IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee	6 May 2019 ANSWER TO APPELLANT'S ASSIGNMENTS OF ERROR ON BEHALF OF THE UNITED STATES
v.	CGCMSP 24978 Docket No. 1464 Before McClelland, Brubaker, Koshulsky
Justin D. Steen, Boatswain's Mate Third Class (E-4) U.S. Coast Guard, Appellant.	Tried at Norfolk, Virginia by a special court-martial convened by Commanding Officer, USCGC FOWARD, on 5-9 June 2018.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

The United States, through undersigned counsel, submits this answer and brief in accordance with Rule 15 of this honorable Court's Rules of Practice and Procedure.

STATEMENT OF THE CASE

The Appellant, Boatswain's Mate Third Class Third Class Justin D. Steen, was tried at a special court-martial on 5-9 June 2018 for one specification of wrongful introduction of a controlled substance onto a military installation in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016), and one specification of wrongful distribution of a controlled substance in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016).[1] Contrary to his pleas, a panel consisting of officer and enlisted members found Appellant guilty of both specifications under Article 112a,

[1] Charge II for failure to obey an order or regulation was withdrawn and dismissed without prejudice on 4 June 2018, prior to trial.

UCMJ. On 9 June 2018, the members sentenced Appellant to reduction in paygrade to E-1, confinement for fifteen days, and a bad conduct discharge. Special Court-martial Order 1-18. On 1 October 2018, the convening authority approved the findings and sentence, and, except for the bad conduct discharge, ordered the sentence executed. Convening Authority Action dtd 1 Oct 18. The Judge Advocate General referred the case to this honorable Court on 29 October 2018. This Court has jurisdiction over this case pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (2016).

STATEMENT OF FACTS

On 4 November 2017, Appellant entered Coast Guard Base Portsmouth, driving his blue Dodge Charger. He had with him four grams of marijuana he intended to sell to Seaman [redacted]. R. at 355.[2] Appellant picked up [redacted] in parking lot 11, adjacent to the moored CGC FORWARD. The two proceeded directly to the Coast Guard Exchange in order for [redacted] withdraw money from the ATM at the Exchange. R. at 359-60, 556. Within two minutes of entering the Coast Guard Exchange, [redacted] returned to Appellant's car with $80 cash. [redacted] gave Appellant $65 in exchange for four grams of marijuana. R. at 359, 415. The two drove directly back [redacted] black Dodge Dakota truck, also located in parking lot 11. R. at 412-413, 556. After pulling up to [redacted] vehicle, [redacted] got out of Appellant's car and placed the marijuana in the center console of his truck. R. at 414. At that point Appellant departed Base Portsmouth. R. at 415. [redacted] movements were corroborated by surveillance video that showed both the parking lot and the Coast Guard Exchange. PE 1-3.

[2] References to the record throughout this brief are to page numbers in the .pdf version of the entire record of trial, which is different from the citation method used by Appellant in his Assignments of Error. Appellant's citations are to Volume numbers in the paper copy of the record, but as the transcriptionist did not number the volumes, for sake of clarity the Government used the .pdf page numbers. To aid in cross-referencing Defense Counsel's volume numbers begin on the following pages of the .pdf file: Vol. 1, R. at 27; Vol. 2, R. at 74; Vol. 3, R. at 131; Vol. 4, R. at 382; Vol. 5, R. at 646; Vol. 6, R. at 876.

The same day, after selling [redacted] the four grams of marijuana, Appellant departed the Portsmouth area, headed to Charlotte, North Carolina. R. at 585-6, 613. Upon arriving in North Carolina, on 6 November 2017, Appellant contacted his friend [redacted] and in a series of text messages asked about obtaining marijuana. R. at 591, 593, 605, 613; PE 5 at 8.

Meanwhile, on 8 November 2017 SA [redacted] was stopped by the Virginia Beach Police Department for running a stop sign. R. at 391, 427. Upon rolling down the window to speak to the Virginia Beach Police, the responding officer inquired if [redacted] had anything illegal in his vehicle. R. at 391-2. [redacted] admitted to the Virginia Beach Police he had two (remaining) grams of marijuana. [redacted] later that day informed the Virginia Beach police he purchased the marijuana from Appellant. R. at 392. The following day, 9 November 2017, [redacted] was interviewed by CGIS. R. at 393. During the CGIS interview, [redacted] disclosed that Appellant sold him the marijuana on board Base Portsmouth on 4 November 2017. *Id.*

[redacted] admissions to CGIS led to Appellant being charged with introduction of marijuana onto a military installation and distribution of marijuana in violation under Article 112a, UCMJ, 10 U.S.C. § 912a (2016). As a part of his agreement with Government, [redacted] was offered a grant of immunity and a promise of leniency to testify against Appellant. R. at 394.

As the case proceeded to trial Appellant, through counsel, filed a motion to suppress the text messages pertaining to Appellant's attempts to obtain marijuana. R. at 90-1; AE VI. At the start of trial on 5 June 2018, the military judge addressed this motion. Appellant argued the text messages were not admissible under Mil R. Evid. 404(b) as the evidence did not indicate any intent, motive, plan, knowledge, or state of mind at the time of the charged offenses. Appellant asserted the attempts to obtain marijuana happened after and apart from any sale to [redacted], and Appellant's desire to acquire marijuana was being offered as propensity evidence, something

Mil. R. Evid. 404 prohibits. R. at 94-96. At the motion hearing, the military judge ruled in favor of Appellant, finding "whether or not he did something after that that made him want to get more or less marijuana is not relevant to the offense that he was charged with. However . . . this may be relevant evidence on rebuttal if Defense opens the door to making this evidence relevant." R. at 99; AE VIII.

After the Government rested its case, Appellant testified in his own defense. During direct examination, Appellant denied selling marijuana to SA [redacted]. R at 565. He also indicated that he and [redacted] were not friends and, prior to [redacted] contacting him via text on 3 November 2017 to ask about where he could get marijuana, had not communicated via text or phone. R. at 529-30; 544-47. When [redacted] asked about where to get marijuana, Appellant stated he tried to pass on [redacted] cell number to a civilian with whom he played basketball that be believed smoked marijuana. R. at 54-547. Further, Appellant asserted the only reason Appellant was on Base Portsmouth 4 November 2017 was to deliver hair products for another Coast Guard member, SN [redacted]. His stated plan was to give the hair care products to [redacted] to deliver them to [redacted] but that as he arrived at Base Portsmouth, [redacted] contacted Appellant and asked that he ship the hair care products to [redacted] father's address instead. Appellant denied that [redacted] ever gave him any money and asserted the reason he took [redacted] to the Exchange was that he felt bad for calling him out to from the ship for nothing since he did not need [redacted] to take the hair care products after all. R. at 529-30, 544-57, 562, 565. As Appellant neared the conclusion of his direct testimony he also stated that he had been subject to random urinalysis testing between 12 and 15 times during his five years on active duty and had to provide both a hair sample and participate in a urinalysis upon his return to the Coast Guard from terminal leave on 13

November 2017. R. at 561-62. He indicated he had never tested positive for drugs on any of these tests. *Id*.

Based on Appellant's statements, trial counsel requested a 39(a) session and asked the judge reconsider his earlier ruling excluding Appellant's text messages. R. at 566-7; *see* AE VIII at 3. Trial counsel's position was that Appellant opened the door to admit the text messages. R. at 574. The military judge reconsidered his earlier decision and found that based on Appellant's testimony the text messages were admissible. R. at 571-2; AE VIII. Trial counsel then questioned Appellant regarding the content of the text messages. R. at 591-5. Trial counsel also questioned Appellant about indications found on his phone of an internet search performed on 22 October 2017 looking in the Newport News backpages for "weed seller". R. at 594; PE 5 at 9. At the conclusion of trial, the members found Appellant guilty of both specifications of violation of Article 112a, UCMJ.

Other facts necessary to resolving the errors assigned are discussed below.

I. THE MILITARY JUDGE PROPERLY ADMITTED EVIDENCE OF APPELLANT'S ATTEMPTS TO OBTAIN MARIJUANA UNDER MIL. R. EVID. 404(B) AFTER APPELLANT TESTIFIED THAT THAT HE DID NOT SELL MARIJUANA TO SA [redacted] AS WELL AS THAT HE HAD PASSED 12 TO 15 URINALYSES WHILE IN THE COAST GUARD AND NO DRUGS WERE FOUND IN HIS SYSTEM WHEN HE WAS SUBJECTED TO A HAIR TEST AND URINALSYIS UPON HIS RETURN TO THE COAST GUARD ON 13 NOVEMBER 2017.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018) (citation omitted). A military judge's interpretation of a rule of evidence is reviewed *de novo*. *United States v. Barker*, 77 M.J. at 382.

Discussion

A military judge abuses his discretion when he admits evidence based on an erroneous view of the law. *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013) (citing *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008)). "Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." *Id.*

A. The military judge properly admitted the evidence of Appellant's text messages seeking to obtain marijuana within two days of his sale of marijuana to SA [redacted]

As a general rule only relevant evidence is admissible. Mil. R. Evid. 401 and 402; *United States v. Reynolds*, 29 M.J. 105, 109 (C.A.A.F. 1989). Evidence must "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence" and "its probative value must not substantially be outweighed by the danger of unfair prejudice." Mil. R. Evid. 401; Mil. R. Evid. 403. Mil. R. Evid. 404 generally prohibits use of character evidence to prove that an accused acted in accordance with a particular character trait, but does allow evidence of other crimes, wrongs or acts if the evidence is offered for some other purpose than to show bad character. Evidence offered under Mil. R. Evid. 404 (b) ". . . need not fall within a category listed but must be legally and logically relevant." *United States v. Tyndale*, 56 M.J. 218, 215 (C.A.A.F. 2001). The test under Mil. R. Evid 404(b) is "whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime [i.e. character.]" *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989); *see also United States v. Acton*, 38 M.J. 330 (C.M.A. 1993).

In *United States v. Reynolds,* the Court of Appeals for the Armed Forces established a three part test to determine if uncharged misconduct is admissible under Mil. R. Evid. 404(b)(2).

29 M.J. at 109. If the evidence fails to meet any of these standards, it is inadmissible. *Id.* The standards of the *Reynolds* test are:

> 1. Does the evidence reasonably support a finding by the court members that Appellant committed prior crimes, wrongs or act? (Citation omitted).
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence? (Derived from Mil. R. Evid. 401)
> 3. Is the probative value . . . substantially outweighed by the danger of unfair prejudice"? Mil. R. Evid. 403.

United States v. Yammine, 69 M.J. 70, 77 (C.A.A.F. 2010) (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)).

As noted previously, prior to trial, Appellant moved to suppress evidence the Government obtained from Appellant's cell phone in the form of text messages beginning on 6 November 2017 indicating he wished to obtain marijuana. AE VI. Initially the military judge ruled in Appellant's favor. R. at 99. He reconsidered his ruling after Appellant testified in his own defense. R. at 567. Specifically, Appellant denied that he sold marijuana to SA [redacted], alleging instead that the purpose of his meeting with SA [redacted] on 4 November 2017 was an abortive attempt to transfer hair care products intended for another shipmate, SN [redacted], to [redacted] for delivery to [redacted]. R. at 551-556. Near the end of his direct testimony Appellant then testified that he had taken 12 to 15 urinalysis tests while in the Coast Guard and had not failed any of them. In addition, he made specific reference to providing a hair sample and a urine sample for testing when he returned to the Coast Guard on 13 November 2017 that, when tested, was also negative. R. at 561-62.

The first prong of the *Reynolds* test is whether the "evidence reasonably support[s] a finding by the court members that Appellant committed prior crimes, wrongs or act." 29 M.J. at

109. The standard required to meet this prong is low. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2008); *Huddleston v. United States*, 485 U.S. 681, 686 (1988). Here the specific evidence was a series of text messages obtained from Appellant's phone in which he stated the following: "who got the bud though"; "hit her up for a g"; "I want to smoke"; "Shit I need to stop but I truly enjoy it." R. at 591-93, 605, 613; PE 5. These messages began on 6 November 2017. Appellant admitted on cross-examination that they reference his efforts to obtain marijuana. R. at 591-94.

The second prong is whether the evidence shows a fact of consequence is made more or less probable by the evidence. Initially the judge ruled that the text messages did not meet this prong. He found that seeking to acquire marijuana on dates after the charged offenses, which occurred two days earlier, when Appellant was on terminal leave did not make a fact of consequence to the charged offenses more or less likely. R. at 99. That changed once Appellant testified. Appellant testified that he never sold marijuana to SA [redacted] and that he only had one conversation with [redacted] about marijuana and that concerned Appellant attempting to put [redacted] in touch with someone else from whom [redacted] could buy it. R. at 573. Then, near then end of his direct testimony, Appellant stated he had taken 12 to 15 urinalyses, passed each one and passed a hair and urine test upon his return to Coast Guard control. R. at 561-62. As the military judge indicated, the fact of consequence "that's made more or less probable by the existence of this evidence is circumstantial evidence that Petty Officer Steen had in fact sold marijuana on the day of November 4th. Because within twenty-four to seventy-two hours afterwards, he was reaching out to someone to procure additional marijuana." R. at 567. The military judge also noted that use of the text messages was appropriate impeachment regarding specific instances of conduct under Mil R. Evid. 608(b) given his testimony that he did not sell marijuana to SA

[redacted] and his claims regarding the number of drug tests he passed were essentially a categorical denial of any drug use. R. at 568-573.

Finally, the military judge addressed the third prong of the *Reynolds* test, evaluating whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice from Mil. R. Evid. 403. He stated:

> "[a]nd I agreed at that point it would have been improper to bring it in. But because now Petty Officer Steen has testified in the manner that he did, that he had no other conversations with Seaman Apprentice [redacted], that the only conversations he had was this one text message. That it's coincidental that, no, I wasn't meeting with him to give him pot, I was meeting with him to give him that box, that that's proper rebuttal. This idea that now less than seventy-two hours later Petty Officer Steen was going out and purchasing additional marijuana, I think becomes significantly more probative and significantly outweighs the prejudicial value of the information." R. at 573.

In his written ruling the military judge went into more detail on the balancing required by *Reynolds* and Mil. R. Evid. 403:

> Regarding the third prong of the *Reynolds* test, the court finds the manner in which the defense conducted their direct examination and the answers provided by BM3 Steen significantly impacted the balancing of the probative value of the evidence against whether or not it would be substantially outweighed by the danger of unfair prejudice. Initially, as the court stated from the bench, the court found that the government's initial attempt to enter this evidence failed because BM3 Steen's text messages and the replies focused on gaining marijuana to allegedly use with his civilian friends. The court was initially concerned that the finders of fact might see evidence that BM3 Steen was using marijuana shortly after being sent home on terminal leave as propensity evidence - particularly since BMJ Steen was not charged by the government of having used marijuana. But BM3 Steen's testimony changed the calculus of the balancing test. First, BM3 Steen provided an alternate explanation for why he was on the Base, i.e.: to deliver SN [redacted] hair care products to SA [redacted] so SA [redacted] could give the box to SN [redacted]. Second, BMJ Steen provided strident testimony that he had never failed a drug test - and by inference had never used marijuana while on active duty. Therefore, the court finds the government should had reasonable, non-propensity reasons to enter this evidence. Based on the factors, the court determined at trial that the danger or unfair prejudice did not substantially outweigh the probative value of the evidence and the court found the third prong or the *Reynolds* test was met. AE 33 at 7.

A military judge is given "wide discretion" and more deference if [he] properly conducts the balancing test and articulates [his] reasoning on the record. *United States v. Carter*, 74 M.J.

204, 206 (C.A.A.F. 2015) (*quoting United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)). At the commencement of trial, the military judge viewed the Government's desire to make use of the text messages about Appellant's attempts to obtain marijuana after the date of the charged offenses and while he was on terminal leave as inadmissible because the judge held at that point in the trial there was a danger of unfair prejudice to Appellant. R. at 99-100. As he clearly indicated, however, that changed after Appellant's testimony. R. at 567-71; AE VIII at 6-7. Given Appellant's specific and general denials of introduction, distribution or use of marijuana there was no longer a risk of unfair prejudice to Appellant by allowing the use of the evidence of the text messages. Certainly use of the text messages was likely prejudicial to Appellant's case, otherwise the Government would not have wanted to use the messages or internet search and arguably they would not have been relevant under Mil. R. Evid. 401. The question is whether it was unfair.[3]

Here, the military judge used his discretion appropriately. Prior to trial, the military judge was concerned that Appellant's interest in marijuana would be used as propensity evidence to indicate that because he was interested in marijuana, he probably introduced and sold marijuana a few days earlier; exactly the type of evidence that Mil. R. Evid. 404 would seem to prohibit. Once Appellant testified that he had only one communication with SA [redacted] via text about marijuana and that all he did was attempt to put [redacted] in touch with someone else from who he could buy it, that he never sold marijuana to SA [redacted], and that he never tested positive for any drugs during his five years in the Coast Guard including immediately upon his return to

[3] The other bases for exclusion under Mil. R. Evid. 403, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence, are not implicated, despite Appellant's arguments to the contrary. Appellant's Assignments of Error at 19-20. What danger there might have been for confusion of issues and misleading the members was dealt with by the military judge's instruction limiting the use of the text messages. AE 33 at 5. An instruction to which Appellant did not object. R. at 771-773.

the Coast Guard after being recalled from terminal leave on 13 November 2017, the military judge assessed that allowing use of the text messages was no longer unfair, nor would it risk confusing the issues or misleading the members. Given the care with which he addressed this issue before trial, during trial, and in his written ruling, his determination the text messages and other evidence from Appellant's cell phone was admissible is entitled to significant deference and should be affirmed.

b. Use of the text messages met the requirements of Mil. R. Evid. 404(b) and 608(b).

Appellant takes issue with the military judge's assessment of the basis for admission being that the members could infer a reason Appellant was seeking marijuana so soon after the date of his sale to SA [redacted] was that the sale had depleted his supply. Appellant's Assignments of Error at 14-17. He asserts that the "resupply theory" was not a fact of consequence under the second prong of *Reynolds. Id*. Appellant misinterprets the military judge's ruling, however. The judge was not ruling that the attempt to obtain marijuana to resupply himself was the fact of consequence, rather that the charged offenses of introduction and distribution were more likely to have occurred in light of the evidence in the text messages that almost immediately after the events of 4 November 2017 Appellant was seeking to obtain marijuana. The fact Appellant was trying to obtain marijuana on November 6th was made relevant by Appellant's testimony that he did not sell SA [redacted] marijuana, all he attempted to do was put SA [redacted] in touch with someone else who could sell it to him only days earlier, and he never tested positive on the many urinalyses he took while in the Coast Guard including the hair and urine test he took on his return, a date after his attempts to acquire marijuana.

Appellant also asserts that use of the text messages to impeach him was impermissible. Appellant's Assignments of Error at 17-18. The military judge did articulate that a basis for

admission of the text messages was impeachment under Mil. R. Evid. 608(b). R. at 567-68, 574-75; AE VIII at 6-7. Generally, Mil. R. Evid. 608(b) prohibits use of extrinsic evidence to impeach a witness by reference to specific instances of conduct. That rule is not absolute though. "A broad assertion by an accused on direct examination that he has never engaged in a certain type of misconduct may open the door to impeachment by extrinsic evidence of misconduct." *United States v. Matthews*, 53 M.J. 465, 469 (C.A.A.F. 2000)(internal quotations omitted), *quoting United States Trimper*, 28 M.J. 460, 467 (C.M.A. 1989); *see also Walder v. United States*, 347 U.S. 62 (1954). As discussed by the Tenth Circuit in more detail referring to Fed. R. Evid. 608:

> "608(b) precludes the admission of extrinsic evidence of specific instances of conduct of the witness when offered for the purpose of attacking credibility. The rule does not apply, however, when extrinsic evidence is used to show that a statement made by a defendant on direct examination is false, even if the statement is about a collateral issue. A defendant may not make false statements on direct examination and rely on the government's inability to challenge his credibility as to the truth of those statements." *United States v. Fleming*, 19 F.3d 1325, 1331 (10th Cir. 1994).

Appellant testified that he had been tested for drugs via urinalysis 12-15 times during his five years in the Coast Guard and that he was tested and passed upon his return from terminal leave on 13 November 2017. R. at 561-62. Yet the text messages revealed not only had he attempted to acquire marijuana, but he also sent the following text message on 6 November 2017: "Shit I need to stop but I truly enjoy it." PE 5 at 5; AE VI at 23. The other messages place this statement in context and indicate that what Appellant was referring to was marijuana. Given Appellant's testimony on direct, that not only did he not sell marijuana to [redacted] but that he had no involvement with it while on active duty, use of the text messages as extrinsic evidence to impeach his credibility under Mil. R. Evid. 608(b) was appropriate.

II. APPELLANT'S CONVICTIONS ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of review.

This Court has a statutory mandate to conduct *de novo* review of both the legal and factual sufficiency of a conviction. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gutierrez*, 73 M.J. 172, 175 (C.A.A.F. 2014). The standard for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011).

A. The Record Clearly Indicates Appellant's Convictions are Legally Sufficient.

Appellant was convicted of wrongful introduction of a controlled substance in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016), and wrongful distribution of a controlled substance in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (2016). Elements of those offenses are:

Wrongful introduction of a controlled substance

(a) The accused introduced unto a vessel, air craft, or instillation used by the armed forces or under the control of the armed forces a certain amount of a controlled substance; and

(b) The introduction was wrongful.

Wrongful distribution of a controlled substance.

(a) The accused distributed a certain amount of a controlled substance; and

(b) The distribution was wrongful.

Article 112a, UCMJ, 10 U.S.C. § 912a (2016).

The Government's main witness as to these two offenses was Seaman Apprentice [redacted]. [redacted] testified under a grant of immunity and as part of a peal agreement where in exchange for his truthful testimony against Appellant pending charges against him would be dropped, [redacted] would admit the possession and use of marijuana at nonjudicial punishment and he would be administratively separated with a general discharge. R. at 390-91, 432-34. [redacted] identified Appellant as the person from whom he obtained the marijuana. He described in detail, pointing to surveillance video of him getting in Appellant's car near CGC FORWARD and entering the Coast Guard Exchange on Base Portsmouth, the transaction through which he purchased marijuana from Appellant. R. at 402-415. Included within his testimony was the exchange between he and Appellant where Appellant told him he would bring the marijuana to him on Base Portsmouth and how Appellant contacted him once he was on board. R. at 402-03. [redacted] was able to identify the material Appellant provided him as marijuana because he smoked about half of it by the time of his arrest, and at the time he purchased it he recognized the substance as marijuana by its smell and appearance based on his previous exposure to marijuana. R. at 391, 416. He also testified at that at the time of his arrest, he had smoked approximately half the marijuana Appellant sold to him. R. at 391, 417. [redacted] also testified that his reason for buying marijuana was to get kicked out of the Coast Guard and Appellant did not have any official or medical purpose behind providing marijuana to [redacted]. R. at 396-97; 416-417. [redacted] was subjected to extensive cross-examination, including the fact that he was testifying under a grant

of immunity and that charges against him would be dropped in exchange for his testimony against Appellant. R. at 432-33.

The Government's case in chief offered evidence on every element of both offenses. Appellant was able to fully explore before the members credibility and bias issues with [redacted]. [redacted] admitted to being less than forthright at times with the police and CGIS, and testified about the benefits he would receive as a result of his testimony against Appellant. R. at 430-34. The military judge instructed the members about the fact that SA [redacted] was a witness testifying under a grant of immunity and with a promise of leniency. AE 33 at 6. The members had the opportunity to observe SA [redacted] and Appellant, as well as the other witnesses. They were provided with information about reasons to question SA [redacted] credibility and instructed about considerations they would have to weigh because SA [redacted] was receiving benefits from the government in exchange for his testimony. As summarized above, this record provides ample basis where a "reasonable factfinder reading the evidence one way could have found all the elements of the offense beyond a reasonable doubt" and is, therefore, legally sufficient. *United States v. Gutierrez*, 73 M.J. at 175.

B. The Evidence is Clearly Factually Sufficient.

If anything, the case for factual sufficiency, measured by the entire record, is even stronger, thanks in no small part to Appellant's perhaps unfortunate decision to testify in his own defense. Nothing did more to improve SA [redacted] credibility than the version of the events of 4 November 2017 Appellant offered. Appellant's purported reason for meeting with [redacted] in his car on 4 November 2017 was to give him a package of hair care products that another member of FORWARD's crew, Seaman [redacted], had shipped to Appellant's off base apartment. R. at 549-50. In Appellant's version, in the matter of minutes between the time he asked [redacted] to meet him at

his car to pick up the box of hair care products, and his arrival near the ship, Appellant heard from [redacted], whom he had been previously unable to reach. Appellant stated that [redacted] asked, during the conversation just minutes prior to meeting [redacted], that Appellant ship the hair care products to [redacted] father's house. R. at 549-553. Why Appellant would not have mentioned to [redacted] that he was minutes away from delivering the products to [redacted] who would then have them on the ship was unexplained. Both [redacted] and [redacted] testified they knew nothing of Appellant trying to get [redacted] to deliver hair care products to [redacted] R. at 424-25, 511. Feeling bad about asking [redacted] to leave the ship and walk all the way to his car for nothing, Appellant's testimony was that he insisted on driving [redacted] to the Exchange even though [redacted] car was in the same parking lot, and surveillance video showed Appellant dropping [redacted] off at his car. R. at 554-55: PE 1 and 3. Further, appellant's explanation for why he tried to ask [redacted] to deliver the hair care products was that he knew [redacted] and [redacted] were close. R. at 548. This despite the fact that [redacted] had earlier testified that he and [redacted] were not close at all. R. at 511. After all of this claimed effort, [redacted] testified, and Appellant confirmed, that Appellant never actually delivered the hair care products to [redacted] R. at 511, 602.

Appellant also admitted that he and [redacted] did not socialize together outside work. R. at 584. The first time [redacted] contacted him on his cell phone was on 3 November 2017 asking Appellant if he knew how [redacted] could obtain some marijuana. R. at 544-45. And, according to Appellant, when [redacted] initiated this first contact to ask for help finding someone from whom he could purchase marijuana, Appellant's reaction was to agree to try to put [redacted] in touch with a civilian on the base with whom he played basketball. R. at 545-47. His exceptionally helpful attitude towards [redacted] request seemed at odds with his testimony earlier on direct examination that he was against people smoking, and had been particularly disturbed by the amount of

smoking [redacted] did. R. at 529. When confronted on cross-examination about this potential inconsistency, Appellant's response was that he was against people smoking tobacco but marijuana was okay. R. at 585. Things did not improve for Appellant upon redirect. When asked about the text message stating he wanted to smoke, followed by four exclamation points, despite admitting that he was seeking to obtain marijuana in a series of other text messages, Appellant asserted that this message was to his sister and that what it really referred to was smoking hookah with her. PE 5 at 6; R. at 608-09. Although smoking hookah was something he stated he did not do regularly. R. at 609.

Separate and apart from the use of the text messages indicating Appellant was searching for marijuana within days of the interaction with [redacted] Appellant's explanation for why he was seen on surveillance video with [redacted] on 4 November 2017 was simply not credible. He claimed he was coming to Base Portsmouth just as we was about to depart on terminal leave not to sell marijuana to [redacted] despite admitting [redacted] had asked him where he could get it, but to deliver hair care products for [redacted] to deliver to a shipmate, SN [redacted] Although neither [redacted] nor [redacted] knew anything of this plan. His reason for taking [redacted] on a two minute trip to the Exchange, according to Appellant had nothing to do with paying for marijuana, but rather because he felt bad as the request to deliver hair care products became moot due to SN [redacted] exceptionally well timed communication with Appellant to ship the hair care products to his father's address just as Appellant was about to drop them off with [redacted] There is evidence on every element of both offenses sufficient to prove beyond a reasonable doubt that Appellant was guilty of introducing and distributing marijuana on Base Portsmouth. Appellant's efforts on direct examination to undermine SA [redacted] credibility only served to improve it. With the addition of the text messages and that among internet search terms found on Appellant's phone

was the phrase "weed seller" searched on 22 October 2017, after testifying that he had never tested positive for drugs during his time in the Coast Guard, by the time he left the witness stand Appellant's credibility had gone up in smoke. PE 5 at 9. Appellant's convictions are factually sufficient.

Conclusion

The military judge appropriately used his discretion, reconsidered his earlier ruling, and allowed use of text messages and internet searches after Appellant denied selling marijuana to SA [redacted] and asserted he had never failed a drug test. Given the evidence that was before him at the point where Appellant completed his direct examination, the text messages and internet search information were admissible under both Mil. R. Evid. 404(b) and to impeach Appellant under Mil. R. Evid. 608(b). In addition, the evidence is both legally and factually sufficient.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that this honorable Court affirm the findings and sentence.

Respectfully submitted,

DATE: 6 May 2019

//s//

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to the Court and opposing counsel on 6 May 2019.

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