IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

RYAN PARINO-RAMCHARAN,
First Lieutenant (O-2),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0245/AF

Crim. App. Dkt. No. 40171

REPLY BRIEF ON BEHALF OF APPELLANT

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COMES NOW, Appellant, First Lieutenant Ryan Parino-Ramcharan, by and through his undersigned counsel pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, hereby replies to the Government's Brief on Behalf of the United States filed on January 3, 2024 [Appellee Br.]. Appellant relies on the facts, law, and arguments filed with this Court on December 30, 2023 [Opening Br.], and provides the following additional arguments for this Court's consideration.

ARGUMENT

1. The Government has repeatedly conceded that the statute contains a scrivener's error.[1]

Although the Government previously conceded, to both this Court and to the CCA that "the plain language of Article 69 seemingly contains a scrivener's error **in its internal reference to Article 65(b)**" (JA 118, 120), the Government now insists that the scrivener's error exists in the 2019 Manual for Courts-Martial [2019 MCM]. (emphasis added). The Government argues, "[t]he 2019 Manual contains a genuine scrivener's error. It does not include Article 69(c)'s reference to Article

[1] A "scrivener's error" is a mistake of transcription, or a mismatch between the original (e.g., spoken word, manuscript) and a copy. Ryan D. Doerfler, *The Scrivener's Error*, 110 Nw. U. L. Rev. 811, 816 (2016). "Today, of course, Congress does not use actual scriveners. Indeed, the phrase 'scrivener's error' came into popular usage only once reliance upon scriveners was uncommon. The phrase is thus a term of art, referring to a particular sort of legislative mistake." *Id*. "Specifically . . . a 'scrivener's error' is a case in which the words of a legislative text diverge from what Congress meant to say." *Id*.

65(b). Rather the 2019 Manual, without explanation, substitutes 'Article 65(d)' for 'Article 65(b).'" (Appellee Br. at 21) (citations omitted).

While the Government does not explain its abandonment of its previous position, it cannot escape its previous concessions that the statute contains a scrivener's error in the internal reference to Article 65(b).

2. Because the plain language of the statute produces an absurd result, the Government now claims – unconvincingly -- that the 2019 MCM contains "typographical errors."

Despite the Government's contentions, the plain language of the statute produces an absurd result. The absurdity is that under Article 69(c)(1)(A), UCMJ, 10 U.S.C. § 869(c)(1)(A), TJAG may set aside the findings or sentence on the grounds of newly discovered evidence, fraud on the court, lack of court-martial jurisdiction over the accused, error prejudicial to the accused's substantial rights, or sentence appropriateness in cases that are automatically reviewed by the CCA or are eligible for direct appeal review by the CCA. In other words, this reading limits TJAG to only setting aside the findings or sentence in cases that will already be reviewed by the CCA. (Opening Br. at 36-37, 43-44). Thus, cases already subject to automatic review would receive a redundant level of review by TJAG, while all subjurisdictional cases would be precluded from any review whatsoever.

Now that the Government has advanced a new argument to this Court – that the scrivener's error exists in the 2019 MCM rather than in the statute – it asserts that the 2019 MCM contains "typographical errors." (Appellee Br. at 16). This argument is unconvincing. While there is a typographical error, it occurred in the statute and not the 2019 MCM.

This Court can be confident that the error occurred in the statute and not the 2019 for two reasons. First, the typographical error here – the transposition of (d) and (b) in 10 U.S.C. § 869(c)(1)(a) – is easy to make. Indeed, sometimes a statute will misspell "third party" as "third partly." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* at 235 (2012). A statute may provide that the "winning party" rather than the "losing party" must pay the other side's reasonable attorney's fees. *Id*.

Examples of typographical errors, otherwise known as scrivener's errors, abound in military justice practice. *See*, *e.g.*, *United States v. Eppes*, 77 M.J. 339, (C.A.A.F. 2018) (a scrivener's error in the search authorization did not warrant relief); *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016) (the CCA's definition of "incapable of consenting" should have stated "to make *or* to communicate a decision" rather than "to make *and* communicate a decision but this scrivener's error did not amount to reversible error) (emphasis in original); *United States v. Williamson*, 2023 CCA LEXIS 219, *25-26 (A.F. Ct. Crim. App.

May 22, 2023) (unpub.) (the military judge's ruling mistakenly referenced victim AB when discussing the acts involving victim JT but this mistake did not amount to error because the factfinding was articulated with sufficient precision for the CCA to perform its appellate function in an informed manner); *United States v. Watford*, 2017 CCA LEXIS 68, *3 (Army Ct. Crim. App. Jan. 30, 2017) (unpub.) (scrivener's error in the statute on the Charge Sheet was not fatal because the disputed specification alleged, expressly or by necessary implication, each element of the offense); (*United States v. London*, 2006 CCA LEXIS 301, *2 (N-M. Ct. Crim. App. Nov. 30, 2006) (unpub.) (the promulgating order contains a scrivener's error when referring to "17 October 2003 instead of 17 January 2004" but the error was harmless). Hence, the fact that the scrivener's error exists in the instant case is hardly unusual.

Second, the legislative history of the statute is clear that Congress intended to expand the opportunity for servicemembers to request review by the CCAs in cases that are not now eligible for direct review at the request of the accused. The MJRG Report explicitly referenced 10 U.S.C. § 865(d) in its proposed amendment to 10 U.S.C. § 869(c)(1)(A), both the Senate and House conference reports contained language addressing the amended language permitting an accused to seek discretionary review at the CCAs after a TJAG decision pursuant to 10 U.S.C.

§869, and the Senate version of the bill referenced section 865(d) of the bill. (Opening Br. at 12, 20, 21, 22-23).

The Government has a myopic approach toward the legislative history of the statute in order to avoid the conclusion that the statute contains a typographical error. In its ostrich-like effort to ignore the explicit language of the MJRG Report, the existence of which it fails to acknowledge, the Government deliberately ignores the intent of the proposed amendments regarding TJAG and CCA review:

> Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.
>
> . . . .

> Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a punitive discharge was not imposed and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra*.
>
> . . . .
>
> General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra*. Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

MJRG Report at 602-603.[2]

[2] https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf (Dec. 22, 2015) (last visited November 14, 2023)

Next, while the Government references the text of the amended statute in the House conference report (Appellee Br. at 4-6), it conveniently ignores the language accompanying the text of the amended statute, which includes the statement:

> The Senate bill contained a provision (sec. 5293) that would amend section 869 of title 10, United States Code, (Article 69, Uniform Code of Military Justice (UCMJ)), to authorize an accused, after a decision is issued by the Office of the Judge Advocate General under Article 69, UCMJ, to apply for discretionary review by the Court of Criminal Appeals under Article 66, UCMJ. *The Judge Advocates General would retain authority to certify cases for review by the appellate courts*.

H.R. REP. 114-840, https://www.congress.gov/114/crpt/hrpt840/CRPT-114hrpt840.pdf (last visited Nov. 20, 2023) (emphasis added).

This report makes clear that Congress intended to authorize a discretionary CCA review following a review in the Office of TJAG for cases ineligible for automatic review or direct appeal to the CCA. Moreover, the language "The Judge Advocates General would retain authority to certify cases for review by the appellate courts" necessarily means that there is another avenue for review by the appellate courts in addition to TJAG's authority to certify these cases.

The Government also fails to acknowledge the text of the Senate version of the bill which references "section 865(d)" of the bill. While the Government wholly ignores the MJRG Report and has a cramped view of the legislative history, this Court must not engage in the same flawed approach. The legislative history of

the statute makes clear that Congress intended to vest authority[3] in TJAG and jurisdiction in the CCA to review Appellant's case. The typographical errors occurred in the statute and not in the 2019 MCM.

To that end, the spirit of Congress' intentions is entirely removed from the reading of the statute by way of the scrivener's error. Rather than enabling the type of review that Congress had in mind, the error forecloses review from the very category of cases that Congress sought to provide review for, in exchange for providing a redundant layer of review for cases that were already entitled to the oversight of the CCAs.

3. Other federal courts have found scrivener's errors in statutes and applied Congress' intent rather than adhere to the typographical error which would produce an absurd result.

Other courts have concluded that scrivener's errors exist where the plain language of a statute produces an absurd result. In *United States v. Kempter*, the Eighth Circuit concluded that 18 U.S.C. § 2259 contained a scrivener's error when Congress failed to update the cross-reference for a certain definition when it amended the Abolish Human Trafficking Act of 2017. 29 F.4th 960, 969 (8th Cir.

[3] The Government asserts that TJAG possesses "authorities" and has no "jurisdiction." (Appellee Br. at 19). "Jurisdiction is the power of a court 'to decide a case or issue a decree.'" *United States v. Hennis*, 79 M.J. 370, 374 (C.A.A.F. 2020) (quoting *Black's Law Dictionary* 980 (10th ed. 2014). Appellant concurs with the Government on this limited point and notes that this Court used the language "jurisdiction" when referring to TJAG and the CCA in its order granting review. (JA 147).

2022). The court determined that an error existed after examining the legislative history of the statute and conducting a holistic reading of the rest of the statute. *Id*. at 969-70 (citing *Owner-Operator Indep. Drivers Ass'n v. United Van Lines, LLC*, 556 F.3d 690, 694 (8th Cir. 2009) (citation omitted)). The court observed that in *Owner-Operator Indep. Drivers Ass'n*, it noted that "the Supreme Court has treated Congress's 'failure to delete an inappropriate cross-reference' as 'simply a drafting mistake,'" 556 F.3d at 694 (quoting *Chickasaw Nation v. United States*, 534 U.S. 84, 90-91 (2001)), justifying departure from 'rigid adherence to the plain meaning of a statute.'" *Id*. The circuit court explained that, in reading two sections of the statute "holistically," there was "no plausible explanation as to why § 2429(b)(3) would cite the 'enforcement' provision rather than the definition of 'full amount of the victim's losses' other than that Congress failed to update the cross reference." *Id*. at 970.

In *Owner-Operators Indep. Drivers Ass'n v. Mayflower Transit Inc.*, the district court, in a ruling on motions for summary judgment, concluded that a scrivener's error occurred when "the statute was rearranged as a result of a last minute change" because the plain language of the statute produced an absurd result. 2004 U.S. Dist. LEXIS 32645, *9 (S.D. Ind. Dec. 14, 2004).

In *Aetna Cas. & Ins. Co. v. Clerk, United States Bankruptcy Court*, the Second Circuit concluded that Congress' failure to renumber the references in a

statute amounted to a "scrivener's error resulting from inadvertence." 89 F.3d 942, 954 (2d Cir. 1996). The court explained, "Courts construing Acts of Congress are entitled to repunctuate, if need be, to render the true meaning of the statute." *Id*. (quoting *United States Nat'l Bank v. Independent Ins. Agents*, 508 U.S. 439, 462, (1993) (citation and internal quotation marks omitted)). The court continued, "The failure here to correct the cross-references in § 507(d) is akin to an error in punctuation – 'a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design.'" *Id*. The court explained:

> Although, as noted, little ordinarily may be read into the absence or brevity of legislative history, yet, in resolving a statutory mystery, courts must often look for guidance wherever it may be found. In those rare situations, as here, where it appears plain that an error in drafting has occurred, so that a literal construction would make a dramatic change in longstanding law, it is both sensible and permissible for judges to consider, in conjunction with other factors, Congress' complete silence on the literal effect of the change. *See Harrison v. PPG Indus*., 446 U.S. [578,] 602 [1980] (Rehnquist, J., dissenting). After all, Congress should know that courts will not infer a change in statutory meaning when Congress simply revises, renumbers, or consolidates a statute, absent a clear expression of legislative purpose. Moreover, no canon of construction bars courts from using common sense and construing a law as not saying what it obviously does not mean.

Id. at 953-54 (citations omitted).

Here, there is no absence or brevity of legislative history. To the contrary, there is ample evidence of Congress' intent to expand appellate review in

subjurisdictional cases. (Opening Br. at 12, 20, 21, 22-23). Here, as in *Aetna Cas. & Ins. Co*., the scrivener's error resulted from inadvertence.

The aforementioned examples demonstrate that finding a scrivener's error in 10 U.S.C. § 869 does not require this Court to "rewrite the statute," as the Government incorrectly suggests. (Appellee Br. at 7, 22, 29, 30). Instead, this Court should conclude, based on the legislative history and other sections of the statute dealing with the same subject matter (Opening Br. at 39-40), that Congress intended to vest authority in TJAG and jurisdiction in the CCA to review Appellant's case.

4. The Government's approach produces an absurd result.

Under the Government's approach, "[o]nly summary courts-martial & waiver cases can be reviewed under Article 69." (Appellee Br. at 13). Based on this premise, Appellant is entitled to no appellate review whatsoever of his general court-martial conviction. Servicemembers convicted by a summary court-martial have more rights regarding appellate review than Appellant even though a finding of guilt at a summary court-martial does not constitute a criminal conviction as it is not a criminal forum. Rule for Courts-Martial [R.C.M.] 1301(b). Additionally, convicted servicemembers eligible for direct appeal who waive this right have more rights regarding a review of the case than appellant.

Appellant stands convicted of one specification of wrongful use of LSD. The military judge sentenced him to forfeiture of $2000.00 pay per month for three months and a reprimand. (JA 237-39). The maximum sentence for the offense is a dismissal, forfeiture of all pay and allowances, and confinement for five years. 2019 MCM, ¶ 50.d.(1)(a). Should this Court accept the Government's approach to the obvious scrivener's error, then no military appellate court has jurisdiction to consider Appellant's arguments that the military judge abused her discretion in denying the defense motion to suppress Appellant's statement for insufficient corroboration and that the evidence was legally insufficient to sustain the conviction. (JA 07-072, 137). The only review available to Appellant is a cursory review by a designated judge advocate.

Thus, from an appellate perspective, Appellant was disadvantaged by receiving a subjurisdictional sentence; he would have had the opportunity to advocate for his rights if the military judge had sentenced him to the maximum punishment. Appellate review could result in a case dispositive outcome that would remove the most lasting consequence of Appellant's court-martial, a federal conviction.

The Government asserts that "[s]everal rational justifications support [a] limitation" on reviews of cases with subjurisdictional sentences." (Appellee Br. at 26). These justifications are:

> First, it is a limitation that acknowledges that it may not be worthwhile for a TJAG to re-review a case with such a minor sentence. Second, the limitation acknowledges that it may not be worthwhile for TJAG to re-review a case already reviewed by an attorney from his office or an attorney designated by service rules. After all, if the attorney conducting an Article 65(d) review believes corrective action may be warranted, TJAG will already have authority to set aside the findings or sentence under Article 65(e)(1). Finally, perhaps the limitation was to prevent CCA review of cases with such minimal sentences. Any authorized TJAG review could authorize further CCA review and even, potentially, review by this Court. Article 69(d), 67, UCMJ. Perhaps, Congress wished to prevent the CCA and this Court from reviewing cases with such minor sentences. Under Article 69(c), TJAG still retains the authority to review those cases with serious punishments if they are not reviewed under Article 66. This ensures that serious punishments receive more robust review, even if the accused waives review, withdraws from appeal, or fails to file an appeal. This also reflects reason—not absurdity.

(Appellee Br. at 26-27).

The Government's musings about the possible justifications for its approach focus on the adjudged sentence and not on the conviction itself. It is axiomatic that the concept of "equal protection" of the laws in the federal context falls within the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Under the Government's premise that the FY17 NDAA amendments to the UCMJ deprive the CCAs of jurisdiction to review subjurisdictional court-martial convictions, servicemembers convicted of serious offenses are denied appellate review if no punitive discharge or confinement in excess of six months is

adjudged. That servicemember, such as Appellant, has a federal conviction for life, absent a pardon, but no right to appellate review. Other servicemembers who receive subjurisdictional sentences may be required to register as sex offenders or to forego the right to purchase firearms but will not be entitled to appellate review. While the Constitution does not contain an explicit right to appeal, "the federal court system and forty-seven states provide – as a matter of state law – either a constitutional or statutory requirement for appeals as of right in both civil and criminal cases." Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1222 (2013). The Government's approach raises – not removes – significant constitutional questions that this Court should avoid. *See generally Douglas v. California*, 372 U.S. 353, 356-69 (1963); *see also* Peter D. Marshall, *A Comparative Analysis to the Right to Appeal*, 22 Duke J. Comp. & Int'l L. 1 (2011); Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219 (2013).

If Congress specifically intended to deprive TJAG of the authority to review Appellant's case and to deprive the CCA of the jurisdiction to review this case, then it would have explicitly said so. "It is generally understood that when Congress seeks to divest jurisdiction of courts or other tribunals, it does so with a clear statement." *Randolph v. HV*, 76 M.J. 27, 35 (C.A.A.F. 2017) (Sparks, J., dissenting). Here, Congress did not seek to divest TJAG of the authority to review Appellant's case and the CCA of the jurisdiction to review the case; to the

contrary, Congress explicitly intended to expand appellate review for cases with subjurisdictional sentences. A refusal to recognize Congress' typographical error constitutes infidelity to Congress' intent.

5. This Court has already determined that 10 U.S.C. § 869 grants authority to TJAG and jurisdiction to the CCA to review Appellant's case.

The Government insists that Appellant has asked this Court to rewrite the statute in contravention of *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021). (Appellee Br. at 29). This assertion is flawed. This Court has already concluded that the amended statute provides TJAG the authority to review Appellant's case and grants the CCA jurisdiction to review the case. In *United States v. Brown*, this Court recognized Congress' intent when it stated:

> Congress created a bifurcated statutory scheme for the appellate review of completed courts-martial, depending upon the sentence approved by the convening authority. A court of criminal appeals exercises jurisdiction over a broad range of cases under Article 66(b), UCMJ, including every case in which the approved sentence extends to a punitive separation or confinement for a year or more unless mandatory review is waived. Because Appellee's sentence is below the Article 66(b), UCMJ, threshold for mandatory review at the lower court, the Article 66(b), UCMJ, pathway to appellate review is unavailable to Appellee.
>
> Article 69, UCMJ, however, provides a second pathway to review before the Court of Criminal Appeals for an accused convicted and sentenced at a special court-martial. Cases not reviewed by the lower court pursuant to Article 66(b), UCMJ, such as the instant case tried at a

> special court-martial, can still be reviewed by TJAG "upon application of the accused" for, inter alia, "error prejudicial to the substantial rights of the accused." Article 69(b), UCMJ.

81 M.J. 1, 4 (C.A.A.F. 2021).

In a footnote to the final sentence of the above passage, this Court noted:

> The instant case was referred on January 12, 2018. For cases referred on or after January 1, 2019, pursuant to Article 66(b)(1)(D), 10 U.S.C. § 866(b)(1)(D), an accused is now entitled to have the courts of criminal appeals review his case with respect to matters of law if the accused applies for review from a decision of TJAG under Article 69(d)(1)(B) "and the application has been granted by the Court." Thus, it is no longer the case that only those cases that TJAG elects to refer to the court of criminal appeals under Article 69(d), UCMJ, may be heard by the lower court.

Id. at n.5.

The Government ignores this Court's explanation in *Brown*. Instead, the Government turns its attention to other CCA decisions on this issue and declares that they are "[n]ot [h]elpful" because they do not analyze the statutory language. (Appellee Br. at 21).[4] The Government speculates, without evidence, that the

[4] Regarding the Army CCA's decision in *United States v. Tate*, 2022 CCA LEXIS 543 (Army Ct. Crim. App. Sep. 9, 2022), the Government states, "Worth noting, this Court additionally found no jurisdiction to review *Tate* . . . presumably, for the same, related reason – the CCA lacked jurisdiction in the first place." (Appellee Br. at 32 (citing *United States v. Tate*, 83 M.J. 138 (C.A.A.F. 2022). In denying Tate's petition for grant of review, this Court stated, "On consideration of the petition for grant of review, and Appellant's motion to extend time to file the supplement to the petition for grant of review and motion for appropriate relief, it

CCAs "did not notice this issue because of the typographical errors in the version of Article 69 contained in the 2019 Manual."[5] *Id*.

At least one CCA – the Air Force CCA – continues to conclude that servicemembers who receive subjurisdictional sentences under the amended statute "ha[ve] a potential route for review by the CCA." *United States v. Boren*, No. ACM 40296, __ CCA LEXIS __ (A.F. Ct. Crim. App. Sep. 7, 2023) (order) (unpub.).

Regardless of the reasons ascribed to the CCAs for finding that jurisdiction exists, the Government does not dare to suggest that this Court "did not notice the issue"; instead, the Government simply ignores *Brown*.

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is ordered that the petition is dismissed for lack of jurisdiction without prejudice to filing a second petition in the course of normal appellate review; and that the motions are denied as moot." 83 M.J. 138. In permitting Tate to file a second petition in the normal course of appellate review, it is clear that an avenue for appellate review existed for him. If there were no avenue for appellate review, as the Government asserts, then this Court would not have allowed him the opportunity to file a second petition.

[5] The Government does not suggest a solution, supported by statute or caselaw, for the remedy in cases where courts have satisfied themselves that they have jurisdiction but in which a superior court subsequently concludes that no jurisdiction exists. In other words, if the Government's approach to the granted issue is correct, then what happens to these cases?

CONCLUSION

For the foregoing reasons and for the reasons articulated in the Opening Brief, this Court should conclude that TJAG had authority and the CCA had jurisdiction to review Appellant's case.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court hold that TJAG had the authority to review Appellant's case and the CCA had jurisdiction over Appellant's case, grant the Petition for Grant of Review on the Issue Presented, and set aside and dismiss the finding and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via email to the Court and served on Air Force Appellate Government Division and the Air Force Appellate Defense Division on January 9, 2024.

CERTIFICATE OF COMPLIANCE WITH RULE 21(B)

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 4,483 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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Owner-Operators Indep. Drivers Ass'n., Inc. v. Mayflower Transit, Inc.

United States District Court for the Southern District of Indiana, Indianapolis Division

June 1, 2006, Decided ; June 1, 2006, Filed

CAUSE NO. 1:98-cv-0457-SEB-VSS, CAUSE NO. 1:98-cv-0458-SEB-VSS

Reporter
2006 U.S. Dist. LEXIS 39827 *

OWNER-OPERATORS INDEPENDENT DRIVERS ASSOCIATION, INC., et al., Plaintiffs, v. MAYFLOWER TRANSIT, INC., Defendant.

Subsequent History: Motion denied by *Owner-Operators Indep. Drivers Ass'n v. Mayflower Transit, Inc., 2006 U.S. Dist. LEXIS 44550 (S.D. Ind., June 27, 2006)*

Prior History: *Owner-Operators Indep. Drivers Ass'n v. Mayflower Transit, Inc., 2004 U.S. Dist. LEXIS 32645 (S.D. Ind., Dec. 14, 2004)*

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For WILLIAM H. OWEN, Representative Plaintiff added March 29, 2005, TIMOTHY P. CORWIN, SR., Representative Plaintiff added March 29, 2005, Plaintiffs: David J. Carr, Margaret Dewey Wielenberg, ICE MILLER LLP, Indianapolis, IN.

For MAYFLOWER TRANSIT INC., Defendant: David Wells, Michael J. Morris, Rebecca A. Pinto, Pro Hac Vice, THOMPSON COBURN LLP, St. Louis, MO; James Albert Calderwood, Pro Hac Vice, ZUCKERT SCOUTT &, RASENBERGER, Washington, DC; Roman P. Wuller, Pro Hoc Vice, THOMPSON COBURN, St. Louis, MO; David C. Campbell, James M. Hinshaw, Martha S. Hollingsworth, BINGHAM MCHALE LLP, Indianapolis, IN.

For MAYFLOWER TRANSIT INC., Counter Claimant: David Wells, Michael J. Morris, Rebecca A. Pinto, Pro Hac Vice, THOMPSON COBURN **[*2]** LLP, St. Louis, MO; James Albert Calderwood, Pro Hac Vice, ZUCKERT SCOUTT &, RASENBERGER, Washington, DC; Roman P. Wuller, Pro Hoc Vice, THOMPSON COBURN, St. Louis, MO; David C. Campbell, James M. Hinshaw, Martha S. Hollingsworth, BINGHAM MCHALE LLP, Indianapolis, IN.

For ANNE WEBER-NEIDIG, As Personal Representative of the, Estate of John E. Neidig, Individually, and on Behalf of All Others Similarly, Situated, OWNER-OPERATOR, INDEPENDENT DRIVERS, ASSOCIATION, Counter Defendants: David Aaron Cohen, Joseph Albert Black, Paul Damien Cullen, Sr., Pro Hac Vice, THE CULLEN LAW FIRM PLLC, Washington, DC; David J. Carr, ICE MILLER LLP, Indianapolis, IN.

Judges: SARAH EVANS BARKER, JUDGE.

Opinion by: SARAH EVANS BARKER

Opinion

ENTRY ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. *Introduction.*

This cause is before the Court on Plaintiffs' Motion for Partial Summary Judgment on the issue of whether Defendant, Mayflower Transit, Inc. ("Mayflower") may be held absolutely liable for the actions and/or alleged misconduct of its authorized agents under the federal Truth-in-Leasing Regulations, *49 C.F.R. Part 376.12* ("Leasing Regulations"). This entry is the most recent in a long succession **[*3]** of previous rulings by the Court in the two companion cases, 1:98-cv-0457 and-0458, addressed jointly here. [1] **[*5]** The first of those rulings

[1] A significant portion of Mayflower's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment argues the impropriety and/or prematurity of the filing of Plaintiffs' motion, as, at the time of the filing of the motion, Mayflower's Motion to Dismiss and the Plaintiffs' Motion for Class Certification had not yet been ruled upon. Further,

denied Mayflower's motion to dismiss. [2] The second ruling certified the class of owner-operators for purposes of this litigation and conditioned class membership upon Plaintiffs' compliance with the applicable statutes of limitations. [3] On October 8, 2002, the Court granted Plaintiffs' motion for summary judgment with respect to its claim in Cause Number 1:98-cv-0497, ruling that Mayflower's conduct as pertaining to fuel credits violated the Leasing Regulations, but denied summary judgment as to Plaintiffs' claim that Mayflower's action violated Indiana's conversion statute. [4] On December 14, 2004, the Court ruled on the parties' cross-motions for partial summary judgment on the statute of limitations issue, holding a two-year statute of limitations period applicable to Plaintiffs' federal claims and the Interstate Commerce Commission Termination Act applicable to claims arising out of contracts executed prior to 1996. The Court further ordered the parties to submit additional briefing, as part of a Supplemental Motion for Reconsideration of Class **[*4]** Certification, regarding the statutes of limitations applicable to the contract claims and the propriety of a class action as to those claims, as well as the applicability of the Indiana conversion statute to the Plaintiffs. On September 27, 2005, we ruled on Mayflower's Motion to Vacate the Conditional Class Certification Entry, vacating conditional class certification as to Plaintiffs' state law claims for breach of contract and conversion, while denying Mayflower's motion to vacate the conditional class certification order as to the federal claims.

[*6] In the instant motion, Plaintiffs have moved on behalf of themselves and all others similarly situated for partial summary judgment, seeking a declaration that Mayflower maintains absolute liability under the Leasing Regulations for ensuring that owner-operators, such as those included within the Plaintiff class, receive all rights and benefits as outlined in the Leasing Regulations, regardless of whether those owner-operators contracted with Mayflower directly or whether said contracts existed between the individual owner-operator and an authorized agent of Mayflower. The motion has been fully briefed, and for the reasons stated herein, the Court GRANTS the Plaintiffs' Motion for Partial Summary Judgment.

II. *Statement of Facts.*

The Court has, on several prior occasions, summarized the background facts and allegations pertinent to the two cases in which Plaintiffs seek partial summary judgment and, consequently, will not reiterate those facts here. We note, however, that the facts as set forth in Plaintiffs' Statement of Material Facts accompanying Plaintiffs' Motion and Brief in Support of Motion for Summary Judgment remain undisputed by Mayflower. The crux of Mayflower's **[*7]** argument centers on its opposition to Plaintiffs' claimed entitlement to the type of judgment sought, namely, a declaration that Mayflower can be held fully liable under the Leasing Regulations for the acts of its agents. Therefore, the dispute focuses on the extent to which Mayflower may be held accountable for its agents' acts or omissions.

III. *Discussion.*

A. The Standard for Motion for Summary Judgment.

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*. When determining whether a genuine issue of material fact

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Mayflower's brief contains an argument to the effect that it never formally asserted as an affirmative defense that it could not be held liable for the acts of its agents. As the Court subsequently ruled upon the motions identified by Mayflower, and Mayflower has in its Amended Answer and Counterclaims formally pled the affirmative defense in dispute, the Court now notes that those arguments are moot and advises that said arguments will, therefore, not be addressed in this Entry.

[2] *Owner-Operator Independent Drivers Ass'n, Inc. v. Mayflower Transit, Inc., 161 F.Supp.2d 948 (S.D.Ind. 2001)*. The Court notes that in Mayflower's Motion to Dismiss, Mayflower raised the argument that under the applicable statutory and regulatory framework, Plaintiffs maintained no private right of action under the Leasing Regulations. The Court, in ruling upon Mayflower's motion, determined a private right of action to exist, stating: "We agree with the FHWA and with the Eighth Circuit that *49 U.S.C. § 14704(a)* appears *on its face* to provide for a private right of action for damages and injunctive relief by parties injured by a carrier." *Id. at 955*. To the extent that Mayflower asserts the same argument in its briefing on the immediate motion before the Court, we decline to address that argument again in light of our previous ruling.

[3] *Owner-Operator Independent Drivers Ass 'n, Inc. v. Mayflower Transit, Inc., 204 F.R.D. 138 (S.D.Ind. 2001)*.

[4] *Owner-Operator Independent Drivers Ass'n, Inc. v. Mayflower Transit, Inc., 227 F.Supp.2d 1014 (S.D.Ind. 2002)*. Additionally, the Court denied Plaintiffs' Motion for Summary Judgment on the fuel tax credits issue in Cause Number 1:98-cv-0458-SEB-VSS (formerly IP98-0458-C B/S) in a separate unpublished opinion.

exists, the court must view the record and all reasonable inferences in the light most favorable to the nonmoving party. National Soffit & Escutcheons, Inc. v. Superior Systems, Inc., 98 F.3d 262, 265 (7th Cir. 1996). The court may only determine a genuine issue to exist "when a reasonable jury could find for the party opposing the motion based on **[*8]** the record as a whole." Pipitone v. United States, 180 F.3d 859, 861 (7th Cir. 1999). In ruling on a motion for summary judgment, the court must question "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" on any issues for which the nonmoving party bears the burden of proof at trial. *Fed.R.Civ.P. 56(e)*; *see also* Silk v. City of Chicago, 194 F.3d 788, 798 (7th Cir. 1999). The moving party, however, may prevail by "'showing' . . . that there is an absence of evidence to support the nonmoving party's case" and, therefore, is not required to positively disprove that case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In accordance with these standards, we construe the facts presented by the parties in the light most favorable to Mayflower, as the non-movant.

B. The Language of Leasing Regulations **[*9]** and 49 C.F.R. § 376.12(m).

As an initial matter, we note that there exists no dispute regarding the material facts relevant to this motion, as the parties agree that the Department of Transportation ("DOT") has authorized Mayflower to transport property in interstate commerce, that Mayflower provides transportation services primarily via its numerous agents located nationwide, and that said agents provide transportation services in equipment leased from independent owner-operators. There being no genuine issue of material fact for the jury to resolve, the issue to be determined for us is whether Plaintiffs are entitled to judgment as a matter of law. In addressing that issue, the parties' arguments center upon the text of 49 C.F.R. § 376.12(m), as well as the legislative and administrative history of this regulation and the surrounding case law. The promulgated regulation in its entirety provides:

> This paragraph applies to owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier. In this situation, the authorized carrier is **[*10]** obligated to ensure that these owners receive all the rights and benefits due an owner under the leasing regulations, especially those set forth in paragraphs (d)-(k) of this section. This is true regardless of whether the lease for equipment is directly between the authorized carrier and its agent rather than directly between the authorized carrier and each of these owners. The lease between an authorized carrier and its agent shall specify this obligation.

49 C.F.R. § 376.12(m). The parties do not dispute that this regulation requires Mayflower to accept some degree of responsibility for the acts and/or omissions of its authorized agents who contract with individual owner-operators and engage in the transport of household goods. The parties strongly disagree, however, upon the meaning of the regulation and the extent to which Mayflower may be held liable for those actions by its agents that may be found to have violated the Leasing Regulations. [5] The Plaintiffs adamantly assert that the plain language of the regulation dictates that Mayflower maintains absolute liability and ultimate responsibility for ensuring that an owner-operator receives all **[*11]** rights and benefits provided for under the Leasing Regulations, regardless of whether the owner-operator contracted with Mayflower directly or via Mayflower's designated agent. Mayflower interprets the regulation to the contrary, arguing more specifically that the phrase "obligated to ensure" represents a more minimal responsibility imposed upon the carrier, devoid of any implication that a carrier shall be held absolutely liable or primarily responsible for monitoring its agents' actions and/or otherwise ensuring that owner-operators receive the rights and benefits to which they are entitled under the Leasing Regulations.

[*12] Seventh Circuit precedent sets forth the process we are to apply in determining the meaning of such a regulation:

> We begin our inquiry into the proper interpretation

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[5] Mayflower's Mem. in Opp'n to Pls.' Mot. for Partial Summ. J., p.11, stating: "In short, Mayflower does not question that carriers have a responsibility to owner-operators under the regulations. Contrary to Plaintiffs' leap in reasoning, however, this acknowledgment does not mean that Mayflower is necessarily absolutely and primarily liable for all wrongs, errors or mistakes of its agents. Rather, the parties disagree with the nature of the responsibility."

> of the statute and regulation by determining whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

See Ioffe v. Skokie Motor Sales, Inc., 414 F.3d. 708, 710-11 (7th Cir. 2005) (citations and internal quotation marks omitted). In examining the plain language of 49 C.F.R. § 376.12(m), the first sentence clearly identifies the parties to whom the regulation pertains, to wit, "those owners who are not agents but whose equipment is used by an agent of an authorized carrier in providing transportation on behalf of that authorized carrier." Thus, this regulation clearly includes and governs **[*13]** the parties to these lawsuits and pertains to the leasing arrangements existing between Plaintiffs and Mayflower and/or its agents. The second sentence of the regulation imposes upon authorized carriers the obligation to protect the owners whose equipment is used by an agent of the authorized carrier by ensuring that those owners receive all rights and benefits to which they are entitled under the Leasing Regulations, especially those rights arising under subsections (d)-(k). [6] The third sentence of the regulation mandates that the authorized carrier's duty exists irrespective of whether the lease for equipment was entered into directly between the carrier and its agent or between the authorized carrier and the individual equipment owner. The final sentence of the regulation imposes a duty upon the authorized carrier and its agent to include language pertaining to the carrier's obligation within the lease itself.

[*14] Mayflower unconvincingly contends that in reading the regulation to require an authorized carrier to have absolute or primary responsibility for ensuring the owner's receipt of all benefits and rights under the Leasing Regulations, the result is unreasonable and impractical when considering the realities that exist within the household goods transportation industry. Mayflower contends that the regulation was intended instead to accomplish two purposes: (a) to prohibit motor carriers from enacting *system-wide* policies that encourage or require its agents to violate the Leasing Regulations, and/or (b) to prohibit Mayflower from ignoring violations engaged in by its agents that result in *systematic deprivation* of owners' rights and/or benefits. [7] In attempting to find support for its position within the plain language of the regulation, however, Mayflower must rely more upon the words *excluded* from the regulation (by reading words into it that do not appear in the plain language of the statute) than those included. As a result, Mayflower posits an interpretation that, should it be accepted by this Court, would render the regulation meaningless and devoid of its essential **[*15]** purpose.

None of the language set out in 49 C.F.R. § 376.12(m) addresses or even hints at a specific concern regarding system-wide policies implemented by carriers or their agents and/or the systematic deprivation of an owner's rights and benefits. [8] Rather, the plain language of the regulation dictates that carriers, such as Mayflower, maintain a statutory obligation [9], regardless of whether

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[6] As indicated within the plain language of the regulation, the Interstate Commerce Commission ("ICC") intended to place special emphasis upon the importance of ensuring that owners receive all rights and benefits arising under 49 C.F.R § 376.12(d)-(k). Despite the emphasis placed upon the need for compliance with those particular subsections and their attendant duties under those subsections, we do not view the regulation's failure to emphasize the importance of other subsections as removing the duty placed upon carriers to comply with those subsections. Further, we note that the federal claims brought by Plaintiffs in these two actions allege violations of a number of the various subsections which place special emphasis pursuant to the plain language of the regulation.

[7] Plaintiffs contend that the alleged misconduct of Mayflower's agents in fact constitutes a systematic deprivation of owner-operators' rights and/or a system-wide violation of the leasing regulations. *See generally* Pls.' Reply to Mayflower's Mem. in Opp'n to Mot. for Partial Summ. J. at pages 3-4.

[8] Further, none of the materials (including materials pertaining to the legislative and/or administrative history of 49 C.F.R. § 376.12(m)) submitted by Mayflower to support its opposition to Plaintiffs' motion identifies this purported concern over "system-wide" policies or "systematic deprivation."

[9] Black's Law Dictionary defines "obligation" as being either "a legal or moral duty to do or not do something" or "a formal, binding agreement or acknowledgment of a liability to pay a certain amount or do a certain thing for a particular person or set of persons." BLACK'S LAW DICTIONARY 1109 (7th ed. 2001). Under either definition, this Court finds the plain language "obligated to ensure" contained within 49 C.F.R. § 376.12(m) to clearly impose a legal liability and/or duty upon Mayflower in regard to ensuring the receipt of the owner-

they choose to enlist an intermediary agent's services, to ensure that each individual owner entering into a lease with the carrier or the carrier's agent(s) receives all rights and benefits to which he is entitled under the Leasing Regulations. The plain language of the regulation refers to the **[*16]** rights of all owners collectively and mandates that all owners receive that to which they are entitled under the Leasing Regulations. The plain language does not contemplate whether the denial of an owner's rights arise via system-wide policies and procedures or through individual case-by-case circumstances. Rather, the plain language focuses upon the central unwavering premise that the carrier must ensure that the owners receive all their rights and benefits.

[*17] Mayflower, in reading the plain language of the regulation and contending that it is intended to require carriers to engage solely in selective policing at its own volition, imports into it a discretionary obligation on the part of the carrier that simply does not exist. Mayflower's arguments in support of its interpretation of the regulation and its position that the regulation remains ambiguous center upon the regulation's purported failure to spell out and specifically delineate the exact nature or extent of the liability to be imposed upon the carrier or to identify the specific aspects of the Leasing Regulations that a carrier must concern itself with when monitoring the acts of its agents. If we were to adopt Mayflower's arguments, we would have to conclude that, at the time of the regulation's promulgation, there existed an intent on the part of the ICC to bifurcate the Leasing Regulations into two distinct categories: those regulations which the ICC deemed important enough to require oversight by the carrier in order to ensure its agents' compliance and, alternatively, those regulations which were, in essence, deemed so trivial that a carrier could disregard them and place **[*18]** compliance at the discretion of its agents, without regard to whether the owner received all benefits and rights to which he was entitled under the Leasing Regulations. Mayflower's arguments are premised on its faltering efforts to identify other language that could have been included in the regulation, rather than accepting the plain language of the regulation.

As both parties point out in their respective briefs, the intent in enacting the Leasing Regulations, specifically 49 C.F.R § 376.12(m), was to clarify the obligations existing within the leasing relationships between authorized carriers and owner-operators. Further, the materials submitted by each party in support of their respective positions acknowledge that the Leasing Regulations, particularly 49 C.F.R. § 376.12(m), were created in part as an effort to protect owner-operators by fostering economic stability and to provide a more equitable division of bargaining power among the parties involved in the transport of household goods. Mayflower's implication that the promulgation of the regulation (which undoubtedly was intended to assist owner-operators in realizing the **[*19]** full benefit of their rights rather than detracting from their rights) merely places an obligation upon carriers to engage in "selective policing" at the carriers' own discretion leaves us unpersuaded as to any actual ambiguity in the regulation or by Mayflower's proposed interpretation of the regulation. Rather, the plain language of the regulation considered in conjunction with the entire regulatory structure of the Leasing Regulations strongly indicate to us that the regulation imposes full liability upon carriers with regard to ensuring that operator-owners receive all the rights and benefits due them under the Leasing Regulations, irrespective of whether the owner-operator entered into a lease with the carrier directly or whether said lease existed between the owner-operator and the carrier's agent. [10]

[*20] The introduction to 49 C.F.R. § 376.12 provides: "Except as provided in the exemptions set forth in Subpart C of this part, the written lease required under § 376.11(a) shall contain the following provisions. The required lease provisions *shall be adhered to and performed by the carrier."* (emphasis added). Thus, at the very outset of the Leasing Regulations, a carrier is required without exception to obey the regulations and perform the duties associated with said regulations. Furthermore, 49 C.F.R. § 376.12(m) expressly recognizes a loophole in the original Leasing

operators' rights and benefits arising under the Leasing Regulations. Further, the plain language of the regulation in no way indicates that anything less than full responsibility shall be placed upon carriers in carrying out that obligation.

[10] We note that Mayflower raises a myriad of arguments regarding the issue of whether a carrier can be held liable for any and all acts, errors, omissions or misconduct of its agents in general. For purposes of ruling upon the instant motion, however, the Court deems it unnecessary to address these concerns regarding so broad a range of potential liabilities. Instead, we have focused more narrowly upon the issue at hand by holding that the plain language of 49 C.F.R. § 376.12(m) dictates that a carrier maintains ultimate responsibility for ensuring that owner-operators receive all rights and benefits due them under the Leasing Regulations.

Regulations that potentially could be abused by carriers whereby the ability of a carrier to engage in actions in violation of the regulations (e.g. denying an owner his rights and benefits) could be avoided simply by employing an agent to perform the "dirty work" for the carrier. Our conclusion does not permit Mayflower to sidestep or otherwise avoid its liability and responsibility via the loophole sought to be eliminated by 49 C.F.R. § 376.12(m).

Inasmuch as we have determined that the plain meaning of the regulation as written is unambiguous, **[*21]** and that the application of that plain meaning does not lead to an absurd outcome, the Court shall not question further whether the regulation's clear meaning is actually what the ICC intended to achieve. Further, because we do not find that the language of the regulation creates any ambiguity, we need not address either party's arguments based upon the legislative and administrative history of the regulation. [11]

[*22] C. The Scope of the ICC's Authority.

Mayflower contends that the ICC exceeded its authority in promulgating the Leasing Regulations to the extent that it intended the regulations to impose absolute liability upon authorized carriers. Mayflower asserts that "[a]lthough the ICC had broad authority to establish regulations relating to the interstate transportation of household goods, neither it nor the DOT has or had authority to impose absolute liability upon carriers where neither statute nor common law principals of agency would do so." Mayflower's Mem. at p. 20. Again, the Court finds Mayflower's argument unconvincing. We are not persuaded that no statutory basis existed for the ICC to enact 49 C.F.R. § 376.12(m), a regulation whose plain language mandates liability on the part of the carrier. Furthermore, Mayflower provides no support for its contention that the imposition of absolute liability upon carriers violates traditional notions of common law agency principals.

Mayflower correctly states that the ICC Termination Act of 1995 ("ICCTA") extinguished the ICC itself and eliminated a portion of the statutory provisions pertaining to the regulation **[*23]** of the motor carrier industry. However, Mayflower takes its argument one step too far in asserting that Congress intended to create a motor carrier industry primarily free from economic regulation. This argument lacks convincing support for the propositions that Congress intended to strip the leasing regulations currently contained within 49 C.F.R. Part 376 of their purpose and significance or that Congress never intended the ICC to possess authority to enact the Leasing Regulations, more specifically 49 C.F.R. § 376.12(m). Upon the demise of the ICC, the DOT assumed responsibility for the maintenance of motor carrier industry regulations, including but not limited to, the Leasing Regulations promulgated by the ICC. Rather than eliminating the Leasing Regulations or reducing their substantive effect, DOT maintained those regulations and delegated enforcement to the Federal Highway Administration for modification, execution and administration. [12] Even now, the Leasing Regulations remain in place, and the fact that numerous legal actions have been brought alleging violations of the regulations proves our point.

[*24] When the ICC initially proposed the addition of 49 C.F.R. § 376.12(m) (formerly § 1057(n)), it was met with a jurisdictional argument similar to that presented here by Mayflower. The ICC properly responded when it stated that "Congress has given the Commission authority to regulate the surface transportation industry and our authority to adopt reasonable leasing regulations governing the relationship between carrier and lessor has been sustained. Our decision here is a modest modification of existing rules designed to ensure simply that carriers cannot avoid the rules through the

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[11] *See* Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) (noting that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," and that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete"). *See also,* United States v. Ron Pair Enters., 489 U.S. 235 (1989), 109 S. Ct. 1026, 103 L. Ed. 2d 290 (noting that a court's duty in resolving a dispute over the meaning of a statute "begins where all such inquiries must begin; with the language of the statute itself" and that "it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)).

[12] The regulations in dispute among the parties today, formerly know as 49 C.F.R. Part 1057, became 49 C.F.R. Part 376 in October 1996, when the DOT transferred and redesignated those regulations, among others, to the Federal Highway Administration. *See Motor Carrier Transportation; Redesignation of Regulations from the Surface Transportation Board Pursuant to the ICC Termination Act of 1995*, 61 Fed. Reg. 54706 (Oct. 21, 1996).

establishment of an intermediary agent." *Lease and Interchange of Vehicles (Leases Involving Carrier Agents), 47 Fed. Reg. 28396 (June 30, 1982)*. We have previously ruled that the statutory basis for the Leasing Regulations, 49 C.F.R. Part 376, lies within *49 U.S.C. §§ 13301* and *14102*. *Owner-Operator Independent Drivers Ass'n v. Mayflower Transit, Inc., 161 F.Supp.2d at 954*. The materials submitted to the Court in conjunction with the parties' briefing on the instant motion provide further support **[*25]** for the Court's determination that Congress vested in the ICC the authority to enact regulations consistent with its goals of facilitating a balanced bargaining relationship between carriers and owner-operators. Upon the dissolution of the ICC, said authority was transferred to the DOT, who in turn delegated the responsibility to the FHWA, and the Leasing Regulations, though modified in regard to numbering, remain substantively the same as when promulgated. Mayflower's inability to provide substantial, persuasive support for its position, which is, of course, contrary to our prior holding acknowledging the jurisdictional basis for the promulgation of the Leasing Regulations, prompts us to reaffirm that finding at this juncture.

IV. Conclusion.

For the reasons set forth above, Plaintiffs have successfully demonstrated that they are entitled to partial summary judgment establishing that Mayflower may be held absolutely liable under the federal Leasing Regulations, 49 C.F.R. Part 376, for the actions and/or alleged misconduct of its authorized agents occurring during the course of those agents' transactions with owner-operators on behalf of Mayflower. Accordingly, Plaintiffs' Motion **[*26]** for Partial Summary Judgment is GRANTED in its entirety.

ENTERED June 1, 2006

SARAH EVANS BARKER, JUDGE

United States District Court

Southern District of Indiana

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United States v. London

United States Navy-Marine Corps Court of Criminal Appeals

November 30, 2006, Decided

NMCCA 200500323

Reporter
2006 CCA LEXIS 301 *; 2006 WL 4573014

UNITED STATES v. Verdell R. LONDON, Aviation Electrician's Mate Airman (E-3), U. S. Navy

Notice: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

Subsequent History: Motion granted by *United States v. London, 2007 CAAF LEXIS 295 (C.A.A.F., Feb. 27, 2007)*

Review denied by *United States v. London, 2007 CAAF LEXIS 453 (C.A.A.F., Apr. 4, 2007)*

Prior History: Sentence adjudged 13 May 2004. Military Judge: C.L. Reismeier. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

Counsel: LT RICHARD MCWILLIAMS, JAGC, USN, Appellate Defense Counsel.

LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel.

Judges: BEFORE D.A. WAGNER, R.E. VINCENT, E.B. STONE. Senior Judge WAGNER and Judge STONE concur.

Opinion by: R.E. VINCENT

Opinion

VINCENT, Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas, of conspiracy to commit an assault consummated by a battery and assault consummated by a battery, in violation of Articles 81 and 128, Uniform Code of Military Justice, *10 U.S.C. §§ 881* and *928*. The appellant was sentenced to a bad-conduct discharge and confinement for nine months. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error. In his first assignment of error, the appellant asserts that the convening authority failed to timely consider his **[*2]** initial request for clemency. The appellant's second assignment of error contends that the military judge abused his discretion by permitting testimony that the appellant informed the victim that he had "some heat" under his mattress. His third assignment of error alleges excessive post-trial delay.

We have carefully reviewed the record of trial, the appellant's three assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ*.

However, the appellant is entitled to official records that accurately depict the findings and sentence of his court-martial conviction. In his case, although not raised by the appellant, there is a scrivener's error in the promulgating order. Specifically, the specification of Charge I in the convening authority's action erroneously lists the date of the conspiracy as "17 October 2003" rather than "17 January 2004". We note that the staff judge advocate's recommendation lists the correct date for the specification of Charge I. Although we find that this error is harmless, **[*3]** the appellant is entitled to a corrected court-martial order. *United States v. Crumpley, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998)*.

Timely Action on Clemency Requests

Clemency requests should be submitted and forwarded to the convening authority in sufficient time to allow the possibility of favorable action. *United States v. Bell, 60 M.J. 682, 685 (N.M.Ct.Crim.App. 2004)*. In this case, on 22 June 2004, the appellant's trial defense counsel submitted a clemency petition to the convening authority requesting a one-month reduction in the appellant's sentence. The convening authority denied this request

on 4 August 2004. Although 43 days passed between the appellant's clemency request and the convening authority's denial of the request, the convening authority acted on the request approximately 30 days prior to the appellant's release from confinement on 2 September 2004. Therefore, the convening authority, had he chosen to do so, could have granted the entire one-month reduction in confinement requested by the appellant. This assignment of error is without merit.

Admission of 404(b) Evidence

In his second assignment of error, the appellant **[*4]** contends that the military judge abused his discretion by admitting evidence that the appellant threatened his victim by bragging that he had "some heat" under his mattress. We disagree.

On the evening of 16 January 2004, the appellant and Aviation Electronics Technician Airman [H], the victim, were engaged in a verbal altercation in a third party's barracks room. During this altercation, both the appellant and the victim discussed the use of firearms and argued over which one could shoot the fastest. The appellant also informed the victim that he possessed a gun, which he kept under his mattress. On the morning of 17 January 2004, the appellant and his three co-conspirators entered the victim's barracks room and physically assaulted him.

In granting the Government's Motion in Limine to admit this evidence, the military judge explained:

> Both [the victim] and the accused made references to firearms and shooting; each boasted about who would shoot whom the fastest in another confrontation. At some point the accused referred to having a gun claiming that he kept it under his mattress. . . .
>
> I conclude that a [sic] probative value of these facts is not substantially outweighed **[*5]** by the danger of unfair prejudice and they will be admitted. These events provide the underlying favor [sic] of the case as well as the course of events leading us here.
>
> The evidence offered by the government pursuant to M.R.E. 404(b) is not, in my view, other acts evidence; it is part and parcel to the charged offenses. It is part of the *Res gestae*, the continuing interaction between the accused and [the victim]. It completes the story of the alleged crimes. The events immediately surrounding the charged 16 and 17 January offenses to include the word "exchange" before the alleged altercations are all part of this interaction.
>
> However, assuming that the evidence is properly considered as other act evidence, it is being offered for a proper non-character purpose, that is, to show motive of the accused to conspire with others to assault [the victim]. The exchange of menacing words regarding firearms provides motive for the charged offenses.

Record at 214-15.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *Thompson, 63 M.J. at 230*. We will not overturn a military judge's evidentiary decision **[*6]** unless that decision was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004)*.

Although we do not concur with the military judge's conclusion that the appellant's statement that he possessed a gun, which he kept under his mattress, was part of the *res gestae*, we agree with his alternative ruling that the statement was admissible as uncharged misconduct under Military Rule of Evidence, 404(b), Manual for Courts-Martial, United States (2002 ed.).

In order to determine if evidence of uncharged acts of misconduct is admissible under Mil. R. Evid. 404(b), we ascertain whether that evidence is "offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses." *United States v. Thompson, 63 M.J. 228, 230 (C.A.A.F. 2006)*(quoting *United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989)*).

This determination is made using the three-prong test articulated in *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989).* **[*7]** The first prong asks whether the evidence reasonably supports a determination by the fact-finder that the appellant committed the misconduct. *Id. at 109* (citing *United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1988)*). This is a low standard. *United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993)*. The second prong of the test asks what fact of consequence is made more or less probable by the existence of this evidence. *Reynolds, 29 M.J. at 109* (citing Mil. R. Evid. 401 and *United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989)*). The third prong requires the application of the balancing test under Mil. R. Evid. 403. *Id.*

We agree with the military judge's determination that the evidence of uncharged misconduct met the first prong of the test. Specifically, the appellant's statement reasonably supported a conclusion that he communicated a threat, a violation of Article 134, UCMJ. We also conclude that the military judge correctly determined that the evidence satisfied the second prong of the test. We agree with the military judge's alternate finding that the appellant's statement was offered **[*8]** for a non-character purpose. The military judge concluded in his findings of fact that both the appellant and the victim made statements about shooting each other with a firearm. This was illustrative of the level of hostility the two felt for each other hours before the assault and provided evidence concerning the appellant's motive. We note that the offenses that the appellant was convicted of did not involve firearms. Finally, we concur with the military judge's determination that the admission of the appellant's statement was more probative than prejudicial. *See* Mil. R. Evid. 403.

Post-Trial Delay

In his third assignment of error, the appellant asserts excessive post-trial delay. We disagree. This record of trial was docketed with this court 303 days after the appellant was sentenced. We find that this delay is not facially unreasonable for a five-volume, 746-page contested general court-martial involving serious offenses. See *United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)*; *United States v. Jones, 61 M.J. 80, 83 (C.A.A.F. 2005)*; *Toohey v. United States, 60 M.J. 100, 102 (C.A.A.F. 2004)*. Accordingly, we do **[*9]** not need to conduct a due process analysis.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Toohey, 60 M.J. at 102*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*; *United States v. Brown, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)*(en banc).

Conclusion

Accordingly, we affirm the finding of guilty and the sentence, as approved by the convening authority. We also direct that the supplemental court-martial order correctly reflect the date of 17 January 2004 in the specification of Charge I.

Senior Judge WAGNER and Judge STONE concur.

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United States v. Watford

United States Army Court of Criminal Appeals

January 30, 2017, Decided

ARMY 20150549

Reporter
2017 CCA LEXIS 68 *

UNITED STATES, Appellee v. Private E2 THOMAS J. WATFORD, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Affirmed without opinion by *United States v. Watford, 2017 CAAF LEXIS 500 (C.A.A.F., May 22, 2017)*

Prior History: **[*1]** Headquarters, Fort Stewart. John T. Rothwell and John S. T. Irgens, Military Judges, Colonel Peter R. Hayden, Staff Judge Advocate (pretrial), Major Mark D. Nee, Acting Staff Judge Advocate (recommendation), Lieutenant Colonel Brian J. Chapuran, Staff Judge Advocate (addendum).

Counsel: For Appellant: Lieutenant Colonel Melissa R. Covolesky, JA; Major Andres Vazquez, Jr., JA (on brief and brief in response to specified issue); Major Christopher Coleman, JA; Captain Patrick J. Scudieri, JA (on reply to brief in response to specified issue).

For Appellee: Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Michael E. Korte, JA (on brief and brief in response to specified issue).

Judges: Before CAMPANELLA, HERRING, and PENLAND, Appellate Military Judges. Senior Judge CAMPANELLA and Judge HERRING concur.

Opinion by: PENLAND

Opinion

SUMMARY DISPOSITION

PENLAND, Judge:

Adhering to well-established notice pleading requirements, we affirm, *inter alia*, appellant's conviction for enticing a minor to transmit visual depictions of herself engaged in sexually explicit conduct, in violation of *Title 18, United States Code, § 2251(a)* (Sexual Expoitation of Children), though the government unintentionally alleged this misconduct violated *§ 2251A* (Selling or **[*2]** Buying of Children) of the same title.

A military judge sitting as a general court martial convicted appellant, pursuant to his pleas, of one specification of receiving child pornography and one specification of sexual exploitation of a minor,[1] in violation of *Article 134 of the Uniform Code of Military Justice*, *10 U.S.C. § 934* [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for twelve months, total forfeitures, and reduction to the grade of E-1. In accordance with the military judge's decision regarding *Article 13, UCMJ*, punishment in the case, the convening authority credited appellant with thirty days against the sentence to confinement.

We review this case under *Article 66, UCMJ*. Appellant assigns one error, unreasonable multiplication of charges, which merits neither discussion nor relief. *See United States v. Schweitzer, 68 M.J. 133, 136 (C.A.A.F. 2009)*. We have considered appellant's submissions pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*; beyond his complaint regarding the incorrect codal reference, they merit neither discussion nor relief.

In his initial brief, appellate defense counsel wrote in a footnote:

> The government charged PV2 Watford with enticing a minor to engage in sexually explicit conduct for the purpose **[*3]** of producing a visual image, in violation of *18 U.S.C. § 2251A*, however, that statute prohibits the selling or buying of children for sexual exploitation. The statute that should have been charged is *18 U.S.C. § 2251(a)*.

[1] This specification was tried as a clause three offense under *Article 134, UCMJ*; however, it incorrectly cited *18 U.S.C. § 2251A* as the relevant federal criminal statute.

This footnote was correct, but the specification's error prompted us to specify an issue:

> WHETHER SPECIFICATION 2 OF THE CHARGE FAILS TO STATE AN OFFENSE, WHERE *18 U.S.C. § 2251A* (SELLING OR BUYING OF CHILDREN) DOES NOT CRIMINALIZE THE CHARGED MISCONDUCT.[2]

To summarize the parties' responses, on one hand, appellant now contends the specification's incorrect statutory citation renders it fatally defective; on the other hand, the government characterizes the issue as a "scrivener's error" and emphasizes appellant and his counsel clearly understood he was pleading guilty to, *inter alia*, violating *18 U.S.C. § 2251(a)* and, thereby, *Article 134, UCMJ*.

In resolving this problem, we need not craft a new "scrivener's error" exception to the fundamental requirement that the government's charging instrument must state an offense. We are, however, persuaded by the government's reliance on *United States v. Sell, 3 U.S.C.M.A. 202, 206, 11 C.M.R. 202, 206 (1953)*:

> The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. **[*4]** The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Given this fundamental principle, we resolve the specified issue against appellant. While it cited the incorrect statute, the disputed specification alleged, expressly or by necessary implication, each element necessary to state an offense under *18 U.S.C. § 2251(a)*. At arraignment, government counsel described the specification as "enticing or persuading a minor to engage in sexually explicit conduct, in violation of *18 United States Code, Section 2251(a)*."[3] The stipulation of fact associated with the pretrial agreement listed the elements applicable to *18 U.S.C. § 2251(a)*. The inquiry pursuant to *United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969)*, focused on the correct elements as well. Notwithstanding the specification's inexactitude, the record contains no reason to doubt either the government's intent to charge appellant under *18 U.S.C. § 2251(a)* or appellant's knowing, voluntary, **[*5]** and intelligent guilty plea thereto.

As to Specification 2 of The Charge, we AFFIRM so much of the finding of guilty as provides appellant:

> Did, at or near Fort Stewart, Georgia, on or about 20 February 2014, entice or persuade Ms. [MD], a minor, to engage in sexually explicit conduct with the intent that such minor engage in sexually explicit conduct for the purpose of producing visual depiction of such conduct, to wit: two digital photographs in violation of *18 U.S.C. § 2251(a)*.

The remaining findings of guilty and the sentence are AFFIRMED.

Senior Judge CAMPANELLA and Judge HERRING concur.

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[2] Specification 2 of The Charge alleged appellant did "entice or persuade Ms. [MD], a minor, to engage in sexually explicit conduct with the intent that such minor engage in sexually explicit conduct for the purpose of producing visual depiction of such conduct, to wit: two digital photographs in violation of *18 U.S.C. Section 2251A*."

[3] The parties' and military judges' post-trial errata took no exception to this statutory citation.

United States v. Williamson

United States Air Force Court of Criminal Appeals

May 22, 2023, Decided

No. ACM 40211

Reporter
2023 CCA LEXIS 219 *; 2023 WL 3582390

UNITED STATES, Appellee v. Tyler J. WILLIAMSON, Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: THIS IS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 30.4.
NOT FOR PUBLICATION

Subsequent History: Review granted by *United States v. Williamson, 2023 CAAF LEXIS 440, 2023 WL 4567183 (C.A.A.F., June 29, 2023)*

Review denied by *United States v. Williamson, 2023 CAAF LEXIS 597 (C.A.A.F., Aug. 18, 2023)*

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Colin P. Eichenberger (arraignment); Brett A. Landry. Sentence: Sentence adjudged on 29 July 2021 by GCM convened at Hill Air Force Base, Utah. Sentence entered by military judge on 19 October 2021: Dishonorable discharge, confinement for 37 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Counsel: For Appellant: Major Matthew L. Blyth, USAF; Jonathan W. Crisp, Esquire.

For Appellee: Lieutenant Colonel Thomas J. Alford, USAF; Major John P. Patera, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and CADOTTE, Appellate Military Judges. Senior Judge POSCH delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge CADOTTE joined.

Opinion by: POSCH

Opinion

POSCH, Senior Judge:

Contrary to his pleas, Appellant was convicted by a military judge at a general court-martial of one specification of sexual assault of JT, one specification of aggravated assault by inflicting substantial bodily harm upon JT, one specification each of assault consummated by battery upon JT and a different woman, SW, and one specification of animal abuse, in violation of *Articles 120*, *128*, and *134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920*, *928*, *934*.[1],[2] **[*2]** The military judge sentenced Appellant to a dishonorable discharge, confinement for 37 months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

On appeal, Appellant asks whether (1) the military judge abused his discretion in denying Appellant's pretrial motion to exclude Mil. R. Evid. 404(b) matters from consideration by the trier of fact; (2) the findings of guilty are factually insufficient as to his conviction for sexual assault of JT; (3) the findings of guilty are factually insufficient as to his conviction for animal abuse; (4) the findings of guilty for aggravated assault of JT and for the assaults consummated by battery upon SW and JT are factually insufficient, and all five convictions are legally

[1] In this sentence, references to sexual assault, aggravated assault, and animal abuse are to offenses described in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*); and reference to assault consummated by battery is to the offense described in the *Manual for Courts-Martial, United States* (2016 ed.). Except where noted in this opinion, all other references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the 2019 *MCM*.

[2] Appellant was acquitted of two specifications alleging rape by using unlawful force in violation of *Article 120, UCMJ*, *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*). Appellant was also acquitted of one specification of sexual assault; three specifications of assault consummated by battery; one specification of obstructing justice; and one specifications of animal abuse.

insufficient; (5) the military judge abused his discretion by limiting the amount of time available for the court-martial because of a scheduling conflict the following week; (6) trial defense counsel provided ineffective assistance by failing to call witnesses, introduce evidence, rebut evidence, and heed Appellant's key decisions in the **[*3]** court-martial; (7) Appellant's sentence is inappropriately severe; and (8) the omission from the record of trial of the arraignment audio is substantial and warrants relief.[3]

We have considered issues (2) through (8) and find none requires discussion or warrants relief.[4] *See* United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987). In this opinion we discuss the first assignment of error and find no error materially prejudicial to Appellant's substantial rights. Concluding that the findings of guilty and sentence are correct in law and fact, and should be approved, we affirm the findings and sentence.

I. Background

Appellant alleges error in the military judge's application of Mil. R. Evid. 404(b) and 403. He contends he was wrongfully convicted of sexual assault as a result. He claims that evidence of his abusive behavior toward JT, including evidence that was admitted with regard to Specifications 3 through 6 of Charge II (*Article 128, UCMJ*),[5] was inadmissible to show that he committed the sexual assault alleged in Specification 4 of Charge I (*Article 120, UCMJ*). In our consideration of this issue, we evaluated evidence of Appellant's conduct toward JT, including the factual underpinnings of the charged incidents of physical abuse. We summarize that evidence here along with the evidence supporting **[*4]** Appellant's conviction for sexual assault.

JT was the first witness called to testify at Appellant's trial. She and Appellant met in March 2018. In August 2018 she moved to Roy, Utah, and began living with Appellant in an apartment near Hill Air Force Base, Utah. They had a "good" relationship until it took a turn for the worse. In time, Appellant would make derogatory comments about JT's appearance, telling her she "presented [her]self as a wh[*]re." He was "always" angry when she spent time with friends. Appellant told her he "didn't trust any of [her] female friends" and thought her male friends "just wanted to sleep" with her, believing "that[was] the only reason" the males would talk to her. If JT wanted someone to visit their home Appellant "had to approve who it was," but "he never approved anyone coming over." When she was away from home, Appellant made her check in with him before spending time with friends. During a three-day trip to Las Vegas, Nevada, for training, and while away from home on the first night, JT received numerous "missed calls, [and] texts" from Appellant. Appellant was "really upset" that she went out as a group and he called JT's mother to complain about **[*5]** JT spending time with male coworkers.

JT testified about incidents with Appellant that happened two to three years before trial. In her telling, "[t]here were times after things would get physical between [them]" and she "would leave" and go "to a friend's house who lived nearby." "[M]ultiple times" she would pack her belongings in her car and drive away, but she "didn't really have anywhere to go." She lacked money to put down a security deposit on an apartment and had two dogs she "didn't want to leave . . . behind." On cross-examination by Defense, JT volunteered she "d[id]n't recall specific dates for a lot of th[o]se events." When discussing the incidents with special agents of the Air Force Office of Special Investigations (AFOSI) about a year before her trial testimony, she "gave estimates of the months that every situation occurred to the best of [her] knowledge."

Appellant introduced a written statement JT gave to the police during an interview after the last charged incident of assault. JT authenticated that statement and her signature, and the exhibit was admitted without limitation. In that statement she described incidents of

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[3] Appellant personally raises issues (4) through (8) pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*. With regard to issue (8), on 1 March 2023, we granted, without opposition, Appellee's motion to attach an audio recording of the arraignment along with a declaration attesting to its authenticity.

[4] Although not raised by Appellant, we considered the fact that Prosecution Exhibit 9 is missing from the record. In its place is a duplicate of a different exhibit. We conclude relief is not warranted because the missing exhibit relates to a specification of animal abuse of which Appellant was acquitted, and the evidence that was admitted to prove that specification has no bearing on any issue before the court.

[5] Specifications 3 through 6 of Charge II allege offenses committed upon JT. Appellant was found guilty of Specification 3 of Charge II for assault consummated by battery, and guilty, by exceptions, of Specification 6 of Charge II for aggravated assault by inflicting substantial bodily harm. Appellant was acquitted of assault consummated by battery in Specifications 4 and 5 of Charge II.

Appellant's conduct, including some that went **[*6]** beyond misconduct charged by the Government. For example, she described how Appellant "ha[d] shoved [her] previously, throw[n a] phone at the wall multiple times causing holes, punched [a] wall, broke [a] table, punched [a] hole in [a] door, threw [a] fan through [a] door, shoved his mother[, and] mentally abused [JT] by talking down to [her] and degrading [her]." On redirect examination she acknowledged that Appellant shoved and grabbed her multiple times during their relationship.

A. Assault in South Carolina Conviction (Specification 3 of Charge II)

JT testified about the first instance of physical abuse that occurred in September 2018. Appellant was performing temporary duty in South Carolina when she visited and stayed with him in a hotel. On the day she arrived, the two began to argue outside the hotel when JT noticed a picture of Appellant's ex-wife on his phone. JT admitted pushing Appellant during this argument. In JT's telling, she "shoved [Appellant] outside, [they] calmed down a little bit, went up to the room, and that's where things got physical."

JT recalled how Appellant "pushed [her] on the ground and then . . . when [she] got up, he threw [her] onto the bed and kind **[*7]** of held [her] down while [she] was on the bed." She recalled "[a]sking him to stop" as she lay on her back with him on top of her. After Appellant stepped away and she got off the bed, they argued. JT told Appellant she wanted to leave and he then threw her car keys in her direction, hitting a chair. Appellant "said that he wasn't trying to hit [her], that he has good aim, [and] that if he wanted to hit [her], he would have." JT did not leave the hotel after the incident. Appellant's conduct in the hotel room was the basis for his conviction for assault consummated by battery by shoving JT's body with his hand as alleged in Specification 3 of Charge II.

B. Assault in Utah Allegations (Specifications 4-5 of Charge II)

1. Conduct Alleged in Specification 4 of Charge II

JT testified about Appellant's abusive behavior when they lived in Roy, Utah, between December 2018 and July 2019. JT recalled "there was a time that [Appellant] shoved [her] up against the doorframe to the laundry room and he held [her] there . . . . [with] his hand around [her] neck." Her "breathing was restricted" and "it was hard to swallow." Trial counsel asked JT what she was thinking about when Appellant held her against **[*8]** the doorframe. She answered she "was afraid" and "scared of like standing up for [her]self and making [Appellant] more upset. [She] was scared that he was going to choke [her] harder." When he let go, "he was yelling at" her as he followed her to their bedroom. After she turned to face Appellant, he shoved her onto the bed. JT described falling "back onto the bed." During the incident, Appellant "punched [her] and he kind of stepped back a little." When he came toward her again, she stuck out her leg to "keep him away from [her], and [her] foot hit his stomach," which ended the physical conflict. On cross-examination, JT acknowledged she could not remember the month, much less the week, when the incident occurred; however, she "would guess March or April" 2019.

JT testified in general terms about verbal arguments they had, including that Appellant would "throw" and "break" things, which as noted earlier, went beyond the charged incidents of misconduct. In her telling, "the first time it actually got physical was maybe March 2019." Three more times during her direct examination JT offered that she was uncertain if the incident she went on to describe was the first incident involving **[*9]** Appellant in Roy, Utah.

Appellant was found not guilty of unlawfully grabbing JT, an intimate partner, on the neck with his hand between on or about 1 January 2019 and on or about 30 June 2019, as charged in Specification 4 of Charge II.

2. Conduct Alleged in Specification 5 of Charge II

JT described a second incident in July 2019 toward the end of her relationship with Appellant. Sometime in June or early July, Appellant hurt his foot. Although Appellant was given crutches, he rarely used them to walk.[6] The night before this second incident JT "want[ed] to sleep in [their] bed" so she laid down in their bedroom. Appellant "walked into the room and said, 'This is my bed. If you want to sleep here, you have to have sex with me.'" JT

[6] During follow-up questioning by trial counsel about how Appellant was able to walk without crutches, JT explained he walked "[r]eally well. He maybe kind of hobbled a little bit, but . . . there were times that he was going after [her] around the house, around the apartment. So he could still move pretty quickly."

left and went to the room where Appellant's son would sleep when he visited. After JT locked the door, Appellant stood outside of the door, calling her "b[*]tch," "wh[*]re," and saying other "really hurtful" words. JT "didn't say anything back;" she "tried to ignore him" and sleep. "Eventually, he got tired of [her] not responding and he left."

The next morning JT and Appellant walked past each other in the upstairs hallway. He asked JT if she would give him **[*10]** a ride to work, and she declined because of how he spoke to her the previous night. In JT's telling, Appellant "gave [her] this evil look and he shoved [her] into the wall" as they "were standing right outside of the bathroom." Later, she testified, "I think he shoved me -- I don't remember for certain, but I think he shoved me with his hands on my right side." As she walked downstairs Appellant "threw one of his crutches" at her. On cross-examination, JT stated she "d[id]n't remember" if this second incident "was July or June," but "[t]here were multiple times that he shoved" her. During questioning by the military judge, JT likewise could not recall if the incident occurred in June or July. She testified, "My guess would be it was, like, June, but I'm not certain."

Appellant was found not guilty of unlawfully shoving JT, an intimate partner, against a wall with his hand between on or about 1 July 2019 and on or about 28 July 2019, as charged in Specification 5 of Charge II.

C. Aggravated Assault in Utah Conviction (Specification 6 of Charge II)

JT described a third incident at the end of July after the incident with the crutches. She believed this third incident occurred later the same **[*11]** day as the second incident, possibly on 29 July 2019. She explained that in the few days before the incident they had been arguing. The argument related to a text message JT received from Appellant's ex-wife and the mother of his son, which revealed a recent sexual encounter between Appellant and his ex-wife. JT was upset by the text and that night she asked Appellant to show her text messages he had with his ex-wife "just to show [her] that nothing happened between them." JT picked up Appellant's phone where he set it on the kitchen counter. When Appellant saw she had his phone, "he came at [her] and he shoved [her] against the wall." On cross-examination, JT testified with greater certainty that this third incident occurred on the night of 29 July 2019, and that of the "multiple times" when Appellant had shoved her, this one was "the one [she] remember[ed] most." On cross-examination she also acknowledged an interview with police in which she stated that she grabbed Appellant's phone and "that's when he came at" her, although "[h]e didn't shove [her] or anything."

On direct examination JT described how Appellant held her against a wall with his hand or arm either across her chest **[*12]** or at the base of her neck, although he was not trying to choke her. The Government introduced the transcript of the police interview in which JT states Appellant "just kind of held [her] against the wall to get his phone back." JT testified she "shoved him to get him away from [her]," then Appellant "came at [her] again and he grabbed [her] head." He then "pushed [her] down to the ground." In her telling, Appellant "started punching [her] in the head, and he punched [her] in the ribs, on [her] arm, and it felt like he kicked [her]. [She] couldn't really see what was going on, but it felt like he kicked [her]." She believed she was kicked "[b]ecause it felt different than when he punched [her]. [She] didn't see his foot, but it didn't feel the same" as when he punched her with a fist.

JT testified how Appellant "sat down and was just staring at [her]" as she lay on the floor crying. Her face felt "really swollen," she felt a huge bump on her cheek, and was in pain. JT got up to go to the bathroom and locked the door. She saw her face was "really swollen" and she had a black eye. She took pictures and sent them to a manager where she worked. When she spoke to Appellant, explaining she **[*13]** "needed to go to the [emergency room] to make sure that [she] was okay," she "noticed that [her] hearing wasn't right. It sounded really muffled. It sounded like, almost like [she] was under water." At trial she explained "when [she] yawned it . . . sounded like air coming out of [her] ear."

At one point when JT was preparing to leave to go to an emergency room, Appellant grabbed her keys and threw them at her, hitting the oven. Appellant repeatedly asked what she was going to tell the medical providers about the cause of her injuries. In JT's telling,

> He kept saying, "You think you're so strong. You think you're such a tough woman, but you're scared of me now, aren't you?" And he kept like lurching forward at me as if he was going to hit me again. He followed me upstairs like that. He followed me back down the stairs like that. And he just kept making those comments. Kept lurching forward at me like as if he was going to hit me. He kept like laughing, thinking it was funny that I was scared.

> And he told me that if he got arrested for what he did, that he would kill me and kill everyone that I loved.[7]

The following day, at the urging of her manager, JT sought medical evaluation and treatment. **[*14]** At trial, the bruises were corroborated by photographs JT took of her face and the testimony of her manager who saw the pictures and observed her at work the morning after the incident. Additionally, the manager testified that JT asked him to hold onto the pictures "because she was worried that her current boyfriend at the time would go through her phone and delete [them]." A nurse practitioner who treated JT testified she observed bruising on JT's left eyelid, which was consistent with a medical record admitted into evidence. The nurse documented a tympanic membrane perforation she observed inside JT's left ear, which the nurse explained in her testimony "mean[t] that there was a hole in the left eardrum."

Appellant's conduct was the basis for his conviction for aggravated assault by striking JT, an intimate partner, on the head with his hand, and thereby inflicting substantial bodily harm upon her, to wit: a ruptured ear drum on or about 30 July 2019, as alleged in Specification 6 of Charge II. The military judge found Appellant guilty of this offense after excepting the words, "and kicking her back with his foot," from the finding of guilty. Appellant was found not guilty of the **[*15]** excepted words.

D. Sexual Assault Conviction (Specification 4 of Charge I)

JT testified that Appellant sexually assaulted her a day or two after the aggravated assault that ruptured her eardrum. Appellant entered the bedroom as she lay in bed on her stomach. Appellant lay down on top of her. Appellant tried to hug and kiss her as she told him to get off and that she "just wanted to be alone. That [she] needed space." JT explained what happened next:

> A [JT]. I keep asking him to stop. I'm not kissing him back. I'm not showing affection. I just kept asking him to stop, to leave me alone.
> Q [Trial Counsel]. Did he stop?
> A. No, he did not.
> Q. Okay. What did he do?
> A. He -- I remember he took off my shorts. I don't remember if he took off my underwear or not. And he put his penis . . . in my vagina. He -- I was on my stomach and he was on top of me.
> Q. Okay. What was going through your mind while he was doing that?
>
> A. I was really scared. And I didn't want him to hit me again. I didn't want to make him mad. I felt like he -- I felt like he took away my freedom to choose who I give myself to. I just remember being scared. Scared of not giving him what he wanted, or not letting him have what he wanted. **[*16]**
> Q. Did you want to have sex with him?
> A. No.
> Q. And before he started, you told him "No"?
> A. Yes.

At one point, JT relayed that Appellant remarked, "This is the only beating I should do," which prompted JT to start crying. Appellant stopped after JT told him she had to go to the bathroom. When she returned, Appellant was sitting on the couch and asked, "That's it? We're not going to finish?" JT "just said, 'No.'"

On cross-examination JT maintained she told Appellant "no" and "stop." When she returned from the bathroom Appellant did not reinitiate sexual activity. She also acknowledged the first time she reported the sexual assault was more than a year later when she was interviewed by special agents of the AFOSI. She did not mention the incident until a second interview with AFOSI agents. Appellant's conduct in their bedroom was the basis for his conviction for sexual assault of JT by penetrating her vulva with his penis without her consent, as alleged in Specification 4 of Charge I.

After the sexual assault, sometime at the end of July or the beginning of August 2019, JT moved out of the residence. After moving out and making a statement to police, she sent Appellant messages about how much **[*17]** she loved him and how she wanted to marry him one day. She also texted him,

> I think if we live together, that will just delay us from getting us to where we want to be. That is the biggest reason why I left. Not because I don't want to be with you. Not because I'm afraid of you. But because that is what honestly I think will save our relationship.

JT testified she sent the message, telling Appellant what she "thought he wanted to hear."

[7] Appellant was found not guilty of obstruction of justice by uttering words to this effect "with intent to impede the due administration of justice in the case of himself, against whom he had reason to believe there would be criminal proceedings pending," as charged in the Specification of Charge III.

II. Discussion

In his first assignment of error, Appellant urges us to set aside his conviction for sexually assaulting JT on grounds that the military judge who presided at trial erred by denying his pretrial motion and therefore abused his discretion. We conclude that the military judge did not abuse his discretion.

A. Additional Background

Before trial, the Government provided written notice to Appellant of its intent to show Appellant's criminality using several Mil. R. Evid. 404(b) matters. It cited Mil. R. Evid. 404(b)(2) as the basis to use those matters "for a non-propensity purpose." *See* Mil. R. Evid. 404(a)(1). Although the notice cast a wide net, as relevant to Appellant's conviction for sexual assault of JT, the Government explained the non-propensity purposes for three matters like this:

> • First, "[t]he [P]rosecution **[*18]** intends to argue that the charged incidents of physical abuse demonstrate[ ] a pattern of behavior, that continued to escalate . . . ."[8]
> • Second, "[d]uring the course of their relationship, [Appellant] was mentally and emotionally abusive to [JT], to include calling her names and restricting her ability to interact with other people. The [P]rosecution intends to offer this evidence as proof of [Appellant]'s intent, pattern of behavior, and modus operandi."
> • Third, "[d]uring their relationship, in approximately July 2019, [Appellant] called [JT] a 'b[*]tch' and a 'wh[*]re' before throwing a walking crutch in the direction of [JT]. The [P]rosecution intends to offer this evidence as proof of [Appellant]'s intent and pattern of behavior."

Appellant disputed the relevance of these matters by filing a motion to exclude their consideration by the trier of fact. On appeal, he maintains that the conduct noticed by the Government, which was subsequently admitted as evidence, allowed "damaging bad-character evidence . . . without legal purpose."

With respect to the first Mil. R. Evid. 404(b) matter raised by the Government, "the charged incidents of physical abuse" of JT related to the four specifications under Charge **[*19]** II. Those specifications alleged violations of *Article 128, UCMJ*, as discussed above. It bears repeating that the Government accused Appellant of using his hand to shove JT's body and, in a separate incident, striking her on the head and hand, and kicking her back with his foot, thereby causing a ruptured ear drum.[9] The Government also accused Appellant of grabbing JT on the neck with his hand and shoving her against a wall with his hand.[10] In its opposition to the Defense's motion, the Government explained the evidence would show that Appellant's abusive "behavior would precede nonconsensual intercourse" and therefore was relevant on the issue of consent to the charged sexual assault.

The military judge heard argument on the motion in an *Article 39(a), UCMJ*, *10 U.S.C. § 839(a)*, session. Appellant argued the three noticed matters showed criminal propensity, and were not permitted under Mil. R. Evid. 404(b) as a result. Appellant argued, moreover, that any probative value was substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403.

B. Ruling

The military judge ruled on the motion in an email he sent to counsel for both parties before trial. He finalized that ruling in a written decision after the Prosecution completed offering evidence at trial **[*20]** on the offenses of which JT was a named victim.

---

[8] The Prosecution's notice encompassed all "charged incidents of physical abuse," claiming they showed a pattern that escalated "from each romantic relationship" involving Appellant and other victims. To the extent the notice reached incidents that involved victims other than JT, the military judge ruled that the Prosecution failed to show "what non-propensity purpose would be served by allowing trial counsel to argue that an exception exists from the normal prohibition against spillover." Accordingly, with regard to the first noticed Mil. R. Evid. 404(b) matter, the focus of our opinion is evidence of physical abuse of JT, notably, evidence of various assaults upon her.

[9] As discussed, *supra*, the Government charged this conduct in Specifications 3 and 6 of Charge II, which alleged assault consummated by battery and aggravated assault, respectively. Appellant was found guilty of Specification 3; and guilty of Specification 6, except the words, "and kicking her back with his foot."

[10] As discussed, *supra*, the Government charged this conduct as assault consummated by battery (Specifications 4 and 5 of Charge II). Appellant was acquitted of Specifications 4 and 5.

In the email, the military judge stated his finding,

> [T]he Government may argue that [Appellant] engaged in a pattern of behavior relating to physical abuse and control of [JT] as it pertains to the elements of consent and bodily harm and the defense of mistake of fact related to other specifications in Charges I and II involving [JT] as the named victim. In other words, the Government is permitted to argue the relevance of past interactions between [JT] and [Appellant] to the extent they might impact the states of mind of [JT] and [Appellant] related to those elements.

The military judge further found that the Government met its burden to introduce evidence demonstrating that Appellant "may have acted with a plan or intent to control [JT] as that relates to his commission of the charged offenses in which she is the named victim."

In his written ruling, the military judge concluded that the Prosecution presented sufficient evidence to reasonably support a finding that Appellant engaged in the conduct at issue. With regard to the noticed matters, he found the evidence tended to show Appellant engaged in "behaviors . . . that can generally **[*21]** be characterized as 'controlling' in nature."[11] The military judge then applied legal principles underlying Mil. R. Evid. 404(b) to that evidence.

With respect to the first Mil. R. Evid. 404(b) matter—the conduct underlying incidents of physical abuse of JT that the Government alleged in the four specifications of Charge II—the military judge ruled that "[t]o the extent that these interactions show a pattern of behavior or design related to abuse and control of [JT], trial counsel may argue the relevance of these incidents" on its burden of proof. The military judge permitted their use in three ways: (1) on the question of JT's "consent;" (2) "whether a touching was offensive so as to constitute bodily harm;" and (3) whether "defenses such as mistake of fact" were raised by the evidence and disproven by the Government. Applying Mil. R. Evid. 403, the military judge found "the probative value of this evidence [wa]s not substantially outweighed by the danger of unfair prejudice that might occur by evaluating its impact on various specifications, particularly in a military judge alone forum."

With respect to the second and third Mil. R. Evid. 404(b) noticed matters, the military judge likewise found the Government had shown non-propensity purposes. He concluded that **[*22]** those matters

> may be admitted as evidence [of Appellant]'s pattern of behavior, intent and absence of mistake of fact. As these behaviors inform the overall nature of the relationship between [Appellant] and [JT], the effect of these behaviors on the state of mind of both is relevant for multiple valid, non-propensity or character related purposes such as the [c]ourt's consideration of the element of consent in regard to the charged sexual assaults.

Applying Mil. R. Evid. 403, the military judge stated that the probative value was not substantially outweighed by the danger of unfair prejudice.

C. Law

Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion, and cannot be used to show predisposition toward crime or criminal character. However, such evidence may be admissible for another purpose, including to show motive, intent, plan, absence of mistake, or lack of accident. Mil. R. Evid. 404(b)(2); *United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010)* (citation and footnote omitted). The list of potential purposes in Mil. R. Evid. 404(b)(2) "is illustrative, not exhaustive." *United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989)* (footnote omitted).

The rule, "like its federal rule counterpart, is **[*23]** one of inclusion." *United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000)* (citing 1 Edward J. Im-winkelried, *Uncharged Misconduct Evidence* § 2:31 at 163 (1999)), *overruled in part on other grounds by United States v. Inong, 58 M.J. 460, 465 (C.A.A.F. 2003)*. The rule "does not say whether the 'other crimes, wrongs, or acts' must be charged or uncharged conduct." *Id.* (quoting Mil. R. Evid. 404(b), *Manual for Courts-Martial, United States* (1998 ed.)). The factual underpinnings of one specification may be used by the trier of fact as proof of a different offense. *Id.* (observing "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" (citations omitted)). However,

[11] However, the military judge identified a different alleged victim in this paragraph of his ruling, using AR's initials instead of JT's. The weight of evidence indicates that the military judge intended to refer to JT in this part of his analysis. Counsel for both parties seem to concede this was a scrivener's error, as finds this court.

"evidence that an accused committed one offense is not admissible to prove that the accused had the propensity to commit another offense." *United States v. Hyppolite, 79 M.J. 161, 161 (C.A.A.F. 2019)* (citing Mil. R. Evid. 404(b)(1), *Manual for Courts-Martial, United States* (2016 ed.)).

We apply a three-part test to review the admissibility of evidence offered under Mil. R. Evid. 404(b): (1) Does the evidence reasonably support a finding by the factfinder that Appellant committed other crimes, wrongs, or acts? (2) Does the evidence of the other act make a fact of consequence to the instant offense more or less probable? and (3) Is the probative value **[*24]** of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403? *United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989)* (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

A military judge's ruling under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 will not be disturbed except for a clear abuse of discretion. *United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999)* (citation omitted). "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) . . . incorrect legal principles [are] used; or (3). . . 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)* (citing *United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)* (per curiam)).

D. Analysis

The gravamen of Appellant's challenge to the evidentiary rulings is that the analysis therein was faulty and insufficient. Appellant claims it was error to allow evidence of his abusive treatment of JT, including evidence offered to prove the offenses alleged in Specifications 3 through 6 of Charge II, to show that he committed the sexual assault alleged in Specification 4 of Charge I. We conclude that the military judge did not abuse his discretion.

To understand Appellant's claim, we briefly turn to evidence the Government admitted **[*25]** to prove a specification of which Appellant was acquitted: rape of a different alleged victim (AR) by using unlawful force in violation of *Article 120, UCMJ*, *Manual for Courts-Martial, United States* (2012 ed.). Before trial, the Prosecution noticed Appellant's acts of controlling and abusive behavior toward AR that it wanted to use for a stated non-propensity purpose under Mil. R. Evid. 404(b). Over Appellant's objection, the military judge found those acts met safeguards for admissibility and allowed the evidence to prove that Appellant raped AR. As explained next, Appellant contends that the military judge's evaluation of the Mil. R. Evid. 404(b) evidence involving AR was faulty, and so "corrupted his analysis [of] the evidence involving JT."

In Appellant's view, the military judge "seemed to merely cut and paste[ ] the analysis he used regarding AR" in his written ruling, even referring to "AR" by mistake in his analysis of acts involving JT. Appellant contends that the military judge's mistake in referring to AR when he meant JT illustrates he "provided no independent analysis of the facts as they pertained to JT," and "leaves one questioning whether the analysis was actually conducted." Appellant maintains that ruling tainted the military **[*26]** judge's application of Mil. R. Evid. 404(b) to acts on which the Government relied to prove that Appellant committed a sexual assault of JT.

We appreciate Appellant's concern. At the same time, we decline to liken a scrivener's error to flawed judgment. The military judge prefaced his written ruling with the proviso that it was based on "the written submissions" of counsel and "information provided during the motions hearing." Later, he allowed "[n]o evidence has been offered to indicate [JT]'s[12]] testimony at trial would be different in any significant degree from her summarized statements contained in the Report of Investigation." The military judge preceded his analysis of the second and third Mil. R. Evid. 404(b) matters at issue with headers that identified JT as the subject of analysis beneath those headers. On the whole, we interpret the ruling as deciding how evidence of Appellant's treatment of JT could be used without reliance on evidence of Appellant's abusive treatment of

[12] The military judge again identified "AR" by her initials and not JT. We credit Appellant's theory that the military judge duplicated language from elsewhere in his ruling and neglected to change the initials. For two reasons we are confident the military judge was referring to JT's future testimony at trial and not AR's. First, the military judge twice used identical language when he referred to the summarized statements of both victims in the Report of Investigation, each time using AR's initials. Second, the language quoted here from the ruling—using AR's initials—appeared immediately after the military judge summarized JT's pretrial interviews with investigators.

AR, as claimed.

Consistent with our understanding, the military judge's factfinding as regards Appellant's conduct with JT, and his analysis of those facts in his ruling, were articulated with sufficient precision that we can perform our appellate **[*27]** function in an informed manner. Where a military judge evaluates the same or similar acts as bear on admissibility under a rule of evidence, but in regard to different alleged victims, we do not find cause to question the military judge's analysis even though the language of that analysis may be similar, if not identical, to other analysis in the same ruling. We find that the military judge articulated his ruling as regards JT with sufficient particularity that scrutiny of his ruling as regards AR is not warranted.

We turn, then, to evaluate the military judge's application of the three-part test in *Reynolds, 29 M.J. at 109*, to determine the admissibility of evidence under Mil. R. Evid. 404(b).

1. Evidence of Crimes, Wrongs, or Other Acts

With regard to the first *Reynolds* prong—whether the evidence reasonably supports a finding that Appellant engaged in conduct underlying the three noticed matters that involved JT—the military judge did not abuse his discretion in finding that it did. The military judge found that evidence could support a finding that Appellant engaged in instances of abuse that constituted a pattern of controlling behavior.

The military judge's factfinding on the first *Reynolds* prong is supported by the trial record. At times, **[*28]** JT had difficulty recalling when a particular incident of abuse occurred by reference to a date or in relation to other events. However, the trier of fact could conclude that a particular incident occurred during the relevant period even as JT, at times, manifested uncertainty when a particular incident happened.

2. Facts of Consequence Made More or Less Probable

We find, also, that the military judge did not abuse his discretion in his application of the second *Reynolds* prong—whether evidence of other acts makes a fact of consequence to the instant offense more or less probable. Consistent with the Government's proffer, the military judge found the incidents at issue were admissible, *inter alia*, as a "pattern of behavior."

Appellant focuses on this finding in his reply brief. He maintains that a pattern of behavior "seems functionally the same as propensity." Nonetheless, we are convinced that the military judge allowed the evidence at issue for a permissible purpose and not for bad character or propensity, as claimed. In that regard, "a pattern of conduct" that satisfies Mil. R. Evid. 404(b) and "offered for some purpose other than to demonstrate [an] appellant's propensity or predisposition to commit crime" is **[*29]** admissible if logical and legal relevance is shown. *See United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002)* (allowing trier of fact to consider evidence for the "limited purpose of demonstrating appellant's tendency to take advantage sexually of women who were intoxicated or under the influence of alcohol"); *see also Tanksley, 54 M.J. at 175* (pattern of lustful intent); *United States v. Johnson, 49 M.J. 467, 475 (C.A.A.F. 1998)* (pattern of sexual abuse); *United States v. Ray, 26 M.J. 468, 472 (C.M.A. 1988)* (pattern of drug abuse).

Put a different way, a pattern of behavior, conduct, or acts in reference to Mil. R. Evid. 404(b) is not synonymous with propensity where there are logical and legal safeguards for admission and use. Among established safeguards is if the trier of fact could find a fact of consequence more or less probable. *See Reynolds, 29 M.J. at 109* (concluding "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"); *see also Simpson, 56 M.J. at 464* (concluding "evidence was probative of a material issue other than character" (citations omitted)); *Johnson, 49 M.J. at 474* (concluding the evidence at issue "tend[ed] to make [victim]'s alleged abuse more probable than if the evidence had not been introduced"); *Ray, 26 M.J. at 472* (allowing "that a pattern of regular drug use can show a knowing drug use on a particular occasion").

Here, the military **[*30]** judge found Appellant's behavior toward JT showed not only a pattern, but that it "inform[ed] the overall nature of the relationship between [Appellant] and [JT]." The military judge concluded that "the effect of these behaviors on the state of mind of both [Appellant and JT] [wa]s relevant for multiple valid, non-propensity or character related purposes such as the [c]ourt's consideration of the element of consent in regard to the charged sexual assaults." On appeal, Appellant challenges this aspect of the ruling as it bears on his sexual assault conviction.

As explained next, on this record we are confident that the military judge did not consider evidence of a pattern of behavior as interchangeable with propensity.

Among the facts of consequence for this offense were whether JT consented to vaginal intercourse with Appellant,[13] and whether Appellant mistakenly believed that she had consented.[14] The probative value of the evidence at issue was not unlike two "key" facts of consequence in *Reynolds*: "(1) whether the prosecutrix consented or, if not, (2) whether [the] appellant had reason to believe she had and, hence, was reasonably mistaken as to her consent." *29 M.J. at 109*. With respect to sexual assault, **[*31]** "consent" includes "a *freely given* agreement to the conduct at issue by a competent person." *10 U.S.C. § 920(g)(7)(A)* (emphasis added). "All the surrounding circumstances are to be considered in determining whether a person gave consent." *10 U.S.C. § 920(g)(7)(C)*. To refute "mistake of fact" as a defense, the Government had the burden to prove beyond a reasonable doubt that Appellant's ignorance or mistake was not honest or not reasonable "under all the circumstances." R.C.M. 916(b)(1), (j)(1).

The three Mil. R. Evid. 404(b) matters at issue are probative of these facts of consequence. JT testified how she felt insecure to assert herself in the relationship. She feared upsetting Appellant would serve only to escalate conflict and lead to additional and more forceful abuse. She explained her state of mind during the sexual assault in July 2019 after Appellant had recently punched her in the head and ruptured her eardrum: in her telling, she "didn't want him to hit [her] again" or "make him mad." She was "[s]cared of not giving him what he wanted, or not letting him have what he wanted." Trial counsel argued the nexus between the Mil. R. Evid 404(b) matters at issue and the sexual assault by explaining how it followed on the heels of the aggravated assault. Trial counsel **[*32]** argued JT's testimony "provides context to the fact" that Appellant "continuously exerted control over her, making her dependent on him." Trial counsel explained how Appellant used "his physical dominance over her" to achieve that control, and in that context, that the Government had met its burden to prove beyond a reasonable doubt the elements of sexual assault.

We hold that the Mil. R. Evid. 404(b) matters at issue are among the totality of surrounding circumstances that the trier of fact could evaluate: first, to decide whether there was a freely given agreement to the sexual conduct at issue; and second, if Appellant might have misunderstood whether JT had given consent. *See* Mil. R. Evid. 401(a); *United States v. Moore, 78 M.J. 868, 876 (A.F. Ct. Crim. App. 2019)* (holding that evidence of an appellant's controlling behavior was admissible under Mil. R. Evid. 404(b) to show motive, intent, and absence of mistake); *see generally United States v. Jackson, 2011 CCA LEXIS 303, at *17 (A.F. Ct. Crim. App. 15 Aug. 2011)* (unpub. op.) (holding numerous uncharged acts admissible to show appellant's "strong desire to dominate and control women" as motive and plan). The Mil. R. Evid. 404(b) matters at issue made the fact that Appellant may have penetrated JT when she did not consent more probable and Appellant's ignorance or mistake that JT did consent less probable. The military judge did not err in his application of **[*33]** the second *Reynolds* prong.

3. Probative Value and Danger of Unfair Prejudice

Applying the third *Reynolds* prong, the military judge found the probative value of the evidence at issue was not substantially outweighed by the danger of unfair prejudice to Appellant under Mil. R. Evid. 403. With regard to the first Mil. R. Evid. 404(b) matter—evidence underlying the charged incidents of abuse of JT that preceded the sexual assault offense—the military judge considered the probative weight "by evaluating its impact on various specifications, particularly in a military judge alone forum." The military judge reached a similar conclusion with regard to evidence of Appellant's mental and emotional abuse of JT, stating "that the probative value of this [Mil. R. Evid. 404(b)] evidence [wa]s not substantially outweighed by the danger of unfair prejudice." We again find that the military judge did not abuse his discretion.

Appellant urges us to perform our own Mil. R. Evid. 403 balancing, arguing "where a military judge fails to place on the record his analysis and application of the law to the facts, little deference should be given." Citing *United States v. Manns*, Appellant contends that the record is indeterminate how the military judge reached his conclusion. *54 M.J. 164, 166 (C.A.A.F. 2000)*. Appellant contends the **[*34]** military judge did not reveal what his "reasons were for finding that the probative value was not substantially outweighed by the danger of unfair prejudice." Appellant further contends that "[f]ailing to

[13] *See* 2019 *MCM*, pt. IV, ¶ 60.b.(2)(d) (listing elements of sexual assault as charged in Specification 4 of Charge I); *see also* 2012 *MCM*, pt. IV, ¶ 45.a.(g)(8) (defining consent)

[14] *See* R.C.M. 916(j)(1) (2019 *MCM* and 2012 *MCM*) (describing defense of ignorance or mistake of fact).

even cite to the factors or the analysis required is cause to question whether the analysis was even conducted."

In *Manns*, the appellant was sentenced by a military judge who admitted contested rebuttal evidence in sentencing. *Id.* On appeal, the United States Court of Appeals for the Armed Forces (CAAF) observed it "gives military judges less deference if they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the [Mil. R. Evid.] 403 balancing." *Id.* (citing *Gov't of the Virgin Islands v. Archibald, 987 F.2d 180, 186, 28 V.I. 228 (3d Cir. 1993)*). Because the military judge in *Manns* did not articulate any Mil. R. Evid. 403 balancing, the CAAF deemed further scrutiny was appropriate, stating that the judges on the court had "examined the record [them]selves." *Id.* (citation omitted).

Appellant asks us to not only examine the record, but urges us to apply our own balancing of logical and legal relevance. He argues that the military judge "merely recited in a talismanic fashion the third prong of the [*Reynolds*] test." As a remedy, he asks us to equate the military judge's **[*35]** failure to provide a detailed analysis under Mil. R. Evid. 403 with situations like *Manns* where no balancing was articulated. However, we do not read *Manns* as Appellant does. Even if *Manns* were analogous to the facts here, in that case the CAAF did not do as Appellant suggests we should by stepping into the shoes of the military judge to decide whether discretionary exclusion of logically relevant evidence was warranted. In *Manns*, rather, the CAAF examined the record, including the disputed evidence that was at issue in that case, and determined it was "satisfied that the military judge was able to sort through the evidence, weigh it, and give it appropriate weight." *Id. at 167* (citation omitted). The CAAF's rationale was that "the potential for unfair prejudice was substantially less than it would be in a trial with members." *Id.*

We find no reason to question the application of the military judge's Mil. R. Evid. 403 balancing to the Mil. R. Evid. 404(b) matters as they bear on the facts of consequence that underlie Appellant's sexual assault conviction. Noting the "military judge alone forum" and having evaluated the evidence, it appears neither unfair prejudice nor confusion—nor other Mil. R. Evid. 403 considerations—were a concern to the military judge. Our deferential **[*36]** approach is in line with the CAAF's reasoning in *Tanksley*, which the court decided the same day as *Manns*. In *Tanksley*, the CAAF made enduring observations about the third prong of the *Reynolds* test, remarking it had "said on a number of occasions" that a "military judge enjoys wide discretion when applying Mil. R. Evid. 403." *54 M.J. at 176* (internal quotation marks omitted) (citing *Manns, 54 M.J. at 166*) (additional citation omitted). In the rule's application to Mil. R. Evid. 404(b) matters, the CAAF will "exercise great restraint" and afford "maximum deference" when the military judge has "conducted and announced his Mil. R. Evid. 403 balancing test on the record." *Id. at 176-77* (citing *Manns*) (additional citations omitted).

A military judge is presumed to know the law and apply it correctly, absent clear evidence to the contrary. *United States v. Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009)* (per curiam) (citing *United States v. Bridges, 66 M.J. 246, 248 (C.A.A.F. 2008)*). The military judge was confident that, as the trier of fact in the judge-alone case, he would use the evidence of Appellant's controlling behavior and pattern of abuse for the limited permissible purposes under Mil. R. Evid. 404(b), and not for general bad character or propensity. In a trial with members there is concern that members will evaluate such limited-purpose evidence "as character evidence and use it to infer that an accused has acted in character, and thus convict." **[*37]** *Staton, 69 M.J. at 232*. However, in a bench trial where the record shows the military judge conducted and announced a Mil. R. Evid. 403 balancing, as was the case here, "if evidence is admitted for a limited purpose, we presume a military judge will consider it only for that purpose." *United States v. Hays, 62 M.J. 158, 165 (C.A.A.F. 2005)* (citations omitted). We are satisfied, as the CAAF was in *Manns*, that the military judge was able to sort through the evidence and give it appropriate weight.

4. Conclusion

The military judge did not abuse his discretion by allowing evidence of Appellant's abusive treatment of JT, including evidence admitted with regard to Specifications 3 through 6 of Charge II, to show that Appellant committed the sexual assault in Specification 4 of Charge I. His findings of fact are supported by the record and not clearly erroneous. Appellant has not shown that the military judge incorrectly applied the law or that his ruling was arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *See United States v. Shields, M.J. , No. 22-0279, 83 M.J. 226, 2023 CAAF LEXIS 270, at *9 (C.A.A.F. 28 Apr. 2023)* (articulating abuse of discretion standard).

III. CONCLUSION

The findings and sentence as entered are correct in law and fact,[15] and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(d), UCMJ*, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence **[*38]** are **AFFIRMED**.

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[15] The entry of judgment (EoJ), and the Statement of Trial Results that precede the EoJ, state Appellant was found not guilty of the words, "kicking her back with his foot" as charged in Specification 6 of Charge II. In fact, Appellant was found not guilty of the words, "*and* kicking her back with his foot." (Emphasis added). We find no prejudice owing to the omission.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40296**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas C. BOREN	)	
First Lieutenant (O-2)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 7 August 2021, Appellant was convicted at a general court-martial of one specification of violating Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (*Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*)).[1] On 8 August 2021, members adjudged a sentence consisting of 30 days' confinement, forfeiture of $2,645.00 pay per month for six months, and a reprimand. On 26 August 2021, the convening authority approved the sentence in its entirety. On 12 May 2022, the military judge entered the judgment of the court-martial.

On 3 June 2022, a designated judge advocate completed a review of the record of trial pursuant to Article 65(d), UCMJ, 10 U.S.C. § 865(d) (2019 *MCM*). The judge advocate concluded the general court-martial had jurisdiction over Appellant and the offense, the charge and specification stated an offense, "the sentence was legal," and the findings and sentence were correct in law and fact.

On 8 March 2023, Appellant filed a notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A), which the court docketed on 10 March 2023.[2]

On 21 April 2023, Appellant moved for this court to compel the attachment of a verbatim transcript to the record and, if granted, remand the case while the transcript is prepared. Appellant argues he "requires a verbatim

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[1] Unless previous versions as printed in the 2019 *MCM* are cited, references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to versions currently in effect.

[2] Appellant's notice was filed *pro se*. However, he now is represented by military appellate defense counsel.

transcript to identify issues and present them for this [c]ourt's consideration."

On 26 April 2023, the Government responded to Appellant's motion to compel a verbatim transcript. The Government explained it opposed the motion "[b]ecause this [c]ourt might not have jurisdiction over Appellant's case" due to "ambiguities" created when Congress made significant changes to Article 66, UCMJ, 10 U.S.C. § 866, effective 23 December 2022.[3] The Government asserted it intended to file a motion to dismiss for lack of jurisdiction within 14 days, and this court should decide the jurisdiction question before it "premature[ly]" orders the creation of a verbatim transcript. The Government further explained, "In the event this [c]ourt determines it has jurisdiction over Appellant's case, the United States agrees that this [c]ourt should order production of a verbatim transcript."

On 10 May 2023, the Government filed a motion for leave to file a motion to dismiss and motion to dismiss. The Government contends the changes to Article 66, UCMJ, that went into effect on 23 December 2022 and expanded a convicted servicemember's right to seek review by this court, did not apply to Appellant's court-martial, and therefore this court lacks jurisdiction to review Appellant's case. The Government's specific arguments are addressed in more detail below.

On 17 May 2023, Appellant responded to the Government's motion to dismiss, asserting this court does have jurisdiction over his appeal, and requested this court deny the motion to dismiss.

On 24 May 2023, the Government moved for leave to file a reply to Appellant's response to the motion to dismiss, wherein it offered additional arguments regarding this court's asserted lack of jurisdiction.[4]

On 18 July 2023, the Government filed a motion to submit a supplemental citation of authorities arguing "*MW v. United States*, ___ M.J. ____,

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[3] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022).

[4] On 28 June 2023, Appellant moved for leave to file a request that this court suspend its rules pursuant to Rule 32 of The Joint Rules of Appellate Procedure for the Courts of Criminal Appeals. JT. CT. CRIM. APP. R. 32. Specifically, Appellant requested this court suspend Rule 18 of the Joint Rules with regard to the time for filing a brief on behalf of Appellant until this court rules on Appellant's motion to compel a verbatim transcript and the Government's motion to dismiss. JT. CT. CRIM. APP. R. 18. On 6 July 2023, this court granted Appellant's motion, thereby suspending Rule 18 until a date to be determined by future order of the court after it rules on the motion to compel a verbatim transcript and motion to dismiss.

23-0104/AF (C.A.A.F. 13 July 2023) is relevant for this [c]ourt to consider when ruling on the Government's motion to dismiss for lack of jurisdiction." On 21 July 2023, Appellant responded stating he did not oppose the motion, however "[t]he additional authorities should not change the result or reasoning this [c]ourt applied in *United States v. Cooley*, No. ACM 40376, ORDER, 7 July 2023 (*Cooley* Order)."

The motions pending before the court with respect to Appellant's direct appeal either hinge on or are ancillary to the Government's motion to dismiss for lack of jurisdiction. Accordingly, we first address the Government's arguments regarding jurisdiction, beginning with a review of the applicable law.

LAW

"The [C]ourts of [C]riminal [A]ppeals are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). The scope of an appellate court's authority, like other questions of jurisdiction, is a legal question we review de novo. *See United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019) (citations omitted); *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019) (citation omitted). "The burden to establish jurisdiction rests with the party invoking the court's jurisdiction." *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

Statutory interpretation is also a question of law we review de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citation omitted). "Unless the text of a statute is ambiguous, 'the plain language of a statute will control unless it leads to an absurd result.'" *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)) (additional citation omitted). "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Article 66(b)(3), UCMJ, provides a Court of Criminal Appeals (CCA) shall have jurisdiction over a court-martial in which the judgment entered includes death, a punitive discharge, or confinement for two years or more—a provision known as "automatic review" by the CCA. 10 U.S.C. § 866(b)(3). Prior to 23 December 2022, a servicemember convicted by a court-martial whose sentence included confinement for more than six months and less than two years, with no punitive discharge, had the right to apply for review by the

CCA within a certain period of time[5]—a provision known as a "direct appeal." 10 U.S.C. § 866(b)(1)(A) (2019 *MCM*).[6] Cases in which the sentence did not qualify for either automatic review or a direct appeal, or in which a convicted servicemember elected not to exercise the right to a direct appeal or withdrew a direct appeal, were reviewed by a designated attorney pursuant to Article 65(d), UCMJ (2019 *MCM*).

However, prior to 23 December 2022, a servicemember whose case was reviewed by an attorney pursuant to Article 65(d), UCMJ (2019 *MCM*), still had a potential route for review by the CCA. Article 69, UCMJ, 10 U.S.C. § 869 (2019 *MCM*), provided that such a servicemember could apply for review by The Judge Advocate General (TJAG). Such an application would be timely if submitted within one year after completion of the Article 65(d), UCMJ (2019 *MCM*), review. 10 U.S.C. § 869(b) (2019 *MCM*). After TJAG completed the Article 69(c), UCMJ, 10 U.S.C. § 869(c) (2019 *MCM*), review, the servicemember could apply to the CCA for review, and the CCA had the discretion to grant such review if (1) "the application demonstrated a substantial basis for concluding that the action on review under [Article 69(c), UCMJ (2019 *MCM*),] constituted prejudicial error," and (2) the servicemember filed the application within 60 days of notification of TJAG's decision or 60 days after notification was deposited in the United States mail, whichever was earlier. 10 U.S.C. § 869(d) (2019 *MCM*); *see also* 10 U.S.C. § 866(b)(1)(D), (2019 *MCM*).[7] For matters reviewed by the CCA pursuant to Article 69(d), UCMJ (2019 *MCM*), the CCA could "take action only with respect to matters of law." 10 U.S.C. § 869(e), UCMJ (2019 *MCM*).

The National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (23 Dec. 2022), while retaining the same criteria for *automatic* CCA review, significantly expanded eligibility for *direct appeals* of general and special court-

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[5] Specifically, until the later of "the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under [Article 65(c), UCMJ, 10 U.S.C. § 865(c) (2019 *MCM*)]," or "the date set by the [CCA] by rule or order." 10 U.S.C. §§ 866(c)(1)(A), (B) (2019 *MCM*).

[6] A convicted servicemember whose sentence did not qualify for automatic CCA review could also appeal for review by the CCA under certain other circumstances, including *inter alia* in cases where the Government had previously appealed to the CCA pursuant to Article 62, UCMJ, 10 U.S.C. § 862 (2019 *MCM*). *See also* R.C.M. 908(c)(3) (2019 *MCM*).

[7] The CCA could also review a case not eligible for automatic or direct review if TJAG sent the case directly to the CCA for review. 10 U.S.C. § 869(d)(1)(A) (2019 *MCM*).

martial convictions under Article 66, UCMJ. In its new form, Article 66(b)(1)(A), UCMJ, provides a CCA has jurisdiction over "a timely appeal from the judgment of a court-martial, entered into the record under [Article 60c(a), UCMJ, 10 U.S.C. § 860c(a)], that includes a finding of guilty." 10 U.S.C. § 866(b)(1)(A). Article 60c(a), UCMJ, provides that, "[i]n accordance with rules prescribed by the President, in a general or special court-martial, the military judge shall enter into the record of trial the judgment of the court." 10 U.S.C. § 860c(a)(1). In effect, the FY23 NDAA made every general or special court-martial conviction subject to review by the CCA, regardless of sentence, either automatically or upon timely appeal by the convicted servicemember. As with direct appeals prior to the enactment of the FY23 NDAA, the expanded direct appeals are timely if submitted to the CCA before the later of "the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under [Article 65(c), UCMJ, 10 U.S.C. § 865(c)]," or "the date set by the [CCA] by rule or order." 10 U.S.C. § 866(c)(1). As before the FY23 NDAA, if a convicted servicemember entitled to a direct appeal chooses not to exercise that right, a designated attorney will review the case pursuant to Article 65(d), UCMJ.

The FY23 NDAA also significantly revised Article 69, UCMJ. In particular, Article 69(d), UCMJ, 10 U.S.C. § 869(d), now provides a convicted servicemember the right to seek CCA review of action by the TJAG pursuant to Article 69(c)(1), UCMJ, with respect to cases previously reviewed under Article 64, UCMJ, 10 U.S.C. § 864—which specifically applies only to summary courts-martial. A servicemember convicted by a general or special court-martial who does not exercise the right to a direct appeal, and whose case is reviewed by a designated attorney pursuant to Article 65(d), UCMJ, may still apply for review by TJAG under Article 69, UCMJ; however, in such cases TJAG's review is limited to the issue of whether the servicemember made an invalid waiver or withdrawal of the right to a direct appeal. 10 U.S.C. § 869(c)(2). If TJAG finds an invalid waiver or withdrawal, the remedy is to send the case to the CCA for review. *Id*. The current version of Article 69, UCMJ, provides no right for a servicemember convicted by a general or special court-martial to appeal TJAG's determination, nor to directly apply for review by the CCA.

When a statute has no specified effective date, absent clear direction by Congress to the contrary, it takes effect on the date of its enactment. *Johnson v. United States*, 529 U.S. 694, 702 (2000) (citation omitted). The FY23 NDAA provided that the changes to Articles 66 and 69, UCMJ, "shall not apply to [ ] (1) any matter that was submitted before the date of enactment of this Act to a [CCA]; or (2) any matter that was submitted before the date of the enactment of this Act to a Judge Advocate General under [Article 69, UCMJ (2019 *MCM*)]." 136 Stat. 2395 § 544(d).

DISCUSSION

The record before us indicates we have jurisdiction over Appellant's appeal. As of 23 December 2022, Article 66(b)(1)(A), UCMJ, gives this court jurisdiction over a timely appeal from the judgment of a court-martial entered into the record pursuant to Article 60c(a), UCMJ, that includes a finding of guilty. Such appeals are timely if filed within 90 days of the date the appellant was notified of appellate rights under Article 65(c), UCMJ. 10 U.S.C. § 866(c)(1)(A). In this case, the military judge entered Appellant's conviction by a general court-martial into the record on 12 May 2022. Appellant's case did not fall into either category that Congress specifically excepted from the application of the expanded direct appeal rights under Article 66, UCMJ: as of 23 December 2022, Appellant's case had not previously been submitted to this court, and he had not submitted his case for review by TJAG pursuant to Article 69, UCMJ (2019 *MCM*)—although he was still well within the one-year period of the completion of the Article 65, UCMJ, review on 3 June 2022 in which to apply for such a review by TJAG. *See* 136 Stat. 2395 § 544(d); 10 U.S.C. § 869(b) (2019 *MCM*). Additionally, Appellant's notice of appeal was timely. This court received Appellant's notice of appeal on 8 March 2023, well within 90 days, as a 90-day period had not even started at when this court received Appellant's notice.[8] Accordingly, Appellant was entitled to appeal the judgment of his court-martial to this court, and he did so within the required timeframe.[9]

The Government offers several arguments as to why this court should find Appellant was not eligible to file a direct appeal with this court. We are not persuaded.

First, the Government asserts the expanded direct appeal rights under Article 66(b)(1), UCMJ, "only apply to those cases with [entries of judgment (EoJs)] 'entered into the record' on or after [23 December 2022]." The Government contends the EoJ date is the "logical trigger" for application of the expanded direct appeal right both because it is the event that "initiates the appellate process," and because it "determines which subset of convicted servicemembers may apply for direct appeal" based on the entry of a judgment that includes a conviction. The Government seeks to bolster its argument with three state court decisions to the effect that rights of appeal are deter-

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[8] It appears Appellant has yet to be provided notice of his right to file a direct appeal *See* 10 U.S.C. § 865(c)(1).

[9] Appellant filed his direct appeal to this court within 90 days from the date of the enactment of the FY23 NDAA provision at issue.

mined at the point that a judgment is entered. *See State v. Boldon*, 954 N.W.2d 62, 68 (Iowa 2021); *Murphy v. Murphy*, 761 S.E.2d 53 (Ga. 2014); *In re Farmers & Traders Bank of Wrightstown*, 12 N.W.2d 925 (Wis. 1944). The Government concludes this portion of its argument: "[S]ince there is nothing in the [FY23] NDAA indicating that the [Article 66] changes were intended to apply to cases with E[o]Js received before 23 December 2022, the changes must apply only to those E[o]Js received on or after the effective date of the changes."

We disagree with the Government's reasoning. As the Government's argument implicitly concedes, statutory interpretation is, first and foremost, a matter of determining legislative intent. *Cf. United States v. Haverty*, 76 M.J. 199, 204 (C.A.A.F. 2017) ("[I]f a court determines that Congress intended, either expressly or impliedly, to have a particular mens rea requirement apply to a certain criminal statute, then the court must construe that statute accordingly." (Citations omitted).). The general contour of Congress's intent in the FY23 NDAA with respect to changing the scope of CCA jurisdiction to receive direct appeals is evident. Congress expanded the availability of direct appeals from a relatively narrow class of convicted servicemembers—those who received more than six months but less than two years of confinement and received no punitive discharge—to the much broader class consisting of *every* servicemember convicted by a general or special court-martial whose case is not subject to automatic CCA review. As described above, the FY23 NDAA did expressly identify two categories of cases in which the changes to Articles 66 and 69, UCMJ, would not apply: cases that had already been submitted either to the CCA or to TJAG for review as of 23 December 2022. Appellant's case falls into neither category. If Congress had intended to exclude every general and special court-martial in which judgment had been entered as of that date, as the Government proposes, it could have said so. Under the canon of statutory construction *expressio unius est exclusio alterius*,[10] we infer Congress intentionally did not draw the boundary where the Government now marks it.

The Government's second major argument relies on Rule for Courts-Martial (R.C.M.) 1209(a)(1)(A), which provides, in pertinent part: "[a] conviction in a general or special court-martial is final when [ ] [r]eview is completed under R.C.M. 1201(a) (Article 65[, UCMJ])." Therefore, the Government reasons, "Appellant's proceedings, findings, and sentence were 'final and conclusive'" on 3 June 2022, when the Article 65(d), UCMJ (2019 *MCM*), judge

[10] "[T]o express or include one thing implies the exclusion of the other." *United States v. McPherson*, 81 M.J. 372, 386 (C.A.A.F. 2021).

advocate review was complete. However, the Government's reliance on this provision begs the question of what "finality" means in this context. R.C.M. 1209(b), setting forth the "effect of finality," essentially reiterates Article 76, UCMJ, 10 U.S.C. § 876, but this statute merely states:

> The appellate review of records of trial provided by [the UCMJ], the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by [the UCMJ], and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by [the UCMJ], are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in [Article 73, UCMJ, 10 U.S.C. § 873] and to action by the Secretary concerned as provided in [Article 74, UCMJ, 10 U.S.C. § 874,] and the authority of the President.

We conclude neither R.C.M. 1209(a) nor Article 73, UCMJ, pose any barrier to Appellant's direct appeal. Whatever weight completion of an Article 65(d), UCMJ, judge advocate review may carry with regard to implementing the results of a court-martial, the completion of such a review manifestly did not extinguish a convicted servicemember's right to seek further post-trial review and substantive relief from TJAG and the CCA in light of the express congressional provision for seeking such review in accordance with the pre-23 December 2022 version of Article 69, UCMJ (2019 *MCM*). Thus, Appellant's case was not "final" in the sense of having exhausted his access to the CCA, which is what Congress has expanded in the FY23 NDAA.

Moreover, we are dubious of the Government's reliance on R.C.M. 1209 in light of the statutory changes brought by the FY23 NDAA. As discussed at length above, R.C.M. 1209 was created under a framework by which Congress intentionally limited the appellate rights of convicted servicemembers who received no punitive discharge and six months or less in confinement. However, under the new framework, general and special courts-martial are reviewed by a judge advocate pursuant to Article 65(d), UCMJ, only in cases where the convicted servicemember chooses not to appeal, or chooses to withdraw from an Article 66, UCMJ, appeal. We question the Government's post-23 December 2022 application of R.C.M. 1209's "finality" provisions based on an "old" Article 65(d), UCMJ (2019 *MCM*), review in a situation where Appellant was—according to the Government—precluded from exercising the right to a direct appeal or to apply for CCA review under the "old" Article 69(d), UCMJ (2019 *MCM*).

Further, the Government argues Appellant's application is "untimely" under Article 66, UCMJ, because "Appellant never received, nor was he entitled to receive, a notice of appellate rights under Article 65(c), UCMJ;" and "[n]othing in the language of the NDAA mandates that TJAG now retroactively notify all accused that their [entries of judgment,] entered into the record before 23 December 2022, qualify them for appellate review." We find this reasoning misguided. Article 66(c)(1)(A), UCMJ, states an appeal under Article 66(b)(1) is timely if it is filed before the later of "the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under [10 U.S.C. §] 865(c)" or "the date set by the [CCA] by rule or order." We find the notice provision in Article 66(c)(1)(A), UCMJ, does not confer jurisdiction. Stated in the converse, the failure of TJAG to provide notice does not eliminate appellate rights. Similarly, we find no statutory prohibition for submitting a notice of appeal before an Appellant receives a notice of appellate rights. We find Appellant's notice of appeal timely, and that we have jurisdiction to consider his appeal.

The Government next contends that recognizing Appellant's right to appeal would be a retroactive application of the FY23 NDAA, contrary to *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994). The Government argues if we were to apply the FY23 NDAA "retroactively" to cases such as Appellant's, we would be "impos[ing] new duties and 'creat[ing] new obligation[s]' upon the Government with respect to 'transactions' already completed (*i.e.* a case already final under Article 76, UCMJ)." The Government specifically cites its obligations to notify convicted servicemembers of their new appeal rights, to produce verbatim transcripts for previously "subjurisdictional cases to enable Article 66(d)(1) review," and to provide appellate defense counsel. *See* Article 65(b)(2)(A)(i), UCMJ; Article 65(c)(1), UCMJ; Article 66(d)(1), UCMJ. The Government's argument lacks force. To begin with, as we indicated above, we are not persuaded Appellant's case was "final" in the relevant sense. Under the pre-FY23 NDAA version of Article 69, UCMJ (2019 *MCM*), as of 23 December 2022 Appellant still had the right to seek TJAG and CCA review, which could theoretically have resulted in the findings and/or sentence of his court-martial being set aside, potentially resulting in a rehearing or other obligations more burdensome than a verbatim transcript, provision of appellate counsel, or a notification letter. Moreover, as Appellant observes, *Landgraf* was concerned with the retroactive creation of new obligations for private parties, not with protecting the Government from new legislatively mandated burdens. *See Landgraf*, 511 U.S. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening *private rights* unless Congress had made clear its intent." (Emphasis added).). When carrying out its own laws as directed by Congress, the Government does not have the same due process rights, reliance interests, and po-

tential legal or financial exposure that private parties do. *See id.* at 266 (describing the constitutional bases for the "antiretroactivity principle"). We find nothing remarkable in the Government incurring additional obligations in order to effectuate Congress's directions.

We find the Government's remaining arguments are not persuasive and do not require discussion here.

Accordingly, it is by the court on this 7th day of September, 2023,

ORDERED:

The Government's Motion for Leave to File Motion to Dismiss is **GRANTED**.

The Government's Motion for Leave to File a Reply to Appellant's Response to the Motion to Dismiss is **GRANTED**.

The Government's Motion to Submit Supplemental Citation of Authorities to the motion to dismiss is **GRANTED**.

The Government's Motion to Dismiss is **DENIED**.

The Appellant's Motion to Compel Verbatim Transcript is **GRANTED**. However, the court will not remand Appellant's case. The Government will produce a certified verbatim transcript, in either printed or digital format, to the court, appellate defense counsel, and appellate government counsel **not later than 6 October 2023**.

It is further ordered:

Appellant's brief will be submitted in accordance with the timelines established in Rule 18 of the Joint Rules of Appellate Procedure, JT. CT. CRIM. APP. R. 18, with one exception: Appellant's brief shall be filed within 60 days after appellate counsel has received a printed or digital copy of the certified verbatim transcript.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court