October 7, 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

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) Jerin P. Menard, the Appellant, hereby replies to the Government's Answer concerning the granted issue, filed on Sep. 23, 2025.

Argument

A. The Air Force Court of Criminal Appeals incorrectly applied the law.

The Air Force Court of Criminal Appeals (Air Force Court) erred by applying the "common factors" test from *United States v. Hyppolite*, 79 M.J. 161 (C.A.A.F. 2019) to broadly, while disregarding the more rigorous "almost identical" standard from *United States v. Morrison*, 52 M.J. 117 (C.A.A.F. 1999) for admitting other-acts evidence under Mil. R. Evid. 404(b). *Hyppolite* allows prior acts to be admitted if they share substantial similarities in relationship, circumstances, and nature of misconduct, but that approach was developed in cases involving multiple victims and a recurring pattern of conduct. *Hyppolite*, 79 M.J. at 162. *Morrison*, by contrast, requires that uncharged acts be "almost identical" to the charged conduct. 52 M.J. at 122. In line Mil. R. Evid. 404(b), *Morrison*'s standard helps ensure improper propensity evidence is not admitted, and only acts with a close factual connection to the charged offense are considered.

In SrA Menard's case, the Government presented evidence SrA Menard demanding RH's social media passwords, accessed RH's phone while she slept, and blocking male contacts during a turbulent relationship, J.A. at 130-32, acts that were

materially different from the charged conduct of surreptitious indecent viewing after the breakup. The breakup itself was a decisive intervening event that severed any plausible continuity between the prior acts and the charged offense. Unlike *Hyppolite*, where the court had multiple victims and a clear, recurring pattern supported by consistent evidence, the record here the Mil. R. Evid. 404(b) evidence shows only acts in an isolated relationship between RH and SrA Menard. There is no broad scheme or repeated conduct spanning different individuals. Instead, the government's case relies on a handful of prior acts, all limited to the same two people and lacking the kind of consistent, recurring data points that justified the flexible approach in *Hyppolite*. These acts do not form a unified plan; they are disconnected events within a single, tumultuous relationship, not evidence of a larger, ongoing scheme.

Even if *Hyppolite*'s flexible framework were the correct standard, the Air Force Court failed to apply it with the necessary rigor. The Government's theory relied on superficial similarities—such as the existence of a prior relationship, temporal proximity, and generalized monitoring—while overlooking the material differences in means, scope, and privacy interests. The prior acts involved digital access and social control during the relationship, while the charged offense was a physical invasion of intimate privacy after the breakup. These are not the similar types of conduct.

B. *Morrison*'s "almost identical" standard is a high threshold for admitting other acts evidence.

The Government demonstrates a misunderstanding of the law and the record when it essentially argues that *Hyppolite* and *Morrison* are two roses by different names—each requiring only a low threshold of similarity for admitting other acts evidence. Government Br. at 21-23. A rose by any other name may smell as sweet, but in the world of evidentiary safeguards, the difference between *Hyppolite*'s "common factors" and *Morrison*'s "almost identical" standard is profound. *Hyppolite* was not just a rebranding of *Morrison*; it has also served as a distinct, less demanding test. *See* J.A. at 13-14.

Morrison explicitly holds that "uncharged acts 'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme." 52 M.J. at 122 (quoting *United States v. Brannan*, 18 M.J. 181, 183 (C.M.A. 1984). This is a substantive safeguard, as the degree of similarity crafted ensures that only prior acts nearly indistinguishable in kind, context, and execution are admitted for non-propensity purposes. *Morrison*'s "almost identical" standard is rooted in the need to protect the accused from unfair prejudice, especially in cases where the Government relies on isolated or loosely connected acts, and where the risk of improper character reasoning is highest. *See Morrison*, 52 M.J. at 122.

The Government's brief tries to collapse *Morrison* into *Hyppolite*, suggesting that both simply apply a "common factors" test and that the "almost identical"

language is just another way of saying similar enough. *See* Government Br. at 21-23. But this ignores *Morrison*'s explicit language and rationale. *Morrison* was decided in a context where the government sought to admit highly inflammatory testimony of uncharged misconduct, and this Court reversed precisely because the acts were not sufficiently similar to the charged conduct to show a plan or scheme. *See Morrison*, 52 M.J. at 122-23. The "almost identical" standard is a deliberate, heightened safeguard—not a semantic flourish. It demands a true concurrence of features, not just a general pattern or abstract similarity.

Hyppolite, by contrast, delt with a a case involving multiple victims and a recurring pattern of conduct. *Hyppolite*, 79 M.J. at 162. There the "common factors" standard was appropriate because all the acts were building toward a single, unified criminal goal. In that circumstance, the flexible approach makes sense. But in cases like SrA Menard's—where the government relies on incidents separated by a decisive intervening event (the breakup), and the prior acts are materially different in kind and context—*Morrison*'s strict standard must control.

The record makes clear that the prior acts at issue—demanding social media passwords, going through RH's phone while she slept, and blocking male contacts—are not "almost identical" to the charged conduct of surreptitious viewing after a breakup. The acts differ fundamentally in kind, context, and motivation. *Morrison*'s safeguard is not satisfied by superficial or abstract similarities; it requires a true

concurrence of features, not just a general pattern of "monitoring." *See Morrison*, 52 M.J. at 122-23 (comparing the nature, situs, circumstances, and time span of the Mil. R. Evid. 404(b) evidence in comparison to the charged acts.) The Air Force Court's refusal to apply *Morrison*, and the Government's attempt to collapse the *Morrison* "almost identical" standard with *Hyppolite*'s "common factors" standard, undermines the protections of Mil. R. Evid. 404(b) and was a misapplication of the law.

C. The Air Force Court and the Government's expansive reading of *Hyppolite* erodes the safeguards required for admission of Mil. R. Evid. 404(b) evidence.

The Air Force Court and the Government's expansive reading of *Hyppolite* is not supported by the case law and is precisely the danger Judge Hardy identified in *Greene-Watson*: "the common scheme or plan exception [should not] swallow[] [Mil. R. Evid.] 404(b)(1)'s general rule prohibiting the admission of propensity evidence." *United States v. Greene-Watson*, 85 M.J. 340, 351-52 (C.A.A.F. 2025) (Hardy, J., concurring in part and in the judgment, joined by Sparks, J.). In the present case, the Government (like the Air Force Court) blurs the line between legitimate non-propensity uses and impermissible character evidence. This error is especially acute in a members trial, where lay factfinders are more likely to be swayed by prior bad acts and less able to compartmentalize evidence, increasing the risk of unfair prejudice.

1. The Government's claim that the prior acts provide "connective tissue" or necessary "background information" fails because these acts are fundamentally different from the charged conduct and do not establish a unified scheme.

The Government's argument leans heavily on the idea that prior acts in domestic relationships are "background information" that clarify motive and illustrate the history between the parties, suggesting these acts form a "connective tissue" leading to the charged offense. Government Br. at 28-30. First, background on a relationship is not a properly admissible "act" under M.R.E. 404(b). And second, this proposition gloss ignores the dissimilarities between the prior acts and the charged conduct.

The prior acts—demanding social media passwords, going through RH's phone while she slept, and blocking male contacts—were digital, informational invasions occurring during an ongoing relationship. These acts were about monitoring RH's communications and social interactions. In contrast, the charged offense was a physical, surreptitious invasion: placing a hidden camera to view RH's nude body after the breakup.

The actions were distinct. Looking at a cell phone meant checking messages and monitoring who RH talked to. Watching a video feed meant secretly observing RH's private physical behavior in her bedroom. The privacy concerns were also different. The cell phone access affected what information RH shared and who she communicated with. The video feed intruded on her bodily autonomy and risked

exposing her in a private moment. These differences show that the prior acts and the charged conduct are not truly alike—they involved different methods, different goals, and invaded different types of privacy.

Contrary to the Government's claims, these acts were not "steps to a single end." Government Br. at 30. Getting RH's media passwords did not make it possible for SrA Menard to set up a hidden camera to watch her. The earlier acts—such as checking her phone or blocking contacts—were about monitoring communication, not secretly viewing RH's private area. There is no logical link between demanding passwords and secretly viewing RH's private area. The Government's theory stretches the connection between the noticed evidence and the charged acts too far.

The actions in question are not "almost identical" in kind or degree, as *Morrison* requires, and they do not show a recurring pattern across multiple victims that would justify *Hyppolite*'s more flexible approach. Here, the prior acts—like checking RH's phone and blocking contacts—were about monitoring communication within one relationship. The charged conduct was a separate act: secretly watching RH masturbate after the breakup. These are different types of invasions, with different methods and privacy concerns. There is no broad, repeated scheme or pattern involving multiple people, as in *Hyppolite*. Instead, the Government is trying to link a handful of acts from a single, troubled relationship to

a separate and distinct offense. That connection is superficial and does not meet the high bar set by *Morrison* or *Hyppolite* for admitting other acts evidence.

RH and SrA Menard's breakup was an intervening event that makes the prior acts even more dissimilar from the charged conduct. The Government downplays its significance, but the record shows the nature of the parties' interactions changed dramatically at this point. J.A. at 220. The charged conduct was not a continuation of prior behavior, but a new, distinct act in a changed relational context. The Government's narrative of continuity is contradicted by the facts: the relationship ended, the parties lived as housemates, and the alleged offense occurred in a context of post-breakup suspicion, not ongoing romantic control. *Id*.

Accepting the Air Force Court and the Government's argument accepts the admission of improper propensity evidence. Painting SrA Menard as controlling implies that he must have committed the charged offense because of his character, J.A. at 19; Government Br. at 33, not because of any logical or factual connection between the acts. This is precisely what Mil. R. Evid. 404(b) prohibits. The "connective tissue" here is not a genuine scheme, but a loose association of behaviors that are not sufficiently similar to the charged conduct to justify admission under either *Morrison* or *Hyppolite*. The Government's reliance on broad notions of "monitoring" dilutes the protections against unfair prejudice and turns the exception into the rule. Most glaringly, the Government concedes these "acts" are background

on RH and SrA Menard's relationship. Government Br. at 29. Relationship background is not a specific other act with a logical nexus to a fact of consequence.

In sum, the Government's argument fails to grapple with the real dissimilarities: digital vs. physical invasion, informational vs. bodily privacy, pre-breakup vs. post-breakup conduct, and the absence of a recurring, unified scheme. The prior acts do not "complete the story" of the charged offense—they are a different story altogether. Admitting them risks conviction based on character, not proof, and undermines the fairness of the proceedings.

2. The Government and the Air Force Court misapplied *Hyppolite*'s "common factors" test.

Hyppolite's "common factors" standard is not the right fit here. That standard makes sense when there are multiple, varied acts working together as part of a single, unified conspiracy—where each act, even if different, helps achieve a clear criminal goal. In those cases, the acts are connected and build toward something bigger. But in this case, the Government points only to separate incidents of alleged controlling behavior within a relationship. Government Br. at 26-31. There is no larger plan or ongoing scheme. The prior acts are just individual events between RH and SrA Menard, not steps in a broader conspiracy.

Hyppolite works in circumstances where various behaviors, even if distinct (for example, credit card fraud, wire fraud, and mail fraud), are all functionally interwoven in service of the larger scheme, such as operating a pyramid scheme. In

a pyramid scheme, the conspirators might use credit card fraud to process illicit payments, wire fraud to transfer funds, and mail fraud to solicit new victims. Each offense, while different in statutory elements and execution, is logically and factually connected as a building block of the overall criminal enterprise. The "common factors" test is effective here because the recurring pattern and unified purpose are clear: every act is a manifestation of the same criminal plan, and the similarities in relationship, context, and motivation are not superficial—they are integral to the conspiracy's structure.

However, the present case is fundamentally different. The Government's theory does not involve a broad, ongoing scheme with multiple, interdependent acts working toward a single criminal objective. Instead, it involves separate instances of digital monitoring behavior during a romantic relationship, followed by the charged act of SrA Menard secretly viewing RH's private area after the breakup. There is no evidence of a unified, recurring plan. The prior acts are not steps in a larger conspiracy, but rather discrete events separated by a significant intervening event (the breakup) that severs any plausible continuity. The motivations, context, and nature of the conduct changed dramatically, and the acts are not "almost identical" in kind or degree. Even if the Air Force Court was correct to apply *Hyppolite*'s flexible "common factors" test, its analysis was flawed in this context. The court affirmed the admission of the evidence based on surface-level similarities, not on

any real, unified plan. This approach risks allowing the conviction to stand on a general perception of SrA Menard's character or propensity, rather than proof of a specific, connected scheme. The Air Force Court's reasoning lowered the bar for admitting other acts evidence and weakened the safeguards against improper propensity evidence.

To prevent the exception from swallowing Mil. R. Evid. 404(b), this Court should reserve *Hyppolite*'s approach for cases where the Government can demonstrate a genuine, recurring scheme—like a pyramid scheme with multiple, coordinated crimes. Where the evidence consists of isolated acts with no unified purpose, *Morrison*'s "almost identical" standard should control, ensuring that only prior acts nearly indistinguishable from the charged conduct are admitted. This disciplined approach preserves the integrity of Mil. R. Evid. 404(b), protecting the accused from unfair prejudice and maintaining the fairness of the proceedings.

D. The other acts evidence was not properly probative and was unduly prejudicial.

The risk of unfair prejudice was substantial and not adequately considered by the Air Force Court. In a members trial, lay factfinders are especially vulnerable to improper propensity reasoning, particularly when presented with evidence of prior acts that are not "almost identical" to the charged conduct, as required by *Morrison*. The Government's case a trial relied on these prior acts to prove SrA Menard had a character for jealousy and controlling his romantic partner. J.A. at 315-16, 321, 324,

327, 338-39. This created a propensity argument because it shifted the panel's focus from evaluating the charged allegations to a general perception of SrA Menard's character as someone who "would" secretly view his ex-girlfriend private area rather turn his head away. *See* J.A 19; *see also* Government Br. at 33. There is significant danger that the panel convicted SrA Menard for seeming like the kind of person who "would" do something like the charged act, rather than for actually doing the charged act. This is precisely the danger Mil. R. Evid. 404 is designed to prevent.

The Government's reliance on limiting instructions and the presumption that panel members can compartmentalize evidence, Government Br. at 23-26, is misplaced. While instructions are important, they are not a cure-all: especially in a members trial where lay factfinders are more likely to be influenced by improperly character evidence, where the prior acts are materially different from the charged conduct, and where the verdict does not require unanimity.

E. *Hyppolite* does not lower the quantum of proof required for admission of Mil. R. Evid. 404(b) evidence.

Neither *Hyppolite* nor *Morrison* permits the admission of other acts evidence based on vague commonalities. Both require a careful, context-specific analysis that guards against unfair prejudice and improper character inferences.

Hyppolite should not be read to allow the Government to admit Mil. R. Evid. 404(b) evidence at a lower quantum of similarity than *Morrison* requires. If this Court rejects the notion that two distinct standards can exist, it should clarify that

both *Hyppolite* and *Morrison* require a high degree of commonality—whether through nearly identical acts or a robust pattern of substantial similarities. The standards taken together reflect different ways of ensuring that only genuinely connected acts are admitted, and both demand rigorous scrutiny to prevent the erosion of Mil. R. Evid. 404(b)'s protections. The Government should not be allowed to rely on superficial or attenuated similarities to admit prior acts, regardless of which standard is applied. Instead, this Court should hold that admissibility under either framework requires a meaningful, fact-driven showing of commonality, sufficient to justify the risk of unfair prejudice inherent in other acts evidence.

WHEREFORE, 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 October 7, 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 4,500 words because it contains approximately 2,961 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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