August 19, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

V.

JERIN P. MENARD,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 25-0173/AF

Crim. App. Dkt. No. ACM 40496

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

Whether the Air Force Court erred by applying the *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), "common factors" test too broadly, while also declining to apply this Court's "almost identical to the charged acts" standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999), thereby improperly admitting propensity evidence.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) had jurisdiction to review this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[1] This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On March 20-23, 2023, at a general court-martial at Joint Base McGuire-Dix-Lakehurst, New Jersey, a panel of officer members convicted Senior Airman (SrA) Jerin P. Menard, contrary to his plea, of wrongful viewing in violation of Article 120c, UCMJ, 10 U.S.C. § 920c (2018). J.A. at 32, 345. The military judge sentenced SrA Menard to a bad-conduct discharge, six months' confinement, reduction to the grade of E-1, and a reprimand. J.A. at 32. The convening authority took no action on the findings or sentence. J.A. at 36.

On March 23, 2025, the Air Force Court affirmed the findings and found no

[1] Unless otherwise noted, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the version in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

error was materially prejudicial to SrA Menard's substantial rights. J.A. at 29.

Statement of Facts

SrA Menard and then-SrA RH met on an online dating application in February 2020 and began a relationship marked by repeated breakups and reconciliations, with both parties acknowledging trust issues from the outset. J.A. at 199-200, 255, 277. Despite these problems, they signed a lease together while SrA Menard was deployed and later adopted a dog. J.A. at 257. The relationship ended in July 2021, with RH discovering that SrA Menard was involved with another woman. J.A. at 214-16. At the same time, SrA Menard found out that RH herself had sent a photo or video of her breasts to another man. J.A. at 215-16.

After the breakup, SrA Menard and RH worked opposite shifts and shared the same residence, with SrA Menard sleeping on the couch and moving to the bed when RH left for work. J.A. at 220. On August 15, 2021, while SrA Menard was out walking the pair's dog, he texted RH, "snapping[2] guys again I *see*," after she had sent an image to her father. J.A. at 40, 225-26. RH closed the blinds and curtains, suspecting she was being watched. J.A. at 227-28.

Later that week, while SrA Menard was away at a softball game, RH testified that she took a shower, entered the bedroom, and masturbated on the bed while nude. J.A. at 229-30. RH stated that she believed she was on top of the covers while she

[2] "Snapping" involves the sending of Snapchat messages.

masturbated. J.A. at 229. Some seconds after RH finished masturbating, she received text messages from SrA Menard: "Did you make any videos today?" Followed by "Any videos? Bring the toys out?" J.A. at 45, 230-31. RH testified that SrA Menard knew she used sex toys when masturbating. J.A. at 231. After an acrimonious exchange, RH tried on a blue outfit and took a photo of herself, only to receive another text from SrA Menard referencing her "blue outfit." J.A. at 46, 232-33. RH became worried, called a friend, and began searching her room. J.A. at 234-35. She discovered a "stuffed cupcake-shaped toy" with a cut-out eye containing a camera, which snagged on a wire when she picked it up. J.A. at 39, 235-36. After unplugging the camera, SrA Menard texted, "Oh look you caught on[.] Bravo[.]" J.A. at 47.

RH claimed the camera had a direct line of sight to the bed, but her testimony did not establish her exact location on the bed, the bed's orientation, or whether anything obstructed the camera's view during the alleged incident. J.A. at 228-29, 238. The only photographic evidence, showing roughly where the camera would have been, was grainy and did not clarify the room's layout or the camera's field of view. J.A. at 37. The photo suggests that the television may have obstructed the camera, and there was no evidence that the camera's position was unchanged during the relevant period. J.A. at 37, 249.

In October 2021, investigators from the Air Force Office of Special Investigations (OSI) interviewed SrA Menard. J.A. at 268. He admitted to placing

the camera in the bedroom to *see* if RH was sending pictures to other men. J.A. at 288, 363, Clip 2 at 0:00-1:07. He explained that he checked the camera when RH said she was dropping off clothes and saw her taking pictures in a blue outfit J.A. at 363, Clip 2 at 1:07-3:30). Specifically, SrA Menard stated,

> Obviously what I did was wrong. I'm wrongful for it. I shouldn't have done that. I didn't know it was a law. We're allowed to have cameras in our own house in Louisiana. It's different in New Jersey I guess you could say. Yes, the video . . . Was videoing her without her knowledge, I'm aware of that.

J.A. at 363, Clip 2 at 5:05-5:32. He admitted to checking the camera earlier in the week but denied ever seeing RH naked through the camera. J.A. at 363, Clip 3 at 00:50-2:15, 4:22-4:40.

The government charged SrA Menard with indecent viewing under Article 120c, UCMJ. Over defense objection, the military judge allowed the government to admit the following evidence pursuant to Mil. R. Evid. 404(b): (1) SrA Menard demanded RH give him her social media passwords, including to her Snapchat and Instagram accounts; (2) SrA Menard would take her phone during the night while she slept and go through her messages, sometimes locking himself in the bathroom while doing so; and (3) SrA Menard would access RH's social media and block male friends and ex-boyfriends. J.A. at 130-32.

The military judge found the government's evidence illustrated SrA Menard's motive to dominate and monitor RH within their relationship. *Id.* He found that the

government's evidence—SrA Menard demanding social media passwords, accessing RH's phone without her permission, and blocking male contacts—was enough for a reasonable fact finder to conclude these incidents happened and that they reflected a pattern of controlling behavior. *Id.*

The military judge then determined that these acts were relevant to show SrA Menard's motive and intent to monitor RH without her consent, which he found to be a proper, non-propensity purpose. *Id.* The military judge weighed the probative value of this evidence against the risk of unfair prejudice under Mil. R. Evid 403. *Id.* He concluded that the probative value was not substantially outweighed by any danger of unfair prejudice, reasoning that excluding the context would mislead the members about the nature of the relationship and the motivations. *Id.* The military judge stated the acts in question were much less severe than the charged conduct, would not take significant time to present, and would not confuse the panel. J.A. at 131. As a result, he denied the defense motion to exclude the items. *Id.*

The evidence at trial consisted largely of RH's testimony, text messages, SrA Menard's OSI interview, and a photograph showing the cupcake toy's location a week before the alleged incident. J.A. at 37, 345. The defense emphasized the lack of objective evidence showing that SrA Menard actually viewed RH's private area, highlighting the uncertainty about the camera's position, the room's layout, and SrA Menard's consistent denial of seeing RH nude. J.A. at 228-29, 349, 363, Clip 3

at 4:22-4:40. At the government's rebuttal findings argument, government counsel asserted that the case "comes down to a year and a half relationship, it comes down to a scheme to monitor [RH]. It comes down to control. It comes down to abuse." J.A. at 338.

On appeal, the Air Force Court reviewed the military judge's decision to admit the Mil. R. Evid. 404(b) evidence for abuse of discretion, applying the "common factors" test from *Hyppolite*. J.A. at 14. The Air Force Court expressly acknowledged, but declined to apply, the "almost identical to the charged acts" standard from *Morrison*, instead relying on *Hyppolite* as the controlling precedent. *Id.* The Air Force Court focused on the parties being the same, the proximity in time between the charged and uncharged acts, and the purported similarity in the nature of the misconduct and uncharged acts. J.A. at 18.

The Air Force Court found that the acts of reviewing RH's phone and deleting messages while she slept were sufficiently similar to the charged act of indecent viewing to support a common scheme, reasoning that both involved invasions of privacy without RH's knowledge or consent. *Id.* The Air Force Court concluded that the difference between monitoring RH's communications and monitoring her actions in the bedroom was a difference in type, not in kind, and that both could be considered part of a unified scheme to monitor RH. *Id.*

Summary of the Argument

The Air Force Court erred by failing to apply the correct legal standard for admitting prior acts evidence under Mil. R. Evid. 404(b). Rather than first determining whether the facts supported *Hyppolite's* flexible "common factors" approach, the Air Force Court defaulted to that test in a case where no genuine, recurring scheme was present, while discounting applying *Morrison's* "almost identical" standard. *See United States v. Hyppolite*, 79 M.J. 161, 166–67 (C.A.A.F. 2019), *see also United States v. Morrison*, 52 M.J. 117, 122 (C.A.A.F. 1999); J.A. 17-18.

The *Reynolds* test requires that all three prongs be satisfied before admitting other-acts evidence: (1) the evidence must reasonably support a finding that the appellant committed the specific act; (2) the act must make a fact of consequence more or less probable; and (3) the probative value must not be substantially outweighed by unfair prejudice. See *United States v. Wilson*, 84 M.J. 391, 390 (C.A.A.F. 2024) (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)).

Rather than rigorously applying this test, the Air Force Court relied on *Hyppolite*'s "common factors" approach, expressly rejecting *Morrison's* "almost identical" standard. *See. Hyppolite*, 79 M.J. at 166–67; *see also Morrison*, 52 M.J. at 122. The court focused on superficial similarities—same parties, temporal proximity, and general nature of misconduct—without demonstrating that the prior

acts were sufficiently similar in intent or execution to the charged offense. J.A. at 14, 17-18.

Hyppolite's framework is appropriate only when the government can demonstrate a broad, unified scheme supported by multiple, consistent data points. *Hyppolite*, 79 M.J. at 166–67. In SrA Menard's case, the government relied on isolated incidents—digital monitoring and controlling behavior during the relationship—that were materially different from the charged conduct and separated by the significant intervening event of the breakup. The Air Force Court's broad application of *Hyppolite* resulted in the admission of evidence that was not logically or factually connected to the charged offense, diluting the protections of Mil. R. Evid. 404(b) and exposing SrA Menard to unfair prejudice.

Even if *Hyppolite* were the correct standard, the Air Force Court failed to apply it with the necessary rigor. *Hyppolite* demands a genuine, recurring scheme, not superficial similarities. The court overlooked the significance of the breakup and treated pre-breakup acts as probative of post-breakup conduct, despite the absence of a continuous pattern or unified plan.

In sum, the Air Force Court's failure to select and rigorously apply the appropriate standard—choosing *Hyppolite* where *Morrison* should have governed, and misapplying both—led to the erroneous admission of propensity evidence and undermined the fairness of SrA Menard's trial.

Argument

The Air Force Court erred by applying the *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019), "common factors" test too broadly, while also declining to apply this Court's "almost identical to the charged acts" standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999), thereby improperly admitting propensity evidence.

Standard of Review

This Court reviews a military judge's decision to admit Mil. R. Evid. 404(b) evidence at trial for abuse of discretion. *Wilson*, 84 M.J. at 390 (citing *Hyppolite*, 79 M.J. at 164). Military judges abuse their discretion when: (1) the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) incorrect legal principles are used; or (3) the application of the correct legal principles to the facts are clearly unreasonable. *Id.* (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010)).

This Court reviews issues of law de novo. *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019) (citing *United States v. Paul*, 73 M.J. 274, 277 (C.A.A.F. 2014); *United States v. Cessa*, 861 F.3d 121, 140 (5th Cir. 2017).

Law and Analysis

Mil. R. Evid. 404(b) prohibits the government from introducing evidence of prior misconduct solely to suggest that the accused is predisposed to commit the charged offense. Such evidence is admissible only for specific, non-propensity purposes—such as motive, intent, or plan—when it is genuinely relevant and

sufficiently similar to the charged conduct. *See* Mil. R. Evid. 404(b); *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989).

This Court in *United States v. Morrison* required that uncharged acts be "almost identical" to the charged offense to be admissible as evidence of a common scheme or plan, thereby safeguarding against convictions based on character rather than proof of the actual crime, a concern especially acute in members trials. *See. Morrison*, 52 M.J. at 122.

Twenty years later, the Court adopted a more flexible "common factors" approach in *United States v. Hyppolite*, permitting admission of prior acts if they share substantial similarities in relationship, circumstances, and nature of the misconduct. *See Hyppolite*, 79 M.J. at 166–67. While *Hyppolite* does not overtly declare *Morrison* to be bad law, it marks a significant departure from *Morrison's* "almost identical" requirement. Whether *Morrison* remains controlling is critical, as the tension between these standards directly impacts the rigor with which courts protect against improper propensity inferences. Only by carefully applying the most appropriate test, determined as the facts necessitate, can the courts ensure that Mil. R. Evid. 404(b)'s safeguards are not eroded.

This Court utilizes the *Reynolds* test when assessing a military judge's decision to admit evidence under Mil. R. Evid. 404(b). *Wilson*, 84 M.J. at 391 (citing *Reynolds*, 29 M.J. at 109. The three-prong test asks: "(1) does the evidence

reasonably support a finding that appellant committed a specific act; (2) does evidence of this act make a fact of consequence more or less probable; and (3) is the probative value of the evidence of this act substantially outweighed by the danger of unfair prejudice?" *Id. at* 390. All prongs of the *Reynolds* test must be met for the evidence to be admitted. *Id.*

This Court utilizes the *Reynolds* test when assessing a military judge's decision to admit evidence under Mil. R. Evid. 404(b). *Wilson*, 84 M.J. at 391 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The three-prong test asks: "(1) does the evidence reasonably support a finding that appellant committed a specific act; (2) does evidence of this act make a fact of consequence more or less probable; and (3) is the probative value of the evidence of this act substantially outweighed by the danger of unfair prejudice? *Id.* at 390 (citing *Reynolds*, 29 M.J. at 109). All prongs of the *Reynolds* test must be met for the evidence to be admitted. *Id.* (citing *Reynolds*, 29 M.J. at 109).

In *Hyppolite*, this Court stated that "common plan or scheme" evidence need only share "common factors." *Hyppolite*, 79 M.J. at 166-67. That contradicted, but did not overrule, this Court's previous holding in *Morrison* that evidence of other acts "'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." *Morrison*, 52 M.J. at 122 (quoting *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984)).

In this case, the Air Force Court, relying on this Court's decision in *United States v. Greene-Watson*, applied the *Hyppolite* "common factors" test while expressly acknowledging, but rejecting, *Morrison's* "almost identical to the charges acts" standard. J.A. at 14, 17-18. In applying the "common factors" test, the Air Force Court's Mil. R. Evid. 404(b) analysis focused on the parties being the same, the proximity in time between the charged and uncharged acts, and the purported similarity in the nature of the misconduct and uncharged acts. *Id*. at 18. The Air Force Court found that the military judge did not abuse his discretion in his ruling regarding the "surreptitious surveillance," and assumed that even if the "permissive surveillance" evidence was improperly admitted, the admission was harmless. *Id*. at 17-20. This approach resulted in the inclusions of propensity evidence under the guise of Mil. R. Evid. 404(b) a consequence of overinclusion noted in Judge Sparks concurring opinion in *Greene-Watson*. *See Greene-Watson*, 85 M.J. at 349 (Sparks, J., concurring in part and in the judgment) ("too often evidence admitted under the [Mil. R. Evid. 404(b)] common scheme or plan exception is merely evidence of parallel offenses or a temporally proximate series of events.")

A. Courts should first assess whether the evidence demonstrates a broad, recurring scheme that justifies *Hyppolite's* flexible approach; if no such scheme exists, *Morrison's* "almost identical" standard must be applied to safeguard against improper propensity evidence.

The Air Force Court misapplied the standards for admitting other-acts evidence under Mil. R. Evid. 404(b) by relying too broadly on *Hyppolite's* "common

factors" test. In *Hyppolite*, this Court endorsed a flexible approach to the admission of prior acts, focusing on substantial similarity in the relationship, circumstances, and nature of the alleged misconduct. *See Hyppolite*, 79 M.J. at 161. But this approach was developed in the context of multiple victims and recurring patterns of conduct, *id* at 161, 167, which are not present in this case.

In *United States v. Hyppolite*, the accused faced multiple sexual offense charges involving several victims, each of whom was either a friend or an acquaintance. 79 M.J. 161. The alleged incidents typically occurred after drinking, and most of the assaults were said to have happened while the victims were asleep or drifting off. *Id. at* 162. The government moved to introduce evidence of each incident to establish a "common plan" or "scheme" under Mil. R. Evid. 404(b), rather than to argue propensity.

The motions judge found the evidence admissible under Mil. R. Evid. 404(b)(2), reasoning that each specification was probative of the others in demonstrating a common plan by the accused. This Court identified key similarities among the offenses—namely, the nature of the relationships (friends), the circumstances (after drinking, when victims were asleep or nearly asleep), and the conduct itself (touching the victims' genitalia), *id.* at 162—which together supported the finding of a common plan. Ultimately, this Court held that the military judge did

not abuse their discretion in admitting the evidence for this purpose, emphasizing that it was used to show a plan or scheme, not to establish propensity. *Id.* at 167.

In this case, the Air Force Court incorrectly relied on *Hyppolite's* "common factors" test despite the absence of a genuine, recurring scheme. The *Hyppolite* test was developed based on a situation involving multiple victims and a clear pattern of conduct, supported by consistent data points across multiple incidents. *See Hyppolite*, 79 M.J. at 166–67. Here, however, the government presented only a single alleged victim and prior acts—digital monitoring and controlling behavior during a turbulent relationship—that were materially different from the charged conduct of surreptitious viewing after the breakup.

By broadly applying *Hyppolite*, the Air Force Court overlooked the more demanding standard set forth in *Morrison*, which requires that uncharged acts be "almost identical" to the charged offense to qualify as evidence of a common scheme or plan. *See Morrison*, 52 M.J. at 122. As Judge Hardy cautioned in his *Greene-Watson* concurrence, an expansive reading of *Hyppolite* risks allowing the common scheme or plan exception to "swallow [Mil. R. Evid.] 404(b)(1)'s general rule prohibiting the admission of propensity evidence." *Greene-Watson*, 85 M.J. at 351-52 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment).

To preserve the full force of Mil. R. Evid. 404(b), *Hyppolite's* test should be reserved for cases where the government can demonstrate a genuine, recurring

scheme—a pattern of conduct supported by multiple, consistent data points. In those circumstances, the flexible approach allows the court to consider substantial similarities in relationship, context, and nature of the misconduct, even if the acts themselves are not identical. *See Hyppolite*, 79 M.J. at 166–67.

Although recent decisions have shifted toward *Hyppolite's* less demanding "common factors" test, *Morrison* remains binding precedent and serves as a critical safeguard against the erosion of the rule prohibiting propensity evidence. *See Greene-Watson*, 85 M.J. at 351–52 (Hardy, J., joined by Sparks, J., concurring in part and in the judgment). *Hyppolite's* framework should not give the government license to admit loosely connected or isolated acts under the guise of proper plan or scheme evidence per Mil. R. Evid. 404(b). Where the government's theory relies on a handful of prior acts that are only superficially related to the charged offense, *Morrison's* "almost identical" standard must control. *Morrison* requires that prior acts closely resemble the charged conduct before they may be admitted as evidence of a common scheme or plan—a strict requirement that is especially important in members trials, where the risk of unfair prejudice is greatest. *See Morrison*, 52 M.J. at 122.

Hyppolite and *Morrison* should be applied as alternative standards. Courts should select the appropriate test based on the facts presented. *Hyppolite's* flexible approach should be reserved for cases with a genuine, expansive schemes; while

Morrison's "almost identical" requirement should govern when the evidence does not support such a pattern.

In SrA Menard's case, the government failed to establish any broad, recurring scheme that would justify the use of *Hyppolite*. The prior acts—digital monitoring and controlling behavior during the relationship—were isolated incidents, fundamentally different from the charged conduct, and separated by the significant intervening event of the breakup. The Air Force Court's broad application of *Hyppolite* ignored *Morrison's* stricter standard and resulted in the admission of evidence that improperly suggested propensity.

This error is not a mere technicality; it undermines the core protections of Mil. R. Evid. 404(b), which exist to prevent convictions based on character or perceived propensity rather than proof of the specific charged offense. When courts fail to distinguish between cases warranting *Hyppolite's* broader approach and those requiring *Morrison's* stricter standard, they dilute these protections and compromise the fairness of the proceedings.

A proper analysis would have recognized the absence of a unified scheme and applied *Morrison's* demanding threshold, excluding the prior acts and preserving the integrity of Mil. R. Evid. 404(b). This approach ensures that accused members are judged solely on evidence relevant to the charged offense, not on impermissible character inferences.

B. The *Morrison* "almost identical" standard is the only appropriate safeguard for admissibility of prior acts in this case.

The Air Force Court erred by disregarding the controlling *Morrison* standard in its analysis of prior acts evidence. *Morrison* requires that, to be admissible as evidence of a common scheme or plan, prior acts must be "almost identical" to the charged conduct. *Morrison*, 52 M.J. at 122. This critical safeguard is designed to prevent convictions based on character or propensity, rather than proof of the specific offense charged. *Id*.

The prior acts attributed to SrA Menard—demanding social media passwords, accessing RH's phone while she slept, and blocking male contacts—differ fundamentally from the charged conduct of surreptitious viewing of RH's nude body without her consent. The earlier acts involved digital monitoring and attempts at social control during a turbulent relationship. In contrast, the charged offense was a physical invasion of bodily autonomy that occurred only after the relationship had ended. This distinction is not trivial; it is central to determining whether the prior acts are relevant to proving a common plan or scheme.

Morrison sets a demanding standard: prior acts must be "almost identical" to the charged conduct and to each other, so that their connection to a single plan is unmistakable. *See Morrison*, 52 M.J. at 122–23. Here, the government's evidence of digital snooping and social media control during the relationship bears little resemblance to the later act of surreptitiously viewing RH's nude body. The means,

scope, and privacy interests at stake are materially different. Digital monitoring implicates informational privacy, while the charged conduct is a direct, physical invasion of intimate privacy. These are not "almost identical" in kind or degree.

Context matters. The prior acts occurred during the relationship, when both parties were still living together and interacting as partners. The charged conduct, by contrast, took place after a definitive breakup—a moment that fundamentally changed the nature of their interactions. The breakup is a meaningful intervening event that severs any plausible continuity between the prior acts and the charged offense. Without a continuous pattern or a direct, meaningful connection, the prior acts cannot be said to form part of a unified scheme or plan under *Morrison*.

By declining to apply *Morrison's* "almost identical" requirement, the Air Force Court displayed a willingness to treat disparate acts as part of a common scheme diluting the strict protections of Mil. R. Evid. 404(b). This approach invites factfinders to convict based on a general perception of the accused's character or controlling tendencies, rather than on proof of the specific charged conduct. That is precisely what Mil. R. Evid. 404(b) is designed to prevent.

Morrison's "almost identical" standard is the only appropriate test in this case. The prior acts did not meet the threshold required for admissibility under *Morrison*, and the Air Force Court's decision to affirm their admission on appeal further diluted

the fairness of the proceedings and the protections guaranteed by Mil. R. Evid. 404(b).

C. Even if *Hyppolite's* flexible framework were the proper standard, the Air Force Court's application was deficient, and a correct analysis would have shown the admission of the prior acts evidence was in error.

Even assuming *Hyppolite's* flexible approach could apply, the Air Force Court failed to implement it with the rigor required. *Hyppolite* demands that prior acts be admitted only when the government can demonstrate a genuine, recurring pattern supported by multiple, consistent data points. In this case, that threshold was not met. The breakup between SrA Menard and RH was not simply a chronological marker; it was a decisive event that fundamentally changed the nature of their relationship and severed any plausible continuity between the prior acts and the charged conduct.

By overlooking the significance of the breakup, the Air Force Court improperly treated digital monitoring and controlling behavior during the relationship as probative of surreptitious indecent viewing after the relationship had ended. This analytical misstep led to an unfounded inference of a common scheme or plan, contrary to *Hyppolite*.

A proper analysis under *Hyppolite* would have required the Air Force Court to consider whether there enough similarities to show a continuous pattern or unified

scheme linking the prior acts to the charged conduct despite overall differences in the acts. *See Hyppolite*, 79 M.J. at 162-63.

The facts do not support such a finding. After the breakup, the parties' interactions and motivations changed dramatically, and the motivations underlying SrA Menard's conduct could not reasonably be presumed to remain the same. The government's attempt to connect digital monitoring during the relationship to an indecent viewing after the breakup is speculative and unsupported by the record. The prior acts are isolated incidents, not part of a broader, recurring plan.

Even under *Hyppolite's* flexible approach, the government's evidence in this case fails to meet the necessary criteria for admission. The Air Force Court's error in applying *Hyppolite* too broadly resulted in the improper admission of propensity evidence and compromised the fairness of SrA Menard's trial.

D. The admission of the prior acts evidence created a substantial risk of unfair prejudice, especially in a members trial, and thus violated the protections of Mil. R. Evid. 404(b).

The Air Force Court's decision to affirm the admission of prior acts evidence in SrA Menard's case failed to properly apply the *Reynolds* test, resulting in a substantial risk of unfair prejudice—particularly in the context of a members trial. The *Reynolds* test requires that all three prongs be satisfied: "(1) does the evidence reasonably support a finding that appellant committed a specific act; (2) does evidence of this act make a fact of consequence more or less probable; and (3) is the

probative value of the evidence of this act substantially outweighed by the danger of unfair prejudice?" *Wilson*, 84 M.J. at. 390 (citing *Reynolds*, 29 M.J. at 109).

The second prong of the *Reynolds* test asks whether the prior acts evidence makes a fact of consequence more or less probable. This requirement is only satisfied if the evidence survives exclusion under Mil. R. Evid. 404(b)(1) and is offered for a legitimate purpose, such as motive, intent, or plan—not simply to show propensity. *See Hyppolite*, 79 M.J. at 164–65.

In SrA Menard's case, the government relied on prior acts of digital monitoring and controlling behavior during the relationship. These acts were not sufficiently similar to the charged conduct of surreptitious indecent viewing after the breakup. The only connection was a broad, abstract notion of "monitoring," which does not meet the requirements for admission under the common scheme exception. The breakup itself was a significant intervening event, severing any plausible continuity and further diminishing any probative value the evidence might have had.

Because the prior acts did not logically or factually connect to the charged offense, they failed to make any fact of consequence more or less probable in a way that is permissible under Mil. R. Evid. 404(b)(2). Instead, their admission risked shifting the panel's focus from the specific allegations to a general perception of SrA Menard's character. This is precisely what the second prong of *Reynolds* is designed to prevent. The Air Force Court's analysis did not rigorously assess

whether the evidence was admitted for a proper purpose, and as a result, the second prong was not satisfied.

The third prong of *Reynolds* demands that the probative value of prior acts evidence not be substantially outweighed by the danger of unfair prejudice. Here, the government's case was weak, lacking direct evidence that SrA Menard viewed RH's nude body without her consent. The prior acts evidence became central to the government's theory, painting a picture of SrA Menard's character for the members. Yet these acts were not sufficiently similar to the charged conduct, and the connection was speculative at best.

The risk of unfair prejudice was heightened by the fact that SrA Menard was tried before a panel of lay members, not a military judge. As this Court recognized in *United States v. Woods*, "Members are not and should not be charged with independent knowledge of the law. This is not just any principle of law, however; it is one of the fundamental tenets of U.S. criminal law that predates the founding of the republic." *United States v. Woods*, 74 M.J. 238, 244 (C.A.A.F. 2015). Members of a court-martial panel lack the legal training and experience necessary to reliably compartmentalize evidence or follow limiting instructions, making them far more susceptible to using other-acts evidence as proof of bad character or propensity, rather than for any legitimate non-propensity purpose.

During rebuttal, government counsel emphasized a narrative of control and abuse, inviting the panel to convict based on a general perception of SrA Menard's character rather than on proof of the specific charged conduct. J.A. 339. This risk was further amplified by the panel's instruction that a finding of guilt required only a three-fourths concurrence, not unanimity. J.A. 340.

This risk is not theoretical. In *Greene-Watson*, the appellant was tried by a military judge alone, and this Court found that even if error occurred in admitting prior acts, it did not materially prejudice the appellant's substantial rights. *See Greene-Watson*, 85 M.J. at 345, 349. In part because judges are presumed to apply the law faithfully and avoid improper reliance on propensity evidence. *See United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000). That presumption does not extend to members panels, where the risk of unfair prejudice is heightened.

The danger was further amplified in this case by the panel's instruction that a finding of guilt required only a three-fourths concurrence, not unanimity. J.A. 340. This lowered threshold increased the likelihood that some members might be swayed by impermissible character reasoning.

The admission of this evidence diluted the protections of Mil. R. Evid. 404(b) and the *Reynolds* test, as the prejudicial impact far outweighed any minimal probative value. The government's reliance on prior acts to establish a narrative of control and abuse, combined with the context of a members trial, created a

substantial risk that SrA Menard was convicted based on propensity rather than proof of the charged offense. This error undermined the fairness of the proceedings and violated the core protections of Mil. R. Evid. 404(b).

E. The Air Force Court's error was not harmless, as the improperly admitted evidence significantly prejudiced the SrA Menard's right to a fair trial.

The erroneous admission of prior acts evidence in SrA Menard's trial was not a harmless error. In assessing prejudice from non-constitutional evidentiary errors, this Court weighs: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Here, the government's case relied heavily on RH's testimony, text messages, and SrA Menard's OSI interview, but lacked objective evidence showing that SrA Menard actually viewed RH's private area. The defense emphasized the uncertainty surrounding the camera's position, the room's layout, and SrA Menard's consistent denial of seeing RH nude without her consent. The prior acts evidence was highly material to the government's theory of motive and intent, yet its quality was questionable, as it bore little resemblance to the charged conduct and was separated by the significant intervening event of the breakup.

The prejudicial effect of the evidence was magnified by the members trial context. Lay members are more likely to be influenced by evidence of prior bad acts, especially when those acts are presented as part of a supposed pattern of controlling behavior. The risk that the panel convicted SrA Menard based on a belief in his propensity to invade RH's privacy, rather than on proof of the specific charged offense, is substantial.

Given the centrality of the prior acts evidence to the government's case and the heightened risk of unfair prejudice in a members trial, the error cannot be deemed harmless. The admission of this evidence significantly prejudiced SrA Menard's right to a fair trial.

Conclusion

The Air Force Court failed to apply the correct legal standards for admitting other-acts evidence under Mil. R. Evid. 404(b). Instead of first determining whether the facts supported using *Hyppolite's* flexible approach or the more stringent *Morrison* test, the court defaulted to a broad application of *Hyppolite's* "common factors" test in a case where no genuine, recurring scheme was present. This error ignored the critical safeguard provided by *Morrison's* "almost identical" standard, which is essential when the government relies on isolated or loosely connected acts.

The prior acts attributed to SrA Menard were fundamentally different in nature and context from the charged conduct, and the breakup between the parties

was a decisive intervening event that severed any plausible continuity. Even under *Hyppolite's* framework, the government's evidence failed to meet the necessary criteria for admission, as it did not establish a continuous pattern or unified scheme linking the prior acts to the charged offense.

Further, the admission of these prior acts created a substantial risk of unfair prejudice, especially in a members trial where lay factfinders are more likely to be influenced by improper propensity reasoning. The government's reliance on a narrative of control and abuse, combined with the lack of direct evidence, amplified this risk and undermined the fairness of the proceedings.

For these reasons, the Air Force Court's approach diluted the protections of Mil. R. Evid. 404(b) and the *Reynolds* test, resulting in the erroneous admission of propensity evidence. Accordingly, SrA Menard respectfully requests this Court set aside his conviction.

Respectfully Submitted,

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Certificate of Filing and Service

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on August 19, 2025 and that a copy was also electronically served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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Certificate of Compliance

This brief complies with the type-volume limitation of Rules 21(b) and 21(6) of no more than 9,000 words because it contains approximately 6101 words.

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