

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES v. SSGT KINYADA J. JOHNSON 552d Operations Support Squadron (AFMC) Tinker Air Force Base, OK	GOVERNMENT RESPONSE TO DEFENSE MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT PURSUANT TO MIL. R. EVID. 404(b) 3 February 2026
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MOTION

The United States (Government), by and through counsel, hereby responds to the Defense Motion in Limine to Exclude Evidence and Argument Pursuant to Military Rule of Evidence (Mil. R. Evid.) 404(b) and moves this Honorable Court to deny Defense’s Motion in Limine. The Prosecution requests an Article 39(a) session to present additional evidence and argument on the motion.

SUMMARY

The Defense Motion in Limine to exclude Mil. R. Evid. 404(b) evidence should be denied. The evidence contemplated by the Government under Mil. R. Evid. 404(b) is relevant, highly probative, and properly noticed. Consistent with case law, the evidence put forward by the Government in subparagraphs 1(a) and (b) are being offered for admissible purposes, namely as *res gestae* of the charged offenses, and under Mil. R. Evid. 404(b) to show the Accused’s common plan or scheme, motive, opportunity, and, if raised by Defense counsel, to rebut issues related to lack of knowledge and intent or mistake of fact. Similarly, this Honorable Court should admit evidence noticed in subparagraph 1(c) because it is admissible under Mil. R. Evid. 404(b) for the non-propensity purposes of common plan or scheme and, if raised by Defense counsel, to rebut issues related to lack of knowledge and intent or mistake of fact. Given the specific facts of this case, the probative value of this evidence is not outweighed by the minimal danger of unfair prejudice to the Accused. Accordingly, this Court should deny the Defense’s Motion in full.

FACTS

1. The Government generally agrees with the recitation of facts in paragraphs 1-4 of Defense’s Motion where supported by evidence.
2. On 26 August 2021, Colonel [REDACTED] then-72d Air Base Wing Commander, signed the Policy Regarding Re-Inspection Testing Under the Urinalysis Inspection Program: *Bickel Testing Policy Letter*. (Att. 1). This memorandum established the installation commander’s policy regarding re-inspection testing under the urinalysis inspection program. (*Id.*). The memorandum states that “[t]he subsequent re-inspection test is a continuation of the original

inspection, and re-inspection will be repeated in accordance with this policy ... until a negative result is received” (*Id.*).

3. Between on or about 26 July 2024 and on or about 21 January 2025, the Accused tested positive for Delta-9 Tetrahydrocannabinol (THC9) on nine (9) separate urinalysis tests (and one forensic toxicology examination of his blood).

a. On **16 August 2024**, the Accused was randomly selected for drug testing at the 72d Air Base Wing Drug Demand Reduction Program Office on Tinker AFB, OK. (**Att. 2**). The Accused was ordered to report to the 552d Operations Support Squadron Commander’s Support Section to report for a random urinalysis. (*Id.*). When contacted by the trusted agent, Mr. [REDACTED] (552 OSS/CSS), after SSgt Johnson did not show up as directed, the Accused made up lies about not being able to make it because his truck was at the shop. (*Id.*). SSgt Johnson refused to answer his phone, or show up, in an attempt to avoid mandatory drug screening. (*Id.*). Later that evening, after multiple unsuccessful attempts to reach the Accused, the Accused contacted MSgt [REDACTED] 552 OSS/CCF. (*Id.*). MSgt [REDACTED] directed the Accused to surrender himself at the gate, and the Accused did. (*Id.*). Security Forces apprehended the Accused. (*Id.*). The Accused was charged with violating Article 86 (Absence without leave) and Article 92 (Failure to obey). (*Id.*). Security Forces obtained search authorization based on probable cause to search and seize the Accused’s blood. (*Id.* and **Att. 3**). The Accused’s blood was collected, packaged, and shipped to the Armed Forces Medical Examiner System, Division of Forensic Toxicology at Dover AFB, DE for testing. The Accused’s blood tested positive for THC9 at 5.6 ng/mL (cutoff of 5 ng/mL). (**Att. 3**).

b. On **24 October 2024**, the Accused provided a urine sample at the 72d Air Base Wing DDRP Office on Tinker AFB, OK as part of a random urinalysis. (**Att. 4a**). The Accused’s urine specimen tested positive for THC9 at **25 ng/mL**. (*Id.*). The Department of Defense cutoff for THC9 is 15 ng/mL. (**Att. 5**).

c. On **5 November 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4b**). The Accused’s urine specimen tested positive for THC9 at **244 ng/mL**. (*Id.*).

d. On **14 November 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4c**). The Accused’s urine specimen tested positive for THC9 at **315 ng/mL**. (*Id.*).

e. On **25 November 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4d**). The Accused’s urine specimen tested positive for THC9 at **149 ng/mL**. (*Id.*).

f. On **5 December 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4e**). The Accused’s urine specimen tested positive for THC9 at **110 ng/mL**. (*Id.*).

g. On **13 December 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4f**). The Accused’s urine specimen tested positive for THC9 at **50 ng/mL**. (*Id.*).

h. On **30 December 2024**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4g**). The Accused's urine specimen tested positive for THC9 at **74 ng/mL**. (*Id.*).

i. On **13 January 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4h**). The Accused's urine specimen tested positive for THC9 at **238 ng/mL**. (*Id.*).

j. On **21 January 2025**, the Accused was ordered to provide a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 4i**). SrA [REDACTED] performed as the DDRP observer for the Accused's urinalysis. (*Id.*). On 21 January 2025, at 1006 hours, after the Accused provided a urine specimen, the Drug Testing Program Drug Testing Register was completed by the Accused, SrA [REDACTED], and collector Mr. [REDACTED]. (*Id.*). On 21 January 2025, the Accused's urine specimen was shipped to the AFDTL. (*Id.*). The Accused's urine specimen tested positive for THC9 at **392 ng/mL**. (*Id.*).

4. On 3 February 2025, the Accused was offered Non-Judicial Punishment (NJP) for failing to go to the 552d OSS/CSS as directed on 16 August 2024 and for knowingly and wrongfully using THC9 on divers occasions between on or about 26 July 2024 and on or about 21 January 2025 in violation of Article 112a, UCMJ. (**Att. 6**). In his written response to the NJP, dated 6 February 2025, the Accused stated in pertinent part as follows:

2. I accept full responsibility for the allegations against me. I am *truly* sorry for my lack of judgement and want to provide some insight on how I found myself in this situation. I do not intend on making excuses for my actions, I just respectfully ask that you empathize with the struggles that led me to make this poor decision. The last two years and the transition I made to Oklahoma have been the hardest of my life. When I was notified that I had orders to Tinker AFB, my wife of 19 years told me that she was divorcing me and taking my daughter to Texas with her. The divorce was a complete shock to me. When I arrived here, I did not know anyone , and I did not have the support system I had relied on for 19 years anymore. I felt completely alone and found myself falling into a deep depression like I had never experienced before. I felt isolated and work was my only opportunity to make friends, but it is hard to make deep connections with those you work with, especially when everyone is going to PCS at some point.

3. The void my wife left me with cannot be understated and because of this desperate need for comfort, I accepted friendships with people whom I would have never been around normally. I began to drink alcohol at an alarming rate to try to cope with my depression and suicidal thoughts. Many of the poor choices were made as I attempted to drink my sorrows away. The environment this friend group created enabled this and ultimately led to me partaking in marijuana. After completing in-person rehab and ADAPT, I have tools and people I can rely on to help me control my stress. I know that my job as an Aerospace Physiology Technician is extremely important, and that people depend on me to achieve the mission. I will take every precaution to make sure that this never happens again. I am extremely grateful for the opportunity to correct my mistake, and I will not let that opportunity go to waste. As difficult as they have been, I am going to take these last two years of my life as a learning experience, and not repeat the same mistakes.

(**Att. 7**). He appealed the NJP and provided an additional written response explaining the circumstances present in his personal and professional life. (**Att. 8**).

5. Between on or about 22 January 2025 and on or about 9 June 2025, the Accused tested positive for THC9 on 13 separate urinalysis tests. (**Att. 9**).

a. On **31 January 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9a). The Accused's urine specimen tested positive for THC9 at **388 ng/mL**. (*Id.*).

b. On **10 February 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9b). SrA [REDACTED] performed as the DDRP observer for the Accused's urinalysis. On 10 February 2025, at 1325 hours, after the Accused provided a urine specimen, the Drug Testing Program Drug Testing Register was completed by the Accused, SrA [REDACTED], and collector Mr. [REDACTED]. (*Id.*). On 10 February 2025, the Accused's urine specimen was shipped to the AFDTL. (*Id.*). The Accused's urine specimen tested positive for THC9 at **88 ng/mL**. (*Id.*).

c. On **20 February 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9c). SrA [REDACTED] performed as the DDRP observer for the Accused's urinalysis. On 20 February 2025, at 1102 hours, after the Accused provided a urine specimen, the Drug Testing Program Drug Testing Register was completed by the Accused, SrA [REDACTED], and collector Mr. [REDACTED]. (*Id.*). On 20 February 2025, the Accused's urine specimen was shipped to the AFDTL. (*Id.*). The Accused's urine specimen tested positive for THC9 at **83 ng/mL**. (*Id.*).

d. On **27 February 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9d). The Accused's urine specimen tested positive for THC9 at **146 ng/mL**. (*Id.*).

e. On **6 March 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9e). The Accused's urine specimen tested positive for THC9 at **494 ng/mL**. (*Id.*).

f. On **13 March 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9f). The Accused's urine specimen tested positive for THC9 at **659 ng/mL**. (*Id.*).

g. On **21 March 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9g). The Accused's urine specimen tested positive for THC9 at **627 ng/mL**. (*Id.*).

h. On **31 March 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9h). The Accused's urine specimen tested positive for THC9 at **957 ng/mL**. (*Id.*).

i. On **8 April 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9i). The Accused's urine specimen tested positive for THC9 at **840 ng/mL**. (*Id.*).

j. On **16 April 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (Att. 9j). The Accused's urine specimen tested positive for THC9 at **1450 ng/mL**. (*Id.*).

k. On **24 April 2025**, the Accused was ordered to provide a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 9k**). The Accused's urine specimen tested positive for THC9 at **436 ng/mL**. (*Id.*).

l. On **5 May 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 9l**). The Accused's urine specimen tested positive for THC9 at **2105 ng/mL**. (*Id.*).

m. On **9 June 2025**, the Accused provided a urine sample as part of a *Bickel* follow-up urinalysis. (**Att. 9m**). The Accused's urine specimen tested positive for THC9 at **19 ng/mL**. (*Id.*).

6. On 10 September 2025, Lt Col [REDACTED], 552d Operations Support Squadron Commander, Tinker AFB, OK, preferred one charge and one specification against SSgt Kinyada J. Johnson, the Accused, for wrongfully using THC9, on divers occasions, between on or about 22 January 2025 and on or about 9 June 2025, in violation of Article 112a, Uniform Code of Military Justice (UCMJ). (**Att. 10**). On 18 December 2025, Colonel [REDACTED], 72d Air Base Wing Commander, referred that charge and specification to trial by special court-martial. (*Id.*).

7. On **5 January 2026**, the Accused provided a urine sample as part of a random urinalysis. (**Att. 11**). The Accused's urine specimen tested positive for THC9 at **1167 ng/mL** and THC-8 at 19 ng/mL. (*Id.*).

8. On 16 January 2026, the Government timely filed notices to include Mil. R. Evid. 304(d) Notice #1 (**Att. 12**) and Mil. R. Evid. 404(b) Notice #1 (**Att. 13**).

9. On 26 January 2026, Defense filed a Motion in Limine to Exclude Evidence and Argument Pursuant to Mil. R. Evid. 404(b). (*See* Defense's Motion).

BURDEN

10. As proponent of the evidence, the Government bears the burden. *United States v. Palmer*, 55 M.J. 205, 208 (C.A.A.F. 2001); *see also* R.C.M. 905(c)(2). The standard to resolve any issue is preponderance of the evidence. R.C.M. 905(c)(1).

LAW

11. Evidence of a crime, wrong, or other 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. Mil. R. Evid. 404(b)(1). Evidence which is offered simply to prove that an accused is a bad person is not admissible under Mil. R. Evid. 404(b). *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).

12. 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. Mil. R. Evid. 404(b)(2).

13. Evidence of both prior and subsequent uncharged conduct may be properly admitted under Mil. R. Evid. 404(b). *United States v. Greene-Watson*, 858 M.J. 340, 347 (C.A.A.F. 2025).

14. In a criminal case, the trial counsel must: (a) provide reasonable notice of any such evidence that the trial counsel intends to offer at trial so the accused has a fair opportunity to meet it; (b) articulate in the notice the permitted purpose for which the trial counsel intends to offer the evidence and the reasoning that supports the purpose; and (c) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice. Mil. R. Evid. 404(b)(3).

15. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Mil. R. Evid. 401. Irrelevant evidence is not admissible. Mil. R. Evid. 402(b).

16. The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403.

17. Military Rule of Evidence 404(b) is a rule of inclusion, not exclusion. *United States v. Humphreys*, 57 M.J. 83, 90-91 (C.A.A.F. 2002).

18. “The sole test under M.R.E. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused’s predisposition to crime.” *United States v. Tanksley*, 54 M.J. 169, 175 (2000) (quoting *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989)). As the Supreme Court stated when speaking of Mil. R. Evid. 404(b)’s counterpart, Fed. R. Evid. 404(b), “The 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). In addition to having a proper purpose, the proffered evidence must meet the standards of Mil. R. Evid. 104(b), Mil. R. Evid. 402, and Mil. R. Evid. 403. *See Reynolds*, 29 M.J. at 109.

19. Reflecting the combined requirements of these rules, our courts apply a three-pronged test for determining admissibility of other-acts evidence under Mil. R. Evid. 404(b). *Id.* Courts evaluate: (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.* (internal quotations, ellipses, and citations omitted).

20. The first prong is founded on Mil. R. Evid. 104(b), dealing with relevance conditioned on a fact. The threshold for this prong of admissibility is low. *United States v. Acton*, 38 M.J. 330, 333 (C.A.A.F. 1993) (internal citations omitted).

In determining whether the Government has introduced sufficient evidence to meet Mil. R. Evid. 104(b), the trial court neither weighs credibility nor makes a finding

that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact...by a preponderance of the evidence.

Id. (quoting *Huddleston*, 468 U.S.at 690)

21. Before admitting Mil. R. Evid. 404(b) evidence, the second prong of the *Reynolds* test requires the court to make a threshold inquiry that the proposed evidence is probative of a material issue other than character. *United States v. McDonald*, 59 M.J. 426, 429 (C.A.A.F. 2004) (citing *Huddleston*, 489 U.S. at 686; see also *United States v. Booker*, 62 M.J. 703 (A.F. Ct. Crim. App. 2006).

22. Mil. R. Evid. 404(b)(2) states: “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.” The list of potential purposes in Mil. R. Evid. 404(b)(2) “is illustrative, not exhaustive.” *United States v. Ferguson*, 28 M.J. 104, 108 (C.M.A. 1989).

23. In terms of the second prong, the Court has cautioned against “broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under M.R.E. 404(b).” *Ferguson*, 28 M.J. at 109 (internal citations omitted).

24. Evidence of a common plan or scheme is admissible under Mil. R. Evid. 404(b). Acts admitted as evidence of a common plan or scheme needn’t be identical, but instead must share enough common factors so as to be substantially similar to the charged conduct. *Greene-Watson*, 858 M.J. at 347. Evidence of motive or opportunity is also admissible under Mil. R. Evid. 404(b). Regarding motive, in *United States v. Watkins*, 21 M.J. 224, 227 (C.M.A. 1986), the court held that evidence of motive is relevant “to show the doing of an act by a person as an outlet for [an] emotion.” Such evidence is admissible where “the prior acts of conduct [are] the type which reasonably could be viewed as ‘the expression and effect of the existing internal emotion’” and “the same motive [is] shown to have existed in [the Accused] at the time of the subsequently charged acts.” *Id.* (citations omitted).

25. The third prong of the *Reynolds* test requires a weighing of probative value and the danger of unfair prejudice; if the probative value is “substantially outweighed” by the danger of unfair prejudice, then the evidence should be excluded. “The general risk, of course, is that members will treat evidence of uncharged acts as character evidence and use it to infer that an accused has acted in character, and thus convict.” *United States v. Staton*, 69 M.J. 228, 232 (C.A.A.F. 2010).

26. The Mil. R. Evid. 403 balancing test favors admissibility. See *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) (the balance between probative value and prejudicial effects “should be struck in favor of admission.”). Where there is a close balance struck between probative value and prejudice, the evidence should be admitted. *Id.* Evidence should be excluded only where its probative value is low, or related to a tangential issue, and it poses a high risk of prejudice or other issues contemplated by Mil. R. Evid. 403. See, e.g., *United States v. Gonzalez*, 16 M.J. 58 (C.M.A.

1983) (holding that the balancing test was designed to protect the finder of fact from demonstrably misleading, confusing, or fraudulent evidence).

27. C.A.A.F. has instructed that in conducting the Mil. R. Evid. 403 balancing test for legal relevance, a military judge should consider the following nine factors: (1) the strength of the proof of the prior act; (2) the probative weight of the evidence; (3) the potential to present less prejudicial evidence; (4) the possible distraction of the fact-finder; (5) the time needed to prove the prior conduct; (6) the temporal proximity of the prior event; (7) the frequency of the acts; (8) the presence of intervening circumstances; and (9) the relationship between the parties. *United States v. Barnett*, 63 M.J. 388, 396 (C.A.A.F. 2006) (citing *United States v. Berry*, 61 M.J. 91, 95-96 (C.A.A.F. 2005) (citing in turn *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000))).

28. Limiting instructions given by the judge to restrict evidence to its proper scope can be an effective tool in the Mil. R. Evid. 404(b) context, particularly when evaluating the Mil. R. Evid. 403 balance of probative value against unfair prejudice. *See Huddleston*, 485 U.S. at 692-693; *United States v. Dorsey*, 38 M.J. 244, 247 (C.A.A.F. 1993).

29. When evidence of the same or similar nature is already before the court, any prejudicial impact is diminished. *Acton*, 38 M.J. at 334.

30. Closely intertwined evidence of the facts and circumstances of an offense are always admissible.

Facts and circumstances surrounding an offense are always admissible, whether or not they fall into the category of uncharged misconduct. This type of evidence often has been termed “res gestae.” It includes conduct, or misconduct not charged, which is admissible because it so closely intertwined with the offense charged as to be part and parcel of that offense Evidence of “res gestae” is always admissible both on the merits and during presentencing proceedings regardless of the plea, subject only to the balancing test prescribed by Mil. R. Evid. 403.

United States v. Keith, 17 M.J. 1078, 1079-80 (A.F.C.M.R. 1984) (citation omitted); *see also United States v. Thomas*, 11 M.J. 388, 392-93 (C.M.A. 1981) (holding admission of uncharged res gestae acts “can be justified in terms of preventing a gap in the narrative of occurrences”).

31. “Res gestae evidence is vitally important in many trials It enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation” *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (citations omitted).

32. In *United States v. Cousins*, 35 M.J. 70, 70-71 (C.A.A.F. 1992), the Appellant was charged with and convicted at a general court-martial, contrary to his pleas, of wrongfully using cocaine between 28 and 31 July 1989 in violation of Article 112a, UCMJ. The charge and specification were based on a positive urinalysis. *Id.* During findings, the military judge permitted a government witness to testify that appellant used methamphetamines 9-11 times prior to the offense charged. *Id.* The military judge instructed the members, “Evidence that the accused may

have used methamphetamine before 29 July 1989 was presented to you as background information. 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 criminal tendencies and that he, therefore, committed the offense charged.” *Id.* at 73. C.A.A.F. held the military judge committed plain error and reversed. In analyzing whether the government witness’s testimony was admissible, the Court conducted a review under *U.S. v. Reynolds*. With respect to the second test, the Court held the government witness’s “Testimony that appellant used methamphetamines 9-11 times previously did not make it more or less probable that Ms. Sigmon provided appellant with cocaine at her house on July 29.” *Id.* at 74-75. The Court held that the evidence of appellant’s prior drug use was irrelevant; therefore, it failed the second *Reynolds* test. *Id.* The Court also ruled that the third test “clearly was not met in this case, because its probative value was substantially outweighed by the danger of unfair prejudice.” *Id.* Lastly, the Court found the military judge’s instructions did not cure the error. *Id.* The military judge told the court members that the evidence of prior drug use was “background information.” *Id.* “[U]ncharged misconduct is admissible as background evidence under Mil. R. Evid. 404(b).” *Cousins*, 35 M.J. at 77 (Crawford, J., dissenting). Although the military judge cautioned them not to conclude that appellant “is a bad person or has criminal tendencies,” he did not define “background information” or tell the court members for what legitimate purpose they could consider the evidence. *Cousins*, 35 M.J. at 74-75. According to the Court, “[t]his lack of guidance left the evidence of uncharged misconduct in the posture of a ‘wild card,’ to be considered and used by the court members for undefined purposes.” *Cousins*, 35 M.J. at 74. For that reason, the Court found the instruction was inadequate to cure the error. *Id.*

33. In *United States v. Thompson*, 63 M.J. 228, 229 (C.A.A.F. 2006), the Appellant was charged with, among other things, three *marijuana*-related offenses in violation of Article 112a, UCMJ. The Appellant was convicted at a general court-martial, contrary to his pleas, of wrongful use, possession, and distribution of marijuana in violation of Article 112a, UCMJ. *Id.* At issue on appeal was whether certain evidence of uncharged misconduct as to the member’s alleged *pre-service use of marijuana* had been improperly admitted. *Id.* Specifically at issue were admissions to Airman JB about Appellant’s use of marijuana “all the time back home” and a statement to a military dependent, DG, about Appellant’s use of marijuana in high school. *Id.* The military judge permitted testimony about the statements to DG and Airman JB relating to preservice use of marijuana because they “reflected ‘knowledge of marijuana use’ and ‘knowledge and absence of mistake.’” *Id.* at 230-31. The Appellant argued that two pretrial statements that contained information about his preservice drug use were erroneously admitted in that they served no legitimate purpose, merely painted him as a habitual drug user, and were prejudicial to his substantial rights. *Id.* at 229.

34. In conducting an analysis under the three-part *Reynolds* test, the Court held that Appellant’s admissions about his preservice drug use failed the second prong of the test. *Id.* at 230-31. “Even though M.R.E. 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 offenses.” *Id.* “[E]vidence of prior drug use is not inadmissible per se at a court-martial. Mil. R. Evid. 404(b) permits evidence of ‘other crimes, wrongs, or acts’ to prove facts other than a person’s character, such as ‘intent, knowledge, or absence of mistake or accident.’” *Id.* (citations omitted). The Court found the “express purposes for which the military judge admitted this evidence of prior drug use were to show knowledge of marijuana use and the absence of mistake.” *Id.* at 231. Because Appellant

“did not raise the issues of lack of knowledge or mistake of fact... that evidence served no relevant purpose and fail[ed] the second prong of the Reynolds test.” *Id.* The Court concluded the military judge abused his discretion in admitting this evidence of preservice drug use but that the error was not prejudicial. *Id.*

35. Mil. R. Evid. 304 addresses the voluntariness of pretrial statements made by an accused and any derivative evidence derived therefrom. *See* Mil. R. Evid. 304. “While the rule itself makes no distinction between statements taken by law enforcement agents and those in an official capacity and statements that were the result of a casual conversation, the analysis of Mil. R. Evid. 304 suggests they should be treated differently. Rule 304 deals with the admissibility of ‘an involuntary statement’ obtained through the actions of officials or agents of the United States in a governmental capacity.” *United States v. Trimper*, 26 M.J. 534, 537 (A.F.C.M.R. 1988); *See also* 2016 Manual for Courts-Martial, App. 22, Section I, Rule 304. For the defense to challenge such statements, Mil. R. Evid. 304(d) imposes a notice requirement on the prosecution. 2016 Manual for Courts-Martial, App. 22, Section I, Rule 304. “Before arraignment, the prosecution must disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements, that the prosecution intends to offer against the accused.” Mil. R. Evid. 304(d).

36. The current version of Mil. R. Evid. 304(d) is the same as the version found in the 2023, 2019, and 2016 versions of the Manual for Courts-Martial (MCM). Neither the rule itself nor any drafter’s analysis clarifies the language of the rule as it relates to the adequacy of the prosecution’s notice. 2016 MCM, App. 22, Section I, Rule 304. However, persuasive authority from the Army Court of Criminal Appeals holds that delineated line-item Mil. R. Evid. 304(d) notices, while perhaps a “best practice,” are not required under the rule. *United States v. Urik*, No. ARMY 20140844, at *6 (A. Ct. Crim. App. Mar. 7, 2017) (“A trial counsel complies with the 300-series of the Rules of Evidence when he or she turns over all statements by an accused. While it is a commendable Army practice to separately turn over a list of statements that the trial counsel intends to introduce at trial, this is not a strict requirement.”).

37. “The disclosure requirement applies only to ‘relevant’ statements; and the relevance of some pretrial statements made by the accused may not be foreseen until the defense has presented its case.” *United States v. Callara*, 21 M.J. 259, 263 (C.M.A. 1986). Furthermore, “if there is a reasonable prospect that the statement might be offered in evidence during the trial, then disclosure is required.” *Id.*

38. Turning to additional persuasive authority, in their learned treatise on the Military Rules of Evidence, Prof. Steven Saltzburg, et al, discuss the policy rationale behind Mil. R. Evid. 304(d) notices and what, if any, remedial action might be appropriate in the event of over-generalized notice:

[Mil. R. Evid. 304(d)] is not hinged on the prosecutor’s intended use and contains no sanction for failing to comply. In addressing a similar disclosure provision in Rule 12 of the Federal Rules of Criminal Procedure, the Advisory Committee in its Notes on the 1974 Amendments to the Rules stated that excluding evidence for

failure to notify would be too burdensome considering other broad discovery rights. That rationale is equally applicable in military practice. Untimely disclosure should support a continuance, however. This would be consistent with (f)(2) which recognizes that disclosure may occur after arraignment and further provides that the military judge may take whatever action is appropriate.

1 Military Rules of Evidence Manual § 304.02 (2025).

39. “If the prosecution seeks to offer a statement made by the accused or derivative evidence that was not disclosed before arraignment, the prosecution must provide timely notice to the military judge and defense counsel. The defense may object at that time, and the military judge may make such orders as are required in the interests of justice.” Mil. R. Evid. 304(f)(2). “Significantly, the Rule does not specifically prescribe suppression of an individual statement by an accused. Instead, it grants authority to the military judge to make such orders as are required in the interests of justice.” *Callara*, 21 M.J. at 263.

ARGUMENT

40. **Paragraph 1.a. of Government’s Mil. R. Evid. 404(b) Notice:** Evidence that, on divers occasions, between on or about 26 July 2024 and on or about 21 January 2025, the Accused knowingly and wrongfully ingested delta-9 tetrahydrocannabinol (THC9) as evidenced by urine samples submitted by the Accused that subsequently tested positive for THC9 and/or 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, including but not limited to the following: (1) “I accept full responsibility for the allegations against me,” or words to that effect; (2) “I do not intend on making excuses for my actions, I just respectfully ask that you empathize with the struggles that led me to make this poor decision,” or words to that effect; (3) “I accepted friendships with people whom I would have never been around normally,” or words to that effect; (4) “The environment this friend group created enabled...and ultimately led to me partaking in marijuana” or words to that effect; (4) “Many of the poor choices were made as I attempted to drink my sorrows away,” or words to that effect; (5) “I am extremely grateful for the opportunity to correct my mistake, and I will not let that opportunity go to waste” or words to that effect; (6) “I am going to take these last two years of my life as a learning experience, and not repeat the same mistakes” or words to that effect; (7) “I understand that my actions are that of my own” or words to that effect.

a. *Res Gestae*:

i. Evidence of the Accused’s knowing and wrongful ingestion of THC9 on divers occasions between on or about 26 July 2024 and on or about 21 January 2025, as evidenced by urine samples submitted by the Accused that subsequently tested positive for THC9 and/or the Accused’s voluntary written admissions about using THC9, are closely intertwined facts and circumstances with the charged offense (*res gestae*) of wrongfully using THC9 on divers occasions between on or about 22 January 2025 and on or about 9 June 2025 in violation of Article 112a, UCMJ.

ii. The Accused tested positive for THC9 on thirteen (13) *Bickel* urinalyses between on or about 22 January 2025 and on or about 9 June 2025. On 31 January 2025 (the urine specimen collection date for the first positive drug test in the charging window), the Accused provided a urine sample as part of a *Bickel* re-inspection test. As a matter of law, a *Bickel* re-inspection test is a continuation of the original inspection, and re-inspection must be repeated until a negative result is received. Stated differently, a *Bickel* test by its very nature means the prior urinalysis test was positive for a controlled substance (the individual ingested a controlled substance/had the substance in their body), thus necessitating a *Bickel* re-inspection test. Those are facts anticipated to be presented in the government's findings case. Consequently, the Accused's nine (9) prior positive urinalysis tests—the original *random* urinalysis on 24 October 2024 and eight (8) *Bickel* re-inspection tests (5 November 2024, 14 November 2024, 25 November 2024, 5 December 2024, 13 December 2024, 30 December 2024, 13 January 2025, and 21 January 2025)—between on or about 26 July 2024 and on or about 21 January 2025 are closely intertwined facts and circumstances with the charged offense (*res gestae*).

iii. These prior acts show the Accused provided a urine sample on multiple occasions between on or about 26 July 2024 and on or about 21 January 2025 that subsequently tested positive for THC9, and the thirteen (13) positive *Bickel* re-inspection tests between on or about 22 January 2025 and on or about 9 June 2025 are a continuation of the original inspection (which happened on 24 October 2024) and the subsequent eight (8) *Bickel* re-inspection tests. The admissions of the Accused to knowingly and wrongfully using THC9 are closely related to these positive drug tests between on or about 26 July 2024 and on or about 21 January 2025.

iv. Simply allowing the government to introduce evidence of these prior positive drug tests is not enough. The Court must allow the government to couple these prior positive drug tests with the admissions of the Accused to knowingly and wrongfully using THC9. Doing so enables the factfinder to see the full picture so that the evidence will not be confusing, and it prevents gaps in the narrative which will induce unwarranted speculation. *Metz*, 34 M.J. at 351. Evidence not part of the crime charged but pertaining to the immediate chain of events explaining the context, motive, and set-up of the crime is properly admitted because the previous events are linked in time and circumstances with the charged crimes, form an integral and natural part of an account of the crimes, and are necessary to complete the story of the crimes for the jury. Even if this Court finds the acts are not *res gestae*, the evidence is admissible under 404(b).

b. **Reynolds First Prong:** The Defense has conceded that the first prong of *Reynolds*, the question of conditional relevancy, would be satisfied by SSgt Johnson's statements in his NJP rebuttal and that he "accepted responsibility in his response." The Accused provided a written response to an offer of NJP, admitting to failing to go to the 552d OSS/CSS on 16 August 2024 as directed and to knowingly and wrongfully using THC9 on divers occasions between on or about 26 July 2024 and on or about 21 January 2025 in violation of Article 112a, UCMJ. In addition, the Accused explained the circumstances surrounding his wrongful use of THC9. Based on his written admissions alone, if offered at trial (through MSgt [REDACTED] (then-552 OSS/CCF) and/or Lt Col [REDACTED] (then-552 OSS/CC)), a panel could reasonably conclude that the Accused did commit those prior acts. It is more than sufficient to meet the low bar of the first *Reynolds* prong. The evidence further supporting this first prong includes the AFMES, DDRP, and AFDTL records related to the Accused's blood serum result and nine (9) urinalysis results—

the original *random* urinalysis on 24 October 2024 and eight (8) *Bickel* re-inspection tests (5 November 2024, 14 November 2024, 25 November 2024, 5 December 2024, 13 December 2024, 30 December 2024, 13 January 2025, and 21 January 2025)—between on or about 26 July 2024 and on or about 21 January 2025, which were all positive for THC9.

c. **Reynolds Second Prong:** Testimony regarding the Accused's prior acts is not offered by the Government as propensity evidence. Rather, as stated in the Government's Mil. R. Evid. 404(b) notice, it is offered to show common plan or scheme. Specifically, the prior positive drug tests and the admissions of the Accused to using THC9 evidence a pattern of operation that shows a common plan or scheme for the Accused to obtain and ingest THC9.

i. These offenses, the Accused's nine (9) prior positive urinalysis tests, are similar in nature to the charged conduct. In the charged conduct, the Accused tested positive on thirteen (13) *Bickel* urinalysis tests. In each of those thirteen (13) tests, the Accused reported to the 72d ABW/DDRP office at Tinker AFB, OK where the Accused would, among other things, check-in with the Collector at the front desk and present the Collector with the Order to Provide a Urinalysis Sample for review and signature. IAW with their drug testing observer's briefing, a designated Observer would, among other things, go with the Accused to the restroom and direct the Accused to rinse his hands with only water and dry them. The Observer would direct the Accused to a stall or urinal and observe the Accused urinate into a bottle. The Observer would observe the Accused provide a sufficient quantity of urine in the bottle and then watch the Accused cap the bottle securely. That bottle was then taken by the Accused to the collector's station while remaining in eyesight of the Observer. The Accused would verify the collection and identification information printed on the drug testing program testing register and specimen bottle label. The Collector would apply a red tamper-evident tape to the bottle. The Accused, the Observer, and the Collector would initial the bottle and sign the testing register stating that the urine in the bottle belonged to the Accused. The Accused's urine was then packaged and shipped to AFDL where it tested positive for THC9. Each of the Accused's nine (9) prior positive urinalysis tests and the thirteen (13) positive urinalysis tests occurring during the charged timeframe followed this same procedure.

ii. In addition to following the same procedure, each test that occurred within the charged timeframe has connections with the tests that occurred outside of the charged timeframe. All of the tests took place at the same facility. Similar people were involved with both sets of tests, to include not only the collectors and shippers, but also one of the observers, SrA [REDACTED], who observed the Accused provide urine samples conducted during the charged and the uncharged misconduct.

iii. Additionally, the Accused responded to an NJP issued for these nine (9) prior urinalysis tests in February 2025, which was during the timeframe of the charged conduct. In his written response to the offer of NJP, dated 6 February 2025, the Accused admitted to using marijuana on divers occasions, and he wrote this admission while continuing to test positive (31 January 2025) for THC9 within the charging window. This action further connects the prior urinalyses with those taking place during the timeframe of the charged conduct. Moreover, in his written response, the Accused wrote about "the struggles that led" him to make these poor decisions. The Accused described his wife of 19 years who divorced him and took their daughter to Texas to live with her. According to the Accused, this left a void in his life and made him feel depressed. This in turn

caused the Accused to accept “friendships with people whom I would have never been around normally.” This environment created, enabled, and ultimately led to his poor choices to use THC9. The Accused also described his professional frustrations at Tinker AFB, noting his “work life has been the least fulfilling in my career since arriving to Tinker AFB.” According to the Accused, “I have felt overlooked, ignored, not tak[en] seriously, underutilized, not cared for and even more isolated from the Air Force!” These same circumstances that supposedly led to his wrongful use of THC9 between on or about 26 July 2024 and on or about 21 January 2025 overlapped with and continued to exist during the charging window, perhaps even more acutely. As part of the NJP, the commander reduced the Accused in grade and imposed forfeiture of \$500 pay per month for two months. As noted by the Accused in his appeal response, dated 24 February 2025, “I have child support, alimony, mortgage, and other expenses that I am obligated to take care of with less money.” These same financial obligations continued to exist during the charging window, but now he was a Staff Sergeant making even less money than when he was a Technical Sergeant. As the Accused noted in his response, he was sent to rehab a year ago. Rehab did not work. He is still stationed at Tinker AFB. His professional life was still the same (perhaps even less fulfilling after the NJP for repeated use of THC9). Bottom line, the circumstances that existed during the charging window are sufficiently similar to the circumstances that existed during the prior positive drug tests.

iv. In its Motion, Defense argues that evidence of the Accused’s previous drug use is not relevant until Defense makes it relevant. According to Defense, “[i]n no way do allegations of prior drug use without any overlap with the charged timeframe make it more or less probable that A1C [REDACTED] [sic] 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.” Defense fails to acknowledge the closely related nature of the charged conduct with the uncharged conduct. There is significant critical overlap. Moreover, the two cases Defense relied upon are distinguishable from this case. Unlike *Cousins*, which contemplates the introduction of testimony about prior *methamphetamine* use to support current usage of *cocaine*, and *Thompson*, which discusses the admissibility of testimony about *pre-service drug usage*, this case involves a continuation of immediately preceding positive drug tests for the same exact drug named in the charge.

d. To the extent Defense raises any issues/defenses related to lack of knowledge and intent or mistake of fact, this evidence would also be admissible under Mil. R. Evid. 404(b) in rebuttal as proof that the Accused knowingly used THC9 during the dates of the charged offenses, has knowledge of THC9, and knew that the substance the Accused was ingesting was THC9.

i. The Accused’s prior positive urinalysis results and admission to use of THC9 speak to knowing and intentional usage of THC9. Knowing prior use of THC9 directly rebuts any inference, evidence, or defense that the THC9 use reflected in the charge and specification was somehow unknowing, innocent, or due to mistake or accident. The Accused’s prior use additionally demonstrates the Accused’s knowledge of what THC9 was and how to use it. Due to the Accused’s repeated prior use, demonstrated through the previous urinalyses, and through the Accused’s own admissions, the Accused was aware of what THC9 looked like, felt like, tasted

like, smelled like, and the effects it had on him. Due to this knowledge, the likelihood of the Accused unknowingly or innocently ingesting THC9 is nonexistent.

ii. Defense took great pains to note in its motion that it “has not filed an innocent or unknowing ingestion defense notice” in this case. Fair enough. Unknowing ingestion and ignorance or mistake of fact are not affirmative defenses requiring notice under R.C.M. 701(b)(2). Defense is not required to file a notice of unknowing ingestion for the Government to notice its usage of evidence in its possession in order to rebut said defense.

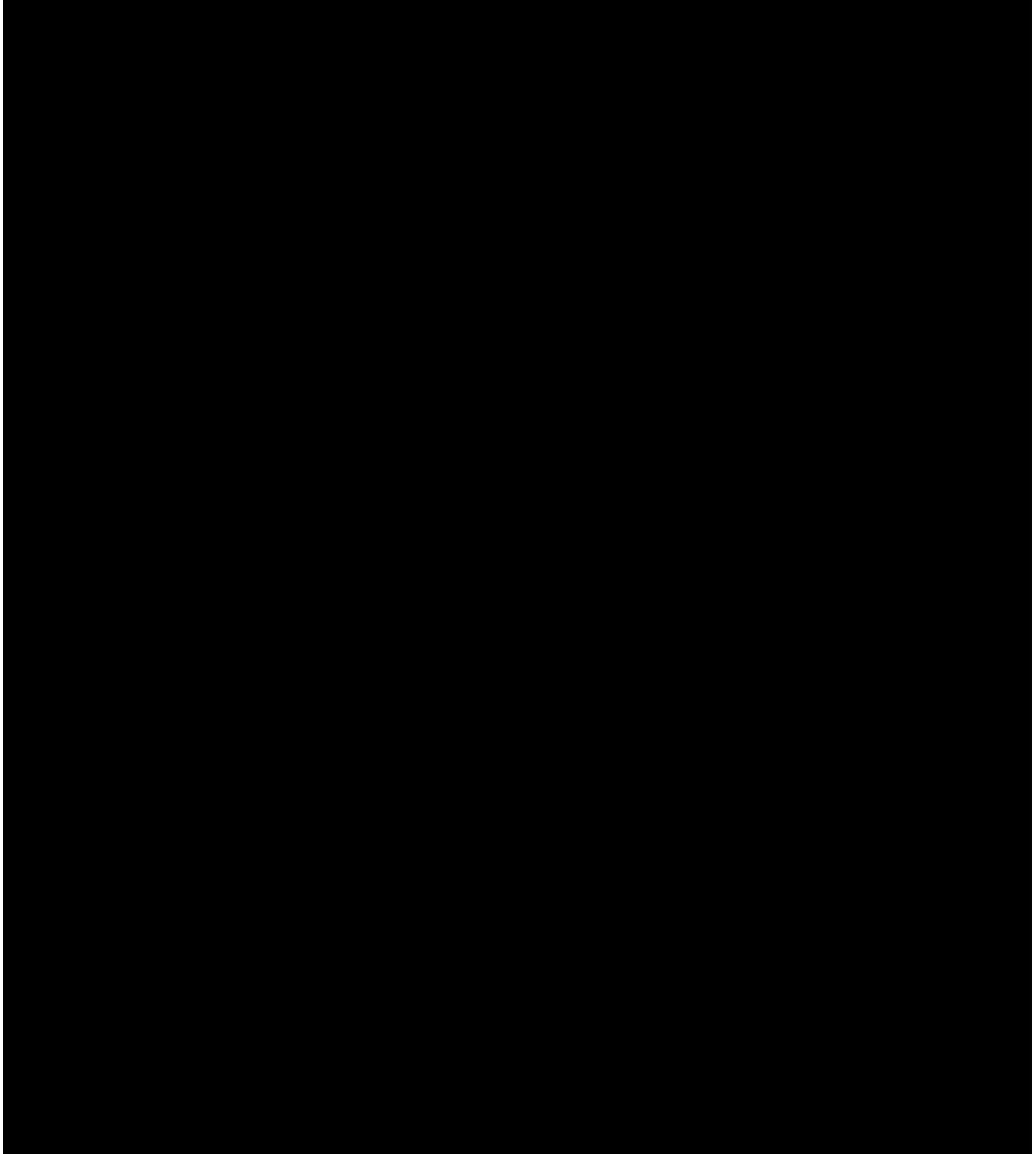
e. **Reynolds Third Prong:** The non-propensity purposes for which the Government intends to use the uncharged misconduct are all highly probative to the charge and specification in this case.

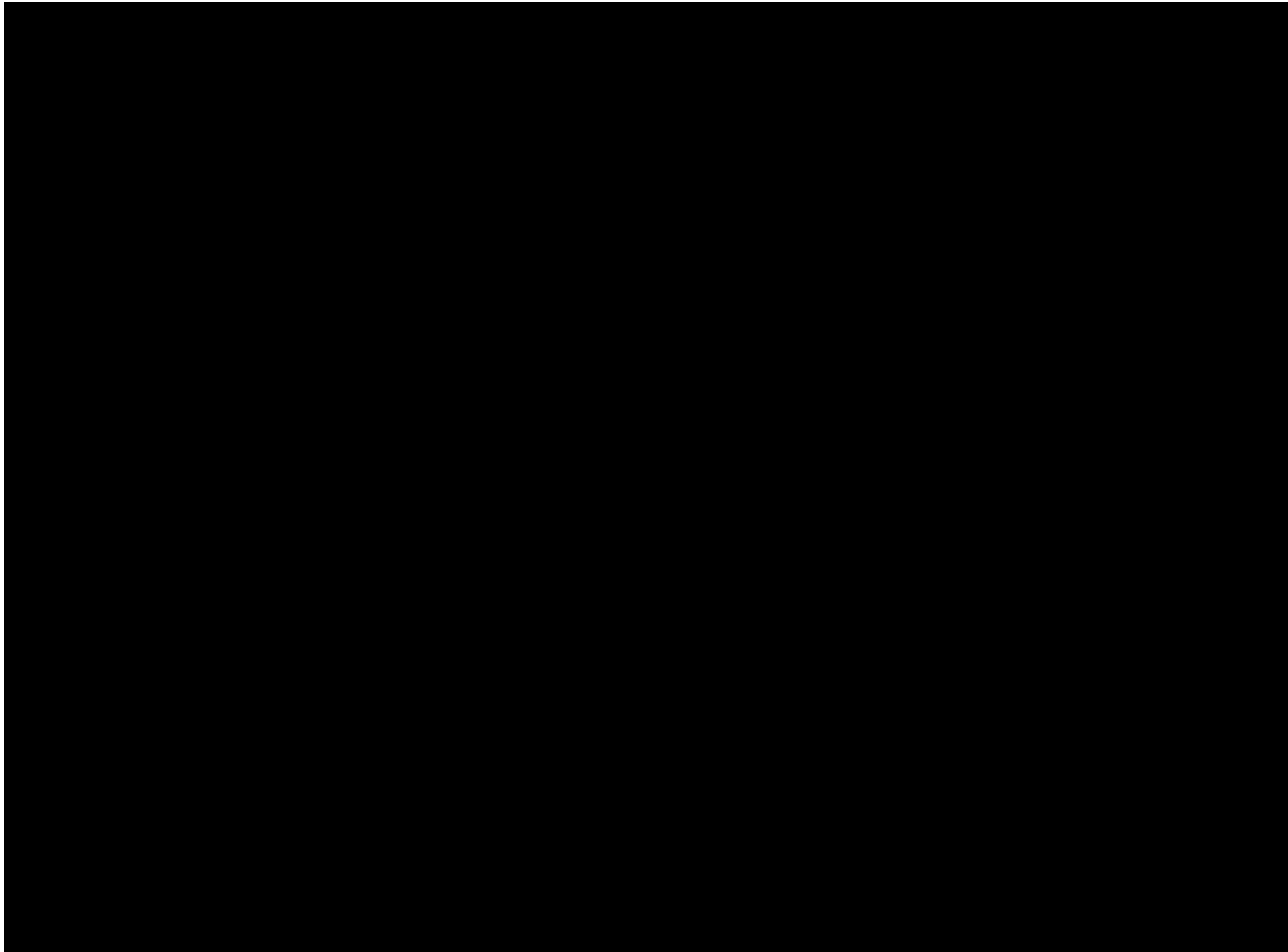
i. In this instance, the presence of the previous urinalyses is *res gestae* to the evidence in the current case. Without the random urinalysis on 24 October 2024, there would have been no *Bickel* tests collected. Without the eight previous *Bickel* tests on 5 November 2024, 14 November 2024, 25 November 2024, 5 December 2024, 13 December 2024, 30 December 2024, 13 January 2025, and 21 January 2025, there would not be a *Bickel* test on 31 January 2025, which is the first urinalysis occurring within the timeframe of the Accused’s charged conduct. The Accused’s previous positive urinalyses are highly probative to the charged offenses and factually necessary to paint a full picture, avoid speculation, and complete the story. Distraction and speculation would occur if the members had no context as to where the Accused’s positive *Bickel* test on 31 January 2025 came from, making this evidence more probative.

ii. Additionally, the Accused’s common plan or scheme is highly probative to the charge and specification in this case. This is the point for which the Accused’s prior acts are offered, and those prior acts are highly probative of this point. The Accused’s prior THC9 use and admissions about his prior THC9 use are extremely probative. Common plan or scheme is particularly important in this case, where the prior drug tests and drug tests occurring within the charging window were a direct and immediate continuation of events with no intervening circumstances. In addition, the circumstances surrounding the collection and testing of the urine samples within the uncharged and charged timeframes and the Accused’s personal and professional life are substantially similar and explain the Accused’s continuing and repeated use of THC9 on divers occasions. The evidence supporting these prior acts is strong as the Government intends to offer certified copies of DDRP and AFDTL records coupled with the Accused’s admissions of knowing and wrongful use of THC9. For the same reason, there is low risk of creating a “trial within a trial” because the Accused admitted to knowingly and wrongfully using THC9 on divers occasions. Any risk that the members will “convict [the Accused] of past behavior” may be averted with a detailed instruction from the Military Judge. Panel members are regularly expected to defer to these instructions and are chosen for their ability to do so.

iii. To the extent Defense raises any issues/defenses related to lack of knowledge and intent or mistake of fact, the Prosecution intends to offer this evidence in rebuttal as proof that the Accused knowingly used THC9 during the dates of the charged offenses, had knowledge of THC9, and knew that the substance the Accused was ingesting was THC9. If Defense opens the door by raising any of these issues/defenses, evidence rebutting lack of knowledge or mistake of fact are even more probative to the charge and specification of this case. The probative weight is strong

because it shows that the Accused was acting knowingly when using THC9 (and knew the substance he was using was THC9 or of a contraband nature) and that it was not some sort of mistaken, accidental, or innocent ingestion. This is a far cry from the “no probative value” Defense claims this evidence has. Further, it would not distract the members to hear about other THC9 use when the trial is already about THC9 use on divers occasions.





42. **Paragraph 1.c. of Government’s Mil. R. Evid. 404(b) Notice:** Evidence 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.

a. ***Reynolds* First Prong:** Defense asserts that because the positive urinalysis did not include “a full litigation package from the Air Force Drug Testing Laboratory” and Government provided “other litigation packages for the alleged positive tests during the charged timeframe,” it is “not reasonable that the court members can find that SSgt Johnson tested positive for THC-8 and THC9 by a preponderance of the evidence” However, records from the DDRP support the collection, packaging, and shipping of the Accused’s urine sample to AFDTL for testing. The Accused’s urine sample tested positive for THC9 and THC8 as reflected on the Electronic DD 2624. Combined, these bits of evidence form a sufficient basis for the Court to conclude that the members could reasonably find by a preponderance of the evidence that the Accused knowingly and wrongfully used THC9. It is more than sufficient to meet the low bar of the first *Reynolds* prong. Additionally, testimony from the observer, Drug Testing Program Administrative Manager, and forensic toxicologist combined with certified copies of the collection and testing of that urine sample will be offered at trial.

b. **Reynolds Second Prong:** Evidence regarding the Accused's positive drug test in January 2026 is not offered by the Government as propensity evidence. Rather, as stated in the Government's Mil. R. Evid. 404(b) notice, it is offered to show common plan or scheme.

i. The Accused's positive drug test in January 2026 is similar in nature to the charged conduct. In the charged conduct, the Accused tested positive on thirteen (13) *Bickel* urinalyses, which were a direct continuation of the original random urinalysis in October 2024. In each of those thirteen (13) tests, the Accused reported to DDRP where an observer watched the Accused urinate into a bottle. That bottle was then taken to the collector's station where the Accused, the observer, and the collector signed the testing register stating that the urine in the bottle belonged to the Accused. The Accused's urine was then shipped to AFDL where it tested positive for THC9. This subsequent test followed the same procedure.

ii. Defense argues that evidence of the Accused's subsequent drug use is inadmissible because it takes place after the charged conduct. However, evidence of both prior and subsequent uncharged conduct may be properly admitted under Mil. R. Evid. 404(b). The Accused's positive drug test from January 2026 contains numerous common factors so as to be substantially similar to the charged conduct and is therefore admissible as proof of a common plan or scheme.

c. Additionally, to the extent Defense raises issues related to lack of knowledge or mistake of fact, the Prosecution intends to offer this evidence in rebuttal as proof that the Accused knowingly used THC9, knowledge of THC9 and that the substance the Accused was using was THC9, and lack of mistake/accident on the part of the Accused during the dates of the charged offenses. The Accused's additional positive urinalysis (which occurred after his NJP in February 2025 and after pretrial and referral of the charge and specification in this case) since his last *Bickel* test speaks to the Accused's knowledge of THC9. This subsequent test demonstrates that, during the dates of the charged offenses, the Accused had knowledge of what THC9 was and that the substance the Accused was ingesting was THC9.

d. **Reynolds Third Prong:** Under the third prong of the *Reynolds* test, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. The non-propensity purposes for which the Government intends to use the uncharged misconduct are all highly relevant to the charge and specification in this case. The Government does not intend to offer this evidence to show any improper propensity purpose. Far from "smearing SSgt Johnson as a [habitual] drug user," a subsequent positive test serves to reinforce the common plan or scheme to obtain and use THC9 and to rebut any issues/defenses that might be raised in terms of lack of knowledge and intent or mistake of fact. The subsequent test, like the tests prior to the charged misconduct, shows that the Accused was acting knowingly when using THC9 and that it was not some sort of mistaken, innocent, or accidental ingestion.

Mil. R. Evid. 304(d)

43. Defense contends that the Government "did not provide a separate M.R.E. 304(d) statement" and instead included only a "catch-all provision" in its Mil. R. Evid. 404(b) notice. Delineated line item 304(d) notices are not required. The Government timely disclosed the evidence and, as a precaution, filed a Mil. R. Evid. 304(d) notice with the Court on 16 January 2026. The "alleged

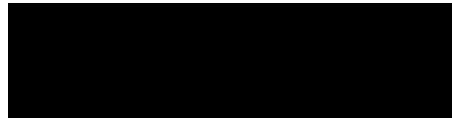
statements” Defense takes issue within the Government’s Mil. R. Evid. 404(b) notice were provided by the Accused himself, were properly turned over to defense in discovery, and were noticed in the Government’s Mil. R. Evid. 304(d) notice.

44. Finally, Defense cites to Mil. R. Evid. 304(f)(4) in its response and requests. This rule is applicable to involuntary statements of a witness or accused, and it enables Defense to make a general objection to suppress or object to evidence when Defense is unable to interview adequately those persons involved in the taking of a statement. The statements noticed in Government’s Mil. R. Evid. 304(d) notice, however, were all made voluntarily by the Accused himself. No one took his statement and, in fact, the Accused properly exercised his Article 31, UCMJ, rights and refused to make a statement to Security Forces Investigators when they brought him in for questioning. As such, Defense’s claim that it is unable to adequately interview the persons involved in making a statement is without merit, and the Accused’s voluntary statements are admissible.

RELIEF REQUESTED

WHEREFORE, the Prosecution respectfully requests this Honorable Court deny the Defense motion to exclude evidence pursuant to Mil. R. Evid. 404(b). The Prosecution requests an Article 39(a) session to present additional evidence and argument on the motion.

Respectfully submitted,



ALISON R. SHERRILL, Capt, USAF
Assistant Trial Counsel

13 Attachments:

1. 72 ABW Bickel Policy Memo, dated 26 August 2021 (2 pages)
2. 72 SFS/S5R Incident Report (redacted), dated 27 August 2024 (17 pages)
3. Forensic Toxicology Investigation Report (redacted), dated 13 September 2024 (6 pages)
4. One Compact Disc (CD) labeled “DDRP Records for NJP-Related Drug Tests” containing nine (9) PDF files titled as follows:
 - a. “4a_24 October 2024” containing DDRP Records (redacted) for 24 October 2024 Urinalysis, various dates (7 pages)
 - b. “4b_5 November 2024” containing DDRP Records (redacted) for 5 November 2024 Urinalysis, various dates (5 pages)
 - c. “4c_14 November 2024” containing DDRP Records (redacted) for 14 November 2024 Urinalysis, various dates (7 pages)
 - d. “4d_25 November 2024” containing DDRP Records (redacted) for 25 November 2024 Urinalysis, various dates (7 pages)
 - e. “4e_5 December 2024” containing DDRP Records (redacted) for 5 December 2024 Urinalysis, various dates (6 pages)

- f. "4f_13 December 2024" containing DDRP Records (redacted) for 13 December 2024 Urinalysis, various dates (7 pages)
- g. "4g_30 December 2024" containing DDRP Records (redacted) for 30 December 2024 Urinalysis, various dates (7 pages)
- h. "4h_13 January 2025" containing DDRP Records (redacted) for 13 January 2025 Urinalysis, various dates (7 pages)
- i. "4i_21 January 2025" containing DDRP Records (redacted) for 21 January 2025 Urinalysis, various dates (7 pages)
5. Excerpts of DoDI 1010.16, incorporating Change 1 dated 22 August 2025 (3 pages)
6. AF 3070, dated 3 February 2025 (4 pages)
7. Response to Nonjudicial Punishment Proceedings, dated 6 February 2025 (2 pages)
8. Appeal to Nonjudicial Punishment Proceedings, undated (4 pages)
9. One Compact Disc (CD) labeled "DDRP Records for Drug Tests" containing thirteen (13) PDF files titled as follows:
 - a. "9a_31 January 2025" containing DDRP Records (redacted) and Certification for 31 January 2025 Urinalysis (Specimen F529-0048-245), various dates (8 pages)
 - b. "9b_10 February 2025" containing DDRP Records (redacted) and Certification for 10 February 2025 Urinalysis (Specimen F529-0048-579), various dates (8 pages)
 - c. "9c_20 February 2025" containing DDRP Records (redacted) and Certification for 20 February 2025 Urinalysis (Specimen F529-0048-628), various dates (8 pages)
 - d. "9d_27 February 2025" containing DDRP Records (redacted) and Certification for 27 February 2025 Urinalysis (Specimen F529-0048-831), various dates (8 pages)
 - e. "9e_6 March 2025" containing DDRP Records (redacted) and Certification for 6 March 2025 Urinalysis (Specimen F529-0049-023), various dates (8 pages)
 - f. "9f_13 March 2025" containing DDRP Records (redacted) and Certification for 13 March 2025 Urinalysis (Specimen F529-0049-217), various dates (8 pages)
 - g. "9g_21 March 2025" containing DDRP Records (redacted) and Certification for 21 March 2025 Urinalysis (Specimen F529-0049-260), various dates (8 pages)
 - h. "9h_31 March 2025" containing DDRP Records (redacted) and Certification for 31 March 2025 Urinalysis (Specimen F529-0049-494), various dates (8 pages)
 - i. "9i_8 April 2025" containing DDRP Records (redacted) and Certification for 8 April 2025 Urinalysis (Specimen F529-0049-752), various dates (8 pages)
 - j. "9j_16 April 2025" containing DDRP Records (redacted) and Certification for 16 April 2025 Urinalysis (Specimen F529-0049-859), various dates (8 pages)
 - k. "9k_24 April 2025" containing DDRP Records (redacted) and Certification for 24 April 2025 Urinalysis (Specimen F529-0050-018), various dates (8 pages)
 - l. "9l_5 May 2025" containing DDRP Records (redacted) and Certification for 5 May 2025 Urinalysis (Specimen F529-0050-268), various dates (8 pages)
 - m. "9m_9 June 2025" containing DDRP Records (redacted) and Certification for 9 June 2025 Urinalysis (Specimen F529-0051-089), various dates (8 pages)
10. Charge Sheet (redacted), dated 10 September 2025 (2 pages)
11. DDRP Records (redacted) for 5 January 2026 Urinalysis (Specimen F529-0058-007), various dates (8 pages)
12. Government Mil. R. Evid. 304(d) Notice #1, 16 January 2026 (2 pages)
13. Government Mil. R. Evid. 404(b) Notice #1, 16 January 2026 (3 pages)

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion to Pre-Admit Evidence via electronic mail and e-file to the Military Judge and Defense Counsel on 3 February 2026.



ALISON R. SHERRILL, Capt, USAF
Assistant Trial Counsel