IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellant

APPELLEE'S ANSWER

Crim.App. Dkt. No. 20220575

v.

USCA Dkt. No. 24-0156/AR

Captain (O-3)
ROSS E. DOWNUM,
United States Army,
Appellee

TO THE HONORABLE, THE JUDGES OF THE
COURT OF APPEALS FOR THE ARMED FORCES

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866 (2021). The government contends this Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867 (2021).[1]

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[1] Due to irregularities in the notification process self-reported by the government, this Court has specified several issues relating to whether the proper jurisdictional prerequisites have been satisfied. These issues have been separately briefed and are not further addressed herein.

Statement of the Case

On July 25, August 19, and November 7-10, 2022, Captain (CPT) Ross E. Downum (appellee) was tried by officer members at a general court-martial at Fort Hood, Texas. (JA at 39-40). Appellee was convicted, contrary to his pleas, of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (1983). The military judge sentenced appellee to be reprimanded, to forfeit $1000 pay per month for one month, and to be restricted to post for 30 days. (JA at 39-40). The convening authority reduced the restriction to the confines of Bell County but otherwise did not take action on the findings or the sentence. (JA at 42).

Statement of Facts

1. Background facts

After missing a uranalysis (UA) on September 8, 2021 due to being excused from work, appellee took a "make-up" UA on September 13, 2021. (JA at 68-69, 90-91, 93). His sample from the make-up test allegedly reflected the presence of BZE, a metabolite of Cocaine. (JA at 142). There was evidence that appellee, who was part of unit leadership and was on the same group text message thread as the other unite leaders and the unit prevention leader (UPL) who coordinated the UA program, knew he would be re-tested shortly after missing the first test, though he likely would not know the exact day. (JA at 94-96, 158, 189-90, 194, 487-88).

As a possible explanation for the allegedly positive test, the defense presented evidence that appellee attended a birthday party shortly before the test at which he noticed a foreign substance in a nondescript cup he took a drink from. (JA at 196-97, 201-02, 205-10, 221-22, 225-27, 240-43, 263-65, 270-71, 283).

Nobody who had observed appellee in the relevant timeframe observed him show any indication of being under the influence of drugs (JA at 247, 269) and the defense presented substantial and unrebutted testimony as to his good character as a "rule follower," a dedicated officer, and a law-abiding and truthfulness person. (JA at 293, 305-06, 312-13, 318, 322, 330-33)

2. Urinalysis evidence

The only documentary evidence the government admitted were the testing roster from the UA (JA at 388), the DD Form 2624 documenting portions of the chain of custody but not noting any test results (JA at 390-91), and the physical specimen collection bottle (JA at 393).

The government did not call the lab expert who had conducted the testing as a witness. Instead, the government called a surrogate expert,[2] who testified that she had reviewed the litigation packet and, in her expert opinion, appellee's sample had tested positive for cocaine. (JA at 99). After being qualified as an expert witness in

[2] Dr. CO, the technical director of the testing laboratory.

"forensic toxicology and drug testing," the surrogate expert provided an overview of the testing lab's operations (JA at 104-06), explained the lab's processes for receiving and testing samples – intermixed with testimony about chain of custody procedures (JA at 106-11, 126-34), and explained what cocaine was and how it is detected in drug tests (JA at 134-40). The surrogate expert testified that she had reviewed "the entire packet" containing appellee's sample and "went through all the machine generated data and analysis." (JA at 134, 140). Based on this review, the surrogate expert testified that, in her expert opinion, appellee's sample tested positive for cocaine on the initial screening. (JA at 140-41). Similarly, she testified that "based on [her] review of the litigation packet" she formed "an opinion" that further testing, via gas chromatography mass spectrometry (GC-MS), had been conducted, and that this confirmatory test "was positive for BZE[3] at 295 nanograms per milliliter." (JA 320).

3. The Army Court's opinion

In order to prove its case, the government had to prove: (1) That appellee used drugs; and (2) That such use was wrongful.[4] The Army Court found the evidence both factually *and* legally insufficient on both points. (JA at 33-37).

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[3] A metabolite of cocaine.

[4] Unknowing use would defeat this element.

On the former point, the Army Court found the evidence factually and legally insufficient because the government's method of presenting the urinalysis results was deficient to prove use had occurred. *See* Certified Issues I and II.

The Amry Court also found the evidence factually and legally insufficient on the latter point: "By failing to account for the possibility of innocent ingestion, the government failed to prove beyond a reasonable doubt that appellee's alleged use was wrongful."[5] (JA at 36).

As such, the Army Court found the evidence was insufficient in four ways:

1. It was legally insufficient to prove use;

2. It was factually insufficient to prove use;

3. It was legally insufficient to prove the use was wrongful; and

4. It was factually insufficient to prove the use was wrongful.

Summary of Argument

This Court should summarily dispose of the certified issues as moot because none of them encompass the lower court's finding that the evidence was legally insufficient to establish wrongfulness (by precluding unknowing ingestion) and, as such, even if this Court were to fully agree with the government on all three certified

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[5] Failure to prove appellant's use was wrongful, of course, assumes as a predicate that the use actually occurred. Thus, this finding was independent of the deficiencies in proving use.

issues, the lower court's finding of legal insufficiency with regard to wrongfulness would still stand, the conviction would still be overturned, and the parties would still be in materially the same positions they are in now.

If this Court disagrees that the certified issues are moot in their entirety, the resolution of Issue III (dealing with factual sufficiency) in appellee's favor would still moot the remaining issues. As such, for the sake of judicial economy, this Court may be inclined to consider Issue III first.

On the merits, this Court should answer Issue I in the negative because the Army Court's conclusion that both explanatory surrogate expert testimony and the underlying testing documents are required was correct and the caselaw and considerations cited by the government do not support its position to the contrary.

After addressing Certified Issue I, the government attempts to smuggle a fourth issue under the ambit of issue I by transitioning into arguments about the Army Court's conclusion that the evidence was legally insufficient to preclude unknowing ingestion. These arguments, however, fall outside the scope of Certified Issue I, which is limited to the Army court's treatment of the proper method to prove up the test results. As such, this Court should not reach these arguments. Nevertheless, if the Court reaches the merits of this stealth issue, it should find the Army Court did not error because the Army Court applied the right law and

expressly considered the saliant factors highlighted by the government (the expert's testimony that the sample was above the cutoff, and appellee's testimony).

This Court should also answer Issue II in the negative, largely because it is wholly a subset of Issue I. Even if it is not a complete subset of Issue I, the result of this Court's resolution of Issue I will moot Issue II one way or another. While appellee can see likely no scenario in which the merits of this issue will impact the result, the best reading of the Army Court's comment is simply that the that the omission of the underlying testing documentation reduced the weight of expert's opinion, a proposition the government itself agrees with.

This Court should answer Issue III in the negative because, despite the government's attempt to frame the dispute over factual sufficiency as an issue of law, it is really an issue of fact. While the government takes issue with the Army Court's use of the term "de novo" to *describe* the new factual sufficiency standard, the parties and the CCA all agree on what the underlying standard is: to include the requirement for increased deference. A standard of review can properly be described as "de novo" even if it is subject to some level of deference (appellee cites multiple examples below). The government also waived this issue by explicitly endorsing the standard of review as de novo in its own opening brief below. In addition to constituting waiver, the government's reversal of position after losing reinforces the

conclusion the government is merely attempt to reframe an issue of fact as one of law to secure another bite at the apple.

Argument

Before engaging with the substance of the issues presented, it is appropriate to examine their scope and what, if any, impact their resolution would have on the ultimate position of the parties.

1. The Certified Issues are moot because their resolution would not materially alter the positions of the parties

An issue is moot when "any action which we might take . . . would not materially alter the situation presented with respect either to the accused or the Government." *United States v. Datavs*, 71 M.J. 420, 426 (C.A.A.F. 2012) (citations omitted). When certified issues are moot, this Court's longstanding practice has been to summarily dispose of them. *See United States v. Gilley*, 34 C.M.R. 6, 6–7 (C.M.A. 1963) (holding the questions presented moot because "[p]ractically speaking, any action which we might take with respect to the certified issues would not materially alter the situation presented with respect either to the accused or the Government"); *see also United States v. Clay*, 10 M.J. 269, 269 (C.M.A. 1981) (declining to answer the certified issue because it would not result in "a material alteration of the situation for the accused or for the Government.") (citations omitted); *United States v. McIvor*, 44 C.M.R. 210, 212 (C.M.A. 1972) (holding the certified questions moot because resolution of the issue would not "result in a

material alteration of the relationship of the parties."); *United States v. Aletky*, 37 C.M.R. 156, 156–57 (C.M.A.. 1967) (holding the certified question moot or "academic" because the accused had been separated from the service). Similarly, as this Court recently reinforced, it does not issue advisory opinions. *B.M. v. United States*, No. 23-0233, __ M.J. __ 2024 WL 1471453 (C.A.A.F. Apr. 3, 2024).

In the present case, Certified Issues I and II challenge the finding of legal insufficiency with respect to establishing use.

Certified Issue III challenges the findings of factual insufficiency with respect to both establishing use and establishing wrongful use.

None of the certified issues, however, challenge the finding of legal insufficiency with respect establishing wrongfulness (by precluding unknowing ingestion). As such, even if this Court were to fully agree with the government on all three certified issues, the lower court's finding of legal insufficiency regarding wrongfulness would still stand, the conviction would still be overturned, and the parties would still be in materially the same positions they are in now.

Post-certification the government seems to have realized this dynamic, and has attempted to smuggle a fourth issue under the ambit of issue I. After discussing the issue as certified, the government brief transitions into arguments about the Army Court's conclusion that the evidence was legally insufficient to preclude unknowing ingestion. These arguments fall outside the scope of the certified issue

and this Court should decline consider these arguments because they are not properly before it. *See, e.g.*, *United States v. Jacobsen*, 77 M.J. 81, 83 (C.A.A.F. 2017) (declining to examine an issue because "that issue was not certified and is simply not before us."); *Id.* at 85 ("The certified issue before us is narrowly delimited, and our review is too."). Because the government briefs two separate issues under the ambit of Issue I, appellee bifurcates his response in the below analysis.

If this Court agrees, it should summarily dispose of the certified issues as moot.

2. <u>If this Court finds for appellee on Issue III, the remaining issues are moot</u>

If this Court disagrees that the certified issues are moot in their entirety, the resolution of Issue III, challenging the proprietary of the Army Court's factual sufficiency review, in appellee's favor would still moot the remaining issues. *See, e.g.*, *United States v. Wheatly*, 28 C.M.R. 103 (C.M.A. 1959) (when lower court finds the evidence factually insufficient the issue of legal sufficiency becomes moot). Regardless of the resolution of other issues, answering Issue III in the negative would leave the Army Court's finding of factual insufficiency as to wrongfulness undisturbed and the position of the parties would not change. For the sake of judicial economy, this Court may be inclined to consider Issue III first.

I[A]. 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.

Standard of Review

This Court reviews a lower court's legal conclusions de novo, but gives a lower court's factual findings more deference, and will not reverse such findings unless they are clearly erroneous. *United States v. Durbin*, 68 M.J. 271, 273 (C.A.A.F. 2010) (quoting *United States v. McCollum*, 58 M.J. 323, 335–36 (C.A.A.F. 2003)).[6]

Law and Argument

1. <u>This Court should find admission of the underlying testing documents was required</u>

As this Court stated in *United States v. Green*: "A urinalysis properly *admitted* under the standards applicable to scientific evidence, when *accompanied by* expert testimony providing the interpretation required by *Murphy*, supra, provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use . . . ."). 55 M.J. 76, 81 (C.A.A.F. 2001) (citing *United States v. Murphy*, 23 MJ 310, 312 (C.M.A. 1987) (emphasis added). This precedent clearly envisions that the

[6] Of note, TJAG has not asked this Court to independently review legal sufficiency – but only to determine whether the Army Court erred *when* it determined both surrogate expert testimony and the underlying testing documents are required.

testing documents themselves will be admitted, in addition to the explanatory expert testimony. *See also United States v Bond*, 46 M.J. 86, 89 (C.A.A.F. 1997) ("[E]vidence of urinalysis tests, their results, *and* expert testimony explaining them is sufficient to permit a factfinder to find beyond a reasonable doubt that an accused used marijuana.") (emphasis added).

To be clear, though barely addressed by the government, the present case involved testimony from a surrogate expert, not the testing expert personally.[7] Given this dynamic, in the absence of the underlying testing documents, the government case consisted of little more than a surrogate expert assuring the panel *she had reviewed the evidence* and, in her opinion, it showed cocaine in appellee's system. While it is clear that presentation of (1) the underlying testing documents and (2) explanatory "surrogate" expert testimony to explain the testing documentation provides a legally sufficient basis upon which to convict, it is equally clear that the underlying testing documents alone, with no expert testimony explaining the results, are insufficient to establish guilt. *See United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005); *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991); *Murphy*, 23 M.J. 310. As such, the proper course of action in such cases is clear: the

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[7] While the Army Court's opinion did discuss this dynamic, the Court was not required to repeat all the facts from the record, especially as the case was decided on summary disposition and does not serve as precedent.

prosecution should enter the testing documentation into evidence and provide expert testimony to explain it.

See, e.g., *United States v. Hudson*, No. ACM 38846, 2017 WL 435735, at *1 (A.F. Ct. Crim. App. 2017) (unpub. op.) (explaining in detail how the government presented (1) the positive underlying testing documents and (2) interpretative surrogate expert testimony explaining the results). This procedure tracks the longstanding process noted, *inter alia*, in *Green*, that the UA be "admitted" and "accompanied by" explanatory expert testimony.

The government asks this Court to find that the explanatory expert testimony – even divorced from the underlying documentation – is sufficient. This Court should not adopt this view. Inherent in the concept of explanatory expert testimony is that the expert is explaining the evidence. *See* Stephen A. Salzburg, Lee D. Schinasi, & David A. Schlueter, Military Rules of Evidence Manual, § 702.202[2] at p. no. 7-21-22 (7th Ed., Matthew Bender & Co. 2011) ("Such proof [expert testimony] is admitted because the experts have the knowledge and training to *help factfinders understand other evidence in the case*, or understand the way in which evidence relates to attended legal questions.") (emphasis added). The precedent on UA cases tracks this logic structure: the prosecution should introduce the testing documents, and then offer expert testimony to "assist the factfinder in understanding" the testing documents. In the absence of the underlying testing

documents, the expert testimony does not "accompany," "explain," or "interpret" the evidence – it merely bypasses it altogether. As examined below, the caselaw cited by the government does not support its position to the contrary.

2. United States v. Graham (admissible vs. admitted)

The government cites this Court's holding in *United States v. Graham*, requiring, *inter alia*, that the laboratory results must be "admissible." (gov br. at 14-15) (citing 50 M.J. 56, 58–59 (C.A.A.F. 1999)). The government argues, however, that this precedent does not require "the admission of the underlying test results, rather . . . just their admissibility." (gov br. at 15). The distinction the government seems to be drawing is that the evidence need not actually be *admitted*, as long as it could have been admitted. This argument is in tension with the axiom that factual and legal sufficiency review is limited to the evidence *admitted at trial*. *See* Article 66(d), UCMJ; *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

As noted above, this Court in *Green* stated that "A urinalysis properly *admitted* under the standards applicable to scientific evidence, when *accompanied by* expert testimony providing the interpretation required by *Murphy*, supra, provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use . . . ."). 55 M.J. at 81 (citing *Murphy*, 23 MJ at 312) (emphasis added).

This precedent clearly envisions expert testimony to explain admitted evidence, not evidence that could be – but is not actually – admitted.

3. United States v. Tearman

The government next argues that admission of the DD 2426 cannot be required because this Court found error in admission of portions of the DD 2426 in *United States v. Tearman* on the basis that they constituted testimonial hearsay. (gov br. at 15) (citing 72 M.J. 54 (C.A.A.F. 2013)). Afterall, the government asks by implication, how could admission of an inadmissible document be required? (gov br. at 15).

Appellate defense counsel are old enough to remember the development of this area of law as it happened and, with the Court's indulgence, will digress into a short discourse on said history to reconcile what the government sees as a contradiction. In the wake of *Crawford v. Washington* and its progeny, a wave of civilian and military jurisprudence dealt with the distinction between testimonial and nontestimonial hearsay. 541 U.S. 36 (2004). On the military side, one subject of this litigation was whether the DD Form 2624 (Specimen Custody Document) was testimonial or nontestimonial. The two leading cases on this subject are *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011) and *Tearman*, 72 M.J. 54. *Sweeney* held that the DD Form 2624 was testimonial hearsay and admitting it was error. *Tearman* moderated this holding to a degree – holding that portions of the DD Form

2624, to include the chain of custody, were nontestimonial – but maintained that the portions of the DD From 2624 that certified the testing results *were* testimonial. As such, post *Tearman*, admitting the DD Form 2624 was still error.

However, after these cases, and one would presume in response to them, the DD Form 2624 itself was modified, to remove the sections this Court found constituted testimonial hearsay. This can be seen in the present case – reference to Prosecution Exhibit 3 (the DD Form 2624) shows the form edition date is NOV 2014, the year after *Tearman* was decided. (JA at 390). The old version of the form contained blocks G[olf] and H[otel] where the testing personnel attested in affidavit-like form to the results of the test. The new version of the form no longer has those blocks. As such, the government's comparison to *Tearman* is outdated.

Additionally, the Army Court did not, as the government contends, find "that the omission of the DD Form 2426 made the case legally and factually insufficient." (gov br. at 15). Rather, the Army Court did not specify that the omission of the DD Form 2426 was fatal, but rather the total omission of the underlying testing documents – or some equivalent factual basis – rendered the evidence legally insufficient. *See* (JA at 37). In so holding, the Army Court clearly noted that it was only the *nontestimonial* portions of the underlying test documentation that could have, and should have, been admitted. (JA at 37). Additionally, the Army Court's holding was more nuanced still, caveating that "introduction of the test results in

documentary form" is not "the *only* method of proving use, only that the expert opinion must rely on a sufficient factual basis beyond the mere recitation of a ng/ml level." (JA at 37) (emphasis in original).[8]

While this Court in *Teraman* found the testimonial portions of the DD Form 2624 should not have been admitted, it found the error harmless because the testimonial portions of the DD Form 2624 were cumulative with the expert testimony. 72 M.J. at 63. As such, the government contends that *Tearman* stands for the proposition that the underlying testing documents need not be admitted, because if the underlying data is cumulative on the expert testimony, then clearly the underlying testing documents is not required. (gov br. at 15). This logic, however, fails to consider that in *Tearman* the underlying nontestimonial data *was* admitted, and only a few lines on the DD Form 2624 (the portions certifying the result) were improper. The expert testimony in *Tearman* was cumulative with the testimonial portions of the DD Form 2624, not the nontestimonial underlying testing documents in toto – which were separately and properly admitted in that case.[9] There is no

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[8] Though the issues are not exactly parallel, the Army Court's holding was similar to the Supreme Court's recent opinion in *Smith v. Arizona*, holding that a surrogate expert which's mere recitation of the results of another expert's analysis was improper. 602 U.S. ___ (June 21, 2024).

[9] As this Court explicitly noted, the expert in *Tearman* "relied upon the machine printouts" which were in evidence. The lower court's opinion also listed all the testing documents that were omitted, the vast majority of which were

contradiction between *Tearman* and the Army Court's holding that *nontestimonial* testing documents should have been admitted in the present case.

4. United States v. Ford

The government next argues that "this Court's predecessor expressly found that a urinalysis case supported by an expert's testimony and without the underlying drug test results is legally sufficient." (gov br. at 16) (citing *United States v. Ford*, 4 U.S.C.M.A. 611, 615–16 (C.M.A. 1954)).

While appellate defense counsel are old enough to remember *Sweeney* and *Tearman*, *United States v. Ford* is from a different era entirely. After venturing into the deepest recesses of our virtual law library to blow the cybernetic dust off the fourth volume of this Court's predecessor's historical reporters, however, appellate defense counsel can confirm this case is inapposite. *Ford* was about the scientific reliability of the test used, not how the evidence should be presented. The opinion is unclear about what was or was not admitted into evidence because that was not the subject under consideration. According to appellate defense counsel's astromech law librarian, *Ford* has only been cited once in this century, and, as far as appellee can tell, has never been cited for the proposition the government cites it for (that admission of the underlying testing documents is not required). Additionally, unlike

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nontestimonial. *United States v. Tearman*, 70 M.J. 640, 642, n.6 (N-M. Ct. Crim. App. 2012), aff'd, 72 M.J. 54 (C.A.A.F. 2013).

the present case where only a surrogate expert testified, in *Ford* both of the testing experts testified personally (one via deposition). 4 U.S.C.M.A. at 612-13.[10]

5. United States v. Boulden

The government next cites a cold-war era Air Force Court of Criminal Review case, which found that the omission of the underlying test results did not make the evidence legally or factually insufficient. (gov br. at 16) (citing *United States v. Boulden*, 26 M.J. 783, 785 (A.F.C.M.R. 1988), aff'd on other grounds, 29 M.J. 44 (C.M.A. 1989)). While this is an admirable piece of legal research by the government, this aged case is not controlling either on this Court nor the Army Court. Additionally, just as in *Ford*, there is no indication in *Boulden* that it was a surrogate expert that was testifying. Finally, while upholding legal sufficiency, the Air Force Court of Criminal Review noted that omission of the underlying results was out of step with the usual practice. 26 M.J. at 785.

6. The government arguments that defense conceded the presence of cocaine in Appellee's system

Throughout its brief the government argues that the defense at trial conceded the presence of cocaine in appellee's system. While the government points to

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[10] Going even further back, the Government cites the Army Board of Review's opinion in *United States v. Ellibee* for the same proposition as *Ford*. (gov br. at 16) (citing 13 C.M.R. 416, 417 (A.B.R. 1953)). For the same reasons as *Ford*, *Ellibee* is inapposite: it is focused on a different subject, unclear about what was or was not admitted, and the testing expert personally testified.

various statements of trial defense counsel, it is axiomatic that the statements of counsel are not evidence. The government also argues appellee, in his testimony, conceded cocaine was in his system. This is inaccurate. Appellee offered a potential explanation for the purported positive test, but did not, by so doing, concede the test results were accurate. Indeed, it is unclear how appellee personally would have the foundation to confirm the accuracy of the test, outside perhaps confessing to known cocaine use, which he certainly could not do.

Presenting a defense theory that would potentially undermine knowing/wrongful use does not serve as a de facto stipulation that use occurred in the first place. The military justice system has a well-established system in place for stipulations, the criteria for which were clearly not met here. *See* R.C.M. 801.

7. Remedy

If this Court agrees with the government substantively, and finds this issue is not mooted by the resolution of other issues, the proper remedy is remand to the Army Court for consideration consistent with this Court's guidance. *See Beatty*, 64 M.J. at 459 (pointing out that where the lower court conducts an invalid review, the proper remedy is remand for a proper review); *United States v. Holt*, 58 M.J. 227, 233 (C.A.A.F. 2003) (where an appellant does not receive a proper legal review from the CCA, the remedy is a remand to the CCA for a proper review) (citation omitted); *see also United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016) (remanding for a new

CCA review where "the CCA erroneously applied a standard short of that required by law" in its original review).[11] Affirming the findings outright would run contrary to these precedents. Additionally, the certified issue does not ask this Court to conduct its own legal sufficiency review.

WHEREFORE, appellee respectfully requests this Court affirm the Army Court's opinion.

I[B]. 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 [EVIDENCE TO REASONABLY DISCOUNT THE POSSIBILITY OF UNKOWNING INGESTION].

Standard of Review

Adopted from Issue I[A].

Law and Argument

1. <u>These arguments are outside the scope of Certified Issue I</u>

After making the above arguments about whether the underlying testing documents were required, the government transitions into lengthy arguments about the Army Court's conclusion that the evidence was legally insufficient to preclude

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[11] Additionally, the certified issue does not purport to ask this Court to conduct an independent legal sufficiency review, only to determine whether the Army Court erred in its legal sufficiency review.

unknowing ingestion. (gov br. at 18-24). These arguments, however, fall well outside the scope of the certified issue, which is limited to the Army court's treatment of the proper method to prove up the test results.

Unknowing ingestion is a wholly separate issue. Indeed, unknowing ingestion assumes as a prerequisite that use has been properly proven. If the TJAG wanted to certify an issue regarding the Army Court's legal sufficiency finding about unknowing ingestion, he was free to do so. He did not.

The certified issue asks "whether the Army Court erred in conducting its legal sufficiency analysis *when* it held that [both expert testimony and the underlying testing documents are required]." It does not ask whether the Army Court erred in toto, nor does it ask this Court to determine independently whether the evidence is legally sufficient. TJAG chose a limited issue to certify and this Court's review is limited to that issue. *See, e.g.*, *Jacobsen*, 77 M.J. at 85 ("The certified issue before us is narrowly delimited, and our review is too.").

2. <u>If the Court reaches this issue, the Army Court's analysis of the legal sufficiency of the evidence to prove wrongfulness was proper</u>

As cited by the Army Court, this Court in *Campbell* outlined three criteria that can permit an inference of wrongful use on the basis of uranalysis evidence:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question (*see, e.g.*, *Harper*, supra at 161); (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of

> unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug," *see id.* at 163; *Murphy*, *supra* at 312; and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

United States v. Campbell, 50 M.J. 154, 160 (C.A.A.F. 1999). On reconsideration, this Court clarified that the three criteria are not necessarily exclusive, as long as the government "can explain, with equivalent persuasiveness, the underlying scientific methodology and the significance of the test results, so as to provide a rational basis for inferring knowing, wrongful use." *United States v. Campbell*, 52 M.J. 386, 389 (C.A.A.F. 2000).

The 2nd criterion ("that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion") is at issue here. Even if the government establishes the metabolite does not occur naturally, and the testing methodology was reliable, it must also establish that the test accounted for unknowing ingestion. While the government is free to do this in any scientifically valid way, as the Army Court acknowledged, and is confirmed by decades of caselaw, that the 2nd criterion "is *usually* addressed with testimony about the significance of the 'cutoff' level." (JA at 36) (emphasis added). This dynamic was present in *Green*, as cited by the Army Court, where this Court found:

> [T]he Government adequately established that BZE does not naturally occur in the human body, and that the result of the urine test was reliable. We find, however, that the testimony of [the lab expert] did not establish that the cutoff

> level and the appellant's nanogram level was sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug.

55 M.J. 76, 83–84 (C.A.A.F. 2001).

Applying these noncontroversial principles from this Court's precedent, the Army Court found the government failed to fulfill the 2nd criterion when, beyond noting that the cutoff level was exceeded, the government presented "no explanation of the cutoff level's relevance, or any other evidence indicating test controls for the possibility of innocent ingestion." (JA at 35-36)

3. The government arguments about 3rd Criterion are inapposite

The government defends its case below at considerable length, focusing mostly on the scientific reliability of the test, which presumably has increased with time and technological advances. (gov br. at 19-22). This section of the government's brief is largely inapplicable, because it does not relate to the deficiency in the evidence the Army Court relied on. While the Army Court noted gaps in the government's presentation about the scientific reliability of the test[12] these gaps were not the basis for the ultimate decision. Rather, the Army Court found the evidence legally and factually insufficient on the basis of the government's

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[12] "[T]he expert offered virtually no information about the test itself, whether it is regarded as scientifically sound and whether it was conducted in accordance with prescribed procedures in this case."

failure to account for unknowing ingestion: "By failing to account for the possibility of innocent ingestion, the government failed to prove beyond a reasonable doubt that appellant's alleged use was wrongful." (JA at 35-36).

4. The government arguments about 2nd Criterion

The government's defense of the 2nd Criterion – which appellee understands to be the material issue in this case, is much shorter. (gov br. at 23-24). The government points out, as acknowledged by the Army Court, that the expert did testify appellee's sample was above the "cutoff level," and provided some comparative statistics relating to other samples tested in 2021. (gov br. at 23; JA at 35-36).

The government does not dispute the Army Court's finding that its case below contained "no explanation of the cutoff level's relevance, or any other evidence indicating test controls for the possibility of innocent ingestion." (JA at 35-36).

The government protests that appellee's testimony about a possible source of unknowing ingestion added to the quantum of evidence from which a factfinder could have found wrongful use, a dynamic the Army Court expressly addressed as well. (JA at 37).

5. The Army Court conducted a proper review and the TJAG does not ask this Court to conduct its own review

TJAG does not purport to ask this Court to conduct an independent legal sufficiency review, but only whether the Army Court erred. It did not. With respect

to unknowing ingestion, the Army Court applied the right law and expressly considered the saliant factors highlighted by the government (the expert's testimony that the sample was above the cutoff, and appellee's testimony). The government does not dispute the heart of the Army Court's analysis, finding "no explanation of the cutoff level's relevance, or any other evidence indicating test controls for the possibility of innocent ingestion." (JA at 35-36). The government's disagreement with the result does not mean the Army Court erred.

WHEREFORE, appellee respectfully requests this Court affirm the Army Court's opinion.

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.

Standard of Review

Adopted from Issue I[A].

Law and Argument

1. <u>This issue is a subset of Issue I</u>

While TJAG has certified this as a separate issue, it seems to appellee it is wholly a subset of Issue I[A]. The Army Court's comment that, without the underlying testing documents to interpret/explain, the expert's testimony lacked relevant is merely an elaboration on its ultimate conclusion: that both explanatory

surrogate expert testimony and the underlying testing documents are required. *See* (JA at 37).

The government brief seems to characterize the Army Court's comment as a holding that expert's re-statement of the ng/ml level constituted hearsay. (gov br. at 27-29). Appellee does not read it that way. The Army Court expressly acknowledged that the "facts in evidence" *included* the expert "stating a ng/ml level". (JA at 37). In fact, it was not even this portion of the expert's testimony the Army Court characterized as lacking relevance. Rather, it was expert's explanation of the results that lacked relevance because, *apart from* the expert "stating a ng/ml level, there were no facts in evidence for her to explain, and no test results for her to interpret." (JA 37). Even if this the Army Court meant something more by this comment than a mere elaboration on its larger conclusion, the result of this Court's review of Issue I[A] will presumably render the point moot.

2. <u>The Army Court found the evidence lacked relevance, not that it was irrelevant</u>

While appellee can see no likely scenario in which the merits of this issue will impact the result, the best interpretation of the Army Court's comment is that it was articulating a point the government itself makes, albeit in slightly different words.

The government agrees that the considerations cited by the Army Court impact the *weight* of the evidence. The disagreement, which seems to be largely semantic, is that the government seems to equate the Army Court's use of the word

"relevance" with "admissibility." The government cites *United States v. Katso* for the government's contention that the omission of "the machine generated data should go to the weight of the expert testimony rather than its *relevance*." (gov br. at 26-27) (citing 74 M.J. 273, 284 (C.A.A.F. 2023)) (emphasis added).[13] As noted in its own paratheatrical quotation from *Katso*, however, the government has altered that case's language. *Katso* held that the fact that the expert in that case was a surrogate "goes to the weight, rather than to the *admissibility* of his opinion." Katso, 74 M.J. at 284 (emphasis added) (quotation omitted).[14] The Army Court did not hold that the expert's testimony "lacked admissibility." Rather, by finding it "lacked relevance," the Army Court is simply using other language for the same proposition the government itself advances: that the omission of the underlying testing documentation reduced the weight of expert's opinion.

As noted by the government, the Army Court softened its position on this exact point on reconsideration. In the Army Court's original opinion, it found "the

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[13] While, in the previous issue, the government seemed to be under the impression that it was the omission of testimonial portions of the underlying documents that the Army Court found lacking, here the government notes that it was the omission of the machine generated data (which is clearly nontestimonial) the Army Court found lacking.

[14] While the government cites *Katso* for the general proposition of weight vs. admissibility, the issues examined in *Katso* are different than those examined here. While both Katso and this case involved a surrogate expert, this case also involves the omission of the underlying test results.

expert's testimony lacked *any* relevance." (gov br. at n.8) (citing JA at 13). On reconsideration, and at the government's request, the Army Court softened this stance, changing its prior characterization of the expert's testimony as wholly irrelevant, and finding merely that it "lacked relevance." (JA 37).[15]

To the extent the government is attempting to take issue with the Army Court's original, harder language, the government has already successfully persuaded the Army Court to change its holding in this regard, though the ultimate result did not change. This Court's review is of the superseding opinion on reconsideration, in which the Army Court has already adopted what appears to be a very similar – if not identical – position to the one the government advocates for.

WHEREFORE, appellee respectfully requests this Court affirm the Army Court's opinion.

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

Standard of Review

This Court "retain[s] the authority to review factual sufficiency determinations of the CCAs for the application of 'correct legal principles,' but only

[15] There is a clear difference between lacking relevance and being wholly irrelevant.

as to matters of law." *United States v. Clark*, 75 M.J. 298, 300 (C.A.A.F. 2016) (quoting *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005)).

Law

This Court has "a strong disinclination to involve ourselves in the review of the exercise of" the CCA's factual sufficiency powers. While, as noted above, this Court retains he authority to review factual sufficiency determinations of the CCs for the application of correct legal principles, it has explicitly cautioned that this principle should not be "perceived as encouraging the Government to certify questions of law in cases where courts of criminal appeals have ruled against the Government on the ground of factual insufficiency . . . ." *Leak*, 61 M.J. at n.6.

The waiver doctrine bars consideration of an issue that a party could have raised in an earlier appeal in the case. *See Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985). It "serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals." *Hartman v. Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), cert. denied, 520 U.S. 1240 (1997).

Appellate military judges are presumed to know the law and apply it correctly. *Clark*, 75 M.J. at 300 (citing *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). A "presumption

of regularity . . . applies to the acts of the appellate military judges. . . ." *Clark*, 75 M.J. at 300.

Argument

1. The government attempts to frame an issue of fact as an issue of law

As this Court has cautioned, when the government, via the certification process, attempts to frame an issue as one of law where it is clearly one of fact, this Court, while obligated by statute to review the case, is permitted to "review[] the case in a succinct manner." *Leak*, 61 M.J. at n.6. Such is the case here. While the government purports to disagree with the legal principles applied in the Army Court's factual sufficiency review, its true disagreement is with the result. Before this Court, as it did on reconsideration below, the government makes extensive factual arguments about the weight and credibility of the evidence. (gov br. at 33-35; JA at 27-29). These issues of fact are outside the purview of this Court's review.

The government attempts to find a legal "hook" to secure a ~~second~~ third bite at the apple by contending that the new factual sufficiency standard is no longer properly described as "de novo" (despite itself endorsing the de novo review in its original brief). This semantic argument makes much to do about little. The Army Court quoted the new factual sufficiency standard verbatim, to include the portions the government argues are at issue here. Yet, the government urges this Court to find that, despite quoting the exact language at issue, the Army Court judges did not

apply it because it of an introductory string citation describing the standard as de novo.

2. Scope and nomenclature of new factual sufficiency standard

As noted by the government, the contours of the new factual sufficiency standard are currently before this Court in *United States v. Harvey*. 84 M.J. 262 (C.A.A.F. 2024) (review granted). The resolution of that case will likely be relevant to the issue presented here, though it seems to appellee that both parties in *Harvy* go further than is necessary to the decide the present controversy. In the present case, the government makes a narrower argument, that the increased deference called for by the new standard means the CCA review is no longer properly described as de novo. (gov br. at 33-34) (citing Art. 66(d)(1)(B)(ii), UCMJ).

It is true that many issues explicitly call for de novo review devoid of any deference. At times the term "de novo" is even used as shorthand for no deference. It does not follow, however, that invocation of the term "de novo" necessarily means no deference is given. Issues may be reviewed de novo ("anew") subject to some degree of deference. These reviews are still properly characterized as de novo but caveated by the deference applied. For example, 38 U.S.C. § 636(c) provides for a magistrate judge to enter proposed findings and recommendations, subject to "a de novo determination" by a district judge of any contested portions of the magistrate judge's report. *See also* Fed. R. Civ. P. 72(b) (again describing this review as "de

novo."). Despite the explicit statutory description of the review as devo, district judges recognize that appropriate deference must be afforded to the magistrate's judge credibility determinations. *See, e.g.*, *United States v. Wofford*, 527 F. Supp. 3d 486, 489 (W.D.N.Y. 2021) ("Although this Court's review is de novo, it must give appropriate deference to the credibility determinations made by [the magistrate judge] who conducted the evidentiary hearing and observed the witness testimony firsthand.") (citation omitted). Indeed, the structure – and even the wording – of this framework is almost identical to the new factual sufficiency standard, but the "appropriate deference" afforded does not conflict with the standard of review being described as "de novo." Even the old factual sufficiency standard, was not totally devoid of deference – as it was "subject to" consideration for not having heard or seen the witnesses. In *United States v. Washington*, this Court noted that caveat in the breath as describing the standard of review as "de novo." 57 M.J. 394, 399 (C.A.A.F. 2002). [16] In short, while de novo review sometimes involves the total

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[16] There are also many examples of state courts describing de novo review, caveated by some level of deference. *See, e.g.*, *In re Marriage of Bigg*, 5 N.W.3d 663 (Iowa Ct. App. 2024) ("Upon our de novo review of the record, with appropriate deference to the trial court that heard the testimony first-hand, we find the determination of [the spouse's] gross annual income to be within the range of permissible evidence.") (quotation omitted); *Matter of Gruner*, 208 N.Y.S.3d 371, 374 (N.Y. App. Div. 2024) ("Our review of the advisory determination of a referee in a formal attorney disciplinary proceeding is thoroughly de novo (see Judiciary Law § 90[2]; Rules of App.Div., 3d Dept [22 NYCRR] § 806.8[c][4]), albeit with appropriate deference to credibility determinations borne of the referee's ability to

absence of deference, a review can apply some level of deference yet still properly be described as de novo.

Such is the case here, where the Army Court described the standard of review as de novo, in accordance with the published opinion of *United States v. Scott*, but expressly caveated it by directly citing the new, *higher* standard of deference. (JA at 34-35). *United States v. Scott* itself also explicitly endorsed the new, higher standard of deference. 84 M.J. 583, 585 (A. Ct. Crim. App. 2024) ("we hold the new burden of persuasion with its required deference *makes it more difficult* for one to prevail on appeal. . . .") (emphasis added).[17] Indeed, the Army Court in *Scott* largely endorsed the Navy Court's analysis in *Harvey* which the defense is currently challenging on appeal before this Court. *Id.* ("we agree with much of our sister court's analysis in *United States v. Harvey*. . . .").[18]

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directly observe witness testimony.") (citation omitted); *In re Claims Against Banghart Properties*, 995 N.W.2d 212, 222 (Neb. Ct. App. 2023) ("[W]e find it appropriate, even under a de novo standard of review, to adhere to the common practice among appellate courts to afford appropriate deference to the findings of the agency before which the record was created.").

[17] The Army Court's precise language in *Scott* was: "Once appellant makes a specific showing of a deficiency in proof, we will conduct a de novo review of the controverted questions of fact." 84 M.J. at 585. This limited holding precisely tracks the statutory mandate: "After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact . . . ." Article 66(d)(1)(B)(ii). In both *Scott*, and in the statutory text, the very next sentence then notes the new, higher standard of deference.

[18] The point of disagreement between the Army and Navy Courts was that the Army Court did not adopt the Navy Court's presumption of guilt. *Id.* ("we stop

As far as appellee can tell, the parties and the CCA all agree on the substance underlying standard, to include the requirement for increased deference. Despite seemingly agreeing on the substance of the new standard, the government argues that "de novo" is not a proper *characterization* of the new standard. As outlined above, appellee disagrees that a standard of review cannot properly be described as de novo while still involving some level of deference. Either way, however, the government's argument elevates the label over the content. All sides agree that the new standard requires increased deference. Given that the Army Court applied the operative underlying standard directly, whether it characterized the standard (the same way the government did in its original brief) as "de novo" does not change the fact that it applied the correct legal principles. This Court should reinforce the presumption of regularity that applies to the acts of the appellate military judges and find the Army Court did exactly what it said it did: apply the new, higher standard of deference.

3. <u>This Court should not reach the factual arguments</u>

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short of finding an implicit creation of a rebuttable presumption of guilt and will continue to conduct a de novo standard of review."). However, the government in the present case does not go so far as to advocate for a presumption of guilt. Indeed, appellee understands that even the government in *Harvey* has distanced itself from the presumption of guilt language, arguing it was more of a description of the new standard than a new standard in and of itself. *See United States v. Harvey*, ANSWER ON BEHALF OF APPELLEE (March 20, 2024) at 47 ("The lower court's 'presumption of guilt' language was unnecessary but not incorrect.").

The next portion of the government's brief on this issue is devoted to advancing factual arguments about the weight and credibility of the evidence. (br. at 33-35). These are issues of fact and outside the purview of this Court's review. To the extent the government's point is that these factual arguments demonstrate the Army Court did not apply appropriate deference, the government's disagreement with the result does not mean the Army Court did not apply the correct law.

4. The government waived the issue by explicitly endorsing a de novo standard of review in its opening brief below

"[F]orfeiture and wavier can stymie an appellee as well as an appellant." *Cross v. United States*, 892 F.3d 288, 294 (7th Cir. 2018). On appeal, a "party waives arguments that are not presented in the opening brief." *Bernard v. Sessions*, 881 F.3d 1042, 1048 (7th Cir. 2018) (citation omitted). Here the government not only failed to make its present argument about the standard of factual sufficiency review in its opening brief but went even further by explicitly endorsing the exact standard it now argues against. (Gov Army Court Answer Brief at 32) ("Once an appellant makes a specific showing of a deficiency in proof, [this court] will conduct a *de novo* review of the controverted questions of fact.") (alteration in original) (internal quotation marks and citation omitted). The government explicitly agreed the standard of review was de novo and only decided to change its position after losing. This is waiver.

In addition to constituting a waiver, the government's change in position lays bare the obvious: the government's true complaint with the lower court's opinion is one of fact, not of law.

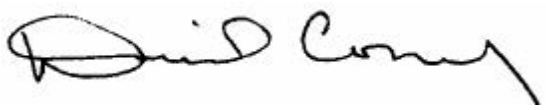
5. The government's requested remedy is improper

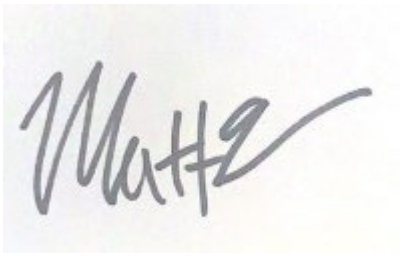
In its prayer for relief, the government asks this Court to "set aside the Army Court's decision and *affirm the trial court's finding and sentence*." (Gov Brief at 35) (emphasis added). If this Court determines that the Army Court applied incorrect legal principles in its factual sufficiency review, the proper remedy is to remand the case for a new factual sufficiency review under correct principles. In no case should this Court, as the government requests, bypass the CCA altogether by simply affirming the findings and sentence. The government's requested remedy would result in appellee receiving no factual sufficiency review at all.

WHEREFORE, appellee respectfully requests this Court affirm the Army Court's opinion.

Conclusion

WHEREFORE, appellee respectfully requests this Court affirm the Army Court's opinion.





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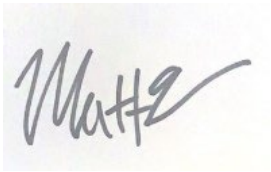

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Downum, Crim App. Dkt. No. 20220575, USCA Dkt. 24-0156/AR was electronically with the Court and Government Appellate Division on July 12, 2024.

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