IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellant v. Captain (O-3) **ROSS E. DOWNUM,** United States Army Appellee	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20220575 USCA Dkt. No. 24-0156/AR

ANTHONY J. SCARPATI
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0793
U.S.C.A.A.F. Bar No. 37765

CHASE C. CLEVELAND
Major, Judge Advocate
Branch Chief, Government
Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060
(703) 693-0749
U.S.C.A.A.F. Bar No. 37916

Issues Presented

I. WHETHER THE ARMY COURT ERRED IN CONDUCTING ITS LEGAL SUFFICIENCY ANALYSIS WHEN IT HELD THAT *UNITED STATES V. CAMPBELL*, 50 M.J. 154, 160 (C.A.A.F. 1999) REQUIRES NOT ONLY EXPERT TESTIMONY INTERPRETING URINALYSIS RESULTS BUT THE ADMISSION OF THE UNDERLYING PAPER URINALYSIS RESULTS AS WELL.

II. WHETHER THE ARMY COURT ERRED WHEN IT HELD THAT UNOBJECTED TO EXPERT TESTIMONY INTERPRETING THE URINALYSIS RESULTS LACKED RELEVANCE WITHOUT THE ADMISSION OF THE PAPER URINALYSIS RESULTS.

III. WHETHER THE ARMY COURT FAILED TO CONDUCT A PROPER FACTUAL SUFFICIENCY ANALYSIS UNDER ARTICLE 66(d)(l)(B).

Argument

1. Issue I encompasses the legal sufficiency of the expert's testimony.

Appellee characterizes the government's argument as "an attempt to smuggle a fourth issue under the ambit of issue I." (Appellee's Br. 6). This is an intentionally narrow characterization aimed at precluding the government from making necessary and relevant arguments that flow from Issue I. Appellee attempts to frame this issue in a vacuum. Appellee does so by concluding that the Army Court's finding—the paper urinalysis results were required—is entirely bifurcated from the argument that the expert's testimony was, on its own, legally

insufficient to sustain a conviction. (Appellee's Br. 22). Appellee ultimately concludes that the government is precluded from arguing that the expert's testimony *was* legally sufficient under *United States v. Campbell*, which is clearly the logical conclusion of Issue I. This is a faulty premise.

Relevant to Issue I, *Campbell* plainly states:

> To sustain a prosecution in such cases, we have required only that the results be supported by expert testimony explaining the underlying scientific methodology and the significance of the test result, so as to 'provide a rational basis for inferring that the substance was knowingly used and that the use was wrongful.' We have permitted, but have not required, the factfinder to conclude on that basis that the Government has satisfied its burden to establish both elements of the offense – use of the controlled substance, as well as the wrongfulness of the use.

50 M.J. at 159 (quoting *United States v. Graham*, 50 M.J. 56, 58–59 (1999)). Issue I is aimed at the Army Court's legal sufficiency analysis beginning with a faulty premise that *Campbell* somehow requires the underlying paper urinalysis results in order to sustain a wrongful use conviction as legally sufficient regarding the knowing and wrongful use element. Because the Army Court's entire finding stems from this faulty premise, its' entire legal sufficiency analysis must be scrutinized and is properly encompassed within Issue I.

Appellee argues that the Army Court's opinion thoroughly bifurcates the knowing and wrongful use requirement finding only that the paper urinalysis result requirement applies to knowing but not wrongful use. (Appellee's Br. 22). This is

incorrect. First, the Army Court's opinion expressly intertwined the absence of the paper urinalysis result with the Government's alleged failure to prove the knowing *and wrongfulness* elements when it found: "We are unfamiliar with any remotely recent authority supporting the government's contention that an expert opinion alone, devoid of sufficient factual basis, is adequate to prove drug use, let alone wrongful drug use." (JA 036). Issue I fairly raises both whether the Army Court's interpretation of *Campbell* is correct and whether the Government otherwise met the requirements of *Campbell* through the expert's testimony.

Second, Issue I transcends how the Army Court characterized their finding that the evidence was legally insufficient and also focuses on what *Campbell* itself requires. Regardless of how the Army Court structured their findings, their ultimate conclusion is based on a faulty premise which, as stated *supra*, is inextricably intertwined with their ultimate conclusion that the expert's testimony was legally (and factually) insufficient. The Government is well within the bounds of Issue I when it argues that *Campbell* does not require the admission of the paper urinalysis result and that the Government otherwise met their burden at trial through the testimony of the expert witness.

2. Issue II also encompasses the legal sufficiency of the expert's testimony.

However, even if this Court agrees with Appellee's narrow interpretation regarding Issue I, whether the expert's testimony was otherwise relevant and

therefore legally sufficient is also be encompassed within Issue II. The Army Court held that "[w]ithout the admission of the test results . . . the expert's testimony lacked relevance."[1] (JA 037). Issue II squarely addresses this erroneous finding. Although the government does not address the argument regarding the sufficiency of the expert's testimony related to innocent ingestion under this subsection, certainly the substance of the expert's testimony is rationally related to this erroneous finding by the Army Court. There is significant overlap between the two separate, but related, certified issues.

In other words, both certified issues take aim at the Army Court's ultimate conclusion that the expert's testimony was legally insufficient without the admission of the underlying documentary evidence (Issue I) and that the expert's testimony otherwise "lacked relevance" (Issue II). The Army Court's erroneous premise that the paper urinalysis results were required both began and ended their opinion illustrating that this faulty premise was instrumental to their ultimate finding that the evidence was legally insufficient. (JA 033, 037). Both certified issues individually, and certainly in tandem, necessarily encompass whether the expert's testimony was legally sufficient under the requirements delineated in *Campbell*—to include the requirement that the testimony "reasonably discount[ed]

[1] In the very next sentence, the Army Court stated: "For these reasons, and after reviewing all the evidence, we conclude the finding of guilty was legally and factually insufficient." (JA 037).

the possibility of unknowing ingestion." 50 M.J. at 160. [2]

3. The standard of review regarding Issue III is not waived.

Appellee argues that the government waived this argument by not raising it in its' initial brief to the Army Court. (Appellee's Br. 7). This argument is misguided for two reasons: 1) the underlying purpose of applying the waiver doctrine is not met; and 2) the Government properly preserved the issue in its Motion for Reconsideration.

As Appellee points out, the waiver doctrine "serves judicial economy by forcing parties to raise issues whose resolution *might spare the court and parties later rounds of remands and appeals*." (Appellee's Br. 30) (quoting *Hartman v. Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997)). Here, the Government did not raise the issue with the Army Court in its' initial brief because any such argument in light of the Army Court's recent Opinion of the Court in *United States v. Scott*, would have been futile and thus would not have served judicial economy. *C.f. United States v. Cueto*, 82 M.J. 323, 329 (C.A.A.F. 2022) ("An attorney's decision to forego taking actions that likely would

[2] Issue III also encompasses the adequacy of the expert's testimony. Although Appellee does not raise this issue in his Answer, this point is relevant to his assertion that the Government is somehow precluded from arguing that the expert's testimony alone was sufficient to sustain appellee's conviction. This is especially true considering the Army Court failed to delineate which of their findings apply to legal sufficiency and which apply to factual sufficiency. (JA 037).

be futile is not deficient."). The Government was well-aware of where the Army Court stood on this issue, and judicial economy would not be served by making the same argument that the Army Court had recently rejected in *United States v. Scott*.

However, once *United States v. Scott* was set aside by this Court, the Government immediately raised the issue again upon reconsideration. (JA 029–30). Thus, even if the Government's failure to raise the issue initially would have constituted waiver, the Government preserved the issue by raising the standard of review in the Government's Motion for Reconsideration. (JA 029–30). Despite Appellee's efforts to characterize the "rebuttable presumption" language from *United States v. Harvey* as something other than an alternative to a de novo standard of review, that is exactly what the *Harvey* court qualified it as.[3] Although the Government did not go so far as to suggest to this Court exactly how to characterize the new standard of review, the Government did follow the same argument that it proposed to the Army Court in its Motion for Reconsideration—an alternative to a de novo standard of review is clearly warranted. (JA 029–30).

[3] 83 M.J. 685, 693 (N.M. Ct. of Crim. App. 2023) ("It is clear that the factual sufficiency standard in the revised Article 66, UCMJ, statute has altered this Court's review from taking a fresh, impartial look at the evidence requiring this Court to be convinced of guilt beyond a reasonable doubt, to a standard where an appellant has the burden to both raise a specific factual issue, and to show that his or her conviction is against the weight of the evidence admitted at trial. Thus, Congress has implicitly created a rebuttable presumption that in reviewing a conviction . . . .").

This stands in direct contradiction to Appellee's contention—that the Government "change[d] its position after losing." (Appellee's Br. 36). The Government did not change its' position, but rather respected and acknowledged the binding precedent of the Army Court in *United States v. Scott* in its original brief, but immediately raised the issue again once that opinion was set aside. (JA 029–30).

4. This Court may act on findings by the Army Court which are set aside as incorrect in fact.

Appellee argues that the Government is attempting to frame an issue of fact as an issue of law. (Appellee's Br. 31). The Government is not asking this Court to make new factual findings as Appellee suggests in his brief, but rather to determine whether the Army Court erred in their application of the law when they approached their review through the wrong lens and similarly ignored or failed to give appropriate deference to material facts which were before the trial court during their factual sufficiency review. (Appellee's Br. 33–34).

This Court is expressly authorized to act with respect to the Army Court's findings setting aside the trial court's finding of guilt as incorrect in fact. *See* Article 67(c)(1)(C) (stating that this Court "may act only with respect to . . . the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals as incorrect in fact under section 866(d)(1)(B) of this title (article 66(d)(1)(B)) [10 USCS § 866(d)(1)(B)]). Based on the evidence presented to the finder of fact and the erroneous application of the

law by the Army Court, this Court should reverse the lower court's findings or remand to the lower court in accordance with this Court's guidance.

Conclusion

WHEREFORE, the government respectfully requests this honorable court reverse the Army Court's decision.

ANTHONY J. SCARPATI
CPT, JA
Appellate Government
Counsel

CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 1802 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

ANTHONY J. SCARPATI
Captain, Judge Advocate
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on July 22, 2024.

DANIEL L. MANN
Senior Paralegal Specialist
Office of The Judge Advocate General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822