IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*, v. Senior Airman (E-4) **JERIN P. MENARD** United States Air Force *Appellee*.	)))))))))	BRIEF ON BEHALF OF THE UNITED STATES Crim. App. Dkt. No. 40496 USCA Dkt. No. 25-0173/AF 23 September 2025

BRIEF ON BEHALF OF THE UNITED STATES

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v.	)	
	)	Crim. App. No. 40496
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	)	23 September 2025

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

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.

RELEVANT AUTHORITIES

In relevant part, Military Rule of Evidence 404(b) provides that:

> (b) *Other Crimes, Wrongs, or Acts*.
>
> > (1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

> (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On 23 March 2023, a general court-martial composed of a panel of officers convicted Appellant, contrary to his plea, of one specification of indecent viewing in violation of Article 120c, UCMJ. [1] (JA 345.) The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for six months, and a bad-conduct discharge. (JA 032.) After considering the post-trial submissions, the convening authority took no action on Appellant's case. (Id.) On 28 March 2025, AFCCA affirmed the findings and sentence. (JA 001.)

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[1] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial, and the Military Rules of Evidence are to the Manual for Courts-Martial, United States (2019 ed.).

STATEMENT OF THE FACTS

"I'll see what you're doing."

In early 2020, Appellant and RH began a relationship after matching on a dating application. (JA 198.) Shortly after they began dating, Appellant obtained RH's phone password and began surreptitiously accessing her device by taking it into a locked bathroom or going through it while she was asleep. (JA 209.)

Several months later, Appellant also asked RH for the passwords to her social media accounts so that he could see who she was talking to and with whom she was connected: "I'll see what you're doing." (JA 205, 363 at Video File 1, 12:09-12:10.) Appellant threatened to break up with RH if she did not comply. (JA 203.) RH, who wanted to maintain the relationship, obliged. (Id.) Subsequently, Appellant used RH's passwords to access her phone and monitor her social media accounts. (JA 207, 212.) Using what he learned from surveilling RH's accounts, Appellant questioned RH about old friends, current friends, and past relationships. (JA 206.) Appellant also used his access to block various male friends from RH's social media, without RH's knowledge. (JA 207, 212.)

After a little over a year of this behavior, the relationship between Appellant and RH was "not well," and in July 2021, it came to an end. (JA 213.)

"Snapping guys again I see."

After breaking up, RH and Appellant continued to live together while RH looked for another place to live. (JA 220.) One evening after their break-up, RH was lying in bed exchanging pictures with her father via text and took a picture using the flash. (JA 226-28.) RH then received a message from Appellant: "Snapping guys again I see." (JA 226-28; JA 040.)

RH, who was alone in her bedroom, was confused as to how Appellant knew she was on her phone, given that he was not in a place where he could see through her window. (JA 226-27.) RH told Appellant she was "literally texting [her] dad," to which Appellant replied: "Yea didn't know you take pictures to text your dad." (JA 040.) RH emphasized that she was "not doing anything," and Appellant responded, "Sure." (JA 040.)

"Did you make any videos today?"

A week later, RH was home alone while Appellant attended an event in Pennsylvania. (JA 228.) After getting out of the shower, RH removed her towel, laid on her bed, and masturbated in the nude. (JA 229-230.) Seconds after RH stopped masturbating, Appellant texted RH: "Did you make any videos today?" (JA 230; JA 044.) Confused, RH asked Appellant "what?" (JA 044.) Appellant pressed RH further: "Any videos? Bring the toy out?" (JA 044.) RH then asked

Appellant why he was asking her such questions, and he responded: "Just figure that's what you'd be up to with me gone." (JA 044.)

RH then stopped responding to Appellant and began trying on several outfits, including one consisting of a blue top and blue pants, and took several photos to send to her friend. (JA 231-32.) During this time, Appellant texted her again: "You want to take pictures of your butt in your blue outfit. Yea okay." (JA 232; JA 041 at 6.)

By this point, RH was "confused" and "scared." (JA 233.) Appellant had never seen the blue outfit before, and she had never sent him any pictures of the outfit. (JA 323; JA 363 at Video File 2, 01:33-01:34.) Appellant was also "four hours away" in Pennsylvania and should have had "no way" of knowing what RH was doing. (JA 228, 233.) RH then inspected her bedroom and discovered that a cupcake-shaped plush toy on her TV stand had a camera hidden inside of it. (JA 236-37.) Unbeknownst to RH, Appellant had set it up in RH's room so he could see what she was doing. (JA 363 at Video File 2, 00:11-00:30.) As soon as RH unplugged the camera, Appellant texted her: "Oh look you caught on. Bravo." (JA 236-37; JA 041 at 7.)

"I wanted to see if she was still doing this behind my back."

During the ensuing investigation, the Office of Special Investigations (OSI) brought Appellant in for an interview. (JA 363.) After being advised that he was

being investigated for indecent viewing in violation of Article 120c, Appellant waived his Article 31 rights and admitted that he hid the camera inside a "stuffed cupcake" on the TV stand in RH's room "without her knowledge." (JA 363 at Video File 2, 5:28-5:30; Video File 3, 06:58-07:31.) Appellant stated that he did so after looking through RH's Snapchat account and discovering that RH had sent a video of herself masturbating to another male. (JA 363 at Video File 1, 2.)

> So obviously after the situation with me finding the video of her, you know, where she was exchanging naked videos to another guy. Uh, yeah, I decided to hook up a doggy cam in her room. And I wanted to see if she was still doing this behind my back...

(JA 363 at Video File 2, 00:11-00:30.)

Appellant explained that the camera was connected to an application on his phone, which he would use to check the live camera feed. (JA 363 at Video File 4, 00:58-01:37.) He first checked the camera while walking the dog, at which point he saw RH's phone camera flash. (JA 363 at Video File 3, 1:26-1:36.)

According to Appellant, the second time he checked the camera, he saw RH trying on "some blue outfit" and taking pictures. (JA 363 at Video File 2, 01:45.) Appellant, who did not receive any of those pictures from RH, assumed they were "obviously unsolicited pictures to someone else." (JA 363 at Video File 2, 01:29-01:34.) Appellant stated that he became upset and "called [RH] out." (Id. at 03:01-03:15.) According to Appellant, he "wasn't even trying to hide it" and did

so to send a message: "I see what you're doing." (Id.) Appellant conceded that his comments would have alerted RH to the presence of a camera: "Obviously everything that I said, she would have known that there was a camera in the room." (JA 363 at Video File 2, 03:44-03:48.)

Appellant denied seeing RH masturbating earlier the same day or ever seeing her naked and claimed he "would have just called her out" if he had. (JA 363.) Appellant claimed that he only asked RH if she "brought out the toy today" because she was not responding to his earlier messages and alluded to the video that RH had sent to the other male, which depicted her masturbating:

> Appellant: So I had sent her two texts, like, did you like bring out the toy today? Like, you're like-- what are you doing? Because she wasn't responding. And she was like, the fuck you talking about? Like, no, blah, blah, blah, all this. And I was like, well, last time I was gone, that's what you were doing. So I'm just asking.
>
> OSI: What do--what do you mean by that?
>
> Appellant: Because the weekend-- the weekend prior was in PA. And she was telling me that she loved me and she wanted this to work, blah, blah, blah. And she was doing all these things in person. But like the same exact night, literally around the same timeframe, she was on Snapchat sending naked videos of herself to another guy, so that's why.
>
> OSI: Did that involve a toy of some sort? You mentioned a toy.
>
> Appellant: Well yeah. She was, you know, masturbating in the video. And she was sending it to another guy. So

> yeah, that's why I asked her like, yo, is this what you're doing while I'm gone? Because you're not fucking texting back. Yeah. That's-- that was the reason for those two questions.

(JA 363 at Video File 3, 5:15-6:16.)

Of his conduct generally, Appellant said: "Obviously what I did was wrong." (JA 363 at Video File 2, 5:08-5:09.)

"A plan or scheme to monitor RH."

Prior to trial on the merits, the prosecution notified the defense that it intended to introduce six items of evidence regarding Appellant's controlling behavior pursuant to Mil. R. Evid. 404(b) as proof of intent, knowledge, and a "common scheme to control RH." (JA 102-104.) The defense moved to exclude all the evidence. (JA 060-094.) The military judge suppressed three of the proffered items, and ruled that the following items were admissible: (1) evidence that Appellant demanded that RH give him the passwords to her social media accounts; (2) evidence that Appellant sometimes took RH's phone into a locked bathroom or went through it while she was asleep; and (3) evidence that Appellant accessed RH's social media applications and blocked male friends and ex-boyfriends. (JA 131.) The military judge opined that there were "multiple, non-propensity reasons why the evidence that [Appellant] engaged in a pattern of behavior designed to monitor RH within the context of their relationship is relevant to the finder of fact." (Id.) The judge further found that the evidence "support[ed]

a finding …that [Appellant] had an intent and motive to dominate and control RH," and that it was probative of his desire, motive, and plan or scheme to monitor RH without her consent. (Id.)

In finding that the probative value of this evidence was not outweighed by the danger of unfair prejudice "or any other factor that might be considered under that [Mil. R. Evid. 403]," the military judge noted:

> To force the Government to present evidence of the charged offenses involving RH in a vacuum would likely mislead the finder of fact in this case. Panel members individually will enter this case with their own understanding of what a serious dating relationship typically looks like. To deprive the members of evidence that might inform them as to what [Appellant's] relationship with RH was like in this case would deprive the members of critical context that might serve to explain the motivations and intent of [Appellant] and RH. The Court views this evidence, subject to appropriate limitations as described below, as having significant probative value for the members as they attempt to evaluate the credibility of various witnesses.

(JA 130.)

After findings, the military judge instructed the members that they could only consider evidence of Appellant's other acts "that establishes a scheme to monitor [RH] for the limited purpose of its tendency, if any, to prove a common scheme of the accused to commit the alleged misconduct." (JA 134.) The judge then warned them against impermissible uses: "You may not consider this evidence for any other purpose and you may not conclude from this evidence that

the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." (Id.)

"An invasion of privacy without the knowledge or consent of the victim."

On appeal, Appellant alleged that the military judge abused his discretion by admitting the Mil. R. Evid. 404(b) as evidence of a plan or scheme to monitor RH. (JA 010.) In rejecting Appellant's assertion that the "almost identical" standard from United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999), was the proper test for common plan or scheme evidence, AFCCA stated: "We construe our superior court's much more recent guidance on the subject in Hyppolite as the controlling precedent." (JA 017) (citing United States v. Hyppolite, 79 M.J. 161, 166 (C.A.A.F. 2019)).

The court then noted commonalities between the other acts and charged misconduct: "(1) the parties were the same; (2) the timeframe was proximate with and no major intervening events which changed any motivations to implement the scheme to monitor RH; and (3) the similarity of the invasions of privacy in the charged and uncharged misconduct were substantially similar." (JA 018.)

AFCCA went on to distinguish between what it called "surreptitious surveillance" (going through RH's phone without her knowledge) and "permissive surveillance" (obtaining RH's passwords and logging onto social media accounts).

The lower court found that the "surreptitious surveillance" evidence was properly admitted:

> [A]t a minimum, the act of taking RH's phone—without her knowledge, while she slept, for the purpose of reviewing and sometimes deleting her messages—shares significant common factors to the surreptitious surveillance at the heart of an Article 120c, UCMJ, indecent viewing offense and thus satisfies the Hyppolite standard. The gravamen of each action is the same: *an invasion of privacy without the knowledge or consent of the victim.*

(JA 018) (emphasis added).

The court opined that the similarity between the "surreptitious surveillance" and the charged misconduct—"a gross invasion of privacy"—was relevant to a fact of consequence, namely, "whether Appellant engaged in an ongoing scheme to monitor RH without her knowledge." (Id.) This scheme, in the court's view, was "at the core of the indecent viewing offense wherein the Government had to prove that Appellant viewed RH without her consent under the circumstances where she enjoyed a reasonable expectation of privacy." (Id.)

With respect to the "permissive surveillance" evidence, AFCCA "assume[d] without deciding that the dissimilarity between permissive and surreptitious surveillance renders those acts insufficiently similar to the charged offense to qualify as common plan or scheme evidence," and conducted a prejudice analysis—and found none. (JA 019-020.)

SUMMARY OF THE ARGUMENT

Evidence of other acts may be admissible as proof of a scheme or plan if they share common "features" or "factors" with the charged misconduct. United States v. Brannan, 18 M.J. 181 (C.M.A. 1984); Hyppolite, 79 M.J. at 166. Although some cases—like Morrison—have occasionally used the phrase "almost identical" to describe the requirements for plan and scheme, a close examination of these cases reveals that they are all applying the same "common factors" developed through this Court's jurisprudence over the last four decades.

While these "common factors" are used to determine whether other acts qualify as evidence of a plan or scheme, they are not the sole prerequisite for admission. Like all other 404(b) evidence, plan or scheme evidence must still pass the test set forth in United States v. Reynolds, 29 M.J. 105, 109 (C.M.A. 1989). This test—which effectively requires the military judge to assess whether the factfinder is more likely to use the evidence to conclude that the accused committed the crime "because he planned to," or "because he is a bad person," and to admit or exclude evidence accordingly—serves as a safeguard against the forbidden propensity inference. And once the evidence is admitted, it is further insulated from misuse by limiting instructions that prohibit the members from using it to conclude that an accused has "general criminal tendencies." These guardrails ensure that the "common factors" test does not result in the admission of

evidence for propensity purposes. And because this test remains controlling precedent, AFCCA did not err by employing the "common factors" analysis to review the military judge's Mil. R. Evid. 404(b) ruling.

Under this "common factors" test, Appellant's other acts, i.e., surreptitiously snooping through RH's phone, were properly admitted as evidence of a plan and scheme to control RH. The other acts and charged misconduct involved the same victim (RH), same situs (Appellant and RH's shared residence), similar circumstances (made possible by Appellant's proximity and access to RH as her cohabitant), similar motivations (jealousy), and a similar nature (intentional, surreptitious invasions of RH's privacy). And evidence of Appellant's plan to monitor RH made a disputed fact of consequence more likely than it would be without the evidence—specifically, whether Appellant would have knowingly and wrongfully viewed RH's private area without her consent. Accordingly, this evidence had significant probative value. By comparison, the danger of unfair prejudice was low because as noted by the military judge, the other acts evidence was "much less severe" than the charged misconduct. Moreover, the military judge gave an appropriate limiting instruction, (JA 134), which the members are presumed to have followed absent evidence to the contrary. United States v. Quezada, 82 M.J. 54, 59 (C.A.A.F. 2021). Thus, the military judge did not abuse his discretion in admitting this evidence, nor did AFCCA err in affirming him.

ARGUMENT

THE AIR FORCE COURT PROPERLY APPLIED THE "COMMON FACTORS" TEST TO FIND THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING APPELLANT'S OTHER ACTS AS EVIDENCE OF A PLAN OR SCHEME TO MONITOR RH.

Standard of Review

While this Court generally reviews evidentiary rulings regarding Mil. R. Evid. 404(b) for an abuse of discretion, United States v. Wilson, 84 M.J. 383, 390 (C.A.A.F. 2024), "where the issue appealed involves pure questions of law, [it] utilize[s] a de novo review." United States v. Watson, 71 M.J. 54, 56 (C.A.A.F. 2012). If this Court finds an evidentiary ruling erroneous, it reviews its prejudicial effect de novo. United States v. Kohlbek, 78 M.J. 326, 334 (C.A.A.F. 2019).

Law

Mil. R. Evid. 404(b) is a "rule of inclusion," United States v. Young, 55 M.J. 193, 196 (C.A.A.F. 2001), that permits the admission of evidence of other crimes, wrongs, or acts as long as: (1) the evidence "reasonably support[s] a finding by the court members that the appellant committed the prior crimes, wrongs, or acts"; (2) any "fact of consequence"—other than the accused's propensity for wrongdoing—is made more or less probable by the existence of the evidence; and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. Reynolds, 29 M.J. at 109; United States v. Castillo, 29 M.J. 145, 150 (C.M.A.

1989) ("It is unnecessary…that relevant evidence fit snugly into a pigeon hole provided by [the rule].")

One permissible use of other acts evidence is as proof of a plan or scheme, Mil. R. Evid. 404(b), "to show that the charged acts were done as parts of this plan." United States v. Mann, 26 M.J. 1, 4 (C.M.A. 1988), for "[i]t is well established that it is appropriate to show the course of conduct leading to the events which form the basis of the crime charged." United States v. Adcock, 558 F.2d 397, 401 (8th Cir. 1977). Other acts need not be identical to the conduct charged, nor be of exactly the same nature, to constitute evidence of a plan. United States v. Haimson, 17 C.M.R. 208, 229 (C.M.A. 1954) (court was "not disturbed" by the fact that other acts admitted as evidence of a plan were "offenses of a nature slightly different" than charged bribery offenses); *see also* United States v. Shaw, 562 F. App'x 593, 598 (10th Cir. 2014) (to be admissible as evidence of a plan, "the other act need not be 'identical' to the crime charged; it must only be 'similar'"); United States v. Levy, 865 F.2d 551 (3d Cir. 1989) (use of false passports properly admitted as evidence of common plan in a heroin distribution case because it showed that conspirators were taking measures to "protect themselves from future investigation and pursuit"); United States v. Caruso, 63 F.4th 1197, 1203 (8th Cir. 2023) (defendant's sexually suggestive Pinterest activity properly admitted as evidence of "intermediate step[s]" in plan to trade in child

pornography because his profile was the "vehicle driving his child-pornography offenses").

Rather, other acts must be "*related* in character, time, and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged." Haimson, 17 C.M.R. at 227. To determine whether acts are so related, courts look to the existence of "common factors" between the other acts and the charged misconduct. Hyppolite, 79 M.J. at 166*; see also* United States v. Damato, 672 F.3d 832, 845 (10th Cir. 2012) (other acts may qualify as scheme or plan if "substantially connected to [the offense of conviction] by at least one common factor"); United States v. Elizondo, 920 F.2d 1308, 1320 (7th Cir. 1990) ("There is no requirement that acts used to show the existence of a common scheme or plan be identical, just that the charged and uncharged prior events 'have sufficient points in common.'").

This "common factors" test is not new—it has been a mainstay of this Court's jurisprudence on plan and scheme evidence for decades. In Brannan, this Court grappled with the question of whether evidence of appellant's previous contacts with marijuana—offering, possessing, transferring, and smoking—was admissible as evidence of "a common scheme, plan or design [by appellant] for the continual sale of marihuana to troops." 18 M.J. at 184. In stating that that the uncharged acts at issue had to be "almost identical to the charged acts and each

other," to be admissible as evidence of the alleged plan, the Court explained that it meant the acts had to "possess a concurrence of *common features*." Id. at 183 (emphasis added). The Court then went on to opine that the uncharged acts at issue lacked "a sufficient combination of common features," to be probative of a plan to sell (or even transfer) marijuana, citing their dissimilar nature as well as the fact that "the evidence was largely unspecific as to the military status of the transferees and the military situs of these offenses." Id. at 184.

As this Court's jurisprudence on plan and scheme evidence took shape, it uniformly focused on the commonalities (or lack thereof) between the charged and uncharged acts. *See* Mann, 26 M.J. at 4; Reynolds, 29 M.J. at 110; United States v. Munoz, 32 M.J. 359, 363 (C.M.A. 1991); United States v. Miller, 46 M.J. 63, 66 (C.A.A.F. 1997); United States v. Johnson, 49 M.J. 467, 475 (C.A.A.F. 1998). For example, in finding that an appellant's uncharged acts (attempting to insert his adopted son's penis into his daughter's vagina) were sufficiently similar to the charged acts (sodomy and penetration of his daughter's vagina with various objects other than his penis) to be probative of a plan to sexually abuse his children, the Court cited the "bizarre similarity of the indecent acts, the common situs of their commission in the home, and the usual time of occurrence during the mother's absence." Mann, 26 M.J. at 5. Similarly, in finding that uncharged sexual misconduct (where the appellant offered his date a ride home, only to pull over and

rape her on the side of the road) was sufficiently similar to the charged rape (where the appellant invited his date to his room and showed her a slideshow with music before forcing himself on her) to be admissible as evidence of a scheme, the Court cited the similar nature of the acts and the circumstances of their commission: "The logical inference to be drawn from his similar acts was that he had worked out a system to put his victim into an unsuspecting and vulnerable position whereby he could engage in sexual intercourse with or without consent. Reynolds, 29 M.J. at 110. Eventually, several go-to "common factors" emerged for testing the admissibility of plan and scheme evidence: the age of the victims, their relationship to the accused, the nature of the misconduct, the situs of the offenses, and the circumstances surrounding their commission. Munoz, 32 M.J. at 363; Johnson, 49 M.J. at 474-75.

This "common factors" test has endured ever since. Even in Morrison—which cited Brannan for the proposition that "uncharged acts 'must be almost identical to the charged acts' to be admissible as evidence of a plan or scheme"—this Court ended up applying the common factors identified in its earlier precedent, Munoz. *Compare* Morrison, 52 M.J. at 122 (comparing relationship between victims and appellant; ages of victims; nature of the acts; situs of the acts; circumstances of the acts; and time span), *with* Munoz, 32 M.J. at 363 (listing common factors as "the age of the victim, the situs of the offenses, the

circumstances surrounding their commission, and the fondling nature of the misconduct"). That Morrison embraced (and is understood as embracing) the "common factors" test is evident from subsequent decisions citing it for the proposition that determining the admissibility of plan and scheme evidence requires a "six-part analysis," United States v. Barnett, 63 M.J. 388, 395 (C.A.A.F. 2006), namely, a comparison of "the relationship between victims and the appellant; ages of the victims; nature of the acts; situs of the acts; circumstances of the acts; and time span." United States v. McDonald, 59 M.J. 426, 430 (C.A.A.F. 2004).

This Court again reaffirmed the use of "common factors" in Hyppolite, when it found that the military judge properly permitted certain charged misconduct (abusive sexual contact on sleeping airmen) to be used as evidence of plan or scheme with respect to other charged misconduct (abusive sexual contact and sexual assault causing bodily harm)—notwithstanding certain factual variances—based on the similarities between "the relationship of the alleged victims to the accused (friends), the circumstances surrounding the alleged commission of the offenses (after a night of drinking when the alleged victim was asleep or falling asleep), and the nature of the misconduct (touching the alleged victims' genitalia)." 79 M.J. at 166 (citing Munoz, 32 M.J. at 359, and Johnson, 49 M.J. at 467).

In summary, this Court's plan and scheme jurisprudence has always required an analysis of common "features" or "factors" between other acts and charged misconduct, and continues to do so to this day. *See also* United States v. Greene-Watson, 85 M.J. 340, 347 (C.A.A.F. 2025) (Johnson, J., joined by Maggs, J.) (explicitly rejecting argument that uncharged conduct must be "virtually identical" to the charged conduct to be admissible as evidence of a common plan or scheme); id. at 349 (Sparks, J., concurring in part) (noting that "conduct need not be identical" to be admissible as evidence of plan or scheme); id. at 351 (Hardy, J., concurring in part) (observing that the Court has more recently applied a much less demanding standard than the "almost identical" standard from Brannan). Under this framework, as set forth below, Appellant's complaints fall flat.

Analysis

Here, in claiming error, Appellant makes a number of intermingled arguments that ultimately require this Court to address three questions: first, whether Hyppolite and Morrison present different tests for plan and scheme evidence with differing protections against misuse of the evidence (they do not); second, whether Appellant's other acts were properly admitted as evidence of a plan or scheme under the controlling test (they were); and third, if the evidence was erroneously admitted, whether Appellant suffered prejudice (he did not). The United States addresses each of these in turn.

A. Both Hyppolite and Morrison apply the "common factors" test, which has always been counterbalanced by the Mil. R. Evid. 403 balancing test to guard against the potential misuse of other acts evidence.

At the front and center of Appellant's complaints is his mistaken belief that Hyppolite and Morrison create two different legal tests for a single theory of admissibility (plan or scheme). Based on this erroneous premise, Appellant suggests that courts must "first assess whether the evidence demonstrates a broad, recurring scheme" before they can apply the "common factors" test. (*See* App. Br. at 12-16.) And "if no such scheme exists, Morrison's 'almost identical' standard must be applied." (App. Br. at 16.) In Appellant's view, "[t]he Morrison 'almost identical' standard is the only appropriate safeguard for admissibility of prior acts in this case." (App. Br. at 17.) But as set forth below, these propositions fail because they have no basis in either logic or law.

1. Hyppolite and Morrison cannot be applied as alternative standards because they both espouse the "common factors" test.

To start, Appellant's suggestion that the "common factors" test could not be applied until and unless a court found a "genuine, recurring scheme" is logically flawed because it puts the cart before the horse. If a court had to find a scheme (or lack thereof) as the first step of its analysis, but could not consider the information that would be indicative of a scheme until afterward, it would simply be guessing. Like asking a physician to render a diagnosis first and hear the symptoms second, this would be an illogical sequence of events.

More importantly, Appellant's assertion that "Hyppolite and Morrison should be applied as alternative standards" is legally unsound given that both cases apply the same test. In asserting that they are distinct standards, Appellant contends that "[t]he Hyppolite [common factors] test was developed based on a situation involving multiple victims and a clear pattern of conduct, supported by consistent data points across multiple incidents." (App. Br. at 14.) Thus, he says, it "should be reserved for cases with genuine, expansive schemes." (App. Br. at 15.) His argument, in effect, boils down to this: because there were enough "common factors" in Hyppolite to find a scheme, the "common factors" analysis should only be applied to cases like Hyppolite. This reasoning is not only circular, but also indicative of Appellant's misunderstanding of the law.

Contrary to Appellant's suggestion that the "common factors" analysis was recently developed by Hyppolite, it has been this Court's test for plan and scheme since the beginning. *See* Brannan, 18 M.J at 183 (plan or scheme evidence requires "concurrence of common features"). Indeed, Morrison embraced the "common factors" analysis long before Hyppolite came around. *Compare* Morrison, 52 M.J. at 122 (considering relationship between victims and appellant; ages of victims; nature of the acts; situs of the acts; circumstances of the acts; and time span), *with* Hyppolite, 79 M.J. at 166 (considering the relationship of the alleged victims to the accused, circumstances surrounding the alleged commission

of the offenses, and nature of the misconduct). In other words, there is no discrete "almost identical" test—in our jurisdiction, it is simply the "common factors/features" test by another name. *See* Morrison, 52 M.J. at 122 (citing Brannan as holding that plan or scheme evidence must be "almost identical," but then applying common factors identified in Munoz and Johnson); *see also* Shaw, 562 F. App'x at 598 (to be admissible as evidence of a plan, "the other act need not be 'identical' to the crime charged; it must only be 'similar'"). Considering this, there is no merit to Appellant's attempts to distinguish the "almost identical" standard as the "only appropriate safeguard" against the use of other acts as evidence of propensity instead of plan. (App. Br. at 17-19.)

2. *Regardless of how courts determine whether other acts are evidence of a plan, the Reynolds test and limiting instructions protect against their improper use as propensity evidence.*

In attacking AFCCA's analysis, Appellant avers that the lower court's use of "common factors" resulted in it "treat[ing] disparate acts as evidence of a plan or scheme," which he believes "invites factfinders to convict based on a general perception of the accused's character." (App. Br. at 18.) At the same time, Appellant contends that requiring other acts to be "almost identical" to qualify as evidence of a plan would "prevent convictions based on character or propensity." (App. Br. at 17.) This Court should be unpersuaded, not least of all because the potential for other acts to be misused as propensity evidence is arguably greater

when they are more similar than not, given that propensity evidence "mean[s] 'using another bad act to show that an individual is likely to do the *same thing* again in the future.'" United States v. Vaca, 38 F.4th 718, 721 (8th Cir. 2022) (emphasis added). Moreover, similarity and dissimilarity aside, Appellant's position fails to account for the fact that even if other acts qualify as evidence of a plan or scheme, they must still be "sufficiently probative to make *tolerable* the risk" of introducing evidence that might reflect poorly on the accused's character. United States v. Beasley, 809 F.2d 1273, 1279 (7th Cir. 1987) (recognizing that most 404(b) evidence is probative of both character and other proper purposes).

Enter the Reynolds test—specifically, the second and third prongs, which prevent a military judge from admitting plan or scheme evidence unless they find that it is (a) probative of a fact of consequence, *and* (b) the probative value is not substantially outweighed by the danger of unfair prejudice. 29 M.J. at 109. The analysis mandated by these prongs effectively requires the military judge to assess whether the factfinder is more likely to use the evidence to conclude that the accused committed the crime "because he planned to," or "because he is a bad person." And if the judge concludes that the factfinder is more likely to use other acts as evidence of propensity instead of as evidence of a plan—i.e., "confus[e] the issues," Mil. R. Evid. 403—then the evidence will be excluded. In this way, the military judge serves as the safeguard against the forbidden propensity inference.

On the other hand, if the judge reaches the opposite conclusion and determines that the probative value is *not* substantially outweighed by the danger of unfair prejudice, the 404(b) evidence will be admissible "even though it has 'the potential impermissible side effect of allowing the jury to infer criminal propensity.'" United States v. Moran, 503 F.3d 1135, 1145 (10th Cir. 2007); United States v. Gomez, 763 F.3d 845, 860 (7th Cir. 2014) ("Other-act evidence need not be excluded whenever a propensity inference can be drawn."). Because ultimately, Mil. R. Evid. 404(b) is a "rule of inclusion," Young, 55 M.J. at 196, and the court-martial has a "truth-seeking function." United States v. Tipton, 23 M.J. 338, 342 (C.M.A. 1987) ("Protecting the truth-seeking function of a trial should not be outweighed by oversensitivity to 'embarrassing' testimony"). And since "the public…has a right to every man's evidence," United States v. Bryan, 339 U.S. 323, 331 (1950), the exclusion of relevant evidence should be limited to those situations where it serves "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Trammel v. United States, 445 U.S. 40, 50 (1980) (citation omitted). No such purpose is served by excluding evidence "show[ing] the course of conduct leading to the events which form the basis of the crime charged." Adcock, 558 F.2d at 401; United States v. Fleck, 413 F.3d 883, 890 (8th Cir. 2005) ("A jury is entitled to know the circumstances and background of a criminal charge.").

This does not, however, mean there are no further safeguards against the misuse of this evidence. As with any evidence admitted for a limited purpose, a military judge's limiting instruction provides guardrails on the use of 404(b) evidence and "fully respond[s] to…concern with the possible misuse of this evidence by the members." United States v. Acosta, 49 M.J. 14, 19 (C.A.A.F. 1998); *see also* United States v. Smith, 52 M.J. 337, 344 (C.A.A.F. 2000) (dismissing argument that other acts "had" to be used as propensity evidence by members given that the military judge "carefully instructed the members that it could not be used for this purpose").

Considering the above, Appellant's suggestion that the "almost identical" standard is the "only appropriate safeguard for admissibility of prior acts" is not just unpersuasive, but wrong. (*See* App. Br. at 17.) Ultimately, "[w]hen the same evidence has legitimate and forbidden uses, when the introduction is valuable yet dangerous, the [trial] judge has great discretion." Beasley, 809 F.2d at 1278. And here, as discussed below, the military judge properly exercised that discretion.

B. Under the "common factors" test, Appellant's other acts were properly admitted as 404(b) evidence of a plan and scheme to control RH.

In addition to challenging AFCCA's choice of legal standard, Appellant also challenges the admissibility of the evidence itself. Appellant makes two claims in this regard: (1) that the other acts were insufficiently similar to the charged crime to be admissible as evidence of a plan or scheme, and (2) by extension, their

probative value was substantially outweighed by the danger of unfair prejudice. (*See* App. Br. at 19-24.)

Although Appellant attempts to frame these errors as AFCCA's doing, his arguments ultimately amount to an attack of the military judge's ruling. Thus, this Court "pierce[s] through that intermediate level and examine[s] the military judge's ruling, then decide[s] whether the Court of Criminal Appeals was wrong in its examination." United States v. Harborth, Nos. 24-0124, 24-0125, 2025 CAAF LEXIS 436, at *14 (C.A.A.F. June 3, 2025). Here, such an examination will reveal that the military judge did not abuse his discretion either in concluding that the uncharged acts were evidence of a "plan or scheme to monitor RH" or in finding that the probative value of this evidence was not outweighed by the danger of unfair prejudice. (*See* JA 123-132.)

1. The other acts and charged misconduct shared enough commonalities to be evidence of a plan or scheme.

In contending his other acts could not be considered plan or scheme evidence, Appellant advances two main arguments. First, he argues that his snooping and intrusions into RH's phone were "isolated incidents" that are "fundamentally different" from indecent viewing. (App. Br. at 17-18.) Second, he avers that his break-up with RH 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." (App. Br. at 19.) Neither of these proves persuasive.

To start, Appellant's self-serving description of his other acts as "isolated incidents" is directly contradicted by RH's testimony during the motions hearing on this issue, during which she described his intrusions into her phone and social media accounts as "a pretty constant factor" during their time together. (JA 155.) That this "constant" snooping is not "almost identical" to his surreptitious viewing of RH's nude body is immaterial, because as discussed above, that is not the standard. *See* Ali v. United States, 520 A.2d 306, 312 (D.C. 1987) ("Completely dissimilar crimes may form part of a true plan or scheme."). While the acts may be mechanically different, at their core they are "fundamentally" the same—as Appellant himself concedes, both constitute invasions of privacy. (*See* App. Br. at 18.) More importantly, they constitute violations of the *same* person's privacy, which matters, because "the relative probative value of prior crime evidence is 'increased by the fact that both offenses were associated with the same victim.'" United States v. Littlewind, 595 F.3d 876, 881 (8th Cir. 2010).

Indeed, in cases involving domestic relationships like this one, evidence of other acts goes beyond simply demonstrating some enumerated purpose from the rule—it often provides a "'critical part of the story' that clarifies the motive behind the charged crimes," and "illustrate[s] the 'history of [the] relationship'" between a

victim and her abuser. United States v. Berckmann, 971 F.3d 999, 1002 (9th Cir. 2020). That such "background information" is necessary to "complete the story of the crime," United States v. Green, 617 F.3d 233, 250 (3d Cir. 2010), is evident when one considers the incomplete picture painted by Appellant's claim that their break-up "severed any plausible continuity between the prior acts and the charged offense." (App. Br. at 18.) While Appellant and RH were indeed broken up by the time of the charged offense, they were still living together and interacting on a daily basis. (JA 160.) And despite being broken up, Appellant continued to harangue RH about who she might be talking to, as he did when they were still together. (JA 152, 165.) Considering this, Appellant's suggestions that the split "changed the nature of their interactions" such that "the motivations underlying [his] conduct could not reasonably be presumed to be the same," ring hollow. (App. Br. at 20.) If anything, the evidence before the military judge demonstrated that Appellant's motivations *were* still the same.

Against this backdrop, the significance of the commonalities between Appellant's "digital snooping" and indecent viewing is apparent. The first and most obvious commonality is of course RH, who was the victim of both acts as a result of not just her relationship with Appellant, but also her living arrangement. Second is the "situs"—both the digital snooping and the indecent viewing occurred in a residence that RH and Appellant shared. This commonality, in turn, is tied to

another—the physical and emotional circumstances surrounding the commission of the acts. Both the digital snooping and the indecent viewing were made possible by Appellant's proximity and access to RH's private spaces as her cohabitant. And as evidenced by his "constant accusations" during the relationship, (JA 152), and the continued probing after the break-up, (JA 162), both acts were motivated by Appellant's jealousy and concern that RH might have other men in her life. Last, but certainly not least, is the nature of the acts—intentional, surreptitious invasions of RH's privacy.

These commonalities serve as the "connective tissue" between a series of acts that, while not exactly identical, are "a sequence of steps to a single end." United States v. Martin, 749 F.3d 87, 95-96 (1st Cir. 2014) (determining what constitutes a scheme or plan requires "the existence of a so-called 'connective tissue'"). The sequence began with Appellant obtaining access to RH's phone and social media. Then it escalated to his snooping through her phone and accounts to see what she was doing and who she was talking to. Through this snooping, which continued even after the breakup, Appellant found out that "[RH] was on Snapchat sending naked videos of herself to another guy." (JA 363 at Video File 3, 5:15-6:16.) And based on this discovery, he installed the hidden camera because he "*wanted to see* if she was still doing this behind [his] back." (JA 363 at Video File 2, 00:11-00:30) (emphasis added). Taken altogether, the "logical inference to be

drawn" is that Appellant had "worked out a system" to monitor RH based on trust issues, and his remote viewing of her private area while she was naked was the culmination of that "system" (scheme). *See* Reynolds, 29 M.J. at 110.

At this juncture, it is worth noting that this inference is possible *because* the other acts and the charged crime both involved the same victim and arose out of her romantic entanglement with Appellant. Had the other acts involved different victims, one can see how they might be less probative of Appellant's plan to monitor RH and more prone to being misused as evidence of propensity to conclude, "once a snoop, always a snoop." *See, e.g.,* Gomez, 763 F.3d at 862-63 (using defendant's history of drug dealing to prove his identity as a participant in the charged drug deal was only possible via impermissible propensity inference of "once a drug dealer, always a drug dealer"). But as this Court has recognized, "the romantic nature of a relationship has a 'special relevance' to motivation." United States v. Collier, 67 M.J. 347, 352 (C.A.A.F. 2009). Thus, a discrete instance of interpersonal abuse cannot be evaluated without an examination of the rest of the relationship. Considering this, it was reasonable for the military judge to conclude that Appellant's other acts—all motivated by his desire to know what RH was doing—were admissible as evidence of a plan or scheme. By extension, it was not error for AFCCA to uphold his ruling.

2. The evidence's probative value was not substantially outweighed by a danger that the members would misuse it for propensity purposes.

In asserting that the 404(b) evidence "created a substantial risk of unfair prejudice," Appellant alleges that it "failed to make any fact of consequence more or less probable" and instead "risked shifting the panel's focus from the specific allegations to a general perception of [his] character." (App. Br. at 21.)

This Court should be unpersuaded first and foremost because of the evidence's probative value. Evidence of Appellant's plan or scheme to monitor RH made a fact of consequence—whether Appellant would have *knowingly and wrongfully* viewed RH's private area without her consent—more likely than it would be without the evidence. Given that Appellant denied seeing RH masturbate and claimed he simply "figure[d]" that was what she was doing, evidence that he went through her phone, discovered that she was sending naked videos to someone else, and set up a camera to "see" if she would do it again was probative in two ways. First, it made it more likely that Appellant's messages alluding to masturbation were *not* coincidence, because shows that his question—"Did you make any videos *today*?"—was probably related to Appellant's discovery of RH's previous sending of nude videos. Second, it made it more likely that Appellant did, in fact, watch RH when he saw her naked, since he "*wanted to see* if she was [making naked videos] behind his back." (JA 363) (emphasis added). As AFCCA put it:

> [I]t made it much more likely that the man who wanted and needed to know everything about what he suspected were RH's sexually explicit activities and communications, would not turn his head to avoid seeing her engaged in just the type of activity he had installed that camera to transmit.

(JA 019.)

In other words, Appellant's scheme to monitor RH was probative of his mens rea at the time of the charged offense, and relevant to disprove any suggestion that he was, by then, a disinterested ex-boyfriend or an astute prognosticator of RH's activities. *See* Reynolds, 29 M.J. 110 (evidence of appellant's system for putting victims in unsuspecting positions was probative of a predatory mens rea and to disprove his suggestions that he was a "kind, romantic, poetic lover, who would never resort to force to satisfy his lust"). And given that this was one of the only facts truly in question, evidence tending to prove that fact had significant probative value.

By comparison, the danger of unfair prejudice was minimal, as articulated by the military judge: "The acts are much less severe than the charged conduct, would take insignificant time to present at trial through RH, and would not confuse or mislead the members." (JA 131); *cf.* Munoz, 32 M.J. at 364 (a strong possibility of prejudice existed based solely on the fact that the uncharged acts of sodomy were "clearly more egregious" than charged act of fondling).

Appellant, who naturally disagrees, claims that the "the risk of unfair prejudice was heightened" by the mere fact that he was tried by members instead of a judge. (App. Br. at 20-23.) Despite having chosen his forum himself, Appellant now bemoans the fact that he was tried by members, who he contends "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." (App. Br. at 22.) In making this argument, Appellant effectively invites Court to presume that the members misused the 404(b) evidence for propensity purposes, despite being instructed that they could not do so. (*See* JA 134.)

But this Court does the opposite: "We presume, absent contrary indications, that the panel *followed* the military judge's instructions." United States v. Norwood, 81 M.J. 12, 20 (C.A.A.F. 2021) (emphasis added). And it should continue to do so here. There is no evidence "which would show that the use of the [plan and scheme] evidence was not limited by effective instructions by the military judge." United States v. Taylor, 53 M.J. 195, 199-200 (C.A.A.F. 2000). Moreover, as the military judge noted, the other acts evidence was "much less severe" than the charged misconduct. Accordingly, this Court should be unmoved

by any suggestion that there was a "substantial risk that [Appellant] was convicted based on propensity rather than proof of the charged offense." (App. Br. at 24.)

C. Even if the admission of the other acts evidence was error, it was harmless because its nature and quality paled in comparison to the charged crime.

Given that AFCCA properly applied the "common factors" test to ratify the military judge's admission of this plan and scheme evidence, this Court should not reach the issue of prejudice. But even if it does, Appellant's claim fails. "For nonconstitutional evidentiary errors, the test for prejudice 'is whether the error had a substantial influence on the findings.'" Kohlbek, 78 M.J. at 334 (quoting United States v. Fetrow, 76 M.J. 181, 187 (C.A.A.F. 2017)). This Court evaluates prejudice from an erroneous evidentiary ruling by weighing (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. Kerr, 51 M.J. 401, 405 (C.A.A.F. 1999). Here, application of these factors shows that the challenged evidence did not have a substantial influence on the findings.

First, contrary to Appellant's assertions, the prosecution case did *not* "lack objective evidence showing that [he] viewed RH's private area." (App. Br. at 24.) Admittedly, the prosecution did not have Appellant's voice saying, "I viewed her private area." But between RH's testimony, the text messages, and Appellant's own admissions, the prosecution had plenty of circumstantial evidence proving that

he did. The uncontradicted evidence establishes that the first time Appellant texted RH after observing her through the camera, he could see her as she was taking a picture on the bed. (JA 223-28, 363.) That is, the camera had a direct line of sight to the bed. A week later, Appellant—by his own admission—sent RH text messages alluding to masturbation. According to RH, she received the texts mere seconds after she stopped masturbating. This alignment of both time and subject matter is strong circumstantial evidence that Appellant texted RH about masturbation because he had just watched her masturbate while naked—during which he viewed her private area. The prosecution case against Appellant was "strong and conclusive," and therefore weighs against a finding of prejudice. United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).

By comparison, the defense case was "feeble [and] implausible." Id. The trial defense presented no evidence to directly contradict RH or any of her testimony. Instead, the defense mounted a disjointed attack that relied on "suggestion and insinuation." Kerr, 51 M.J. at 405. First, the defense leaned on Appellant's self-serving denial to OSI and asked the factfinder to believe the improbable theory that the timing and content of Appellant's text messages was simply fortuitous. (JA 332-33.) Then the defense suggested that the camera may not have had a line of sight to the bed, even though RH and Appellant's accounts established that it did. (JA 332.) The defense then pivoted again and used the existence of RH's dog to insinuate that

she was lying about masturbating on top of the covers: "She has a black lab that sleeps on the bed so it doesn't make sense that she would actually go on top of the covers and masturbate." (JA 333.) Then the defense switched course again and took issue with the prosecution's failure to present the cupcake toy as physical evidence. (Id.) This was not a strong defense case—it was grasping at straws. Accordingly, this factor weighs in favor of the Government.

The materiality and quality of the challenged evidence also weigh against a finding of prejudice. In examining materiality and quality of erroneously admitted evidence, this Court assesses "how much the erroneously admitted evidence may have affected the court-martial." United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020). This assessment considers the "particular factual circumstances of each case":

> For example, we have previously considered such things as the extent to which the evidence contributed to the government's case; the extent to which instructions to the panel may have mitigated the error; the extent to which the government referred to the evidence in argument; and the extent to which the members could weigh the evidence using their own layperson knowledge.

Id.

Here, the factual circumstances demonstrate that the challenged evidence, while probative, would not have decisively "affected the court-martial." Id. To start, the extent to which the evidence contributed to the prosecution's case was

minimal. None of the uncharged misconduct served as the sole evidence of a key fact—Appellant's access to RH's phone and his willingness to invade her privacy were facts that could be gleaned from Prosecution Exhibit 5, Appellant's recorded interview with OSI. Nor did the evidence serve as the only corroboration for RH's testimony, given that Appellant's admissions to OSI corroborated most of her account. *Cf.* United States v. Giambra, 38 M.J. 240, 242-43 (C.M.A. 1993) (objected-to evidence serving as sole corroboration for victim's account was of material quality because there was no substitute for it and victim's testimony was "heart of the prosecution's case.").

After the evidence's admission, the military judge limited its material effect through his instructions, in which he discussed the limited permissible uses of the evidence and reminded the members that they could not "conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he therefore committed the offenses charged." (JA 310.) Further offsetting the materiality of the challenged evidence is the prosecution's minimal use of it in closing argument. In an argument spanning 14 pages consisting of approximately 296 lines of the record, trial counsel's comments about the other acts comprised only 14 lines—a negligible 4% of his argument—none of which argued the other acts as propensity. (JA 314-327.)

Finally, none of the evidence in this case was complex. Expert testimony was neither required nor presented. In other words, the members would have been fully capable of weighing all the evidence using their layperson knowledge—that is, their common sense and knowledge of the ways of the world. *See* Department of the Army Pamphlet (D.A. Pam.) 27-1, *Military Judge's Benchbook*, para. 8-3-12 (29 February 2020). Members using their common sense would not have convicted Appellant of indecent viewing simply because he had been a controlling boyfriend in the past. Instead, they would have relied on their knowledge of human nature and the ways of the world to conclude that Appellant's theory of the case was "feeble [and] implausible." Weeks, 20 M.J. at 25. Taken altogether, these circumstances support a conclusion that the alleged error did not "substantially influence the findings." Kohlbek, 78 M.J. at 334. Accordingly, even if this Court finds that Appellant's other acts should not have been admitted as evidence of a plan or scheme, Appellant is not entitled to relief.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and Appellate Defense Division on 23 September 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

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Dated: 23 September 2025