IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. James E. BASS Gunnery Sergeant (E-7) U.S. Marine Corps, Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 202300185 USCA Dkt. No. 25-0149/MC

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

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Index of Supplement

Table of Authorities

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS AND OTHER SERVICE COURTS

UCMJ ARTICLES

OTHER AUTHORITIES

Issues Presented

I.

Whether the Military Judge abused his discretion in admitting evidence under M.R.E. 404(b) of prior positive urinalysis results for which Appellant had been previously acquitted at court-martial.

II.

Whether the Military Judge erred in relying on the "permissive inference" to convict Appellant under Article 92 of knowing use of a non-controlled, commonly available substance.

Statement of Statutory Jurisdiction

After being found guilty at special court-martial, Appellant timely appealed the lower court for review under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[1] Accordingly, this Court has jurisdiction under Article 67(a)(3), UCMJ.[2]

Statement of the Case

A special court-martial consisting of a military judge sitting alone convicted Appellant, contrary to his pleas, of two specifications of violating a lawful general order under Article 92, UCMJ.[3] He was sentenced to reduction to E-5 and a reprimand.[4] The convening authority approved the sentence, and the Military

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[1] 10 U.S.C. § 866(b)(1).
[2] 10 U.S.C. § 867(a)(3).
[3] 10 U.S.C. § 892.
[4] R. at 280.

Judge entered the findings and sentence into judgment.[5] The lower court affirmed the findings and sentence.[6] Appellant then timely petitioned this Court for review.

Statement of Facts

A. Hemp is not a controlled substance.

In 2018, hemp was removed from the Controlled Substances Act.[7] In response, in July 2020, the Secretary of the Navy issued ALNAV 074/20, prohibiting Sailors and Marines from "using any product made or derived from hemp . . . regardless of the product's THC concentration, claimed or actual, and regardless of whether such products may lawfully be bought, sold, and used under the law applicable to civilians."[8]

B. The Government charged Appellant with violating ALNAV 074/20 based solely on two positive urinalysis test results for THC-8.

The Government's case against Appellant consisted of two positive urinalysis results in November and December 2022, showing THC-8 levels of 84 ng/ml and 68 ng/ml respectively.[9] Not a single witness offered evidence that Appellant knowingly violated ALNAV 074/20 by using hemp products. Nor could any witness say with

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[5] Convening Authority's Action; Entry of Judgment.
[6] *United States v. Bass*, No. 202300185, slip op. (N-M. Ct. Crim. App. Feb. 25, 2025).
[7] 21 U.S.C. § 802(16).
[8] Pros. Ex. 2, ¶ 5a.
[9] *Id.*

certainty that either urinalysis resulted from the use of hemp products specifically banned by the ALNAV.

The Government's lab expert testified while THC-8 can be derived from hemp, she could not tell when Appellant was exposed to THC-8, how the exposure occurred, or how much he ingested, and thus could not rule out unknowing ingestion.[10] She did not testify about whether the levels for THC-8 in the samples would have resulted in any physiological effect.[11] She testified that products available at gas stations, grocery stores, tobacco stores, and homeopathic stores can produce the same urinalysis results.[12] And she testified that the urinalysis results in this case cannot distinguish the source of THC-8, which can be synthetically produced or derived from naturally occurring cannabis sativa plants that do not meet the definition of hemp.[13]

C. The Military Judge admitted evidence of Appellant's prior urinalysis results under M.R.E. 404(b).

At trial, the Government offered evidence of two prior urinalysis results for THC-8 from September 2021 and November 2021, for which Appellant had been charged and acquitted at an earlier court-martial in October 2022.[14] Although

[10] R. at 227-28, 232.
[11] R. at 205-22.
[12] R. at 236-37.
[13] R. at 241, 244.
[14] R. at 274.

Appellant did not assert innocent ingestion as a defense at the later court-martial, the Military Judge admitted the evidence under M.R.E. 404(b), finding that "testing positive on two prior occasions and going through the court-martial process . . . makes it less probable that any ingestion was mistaken."[15]

D. The Military Judge relied on the permissive inference and the prior use evidence to convict Appellant.

The Military Judge convicted Appellant of both charged specifications, relying on the "permissive inference" in his special findings to prove knowing use.[16] He also relied on the evidence of prior use, for which Appellant had been acquitted, to show that Appellant was "on notice to avoid the mistake of accidental or unknowing ingestion."[17]

Summary of Argument

The lower court ratified two significant errors by the Military Judge for which this Court should grant review and reverse. First, absent evidence of the statistical probability of unknowingly ingesting a commercially available product, the lower court allowed the Military Judge to make the logical leap that prior positive urinalysis results, in and of themselves, make it less likely that subsequent ones could be the result of unknowing exposure. This Court specifically rejected this logic

[15] R. at 281.
[16] App. Ex. XXI at ¶¶ 12, 17.
[17] *Id.* at ¶ 16.

in *United States v. Graham* for controlled substances, which is even more illogical for non-controlled ones.[18]

Second, in finding the evidence sufficient to support Appellant's convictions under the ALNAV, the lower court tacitly approved the Military Judge's erroneous reliance on the so-called "permissive inference" to satisfy the element of knowingly "using any product made or derived from hemp . . . regardless of the product's THC concentration, claimed or actual, and regardless of whether such products may lawfully be bought, sold, and used under the law applicable to civilians."[19] Use of the permissive inference for a substance that is not controlled and is readily available to average consumers cannot be squared with this Court's opinion in *United States v. Ford*,[20] nor does logic support its use in this context. Without the permissive inference, there is not a scintilla of evidence that Appellant knowingly ingested hemp products.

[18] *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999).
[19] Pros. Ex. 2, ¶ 5a.
[20] *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987).

Reasons for Granting Review

A. The lower court decided a question of law that conflicts with this Court's opinion in *Graham*.

This Court should grant Appellant's petition to provide clarifying guidance to the service courts and the trial judiciary on the use of prior positive urinalysis results under M.R.E. 404(b), particularly where the urinalysis does not involve a controlled substance. In *United States v. Graham*, the Court found it was an abuse of discretion to admit evidence of a prior positive urinalysis under M.R.E. 404(b) to rebut the appellant's "surprise" at a second positive urinalysis result for the same substance.[21] In *Graham*, as here, the appellant did not allege any specific instance of innocent ingestion for the later offense, but instead made a general denial of the charge.[22] The Court recognized that a prior urinalysis test was not logically relevant to rebut a general denial.[23]

Here, the lower court decided a question of law that not only conflicts with this Court's opinion in *Graham*, but relied on the exact logic rejected in *Graham.*[24] Specifically, the lower court held the prior use evidence was relevant to rebut a fact of consequence—namely, "the probability of mistaken ingestion"[25]—whereas

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[21] *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999).
[22] *Id.*
[23] *Id.*
[24] C.A.A.F. Rule 21(b)(5)(B); *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999).
[25] *United States v. Bass*, No. 202300185, slip op. (N-M. Ct. Crim. App. Feb. 25, 2025).

Graham rejected the logic that a prior positive urinalysis makes it more likely that an appellant knowingly used a prohibited substance on a second occasion.[26] In *Graham*, there was no evidence regarding the "likelihood" of a military member testing positive twice in the same period due to innocent ingestion.[27] As the Court explained, "We have no clue from this record, nor from our experience, what the statistical probability is for 'innocent ingestion' to occur, nor can we say what the percentage might be for laboratory error, errors in the chain of custody, or other like errors."[28]

So, too, here. Just as in *Graham*, the record does not support any inference about the statistical probability or improbability of an unknowing exposure in the time frame at issue. The lower court reasoned that the prior urinalysis results in this case were only a year before as opposed to four years in *Graham*.[29] But temporal proximity was only one aspect of the Court's ruling in *Graham*, the logic of which applies regardless of when the prior urinalyses occurred.

Indeed, the prior urinalyses in this case are even more irrelevant than the one in *Graham* was, since here the positive results were not even for a controlled

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[26] *Id.* at *9.
[27] *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999).
[28] *Id.*
[29] *United States v. Bass*, No. 202300185, slip op. (N-M. Ct. Crim. App. Feb. 25, 2025).

substance.[30] There is no evidence in this record on the probability or improbability of unknowing exposure to hemp, from which THC-8 can be (but is not necessarily) derived. But there is ample evidence in the record to support that hemp is commercially available and *not* a controlled substance.[31] The Government's own expert testified that products available at gas stations, grocery stores, tobacco stores, and homeopathic stores can produce the results seen here.[32] Even the ALNAV Appellant is accused of violating recognizes the prevalence and availability of hemp.[33] The ALNAV also acknowleges that lableling and packaging of commercial products may not be reliable for products containing hemp.[34]

On this record, this Court should be even less convinced of the relevance of a prior positive urinalysis test, where there is no evidence of "the statistical [im]probability of innocent ingestion."[35] There is, for example, no evidence that unknowing exposure to hemp or THC-8 is a rare event. To the contrary, the Federal Drug Administration (FDA) recently warned consumers that "edible products containing THC can *easily* be mistaken for commonly consumed food such as

[30] 21 U.S.C. § 802(16).
[31] 21 U.S.C. § 802(16), Pros. Ex. 2, R. at 236-37.
[32] R. at 236-37.
[33] Pros. Ex. 2.
[34] *Id.*
[35] *Graham*, 50 M.J. at *59.

breakfast cereal, candy, and cookies and accidently ingested."[36] At the time of this filing, there is an active recall of a popular candy due to contamination with cannabis.[37] As such, unknowing exposure to THC is not theoretical, it is a real-world problem that at least two federal agencies are actively working to address.[38]

B. The lower court's decision also conflicts with this Court's opinion in *United States v. Tyndale*.

The lower court's opinion also misapprehends this Court's ruling in *United States v. Tyndale.*[39] In *Tyndale*, a divided Court drew a distinction from *Graham* and found prior urinalysis results relevant where the appellant, for a second time, alleged a specific instance of innocent ingestion under factually similar circumstances.[40] Re-affirming that the holding in *Graham* "remained valid," the Court emphasized that *Tyndale* was a "close case" that hinged on the specific factual similarities of the

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[36] *FDA Warns Consumers About the Accidental Ingestion by Children of Food Products Containing THC. Food and Drug Administration*. U.S. Food and Drug Administration (June 16, 2022), https://www.fda.gov/food/alerts-advisories-safety-information/fda-warns-consumers-about-accidental-ingestion-children-food-products-containing-thc.

[37] *Haribo Recalls Cola Candy in the Netherlands After Cannabis Is Found.* New York Times. (May 30, 2025), https://www.nytimes.com/2025/05/30/world/europe/haribo-netherlands-cannabis-recall.html.

[38] *FTC and FDA Send Second Set of Cease-and-Desist Letters to Companies Selling Products Containing Delta-8 THC in Packaging Designed to Look Like Children's Snacks*, Federal Trade Commission (July 16, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-fda-send-second-set-cease-desist-letters-companies-selling-products-containing-delta-8-thc.

[39] *United States v. Tyndale*, 56 M.J. 209 (C.A.A.F. 2001).

[40] *Id.*

alleged innocent ingestion.[41] The Court carefully compared the circumstances the appellant alleged between his prior urinalysis and the one at issue at his later court-martial.[42] The Court found "logical relevance" of the prior instance, relying on the doctrine of chances, only after finding the two innocent ingestion theories "substantially similar."[43] But the Court cautioned the doctrine of chances could only be applied "in rare circumstances" where the factual allegations are substantially similar.[44]

The lower court erred in applying *Tyndale* to the facts of this case, which are a far cry from the "rare circumstances" cautioned by *Tyndale*. Here, as in *Graham,* and unlike in *Tyndale*, Appellant did not put on evidence of a specific incident of innocent ingestion at the later court-martial.[45] There is therefore no "substantially similar" factual predicate that makes the prior urinalysis logically relevant. Instead, as in *Graham*, Appellant simply argued that the Government did not satisfy its burden of proving any ingestion was knowing.[46] As the Court explained in *Graham*, there is a difference between a "good soldier" defense, along with a general denial,

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[41] *Id.* at 216.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] R. at 274.
[46] R. at 275.

and an innocent ingestion defense, where the Defense affirmatively puts on evidence of an instance of innocent ingestion.[47]

Nor does the closer temporal proximity of Appellant's positive test results supports that his exposure to a *non*-controlled substance was somehow more knowing than the exposure to a controlled substance was in *Graham*. As the record in this case reveals, hemp is not only legal, but ubiquitous; it is found in common, everyday products sold at gas stations and grocery stores. And Appellant was a sixteen-year Gunnery Sergeant and career Marine who had gone through a court-martial process where his career and retirement benefits were on the line.[48] It is unimaginable that a person in such circumstances, particularly one with "good military character" evidence, would *knowingly* use hemp products shortly after going through a trial for using hemp products.

To the contrary, Appellant's serial positive test results make it far more likely that he simply had not correctly identified the source of his unknowing exposure. If a person does not know how he is exposed to a substance, no matter how many times he tests positive and/or is brought to court-martial, he will continue to be exposed (and test positive) until he has identified the source of the exposure (no matter how "monumental" the court-martial experience is for them).[49]

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[47] *Graham*, 50 M.J. at 59.
[48] Def. Ex. A.
[49] App. Ex. XXI para. 16.

This point is illustrated by a real-world example in 2023 where hundreds of children were inadvertently exposed to harmful levels of lead through contaminated apple sauce pouches.[50] Even after children tested positive for dangerous levels of lead in their blood, alarming their parents and public health officials, their levels continued to rise until a massive investigation was finally able to identify the source of the exposure.[51]

C. The Court should clarify the appropriateness of using the "permissive inference" under Article 92 to prove knowing use of non-controlled substances.

The Government relied on two positive urinalysis test results for a commercially available, non-controlled substance to convict Appellant of hemp use in violation of Article 92. In the absence of any evidence of knowledge, the Military Judge relied on the permissive inference to find that Appellant knowingly used hemp.[52] This Court should grant Appellant's petition to consider the appropriateness of the use of the permissive inference in this context, without which the evidence is not sufficient to support Appellant's convictions.

This Court once cautioned that "drug testing . . . is fallible. The possibility of a positive result . . . from unknowing ingestion of a substance that does not trigger

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[50] *Lead-Tainted Applesauce Sailed Through Gaps in Food-Safety System*. New York Times. (Feb. 27, 2024). https://www.nytimes.com/2024/02/27/world/europe/lead-applesauce-food-safety.html.
[51] *Id.*
[52] App. Ex. XXI para 16.

any reaction on the part of the servicemember is the worst nightmare of every good servicemember and cause of serious concern to the judicial system."[53] Since 2018, and the commercial availability of hemp products, this concern has only gotten greater for servicemembers. In 1987 when the Court of Military Appeals upheld the constitutionality of the permissive inference in *United States v. Ford*, it did so based on the following assumptions:

> (1) The probability of innocent ingestion of a *controlled* substance by a servicemember is greatly reduced because it is considered contraband in the military;
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> (2) The military had a "well publicized campaign" to eliminate drug abuse, which puts servicemembers on notice to avoid any and all contact with these substances;
>
> (3) The physiological effects of the internal presence of the drug in the body might serve to alert the user to the presence of a *controlled* substance in his system;
>
> (4) Human self-preservation dictates that a person "generally knows what he consumes."[54]

None of these assumptions support the use of the permissive inference for the use of hemp products in violation of Article 92. First, regardless of whether hemp is considered contraband in the armed forces, it has proliferated in the civilian world.[55] The removal of industrial hemp from the Controlled Substances Act in 2018 had the

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[53] *United States v. Campbell*, 50 M.J. 154, 160 (C.A.A.F. 1999), *recon. granted*, 52 M.J. 386 (C.A.A.F. 2000) (per curiam).
[54] *United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987).
[55] 21 U.S.C. § 802(16), Pros. Ex. 2, R. at 236-37.

effect of making hemp products commercially available in the United States.[56] This changing landscape has led to an increase in manufacturers producing edible food and beauty products containing hemp derivatives.[57]

Second, as innocuous-looking, THC-laced foods are proliferating in the civilian world, more servicemembers than ever are living in civilian communities.[58] Even servicemembers who live on-base order from Doordash, take rides in Ubers, and vacation in AirBnB rental homes. There are no special perimeters around servicemembers that protect them from accidently encountering prohibited substances.

Third, the ALNAV specifically prohibits hemp products regardless of their ability to produce any physiologic effects.[59] In other words, there are products

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[56] 21 U.S.C. § 802(16).

[57] *FTC and FDA Send Second Set of Cease-and-Desist Letters to Companies Selling Products Containing Delta-8 THC in Packaging Designed to Look Like Children's Snacks*, Federal Trade Commission (July 16, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-fda-send-second-set-cease-desist-letters-companies-selling-products-containing-delta-8-thc.

[58] As of 2019, two-thirds of servicemembers collect BAH enabling them to live in civilian communities compared to one-half of servicemembers in the year 2000. *See How the Military's Basic Allowance for Housing Compares With Civilian Housing Costs.* Congressional Budget Office (March 2024) p. 7-8, https://www.cbo.gov/system/files/2024-03/59570-Military-Housing.pdf.

[59] Pros. Ex. 2. ("Sailors and Marines are prohibited from using any product made or derived from hemp . . . including CBD, regardless of the product's THC concentration, claimed or actual . . . "Use" also includes the use of topical products containing hemp, such as shampoos, conditioners, lotions, lip balms, or soaps.)

incapable of producing a physiologic effect that may still result in a positive urinalysis for THC-8 and a violation of the ALNAV. And this Court's decision in *United States v. Green* no longer requires evidence that an accused actually experienced the physiologic effects of a substance to be convicted of knowingly using it based on the permissive inference.[60]

Finally, in *Ford*, the Court surmised that human self-preservation dictates that a person "generally knows what he consumes" and this would minimize unknowing exposure to *controlled* substances.[61] However, there are now two federal agencies actively warning consumers of the ease with which they might accidently consume THC-laced food. Given this present reality, there is no rational basis for the use of the permissive inference as it pertains to hemp products in violation of Article 92. While the permissive infernece has been considered a "well recognized use of circumstantial evidence"

[60] *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001).
[61] *United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987).

Conclusion

Accordingly, this Court should grant the Petition for Review.

Respectfully submitted,

/s/

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Certificate of Compliance

This Supplement complies with the type-volume limitations of Rule 21(b) because it does not exceed 9,000 words and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

Appendix

A. *United States v. Bass*, No. 202300185, slip op. (N-M. Ct. Crim. App. Feb. 25, 2025).

Certificate of Filing and Service

I certify that the foregoing was filed electronically with this Court, and copies were electronically delivered to Deputy Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on June 3, 2025.

/s/

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United States Navy–Marine Corps Court of Criminal Appeals

Before
KISOR, KIRKBY, and de GROOT
Appellate Military Judges

UNITED STATES
Appellee

v.

James H. BASS
Gunnery Sergeant (E-7), U.S. Marine Corps
Appellant

No. 202300185

Decided: 25 February 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges:
Ryan Lipton (arraignment)
Adam J. Workman (motions and trial)

Sentence in the Entry of Judgment: a reprimand and reduction to E-5.

For Appellant:
Lieutenant Commander Doug Ottenwess, JAGC, USN

For Appellee:
Lieutenant Michael A. Tuosto, JAGC, USN

Judge de GROOT delivered the opinion of the Court, in which Senior Judge KISOR and Senior Judge KIRKBY joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

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de GROOT, Judge:

Appellant was convicted, contrary to his pleas, of two specifications of violation of a lawful general order, Article 92, Uniform Code of Military Justice [UCMJ], by wrongfully using tetrahydrocannabinol [THC]-8.[1]

Appellant raises three assignments of error, which we rephrase as follows: (1) whether the military judge abused his discretion by admitting the results of a prior urinalysis for which Appellant was previously acquitted and his previous testimony pursuant to Military Rule of Evidence [Mil. R. Evid.] 404(b); (2) whether Appellant's convictions are factually sufficient; and (3) whether referral of Appellant's case to a judge-alone special court martial pursuant to Article 16(c)(2)(A) violated his Fifth Amendment right to due process.[2] We find no prejudicial error and affirm.

I. BACKGROUND

Appellant provided urine samples on 16 September, 9 November, and 15 November of 2021, all of which tested positive for THC-8.[3] Appellant was charged with wrongfully using THC-8 in violation of Article 92. At a special court-martial in October 2022, Appellant argued he innocently ingested THC-8 and testified that "you only remember things in your life that mean something," and "I remember those days because they were monumental days to me

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[1] 10 U.S.C. § 892. Sec'y of the Navy, All Dep't Admin. Msg. 074/20, *Prohibition on the use of hemp products* updated, para. 5 (Jul. 24, 2020) [ALNAV 074/20].

[2] Appellant's third assignment of error does not warrant discussion or relief. *See United States v. Wheeler*, 85 M.J. 70, 2024 CAAF LEXIS 479, at *16-17 (C.A.A.F. Aug. 22, 2024).

[3] App. Ex. XIX.

because my career was almost going to get flushed down the drain."[4] Appellant was acquitted.[5]

Shortly after the conclusion of that special court-martial, Appellant provided two urine samples on 29 October and 13 December 2022. The Defense did not challenge that those samples were properly obtained, handled, and tested by the laboratory. Each sample tested positive for THC-8 above the Department of Defense cutoff level. Appellant was charged with two specifications of Article 92, UMCJ, for violating paragraph 5 of ALNAV 074/20, which prohibits Sailors and Marines "from using any product made or derived from hemp."[6] The specifications were referred to a judge alone special court-martial. The issues arising from this second court-martial form the basis of this appeal.

The Government provided notice of its intent to use the evidence of the previous positive urinalyses and excerpts of Appellant's testimony in its case in chief pursuant to Mil. R. Evid. 404(b). During an Article 39(a) hearing, the military judge ruled that the Government failed to provide proper notice, but allowed the Government to re-notify trial defense counsel. Although he ruled against the Government, he told the parties that he may reconsider his ruling if there is a re-notification by the Government and if Appellant "raises a defense of innocent ingestion or mistake or accident."[7] The Government did re-notify trial defense counsel of its intent to use the evidence to prove Appellant's knowledge, absence of mistake, and lack of accident.[8]

At trial, the Government called the senior chemist, Dr. Gordon-Reese from the Navy Drug Screening Lab in Jacksonville, Florida, as an expert witness.[9] She testified about the procedures of the laboratory, the handling and testing of Appellant's samples, and THC-8 and drug testing in general. She also testified that THC-8 could be derived from hemp or the marijuana plant, or made

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[4] *See* Pros. Ex. 22; *see also* App. Ex. XXI at 3.

[5] R. at 31, 281.

[6] *See* ALNAV 074/20. *See also* 7 U.S.C. § 1639o. ("Hemp" is defined as "the plant Cannabis sativa L and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.").

[7] R. at 45.

[8] *See* App. Ex. XIX.

[9] All names in this opinion, other than those of Appellant, the judges, and counsel, are pseudonyms.

synthetically. Dr. Gordon-Reese went on to state that THC-8 is not naturally produced in the body. She opined that if the THC-8 was derived from marijuana, then she would expect to see an additional positive urinalysis for THC-9 because the concentration of THC-8 is 50 to 75 percent less than THC-9.[10] She testified that Appellant's samples did not contain THC-9. Additionally, she stated that the process to produce THC-8 synthetically is costly given the time and resources necessary.[11] She also described how products containing THC-8 were generally commercially available.

On cross-examination, Dr. Gordon-Reese testified that the laboratory tests could not prove Appellant's intent.[12] Said another way, the tests could not rule out unknowing ingestion. She was also aware that products containing THC-8 had been mislabeled, stating the product listing only "hemp containing compounds," when there were "quantities of THC-9 and THC-8" in them.[13] However she had not seen any products that failed to include a label altogether.[14]

In his defense, Appellant called three witnesses to testify to his good military character. After trial defense counsel rested its case, the Government sought to introduce the results of Appellant's prior urinalyses on 16 September 2021 and 15 November 2021 to rebut trial defense counsel's cross-examination of Dr. Gordon-Reese relating to knowledge and lack of mistake. Over Appellant's objection, the military judge allowed the Government to present the evidence in rebuttal.[15] The Government subsequently called the substance abuse control officer [SACO] during the September – November 2021 time frame to lay the foundation and chain of custody for the testing of Appellant's urine samples that were obtained during that time. They then recalled Dr. Gordon-Reese to explain the positive results of Appellant's 2021 urine samples. Finally, the Government introduced select portions of Appellant's testimony from his first court-martial as a self-authenticating business record in accordance with Mil. R. Evid. 803(6) and 902(11).[16]

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[10] R. at 222–23.

[11] R. at 295.

[12] R. at 233–34.

[13] R. at 239.

[14] R. at 238.

[15] R. at 280.

[16] R. at 284.

In surrebuttal, Appellant called his own expert in chemistry and urinalysis certification to testify.[17] Appellant's expert disagreed with Dr. Gordon-Reese and testified about synthesizing THC-9 from THC-8, which would mean that a person's urine "might" test positive for THC-8 without THC-9 being present despite the source of THC-8 being marijuana rather than hemp.[18]

Appellant was found guilty of both specifications. In his special findings, the military judge wrote that while "it may be possible to isolate THC-8 from marijuana, it would be costly and difficult. The same is true regarding THC-8 derived synthetically."[19] The military judge found "the possibility that the THC-8 in [Appellant's] samples came from something other than hemp, is speculative and fanciful."[20]

Additional facts necessary to resolve Appellant's AOE are discussed below.

II. DISCUSSION

A. The Military Judge did not abuse his discretion in admitting evidence pursuant to Mil. R. Evid. 404(b).

1. Law

We review the military judge's decision to admit evidence pursuant to Mil. R. Evid. 404(b) for an abuse of discretion.[21] Military judges abuse their discretion (1) if the findings of fact upon which they predicate their ruling are not supported by the evidence of record; (2) if they use incorrect legal principles; or (3) if their application of the correct legal principles to the facts is clearly unreasonable.[22] "[T]he abuse of discretion standard of review recognizes that a judge has a wide range of choices and will not be reversed so long as the decision remains within that range."[23]

Evidence of a crime, wrong, or other act may not be used to show character or propensity, but it "may be admissible for another purpose, such as proving

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[17] R. at 315.

[18] R. at 333–35.

[19] App. Ex. XXI at 2.

[20] App. Ex. XXI at 2.

[21] *United States v. Wilson*, 84 M.J. 383, 390–91 (C.A.A.F. 2024) (citation omitted).

[22] *Id.*

[23] *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010).

motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[24]

To determine whether evidence of uncharged acts of misconduct is admissible under Mil. R. Evid. 404(b), we look to "whether that evidence is offered for some purpose other than to demonstrate the accused's predisposition to crime. . . ."[25] This requires the evidence at issue to satisfy the three factors set forth in *United States v. Reynolds*: (1) whether the evidence reasonably supports a finding that appellant committed prior crimes, wrongs, or acts; (2) whether a 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.[26]

The Court of Appeals of the Armed Forces [CAAF] clarified the *Reynolds* factors in cases involving prior drug use. In *United States v. Graham*, the CAAF held that the military judge abused his discretion in admitting evidence of a previous positive urinalysis.[27] The military judge allowed the Government to ask one question regarding a positive urinalysis result for marijuana four years prior in order to rebut his "surprise" when he was notified of the positive urinalysis result for marijuana.[28] The CAAF noted the foundation was insufficient to introduce the prior positive urinalysis.[29] Further, the prior positive urinalysis was not "logically relevant."[30] It did not logically rebut the appellant's surprise that he tested positive twice due to innocent ingestion with four years in between the results, nor the likelihood that the appellant would test positive twice due to innocent ingestion. In addition, the military judge specifically instructed the members they were not to consider it for whether or not the appellant knowingly used marijuana that was the basis for the charged offense.[31]

Subsequently the CAAF decided *United States v. Tyndale,* wherein it held that the military judge properly admitted evidence of a prior positive urinalysis

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[24] *United States Hyppolite*, 79 M.J. 161, 165 (C.A.A.F. 2019)

[25] *United States v. Thompson*, 63 M.J. 228 (C.A.A.F. 2006).

[26] 29 M.J. 105, 109 (C.M.A. 1989).

[27] 50 M.J. 56, 57 (C.A.A.F. 1999).

[28] *Id.* at 58.

[29] *Id*. at 60.

[30] *Id.* at 58.

[31] *Id.* at 58–60.

in a subsequent prosecution for wrongful use of a controlled substance.[32] In a plurality opinion, the CAAF found the military judge properly admitted the evidence using the *Reynolds* factors. The Government counsel appropriately laid the foundation for both the appellant's previous positive urinalysis result and his testimony at his first court-martial to show that there was prior use.[33] Applying the doctrine of chances, the Government counsel met the second prong of *Reynolds* to show the evidence was logically relevant to rebut the appellant's theory that he unknowingly ingested a controlled substance.[34] As to the final *Reynolds* factor, the military judge properly weighed the evidence and properly instructed the panel.[35] The CAAF distinguished this case from *Graham*.[36] While there was no fact of consequence that a prior positive urinalysis result could rebut in *Graham*, in *Tyndale*, the appellant's testimony did provide facts that could be rebutted.[37]

In *United States v. Thompson*, the CAAF found the military judge did abuse his discretion when he admitted the appellant's admissions of preservice drug use for the "express purpose[ ]. . . to show knowledge of marijuana use and the absence of mistake."[38] The CAAF found that while the military judge's analysis was successful in meeting the first prong of the *Reynolds* test, the second prong was not met. The appellant did not use mistake or lack of knowledge as a defense, but rather argued the credibility of the witnesses and the pressure he

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[32] 56 M.J. 209, 216 (C.A.A.F. 2001).

[33] *Id.* at 213. The dissent in *Tyndale* argued that there was insufficient foundation of the prior urinalysis because the only evidence introduced was the testimony from the trial counsel from the first court-martial. *Id.* at 219–220 (Gierke, J. dissenting). According to the dissent, the trial counsel's testimony constituted hearsay and he lacked the expert experience to testify regarding the urinalysis results. *Id.*

[34] *Id.* at 213–14.

[35] *Id.* at 214–15. The dissent also would have held that there was insufficient similarity between the two positive urinalyses to justify an inference that the first ingestion was knowing. *Id.* at 220. Additionally, the dissent believed that the members were not properly instructed on the doctrine of chances. *Id.*

[36] *Id*. at 216.

[37] *Id.* at 216. In a separate concurring opinion, Chief Judge Crawford stated that she "would conclude that the evidence is probative of the material issue in this case." *Id* at 217–19 (Crawford, C.J., concurring). Similarly, Judge Sullivan wrote that the members were "entitled to know that the appellant was in reality asserting that 'he was struck by lightning twice.'" *Id.* at 219 (Sullivan, J., concurring).

[38] 63 M.J. 228, 230 (C.A.A.F. 2006).

felt to hide his status as a confidential informant.[39] Therefore, the preservice drug use did not make a fact of consequence more or less probable.[40]

2. Analysis

Under an abuse of discretion standard, "[w]e will not overturn a military judge's evidentiary decision unless that decision was 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'"[41] Applying the *Reynolds* factors, we hold that the military judge did not abuse his discretion when he found the Government counsel established proper foundation for the consideration of the evidence at issue, the evidence was relevant to show Appellant's lack of mistake, and the probative value was not substantially outweighed by unfair prejudice.

a. There was reasonable support for the evidence in question.

The standard to establish the first *Reynolds* prong "is low."[42] Here, the Government satisfied its burden. The Government avoided the foundation issues of *Tyndale* and *Graham* in three ways: (1) by calling the SACO from the prior urinalyses to lay the foundation for the 2021 samples; (2) by having their expert witness testify to the urinalyses' results; and (3) by introducing Appellant's prior testimony as a business record. There was sufficient, reliable evidence to determine that Appellant committed the prior act.

b. The evidence in question had probative value to a fact at issue.

"The second prong mirrors the relevance concerns reflected under [Mil. R. Evid. 401 and Mil. R. Evid. 402], while the third prong reflects the concerns ordinarily handled under [Mil. R. Evid. 403]."[43]

The Government introduced evidence that Appellant tested positive for THC-8 on 16 September 2021 and 15 November 2021. At his first court-martial in October of 2022, Appellant testified that the experience had "monumental" effect on him because his "career was almost going to get flushed down the drain." The Government's theory of relevance was that this "monumental" ex-

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[39] *Id.* at 231.

[40] *Id.*

[41] *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citing *United State v Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

[42] *Thompson,*63 M.J. at 230.

[43] *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010).

perience put Appellant on notice of conduct that may have resulted in a positive urinalysis. Thus, according to the Government, the evidence made it less likely that Appellant unknowingly used THC-8 on or about 19 October 2022 and again on or about 13 December 2022.

As to this factor, the military judge found that the prior urinalyses and Appellant's testimony at his previous court-martial were relevant to rebut Appellant's theory of "unknowing or mistaken ingestion" as elicited in cross examination of Dr. Gordon-Reese. The military judge held that the evidence made "the possibility of mistake less probable" because "[t]esting positive on two prior occasions and going through the court-martial process [ ] makes it less probable that any ingestion was mistaken."[44]

Importantly, the military judge's reasoning and analysis did not run afoul of *Graham*, *Tyndale*, or *Thompson*. The evidence in *Graham* was from four years prior and offered for a different purpose: to rebut Graham's surprise at a subsequent positive urinalysis.[45] Importantly, the military judge in *Graham* found that the evidence was not relevant to prove that Graham knowingly used marijuana four years later.[46] Here, there is a stronger temporal connection and the evidence was offered to rebut a fact of consequence – the probability of mistaken ingestion. As in *Tyndale*, the Government here provided additional support to Appellant's prior positive urinalysis, namely his previous testimony to demonstrate the improbability of unknowing ingestion. And, unlike in *Thompson*, knowledge and mistake were at issue in Appellant's court-martial.

Military Rule of Evidence 404(b) is a rule of inclusion. A review of federal decisions that analyze Federal Rule of Evidence [Fed. R. Evid.] 404(b) in analogous cases show that *every* federal circuit court of appeals permits the introduction of evidence relating to prior drug activity to prove knowledge, intent, or lack of mistake.[47] Interpreting an identical rule of evidence, our federal

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[44] R. at 281.

[45] *Graham*, 50 M.J. at 57.

[46] *Id.* at 59.

[47] *United States v. Abreu*, 2023 U.S. App. LEXIS 31630, *1 (2d. Cir. 2023) (district court did not abuse its discretion by admitting evidence of previous drug trafficking over ten-years prior); *United States v. Alvarez*, 2023 U.S. App. LEXIS 30807 (9th Cir. 2023) (district court did not abuse its discretion by admitting twenty-year-old drug trafficking conviction at subsequent trial); *United States v. Garner*, 961 F.3d 264, 273 (3d Cir. 2020) *cert denied* 141 S. Ct. 932 (2020) (district court properly admitted evidence of prior drug involvement because it demonstrated Garner's personal knowledge of drug trafficking); *United States v. Avalos*, 458 Fed. Appx. 530, 533 (6th Cir. 2012)

counterparts have allowed: evidence that is over a decade old;[48] evidence relating to the possession of a completely different controlled substance;[49] evidence from a previous acquittal;[50] and evidence that an accused possessed or sold a controlled substance from a different location.[51] Additionally, federal courts have consistently allowed this evidence to be introduced on the merits rather than in rebuttal.[52]

("Where a defendant is charged with a specific intent offense . . . evidence of her prior convictions or bad acts may be admissible under Rule 404(b) for the purpose of proving such intent."); *United States v. Enriquez*, 457 Fed. Appx. 795, 803 (10th Cir. 2012) (district court did not abuse discretion by admitting evidence of prior drug involvement, as "[r]elevant purposes include raising an inference that the defendant had knowledge of the existence of contraband in a vehicle."); *United States v. Samuels*, 611 F.3d 914, 918 (8th Cir. 2010) *cert denied* 562 U.S. 1262 (2011) (district court did not err in admitting Samuels' eight-year-old conviction because it was relevant to prove "intent and knowledge."); *United States v. Smith*, 228 Fed. Appx. 383, 388 (5th Cir. 2007) *cert denied* 552 U.S. 885 (2007) (district court did not abuse its discretion admitting five-year-old conviction for drug distribution); *United States v. Puckett*, 405 F.3d 589, 596 (7th Cir. 2005) ("It is well settled in this circuit, that when a defendant is charged with a specific intent crime . . . evidence of past action is probative if used to establish an essential element of the crime charged."); *United States v. Brewer*, 2005 U.S. App. LEXIS 20709, *6 (11th Cir. 2005) (holding prior conviction of a drug-related offense was relevant to prove Brewer's intent, which he made a material issue by pleading not guilty); *United States v. Scalco*, 1992 U.S. App. LEXIS 9559 (4th Cir. 1992) ("Scalco's prior drug involvement tended to show intent and lack of mistake."); *United States v. Rubio-Estrada*, 857 F.2d 845, 847 (1st Cir. 1988) (Judge Breyer, writing for the court, held that evidence of a prior conviction "is admissible to show 'knowledge' and 'intent' both controverted issues in the case *that are not based on 'bad character'*."); *United States v. Harrison*, 679 F.2d 942, 948 (D.C. Cir. 1982 (testimony regarding defendant's prior drug dealing in his basement was properly admitted to prove motive, intent, preparation, plan, knowledge, identity, and absence of mistake in a subsequent trial for conspiracy).

[48] *Alvarez*, 2023 U.S. App. LEXIS 30807 at *3. *See also Puckett*, 405 F.3d at 597 (citations omitted).

[49] *Smith*, 228 Fed. Appx at 387–88.

[50] *United States v. Vega*, 676 F.3d 708, 718 (8th Cir. 2012) *cert denied* 568 U.S. 878 (2012).

[51] *Garner*, 961 F.3d at 273.

[52] *See* n. 47.

Our superior court routinely references Fed. R. Crim. 404(b) and looks to the federal courts' application the rule.[53] Accordingly, we do the same and find their analysis persuasive.

c. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

As to the final *Reynolds* factor, military judges enjoy wide discretion when they conduct the requisite balancing on the record.[54]

Mindful of the potential prejudicial effect, the military judge denied the Government's motion for a preliminary ruling on admissibility but allowed them to re-notify and re-raise the issue prior to trial. The Government raised the issue at multiple points throughout the trial, but the military judge reserved ruling to hear the presentation of the evidence. After the Defense rested its case, the military judge ruled and allowed the Government to present the evidence in rebuttal.[55] The military judge made the following findings of fact and conclusions of law:

> [T]he defense theory of an unknowing or mistaken ingestion, which was brought out on the cross-examination of the government's witness, does raise the probative value of the evidence; however because the accused was acquitted, the probative value of that evidence is greatly diminished in accordance with *U.S. v. Hoffman* [ ]. The Court does not find, however, that the danger of unfair prejudice is substantially outweighed by the probative value, albeit a diminished probative value. Therefore, I will allow the government to proceed with the two prior urinalyses and only the portion of the testimony that you gave specific notice of.[56]

The danger of unfair prejudice was lessened given that the military judge was the factfinder and is presumed to know and follow the law.[57]

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[53] *Graham*, 50 M.J. at 60; *Tyndale*, 56 M.J. at 219.

[54] *United States v. Chamorro*, 2019 CCA LEXIS 107, *5 (N-M. Ct. Crim. App. March 11, 2019) (citing *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997)).

[55] R. at 265.

[56] R. at 281-82 (citing *United States v. Hoffman* 2018 CCA LEXIS 326 (N-M. Ct. Crim. App. 2018), *rev. denied*, 80 M.J. 462 (C.A.A.F. 2020)).

[57] *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011) (citing *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000)). We also note from the evidence presented

We reject Appellant's argument that this evidence created a trial within a trial or shifted the burden of proof to Appellant in any way.[58] This misapprehends the limited purpose of the evidence. We note that the proper introduction of evidence of an accused's guilt cannot be characterized as burden shifting.

The military judge used the correct legal principles, his findings of fact are supported by the evidence in the record, and he applied the correct legal principles in a reasonable manner. While a different judge may have reached a different conclusion, we find the decision here was not outside the range of choices available to the military judge. Accordingly, we find that the military judge did not abuse his discretion in admitting the results of Appellant's urinalyses from 16 September and 15 November 2021 and select portions of Appellant's testimony at his previous court-martial.

B. Appellant's convictions are factually sufficient.

In order to trigger our duty to review a specification for factual sufficiency, an appellant must first make a request and show a specific deficiency in proof.[59]

We find that Appellant has made an adequate showing to trigger our factual sufficiency review. However, after first weighing of the evidence, giving appropriate deference to the types of evidence admitted as required and interpreted by our superior court in *United States v. Harvey* – and deciding it has met the "beyond a reasonable doubt" standard, we are not "clearly convinced that the finding of guilty was against the weight of the evidence."[60]

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at trial that THC-8 is not a controlled substance and is commercially available in a variety of products. It follows that there would be less stigma associated with its use, which further separates this case from *Graham*, *Tyndale*, and *Thompson*. The commercial availability and decreased stigma lessen the potential prejudicial effect of this type of evidence.

[58] Appellant's Br. at 12.

[59] 10 U.S.C. § 866(d)(1)(B).

[60] __ M.J. __, 2024 CAAF 502, at *12–13 (C.A.A.F. September 6, 2024).

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[61]

The findings and sentence are **AFFIRMED**.

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[61] Articles 59 & 66, UCMJ.