

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES	))	DEFENSE MOTION IN
	)	LIMINE TO EXCLUDE EVIDENCE
v.	)	AND ARGUMENT PURSUANT TO
	)	MIL. R. EVID. 404(b)
SSGT KINYADA J. JOHNSON	)	
552d Operations Support Squadron (ACC)	)	
Tinker Air Force Base, OK	)	26 January 2026
	)	

MOTION

COMES NOW the Accused, SSgt Kinyada Johnson, by and through his Defense Counsel, and files this motion in limine to exclude evidence under Mil. R. Evid. 404(b) pursuant to R.C.M. 906(b)(13). The Defense respectfully requests this Honorable Court exclude any testimony or other evidence relating to the Accused's previous drug use and alleged other irrelevant acts and statements. The Defense requests an Article 39(a), UCMJ, session.

SUMMARY

The Government's noticed evidence of previous drug use by SSgt Johnson is not relevant, not supported by evidence, not proper Mil. R. Evid. 404(b), and would be highly prejudicial with no probative value. Thus, such evidence is not admissible via Mil. R. Evid. 404(b). Additionally, the Government's remaining noticed evidence is not remotely relevant, not proper Mil. R. Evid. 404(b), and would be highly prejudicial with no probative value. Thus, such remaining noticed evidence is not admissible via Mil. R. Evid. 404(b).

FACTS

1. SSgt Kindyada Johnson is accused of wrongful use of THC-9 on diverse occasions in violation of Article 112a, UCMJ. (Attachment 1)
2. On 16 January 2026, the Government filed its notice and intent to admit evidence via Mil. R. Evid. 404(b). (Attachment 2) The notice included "the Accused's voluntary written admissions on or about 6 February 2025 and on or about 24 February 2025 about using THC9 between on or about 26 July 2024 and on or about 21 January 2025", which are outside the charged timeframe. *Id.*, at para. (1)(a). Government further stated that the evidence in (1)(a) is offered to demonstrate "common plan or scheme and, if raised by defense counsel, to rebut defenses/issues related to lack of knowledge and intent or mistake of fact." *Id.*

[REDACTED]

[REDACTED]

4. Finally, Government noticed “[e]vidence that, between on or about 5 December 2025 and on or about 5 January 2026, the Accused knowingly and wrongfully ingested delta-9 tetrahydrocannabinol (THC9) and delta-8 tetrahydrocannabinol (THC8) as evidenced by a urine sample submitted by the Accused on 5 January 2026 that subsequently tested positive for THC9 and THC8.” *Id.* at para. (1)(c). Government intends to use this evidence, if admitted, to show “common plan or scheme and, if raised by defense counsel, to rebut defenses/issues related to lack of knowledge and intent or mistake of fact.” *Id.*

BURDEN

5. Upon defense objection, it is the Government’s burden to identify a non-character purpose for offering evidence under Mil. R. Evid. 404(b). *United States v. Smith*, 52 M.J. 337, 342 (C.A.A.F. 2000). The burden of proof is preponderance of the evidence and shall be on the Government as the proponent of the evidence. R.C.M. 905(c).

LAW

6. In order to be admissible, evidence must be relevant. Mil. R. Evid. 402. Relevant evidence is that which has a tendency to make a fact of consequence more or less probable than it would be in the absence of the evidence. Mil. R. Evid. 401. “Relevancy has two components: (1) probative value, the relationship between the evidence and the proposition it is offered to prove; and (2) materiality, the relationship between the proposition the evidence is offered to prove and the facts at issue in the case.” *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006).

7. Evidence of “other crimes, wrongs or acts” is generally inadmissible to prove the character of a person and “action in conformity therewith.” Mil. R. Evid. 404(b). Evidence of prior crimes, wrongs, or acts may be admitted to prove “opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* However, the Government must, if requested by the Defense to do so, provide reasonable notice in advance of trial of any intent to offer evidence pursuant to Mil. R. Evid. 404(b).

8. Even otherwise relevant and admissible evidence may be excludable where the evidence’s “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the members” Mil. R. Evid. 403.

9. Evidence which is offered simply to prove that an accused is a bad person, such an alleged drug abuser, is not admissible under Mil. R. Evid. 404(b). *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). “The test for admissibility of uncharged acts is ‘whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused’s predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as

charged, because he is predisposed to commit similar offenses.” *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006) (citing *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989); *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998); *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)). As the United States Supreme Court stated when speaking of Mil. R. Evid. 404(b)’s counterpart, Federal Rule of Evidence 404(b), “[t]he threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.” *Huddleston v. United States*, 485 U.S. 681, 686 (1988).

10. Courts apply a three-pronged test for determining admissibility of other-acts evidence under Mil. R. Evid. 404(b). *See Reynolds*, 29 M.J. at 109. The evaluation is: (1) whether “the evidence reasonably supports a finding by the court members that appellant committed prior crimes, wrongs or acts;” (2) “what fact of consequence is made more or less probable by the existence of this evidence;” and (3) whether “the probative value [is] substantially outweighed by the danger of unfair prejudice.” *Id.* *See also, Thompson*, 63 M.J. at 230; Drafters Analysis of Mil. R. Evid. 403, Manual (noting that Mil. R. Evid. 403 is focused on “legal relevance” as compared to other types of relevance (e.g. “logical”). Although CAAF noted that the facts between the uncharged misconduct and charged misconduct do not have to be identical, they nonetheless must share “common factors”. *See United States v. Hyppolite*, 79 M.J. 161, 166 (C.A.A.F. 2019); *United States v. Greene-Watson*, 85 M.J. 340, 347 (C.A.A.F. 2025). Notably, common plan or scheme is two separate and distinct theories for admitting uncharged misconduct: a specific common plan and a common scheme, both of which contain their own standards for the moving party to meet. *See United States v. Hyppolite*, 79 M.J. 161, 161 (C.A.A.F. 2019) (analyzing only “common plan,” as noticed by the Government); *United States v. Munoz*, 32 M.J. 359, 361 (C.M.A. 1991) (also analyzing only a “plan”); and *United States v. Johnson*, 49 M.J. 467, 473 (C.A.A.F. 1998) (analyzing a “plan or scheme”).

11. “If the evidence fails any of the three tests, it is inadmissible.” *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992). Although the military judge must not make a finding that the evidence meets a preponderance of the evidence standard to reasonably support the uncharged misconduct, evidence that does not meet a preponderance of the evidence does not reasonably support a finding that an accused committed the other misconduct. *United States v. Castillo*, 29 M.J. 145, 151 (C.M.A. 1989).

Evidence of Prior Drug Abuse

12. Prior confirmed drug use does not make it any more or less probable that an accused used drugs during the alleged offense. The Court of Military Appeals has held that “the admission of...the testimony regarding [the accused’s] prior drug use was plain error.” *Cousins*, 35 M.J. at 75. Even though the court concluded that the first prong of *Reynolds* was met, it found that “testimony that the [accused] used methamphetamines 9–11 times previously did not make it more or less probable that [dealer] provided [the accused] with cocaine at her house on July 29.” *Id.* at 74 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The court held that the evidence of the accused’s prior drug use was irrelevant, and therefore, it failed the second test.” *Id.*

13. Even if prior drug use did meet the second prong of *Reynolds*, it categorically runs afoul of the third prong. Again, the Court of Military Appeals has held that even if it were to find minimal relevance to satisfy the second test, “the third test clearly was not met in this case, because its probative value was substantially outweighed by the danger of unfair prejudice.” *Id.* (noting that a member instruction which stated that the prior drug use could only be used as “background information” did not cure the Mil. R. Evid. 403 prejudicial error). *Id.*

14. Prior confirmed drug use is not evidence of “knowledge and absence of mistake”; until such a defense is raised, that evidence is not relevant and fails the second prong of *Reynolds*. In *Thompson*, the accused was charged with wrongful use of cocaine among other offenses. Over defense objection, the trial court judge permitted testimony that he used marijuana “all the time back home” and that he used marijuana in high school because it reflected Thompson’s “knowledge of marijuana use” and “knowledge and absence of mistake”. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). On appeal, C.A.A.F. applied the *Reynolds* test and found that the evidence failed to meet the second prong of the test for uncharged misconduct. C.A.A.F. further stated that even though Mil. R. Evid. 404(b) is a rule of inclusion, the evidence must be relevant to a fact in issue other than an accused’s character or predisposition to commit the charged offense. *Id.* at 231. C.A.A.F. lamented the trial judge’s admission of such evidence under the guise of knowledge or absence of mistake when those defenses were not present at trial. *Id.* (concluding the evidence served no relevant purpose and fails the second prong of the *Reynolds* test).

Evidence of Charged Misconduct

15. Mil. R. Evid. 404(b) permits the admission of evidence of other crimes, wrongs, or acts only when the proponent shows a *specifically* relevant purpose. *United States v. Tanner*, 63 M.J. 445, 448 (C.A.A.F. 2006) (citing *United States v. Wingart*, 27 M.J. 128, 134–35 (C.M.A. 1988)). It does not allow for the Government to admit evidence of uncharged misconduct for the purposes of intent or lack of mistake to support the other charged conduct. Simply put, there are other bases of admission for charged conduct.

16. When unrelated but similar offenses are tried at the same time, there is a possibility that the court members may use evidence relating to one offense to convict another offense. Another danger is that the members could conclude that an accused has a propensity to commit crime in general. The Court of Military Appeals recommended that the military judge give a specific instruction to preclude this potential spillover effect. *United States v. Hogan*, 20 M.J. 71 (C.M.A. 1985).

ARGUMENT

Some of the evidence does not reasonably support a finding that AIC [REDACTED] engaged in previous drug use; the evidence is not relevant; the evidence is not proper Mil. R. Evid. 404(b) evidence; the evidence would be unfairly prejudicial within the meaning of Mil. R. Evid. 403; and the evidence should not be admitted under Mil. R. Evid. 304(d)

Para. (1)(a) of Government's Notice

17. The evidence in para. (1)(a) of the Government's notice supports the first prong of *Reynolds* to the extent that the statements were made in SSgt Johnson's NJP rebuttal from 2024-2025 because SSgt Johnson was found guilty during the NJP process and accepted responsibility in his response.

18. However, the evidence in para. (1)(a) fails the second *Reynolds* prong because it is not relevant. Although the bar for relevancy is quite low, it is a bar nonetheless. The Mil. R. Evid. 404(b) relevancy is distinctly different—a test of legal relevancy, not logical relevancy.

19. Evidence of pre-service drug use is categorically not relevant until the defense makes it relevant. For evidence to be relevant it has to make a fact *of consequence* more or less probable than it would be without the evidence. Prior drug use outside of the charged time frame that was disposed of with a nonjudicial punishment was not subject to the strict evidentiary barriers in a court-martial and thus weighs heavily against the probability that SSgt Johnson knowingly used THC-9 in the charged misconduct. The NJP serves only to prove that SSgt Johnson was found guilty of Article 112a before the alleged timeframe. In no way do allegations of prior drug use without any overlap with the charged timeframe make it more or less probable that A1C McClenney used or possessed drugs in the charged timeframe, as demonstrated in *Cousins* and *Thompson*, where CAAF held that evidence of prior drug use does not make it more or less probable that an accused engaged in drug abuse during the charged timeframe.

20. Moreover, the alleged evidence of prior drug use is not proper Mil. R. Evid. 404(b) evidence because it falls under no permissible purpose. Evidence of prior uncharged misconduct may be admitted under a number of exceptions enumerated in Mil. R. Evid. 404(b). The exceptions outlined in 404(b) must go to proving “opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The Government asserts that the statements in para. (1)(a) related to prior drug use is evidence of common plan or scheme (which Government did not differentiate in its reasoning); Government also noticed this evidence as potential rebuttal evidence to any mistake of fact or lack of knowledge defenses. Notably, Defense has not filed an innocent or unknowing ingestion defense notice, and the use of the statements to demonstrate knowing use is prohibited unless and until defense files such a notice under *Cousins*. Whether or not SSgt Johnson made a statement about circumstances surrounding prior drug use, and then actually did commit such prior drug use, does not make it more or less probable that he used THC-9 in the charged timeframe. Just like *Thompson* and *Cousins*, where confirmed uncharged uses of controlled substances were not admissible to show the charged use of controlled substances, SSgt Johnson's statements in his NJP certainly do not show drug use or possession in the charged timeframe. *Id.*; *United States v. Cousins*, 35 M.J. 70, 74 (C.M.A. 1992).

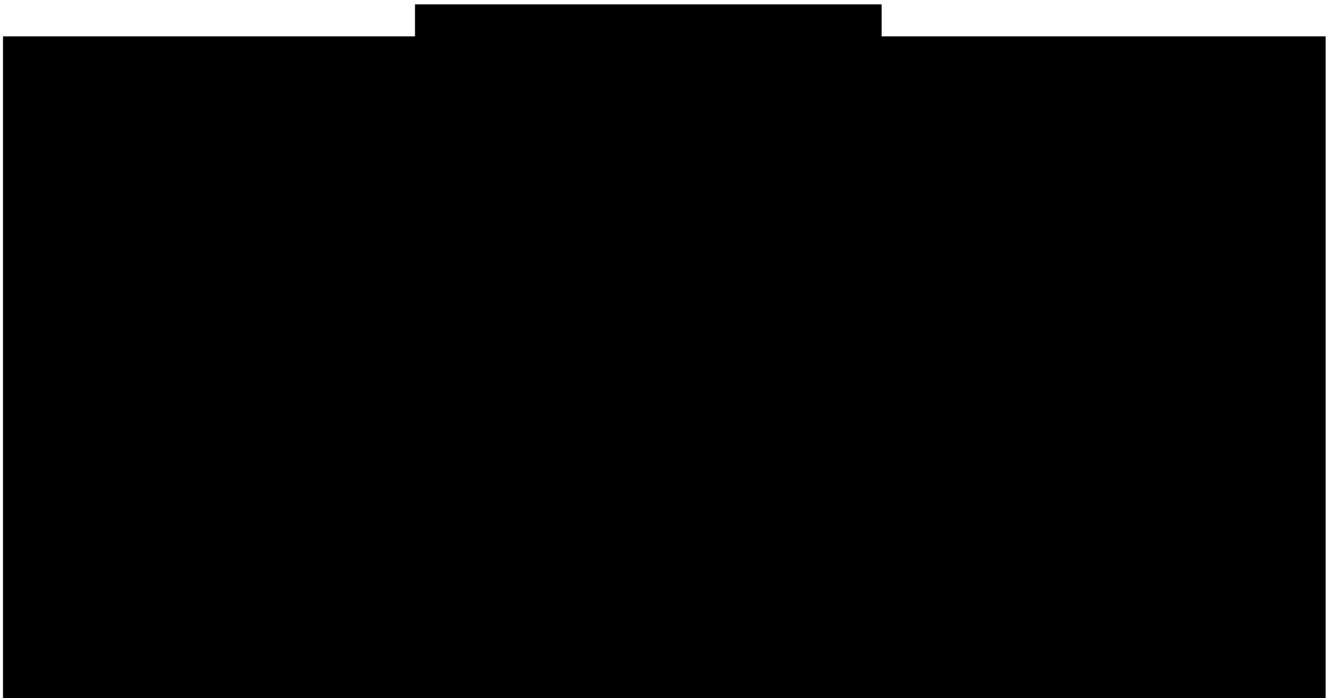
21. The alleged conduct does not logically fall into any of the other enumerated exceptions, including common plan or scheme. Government made no effort to differentiate between common plan and scheme, which the courts have routinely recognized as different bases for admission of uncharged misconduct; under 404(b), Government's notice must sufficiently place Defense on notice of the purported use of the uncharged misconduct, and without more specificity, the notice is insufficient. Under the circumstances, none of the alleged conduct

should properly be admitted under Mil. R. Evid. 404(b) for the purported purposes. Accordingly, the alleged statements from SSgt Johnson allegedly concerning prior drug use fail the second prong of *Reynolds*.

22. Even if the purported evidence of prior drug use does not fail the first two prongs of *Reynolds*, the evidence is unfairly prejudicial with no probative value. Evidence of alleged statements and disposed of prior drug use would clearly be unfairly prejudicial to SSgt Johnson. The evidence would serve only to show that “because SSgt Johnson used before, he’ll use again,” which by definition is propensity and is thus prohibited under 404(b).

23. The Government’s only purpose in introducing this statement in front of the finder of fact would be to paint SSgt Johnson as a routine drug abuser in order to gain a conviction for using drugs. This case involves one charge and one specification of alleged wrongful THC-9 use between 22 January 2025 9 and June 2025. SSgt Johnson was offered, accepted, and received nonjudicial punishment for any prior alleged drug abuse; that use has been dealt with, and SSgt Johnson has been punished. Any statements he made concerning that use are relevant only to the punishment at that time and offer nothing to address whether he knowingly used THC-9 from 22 January to 9 June 2025. The admission of evidence of allegations concerning prior drug use does nothing to address the central issue at hand. In fact, it would serve only to cloud and obscure it.

24. Additionally, the evidence in (1)(a) is substantially more prejudicial than probative. The statements and uncharged misconduct have not only been adequately disposed of through the nonjudicial punishment process, but they paint him as a drug abuser, who must have used drugs during the charged timeframe because he allegedly made a statement about using drugs in the past. The propensity of this evidence is clear as day, and the dangers of unfair prejudice by smearing SSgt Johnson as a drug abuser, even when a proper instruction is given, far outweigh any probative value of the evidence.



Para. (1)(c) of Government's Notice

28. The purported evidence in para. (1)(c) of Government's notice fails all three *Reynolds* prongs. First, the evidence does not support a reasonable finding by the fact finder that the act occurred. The purported positive test from a year after the beginning of the charged timeframe does not include a full litigation package from the Air Force Drug Testing Laboratory that Government has provided to Defense. However, Government provided other litigation packages for the alleged positive tests during the charged timeframe. Even those packages are up for litigation about their reliability, validity, authenticity, and accuracy – Government should not be able to submit a *testimonial* piece of paper stating that SSgt Johnson tested positive for THC-8 and THC-9 a year after the charged timeframe began when all other positives contain litigation

packages are that are being heavily scrutinized through routine litigation procedures. It is therefore not reasonable that the court members can find that SSgt Johnson tested positive for THC-8 and THC-9 by a preponderance of the evidence when the evidence is testimonial, lacking in substance, and has not gone through the other hurdles for admission, such as hearsay. (1)(c) thus fails the first *Reynolds* prong.

29. Second, (1)(c) fails the second *Reynolds* prong. The existence of an allegedly positive test for THC-9 and THC-8 in January of 2026, more than six months after the end of the charged timeframe, does not make it more or less probable that SSgt Johnson wrongfully used THC-9 a year prior, from January 2025 – June 2025. Moreover, THC-8 is not charged in this court-martial, so, just as demonstrated in *Cousins* and *Thompson*, where the existence of *prior* drug use of drugs other than the charged substance did not make it more or less probable that the accused committed the alleged act, the *later* existence of an alleged positive test also does not make it more or less probable that SSgt Johnson used THC-9 a year earlier. Most importantly, the caselaw largely contemplates *prior* crimes, wrongs, or other acts, not alleged misconduct occurring after the charged timeframe. Here, Government has stated only that an alleged THC-9 and THC-8 positive shows that somehow, a year prior, SSgt Johnson had the common plan and scheme to use THC-9. As stated above, enough common factors must be present for common plan, and plan and scheme should be analyzed separately. *See Hyppolite* at 161, *Munoz* at 361, and *Johnson* at 473. Here, Government has offered no connection between an allegedly positive test a year after the start of the charged timeframe and more than six months after the end of the timeframe and the alleged positives from the charged timeframe. Thus, Government’s notice lacks sufficiency for the same reasons as (1)(a) and (1)(b). Finally, Government’s notice includes reference to the intent to use this evidence to rebut mistake or lack of knowledge, which have not been noticed as defenses; thus, this purpose is impermissible under *Cousins*. (1)(c) thus fails the second *Reynolds* prong.

30. Finally, (1)(c) fails the third *Reynolds* prong because the probative value is substantially outweighed by the danger of unfair prejudice. Here, even if this Court finds that there is some probative value, the danger of unfair prejudice looms over this noticed item because it falls into the same trap as (1)(a) and (1)(b): smearing SSgt Johnson as a habituation drug user who has the propensity to use THC-9, which means that he used THC-9 during the charged timeframe. This item also serves to confuse the members about the real question at issue, which is alleged THC-9 (not THC-8) use six months to a year prior. Thus, (1)(c) fails the third *Reynolds* prong.

M.R.E. 304(d)

31. Under M.R.E. 304(d), the Government is required to provide notice to Defense prior to arraignment for any statements that fall under M.R.E. 304(d). Government did not provide a separate M.R.E. 304(d) statement and instead included a catch-all provision in the 404(b) notice under para. 2, stating “[t]o the extent any of the above-referenced actions could be interpreted as or include Mil. R. Evid. 304(d) evidence/conduct, such notice is hereby given to Defense counsel.” This notice is insufficient and improper because, as argued above, many of the purported statements have zero corroboration from evidence (primarily (1)(b)) and does not outline what specifically Government intends to admit *in its case in chief*. Additionally, a two-

line add-on to a notice titled “404(b)” negates the spirit of separate notices being required for each issue.

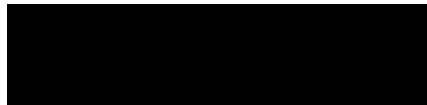
32. Moreover, M.R.E. 404(d)(4) allows Defense to make a general objection without specificity when, “despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.” Here, Defense is unable to interview anyone involved in the alleged statements in the Government’s 404(b) because the deadline has not passed for notice of witnesses.

33. Thus, the evidence noticed in Government’s 404(b) notice should be suppressed or excluded for M.R.E. 304(d) purposes as well.

RELIEF REQUESTED

34. The Defense requests that this honorable court find that evidence of a prior drug use by SSgt Johnson is inadmissible and that remainder of the noticed evidence is not relevant and thus inadmissible, and deny the admission of such evidence under M.R.E. 404(b) and 304(d).

35. The Defense requests an Article 39(a), UCMJ, hearing on this motion.



MARY CLAIRE RIZZARDI, Capt, USAF
Defense Counsel

Attachments (2):

1. DD Form 458, dated 19 December 2025, 2 pages
2. Government’s Notice under Mil. R. Evid. 404(b), dated 16 January 2026, 32 pages

CERTIFICATE OF SERVICE

I certify that a copy of this Defense Motion-In-Limine was served via e-mail on the Military Judge and Government on 26 January 2026.



MARY CLAIRE RIZZARDI, Capt, USAF
Defense Counsel