DEPARTMENT OF THE AIRFORCE
TRIAL JUDICIARY

UNITED STATES	)	
	)	
	)	
v.	)	**DEFENSE MOTION IN LIMINE**
	)	**TO EXCLUDE EVIDENCE**
	)	**UNDER M.R.E. 404(b)**
BAKER, Travis	)	
1ST LT, U.S.A.F.	)	
Delta 4 Detachment 2 (SpOC)	)	
Buckley SFB, Colorado	)	

RELIEF SOUGHT

The Accused, by and through Counsel, respectfully moves this Court to prohibit the Government from introducing any of the evidence contained in its Military Rule of Evidence (M.R.E.) 404(b) Notice in this case.

HEARING

If opposed, the Defense requests oral argument to be heard on the merits.

BURDEN OF PROOF AND PERSUASION

Generally, the moving party bears the burden of proof and persuasion by a preponderance of the evidence. RCM 905(c). However, "the proponent of evidence has the burden of showing that it is admissible." United States v. Palmer, 55 M.J. 205, 208 (C.A.A.F. 2001) (citing United States v. Shover, 45 M.J. 119, 122 [1996]). Therefore, the Government holds the burden of proof and persuasion in this matter.

FACTS

1. 1ST LT Travis Baker (hereinafter, "the Accused") has been accused of two (2) Specifications of Article 107, False Official Statement; two (2) specifications of Article 113, Drunken Operation of a Vehicle; and two violations of Article 133, Conduct Unbecoming an Officer and a Gentleman. The maximum punishment of twelve years and six months in total.

2. On or about 14 October 2022, the accused approached the gate at Peterson Space Force Base (SFB) and upon approaching, he was stopped at the gate by security forces (SF) personnel because they believed he was displaying signs of intoxication.

3. According to SF personnel, the accused was asked to provide a breath sample and the accused declined to do so. Upon the alleged refusal, Peterson SF personnel obtained a search authorization for a blood/urine draw. The result of the draw was a reading of .282%. During the course of the stop, apprehension and draw, the accused was allegedly unprofessional towards SF personnel.

4. On or about 18 October 2022, the accused allegedly asked [redacted] to bring his CAC to an off-base location, allegedly asserting he had left it on base on his last duty day. The accused further allegedly indicated he had arranged for a Lyft because his driving privileges were suspended, but the accused was witnessed by [redacted] to be walking erratically in a different location.

5. It was at this locale the accused allegedly gave [redacted] the "middle finger" after [redacted] attempted to interact with him. [redacted] also claims to have seen the accused's pickup truck at this location and that the accused allegedly drove the pickup truck away from the location.

6. [redacted] alerted SF personnel that [redacted] believed the accused was intoxicated and the accused was stopped at the gate at Buckley SFB and the accused's blood was again tested and resulted in a reading of .217%

7. On 14 April 2023, the Government provided the Defense with their M.R.E. 304 and 404(b) notice (Attachment 1). Specifically, the Government provided notice of the following twenty (20) circumstances allegedly falling within the purview of M.R.E. 404(b):

> a. On or about 14 October 2022, the accused refused to step out of his vehicle after being ordered to exit his vehicle in order to be arrested. The prosecution intends to offer this evidence as the accused's consciousness of guilt.
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> b. On or about 14 October 2022, the accused forcibly moved away from TSgt Robertson to avoid being handcuffed after exiting his vehicle. The prosecution intends to offer this evidence as the accused's consciousness of guilt.
>
> c. On or about 14 October 2022, the accused apologized to [redacted] for disrespecting his authority and for "saying the stuff that I said" or words to that effect. The prosecution intends to offer this evidence as the accused's consciousness of guilt.
>
> d. On or about 14 October 2022, the accused refused to complete Standardized Field Sobriety Tests. The prosecution intends to offer this evidence as the accused's consciousness of guilt.

e. On or about 14 October 2022, the accused refused to complete a breathalyzer screening. The prosecution intends to offer this evidence as the accused's consciousness of guilt.

f. On or about 14 October 2022, the accused expressed a desire to leave Peterson SFB, CO, threatened [redacted] that he would drive away, and tried to convince [redacted] to let him go in order to avoid being arrested. The prosecution intends to offer this evidence as the accused's consciousness of guilt.

g. Between on or about 1 July 2021 and on or about 18 October 2022, the accused came to work and arrived at ADAPT appointments under the influence of and smelling like alcohol. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

h. On or about 12 October 2022, the accused refused bloodwork at his ADAPT appointment at Peterson SFB, CO, after his provider suspected he had been drinking. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

i. On or about 14 October 2022 and on or about 18 October 2022, and on numerous occasions between on or about 1 July 2021 and on or about 18 October 2022, the accused wore a facemask to work. The prosecution intends to offer this as evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

j. On or about 14 October 2022, the accused smelled like mouthwash at work. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

k. Since the accused was released from inpatient treatment for alcohol abuse on or about 1 January 2023, he has not worn a facemask to work. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

l. On or about 14 October 2022, the accused refused to call the police regarding his alleged hit and run. The prosecution intends to offer this evidence as consciousness of guilt.

m. Between on or about 1 July 2022 and on or about 31 July 2022, the accused refused to continue coming to work. The prosecution intends to offer this evidence as motive.

n. Between on or about 1 July 2021 and 14 October 2022, the accused refused to get a badge to be in the restricted area, as he was trained to do. The prosecution intends to offer this evidence as motive.

o. On or about 18 October 2022, the accused purchased a bottle of mouthwash at a 7-11. The prosecution intends to offer this as motive, intent, preparation, plan, absence of mistake, and lack of accident.

p. Between on or about 24 October 2022 and on or about 26 October 2022, the accused purchased and drank bottles of mouthwash. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

q. On or about 18 October 2022, the accused arrived to work without proper rank on his cover and a broken strap. The prosecution intends to offer this evidence as motive, intent, preparation, plan, absence of mistake, and lack of accident.

r. On or about 18 October 2022, the accused lied to [redacted] about where he was going. The prosecution intends to offer this as consciousness of guilt.

s. On or about 18 October 2022, the accused refused to answer [redacted] questions, tried to ignore him, hid from him in a 7-11, tried to get away from him, and gave him the middle finger. The prosecution intends to offer this as consciousness of guilt.

t. On or about 18 October 2022, the accused had several containers with alcohol in them or previously in them in his truck. The prosecution intends to offer this as motive, intent, preparation, plan, absence of mistake, and lack of accident.

LAW & ARGUMENT

8. M.R.E. 404(b) states the following:

a. "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." M.R.E. 404(b)(1). The rule then goes on to state that such evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." M.R.E. 404(b)(2).

b. "On request by the Accused, the prosecution must provide reasonable notice of the general nature of any such evidence that the prosecution

intends to offer at trial; and do so before trial – or during trial if the military judge, for good cause, excuses lack of pre-trial notice." Id.

9. Under the M.R.E. 404(b) rule, the "sole test…is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to the crime and thereby to suggest that the fact-finder infer he is guilty as charged, because he is predisposed to commit similar offenses." United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989). With regard to notice of the intent to offer evidence under M.R.E. 404(b), the rule states:

> On request by the Accused, the prosecution must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and
>
> (B) do so before trial – or during trial if the military judge, for good cause, excuses lack of pre-trial notice.

M.R.E 404(b)(2) (A & B)

11. In addition, the not so recent changes to the rule have actually elevated the Government's notice requirement under this Rule. As This Honorable Court is aware, Federal Rule of Evidence 404(b) was amended effective 1 December 2020. By operation of Military Rule of Evidence 1102, the amendments to the federal rule also amended its military counterpart on 1 June 2022. Thus, the prosecution's written notice to the Defense of intent to offer evidence under this Rule must articulate both the permitted purpose for which the prosecutor seeks to offer the evidence and the reasoning that supports the purpose.

12. The drafter's analysis of the 2020 changes to the Federal Rule should be viewed persuasively in understanding the meaning and intent of this increased notice provision. In relevant part, the drafter's analysis reads:

> The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required…

LexisNexis, USCS Fed. Rules Evid. R. 404, https://plus.lexis.com/api/permalink/40a29993-cadf-4e4d-a85f-bf0045ec59d0/?context=1530671.

13. The seminal case governing M.R.E. 404(b), United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989) established a three-prong test to consider evidence proffered under M.R.E. 404(b). Specifically:

a. Does the evidence reasonably support a finding by the court members that [the Accused] committed prior crimes, wrongs, or acts?
b. What fact…of consequence is made more or less probable by the existence of the evidence?
c. Is the probative value…substantially outweighed by the danger of unfair prejudice?

Reynolds, 29 M.J. at 109 (internal quotations and citations omitted).

14. In determining whether the first and second prongs of the Reynolds test are satisfied, there must be a "logical relevance" to the uncharged misconduct and the offense charged. United States v. Barnett, 63 M.J. 388, 395 (C.A.A.F. 2006). Logical relevance is based on the degree of dissimilarity between the offenses charged and the prior misconduct. Id.

15. The third prong of Reynolds requires the M.R.E. 403 balancing test. Id. at 396-397. Unfair prejudice occurs when the proffered evidence causes, or leads, the factfinder to make a decision on an improper basis. Old Chief v. United States, 519 U.S. 172, 180 (1997).

16. M.R.E. 403 provides that "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by…a danger of…unfair prejudice, confusing the issues, misleading the members, undue delay, waste of time, or needlessly presenting cumulative evidence." The analysis to this provision notes that the military judge is vested with wide discretion in determining the admissibility of evidence which comes within this rule. "The same balancing test required under M.R.E. 403 applies equally to evidence received during findings and sentencing." United States v. Martin, 20 M.J. 227, 229 (C.M.A. 1985).

17. Though M.R.E. 404(b) "is a rule of inclusion rather than exclusion," (United States v. Browning, 54 M.J. 1, 6 (C.A.A.F. 2000)), military courts should not approve "of broad talismanic incantations of words such as intent, plan, 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)." United States v. Brannan, 18 M.J. 181, 185 (C.M.A. 1984).

18. Here, the Government indicates in its M.R.E. 404(b) notice that it intends to offer the information described in its 14 April 2023 notice as evidence under M.R.E. 404(b) to show the Accused's motive, intent, plan, absence of mistake, lack of accident, preparation and consciousness of guilt.

19. Accordingly, the Government has not and will not meet its burden for the introduction of this M.R.E. 404(b) evidence, as seen under the Reynolds test because those exceptions are not applicable, and the Government is seeking to apply them in the incorrect context. Further, the purposes the Government described are simply talismanic incantations to be avoided under M.R.E. 404(b).

20. As a preliminary matter, the Government's 404(b) notice is facially insufficient and fails to comply with its obligations under the rule. The Government's notice of 14 April 2023 does not meet these requirements based on the amended rule and to avoid repeating the same objection, the defense assets as to each subparagraph that it is unclear as to which specification the accused's behavior is relevant for a non-propensity act, or acts, listed.

21. The Government's notice calls to mind the Latin maxim *Ubi jus ibi remedium*: where there is a right, there is a remedy.[1] The failure to provide a remedy to a breach of a right was also discussed in American jurisprudence as early as 1803 by Chief Justice in Marbury v. Madison, 5 U.S. 137, when he quoted Blackstone writing that "for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." Id. at 163 (internal citations omitted.) To allow the government to remedy their deficiencies in a reply brief runs afoul of Marbury.

A. 3a-f

22. The defense will address the respective notices in groupings pertaining to dates and the proposed notice(s). The first group discusses the accused's alleged behavior on 14 October when stopped by SF personnel as evidence of the Accused's consciousness of guilt. Here, the Government has not met their burden to offer this evidence as M.R.E. 404(b) evidence.

23. Regarding the first Reynolds prong, the first grouping is likely capable of proof through the various witnesses.

24. The second prong is problematic for the government because it is unclear as to what fact of consequence is being proved. The behavior does not demonstrate guilt as much as it displays, rightly or wrongly, frustration, embarrassment or anger over being accosted; and a factfinder would not, in any logical way, connect this to the charged misconduct.

25. Additionally, the Government fails to meet prong three of Reynolds. As required, the Government must show that such evidence offered passes an M.R.E. 403 analysis. In United States v. Brannan, 18 M.J. 181 (C.M.A. 1984), the Court states that when offering evidence, counsel should avoid making "broad talismanic incantations". In line with the above sentiments, the Court goes on to say that in cases with complicated issues "counsel should be particular in the offer of proof, supporting arguments for admission, and objections."

1 [redacted]

26. As previously mentioned, the third prong of Reynolds requires an M.R.E. 403 balancing test to be conducted. United States v. Wright, 53 M.J 476 (C.A.A.F. 2000), established a list of factors to be considered when conducting a M.R.E. 403 balancing test. *See also* United States v. Barnett, 63 M.J. 388 (C.A.A.F. 2006) (incorporating the Wright factors for a M.R.E. 404[b] analysis.) The Wright factors do not weigh in favor of admission of the evidence the Government has presented. Additionally, those factors need not all be met in order to find that the evidence violates Rule 403.

27. The factors to which Wright referred are:

a. strength of proof of prior act- conviction versus gossip;
b. probative weight of the evidence;
c. potential for less prejudicial evidence;
d. distraction of factfinder;
e. time needed for proof of prior conduct;
f. temporal proximity;
g. frequency of the acts;
h. presence or lack of intervening circumstances, and;
i. relationship between the parties.

28. In analyzing the Wright factors, this evidence should not be admitted under M.R.E. 404(b). Factor b is not met because it is not clear as to what they are probative of. Factor c: there is clearly less prejudicial evidence in the form of the forensic testing and testimony as to the fact he was driving. Factor d: it is going to simply paint the accused in a poor light and distract from the relevant inquiry. Factor e: additional time and testimony will be needed to prove up the purported conduct. Factor f: the acts were contemporaneous to the events of 14 October 2022. Factor g: the acts in and of themselves are isolated incidents. Factor h: again, it is unclear as to whether there were intervening events because the fact of consequence is unclear. Factor i: there was no pre-existing relationship between the parties. Taking all the above factors into consideration, this evidence is substantially prejudicial compared to the probative nature and fails Reynolds' third prong.

B. 3g-k, o and p

29. The Government wishes to offer evidence this grouping to demonstrate motive, intent, preparation, plan, absence of mistake and lack of accident of the Accused. These groupings involve activities between 1 July 2022 through the present date.

30. As to prong 1, the evidence credibly supporting these ostensible acts is not readily capable of proof- that he was intoxicated for example is a legal conclusion. Whether he smelled of alcohol is subjective and not readily determinable. Similarly, the fact he smelled of mouthwash or sought to purchase mouthwash is not a crime or wrong.

31. Similarly, as to prong 2, the fact of consequence as to these groupings is opaque at best. For example, the fact he may have smelled of alcohol at work does not prove his motive to drive drunk days or weeks later. Or that it was motive to lie about an unrelated event weeks later or that those acts show a plan to drive drunk act with a lack of deportment on unrelated days, etc. Smelling of, or purchasing, mouthwash is not a fact of consequence that relates to any of the charged offenses.

32. The third prong regarding the Wright factors is even less impactful. None of the factors are present but certain ones are most pertinent. F: temporal proximity is exceedingly remote; H: intervening acts- there are multiple intervening acts between the events described and the alleged events. It should also be noted that some of the acts are not prior to the charged offense. And I: the relationship between the parties is a nullity.

C. 3l

33. Next, the Government wishes to offer the Accused's alleged failure to refuse to call the police regarding the hit and run accident as consciousness of proof. As to prong 2, it is not clear what fact of consequence is made more or less clear when evaluating his potential guilt to the charged offenses. Prong 3- a simple M.R.E. 403 analysis demonstrates that the probative value is vastly outweighed by the negative inference the government will seek to draw from this to the panel because the government has not shown any probative value to the evidence in any fashion.

D. 3m and n

34. The Government offers evidence that the Accused refused to come to work or obtain the proper badging as motive to the charged offenses. Prong 2- there is no conceivable way in which the accused's alleged failure to work or perform functions of his work make a fact of the charged offenses more or less probable. And again, a simple M.R.E. 403 analysis is not met because the probative value is non-existent and the prejudicial effect is high: he is a poor duty performer therefore he must have committed the offenses. When applying the lack of context for this evidence, this should not be admitted under M.R.E. 404(b).

E. 3q

35. The Government offers evidence that the Accused arrived at work sans the proper rank on his cover and with a broken strap as demonstrative of the Accused's motive, intent, preparation, plan, absence of mistake and lack of accident as to the charged offenses. Prong 2 of the Reynolds test is not provided. And as with m and n, the probative value is far outweighed by the prejudicial effect: he failed to dress properly and thus is a poor officer, he must have committed the acts in question.

F. 3r and t

36. The court in United States v. Quezada, 82 M.J. 54 (C.A.A.F.) defined consciousness of guilt evidence as "evidence used to show 'awareness of an accused that he or she *has* engaged in blameworthy conduct.'" (Emphasis added) Id. at 59. Allegedly lying about where he was going to go is not lying about a prior act, but rather a future act and trying to get away from someone accosting you is also not dispositive of guilt, but annoyance. Taking this definition into consideration, this evidence fails the Reynolds' prongs and should not be admitted under M.R.E. 404(b).

G. 3t

37. The Government offers evidence that the Accused had bottles of alcohol, empty or full, in his truck as proof of motive, intent, preparation, plan, absence of mistake and lack of accident to the charged offenses. Specifically addressing the third Reynolds prong under the Wright analysis, there is more probative and less prejudicial evidence in the form of the forensic testing, the temporal proximity as to the consumption of the alcohol in the vehicle and relation to his alleged intoxication cannot be demonstrated and thus not probative, the factfinder will be immediately drawn to the improper conclusion it was consumed on the day of the event. It is also unknown as to whether the alcohol was his or another individual's.

CONCLUSION

The Defense respectfully requests this Court exclude the Government's noticed evidence under M.R.E. 404(b). This evidence fails the three prongs of Reynolds: it does not make a fact at issue more or less probable, and the risk of unfair prejudice substantially outweighs the probative value of the evidence the Government intends to introduce. Consequently, the noticed evidence should be excluded.

[redacted]
Jonathan W. Crisp, Esquire
Civilian Defense Counsel

I hereby certify that a copy of the attached motion was sent to Trial Counsel and Military Judge on this 28th day of April 2023.

[redacted]
Jonathan W. Crisp, Esquire
Civilian Defense Counsel