THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	FINAL BRIEF ON BEHALF
Appellee/Cross-Appellant	)	OF THE UNITED STATES
	)	
v.	)	
	)	
Staff Sergeant (E-5)	)	USCA Dkt. No. 19-0119/AF
RALPH J. HYPPOLITE II	)	
Appellant/Cross-Appellee	)	Crim. App. Misc. Dkt. No. 39358

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee/Cross-Appellant* v. Staff Sergeant (E-5) RALPH J. HYPPOLITE II, USAF, *Appellant/Cross-Appellee.*	) FINAL BRIEF ON BEHALF) OF THE UNITED STATES)))) USCA Dkt. No. 19-0119/AF)) Crim. App. No. 39358)

TO THE HONORABLE, THE JUDGES OF THE COURT OF APPEALS
FOR THE ARMED FORCES

ISSUE PRESENTED

[IF THE MILITARY JUDGE ABUSED HIS DISCRETION,] WHETHER THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE REGARDING SPECIFICATIONS 1, 2, AND 3, AS A COMMON PLAN OR SCHEME FOR SPECIFICATIONS 4 AND 5 WAS HARMLESS.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case. On 28 February 2019, the United States cross-certified the underlying issue of whether

AFCCA erred when it found the military judge abused his discretion by ruling that the evidence regarding Specifications 1, 2, and 3 could be considered as evidence of a common plan scheme for Specifications 4 and 5. The brief on this issue will be submitted before 1 April 2019.

STATEMENT OF FACTS

Before trial, Appellant sought to "sever specifications 1-3 ('abusive sexual contact allegations') from specifications 4-5 ('[JD] allegations') of the charge" claiming "the acts alleged in specification 1-3 are not relevant to specification 4-5 for any purpose under M.R.E. 404(b) and 413." (JA at 584.) (parentheticals in original.) The United States opposed. (JA at 652.) The severance motion served as the vehicle by which the initial military judge (motions judge) made his M.R.E. 404(b) rulings. (JA at 702-03.) The motions judge admitted all the charged[1] specifications under M.R.E. 404(b) to show Appellant had a common plan or scheme "to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep." (JA at 695.)

The motions judge reached this conclusion after applying the three-part test from United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) and, with regard to the Mil. R. Evid. 403 portion of that test, he adhered to the guidance described in

[1] The motions judge also allowed an *uncharged* act against Mr. JA as evidence of Appellant's common plan and as propensity evidence. (JA at 703, 705.) However, this evidence was not introduced at trial.

United States v. Wright, 53 M.J. 476, 480 (C.A.A.F. 2000). (JA at 698, 702.) When evaluating the various specifications for commonalities, the motions judge relied on the analysis from United States v. Munoz, 32 M.J. 359 (C.M.A. 1991) and United States v. Johnson, 49 M.J. 467 (C.A.A.F. 1998) finding:

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

(JA at 695.)

In addition to finding this information probative, the motions judge put his Mil. R. Evid. 403 balancing test on the record stating:

> The danger of unfair prejudice is low. Since the evidence offered on the M.R.E. 404(b) evidence is the same as the evidence that will be offered to prove the specifications, the dangers of undue delay, waste of time, or needless presentation of cumulative evidence are negligible. The greatest risks posed by the offering of the charged allegations as M.R.E. 404(b) evidence are the dangers of confusion of the issues and misleading the members. The burden of proof in order to find the accused guilty of the specifications in question is beyond a reasonable doubt while the members are not required to find beyond a

> reasonable doubt that the acts happened to consider them as M.R.E. 404(b). The difference in the standards of proof can be addressed, however, by careful instruction to the members distinguishing the proof requirements to convict against those needed to consider the evidence as M.R.E. 404(b) evidence. Given that the concerns confusion of the issues and misleading the members can be addressed through instruction to the members, the probative value of the evidence is not substantially outweighed by the risk of confusion of the issues, misleading the members or any other factor listed in M.R.E. 403.

(JA at 703.)

Before trial, a new military judge was assigned to Appellant case. (JA at 1, 155.) Appellant elected trial by military judge alone. (JA at 191.) During trial, but after the presentation of evidence, Appellant renewed his M.R.E. 404(b) objection. (JA at 445.) The trial judge noted "it seems like the evidence that came out at trial is similar to the evidence that was initially presented to [the motions judge] when he was detailed to this case and when he made this ruling." (JA at 448; 695-97.) The trial judge did "not disturb that ruling" because it was based on accurate facts and the appropriate law, but having received all the evidence, he relabeled the M.R.E. 404(b) purpose as "a 'scheme' instead of a 'common plan.'" (JA at 448.)

Specification 1 – Abusive Sexual Contact of SSgt RW[2]

Appellant was convicted for touching SSgt RW's penis when Appellant knew, or should have known, SSgt RW was asleep. (JA at 30, 574.) At trial, SSgt RW

[2] Although SSgt RW separated from the Air Force, his rank will be included.

testified that Appellant was a good friend since tech school, that they worked together, and that they became roommates. (JA at 181-82.)

While TDY, SSgt RW went out with several friends, including Appellant, to a local bar to celebrate SSgt RW's twenty-second birthday. (JA at 186.) SSgt RW had "about six beers" and felt "buzzed, but conscious and coherent." (JA at 187.) They returned to lodging after 0200 and after a "little bit of conversation in the lobby . . . everybody [went] to their rooms." (JA at 189.) SSgt RW went into his room alone,[3] took off his clothes "down to [his] underwear" and went straight to bed under his covers. (JA at 189-90.)

He began dreaming "that he was having sexual intercourse with a woman" and the dream felt "very, oddly realistic." (JA at 190.) SSgt RW "felt weight on [him]" and it just "seemed too real," so he called out "who's there." (Id.) "It was silent for a split second, and [SSgt RW] felt movement at the bottom of [his] bed, and someone ran out of the room." (Id.) When SSgt RW "got up to follow," he found his underwear "a few inches below [his] waist" covering only the "bottom half of [his] genitalia." (JA at 190-91.) After pulling his underwear up, SSgt RW "chased who was running out of [his] room" into the hallway and could see that it was Appellant "in nothing but his underwear." (JA at 191.) SSgt RW did not "have any doubt in

[3] SSgt RW often left "the latch in the door jamb to let people in and out of [his] room freely." (JA at 200.)

his mind that it was Sergeant Hyppolite." (JA at 192.) "It was very clear that [Appellant] was in a rush to get into his room." (JA at 219.)

SSgt RW did not confront Appellant at that time; he had "to process what had just happened." (JA at 193.) He "went back to [his] room" and "checked [his] genitals and they were wet," specifically his penis. (Id.) SSgt RW had no memory of Appellant "actually touching [his] genitals," just circumstantial evidence. (JA at 213.) All the same, SSgt RW immediately reached out to a female friend who was TDY with them and "told her that [he] had a dream that [Appellant] was having sex with [him]." (JA at 194.) SSgt RW did not "tell her the rest" of the story explaining: "I was scared. I wasn't even sure what happened at the moment. I was terrified actually; but, I didn't want to believe it." (JA at 199.)

Accordingly, SSgt RW "continued [his] life as normal" and remained roommates with Appellant. (JA at 202-03.) Then, a couple of years later, one of their other roommates, SSgt CJ, called SSgt RW late at night and reported an interaction SSgt CJ[4] had with Appellant—"a similar story of what happened" to SSgt RW. (JA at 205.) That is when SSgt RW accepted that it "wasn't a dream; that it couldn't just be a coincidence," i.e. he realized he was in denial. (Id.) SSgt RW testified: "I felt like the whole time I knew it, but I lied to myself, and it's just

[4] SSgt CJ was not a named victim. The United States offered this evidence for its effect on the listener, not offered for the truth of the matter asserted. (JA at 205.)

opened up every memory that I had, and I felt disgusted that I even just blew that off in my head, like, it was nothing more than a dream." (JA at 208.)

SSgt RW and SSgt CJ knew one of their other friends, SSgt STK,[5] had experienced something similar with Appellant, "so, [they] involved him." (JA at 207, 251.) Finally, another member of their friend group, SSgt SAK,[6] relayed a similar experience with Appellant. (JA at 207, 303.) Collectively, these four individuals, SSgt RW, SSgt CJ, SSgt STK, and SSgt SAK, decided to confront Appellant about what he was doing, as a sort of intervention. (JA at 207.) Sometime after the intervention, another member of their unit, SrA JD, confided in SSgt RW that Appellant did something similar to him also. (JA at 238.)

Appellant was convicted of Specification 1 (touching SSgt RW), but AFCCA set aside the conviction for factual insufficiency. (JA at 14, 24.)

Specification 2 – Abusive Sexual Contact of SAK

Appellant was accused of touching SSgt SAK's genitals when he knew, or should have known SSgt SAK was sleeping. (JA at 32.) At trial, SSgt SAK testified that had been close friends since tech school, and during their first assignment, they worked and lived together with SSgt RW "until [SSgt SAK] met [his] wife in December or November of 2011." (JA at 292-94.)

[5] SSgt STK subsequently separated from the Air Force.
[6] SSgt SAK subsequently separated from the Air Force

In the fall of 2013, SSgt SAK went out drinking with Appellant and their friends. (JA at 298.) He had "three or four beers" and "probably four" shots. (Id.) SSgt SAK considered himself drunk "but coherent enough to function." (Id.) They left the bar around 0200, and went back to Appellant's house. (JA at 298-99.) No one else was home. (JA at 299.) They sat on the couch for 15-30 minutes, and the lights were already off when they were talking, and remained off until the next morning. (JA at 299, 302, 318.)

At around 0300, SSgt SAK went to the bathroom, covered his "genitals right back up," returned to the couch, and chatted with Appellant for a few more minutes until he fell asleep with his legs over the armrest and his back "where people normally sit." (JA at 301, 309.) SSgt SAK could not remember if Appellant was there when he fell asleep or if he already went to bed. (JA at 302.)

SSgt SAK woke up in "the same position with [his] legs draped over the armrest" and testified:

> When I looked down, my pants were -- the zipper was undone. I can't remember whether the button was undone or not, but I could also see that my genitals were hanging out of the hole in the boxers that I was wearing that night . . . they were exposed enough to where I could just look down and I could see that I was fully exposed . . . penis and testicles.

(JA at 302-03.) SSgt SAK "immediately buttoned [him]self up and walked out and drove home." (JA at 304.)

Sometime later, SSgt SAK received a call from SSgt RW. (JA at 304.) During the conversation SSgt SAK explained to SSgt RW what had happened, and they decided to confront Appellant about it. (JA at 304-05.)

The trial judge acquitted Appellant of this crime. (JA at 574.)

Specification 3 – Abusive Sexual Contact of STK

Appellant was convicted of touching STK's genitals when Appellant knew, or should have known, he was asleep. (JA at 32, 574.) At trial, SSgt STK testified he was friends with Appellant; they were stationed together, they worked together, and they hung out "every weekend." (JA at 241.)

One night, they decided "to drink some beers together, have a -- just a hang out." (JA at 244.) SSgt STK had "four or five beers or so." (JA at 247.) They stayed up "for maybe an hour, two hours" drinking and then "went to bed" [7] around 0400. (JA at 245.) He "fell asleep on [Appellant's] couch." (Id.) The couch was not backed up against the wall, but "open to the back." (Id.)

SSgt STK testified:

> So, I'm asleep maybe 10 minutes or so, and then I like start feeling something, just like out of the ordinary. And, I wake up and I see a hand reaching over the couch, the backside of the couch. So, he was behind the couch and I'm on the -- then I feel him touching my groin region. And, so, I swat the hand away. And, I at this point, I think I'm still in a dream and I just go right back to bed. And then, a minute

[7] SSgt STK did not live there, but "was considered the extra roommate" because he slept there "two, three times a week." (JA at 246.)

> or so later, I feel something again and I swat the hand away again. And I just --I'm trying to figure out if this is real life or is this -- I'm in a dream.

(JA at 248-49.) After this happened "three or four, maybe five times," SSgt STK testified:

> I was finally like, because I knew me and [Appellant] were the only ones in the house, and I got up and like, dude, what are you doing and I stood up. And, he was crouched over like in a prone position I guess you could say, face down, like trying to hide. And, then, he like sat there and then he, like scrambled, like, scurried off away.

(JA at 251.)

After Appellant ran away, SSgt STK just "sat there, laid there, wide awake, just kind of like scared." (JA at 253.) He could not go back to sleep, his "adrenalin's pumping" because he realized he "was just groped." (Id.) Once the sun came out, SSgt STK went to a friend's house from a different squadron and told him what happened. (JA at 254.) "A few weeks later," SSgt STK told SSgt RW about what happened, and he learned SSgt RW and SSgt CJ experienced "something similar" with Appellant. (JA at 258.) These friends "decided that an intervention was needed." (JA at 259.)

The trial judge convicted Appellant of this specification and AFCCA affirmed the conviction. (JA at 24.)

The Intervention

SSgt RW testified about the intervention as follows:

> We all sat down in the living room and [Appellant] was unaware that we were about to have this conversation with him. And, I immediately came out saying that we know what you've been doing to us while we're passed out sleeping, and this is what we're here to talk about . . . . He seemed very nervous, like he knew that he was caught[8] . . . . His face turned red. He started to stutter, shake a little bit . . . . He said, I know it's a problem. I know it's from –it's caused by when I drink. And, he put most of the blame on the alcohol, saying that he would stop drinking after that.

(JA at 209-10.)

SSgt RW testified that they did not detail the specifics of their allegations, but "judging by [Appellant's] body language and his immediate response," it was clear Appellant "knew exactly what [SSgt RW] was talking about" when he accused him of taking advantage of them in their sleep. (JA at 231.) Moreover, SSgt RW testified "we told [Appellant] that we were still going to be his friends . . . but if a similar thing happened again, and we caught wind of it, that we would report . . . him." (JA at 211.) Appellant remained SSgt RW's roommate for a short while and they tried to "stay civil," but eventually Appellant decided to move out, telling SSgt RW "that he just doesn't feel comfortable in the house anymore." (JA at 211-12.)

[8] SSgt RW had known Appellant since tech school, worked with him closely ever since then, and been his roommate for the three years leading up to this intervention. (JA at 181-82.)

SSgt SAK testified about the intervention as follows:

> We agreed we needed to sit [Appellant] down to let him know that we know what he's been doing and it needs to stop. So, a week later . . . [we] sat down in their living room on those same couches. [Appellant] was in the kitchen washing dishes, and [SSgt RW] had called him into the living room, and that's when [SSgt RW] said, we know what you've been doing whenever we're incapacitated or drunk, or you think that we're asleep, and it has happened to all of us and it really needs to stop . . . . [Appellant] acknowledged it. He said I know. I have a problem and I'm seeking help.

(JA at 305-06.)

SSgt SAK testified that Appellant "didn't seem shocked" but "looked sorry when we confronted him." (JA at 306.) In fact, immediately after the intervention, SSgt SAK told Appellant: "look, you're not going to be my best man, and I recommend that you don't show up at the wedding and I think you know why," to which Appellant "just said, okay." (Id.) SSgt SAK testified that Appellant response was one of "understanding," not "confusion . . . [or] anything like that." (JA at 307.)

SSgt STK testified about the intervention as follows:

> We were all like in the living room, and [Appellant] came in from somewhere and we said, hey, we -- don't let this change anything. We all know that you've done this to us, and we still want to be your friend, but if you ever do something like this again to any of us, we're going to report it.

(JA at 259.) SSgt STK agreed that they did not get into specifics of the offenses, because "it was just assumed." (JA at 260.) However, SSgt STK confirmed that

Appellant appeared nervous and justified his actions by saying "when I drink, I do -- things like this." (JA at 260, 277.) SSgt STK also confirmed that during the intervention they "specifically talked about reporting [Appellant]" to the authorities if he did anything like this again. (JA at 261.)

Specification 4 – Abusive Sexual Contact of SrA JD

Appellant was convicted of touching SrA JD's genitals without his consent. (JA at 32, 574.) At trial, SrA JD testified he met Appellant "as a co-worker." (JA at 322.) At this time, Appellant was an NCO and SrA JD was an E-2 so he "felt kind of uncomfortable socializing with NCOs as if they were peers." (JA at 323.) Despite the disparity in rank, SrA JD became more comfortable with Appellant "through shifts and the frequent interactions that [they] had at work." (JA at 324.)

Sometime later Appellant "invited [SrA JD] to join him to go to a dance club in Raleigh," North Carolina where they met up with someone SrA JD knew from tech school. (JA at 324-25.) Around this period, they had several "getting to know each other" conversations, and SrA JD was confident Appellant knew he had a girlfriend and the relationship was serious. (JA at 390.)

Appellant invited SrA JD to a house party at Appellant's home—this was after the intervention so Appellant no longer lived with the other named victims. (JA at 326.) There were "between six and eight people" there that night. (JA at 327.) SrA JD drank a couple beers and "three-to-four" mixed drinks with a "very significant

alcoholic after-taste," which he drank "[r]elatively fast." (JA at 327-28.) This was "kind of [SrA JD's] first introduction to any kind of off-duty party." (JA at 328.)

Towards the end of the evening, SrA JD "had the motor skills to walk and remain upright," but he was "past [his] comfort zone" and "was beginning to bump into things, slur [his] words, past the point of what [he] would say comfortably drunk." (JA at 329.) This was the most drunk SrA JD had been in his life. (JA at 382.) He felt he was in such a state "that somebody might take a Sharpie to [his] face." (JA at 386.)

Accordingly, he told Appellant he "felt really drunk and he hadn't quite worked out where [he] was going to stay that night," so Appellant said "you can have my bed." (JA at 329.) SrA JD understood this to mean that "he was giving me the bed and that he would sleep on the couch." (JA at 333.) Straightway, SrA JD "la[i]d on one side of the bed, and proceeded to attempt to fall asleep" without taking off any clothes, and not sure whether he got under the covers or not. (JA at 330, 388.)

Likewise, SSgt JH, Appellant's then roommate, testified that after SrA JD got drunk "we laid [him] down in [Appellant's] room." (JA at 442.) This was "between 12 and 1 A.M." (JA at 366.) SrA JD fell asleep, and did not wake up until Appellant came into the room at least an hour later. (JA at 332.) SrA JD knew time had passed because the party was going strong when he fell asleep, but when Appellant entered the room, the noise from the party had died off. (JA at 332.) SSgt JH went to bed

sometime between 0200 and 0400, and he testified "the accused was still at the party" then. (JA at 442-43.)

When Appellant came into the room, it woke SrA JD up, but the lights were off and it was dark. (JA at 332-33.) SrA JD remembered thinking it was odd that Appellant got into bed with him, but did not think it was "a big deal" for military members to share sleeping quarters. (JA at 333.) SrA JD testified that, during this period, he was "definitely still feeling the effects of alcohol, beginning the effects of a hangover," including "a headache and a little bit of nausea." (JA at 334.)

Appellant asked SrA JD "if [he]'d wanted to experiment with guys, or if [he]'d ever thought about messing around with other guys." (Id.) SrA JD said "no man. I just want to go to sleep." (Id.) Appellant then "reached his hand out and grabbed [SrA JD's] penis over [his] pants and began to massage it . . . pleading to, you know, get [SrA JD] to change his mind." (JA at 335.) SrA JD repeated: "no, man, I just want to go to sleep." (Id.) SrA JD did not "say anything that would convey to him that was something [he] wanted." (Id.) He rebuffed Appellant in this way "at least three or four times," and he was absolutely "loud enough that [Appellant] would have been able to hear it." (Id.) Appellant kept rubbing SrA JD's penis through the clothing despite the protests. (Id.)

Specification 5 – Sexual Assault of SrA JD by bodily harm

Appellant was convicted for non-consensually penetrating SrA JD's mouth and anus with his penis later that same night. (JA at 32, 574.) At trial, SrA JD testified that after he told Appellant "no, I want to go to sleep," his memory became fragmented. (JA at 335-36.)

1. Oral penetration

"The next thing [SrA JD] remembered is, being naked and kind of in an inverted position where [his] feet are now toward the head of the bed and [his] head is positioned over [Appellant's] groin and [Appellant's] penis is going into and out of mouth." (JA at 336.) In other words, Appellant was lying underneath SrA JD, but perpendicular to him, with SrA JD positioned face down over Appellant's groin. (JA at 410.) SrA JD was not moving his head, but rather Appellant was thrusting his penis up into SrA JD's mouth. (JA at 337.) SrA JD did *not* testify that he held his head up of his own volition,[9] and thought it was possible Appellant was holding his

[9] Appellant argues SrA JD "remember[ed] holding his own head up," citing JA at 411. (App. Br. at 6, 27.) The cross-examination on that page went as follows:

> Q: And, your head was not moving, right?
> A: That's correct
> Q: It was his hips that were moving?
> A That's correct
> Q: You don't remember him holding your head there?
> A: He could have been
> Q: You don't remember that?
> A: I don't have a clear memory of him holding my head

head up for him. (JA at 411.) In any event, SrA JD did not take "any actions at any point in time that would show any sort of participation." (JA at 431.)

SrA JD still felt the "dullness of senses" and knew he was "still intoxicated to a degree." (JA at 336-37.) He testified about his thought process saying:

> I wanted to be in my mind as far away from what was physically happening to me as possible. Kind of disassociated sort of deal, just where I'd – I wished I could have been anywhere else then where I was and that's what took over the majority of my mind, was just, I don't want to be here.

(JA at 339.)

2. Anal Penetration

SrA JD could not remember how long Appellant penetrated him orally, but remembered that afterward, Appellant "physically transitioning [him] from the position [he] was in to a chest-to-chest position where [SrA JD] was over the top of him." (JA at 339-40.) To do this, Appellant "grabbed and kind of pushed and moved" SrA JD around "with his arms." (JA at 340.) SrA JD did not resist, but did *not* participate in this process either.[10] (Id.)

From this position, Appellant started "pushing his penis against [SrA JD]'s anus and it began to hurt very badly as his penis did begin to slightly enter [SrA JD's] anus." (JA at 341.) SrA JD winced visibly as "it was very physically painful." (JA

[10] Appellant maintains SrA JD "rearranged his body of his own power." (App. Br. at 27.) This is not supported in the record.

at 342.) Appellant "stopped . . removed his penis from the area, kind of rolled to one side as if to kind of get [SrA JD] off of him" and said "I'll just finish the rest myself . . . and then proceeded to masturbate." (JA at 343.)

3. Aftermath and Reporting

The next thing SrA JD remembered was waking up very confused and . . . sick to [his] stomach." (JA at 345.) But, fragmented memories came back and "that's what caused [him] to gather [his] clothes and kind of quickly try and get out of that room without waking him up." (Id.) SrA JD went into Appellant's living room, "waited until he felt sober enough . . . to drive" and then "drove back to his dorm room." (JA at 395.)

SrA JD found "hickeys" on his body the next morning and "sought out [his] girlfriend's advice for ways to conceal" them. (JA at 348-49.) He told her he "had been assaulted," but "didn't give her many details" and expressed "confusion" about how it played out. (JA at 397, 399.) She lived in a different state, and "if [SrA JD] did not want her to know about this," there would have been no need to tell her anything. (JA at 434.) SrA JD "battled" in his head whether to report the incident, but as Appellant's was slated to PCS to Kadena Air Base, Japan in about a month, he resolved to just avoid him until he left. (JA at 349, 351.)

4. Apology Message

Just before Appellant left for Japan, he sent SrA JD "an apology message." (JA at 400, 580.) The message said:

> Hey man,
>
> That's it I'm gone. I'm off to Japan, I really hope you understand where I'm coming from when I say that I truly did and do value our friendship. Your one cool dude, that goes without saying. I just want you to know that yes *I do take full responsibility for what happened that night*. We were drunk and one thing lead to another. If I could take that night back I definitely would.
>
> *If I don't get a response back from you then I will take that as 100% confirmation that our friendship is over*, I just hope you see and understand where I am coming from.
> Once again I'm sorry [JD], it just sucks knowing I lost a good friend.

(JA at 580-81) (emphasis added.) SrA JD "never responded to the message until 20 months later" in a pretext conversation at the behest of investigators.[11] (JA at 401.)

In 2016, SrA JD was reassigned to Kadena AB and learned he would be "working shoulder-to-shoulder" with Appellant. (JA at 350.) This caused SrA JD to reach out to his brother for advice. (JA at 350.) SrA JD reported the assault to the

[11] After SrA JD's pretext conversation, Appellant made a counter-claim of sexual assault in which he no longer took "full responsibility for what happened" but claimed SrA JD "violated [Appellant's] physical security and [his] personal dignity and a portion of [his] self-worth" causing him "great anguish." (JA at 582, 583.) However, this evidence was not introduced until sentencing.

Air Force Office of Special Investigations (AFOSI) the day after he arrived at Kadena AB. (JA at 351.)

5. M.R.E. 404(b) Findings Argument

Although the trial judge admitted the M.R.E. 404(b) evidence over defense objection, he also made clear that "common plan or scheme is certainly something that both side can argue" during findings. (JA at 449.) Appellant did. (JA at 503.) In fact, trial defense counsel made misuse of M.R.E. 404(b) evidence the cornerstone of his closing argument. (JA at 503.) He began his argument by telling the trial judge: "you see, there are still gaps in each one of these specifications. Gaps which the government wants to fill in with propensity evidence. They call it [M.R.E.] 404(b), but it's not. Let's take each potential [M.R.E.] 404(b) theory in turn." (JA at 503) (alterations in original.) In fact, trial defense counsel then went through various legitimate 404(b) purposes, "plan," "motive," "intent," "absence of mistake," and tried to dissuade the military judge that they were applicable. (JA at 504-05.) After developing this theme through his argument, trial defense counsel returned to that same argument saying:

> The defense . . . is confident that you will apply the rules that govern this court-martial; that you will deliberate on this evidence, without starting at the point that the government would want you to start at, which is Staff Sergeant Hyppolite has a propensity to commit these acts. Standing alone, the evidence on each and every one of these specifications, standing alone, as the law requires,

> the evidence on each and every one of these specifications has gaps that can only be filled in by propensity assumptions.

(JA at 558.)

SUMMARY OF THE ARGUEMNT

For M.R.E. 404(b) error, harmlessness is tested for whether it "had a substantial influence on the members' verdict in the context of the entire case." United States v. Harrow, 65 M.J. 190, 200, 202-03 (C.A.A.F. 2007). The presumption of innocence problem identified in United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016) is inapplicable to M.R.E. 404(b) evidence. Hills, 75 M.J. at 357 n.4. Moreover, the military judges in this case demonstrated a clear understanding of the propensity ban and a commitment to follow it. (JA at 48-49.)

Because the only facts at issue in Specifications 4 and 5 were consent and mistake of fact to consent, the M.R.E. 404(b) evidence did not substantially influence the verdict. SrA JD's testimony was strong and corroborated. (JA at 335, 442.) No evidence was presented to contradict SrA JD's testimony that he told Appellant "no" 3-4 times or to show circumstances that would have caused Appellant to think SrA JD was consenting. Moreover, Appellant sent SrA JD an "apology message" shortly after the incident taking "full responsibility for what happened that night" and acknowledging that SrA JD had legitimate grounds to terminate their friendship. (JA at 580.) This evidence is what overcame the mistake

of fact as to consent defense, rendering the M.R.E. 404(b) evidence immaterial to the verdict.

ARGUMENT

EVEN IF THE TRIAL JUDGE ABUSED HIS DISCRETION, APPELLANT WAS NOT PREJUDICED BECAUSE THE M.R.E. 404(B) EVIDENCE WAS ONLY RELEVANT TO HIS MISTAKE OF FACT DEFENSE, AND SRA JD'S UNCONTRADICTED TESTIMONY COUPLED WITH APPELLANT'S DAMNING ADMISSIONS OVERCAME THAT DEFENSE.

Standard of Review

"Applying nonconstitutional harmless error analysis, [military appellate courts] conduct a *de novo* review to determine whether this error had a substantial influence on the members' verdict in the context of the entire case." United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007). To make that determination, "[w]e consider four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." Id.

Law and Analysis

Even if the military judges abused their discretion in admitting Appellant's common plan or scheme for consideration in Specifications 4 and 5, Appellant was not prejudiced. Appellant maintains "Appellant's case presents the precise problem under Mil. R. Evid. 404(b) that Hills and Hukill presented under Mil. R.

Evid. 413," and should be tested for constitutional error. (App. Br. at 15.) Put differently, Appellant argues "[t]he true character of the evidence was propensity evidence," and because the military judge used it that way, Appellant was prejudiced. (App. Br. at 15 n.6.) This argument fails because 1) Hills deals with propensity evidence and M.R.E. 404(b) does not, 2) the military judges are presumed to understand the ban against propensity evidence, and in this case, they did understand it, and 3) The evidence of Appellant's guilt was overwhelming.

1. M.R.E. 404(b) evidence does not erode the presumption of innocence.

In Hills, this Court preempted any argument that its holding would extend to M.R.E. 404(b) issues stating: "The issue before us has no bearing on our jurisprudence with respect to . . . the use of multiple offenses with similar facts to argue identity, absence of mistake, modus operandi, etc." Hills, 75 M.J. at 357 n.4. The Navy Court recently published a case on this very point stating: "Hills does not apply to evidence admitted pursuant to Mil. R. Evid. 404(b)"). United States v. Jeter, __M.J.__, 2019 CCA LEXIS 1 at *28 (N-M Ct. Crim. App. 3 January 2019). Whereas Mil. R. Evid 413 specifically *allows* evidence to be used for a propensity purpose, Mil R. Evid. 404(b) specifically *precludes* the use of evidence "to prove the character of a person in order to show action in conformity therewith." Mil. R. Evid. 404(b).

As such, M.R.E. 404(b) presents a different question than Hills and its progeny. Evidence under M.R.E. 404(b) is not "antithetical to the presumption of innocence" because it is not using "conduct of which an accused is presumed innocent . . . to show a *propensity* to have committed other conduct of which he is presumed innocent;" rather, it is used to show a *non-propensity* purpose i.e. "identity, absence of mistake, modus operandi, etc." Hills, 75 M.J. at 356-57; *see also* United States v. Castillo, 29 M.J. 145, 152 (C.M.A. 1989) (explaining that "[i]n many cases the government will charge several offenses simultaneously, and will take the position that evidence about each offense is relevant to all crimes charged. The evidence may show intent, common plan or scheme, guilty knowledge, etc."); United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000) *rev. on other grounds* (clarifying that this Court "has repeatedly concluded that a pattern of lustful intent, established in one set of specifications could be used by factfinders as proof of lustful intent in a different set of specifications").

In United States v. Cox, 18 M.J. 72, 74 (C.M.A. 1984), during deliberation in a multi-victim case, the members "reopened to ask [inter alia] . . . whether, if [a member] believed that a pattern of lustful intent was established in several specifications, could he use this belief to influence him as circumstantial evidence in another specification." This Court's predecessor explained that the answer to this question is "simply, 'Yes!'" 'Evidence of other crimes, wrongs,' and even

'acts' are specifically admissible to prove, inter alia, intent.'" Id. at 75 (quoting Mil. R. Evid. 404(b)). Thus, even if the military judge made a M.R.E. 404(b) error, it did not raise constitutional concerns and the government need not prove harmlessness beyond a reasonable doubt,[12] but only "whether this error had a substantial influence on the members' verdict in the context of the entire case." Harrow, 65 M.J. at 200.

2. The trial judge did not use the M.R.E. 404(b) evidence for propensity purposes.

A key contextual factor for Appellant's case is the fact that he was tried by a military judge alone. (JA at 191.) "Military judges are presumed to know the law absent clear evidence to the contrary." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted). Thus, the trial judge was presumed to know he could not use evidence of Appellant's scheme "to prove the character . . . in order to show action in conformity therewith." Mil. R. Evid. 404(b).

Even without this presumption, the record is replete with indications that the military judges understood the propensity ban. For example, the motion judge's ruling recognized "[t]he general risk is that the factfinder will treat evidence of uncharged acts as character evidence and use it to infer that an accused has acted in character, and thus convict." (JA at 699.) He also stated: "M.R.E. 413 specifically

[12] Even under a constitutional standard, any error was harmless beyond a reasonable doubt for the reasons outlined in subsection (3) below.

allows for propensity evidence while M.R.E. 404(b) specifically *precludes* propensity evidence." (JA at 703) (emphasis added.) In fact, during the severance hearing, the motions judge pushed back on trial counsel saying:

> "Trial counsel, I have a question . . . So if all five of these specifications are tried together—under *Hills*—you won't be able to offer one as [M.R.E.] 413 evidence on any of the others, correct? . . . So, I mean doesn't that in and of itself raise the specter of unfair prejudice because you have this evidence . . . which you're arguing is very strong evidence . . . . So, we're saying it's so strong . . . it would be [M.R.E.] 413 if they were separate so, we should allow these to remain together, but then we're going to put it before the members and [say] they cannot consider it for a [M.R.E.] 413 purpose. [Y]ou see the problem?"

(JA at 48-49.)

In short, the military judges could "see the problem." In fact, the trial judge allowed trial defense counsel to build his argument around the improper use of M.R.E. 404(b) evidence. (JA at 449.) Trial defense counsel began his argument by telling the trial judge: "you see, there are still gaps in each one of these specifications. Gaps which the government wants to fill in with propensity evidence. They call it [M.R.E.] 404(b), but it's not. Let's take each potential [M.R.E.] 404(b) theory in turn." (JA at 503) (alterations in original.) Then, trial defense counsel tried to dissuade the judge that any of the legitimate M.R.E. 404(b) purposes would be applicable to Appellant's case. (JA at 504-05.) After

developing this theme throughout his argument, trial defense counsel closed where he began saying:

> The defense . . . is confident that you will apply the rules that govern this court-martial; that you will deliberate on this evidence, without starting at the point that the government would want you to start at, which is Staff Sergeant Hyppolite has a propensity to commit these acts. Standing alone, the evidence on each and every one of these specifications, standing alone, as the law requires, the evidence on each and every one of these specifications has gaps that can only be filled in by propensity assumptions.

(JA at 558.)

There is simply no argument that the military judges misunderstood the propensity ban—they cited it, recited it, warned trial counsel against it, and allowed Appellant to build his entire argument around the illegal use of character evidence in reaching a verdict. Because the military judges knew exactly what *not* do with this evidence, Appellant's only argument left would be that they did it anyway. This is not a valid argument because there is simply nothing in the record to support that they did so. *See* Erickson, 65 M.J. at 225. At most this evidence was irrelevant, but it raises no propensity concerns. Since the military judges did not use the M.R.E. 404(b) evidence for propensity purposes, there is no reason to evaluate any error under the "harmless beyond a reasonable doubt" standard.

3. Since the evidence of Appellant's guilt was powerful, any M.R.E. 404(b) error did not substantially influence the verdict.

Even if this evidence was irrelevant, as AFCCA found, in keeping with the factors in Harrow, Appellant was not prejudiced because 1) the government had a compelling case, 2) the defense had virtually no case, 3) Appellant's scheme was not essential to the government's case, nor 4) was it the best evidence to show Appellant's guilt. *See* Harrow, 65 M.J. at 200.

a. The Government's case was strong because SrA JD gave compelling, uncontradicted testimony, and Appellant made damning admissions.

SrA JD's testimony was compelling, and corroborated by the only objective witness—SSgt JH. SrA JD was unequivocal about telling Appellant "no man. I just want to go to sleep." (JA at 335.) He rebuffed Appellant in this way "at least three or four times," and he was absolutely "loud enough that [Appellant] would have been able to hear it." (Id.) This testimony was never contradicted or attacked in any way. In fact during argument, trial defense counsel granted that SrA JD said these words to Appellant, but made a technical argument that this sort of protest might have been confusing to Appellant because it "doesn't exactly answer the question." (JA at 527.)

Moreover, SrA JD's testimony squared with the testimony from the only objective witness, SSgt JH. With regard to SrA JD becoming too intoxicated to remain at the party, SSgt JH testified that SrA JD was drunk enough that "we laid

[him] down in [Appellant's] room." (JA at 442.) SrA JD testified this was "between 12 and 1 A.M."[13] (JA at 366.) SSgt JH also corroborated that Appellant was "still at the party" when SSgt JH went to sleep between 0200 and 0400. (JA at 442.) This established several important facts: that SrA JD was so drunk he had to leave the party; that Appellant knew SrA JD was too intoxicated to continue socializing; that Appellant knew SrA JD was sleeping (or at the very least trying to sleep); and that Appellant did not go into the room until at least an hour after SrA JD had been asleep.

Accordingly, trial defense counsel was left with the argument that SrA JD was motivated to fabricate his allegation to preserve his relationship with his girlfriend. (JA at 548-49.) However, this theory fell flat because she lived in a different state, and "if [SrA JD] did not want her to know about this," there would have been no need to tell her anything. (JA at 434.)

Most importantly, shortly after his encounter with SrA JD, Appellant sent him a message taking "full responsibility for what happened that night." (JA at 580.) The message also shows that Appellant knew SrA JD was drunk and that Appellant blamed the alcohol for his actions, just as he did with the other three victims. (JA) Also, it is unclear what Appellant was taking "full responsibility" for, if not for taking advantage of his drunk, sleepy friend. If SrA JD led Appellant

[13] During argument, trial defense counsel insisted on this timing. (JA at 536.)

to believe that he was consenting, why apologize at all? Why take "full responsibility" if SrA JD was at least partly to blame for leading him on? This is solid evidence that Appellant had a guilty conscience.

Moreover, the apology message also shows that, at least in Appellant's mind, it was completely reasonable (if not expected) for SrA JD to end their friendship as a result of what happened. (JA at 580.) If SrA JD consented, or if Appellant thought he consented, then surely Appellant would think their friendship was salvageable. Instead, Appellant haplessly embraced the inevitable saying: "If I don't get a response back from you then I will take that as 100% confirmation that our friendship is over." (JA at 580.)

Finally, not only did Appellant admit that he was at fault, and concede that SrA JD has legitimate grounds to end their friendship, Appellant also told him "If I could take that night back I definitely would." (JA at 580.) If Appellant acted as any reasonable person would have, what is there to take back? The only reasonable explanation for this apology message is that Appellant knew he crossed the line. (JA at 580.) He knew he has violated his friend's trust, and that does not come from acting reasonably under the circumstances. Taking "full responsibility," acknowledging SrA JD had just cause to end their friendship, and wishing he could take back what had happened point powerfully to one conclusion:

Appellant knew SrA JD did not consent to what happened. Thus, the Government had a compelling case against Appellant.

b. The defense's case was remarkably weak.

With regard to Specification 4 and 5, Appellant did not put on any evidence, but simply asked the trial judge to hold the government to its burden. During argument, trial defense counsel conceded "the defense does not – hopes not to oversell [its] theory. It is not as if the evidence has come out in a way that some sort of sexual encounter between Airman [JD] and [Appellant] was inevitable because the sexual tension was just -- could be cut with a knife; that's not the evidence and the defense acknowledges that." (JA at 525.) This is a telling concession; it shows there was not any evidence to suggest SrA JD led Appellant to believe his advances would be welcome.

In fact, in relation to Specification 4, trial defense counsel primarily argued that when SrA JD said "no, man, I just want to go to sleep," it was somehow code used "in bedrooms all around America and on television and movies [that] can mean I'm not ready right now, but you can try and get me ready." (JA at 527.) In effect, Appellant's only defense against Specification 4 was to argue that when SrA JD said "no," he meant "maybe." This is not a compelling argument on its face, let alone when SrA JD repeats his protest "at least three or four times." (JA at 355.) Yet, this was the only argument available, so trial defense counsel maintained

that despite "repeat[ing] some number of times more . . . no, man, I just want to go to sleep," Appellant may have misunderstood because it was *possible* that rubbing SrA JD's caused an erection. (JA at 528.) But even trial defense counsel concedes this was pure conjecture. (JA at 528.) This argument underscores the weakness of Appellant's case. Even if it was technically possible that Appellant was honestly confused by SrA JD's response, no reasonable person under the circumstances would have believed that SrA JD was consenting to this contact.

Regarding Specification 5, trial defense counsel primarily argued that the gaps in SrA JD's memory were too problematic to be trustworthy. (JA at 538-40.) Yet, despite trial defense counsel's arguments, there simply was no evidence SrA JD consented to the acts, or that Appellant reasonably believed SrA JD had consented. In short, Appellant had no evidence and relied on a strategy of emphasizing reasonable doubt (JA at 538-39) and offered an overly sanitized version of the apology message (JA at 547.) Thus, Appellant had a weak case.

c. The materiality and quality of the M.R.E. 404(b) evidence was minimal because of Appellant's admissions.

With regard to Specifications 4 and 5, the only issues in controversy were consent and mistake of fact as to consent.[14] As discussed *supra*, even if it was error to admit the M.R.E. 404(b) evidence, the trial judge knew that he could use

[14] Trial defense counsel agreed with this assessment during argument. (JA at 525.)

this evidence *only* "for its tendency, if any," to prove Appellant had a scheme, i.e. to disprove mistake of fact as to consent. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, para. 7-13-1.[15] In other words, the motions judge recognized that a reasonable factfinder *could* find the M.R.E. 404(b) evidence probative, not that the factfinder *must* find it probative. In fact, when Appellant renewed his M.R.E. 404(b) objection, the trial judge overruled the objection based on the "finality of rulings," not a substantive analysis of how probative he thought the M.R.E. 404(b) evidence was. (JA at 445-46.) The trial judge even invited trial defense counsel to argue that he should not consider the common plan evidence at all in his deliberations, which trial defense counsel did. (JA at 449, 503-05, 558.) This shows that while the trial judge deemed the evidence has at least some probative potential, he was open to the argument that Appellant man not have had a common plan at all.

To this end, AFCCA made a compelling case for lack of prejudice. (JA at 21.) Either the acts were sufficiently similar to constitute a plan (in which case the military judge did not abuse his discretion by considering the, for that purpose), or they were not similar enough to be constitute probative evidence. (JA at 21.) In the later event, AFCCA rightly determined that, given the judge's understanding of the propensity ban, the only way the M.R.E. 404(b) could be used was to

[15] The motions judge referenced this instruction. (JA at 704.)

undermine Appellant's mistake of fact defense, and the evidence on this point—the apology message in particular—was already substantial. (JA at 21.)

In sum, Appellant effectively eliminated his mistake of fact defense because he sent SrA JD an apology message taking "full responsibility for what happened," and recognized that their friendship was likely over because of it. It is unreasonable to think he was accepting blame for—and believed a friendship was over because of—an encounter that any reasonable person would think was consensual. This consciousness of guilt evidence, coupled with compelling and corroborated testimony from SrA JD, is what secured Appellant's conviction. The weight of this evidence left Appellant arguing that an unequivocal "no" could have been misunderstood highlighting the weakness of the defense's case. Accordingly, even if the M.R.E. 404(b) evidence was irrelevant as to Appellant's mistake of fact, considering it would not have had a "substantial influence on the . . . verdict in the context of the entire case." Harrow, 65 M.J. at 200. Thus, Appellant suffered no prejudice.

CONCLUSION

WHEREFORE, if this Court determines the military judge abused his discretion in the certified issue, the United States respectfully asks this Court affirm AFCCA's determination that Appellant was not prejudiced.

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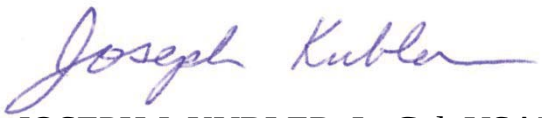

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 28 February 2019.

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