**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

<table>
<tr><td>UNITED STATES,<br>    Appellee/Cross-Appellant<br><br>    v.<br><br>Staff Sergeant (E-5)<br>RALPH J. HYPPOLITE II, USAF,<br>    Appellant/Cross-Appellee.</td><td>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)</td><td>APPELLEE/CROSS-APPELLANT'S<br>BRIEF IN SUPPORT OF THE<br>CERTIFIED ISSUE<br><br><br>USCA Dkt. No. 19-0119/AF<br><br>Crim. App. No. 39358</td></tr>
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# UNITED STATES' BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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**IT WAS NOT AN ABUSE OF DISCRETION TO FIND THAT SPECIFICATIONS 1-3 WERE RELEVANT TO DETERMINE WHETHER APPELLANT HAD A SCHEME TO TAKE SEXUAL ADVANTAGE OF HIS FRIENDS, LATE AT NIGHT, IN THE DARK, AFTER THEY HAD BEEN DRINKING AND WERE ASLEEP OR TRYING TO SLEEP, AND AFCCA DID NOT AFFORD THE MILITARY JUDGE THE APPROPRIATE DEFERENCE.** ........................................ 22

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1 April 2019

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

## ISSUE CERTIFIED

**DID THE AIR FORCE COURT OF CRIMINAL APPEALS ERR 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 OR SCHEME FOR SPECIFICATIONS 4 AND 5.**

## 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 certified issue under Article 67(a)(2), 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 issue above.

## 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). (JA at 698, 702-03.) When evaluating the relevance portion of the Reynolds test for commonalities among the five specifications, 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

[1] The motions judge also ruled he would allow 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.

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

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

While on temporary duty to Mountain Home Air Force Base, Idaho, 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 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.)

---

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

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 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.)

---

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

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 had done 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 he and Appellant 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.)

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.)

---

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

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.)

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[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.)

<u>*Specification 5 – Sexual Assault of SrA JD by bodily harm*</u>

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

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[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 he could remember 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.)

*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.)

*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 M.R.E. 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

AFCCA erred in finding an abuse of discretion, because the commonalities between Specifications 1-3 and Specifications 4-5 evidenced Appellant's scheme to take sexual advantage of his unsuspecting friends, by touching their genitals in the dark, late at night, after they had been drinking and were asleep or trying to sleep. (JA at 703.) The coherence of this plan is evidenced by the fact that Appellant blamed the alcohol for his conduct in each specification. (JA at 210, 260, 580, 696.) This qualifies as a common plan or scheme under this Court's precedent in United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989) and United States v. Munoz, 32 M.J. 359 (C.A.A.F. 1991).

Moreover, as the *actus reus* of Specifications 4 and 5 was not at issue, the common plan evidence had only one purpose: to prove Appellant's intent, i.e. negate his mistake of fact defense. (JA at 504.) As such, the prior acts evidence was not required to "be almost identical to the charged acts and each other." United States v. Brannan, 18 M.J. 181, 183 (C.M.A. 1984). When the M.R.E. 404(b) evidence is "relevant to rebut the defense of a lack of criminal intent . . . the

higher degree of similarity required for [proving the actus reas] is not required."[12] Id. at 185.

Furthermore, AFCCA did not give the trial court "the deference that is the hallmark of abuse of discretion review." GE v. Joiner, 522 U.S. 136, 143 (1997). AFCCA relied on the same facts and the same law as the trial court, but determined that the commonalities were not quite sufficient to qualify as a common plan or scheme. This was a difference of opinion, not an abuse of discretion.

## ARGUMENT

**IT WAS NOT AN ABUSE OF DISCRETION TO FIND THAT SPECIFICATIONS 1-3 WERE RELEVANT TO DETERMINE WHETHER APPELLANT HAD A SCHEME TO TAKE SEXUAL ADVANTAGE OF HIS FRIENDS, LATE AT NIGHT, IN THE DARK, AFTER THEY HAD BEEN DRINKING AND WERE ASLEEP OR TRYING TO SLEEP, AND AFCCA DID NOT AFFORD THE MILITARY JUDGE THE APPROPRIATE DEFERENCE.**

***Standard of Review***

The decision of a military judge to admit evidence under M.R.E. 404(b) is reviewed for an abuse of discretion. United States v. Phillips, 52 M.J. 268, 272 (C.A.A.F. 2000). "The abuse of discretion standard is a strict one, calling for more

[12] Ironically, Appellant's prejudice argument proves that the evidence *was* used for a legitimate M.R.E. 404(b) purpose—"to disprove beyond a reasonable doubt that Appellant's mistake of fact was honest and reasonable." (App. Br. at 26.)

than a mere difference of opinion." United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation and internal quotation marks omitted).

***Law and Analysis***

"Mil. R. Evid. 404(b), like its federal rule counterpart, is one of inclusion." United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000). "It permits admission of relevant evidence of other crimes or acts unless the evidence 'tends to prove *only* criminal disposition.'" United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000) (quoting United States v. Simon, 767 F.2d 524, 526 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985)) (emphasis added). "The *sole* test under Mil. R. Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime." United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1988) (emphasis added).

To that end, in Reynolds, this Court established a three-part test to determine admissibility under M.R.E. 404(b):

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

Reynolds, 29 M.J. at 109 (internal quotations and citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." Id.

**1. Reynolds Prong 1 – Reasonable Support that Appellant Committed The Acts Alleged.**

"The first prong of the Reynolds test tracks the Supreme Court's holding in Huddleston that 'Rule 404(b). . . evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.'" United States v. McDonald, 59 M.J. 426, 429 (C.A.A.F. 2004) (quoting United States v. Huddleston, 485 U.S. 681, 689 (1988)). In Appellant's case, AFCCA "agree[d] with the military judge's ruling on the first Reynolds prong." (JA at 011.) That is, given the evidence during the motions hearing and the testimony at trial, "[a] reasonable factfinder could find by a preponderance of the evidence that Appellant engaged in or attempted the conduct alleged in each of the five charged specifications." (JA at 11.) Thus, the first Reynolds prong is not at issue.

**2. Reynolds Prong 2 – Logical Relevancy**

"The second prong of Reynolds derives from the Supreme Court's conclusion that 'the threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.'" McDonald, 59 M.J. at 429 (C.A.A.F. 2004) (quoting Huddleston, 485 U.S. at 686). So long as the similar acts have *any* tendency to "make the existence of any fact at issue more or less probable," they clear this low

relevancy hurdle. Huddleston, 485 U.S. at 686 (citing Fed. R. Evid. 401 and 402); *see also* United States v. Roberts, 69 M.J. 23, 27 (C.A.A.F. 2010) (explaining "the low threshold for relevant evidence").

On this second prong, AFCCA found "the military judge erred in concluding that evidence of sexual contact supporting Specifications 1-3 made more probable a fact of consequence for Specifications 4 and 5 and vice versa." (JA at 11.) Specifically, AFCCA found that while "the acts charged as Specifications 1-3 and the acts charged as Specifications 4-5 shared some common factors [they] were insufficiently similar to prove a common plan or scheme." (JA at 11-12.) This holding is wrong for three primary reasons: 1) it does not appreciate the difference between using a common plan to prove the act occurred (*actus reus*) and using a common plan to prove Appellant's intent (*mens rea*); 2) it assumes that, unless Appellant acted surreptitiously, he could not have had an underlying plan to take advantage of his unsuspecting and vulnerable friends; and 3) it "fail[s] to give the trial court the deference that is the hallmark of abuse of discretion review." Joiner, 522 U.S. at 143.

a. A common plan used to prove *mens rea* is different than a common plan used to prove the *actus reus*.

"If the prior acts of appellant are *significantly similar* to the charged acts and thus evidence a particular 'design' or 'system,' and are relevant to prove or disprove a fact in issue, the uncharged conduct may be admitted to prove such a

design or purpose." Reynolds, 29 M.J. at 110 (emphasis added). However, the requisite degree of similarity will depend largely on *how* the evidence is being used.

*i. Common plans which prove the* actus reus *require a higher degree of similarity.*

AFCCA maintained that "[e]vidence of other acts 'must be almost identical to the charged acts to be admissible as evidence of a plan or scheme.'" (JA at 10) (quoting United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999)). But, AFCCA also recognizes that, "[i]n contrast, to be used as evidence of intent, the 'other wrongs or acts need only be similar to the offense charged and not too remote therefrom." (JA at 10); *see also* Brannan, 18 M.J. at 185. These are both accurate statements of the law, but AFCCA's opinion on this issue presupposes that common plan evidence can *never* be offered "as evidence of intent." It can. And though judges and appellate courts are sometimes inconsistent in their use of nomenclature, this Court's opinions offer clarity.

In Brannan, the appellant brought two soldier-friends into his truck where they smoked marijuana and the appellant asked "if they or anyone they knew would like to buy [some] marihuana." Brannan, 18 M.J. at 182. The two soldiers testified to these events, but Appellant denied them outright and maintained he "had no idea marihuana was in his truck" until he received a rights advisement. Id. The military judge allowed three witness to testify under M.R.E. 404(b) that they had seen the

appellant with a small bag of marijuana at respective times, locations, and circumstances: one saw a bag when the appellant offered him marijuana in his trailer, another saw the appellant deliver a bag to someone in a blue car, the third saw a bag of marijuana in the appellant's van and saw him deliver various bags to individuals. Id. at 182-83.

The military judge agreed "this evidence was relevant to show a common scheme, plan or design [by the appellant] for the continual sale of marihuana to troops on this post. The inference which can be drawn from the existence of such a plan is that the charged acts as *individual manifestations of such a plan also probably occurred*." Id. at 183 (emphasis added). In other words, because Appellant denied the charged allegation outright, the military judge allowed the common plan evidence to be used to prove the *actus reus*. Id. at 182-83.

Understanding the purpose for which the common plan evidence was to be used, this Court found the commonalities "must be shown to be more than similar to the charged offenses. They must be almost identical to the charged acts and each other." Id. (citations omitted). Accordingly, this Court found that the M.R.E. 404(b) evidence was not relevant as a common plan because it "revealed no more than a collection of disparate acts of appellant only having marihuana as the single feature in common." Id. at 184.

However, *despite* this finding, this Court was “convinced that the trial judge did not err under Mil. R. Evid. 404(b) in admitting this evidence” because it was “relevant to rebut the defense of a lack of criminal intent” (a purpose under M.R.E. 404(b) not presented at trial). Id. at 184. In other words, the commonalities were insufficient to prove the *actus reas*, but they were sufficient to prove the *mens rea*, so the military judge did not abuse his discretion. In making this determination, this Court explained “the higher degree of similarity required for [proving the actus reas] is not required here.” Id. at 185; *see also* United States v. Radseck, 718 F.2d 233, 236-37 (7th Cir. 1983) *cert. denied*, 465 U.S. 1029, 104 (1984) (explaining that when other acts evidence is offered “solely for the purpose of showing intent and plan, and the jury was so instructed . . . the degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent”) (quotations omitted); *cf.* United States v. Evans, 697 F.2d 240, 248 (8th Cir. 1983) (“In prosecutions for violation of narcotics laws, the defendant’s complicity in other similar narcotics transactions may serve to establish intent or motive to commit the crime charged”) (quoting United States v. Lewis, 423 F.2d 457, 459 (8th Cir.), *cert. denied*, 400 U.S. 905, 27 (1970)).

AFCCA relied on Morrison in requiring nearly identical, signature-like commonalities among all five specifications to establish a common plan. (JA at 10.) However, in Morrison “[t]he issue was whether the acts happened” (*actus*

*reus*), not whether the appellant had a mistake defense (*mens rea*). Morrison, 52 M.J. at 123; *see also* Munoz, 32 M.J. at 364 ("The critical issue here was the *occurrence* of the charged indecent acts, and evidence of appellant's *plan to do such acts* was probative on this point") (emphasis added). In fact, in Morrison, because the common plan evidence was used to prove the *actus reus*, on appeal, the common plan was essentially rebranded as modus operandi, and this Court refuted both of those theories in the same analysis. Id. at 122-23. Yet, after explaining why the common plan or scheme fails with regard to signature-like similarities, this Court separately assessed mistake of fact—explaining that "lack of mistake was not in issue" and the appellant "did not assert mistake or accident." Id.

Separate treatment of these questions is important because it shows that a common plan used to prove the *actus reus* (through modus operandi) is not the same thing as a common plan used to prove *mens rea* (through absence of mistake). Id. In other words, when the commonalities of a plan are not similar enough to prove the *actus reus*, they still may be relevant to disprove mistake of fact. *See e.g.* Reynolds, 29 M.J. at 110 (finding similar acts were sufficient to show absence of mistake requiring only "significant similarities," not identical ones.) In fact, the way the Morrison opinion is written suggests that if mistake of fact was at issue in that case, then the M.R.E. 404(b) evidence would have been relevant to prove the appellant's *mens rea*. Morrison, 52 M.J. at 122-23.

*ii. Common plans which prove* mens rea *require fewer commonalities.*

In Reynolds, "there was no issue of appellant's identity or whether he performed the alleged acts. The only issue was his *mens rea* or criminal intent." Reynolds, 29 M.J. at 110. In that case, the appellant brought a date back to the Navy Lodge after dinner and drinks, "set up a photographic slide show which included music, and showed it to her," and when it was over "he jumped on top of her and had sexual intercourse with her." Id. However, she described the sex as a nonconsensual encounter in which "she resisted [him] by crying and begging him not to force her . . . [but he] forcibly removed her underclothing and panty hose, and he pushed up her skirt. He then forcibly removed a tampon and threw it against the wall of the room. He did not remove her blouse or expose her breast," and "threatened her with a bar bell." Id. "[T]he theory of the defense was that appellant was . . . a 'Top Gun' pilot, who would never resort to rape to overcome the will of a woman." Id. at 107. Specifically, the named victim either consented or "certainly led [the appellant] to believe that she had." Id.

The government introduced testimony from another female victim, ML, as M.R.E. 404(b) evidence of similar acts. Id. ML's description of how the appellant *initiated* the sexual encounter was similar to the charged victim, i.e. showing her a slideshow with music, in his room, and then making sexual advances. Id. at 106-07. However, ML testified that she immediately rebuffed him and left. Id. at 107.

Then, the appellant pulled up next to her in his "silver Porsche, and offered to drive her home; she accepted." Id. "About a mile down the road . . . [the appellant] pulled off the road and raped her." Id. at 107. "This evidence was offered by the prosecution to show a common scheme, plan, or design, and to show appellant's intent -- in anticipation of the defenses of consent or mistake-of-fact." Id. at 107-08. This Court found that when "[c]onfronted with this classic consent/mistake-of-fact defense, evidence that appellant used the very same method to accomplish his sordid purposes on other occasions was extremely probative of a *predatory mens rea* on the night in question." Id. at 109 (emphasis added).

Because "there was no issue of [the] appellant's identity or whether he performed the alleged acts," the relevancy of this evidence stemmed from the question: "Was it appellant's intent to have consensual sexual intercourse and only consensual sex, or was it his intent to have sexual intercourse with or without consent?" Id. at 110. In such circumstances, the common plan evidence was relevant to disprove mistake of fact as to consent because it showed the appellant "had worked out a system to put his victim into an *unsuspecting* and *vulnerable position* whereby he could engage in sexual intercourse *with* or *without* consent." Id. (emphasis added).

Appellant's case is no different; he relied on a mistake of fact defense for the specifications involving SrA JD. (JA at 504-05.) Like Reynolds, in Appellant's

case "there was no issue of [his] identity or whether he performed the alleged acts. The only issue was his *mens rea* or criminal intent." Id. at 110. Unlike Morrison, Appellant's common plan—to take sexual advantage of his unsuspecting friends, only after they had been drinking, it was very late, the lights were out, and these friends were asleep or had fallen asleep—is not subject to the higher degree of similarity required to prove the *actus reus* through identity or modus operandi.

Appellant was either honestly and reasonably mistaken about SrA JD's consent or he was not. Accordingly, what was going on in Appellant's mind as he entered the room was highly probative. He knew SrA JD had become intoxicated. (JA at 329.) In fact, SSgt JH testified that SrA JD was so drunk they "laid [him] down in [Appellant's] room" while the party was still going. (JA at 442.) Appellant knew he was entering a room, late at night, in the dark, where his drunk friend was lying in Appellant's bed asleep, or at least trying to sleep. As such, past instances where Appellant came into a room, late at night, in the dark, where his drunk friends were asleep or trying to sleep, have at least some tendency to show what was going on in Appellant's mind. *See* Reynolds, 29 M.J. at 109 (when "[c]onfronted with this classic consent/mistake-of-fact defense, evidence that appellant used the very same method to accomplish his sordid purposes on other occasions was *extremely* probative of a predatory *mens rea* on the night in question.") (emphasis added). This evidence easily clears "the low threshold for relevance." Roberts, 69 M.J. at

27. It has at least *some* tendency to show Appellant did not mistakenly believe SrA JD consented to the sexual activity. In fact, as in Reynolds, it was "extremely probative."

In sum, whether this is called a plan, a scheme, a criminal intent, a design, a strategy, a predatory *mens rea*, or simply disproving a mistake of fact,[13] the point is: Appellant "worked out a system to put his victim into an *unsuspecting* and *vulnerable position* whereby he could engage in sexual" activity with them when they were unaware or not participating. Reynolds, 29 M.J. at 110. (emphasis added). This is sufficient to qualify as a common plan or scheme that was relevant to disprove Appellant's honest and reasonable mistake of fact defense.

b. AFCCA confuses a difference in tactics with a difference in strategy.

Even if Appellant's common plan was measured against the higher degree of similarity required to prove the *actus reus*, it was still relevant. AFCCA found the military judge abused his discretion on the issue of relevance because "in Specifications 1-3, Appellant acted secretively while his friends slept, whereas, in Specifications 4 and 5, Appellant initiated sexual contact with SrA JD while SrA

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[13] "The *sole* test under Mil. R. Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime." Castillo, 29 M.J. at 150 (emphasis added). "[I]t is not necessary that 'evidence fit snugly into a pigeon hole provided by Mil. R. Evid. 404(b).'" United States v. Acton, 38 M.J. 330, 333 (C.A.A.F. 1993) (quoting Castillo, 29 M.J. at 150).

JD was awake and aware" and able to tell Appellant "no." (JA at 11.) This position assumes that Appellant's plan was to abuse his friends *only* if they are asleep. However, like Reynolds, Appellant's plan was "to put his victim into an *unsuspecting* and *vulnerable position* whereby he could engage in sexual" activity with them, regardless of whether they were willing to participate. Reynolds, 29 M.J. at 110. (emphasis added). This is true of every specification.

*i. Large variations in tactics do not undermine a common plan.*

In Reynolds, the two victims responded very differently to their assailant's plan. The named victim tried to resist Appellant's advances and he forced her to have sex right there in his lodging. Id. Conversely, the M.R.E. 404(b) victim in Reynolds rebuffed his advances, and he let her leave his lodging and walk home. Id. at 107. Then, Appellant followed her in his car, lied to her about giving her a ride home, and drove her into a rural area where he forcibly raped her. Id.

As in Reynolds, Appellant's victims responded in myriad ways—some were asleep (SSgt RW and SSgt SAK), other had been sleeping and were trying to get back to sleep (SSgt STK and SrA JD). SSgt STK slapped Appellant's hand away multiple times, SSgt RW chased him into the hallway, and SrA JD, simply said "no, I just want to go to sleep." (JA at 334.) Like Reynolds, the fact that the victims responded differently does not change the fact that Appellant "worked out a system to put his victim into an *unsuspecting* and *vulnerable position* whereby he

could engage in sexual" activity with them, regardless of they were conscious or willing to participate. Reynolds, 29 M.J. at 110 (emphasis added). This is what the motions judge meant when he said "the accused's common plan [was] to engage in sexual conduct with his friends after they have been drinking and were asleep or falling asleep." (JA at 703.)

In essence, AFCCA conflated Appellant's tactical decisions made in the moment with his underlying strategy. Appellant's strategy (or scheme) was the always the same: try to take advantage of his friends sexually when it is late and dark and after his friends have had some alcohol and are sleeping—and then afterward, if necessary, blame it on the alcohol. The fact that Appellant talked to SrA JD after entering the room does not negate Appellant's strategy; his plan was in place before he entered the room because he knew his unsuspecting friend was drunk and asleep. When Appellant came in to find SrA JD stirring, he did not abandon his plan, he simply adjusted fire. Just as the appellant in Reynolds made different tactical decisions—e.g. he let one girl leave his lodging, but forced the other one to stay; here, Appellant made a tactical decision to talk to one of his vulnerable, unsuspecting, drunk, sleepy friends before touching his penis without permission. In fact, it is entirely possible Appellant employed this tactic to test how well SrA JD appreciated what was happening, that is, to ensure that SrA JD would not chase him away as SSgt RW and SSgt STK had done. Relevance is a

low threshold, and this evidence had at least *some* tendency to show what was going on in Appellant's mind when he entered that room.

Likewise, in Munoz the appellant had a common plan or scheme in which he employed different tactics. In that case, the appellant was convicted of four crimes against A, his daughter—for touching her breasts twice, and touching her vagina and breasts twice. Munoz, 32 M.J. at 360. The appellant "denied that any sexual misconduct occurred." Id. The victim's sister, I, presented M.R.E. 404(b) evidence about how the appellant abused her as a child too.[14] Id. at 362. "The prosecutor's theory of admissibility . . . was that it showed a plan on his part to sexually abuse his daughters at a young age." Id. at 363. The appellant "asserted that the incidents [I] would relate were distinctly different from [A]'s testimony such that they were not evidence of a common plan or scheme." Id.

At trial, I's M.R.E. 404(b) testimony described myriad instances of abuse: pulling her pants down in the kitchen and performing oral sex on her while the rest of the family was in the living room; taking her into a storage shed in the backyard and sodomizing her; showing her pornography in his room and having her lay nude in his bed; taking her into the bathroom and have oral sex and then sodomize her; playing a tickling game and then touching her over her underwear. Id. at 363.

[14] The judge excluded M.R.E. 404(b) evidence from another sister, AA, "based on the fact [that it was] only one incident" and "susceptible to more prejudice than substance." Id. at 361.

Afterward, the appellant characterized I's testimony as "nothing more than a collection of disparate acts which were remote in time and dissimilar in nature and circumstance." Id. at 363. He "contend[ed] that the uncharged sexual misconduct evidence in this case did not show a 'plan' but instead reflected 'a generic description of familial sexual abuse.'" Id. at 363.

However, this Court found "significant elements of concurrence" among the various acts. Id. This Court has since relied on six elements of that framework (Munoz factors), to determine the relevancy of common plan evidence: "(1) the '[r]elationship between victims and appellant'; (2) the '[a]ges of the victims'; (3) the '[n]ature of the acts'; (4) the '[s]itus of the acts'; (5) the '[c]ircumstances of the acts'; and (6) the '[t]ime span.'" United States v. Barnett, 63 M.J. 388, 395 (C.A.A.F. 2006) (quoting Munoz, 32 M.J at 363).

Even though "[t]he critical issue [in Munoz] was the occurrence of the charged indecent acts" (the *actus reus* ), the military judge applied the Munoz factors to Appellant's case. (JA at 703.) Even under this framework, the specifications were similar enough to be relevant as a common plan or scheme:

> *Relationship between the victims and appellant*: Appellant's victims were all male friends and coworkers, whose relationships had been strictly platonic. AFCCA recognized agreed these were all "Airmen who were assigned to the same unit and sometimes worked together." (JA at 12.)
>
> *Ages of the victims:* Though the record does not specify the age of every victim, at the time of trial, three victims were E-5s and SrA JD

was an E-4. As AFCCA conceded, all victims were "young adult males." (JA at 12.)

*Nature of the acts*: Specifications 1-4, each involved Appellant touching his victims genitals. Though Specification 5 involved oral and anal penetration (not just touching SrA JD's genitals), the motions judge was right to point out it "occurred in connection with the alleged touching of SrA [JD's] genitalia." (JA at 703.)

*Situs of the acts*: Though the physical locations varied, each act happened on a bed or a couch, i.e. in someone's sleeping quarters.

*Circumstances of the acts*: In each instance, Appellant took sexual advantage if his friends late at night, in the dark, when they were alone, after they had been drinking alcohol and were asleep or trying to sleep. Also, in each instance, Appellant subsequently blamed his conduct on alcohol. No victim had ever expressed any romantic interest in Appellant prior to the encounters. AFCCA concurred that each specification involved "nighttime sexual activity after drinking alcohol and sleeping or falling asleep in the same general location as Appellant." (JA at 12.)

*Time span*: The charges span a two year time frame: Specification 1 (August of 2012); Specification 2 (October 2012); Specification 3 (between May and September of 2013); and Specifications 4 and 5 (August 2014).

In short, Appellant's common plan or scheme was less broad than Munoz, and the commonalities between the offenses were less disparate. Whereas the father in Munoz assaulted his older daughter in different locations (kitchen, storage shed, bathroom, bedroom), using different methods (using pornographic magazines, pretending to tickle), and engaging in sex acts very different from the named victim (oral sex, anal sodomy, etc.); Appellant's system was much more regimented. In each instance, Appellant took sexual advantage of a friend who had

been drinking alcohol, while he was asleep or trying to sleep, when it was dark, and very late, and he always began the sexual contact in the same way—"touching the [four different] victims' genitalia." (JA at 703.)

Like Munoz, Appellant may argue this is "nothing more than a collection of disparate acts which were remote in time and dissimilar in nature and circumstance." Munoz, 32 M.J. at 363. However, the unique acts in Specification 5 do not undermine whether Appellant had a plan, they simply highlight what happened when the plan was carried to fruition. Put differently, his plan was to take sexual advantage of his drunk, unsuspecting friends, in the dark, when it is late and they were asleep or trying to sleep—and Specification 5 is what happened when SrA JD woke up and did not physically repel him. (JA at 703.) Thus, Appellant's plan was more coherent than Munoz, and the common factors overlap better. As such, it was not an abuse of discretion for the military judge, relying on Munoz, to find Specifications 1-3 were relevant to Specifications 4-5, as part of Appellant's common plan or scheme.

*ii. When acts are so different that there is no discernable plan, they are irrelevant.*

Of course, there are times where the M.R.E. 404(b) evidence is so disparate from the charged conduct that it is not logically relevant to establish a common plan or scheme, but Appellant's case is readily distinguishable. For example, in McDonald, the appellant was charged with various crimes against his twelve year-

old step daughter for giving her condoms, taking picture of her while she was bathing, sexually propositioning her, and providing her with sexually explicit reading material about incest. McDonald, 59 M.J. at 427-28. At trial, the appellant's stepsister testified that, 20 years earlier, when appellant was 13 years old and his stepsister was eight, he "exposed himself" to her, touched himself in front of her, brought pornographic magazines into her room, induced her to masturbate him, and attempted to penetrate her digitally. Id. at 428.

The military judge found the stepsister's testimony "was probative of [the] [a]ppellant's intent and plan." Id. However, this Court held "that the evidence of [the] [a]ppellant's uncharged acts was not logically relevant to show either a common plan or Appellant's intent." Id. at 429. Specifically, the Court explained:

> the uncharged acts in this case are extremely dissimilar to the charged offenses: Appellant was 13 years of age at the time of the uncharged acts, rather than a 33-year-old adult; the uncharged acts were committed in the home of his stepsister, where he was visiting, while the charged acts occurred where he was the head of the household; the uncharged acts were with a stepsister who was about five years younger, rather than with a young stepchild under his parental control, who was about 20 years younger.

Id. at 430.

Similarly, in Gamble, "all the Government established was that on two separate occasions [the appellant] talked to an adult female and then had an illicit

sexual contact with her." United States v. Gamble, 27 M.J. 298, 305 (C.M.A. 1988). This was not logically relevant to a common plan or scheme. Id.

Appellant's case does not present such problems. All five specifications against Appellant occurred within a two-year period. (JA at 30-32.) Each of his victims was an adult, a coworker, and a friend, and unlike McDonald, Appellant was an adult at the time he committed each offense. (JA at 186, 241, 294, 322.) Most importantly, the circumstances leading up to these incidents were very similar—it was late, it was dark, they were alone, each of the victims had been drinking and was either asleep or trying to sleep. Moreover, the sheer number of victims (four) and the similarities across all offenses makes Appellant's case substantially different than Gamble and McDonald where there were only two victims, making the common plan or scheme was much less apparent. Thus, unlike McDonald, the conditions leading up to the five specifications against Appellant were strikingly similar; and unlike Gamble, they involved unique conditions not expected in virtually all sexual assault cases.

c. Clear Abuse of Discretion Deference

Regardless of how closely Appellant's plan aligns with other precedents involving common plan or scheme, the military judges did not abuse their discretion in admitting this evidence. This Court has outlined the three circumstances in which "[a] military judge abuses his discretion when: (1) the

findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citations omitted).

Put differently, an abuse of discretion is when "the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and law." United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008). More pointedly, this Court explained "it is not that the judge is maybe wrong or probably wrong, but rather 'it must strike a cord of wrong with the force of a five-week-old, unrefrigerated dead fish.'" United States v. Byrd, 60 M.J. 4, 12 (C.A.A.F. 2004) (J. Crawford concurring) (quoting United States v. French, 38 M.J. 420, 425 (C.M.A. 1994)) (quotation omitted). AFCCA did not apply this framework to the judges' M.R.E. 404(b) decision. (JA at 11-12.)

The Navy-Marine Corps Courts of Criminal Appeals recently recognized the substantial deference it owed to the military judge holding: "[t]he appellant points to no clearly erroneous finding of fact and does not claim that the military judge applied the wrong legal test or otherwise ignored binding law . . . . Consequently, we find no clear abuse of discretion." United States v. Jeter, __ M.J. __, 2019 CCA LEXIS 1 at *34 (N-M Ct. Crim. App. 3 January 2019). Like the appellant in Jeter, AFCCA did not "point[] to [a] clearly erroneous finding of fact," in this case.

Id. Nor did it "claim that the military judge applied the wrong legal test or otherwise ignored binding law." Id. To the contrary, AFCCA applied the exact same legal framework as the military judge, the Munoz factors, but reached a different conclusion, i.e. that while "the acts charged as Specifications 1-3 and the acts charged as Specifications 4-5 shared some common factors," in AFCCA's estimation, they "were insufficiently similar to prove a common plan or scheme." (JA at 12.) Put simply, AFCCA applied the same law to the same facts as the judges, but reached a different opinion.

However, "[t]o reverse for an abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous in order to be invalidated on appeal." Johnson, 49 M.J. at 473 (quotations omitted). Yet, AFCCA did not suggest the judges were being "fanciful" or "clearly unreasonable" to find there may[15] be a common scheme.

Given the existing case law on plan or scheme as described in Reynolds and Munoz—and the clear distinctions between Appellant's case and Morrison and McDonald—there were certainly enough similarities for the military judges to find

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[15] The motions judge noted "[t]he Military Judge's Benchbook has detailed instruction on . . . the proper use of M.R.E. 404(b)" evidence. (JA at 704.) That instruction does not require the factfinder actually use the 404(b) evidence, but *may* use it "for its tendency, *if any*," to prove a common scheme. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, para. 7-13-1 (emphasis added).

Appellant engaged in a common scheme by specifically targeting his intoxicated, sleeping friends. Such a finding surely cannot be said to have risen to the level of being "arbitrary, fanciful, clearly erroneous or clearly unreasonable." Johnson, 49 M.J. at 473. It cannot be said that it was "outside the range of choices" reasonably arising from the facts available to the military judge. Miller, 66 M.J. at 307. It cannot be said that it to "strike a cord of wrong with the force of a five-week-old, unrefrigerated dead fish.'" Byrd, 60 M.J. at 12 (J. Crawford concurring) (quoting French, 38 M.J. at 425) (quotation omitted). The military judge did not abuse his discretion and AFCCA "failed to give the trial court the deference that is the hallmark of abuse of discretion review." Joiner, 522 U.S. at 143. Thus, AFCCA's decision regarding the second Reynolds prong should be reversed.

### 3. Reynolds Prong 3 – M.R.E. 403 Balancing Test[16]

The third Reynolds prong recognizes that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would *not* be placed on the admission of such

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[16] As AFCCA found the judge's ruling did not satisfy the second Reynolds prong, it did not address this final prong. This is a striking error. AFCCA did not find this evidence ran the risk of unfair prejudice; rather, it found the information was not even *logically* related to Appellant's *mens rea*. Given the low threshold for relevance and the existence of undeniable similarities between Appellant's offenses, it seems unreasonable for AFCCA to find that this evidence had *no logical relevance at all*.

evidence." Huddleston, 485 U.S. at 688-89 (emphasis added); *see also* McDonald, 59 M.J. at 429 (C.A.A.F. 2004).

In keeping with the Supreme Court's precedent, this Court determined that when "the military judge . . . conduct[s] and announce[s] his Mil. R. Evid. 403 balancing test on the record, we will not only exercise *great restraint* in reviewing his decision, but will also give him *maximum deference* in determining whether there is a *clear* abuse of discretion." Tanksley, 54 M.J. at 176-77 (quotations and citations omitted) (emphasis added); *see also* United States v. Ediger, 68 M.J. 243, 248 (C.A.A.F. 2010) (holding "we will not overturn his decision unless there is a clear abuse of discretion.")

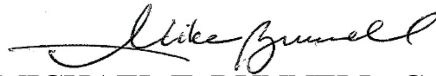
In this case, the motions judge put his M.R.E. 403 balancing test on the record. (JA at 703.) He recognized "the dangers of undue delay, waste of time, or needless presentation of cumulative evidence [we]re negligible" because all of the conduct was on the charge sheet. (JA at 703.) At the same time, he noted the "dangers of confusion of the issues and misleading the members," including the different burdens of proof, but described his plan to cure any danger "by careful instruction," which became unnecessary given Appellant's forum selection. (JA at 703.) After carefully addressing each possible danger and weighing the probative value of the evidence, the judge determined "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.) In sum, the motions judge took great care to address every possible aspect of unfair prejudice and craft a reasonable solution. The M.R.E. 403 balancing test was not a perfunctory recitation of the standard, but a careful, well-described balancing of the relevant factors. As such, the military judges are entitled to "maximum deference," and because they made rational decisions based on the correct law and facts, there was no "clear abuse of discretion." Tanksley, 54 M.J. at 176-77.

In sum, AFCCA erred in finding the military judge abused his discretion. Relevancy is a low hurdle, and the similarities required to prove *mens rea* (disprove mistake of fact) are less strict than the similarities needed to show the *actus reus* (identity or modus operandi). Evidence from four unsuspecting victims who all testified that Appellant took sexual advantage of them only after they had been drinking, it was late and dark, and each one was either asleep or trying to sleep, passes the low hurdle of logical relevance. The differences between Specifications 1-3 and Specifications 4-5 represent a difference in tactic, not strategy—especially in light of Reynolds an Munoz. The military judge was entitled to substantial deference in making this determination, but AFCCA denied him that deference. This was a difference of opinion, not an abuse of discretion.

## CONCLUSION

WHEREFORE the United States respectfully asks this Court reverse AFCCA's decision and find that the military judge did not abuse his discretion in finding the common plan evidence relevant to Appellant's mistake of fact defense.



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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 1 April 2019.

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