>United States v. Downs</i> , No. 202500109, slip op. (N-M. Ct. Crim. App. May 27, 2026).....	15, 20, 21, 22, 23, 24, 27, 31, 34
<i>United States v. Gibson</i> , 14 C.M.R. 164 (C.M.A. 1954).....	2, 26, 27, 28
<i>United States v. Goetzke</i> , 494 F.3d 1231 (9th Cir. 2007)	34
<i>United States v. Grina</i> , 2018 CCA LEXIS 61 (N-M. Ct. Crim. App. Feb. 8, 2018).....	37
<i>United States v. Hamby</i> , 2018 CCA LEXIS 411 (N-M. Ct. Crim. App. Aug. 28, 2018)	37
<i>United States v. Jones</i> , 37 M.J. 459 (C.A.A.F. 1993).....	34, 35

<i>United States v. Jones</i> , 73 M.J. 357 (C.A.A.F. 2014).....	27
<i>United States v. Keeter</i> , 2018 CCA LEXIS 474 (N-M. Ct. Crim. App. Oct. 3, 2018)	37
<i>United States v. King</i> , 71 M.J. 50 (C.A.A.F. 2012).....	29
<i>United States v. Loukas</i> , 29 M.J. 385 (C.M.A. 1990).....	28
<i>United States v. Lowe</i> , 56 M.J. 914 (N-M. Ct. Crim. App. 2002).....	24, 25
<i>United States v. Mooney</i> , 77 M.J. 252 (C.A.A.F. 2018).....	30
<i>United States v. Redlinski</i> , 58 M.J. 117 (C.A.A.F. 2003).....	37
<i>United States v. Schell</i> , 72 M.J. 339 (C.A.A.F. 2013).....	29
<i>United States v. Schoof</i> , 37 M.J. 96 (C.A.A.F. 1993).....	34, 35
<i>United States v. Wilson</i> , 8 C.M.R. 48 (U.S. C.M.A. 1953)	28
<i>United States v. Winckelmann</i> , 70 M.J. 403 (C.A.A.F. 2011).....	34

Statutes

10 U.S.C. § 831	29
10 U.S.C. § 856 (2024)	21, 23, 25
10 U.S.C. § 866	20
10 U.S.C. § 880	34
18 U.S.C. § 3742	22
Fla. Sta. § 934	11, 31, 32

Other Authorities

C.A.A.F. Rule 21(b)(5)	21, 24, 25, 28, 30, 33, 36, 38
MANUAL FOR COURTS-MARTIAL, UNITED STATES	23, 37
Mil. R. Evid. 304.....	31, 33
<i>Plain</i> , MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/plain	20
U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990	29
U.S. Sent'g Comm'n, Guidelines Manual	22

Issues Presented

I

Whether the “plainly unreasonable” standard for reviewing sentences means “obviously unreasonable” under the sentencing requirements of Article 56, UCMJ.

II

Whether federal standards of “reasonableness” in sentencing apply to military sentences given the substantial differences in federal and military sentencing procedures.

III

Whether it is harmless error for a military judge to admit and consider impermissible extrinsic evidence to rebut a recidivism expert’s opinion.

IV

Whether a military servicemember is required to provide Article 31(b), UCMJ, warnings before requesting incriminatory statements in conducting a vigilante sting operation.

V

Whether MRE 304 requires consideration of relevant state law in determining whether a confession or admission was obtained as a result of unlawful influence or inducement.

VI

Whether extrinsic evidence of other acts can be used to prove the specific intent of an attempt when the substantial step itself must firmly indicate the specific criminal intent.

VII

Whether travel away from the intended location of a crime, with the specific intent to engage in a lawful activity, constitutes a substantial step towards an attempted crime charged under Article 80, UCMJ.

Introduction

Appellant was subject to an unauthorized and illegal vigilante sting that confronted Appellant before he had the opportunity to commit a substantial step towards the commission of the gravamen offense. The entirety of the evidence presented against Appellant—on any charge—was collected illegally by the same vigilantes or was derived therefrom. That evidence was admitted at trial without proper consideration of MRE 304. After convicting Appellant on this improper and illegally collected evidence, the military judge admitted and considered improper sentencing evidence and thereby awarded Appellant a sentence that fails to comply with Article 56, UCMJ.

Upholding these convictions establishes a dangerous precedent effectively sanctioning the actions of untrained and unauthorized vigilante groups employing illegal tactics. Lacking legal authority and necessary expertise, these groups are prone to compromising investigations, mishandling evidence, and violating servicemembers' fundamental rights, as the record in this case clearly demonstrates. Affirming Appellant's convictions and sentences undermines sound public policy, jeopardizes public safety, creates a chilling effect on legitimate investigations and trials, and empowers military judges to ignore binding law. Accordingly, this Court should grant review.

Statement of Statutory Jurisdiction

Appellant submitted a timely appeal to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) who reviewed the case under Article 66(b), Uniform Code of Military Justice (UCMJ). Appellant invokes this Court's Article 67(a)(3), UCMJ, jurisdiction.

Statement of the Case

A panel of members convicted Appellant, contrary to his pleas, of one specification of attempted sexual assault of a child, one specification of attempted sexual assault of a child by indecent communication, one specification of distributing child pornography, and one specification of viewing child pornography in violation of Articles 80 and 134, UCMJ.¹ A military judge also convicted Appellant, consistent with his pleas, of three specifications of indecent language in violation of Article 134, UCMJ.² The military judge sentenced him to eighteen years and six months of confinement, reduction to pay grade E-1, and a dishonorable discharge.³ Appellant raised six assignments of error and the lower court affirmed the finding and sentence as correct in law and fact.

¹ R. at 1091; Entry of Judgment at 1.

² R. at 388-89; Entry of Judgment at 1.

³ R. at 1178; Entry of Judgment at 2.

Statement of Facts

A. Appellant's confrontation and questioning by a vigilante group that included a Navy servicemember.

On 6 March 2024, two members of a vigilante group confronted Appellant in a public movie theater in Florida where he believed he was meeting a twelve-year-old girl to see a movie.⁴ However, the twelve-year-old, named "Kelsey," was a fabrication and did not exist.⁵

Navy Hospital Corpsman (HN) Bruni and his wife, the leader of the vigilante group, both confronted and questioned Appellant.⁶ When he confronted Appellant, HN Bruni was dressed in all black, wearing a black mask, and a bulletproof vest.⁷ The vigilantes did not inform Appellant they were not law enforcement.⁸ However, both HN Bruni and his wife testified they had a law enforcement purpose in their actions.⁹ The vigilantes never identified themselves to Appellant, but they indicated they already knew Appellant's name and duty station and made frequent references to Appellant's military service.¹⁰ Throughout the interaction, the vigilantes gave Appellant numerous orders and demands,

⁴ R. at 792.

⁵ R. at 644.

⁶ R. at 731, 737.

⁷ R. at 37.

⁸ R. at 53.

⁹ R. at 56-57, 86.

¹⁰ Appellate Ex. XVI at 125-26, 129, 137.

including telling Appellant “we have to do this right now” and “don’t go anywhere.”¹¹ HN Bruni specifically stated “we have contacts in the Navy, we know everything” and “I understand the Navy specifically pretty well. We have people actively at Mayport.”¹² Although he interrogated Appellant, HN Bruni never provided Article 31(b) warnings.¹³

Throughout the questioning, HN Bruni recorded Appellant, contrary to Appellant’s requests that HN Bruni stop.¹⁴ During the questioning, the vigilantes used screenshots of a text conversation that occurred between Appellant and “Kelsey.”¹⁵ In the State of Florida it is illegal “for a person to record a conversation, even though he’s a party to it, without the other person’s consent.”¹⁶ The governing statute also indicates that it is unlawful to use or disclose the contents of an oral or electronic communication without both parties’ consent.¹⁷

¹¹ R. at 53; Appellate Ex. XLI at 8.

¹² Appellate Ex. XLI at 10, 11.

¹³ Appellate Ex. XLI.

¹⁴ R. at 51; Appellate Ex. XVI at 125.

¹⁵ Appellate Ex. XVI at 134, 147, 152.

¹⁶ *Guilder v. State*, 899 So. 2d 412, 418 (Fla. Dist. Ct. App. 2005) (quoting *State v. Tsavaris*, 394 So. 2d 418, 422 n.5. (Fla. 1981)).

¹⁷ Fla. Sta. §§ 934.02, 934.03 (2024).

B. Appellant's conversation with "Kelsey."

Ten days prior to the confrontation, Appellant began speaking with "Kelsey" on a social media platform called Whisper.¹⁸ They switched to text messages after exchanging phone numbers.¹⁹ Claiming to be a twelve-year-old girl, "Kelsey" was in fact an adult man working with a separate vigilante group.²⁰ During their conversation, "Kelsey" and Appellant discussed sexual matters.²¹ Appellant made known that he was interested in sexual activity with "Kelsey" if she was interested:

Have you had sex yet? Maybe we can get naked and cuddle or cuddle in clothes . . . I'm sorry *we don't have to have sex* but I can get you off if you want . . . I want to have sex and I want to eat you out but first I want to take you out to eat. . . . *Or we can just go eat.*²²

Ultimately, "Kelsey" suggested that they go see a movie together.²³

Whenever "Kelsey" asked specific questions about his intent, Appellant was not firm:

¹⁸ *Id.*

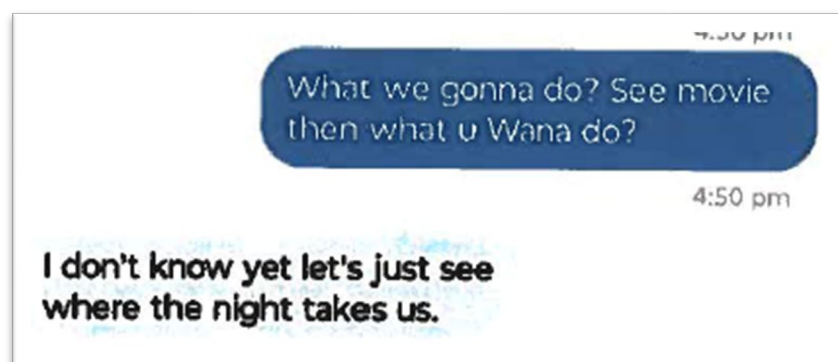
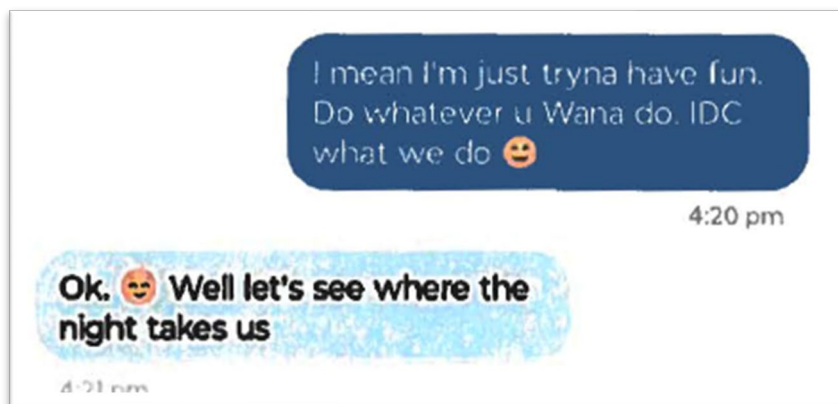
¹⁹ Pros. Ex. 2 at 6; Pros. Ex. 3.

²⁰ R. at 644. This was a different group than the one HN Bruni and his wife belonged to, but shared information with their group.

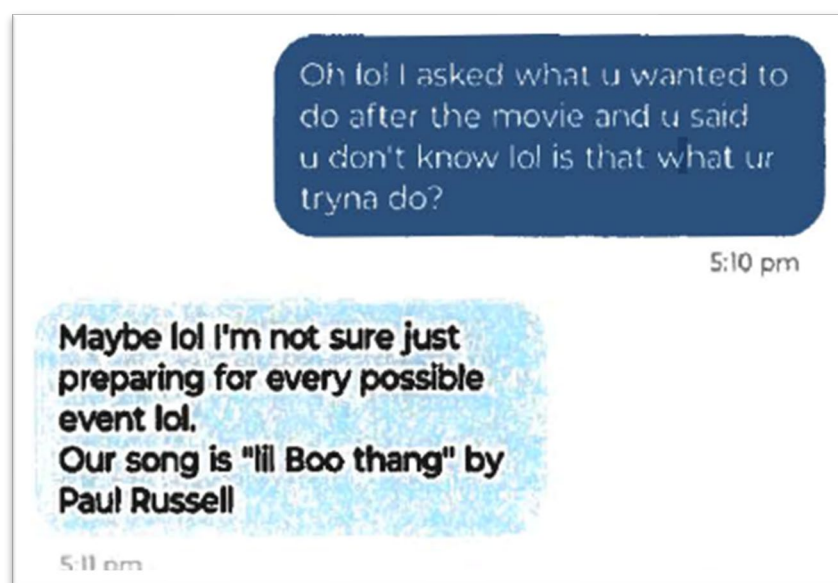
²¹ Pros. Ex. 3.

²² Pros. Ex. 3 at 16-17 (emphasis added).

²³ Pros. Ex. 3 at 72.



24

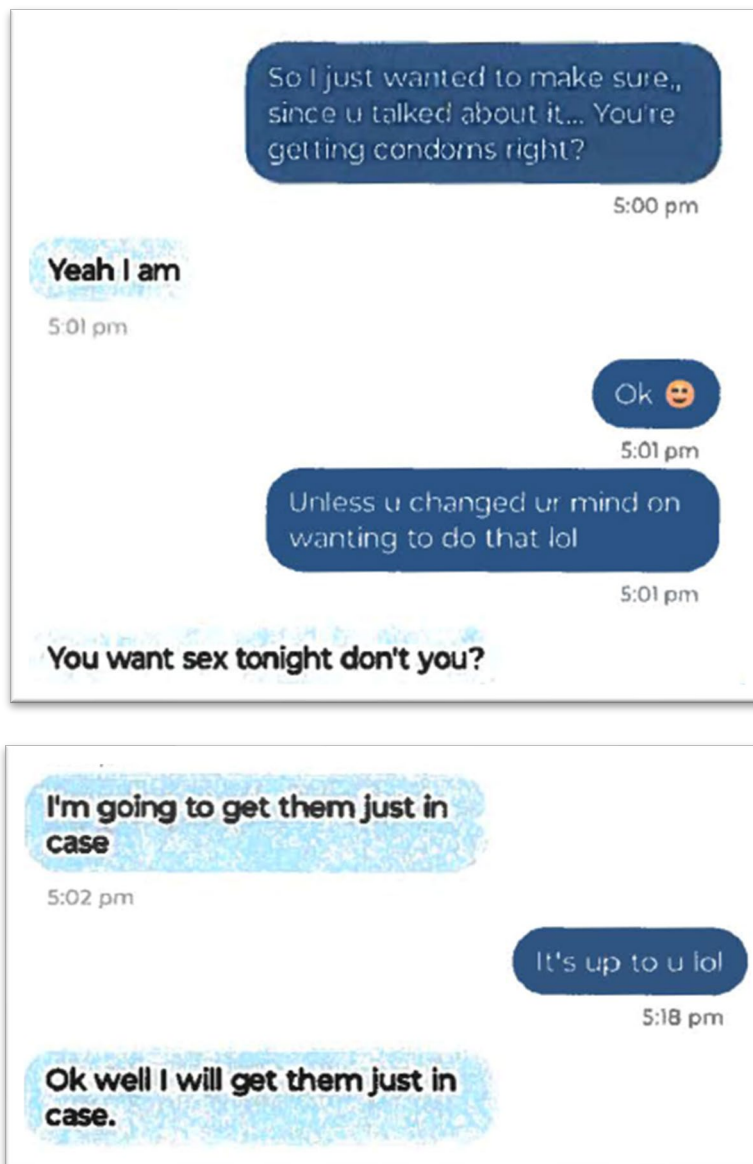


25

²⁴ Pros. Ex. 3 at 73 (Appellant's texts are on the left).

²⁵ Pros. Ex. 3 at 76.

At one point, the man playing the role of “Kelsey” tried to confirm Appellant’s sexual intent by bringing up previously discussed condoms.²⁶ However, Appellant declined to state a firm intent to have sex with “Kelsey,” despite the direct provocation:



27

²⁶ Pros. Ex. 3 at 110.

²⁷ Pros. Ex. 3 at 110-11.

When later confronted by the vigilantes at the theater, the condoms were not with Appellant.²⁸ Instead, the condoms were in an unopened box in Appellant's car along with other purchases made at the same time, including a toaster and a package of nasal decongestants.²⁹ The lower court's opinion misstated this fact in their opinion, referencing Appellant's "trip to meet [Kelsey], *condoms in hand*."³⁰

C. NCIS's advisement of Appellant's rights.

Several hours after the vigilantes confronted and questioned Appellant, they "provided everything" to the Naval Criminal Investigative Service (NCIS) Cyber Tip line, as well as to the Navy's Public Affairs Office in Mayport.³¹ Before receiving this information, NCIS had no knowledge of Appellant or the incident.³² Before apprehending Appellant, the agents reviewed *all* the materials the vigilantes sent—including the video of the confrontation—and spoke directly with the leader of the vigilante group.³³

Two days after the confrontation at the theater, NCIS apprehended Appellant and brought him to their office for questioning.³⁴ NCIS did not provide a cleansing

²⁸ R. at 703; Appellate Ex. XVI at 164.

²⁹ R. at 703; Appellate Ex. XVI at 164.

³⁰ *United States v. Downs*, No. 202500109, slip op. at 16 (N-M. Ct. Crim. App. May 27, 2026).

³¹ R. at 89.

³² R. at 103.

³³ R. at 108.

³⁴ R. at 106-07.

warning to Appellant, because NCIS determined “there was no military involvement.”³⁵ Before reading Appellant’s rights to him, the agents said to Appellant “[s]o we---we got notified pretty much yesterday that there was some incident involving---at the AMC theater with a 12-year-old or something. *I don't know exactly what transcribed [sic] or what happened.*”³⁶

While addressing Appellant’s rights, the agents stated “for me to at least tell you what I know and what’s going on . . . I gotta go through this.”³⁷ Then the agents directed Appellant to read—out loud—the rights waiver portion of his rights advisement.³⁸ The agents then asked “[o]kay. So you *understand* that statement, and you understand what I’ve read to you?”³⁹ The agents did not ask Appellant if he *agreed* with the statement, and there was no further discussion regarding Appellant’s right to remain silent or consult with an attorney.⁴⁰

D. Evidence derived from the NCIS interrogation.

NCIS claims to have interrogated Appellant for only two hours total during the approximately eight-hour period he was kept at the NCIS office.⁴¹ During that

³⁵ R. at 105.

³⁶ Appellate Ex. LXXIV at 1 (emphasis added).

³⁷ Appellate Ex. LXXIV at 1.

³⁸ *Id.* at 2.

³⁹ *Id.* (emphasis added).

⁴⁰ Appellate Ex. LXXIV.

⁴¹ R. at 904.

time, Appellant provided NCIS agents with a permissive authorization for search and seizure (PASS) of his phone, electronics, and car.⁴² As a result of that search, NCIS found the unopened box of condoms, several Whisper chats and text conversations pertaining to sexual activity with minors, and 704 visually unique images of what appeared to be child pornography.⁴³ NCIS did not further investigate the Whisper chats or text messages even though they were aware that at least one contained a telephone number.⁴⁴ The other chat participants were never identified.⁴⁵ After being confronted with the existence of the images, Appellant admitted to having viewed child pornography in the past.⁴⁶

E. Motions to suppress evidence.

Appellant pled guilty to three specifications of indecent language for several of the discovered Whisper chats.⁴⁷ Prior to trial, the Defense moved to suppress evidence of other uncharged Whisper chats, proffered by the Government as M.R.E. 404(b) evidence of Appellant’s alleged intent to have sex with “Kelsey.”⁴⁸ Those chats were:

⁴² R. at 836–37.

⁴³ R. at 859–60, 965.

⁴⁴ R. at 896–97.

⁴⁵ R. at 860–61.

⁴⁶ R. at 840–46.

⁴⁷ R. at 351.

⁴⁸ Appellate Ex. XI.

1. A chat beginning on 27 February 2024 and continuing through 7 March in which [Appellant] asked the other Whisper user to bring his 15-year-old daughter to Florida from New York to meet with the accused and engage in sexual activity.
2. A chat beginning on 26 February 2024 and continuing through 27 February 2024 in which [Appellant] discussed the other Whisper user's 14-year-old daughter and expressed disappointment that he could not meet with her because she lived in the state of Washington.
3. A chat beginning on 20 February 2024 and continuing through 21 February 2024 in which [Appellant] asked the other Whisper user to bring his 15-year-old daughter to Florida from Canada to meet with the accused and engage in sexual activity.⁴⁹

The military judge ruled that only the first chat (“beginning on 27 February 2024 and continuing through 7 March”) could be admitted for purposes of proving intent due to its temporal proximity to Appellant’s attempted meeting of “Kelsey.”⁵⁰

However, the military judge later admitted the other two chats during presentencing to rebut a Defense expert’s recidivism opinion.⁵¹

The Defense also moved to suppress the following:

[A]ll statements made by [Appellant] to law enforcement and [the] vigilante investigators as they were unwarned and coerced. The Defense also move[d] to suppress the ensuing, uncleansed statements made to NCIS . . . as well as evidence obtained from [Appellant’s] phone and vehicle as they are fruits of an unlawful confession.⁵²

⁴⁹ Appellate Ex. LXVII at 1.

⁵⁰ *Id.* at 1, 6.

⁵¹ R. at 1162.

⁵² Appellate Ex. XIII at 1.

The military judge denied the motion to suppress the entirety of the evidence and statements resulting from Appellant's interactions with the vigilantes, local law enforcement, and NCIS between 6 March 2024 and 8 March 2024.⁵³

F. Sentencing evidence admitted.

Over defense objections, the military judge allowed the introduction of two uncharged Whisper chats to rebut the opinion testimony of the defense's recidivism expert.⁵⁴ The government introduced the chats to provide specific examples of Appellant's conduct to rebut the expert's opinion that Appellant held a "low risk of future recidivism."⁵⁵ In admitting the Whisper chats, which she had previously barred as inadmissible M.R.E. 404(b) evidence, the military judge reasoned

I can certainly consider evidence that contradicts [the defense expert's] assessment . . . namely, other conduct that she--in which the accused engaged around--directly around the time of the offenses in this case, and they're introducing it for the purpose of showing that he--rebutting that assessment, risk assessment.⁵⁶

⁵³ Appellate Ex. XLI at 31.

⁵⁴ R. at 1157.

⁵⁵ R. at 1127.

⁵⁶ R. at 1158.

Reasons to Grant Review

I

Under the required considerations of Article 56, UCMJ, a “plainly unreasonable” sentence cannot be held to mean an “obviously unreasonable” sentence.

Under Article 66, UCMJ, sentences are evaluated for whether they are “plainly unreasonable.”⁵⁷ Here, the military judge awarded three consecutive terms of six months confinement (the maximum allowed) for the three specifications of indecent language to which Appellant pled guilty.⁵⁸ The lower court affirmed these sentences as not plainly unreasonable and asserted that, in this context, plainly means “clear or obvious.”⁵⁹

There are several definitions of plain.⁶⁰ Some align with courts’ interpretation of “plain” as meaning “obvious” as it is used in the doctrine of plain-error.⁶¹ However, other definitions hold “plain” as meaning “characterized by simplicity” and “lacking special distinction” as it is used in the doctrine of plain-

⁵⁷ 10 U.S.C. § 866(e)(1)(D) (2024).

⁵⁸ R. at 1178-79.

⁵⁹ *Downs*, slip op. at 18 (citing *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024)).

⁶⁰ *See Plain*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plain> (last visited Aug. 14, 2026).

⁶¹ *See Cole*, 84 M.J. at 404.

language-meaning.⁶² This latter meaning of “plain” more properly addresses the reasonableness of a sentence in light of Article 56, UCMJ.

Article 56, UCMJ, requires that a sentence be “sufficient, *but not greater than necessary*.”⁶³ Accordingly, a sentence need not be *obviously* unreasonable to violate Article 56—it *simply* needs to be greater than necessary. For example, a sentence that is *slightly* greater than necessary will not be *obviously* unreasonable, but it will still violate Article 56 in a simple manner and without special distinction. Consequently, the lower court’s interpretation of “plain” as meaning “obvious” creates a doctrine where Article 56 is without force or effect unless egregiously violated.

As the lower court acknowledged, this Court “has not defined the ‘plainly unreasonable’ standard for sentence appropriateness review.”⁶⁴ Accordingly, the lower court’s assertion that “plainly unreasonable” means “obviously unreasonable” is a question of law that this Court has not, but should, answer.⁶⁵

⁶² *Supra* note 60.

⁶³ 10 U.S.C. § 856 (2024) (emphasis added).

⁶⁴ *Downs*, slip op. at 17.

⁶⁵ C.A.A.F. Rule 21(b)(5)(A).

II

Federal standards of “reasonableness” in sentencing are inapplicable to military sentences given the substantial differences in federal and military sentencing procedures.

The lower court relied on Federal Circuit case law to assert that Appellant’s sentence was reasonable.⁶⁶ Although the lower court acknowledged “there are some variances in sentencing mandates between military and federal courts,” this fails to acknowledge a crucial difference.⁶⁷ A properly calculated federal sentence carries an inference of reasonableness that is completely absent from Appellant’s unexplained military sentence.

In civilian cases, “plainly unreasonable” analysis is applied only when there are no sentencing guidelines.⁶⁸ This is because the federal sentencing guidelines inherently provide reasoning through a calculated sentencing range. The sentencing guidelines consist of over 500 pages of calculations and considerations.⁶⁹ These calculations determine which offense level (out of forty-three), and which criminal history category (out of six) apply to a particular offense and offender.⁷⁰ Ultimately, these calculations direct the courts to one of

⁶⁶ *Downs*, slip op. at 17-18.

⁶⁷ *Id.*

⁶⁸ 18 U.S.C. § 3742(a)(4), (b)(4), (e)(4), (f)(2).

⁶⁹ U.S. Sent’g Comm’n, Guidelines Manual, Table of Contents (Nov. 2025).

⁷⁰ *Id.*, ch. 5, pt. A.

258 potential sentencing ranges. By comparison, sentencing under the military justice system requires no calculation, does not consider criminal history, and encompasses only six potential sentencing ranges.⁷¹ In short, a sentence within the military sentencing parameters is not determined through any systematic reasoning and is, therefore, not inherently reasonable—as in the civilian system.

In the military justice system, reasonableness is derived from consideration of the factors listed under Article 56, UCMJ. But, as here, such analysis—if done—rarely makes it into the record. Here, the military judge provided no analysis.⁷² And the lower court merely listed characteristics of the offenses and Appellant but failed to account for numerous other factors under Article 56.⁷³ For example, as discussed further in the next section, the lower court did not address whether the military judge properly considered “the need for the sentence [] to protect others from further crimes by the accused.”⁷⁴

This does not begin to approach the reasoning involved in calculating a sentencing range under the federal guidelines. Therefore, the presumption of reasonableness under the federal system is inapposite to military sentencing.

⁷¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 12B. (2024) [hereinafter MCM].

⁷² R. at 1178-79.

⁷³ *Downs*, slip op. at 18; see 10 U.S.C. § 856 (c)(1)(A) (2024).

⁷⁴ 10 U.S.C. § 856 (c)(1)(C) (2024).

While a well-reasoned analysis of the required considerations under Article 56 can achieve such a presumption—such an analysis is missing here. By relying on the federal presumption of reasonableness without conducting an equivalent analysis, the lower court’s opinion attempts to bake an apple pie using oranges instead. If, in fact, a presumption of reasonableness does exist—absent a reviewable analysis—this Court has yet to opine on what circumstances invoke such a presumption. Accordingly, this case presents a question of law that this Court has not, but should, answer.⁷⁵

III

It is not harmless error for a military judge to admit and consider impermissible extrinsic evidence to rebut a recidivism expert’s opinion.

The government cannot offer extrinsic evidence to rebut recidivism.⁷⁶ At trial, the military judge admitted and considered extrinsic evidence offered to rebut a recidivism expert’s opinion. The lower court acknowledged that the military judged erred but asserted that it was harmless.⁷⁷ However, recidivism evidence is a required sentencing consideration under Article 56, UCMJ.

⁷⁵ C.A.A.F. Rule 21(b)(5)(A)

⁷⁶ *United States v. Clark*, 2004 CCA LEXIS 63, at *4 (N-M. Ct. Crim. App. 2004); see *United States v. Lowe*, 56 M.J. 914, 917 (N-M. Ct. Crim. App. 2002).

⁷⁷ *Downs*, slip op. at 14.

Under Article 56, UCMJ, a proper sentence must consider the need to “protect others from further crimes by the accused.”⁷⁸ This is a touchstone question of recidivism. To this point, an accused may present opinion testimony as to their rehabilitative potential. And while such an opinion may be tested by questioning the witness on their knowledge of prior misconduct, their opinion may not be rebutted with extrinsic evidence of misconduct.⁷⁹ The military judge’s admission and consideration of impermissible extrinsic evidence raised an unanswered question about her Article 56 analysis. Namely, to what extent did the improper rebuttal evidence influence the military judge’s determination that Appellant’s sentence was sufficient, but not greater than necessary, to “protect others from further crimes by the accused?”⁸⁰ Consequently, the lower court’s finding that such consideration was harmless is speculative and sanctions the military judge’s failure to obey Article 56, UCMJ. Accordingly, review is warranted to provide guidance regarding the consideration of improper evidence addressing requisite sentencing considerations.⁸¹

⁷⁸ 10 U.S.C. § 856 (c)(1)(C) (2024).

⁷⁹ *Clark*, 2004 CCA LEXIS 63, at *4; *Lowe*, 56 M.J. at 917.

⁸⁰ Art. 56(c)(1)(C), UCMJ; 10 U.S.C. § 856 (c)(1)(C) (2024).

⁸¹ *See* C.A.A.F. Rule 21(b)(5)(F).

IV

Military servicemembers should be required to provide Article 31(b), UCMJ, warnings before requesting incriminatory statements as part of a vigilante sting operation.

The lower court affirmed the military judge’s admission of Appellant’s unwarned statements to a servicemember vigilante. The lower court held that HN Bruni was not required to provide Article 31(b) warnings under the circumstances.

A. The lower court’s opinion selectively relies on the holding of *United States v. Gibson*, 14 C.M.R. 164 (C.M.A. 1954), in a manner that is incompatible with contemporary standards of statutory interpretation.

In *United States v. Gibson*, the Court of Military Appeals held that “no intention to extend the requirement [for Article 31(b) warnings] to other than ‘official investigation’ is found in the legislative history of the Uniform Code.”⁸² This Court has “acknowledge[d] the Supreme Court’s recent reminders that ‘legislative history is not the law,’ and that using legislative history to determine legislative intent is ‘a relic from a bygone era of statutory construction.’”⁸³ Moreover, the circumstances of *Gibson* are greatly distinguishable and the lower court’s opinion fails to apply the entire holding in context.

⁸² *United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954).

⁸³ *United States v. Avery*, 79 M.J. 363, 368 n.8 (C.A.A.F. 2020) (internal citations omitted) (citing *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019); *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 435 (2019)).

In *Gibson*, the Court held that a casual conversation in which a fellow inmate, purpose selected by investigators to be an informant, asked the accused “[w]hat are you in for?” did not rise to the level of a request for an incriminating statement, and Article 31(b) warnings were not required.⁸⁴ Relying on *Gibson* and its progeny, the lower court found HN Bruni was not required to give Article 31(b) warnings “[b]ecause *undercover* officials and *informants* do not usually place the accused in a position where a reasonable person in the accused’s position would feel compelled to reply to questions.”⁸⁵

But those circumstances are not present in this case. Here, HN Bruni was not acting as an undercover official or informant. While questioning Appellant, HN Bruni made repeated references to the Navy, gave Appellant orders, refused to let him end the interaction, and did so while dressed in a mask and tactical clothing.⁸⁶ Appellant was undoubtedly in a situation ““where a reasonable person . . . would feel compelled to reply to questions.””⁸⁷

The lower court’s opinion also fails to consider the caveat in *Gibson* that “military persons not assigned to investigate offenses, do not ordinarily interrogate

⁸⁴ *Gibson*, 14 C.M.R. 171.

⁸⁵ *Downs*, slip op. at 6 (quoting *United States v. Jones*, 73 M.J. 357, 361 n.5 (C.A.A.F. 2014)).

⁸⁶ R. at 37, 53; Appellate Exs. XVI, XLI at 8, 10-11.

⁸⁷ *Downs*, slip op. at 6 (quoting *Jones*, 73 M.J. at 361 n.5 (C.A.A.F. 2014)).

nor do they request statements from others accused or suspected of crime.”⁸⁸ This Court has further acknowledged that caveat:

[W]here the questioner is not acting in a law enforcement or disciplinary capacity, rights warnings are *generally* not required, because ‘military persons not assigned to investigate offenses, *do not ordinarily interrogate nor do they request statements* from others accused or suspected of crime.’⁸⁹

But again, these are not the circumstances here. HN Bruni was acting with a law enforcement purpose. As a member of the vigilante group, he does ordinarily interrogate and request statements from people he suspects have committed a crime, and he does so through acts that a reasonable person would find intimidating.

The lower court’s opinion raises serious questions that are best answered by this Court.⁹⁰ Is *Gibson*’s reliance on legislative history still good law? And if it is still good law, how far afield from the circumstance of *Gibson* should its holding apply? Such answers would provide necessary guidance to the field and fleet.

⁸⁸ *Gibson*, 14 C.M.R. at 170 (citing *United States v. Wilson*, 8 C.M.R. 48 (U.S. C.M.A. 1953)).

⁸⁹ *United States v. Cohen*, 63 M.J. 45, 49-50 (C.A.A.F. 2006) (quoting *United States v. Loukas*, 29 M.J. 385, 388 (C.M.A. 1990)) (emphasis added).

⁹⁰ C.A.A.F. Rule 21(b)(5)(A).

B. Under the circumstances, the plain language meaning of Article 31(b) is not absurd.

“No person subject to [the UCMJ] may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”⁹¹ Further, “[n]o person subject to [the UCMJ] may interrogate, or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement[.]”⁹²

“Unless the text of a statute is ambiguous, ‘the plain language of a statute will control unless it leads to an absurd result.’”⁹³ Here, it is not an absurd result that HN Bruni should have provided Article 31(b) warnings. HN Bruni is a service member with a duty to report criminal offenses.⁹⁴ HN Bruni had a law enforcement intent in confronting Appellant.⁹⁵ HN Bruni was dressed in tactical clothing while confronting Appellant.⁹⁶ HN Bruni gave Appellant orders and refused to let him end the interaction.⁹⁷ HN Bruni’s intent in confronting

⁹¹ Art. 31(a), UCMJ; 10 U.S.C. § 831(a) (2024).

⁹² Art. 31(b), UCMJ; 10 U.S.C. § 831(b) (2024).

⁹³ *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)).

⁹⁴ U.S. DEP’T OF NAVY, U.S. NAVY REGULATIONS, 1990. Art. 1137 (Sept. 14, 1990) [hereinafter US NAVY REGS] (emphasis added).

⁹⁵ R. at 43, 56-57.

⁹⁶ R. at 37.

⁹⁷ R. at 53; Appellate Ex. XLI at 8.

Appellant was to compel him to incriminate himself.⁹⁸ These facts triggered Article 31(b) and finding otherwise would defy the statute’s plain language. And “the plain language meaning must be enforced and is rebutted only in ‘rare and exceptional circumstances.’”⁹⁹

The lower court’s opinion creates a precedent that empowers and encourages unauthorized, illegal vigilantism by servicemembers that will ultimately compromise legitimate law enforcement activity. The lower court does so by interpreting Article 31(b) contrary to its plain language meaning. Further, this interpretation does not comport with the whole of *Gibson* or contemporary standards of statutory interpretation. While case law adequately addresses the application of Article 31(b) to pretextual calls and undercover investigations, there is a dearth of cases addressing Article 31(b)’s applicability to vigilante sting operations. Accordingly, this case presents a question of law that this Court has not, but should, settle.¹⁰⁰

⁹⁸ R. at 52.

⁹⁹ *United States v. Mooney*, 77 M.J. 252, 257 n.4 (C.A.A.F. 2018) (quoting *Ardestani v. I.N.S.*, 502 U.S. 129, 135, (1991)).

¹⁰⁰ C.A.A.F. Rule 21(b)(5)(A).

V

MRE 304 requires consideration of relevant State law in determining whether a confession or admission was obtained as a result of unlawful influence or inducement.

In addition to being unwarned, the Defense argued Appellant’s statements to the vigilantes were involuntary based on other circumstances.¹⁰¹ On appeal, Appellant cited MRE 304 and Florida State law to show that his statements—and all derivative evidence—were inadmissible because they were “obtained . . . through the use of coercion, unlawful influence, or unlawful inducement.”¹⁰² Without addressing this argument, the lower court affirmed the military judge’s evidentiary ruling.¹⁰³

In Florida, where the vigilantes confronted Appellant, it is unlawful to use or disclose the contents of an oral or electronic communication without both parties’ consent.¹⁰⁴ Simply put, Florida’s wiretapping laws “make it illegal, for a person to record a conversation, even though he’s a party to it, without the other person’s consent.”¹⁰⁵ That is precisely what happened here:

¹⁰¹ Appellate Ex. XIII.

¹⁰² Appellant’s Reply at 7-8 (quoting Mil. R. Evid. 304(a)(1)(A)); Appellant’s Br. at 25-27.

¹⁰³ *Downs*, slip op. at 8.

¹⁰⁴ Fla Sta. §§ 934.02, 934.03 (2024).

¹⁰⁵ *Guilder*, 899 So. 2d at 418 (quoting *Tsavaris*, 394 So. 2d at 422 n.5.).

1. The vigilantes “intercepted” the contents of both electronic and oral communications without Appellant’s consent—in violation of Florida law.¹⁰⁶
2. The vigilantes then used those illegally obtained communications to influence statements from Appellant—in violation of Florida law.¹⁰⁷
3. Those statements were recorded by the vigilantes without Appellant’s consent—in violation of Florida law.¹⁰⁸
4. Then the vigilantes turned over all the illegally obtained communications and recordings to NCIS—also in violation of Florida law.¹⁰⁹

The vigilante’s illegally obtained communications were the basis of all other evidence NCIS obtained. NCIS’s interrogation would not have occurred *but for* the parking lot interrogation and the vigilante’s unlawful actions.¹¹⁰ Moreover,

¹⁰⁶ Fla. Sta. §§ 934.03(1), (1)(a), (2)(d) (2024) (“[A]ny person who [i]ntentionally intercepts . . . any wire, oral, or electronic communication . . . shall be punished as provided . . . [unless] all of the parties to the communication have given prior consent to such interception.”); *id.* § 934.02(3) (2024) (“‘Intercept’ means the aural or other acquisition of the contents of *any* wire, electronic, or oral communication through the use of *any* electronic, mechanical, or other device.”).

¹⁰⁷ Fla. Sta. §§ 934.03(1), (1)(d), (2)(d) (2024) (“[A]ny person who [i]ntentionally uses . . . the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided . . . [unless] all of the parties to the communication have given prior consent to such interception.”).

¹⁰⁸ Fla. Sta. §§ 934.03(1), (1)(a), (2)(d) (2024).

¹⁰⁹ Fla. Sta. §§ 934.03(1), (1)(c), (2)(d) (2024) (“[A]ny person who [i]ntentionally discloses . . . to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; shall be punished as provided . . . [unless] all of the parties to the communication have given prior consent to such interception.”).

¹¹⁰ R. at 108, 762.

during the interview itself, NCIS influenced Appellant with the threat of “burdening” him with a review of the materials the vigilantes illegally obtained.¹¹¹ Absent those illegally obtained materials, NCIS would have neither knowledge of this case nor any basis to influence a statement or compliance from Appellant.

The lower court’s failure to address this issue leaves a critical question unanswered: whether statements obtained in violation of the governing State law are “obtained . . . through the use of . . . unlawful influence, or unlawful inducement.”¹¹² Accordingly, this case presents a question of law that this Court has not, but should, answer.¹¹³

VI

For an attempt charged under Article 80, UCMJ, the substantial step must firmly indicate the specific criminal intent. Accordingly, extrinsic evidence of other acts should not be permitted to prove that specific intent.

Despite defense objection, the Government used extrinsic evidence of other acts to prove the specific intent of an attempt under Article 80, UCMJ.¹¹⁴ The

¹¹¹ R. at 882.

¹¹² Mil. R. Evid. 304(a)(1)(A).

¹¹³ C.A.A.F. Rule 21(b)(5)(A).

¹¹⁴ Appellate Ex. XV.

lower court affirmed the military judge’s decision to admit such evidence for this purpose.¹¹⁵

“The crime of ‘attempt’ requires that the perpetrator do some act, with the specific intent to commit an offense under the UCMJ, that is ‘a substantial step’ toward accomplishing that offense – ‘some overt act, beyond mere preparation.’”¹¹⁶ “[T]he substantial step must ‘unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances.’”¹¹⁷ “The *act* must be one that indicates ‘the firmness’ of the perpetrator’s resolve to commit the crime.”¹¹⁸ The logical conclusion is, for the inchoate crime of attempt, a substantial step must evince the specific intent. Indeed, if specific intent is proved through extrinsic evidence of other acts, there is no basis to believe that *the overt act* indicated “‘the firmness’ of the perpetrator’s resolve to commit the crime.”¹¹⁹ Consequently, the conviction is based on mere propensity evidence of the accused’s prior behavior.

¹¹⁵ *Downs*, slip op. at 12.

¹¹⁶ *United States v. Jones*, 37 M.J. 459, 461 (C.A.A.F. 1993) (quoting Art. 80, UCMJ, 10 U.S.C. § 880).

¹¹⁷ *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (quoting *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007)).

¹¹⁸ *Jones*, 37 M.J. at 461 (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.A.A.F. 1993)) (emphasis added).

¹¹⁹ *Jones*, 37 M.J. at 461 (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.A.A.F. 1993)) (emphasis added).

So too here. Appellant was convicted of an attempt that was proven through extrinsic acts. The *res gestae* of the charged substantial step—traveling to meet “Kelsey” to see a movie—was insufficient to prove specific criminal intent. To compensate for that fact, the Government introduced extrinsic evidence of other conversations about children to prove *specific* intent of the charged attempt.¹²⁰

The Government must prove beyond a reasonable doubt that the Accused had the specific intent to penetrate “Kelsey’s” vulva with his penis when he traveled to meet her. This conversation about wanting to have sex with a 15-year-old child, including repeated requests for the child to be brought to him during the same timeframe as the charged offense, is highly probative of that intent.¹²¹

While these conversations may be highly probative of propensity or even motive, they have no bearing on whether traveling to see a movie firmly indicated specific criminal intent. Indeed, the Government’s reliance on extrinsic evidence is a tacit admission that the substantial step itself could not prove specific intent. Ultimately, the members returned a general verdict after viewing and considering the extrinsic evidence.¹²² Therefore, there is no basis to believe that the members found that *the overt act* itself sufficiently indicated “‘the firmness’ of the perpetrator’s resolve to commit the crime.”¹²³

¹²⁰ Appellate Ex. XV.

¹²¹ *Id.* at 3.

¹²² Appellate Ex. LXXX at 1.

¹²³ *Jones*, 37 M.J. at 461 (quoting *United States v. Schoof*, 37 M.J. 96, 103 (C.A.A.F. 1993)) (emphasis added).

The case law on attempt-based offenses is undeveloped on the question of what is meant by “indicates ‘the firmness’ of [a] perpetrator’s resolve to commit [a] crime.”¹²⁴ This Court has yet to determine whether “firmness of resolve” has the same constructive meaning as “specific intent” or if it describes some other undefined standard. Further, Appellant is not aware of any cases where this Court has addressed whether extrinsic evidence of other acts may be used to prove firmness of criminal resolve for a specific act charged as a substantial step. Accordingly, this Court has not, but should, settle these questions of law.¹²⁵

VII

**Traveling away from the intended location of a crime,
with the specific intent to engage in a *lawful* activity,
does not constitute a substantial step towards an
attempted crime under Article 80, UCMJ.**

Appellant was convicted of an attempted sexual assault of “Kelsey” for traveling to meet her at a movie theatre where he had plans to see a movie. On appeal, Appellant asserted that this conviction was factually insufficient because the charged travel was a mere preparatory step, but the lower court affirmed the conviction.¹²⁶

¹²⁴ *Id.*

¹²⁵ C.A.A.F. Rule 21(b)(5)(A).

¹²⁶ *Downs*, slip op. at 13, 18.

Case law establishes that travel to the *intended location* of a sexual offense with specific sexual intent *for that location* is a substantial step towards an attempted sexual offense.¹²⁷ However, there is lack of case law addressing whether it is a substantial step to travel to a location—that is *not* the intended location of an offense—with specific intent to engage in a *lawful* act.

“The distinction between preparation and attempt has proven difficult for courts and scholars alike.”¹²⁸ However, the Manual for Courts-Martial provides the following demonstrative: “a purchase of matches *with the intent to burn a haystack* is not an attempt to commit arson.”¹²⁹ Even when done *with criminal intent*, the lawful act of purchasing matches does not rise to the level of a substantial step. Logically, traveling to purchase matches—even with criminal intent—similarly does not rise to the level of a substantial step. The facts of this case align with this premise.

The Government charged Appellant with “attempt[ing] to commit a sexual act upon ‘Kelsey’” by “travelling to meet ‘Kelsey’ for the purpose of committing

¹²⁷ See *United States v. Hamby*, 2018 CCA LEXIS 411 (N-M. Ct. Crim. App. Aug. 28, 2018); *United States v. Beltran*, 2017 CCA LEXIS 96 (N-M. Ct. Crim. App. Feb. 14, 2017); *United States v. Grina*, 2018 CCA LEXIS 61, at *8 (N-M. Ct. Crim. App. Feb. 8, 2018); *United States v. Keeter*, 2018 CCA LEXIS 474, at *3 (N-M. Ct. Crim. App. Oct. 3, 2018).

¹²⁸ *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

¹²⁹ MCM, pt. IV, para. 4.c.(2) (2024) (emphasis added).

said sexual act.”¹³⁰ However, the evidence proved Appellant traveled to meet “Kelsey” at a movie theatre for the purpose of seeing a movie with her. He pre-ordered tickets and popcorn.¹³¹ The theatre was *forty-five-minutes away* from the intended location of Appellant’s speculative offense—his home.¹³² The Government even conceded this fact in its pre-trial filings and closing argument.¹³³ Regardless of his ultimate intent once back home, seeing a movie with a child is a legal activity—no matter how unseemly it may be under these circumstances. Accordingly, Appellant’s travel was akin to travel to purchase matches. Even though it was done with criminal intent, it was travel to engage in a lawful act—away from the intended location of the charged crime. Consequently, it was not a substantial step.

Appellant is aware of no case in which mere travel, to a place where no crime is intended, with the purpose of engaging in a lawful activity, was held to be a substantial step towards an attempted crime. Accordingly, this case presents a question of law that this Court has not, but should, answer.¹³⁴

¹³⁰ Charge Sheet.

¹³¹ Pros. Ex. 3 at 95, 100.

¹³² *Id.* at 99.

¹³³ Appellate Ex. XII at 3 (“During his Whisper conversation with ‘Kelsey,’ the Accused proposed bringing her to his house. . . . he was preparing to bring ‘Kelsey’ to his house with the intent engage [sic] in sexual activity with her.”); R. at 1067 (“Snacks for later. . . . for when he took her home and had sex with her.”).

¹³⁴ C.A.A.F. Rule 21(b)(5)(A).

Conclusion

This case presents multiple issues of first impression and statutory construction that are best suited for disposition by this Court. Consequently, Appellant respectfully requests this Court grant review to provide much needed guidance to the field.

Respectfully submitted,

//s//

Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

Appendix

A. *United States v. Downs*, No. 202500109, slip op. (N-M. Ct. Crim. App. May 27, 2026).

Certificate of Compliance

This brief complies with the type-volume limitations of Rule 21 and 37 because it contains 6,445 words, and it has been prepared in 14-point, Times New Roman font.

//s//

Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division (Code 46), at DACCode46@navy.mil and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity (Code 40), at Joshua.D.Ricafrente.civ@us.navy.mil on August 14, 2026.

//s//

Jesse B. Neumann
LT, JAGC, USN
Appellate Defense Counsel
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7087
jesse.neumann2.mil@us.navy.mil
CAAF Bar No. 37933

This opinion is subject to administrative correction before final disposition.

United States Navy-Marine Corps
Court of Criminal Appeals

Before
KISOR, GANNON, and KORN
Appellate Military Judges

UNITED STATES
Appellee

v.

Aron B. DOWNS
Gunner's Mate First Class Petty Officer (E-6), U.S. Navy
Appellant

No. 202500109

Decided: 27 May 2026

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Kimberly J. Kelly

Sentence adjudged 1 November 2024 by a general court-martial tried at Naval Air Station Pensacola, Florida and Naval Air Station Jacksonville, Florida. Sentence in the Entry of Judgment: reduction to E-1, confinement for 18 years and 6 months, and a dishonorable discharge.

For Appellant:
Lieutenant Jesse B. Neumann, JAGC, USN

For Appellee:
Lieutenant Commander Philip J. Corrigan, JAGC, USN (argued)
Lieutenant K. Matthew Parker, JAGC, USN (on brief)

Judge KORN delivered the opinion of the Court, in which Senior Judge KISOR and Judge GANNON joined.

**This opinion does not serve as binding precedent, but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedure 30.2.**

KORN, Judge:

A general court-martial composed of members convicted Appellant, contrary to his pleas, of one specification of attempted sexual assault of a child, one specification of attempted sexual abuse of a child by intentionally communicating indecent language, one specification of distributing child pornography, and one specification of viewing child pornography, in violation of Articles 80 and 134, Uniform Code of Military Justice (UCMJ).¹ Appellant pleaded guilty to three specifications of communicating indecent language, in violation of Article 134. The military judge sentenced Appellant to reduction to E-1, confinement for 18 years and 6 months, and a dishonorable discharge.

Appellant raises six assignments of error (AOE), which we renumber as follows:

I. Whether the military judge erred by (1) ruling that HN Bravo was not required to administer Article 31(b) warnings and (2) admitting evidence derived from Appellant’s unwarned statements to HN Bravo.

II. Whether the military judge erred in permitting the prior Whisper chats to be used as evidence of intent under Mil. R. Evid. 404(b).

III. Whether the evidence is factually sufficient to prove that the act of “traveling to meet ‘Kelsey’” was a substantial step taken with the specific intent of sexually assaulting a fictitious minor.

¹ 10 U.S.C. §§ 880, 934.

IV. Whether the military judge erred by admitting impermissible sentencing evidence.

V. Whether Appellant's sentence is plainly unreasonable.

VI. Whether under *United States v. Palik*, trial defense counsel was ineffective for failing to move for production of the NCIS interrogation under R.C.M. 914.²

We find no prejudicial error and affirm the findings and sentence.

I. BACKGROUND

The series of events that led to this appeal began when Appellant, a married 29-year-old with a newborn child, responded to a post on the messaging application “Whisper” which read “I don’t wana go to school tomorrow.”³ Shortly after Appellant responded, the poster identified herself as “Kelsey,” a 12-year-old girl in sixth grade.

Appellant sent a series of sexually explicit messages to “Kelsey,” and proposed meeting in person to engage in sexual activity. Unbeknownst to Appellant, he was actually corresponding with Mr. Sierra,⁴ an adult man in Indiana who was posing as “Kelsey” in order to “catch and expose online child predators.”⁵

Because Appellant was in Jacksonville, Florida, Mr. Sierra enlisted a Florida-based woman, Ms. Delta, to confront Appellant when he tried to meet “Kelsey.” Ms. Delta ran “Protect the Innocent” (PTI), where she worked to expose would-be sex offenders, filmed the encounters, and posted them online. Ultimately Appellant and “Kelsey” agreed to meet at a movie theater in Jackson-

² It is clear from the record that the portion of the interrogation that Appellant now claims is missing never actually existed. Since Appellant’s argument relies on a recording that never was, defense counsel was not deficient for failing to seek it, and we see no need to further analyze this issue. See *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *United States v. Murray*, No. 2024-04, 2024 CCA LEXIS 280, *10 (A.F. Ct. Crim. App. July 12, 2024) (determining that R.C.M. 914 does not apply to a recording that never existed).

³ Pros. Ex. 2 at 1.

⁴ All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

⁵ R. at 640-41.

ville, after which they planned to spend the night at Appellant's house. Appellant told "Kelsey" he would get condoms, asking her, "You want sex tonight don't you?"⁶

Ms. Delta went to the movie theater to confront Appellant. She was accompanied by her husband, Hospital Corpsman (HN) Bravo, who filmed the encounter. When the pair approached Appellant in the movie theater lobby, he ran out of the theater and into the parking lot. Ms. Delta and HN Bravo chased him, catching up to him near his car. While HN Bravo recorded the interaction, Ms. Delta spoke with Appellant about his chats with "Kelsey" and what he intended to do once he met her.

Appellant initially claimed he only intended to watch a movie and planned to tell "Kelsey" he'd changed his mind about engaging in sexual activity with her. However, he admitted to sending the sexually explicit messages, repeatedly said that he had a problem and needed help, and ultimately admitted that he had purchased a box of condoms and brought them with him to the movie theater. Ms. Delta then walked away to call local Clay County law enforcement, who came to the parking lot and spoke with Appellant. In Ms. Delta's absence, HN Bravo continued the conversation with Appellant.

Ms. Delta later reported Appellant's actions to the Naval Criminal Investigative Service (NCIS), which opened an investigation and interviewed Appellant. Appellant spoke about his interactions with "Kelsey," and further told the agents that they would find images of child pornography on his phone, and that he had exchanged child pornography with other Whisper users.

A subsequent forensic examination of Appellant's phone revealed multiple Whisper chats where Appellant had discussions about engaging in sexual activity with other Whisper users' minor family members, and where he discussed his sexual interest in both his own daughter and his wife's 12-year-old sister. At trial, the Government introduced one of those chats to demonstrate Appellant's intent to engage in sexual activity with "Kelsey."⁷ That chat included discussions where Appellant asked another Whisper user to bring their 15-year-old daughter to Florida so Appellant could have sex with her. This conversation occurred contemporaneously with Appellant's chat with "Kelsey." The forensic examination also found Whisper chats where Appellant exchanged child pornography with other Whisper users. The forensic examination further revealed more than 700 images of child pornography on Appellant's phone.

⁶ Pros. Ex. 3 at 110.

⁷ The military judge granted Appellant's motion to exclude two other chats.

During the presentencing hearing following Appellant’s conviction, his wife presented a victim impact statement pursuant to Rule for Courts-Martial (R.C.M.) 1001(c), describing how she was impacted by Appellant’s crimes. The military judge determined that Appellant’s wife qualified as a victim under R.C.M. 1001(c) because she “has suffered certainly emotional trauma directly as a result of . . . [Appellant’s] offense.”⁸ The military judge then ruled that she would consider some of the victim impact statement, but would not consider portions of it that were not “directly resulting from [Appellant’s] offense.”⁹

Defense presented an expert witness during presentencing who testified that Appellant had a “low risk of future recidivism.” To rebut this evidence, the Government called an expert witness in digital forensics to offer Whisper chats that the military judge had precluded at trial on the merits. The military judge admitted this evidence, ruling that evidence of Appellant engaging in these other chats rebutted the conclusions of the recidivism risk assessment.¹⁰

II. DISCUSSION

A. The military judge correctly ruled that HN Bravo was not required to administer Article 31(b) warnings.

1. Standard of Review

We review a military judge’s ruling on a motion to suppress for an abuse of discretion.¹¹ It is an abuse of discretion when the military judge (1) predicates a ruling on findings of fact that are not supported by the evidence in the record; (2) uses incorrect legal principles; (3) applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) fails to consider important facts.¹² When a motion to suppress is based on improper rights warnings, we apply a clearly erroneous standard to the military judge’s findings of fact, and review the conclusions of law de novo.¹³

2. Analysis

⁸ R. at 1154.

⁹ R. at 1155.

¹⁰ R. at 1161-62.

¹¹ *United States v. Ramos*, 76 M.J. 372, 375 (C.A.A.F. 2017).

¹² *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

¹³ *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (quoting *United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000)).

An involuntary statement, or evidence derived therefrom, is generally inadmissible if an accused makes a timely motion to suppress.¹⁴ An “involuntary statement” is a statement obtained in violation of the Fifth Amendment, Article 31, UCMJ, or through coercion, unlawful influence, or unlawful inducement.¹⁵

“Article 31(b), UCMJ, warnings are required when (1) a person subject to the UCMJ, (2) interrogates or requests any statement, (3) from an accused or person suspected of an offense, and (4) the statements regard the offense of which the person questioned is accused or suspected.”¹⁶ “[T]he questioner’s status and the military context in which the questioning occurs” contribute to whether there is an interrogation or request for a statement from a person suspected of an offense.¹⁷

The purpose behind Article 31(b) is “to avoid impairment of the constitutional guarantee against compulsory self-incrimination. Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command.”¹⁸ Article 31(b) warnings are not required in situations involving undercover officials or informants—even ones who are subject to the UCMJ—“[b]ecause undercover officials and informants do not usually place the accused in a position where a reasonable person in the accused’s position would feel compelled to reply to questions.”¹⁹

When reviewing whether Article 31(b) warnings were required, courts look to: (1) the scope of the questioner’s authority as an agent of the military—focusing primarily on his “personal motivation;” and (2) whether a reasonable person in the appellant’s position could consider the questioner to be acting in an official law enforcement or disciplinary capacity.²⁰ The Court of Appeals for the Armed Forces (CAAF) determined that rights warnings are required if “the

¹⁴ Mil. R. Evid. 304(a).

¹⁵ Mil. R. Evid. 304(a)(1)(A). Appellant argues that his statements to Ms. Delta and HN Bravo were involuntary both because of the lack of Article 31(b) warnings and because the statements were obtained through coercion, unlawful influence or unlawful inducement. We disagree with both of Appellant’s contentions but find that only the issue of whether Article 31(b) warnings were required merits discussion.

¹⁶ *Jones*, 73 M.J. at 361 (cleaned up).

¹⁷ *See United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006).

¹⁸ *United States v. Gibson*, 14 C.M.R. 164, 170 (C.M.A. 1954).

¹⁹ *Jones*, 73 M.J. at 361 n.5.

²⁰ *Id.* at 362–63.

person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry . . . as opposed to having a personal motivation for the inquiry.”²¹

Appellant argues that HN Bravo was required to provide Article 31(b) warnings to Appellant because he questioned Appellant in support of law enforcement purposes.²² We disagree.

The military judge made the following findings of fact, all of which are supported by the record and are not clearly erroneous: HN Bravo worked in the medical field at Naval Hospital Jacksonville, and his military duties were unrelated to law enforcement; prior to confronting Appellant, Ms. Delta and HN Bravo did not coordinate with civilian law enforcement or with any military unit; no law enforcement personnel—civilian or military—were aware of Mr. Sierra’s or Ms. Delta’s interactions with Appellant until after the confrontation at the movie theater; and prior to reporting Appellant following their confrontation, PTI never interacted with either NCIS or Clay County law enforcement.²³ HN Bravo’s motivation for speaking with Appellant was therefore personal, as he was acting not in support of law enforcement, but as the cameraman for PTI, an organization run by his wife and focused on online content creation.

Appellant could not have reasonably believed HN Bravo was acting in a law enforcement or disciplinary capacity because, as the military judge found, he “was not dressed in uniform,” “did not identify himself to the accused as a servicemember,” and did not “hold [himself] out as” law enforcement.²⁴ It is clear from Appellant’s statements that he did not believe either HN Bravo or Ms. Delta were affiliated with either law enforcement or the military.²⁵ In fact, Appellant specifically told NCIS that he knew that HN Bravo and Ms. Delta were not law enforcement.²⁶ Therefore, a reasonable person in Appellant’s position would not believe HN Bravo and Ms. Delta were acting in an official law enforcement or disciplinary capacity, and would not feel compelled to reply to their questions.

²¹ *Id.* at 361 (cleaned up).

²² Appellant’s Brief at 22.

²³ Appellate Ex. XLI at 3-4.

²⁴ Appellate Ex. XLI at 28; R. at 31–32.

²⁵ Appellate Ex. LXV at 25; Appellate Ex. XXVIII.

²⁶ Appellate Ex. XLI at 15; Appellate Ex. XXVIII.

HN Bravo was not required to issue Article 31(b) warnings because he was not acting in a law enforcement role and no reasonable person in Appellant's position would have believed HN Bravo was acting in a law enforcement role. The military judge therefore did not abuse her discretion in admitting Appellant's statements to Ms. Delta and HN Bravo.²⁷

B. The military judge did not err in permitting an uncharged Whisper chat to be used as evidence of Appellant's intent under Mil. R. Evid. 404(b).

1. Standard of Review

Rulings to admit evidence under Mil. R. Evid. 404(b) are reviewed using the same abuse of discretion standard that we applied in the previous section.

2. Analysis

Rule 404(b) "is a rule of inclusion" that allows the admission of evidence of a crime, wrong or other act for purposes other than propensity, such as proving motive or intent.²⁸ Rule 404(b) prohibits the admission of evidence of a crime, wrong or other act to prove an accused's character or show that on a particular occasion an accused acted in accordance with that character.²⁹ Evidence of a crime, wrong or other act offered under Mil. R. Evid. 404(b) must satisfy the *Reynolds* test, which allows the admission of evidence when: (1) it reasonably supports a finding that the accused committed prior crimes, wrongs, or acts; (2) it makes a fact of consequence more or less probable; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice.³⁰

The military judge admitted one of the uncharged Whisper chats to demonstrate Appellant's intent to sexually assault "Kelsey," and precluded the Government from admitting two other chats. In the admitted chat, Appellant graphically expressed interest in meeting with the 15-year-old daughter of another Whisper user in order to engage in sexual activity. Appellant argues that the military judge abused her discretion in admitting this evidence.

²⁷ Because we conclude that Appellant's statements to Ms. Delta and HN Bravo were voluntary and were properly admitted, we need not consider whether any additional evidence in Appellant's case was derived from those statements.

²⁸ Mil. R. Evid. 404(b)(2); *United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000).

²⁹ Mil. R. Evid. 404(b)(1).

³⁰ See *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

Appellant does not challenge the military judge's finding that the uncharged Whisper chat met the first prong of the *Reynolds* test.³¹ As to the second prong, Appellant argues that the chat “prove[s] nothing more than sexual fantasy or predisposition. [It] do[es] not prove an intent to travel to enact those fantasies.”³² We disagree. Nothing in the chat suggests the conversation is fantasy, and Appellant never questions the veracity of the other user's statements. Instead, Appellant asks the child's location and repeatedly asks the other Whisper user to bring the child to Florida to meet with Appellant for the purpose of engaging in sexual activity.

This conversation occurred contemporaneously with Appellant's conversations with “Kelsey,” which involved similar discussions about meeting to engage in sexual activity. In addition to chatting with the Whisper user, Appellant exchanged texts with the 15-year-old,³³ sent her a photo of himself,³⁴ and expressed interest in meeting with her. He then sent copies of those texts to her parent as part of Appellant's ongoing efforts to arrange a meeting with the child, and Appellant continued to request a meeting until the day before he was apprehended trying to meet “Kelsey.”

We agree with the military judge that “the evidence supports a conclusion that a singular intent to meet with a minor for the purpose of engaging in sexual activity motivated [Appellant's] conversations both in the uncharged Whisper chats and with ‘Kelsey.’”³⁵ We further agree with the military judge that “the difference in the charged and uncharged conduct [traveling to meet Kelsey and asking the Whisper user to come to Florida] was more a question of logistical obstacles than dissimilar intent.”³⁶ The military judge therefore correctly found that the uncharged Whisper chat satisfied the second prong of the *Reynolds* test.

³¹ Appellant's Brief at 36.

³² Appellant's Brief at 38.

³³ The people with whom Appellant was chatting were not identified, so law enforcement was unable to confirm that Appellant was actually chatting with a child, but it is clear from the chat itself that he believed he was chatting with a 15-year-old girl and her parent.

³⁴ It appears from the context of the chat that Appellant sent a photo of his exposed penis to the 15-year-old, although the image was not recovered by the forensic examination.

³⁵ App. Ex. LXVII at 5.

³⁶ App. Ex. LXVII at 5.

Once evidence satisfies the first two *Reynolds* factors, the military judge must evaluate the third factor by applying the Mil. R. Evid. 403 balancing test to determine whether the probative value of the evidence “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.”³⁷ The test considers the non-exhaustive factors established in *United States v. Berry*: (1) strength of proof of the prior act; (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts; (8) presence or lack of intervening circumstances; and (9) the relationship between the parties.³⁸

We find that all of the *Berry* factors heavily favored admissibility. There was no less prejudicial evidence available to so clearly demonstrate Appellant’s intent. The chat at issue unmistakably demonstrated Appellant trying to arrange sexual activity with a child on the same chat application where he corresponded with “Kelsey.” The chat was frequent and took place during the same time frame Appellant was arranging to meet “Kelsey” in order to engage in sexual activity. The presentation of this evidence was straightforward, took little time, and did not distract the members.

Appellant did not argue at trial—nor does he argue before this Court—that he did not engage in the chat in question, which was singularly focused on sex with children. Instead, Appellant argues that “the probative value of the Whisper chats is equivocal at best and is substantially outweighed by the unfair prejudice of presenting propensity evidence of Appellant’s private sexual fantasies.”³⁹ Appellant further argues that the minimal probative value of the chat was outweighed by the risk of confusing the issues and misleading the members, as “The Whisper chats were private conversations of a sexual nature. . . . [and] [t]here is no basis to assert that the Whisper chats were criminal or wrongful acts rather than constitutionally protected conduct. . . . [and] reaching this determination would have necessitated a trial within [a] trial, thereby confusing the issue and violating [Mil. R. Evid.] 403.”⁴⁰ Appellant further describes the Whisper chat as “sexual banter.”⁴¹

³⁷ Mil. R. Evid. 403; *United States v. Solomon*, 72 M.J. 176, 180 (C.A.A.F. 2013).

³⁸ *United States v. Berry*, 61 M.J. 91, 95 (C.A.A.F. 2005).

³⁹ Appellant’s Brief at 40.

⁴⁰ Appellant’s Brief at 41-42.

⁴¹ Appellant’s Reply at 10.

We disagree with Appellant’s contention that because this chat might not be “criminal or wrongful” it therefore had limited probative value and created confusion and a waste of the members’ time. Initially, Appellant ignores the third category under Mil. R. Evid. 404(b), which allows for the admission of evidence of a crime, wrong or *act*.⁴² Therefore, it matters not whether Appellant’s discussion with another Whisper user about his interest in having sex with minor children was overtly criminal, as Mil. R. Evid. 404(b) is not limited to criminal acts.⁴³ Because Mil. R. Evid. 404(b) allows for the admission of other non-criminal acts, the arguable lack of obvious criminality would neither confuse the members nor require them to waste time judging the potential criminality, as Appellant suggests. The military judge properly instructed the members that they could consider this evidence for its tendency to demonstrate

⁴² Mil. R. Evid. 404(b) (emphasis added). Appellant makes a baseless argument that Mil. R. Evid. 404(b) requires the “other act” to be “wrongful,” because “the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated.” Appellant’s Brief at 41. But despite the wealth of case law analyzing both Mil. R. Evid. 404(b) and its federal counterpart, Appellant fails to cite a single case to support this imaginative theory. This Court, however, found countless cases, both military and federal, clearly demonstrating that Appellant’s argument has been robustly denied by every court to consider the issue. *See United States v. Franklin*, 35 M.J. 311, 318 (C.A.A.F. 1992) (finding that an act offered under Mil. R. Evid. 404(b) need not be a crime to be logically relevant); *United States v. Reeder*, No. NMCCA 9800702, 2005 CCA LEXIS 211, at *6 (N-M Ct. Crim. App. June 30, 2005) (unpublished) (finding that Mil R. Evid. 404(b) encompasses innocuous acts if they are being tendered for the purposes set forth in the text of the rule); *United States v. Scott*, 677 F.3d 72, 78 (2d Cir. 2012) (determining that “Rule 404(b) is not limited to evidence of crimes or wrongs. By its very terms, Rule 404(b) addresses other crimes, wrongs, or *acts*. Nothing about these words implies that the ‘other . . . acts’ to which Rule 404(b) refers must be bad. Indeed, to read the Rule as such ‘violate[s] the cardinal principle of statutory interpretation that courts must ‘give effect, if possible, to every clause and word of a statute.’”) (cleaned up); *See also United States v. Dairo*, 75 M.J. 867, 872 (A. Ct. Crim. App. 2016); *United States v. Devin*, 918 F.2d 280, 286 (1st Cir. 1990); *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988); *United States v. Kendall*, 766 F.2d 1426, 1436 n.5 (10th Cir. 1985); *United States v. Terebecki*, 692 F.2d 1345, 1348 n.2 (11th Cir. 1982); *United States v. Miller*, 573 F.2d 388, 392 (7th Cir. 1978); *United States v. Cooper*, 577 F.2d 1079, 1087-88 (6th Cir. 1978); *United States v. Beechum*, 582 F.2d 898, 901 n.1 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, (1979).

⁴³ Because the issue is not before us, we make no finding regarding whether the language in the uncharged Whisper chat was criminal. However, the chat contained similar explicit discussions of sex with children as the chats for which Appellant pleaded guilty to communicating indecent language, detracting from Appellant’s argument that “[t]here is no basis to assert that the Whisper chats were criminal or wrongful acts rather than constitutionally protected conduct.” Appellant’s Brief at 41.

Appellant’s specific intent to commit the offense of sexual assault of a child against “Kelsey,” and for no other purpose,⁴⁴ further mitigating the danger of unfair prejudice, confusing the issues, and misleading the members. The military judge therefore correctly found that the uncharged Whisper chat satisfied the third prong of the *Reynolds* test.

The military judge properly applied all three prongs of the *Reynolds* test to the evidence at issue. We therefore find that she did not abuse her discretion by admitting a Whisper chat where Appellant expressed interest in meeting a minor to engage in sexual activity.

C. The evidence is factually sufficient to prove that the act of “traveling to meet ‘Kelsey’” was a substantial step taken with the specific intent of sexually assaulting a minor.

1. Standard of Review

This “Court may consider whether a finding of guilty is correct in fact upon request of an appellant who makes a specific showing of a deficiency in proof.”⁴⁵ If an appellant makes such a showing, this “Court may weigh the evidence and determine controverted questions of fact,” providing “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence.”⁴⁶ If this Court is “clearly convinced that the finding of guilty was against the weight of the evidence,” we “may dismiss, set aside, or modify the finding, or affirm a lesser finding.”⁴⁷

2. Analysis

An attempt offense under Article 80, UCMJ, requires “a specific intent to commit the offense, accompanied by an overt act which directly tends to accomplish the unlawful purpose.”⁴⁸ The overt act must go beyond mere preparatory steps and be “a direct movement toward the commission of the offense.”⁴⁹ The overt act must be a substantial step toward the commission of the crime,

⁴⁴ App. Ex. LXXXV at 15.

⁴⁵ Art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012) (quoting *Manual for Courts-Martial (MCM)*, *United States*, (MCM 2008 ed.) pt. IV, para. 4.a.(a), c.(1)-(2)).

⁴⁹ *Id.*

and “must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.”⁵⁰

Appellant argues that the evidence is factually insufficient to prove that the act of traveling to meet “Kelsey” was a substantial step taken with the specific intent of sexually assaulting her.⁵¹ We must first consider whether Appellant has made a specific showing of a deficiency in proof.⁵² We find that by raising whether Appellant’s driving to the movie theater was merely a preparatory step, and by arguing that the Government failed to establish that Appellant intended to sexually assault “Kelsey,” Appellant has made a specific showing of a deficiency in proof to initiate our factual sufficiency review.

We are wholly unconvinced by Appellant’s identified weaknesses in the evidence. This Court’s case law demonstrates that traveling to meet a purported child, paired with explicit conversations about the acts they would engage in, is sufficient evidence to establish intent and constitute a substantial step towards sexually assaulting that child.⁵³ That is precisely what occurred in Appellant’s case. Appellant’s travelling to meet “Kelsey” with a box of condoms after arranging for her to spend the night at his house following the movie, paired with the explicit chats where he discussed the sexual acts he planned to engage in with her, constituted a substantial step taken with the specific intent to sexually assault “Kelsey.”

Appellant engaged in a series of sexually explicit conversations with someone he believed to be 12 years old. He arranged to meet her in order to engage in sexual activity, he drove to the arranged meeting place with a box of condoms, and it is evident that he did so with the specific intent to have sex with her. We are therefore not clearly convinced that the finding of guilty was against the weight of the evidence.

⁵⁰ See *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (cleaned up).

⁵¹ Appellant’s Brief at 43.

⁵² Art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

⁵³ *United States v. Beltran*, No. 201500270, 2017 CCA LEXIS 96, at *13 (N-M. Ct. Crim. App. Feb. 14, 2017); *United States v. Grina*, No. 201700008, 2018 CCA LEXIS 61, at *9, (N-M. Ct. Crim. App. Feb. 8, 2018); *United States v. Keeter*, No. 201700119, 2018 CCA LEXIS 474, at *7-8 (N-M Ct. Crim. App. Oct. 3, 2018); See also *Winckelmann*, 70 M.J. at 408 (finding no substantial step toward enticement when there was no travel, no plan to meet, and no course of conduct equating to grooming behavior, but generally finding that traveling to meet a minor for sexual activity may constitute a substantial step in a prosecution for attempted sexual assault of a child).

D. The military judge did not abuse her discretion by admitting a victim impact statement from Appellant’s wife. Although the military judge erred by admitting extrinsic evidence of prior misconduct to rebut Appellant’s recidivism expert, Appellant suffered no prejudice.

1. Standard of Review

We review whether a military judge erroneously admitted evidence using the same abuse of discretion standard that we applied in previous sections.

2. Analysis

a. The military judge did not abuse her discretion by allowing Appellant’s wife to present a victim impact statement.

Congress granted the victim of an offense under the UCMJ the right to be reasonably heard during any sentencing hearing related to that offense.⁵⁴ The President authorized the victim to make an unsworn statement.⁵⁵ A “crime victim” is “an individual who has suffered direct emotional, physical, or pecuniary harm as the result of the commission of an offense of which the accused was found guilty.”⁵⁶

Unsworn victim statements are not evidence, but presentencing matters that may be presented to and considered by the military judge.⁵⁷ Although an unsworn victim statement is not subject to the military rules of evidence, a military judge is not powerless to restrict its contents; the military judge has an obligation to ensure that a victim’s unsworn statement comports with the parameters of victim impact or mitigation.⁵⁸

Appellant’s wife presented a victim impact statement pursuant to R.C.M. 1001(c), describing how she was impacted by Appellant’s crimes. The military judge determined that Appellant’s wife qualified as a victim under R.C.M. 1001(c) because she “has suffered certainly emotional trauma directly as a result of . . . [Appellant’s] offense.”⁵⁹ The military judge then ruled that she would

⁵⁴ *United States v. Edwards*, 82 M.J. 239, 245 (C.A.A.F. 2022).

⁵⁵ *Id.*

⁵⁶ R.C.M. 1001(c)(2)(A); Art. 6b, UCMJ, 10 U.S.C. § 806b.

⁵⁷ *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021).

⁵⁸ *See id.*

⁵⁹ R. at 1154.

consider some of the victim impact statement, but would not consider portions of it that were not “directly resulting from [Appellant’s] offense.”⁶⁰

Appellant pleaded guilty to three specifications of indecent language for conversations in which, among many comments demonstrating his sexual interest in children, he discussed his wife and sexually abusing her twelve-year-old sister and their own daughter, which his wife found “sickening and terrifying.”⁶¹ The military judge did not abuse her discretion in ruling Appellant’s wife suffered “emotional trauma” when she “learned that [Appellant] had engaged in indecent language which did talk about not only her daughter and her sister but also herself.”⁶²

Although the victim impact statement included additional information that arguably did not comport with the parameters of victim impact as defined by R.C.M. 1001(c), the military judge properly ruled that she would not consider portions of it that were not “directly resulting from [Appellant’s] offense.”⁶³ As a result, the military judge did not abuse her discretion in determining that Appellant’s wife was a victim and was authorized to present an unsworn statement pursuant to R.C.M. 1001(c).⁶⁴

b. Although the military judge abused her discretion in admitting extrinsic evidence of Appellant’s prior misconduct to rebut Appellant’s recidivism expert, Appellant suffered no prejudice.

During presentencing, Appellant called a forensic psychologist as an expert witness who testified that Appellant held a “low risk of future recidivism.”⁶⁵ The Government then called a digital forensic expert witness to introduce extrinsic evidence of uncharged Whisper chats⁶⁶ to rebut the conclusion that Appellant had a low risk of recidivism.⁶⁷ The military judge admitted the chats

⁶⁰ R. at 1155.

⁶¹ R. at 354–83; Pros. Ex. 16 at 1–4; Pros. Ex. 17 at 2, 4–5, 8, 12–22, 25–26.

⁶² R. 1155.

⁶³ R. 1155.

⁶⁴ Even if the military judge abused her discretion in making this determination, the error was harmless, as Appellant’s wife’s statement was of limited quality and did not substantially influence the adjudged sentence.

⁶⁵ R. at 1127.

⁶⁶ The chats at issue here were the two uncharged chats that the military judge precluded on the merits under Mil. R. Evid. 404(b).

⁶⁷ R. at 1158.

over Appellant’s objection, finding that they rebutted the opinion set forth in the risk assessment.⁶⁸

Appellant argues that the military judge erred by admitting his prior Whisper chats to rebut the expert opinion that he presented a low risk of recidivism. The Government concedes that the admission of this evidence was error but argues that it was harmless. We agree with the parties that the military judge abused her discretion by admitting extrinsic evidence of Appellant’s misconduct.⁶⁹ We therefore turn to the question of whether Appellant was prejudiced by the military judge’s error.

“A sentence . . . of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.”⁷⁰ If a military judge erroneously admits sentencing evidence, the test for prejudice is whether “the error substantially influenced the adjudged sentence.”⁷¹ In determining whether an error substantially influenced a sentence, courts consider (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.⁷²

The Government’s case against Appellant was extraordinarily strong, including Appellant’s sexually explicit chat with “Kelsey” and his trip to meet her, condoms in hand. It included explicit Whisper chats where he discussed his sexual interest in children and tried to arrange to have sex with a child, and further discussed sexually abusing his twelve-year-old sister-in-law and his own daughter. It further involved evidence that he both viewed and distributed child pornography. Appellant’s case, on the other hand, was exceptionally weak. Appellant presented testimony from his mother and the forensic psychologist, and he gave a brief unsworn statement where he apologized and stated he had been reading self-help books and speaking with a chaplain.

⁶⁸ R. at 1162.

⁶⁹ See *United States v. Clark*, 2004 CCA LEXIS 63, at *4 (N-M. Ct. Crim. App. Mar. 9, 2004) (finding that when an accused puts his rehabilitative potential in issue, prior instances of similar misconduct became relevant to test the basis of his witnesses’ opinions, but extrinsic evidence of that misconduct is not admissible to rebut an opinion as to an accused’s rehabilitative potential).

⁷⁰ Art. 59(a), UCMJ, 10 U.S.C. § 859(a) (2016).

⁷¹ *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (cleaned up).

⁷² *United States v. Hamilton*, 78 M.J. 335, 343 (C.A.A.F. 2019).

Turning to the materiality and quality of the improperly admitted Whisper chats, we conclude that although they are material because they involve similar conduct to that for which Appellant was convicted, they are not of significant quality. That limited quality is due primarily to the fact that they were largely cumulative with the various chats that were properly in evidence.⁷³ The improperly admitted chats were also of insignificant quality because of the sheer volume of admissible aggravating evidence against Appellant. The erroneously admitted evidence thus did not substantially influence the adjudged sentence and was therefore harmless.

E. Appellant’s sentence is not plainly unreasonable.

1. Standard of Review/Applicable Law

Congress amended Article 66, UCMJ, in the National Defense Authorization Act for Fiscal Year 2022, adjusting the lens through which courts of criminal appeals (CCAs) review sentencing.⁷⁴ This change permits CCAs to evaluate sentences for offenses occurring on or after 28 December 2023 to determine “whether the sentence is plainly unreasonable.”⁷⁵

The CAAF has not defined the “plainly unreasonable” standard for sentence appropriateness review. Although the Manual for Courts-Martial previously included a definition for “plainly unreasonable,” this definition was removed to allow “plainly unreasonable” to be interpreted according to its plain meaning for review under Article 66(e).⁷⁶

2. Analysis

While there are some variances in sentencing mandates between military and federal courts, the federal courts, in interpreting what is meant by “plainly unreasonable,” have clarified that Congress intends there to be a distinction between “unreasonable” and “plainly unreasonable.” Therefore, as the Fourth Circuit held in *United States v. Crudup*, determining whether a sentence is “plainly unreasonable” begins with an analysis of whether the sentence was

⁷³ See, e.g., *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (concluding that an error was harmless in part because the record was “replete” with similar admissible evidence).

⁷⁴ We acknowledge that Article 66, UCMJ “should be approved” review authority for consideration of sentences was removed for violations of the UCMJ offenses on or after 28 December 2023. See Nat’l Def. Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700-06 (2021).

⁷⁵ 10 U.S.C. § 866(e)(1)(D).

⁷⁶ See *MCM* (2024 ed.), app’x 15, Analysis of the Composition of the Manual, the Preamble, and the Rules for Courts-Martial at A15-29.

“unreasonable.”⁷⁷ “Unreasonable” is defined as “[n]ot guided by reason; irrational or capricious.”⁷⁸ If we determine the sentence was not “unreasonable,” then further analysis is unnecessary. Only if the sentence is determined to be “unreasonable” do we then examine whether it was “plainly” so. Consistent with the decisions of our superior court and that of federal courts, we define “plain” to mean “clear or obvious.”⁷⁹

Appellant, a 29-year-old married Sailor, engaged in a clandestine and sexually explicit conversation with someone he believed to be 12 years old. He then traveled to meet her in order to engage in sexual activity. He further viewed and distributed child pornography and participated in online chats where he engaged in highly sexualized discussions about sex with children, including his own infant child and his sister-in-law. Based on Appellant’s brazen and substantial misconduct, the sentence adjudged by the military judge was not unreasonable, and we therefore will not disturb it.

III. CONCLUSION

After careful consideration of the record, the briefs of appellate counsel, and the oral arguments held on 11 May 2025, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant’s substantial rights occurred.⁸⁰

The findings and sentence are **AFFIRMED**.

FOR THE COURT:



Mark K. Jamison
MARK K. JAMISON
Clerk of Court

⁷⁷ See *United States v. Crudup*, 461 F.3d 433, 438 (4th Cir. 2006).

⁷⁸ Black’s Law Dictionary (11th ed. 2019).

⁷⁹ See *United States v. Cole*, 84 M.J. 398, 404 (C.A.A.F. 2024) (quoting *United States v. Bodoh*, 78 M.J. 231, 236 (C.A.A.F. 2019); See also *Crudup*, 461 F.3d at 439.

⁸⁰ Articles 59 & 66, UCMJ.