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.*	)))))))))	REPLY BRIEF ON BEHALF OF THE UNITED STATES FOR THE CERTIFIED ISSUE USCA Dkt. No. 19-0197/AF Crim. App. No. 39358

UNITED STATES' REPLY BRIEF IN SUPPORT OF THE CERTIFIED ISSUE

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19 April 2019

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

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, the United States, hereby replies to the Appellant/Cross-Appellee's brief on the certified issue, filed on 9 April 2018.

ARGUMENT

1. The common plan and scheme evidence was intent evidence because mistake of fact was the only issue in controversy.

Among other things, Appellant maintains the military judge abused his discretion because the Government did not "move or argue for the admission of Mil. R. Evid. 404(b) evidence to be used as evidence" of Appellant's predatory *mens rea*, or to disprove his mistake of fact defense. (App. Cert. Br. at 6.) Appellant's argument fails because "[t]he *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). "[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). In short, M.R.E. 404(b) evidence is admissible depending on how it is *used*, not how it is *labelled*. United States v. Reynolds, 29 M.J. 105, 110 (C.M.A. 1989) ("The question of whether particular acts are admissible turns upon the issue in controversy.")

The only "issue in controversy" for Appellant's case was the "classic consent/mistake-of-fact defense." Reynolds, 29 M.J. at 109-10 (JA at 527-546, 580.) This Court's opinion in Reynolds made it abundantly clear that having "a predatory *mens rea* on the night in question" rebuts the mistake of fact defense. Id. at 109. Thus, regardless of how it was labelled, the fact that Appellant "worked out a system to put [each of the named victims] into an unsuspecting and vulnerable position" (i.e. his scheme) was evidence of his intent. Reynolds, 29 M.J. at 110. As this Court put it in Reynolds, such a scheme is "extremely probative of a predatory *mens rea*." Id. (emphasis added).

To that end, the Government specifically used the M.R.E. 404(b) evidence to argue "[t]he accused *knew* what he was doing, he *knew*. He *knew* what he was doing when he was doing it. He *knew* what he was doing after he did it." (JA at 499 (emphasis added); *see also* App. Cert. Br. at 6.) This is a clear example of

how trial counsel used the plan or scheme evidence to rebut Appellant's mistake of fact defense. In fact, trial defense counsel conceded that the M.R.E. 404(b) evidence in this case would apply to the SrA JD's specifications. (JA at 504-05) ("Absence of mistake, well, that really only applied to the [SrA JD] specification.")

Appellant's brief on the *granted* issue only bolsters this position. (App. Br. at 26.) In an effort to establish prejudice, Appellant argues that, without the scheme evidence, the government's case was not strong enough "to disprove beyond a reasonable doubt that Appellant's mistake of fact was honest and reasonable." (Id.) The irony of this position is striking for two reasons.

First, when it comes to prejudice, Appellant argues the common plan evidence *is* what overcame his mistake of fact defense; yet, when it comes to the admissibility, he argues "the evidence concerned [his] common plan or scheme, *not* his intent." (App. Cert. Br. at 11) (emphasis added.) However, if the common plan evidence overcame Appellant's mistake of fact defense, then it *did* concern his intent. That is what a mistake of fact is: an innocent intent. Therefore, the scheme evidence *was* intent evidence, and Appellant effectually conceded this point in his brief on the granted issue.

Second, by trying to show prejudice, Appellant has inadvertently shown relevance. "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). Disproving mistake of fact is a legitimate M.R.E. 404(b) purpose. Mil. R. Evid. 404(b); Reynolds, 29 M.J. at 110. Thus, even if the military judge mistakenly admitted Specifications 1-3 under a scheme theory, that evidence is still admissible as evidence of intent. United States v. Brannan, 18 M.J. 181, 184 (C.M.A. 1984). In either case, they are serving the same purpose—disproving Appellant's mistake of fact defense (the only issue in controversy).

Appellant cites United States v. Yammine, 69 M.J. 70, 77 (C.A.A.F. 2010) to suggest this Court should reject "broad talismanic incantations of words such as intent, plan, or modus operandi, offered to secure the admission of evidence of other crimes or acts by an accused at a court-martial under Mil. R. Evid. 404(b)." (App. Cert. Br. at 9.) Importantly, in Yammine, the military judge specifically used the Mil. R. Evid. 404(b) evidence "to show [the appellant's] *propensity* to engage in such acts." Id. at 77 (emphasis added). More importantly, the "broad talismanic incantation language" comes from Brannan where this Court found that, despite the fact that the M.R.E. 404(b) evidence was not relevant under a common plan theory to show modus operandi, the military judge did not abuse his discretion in admitting the evidence under M.R.E. 404(b) because it was relevant for a different theory: intent. Brannan, 18 M.J. at 184.

Unlike Yammine, in Appellant's case, the military judge specifically excluded the use of Specifications 1-3 for a propensity purpose. (JA at 703.) In this case, the M.R.E. 404(b) evidence was used surgically to prove Appellant was not reasonably and honestly mistaken about SrA JD's consent; rather, he had a plan, a predatory *mens rea*, i.e. an intent to take advantage of his drunk friends who were trying to sleep.

In other words, the problem does not stem from reading the word "intent" so broadly that it shelters inadmissible propensity evidence; rather, the problem stems from Appellant reading language like "plan" or "scheme" so narrowly that it could *never* be used to prove intent—even when intent is the only issue in controversy. Such a reading conflicts with the plain language of M.R.E. 404(b), and this Court's opinions in Acton, Castillo, Brannan and Reynolds.

2. Specifications 1-3 were sufficiently similar to Specifications 4-5.

Appellant avers that by arguing "the acts need be only significantly similar and not almost identical, the government acknowledges that the acts charged in Specifications 1-3 were insufficiently similar to the acts charged in Specifications 4-5 to prove a common plan or scheme." (App. Cert. Br. at 12.) To be clear, the United States is arguing that when a scheme is used to prove the *actus reas* (e.g. through modus operandi) the law requires commonalities to be nearly identical; whereas, when the common plan is used to prove *mens rea* (e.g. to disprove

mistake of fact), the law requires commonalities that are only "significantly similar." *See e.g.* 2 Wigmore, Evidence § 304 (Chadbourne rev.1979) (emphasis added) ("the mere prior occurrence of an act similar in its gross features . . . may suffice for that purpose [of negating innocent intent]. But *where the very act is the object of proof*, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test."); s*ee also* Brannan, 18 M.J. at 184-185; United States v. Radseck, 718 F.2d 233, 236 (7th Cir. 1983); United States v. Beechum, 582 F.2d 898, 911 n.15 (5th Cir. 1978); United States v. Danzey, 594 F.2d 905, 913 n.6 (2d Cir. 1979). However, the United States submits that the facts of Appellant's case meet either standard. (*See* Govt. Cert. Br. at 37-39) (applying the Munoz factors to Appellant's case and explaining that, in comparison to Munoz, where the *actus reas* was in dispute, Appellant's plan was more coherent and the commonalities overlapped better.)

In addition to satisfying the Munoz factors, the commonalities in Appellant's plan align better than the common factors in United States v. Simpson, 56 M.J. 462, 464-65 (C.A.A.F. 2002). In that case, M.R.E. 404(b) evidence was admitted "for the limited purpose of showing [the] appellant's plan or design to take advantage sexually of women who were under the influence of alcohol." Id. at

464. The victims in that case each described an assault that occurred after a night of heavy drinking, but with significant variations. Id. at 463.

In one situation, the appellant "was on staff duty" when an active duty female became so drunk she had to be "put to bed by a friend." Id. The appellant "entered the [victim's] room improperly"[1] where, despite the victim's protests and "attempts to physically push him away," he performed oral sex on her. Id.

In another situation, the appellant spent the night drinking at a civilian friend's house. Id. The victim went to bed, but got back up because her child had vomited, and the appellant helped her clean up the mess. Id. The victim then passed out in the hallway and the appellant carried her back to her room and penetrated her with his penis while she was unconscious. Id. The victim woke up during the act when her daughter started crying. Id. After the victim tended to her daughter, the appellant tried to have sex with her again, but when she refused—instead of overcoming her physically—he left her apartment. Id.

Yet, despite the differences, this Court found "no error in the military judge allowing" this evidence to "be used for the limited purpose of demonstrating appellant's tendency to take advantage sexually of women who were intoxicated or

[1] The opinion does not describe the room where the victim was sleeping. Judging by the fact that there was a "proper" way of entering the room and that Appellant "was on staff duty" at the time, it appears the room was not part of a residence, but some public facility on base (e.g. hospital or dorm area).

under the influence of alcohol." Id. at 464. The common thread of taking sexual advantage of inebriated women constituted a "pattern of conduct [that] was admissible under Mil. R. Evid. 404(b)" as a plan or design. Id.

The similarities in Appellant's case are less disparate than Simpson. Like Simpson, each of Appellant's acts happened after a night of drinking. However, whereas in Simpson the appellant sought out soldiers and civilians alike, all of Appellant's victims were active duty members, and co-workers. Moreover, unlike the appellant in Simpson who raped one victim and performed oral sex on the other; here, Appellant initiated each assault in the same way—by touching their genitals. (JA at 703.)

Given this Court's precedent in Simpson, Munoz, and Reynolds, AFCCA erred in finding the military judge abuse his discretion by admitting Appellant's scheme as evidence of his *mens rea*.

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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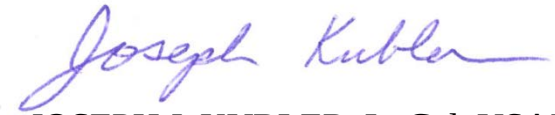

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 19 April 2019.

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