January 17, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

LEO J. NAVARRO AGUIRRE
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0146/AF

Crim. App. Dkt. No. ACM 40354

REPLY BRIEF ON BEHALF OF APPELLANT

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Pursuant to Rules 19(a)(6)(B) and 34(a) of this Court's Rules of Practice and Procedure, Airman First Class (A1C) Leo Navarro Aguirre, Appellant, hereby replies to the Government's Brief (hereinafter Gov. Br.), filed on January 10, 2025.

Argument

I.

A1C Navarro Aguirre's conviction for wrongfully using his prescribed Ambien is legally insufficient because no reasonable inferences make up for the lack of direct evidence of wrongfulness.

It is uncontroverted that A1C Navarro Aguirre had a valid prescription for Ambien when he used it on October 1, 2021. Joint Appendix (JA) at 067; Gov. Br. at 4. Because of this prescription, the only way to prove that A1C Navarro Aguirre's Ambien use was wrongful is through evidence that he unlawfully departed from the use permitted by the prescription. The Government argues his use was not for the prescribed purpose because he took the Ambien to get high, not to sleep. Gov. Br. at 15, 22. There is no direct evidence of such intent. Instead, the Government relies on inferences in an attempt to prove this. Gov. Br. at 20–22.

A. The Government relies on a series of unreasonable inferences to support its flawed argument that a rational factfinder could find beyond a reasonable doubt that Airman First Class Navarro Aguirre's Ambien use was wrongful.

When conducting a legal sufficiency assessment, this Court draws every *reasonable* inference from the evidence in favor of the prosecution. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (quoting *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018)). This is because the trier of fact can "draw reasonable inferences from basic facts to ultimate facts." *Id.* (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). However, if an inference is unreasonable, findings based upon it are legally insufficient. *See United States v. Campbell*, 50 M.J. 154, 161–62 (C.A.A.F. 1999) (setting aside findings where evidence from a positive urinalysis did not provide a rational basis to draw a permissive inference of wrongfulness). Here, the inferences argued by the Government are not reasonable. The basic facts highlighted in the Government's brief do not reasonably lead to an ultimate conclusion of wrongful use.

First, the Government points to the time-of-day A1C Navarro Aguirre apparently used Ambien, arguing that "before 1800 would be too early for Appellant to be intending to go to sleep." Gov. Br. at 20. This does not support a reasonable inference that his use was wrongful

because such an inference relies on an unsupported and paternalistic assumption about when he should go to sleep. There is no legal or medical requirement for sleep to occur at any particular time of day, and his prescription did not impose one. JA at 116–17. A1C Navarro Aguirre could choose to go to sleep earlier in the evening and lawfully use Ambien to help him get a full night's rest from that time. The Government does not dictate his bedtime, and there is no evidence establishing what time he normally went to bed.

To the contrary, testimony from A1C Navarro Aguirre's *Care*[1] inquiry showed that he chose to go to bed early on October 1, 2021, because he had not slept in almost two days. JA at 072–73. Since his shift had ended for the day, he was free to make this choice. JA at 110. The Government's argument also ignores testimony from the prescribing provider that people can properly use Ambien to aid sleep at different times of day and using it at different times does not invalidate a prescription. JA at 116–17. It is not reasonable to infer wrongfulness simply because A1C Navarro Aguirre did not use Ambien at a time the Government presumes to be an acceptable bedtime.

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[1] *United States v. Care*, 18 C.M.A. 535 (U.S. C.M.A. 1969).

The Government continued this argument later in its brief by pointing out that A1C Navarro Aguirre was not working a swing or mid shift at the time of the charged incident. Gov. Br. at 21 (citing JA at 110). This, the Government claims, disproves a need for him to fall asleep earlier to get up for a late-night shift. *Id.* Refuting just one of the many potential reasons that A1C Navarro Aguirre could have chosen to go to sleep early does not create a reasonable inference of unlawful use. The testimony about his shift at the time says nothing about how recently he may have worked another shift before experiencing a schedule change. JA at 110. His testimony that he had not slept in almost two days indicates he recently experienced a significant disruption to his sleep schedule. JA at 072–73. Even without such a disruption, he still could have chosen to go to sleep in the late afternoon or early evening. The fact that he worked day shifts at the time in question does not support a reasonable inference of wrongful Ambien use.

The Government next asserts that A1C Navarro Aguirre had what it characterizes as an Ambien prescription label in his car. Gov. Br. at 21 (citing JA at 040). Notably, the picture upon which the Government relies to assert this fact was taken approximately 75 days *after* the charged

incident. JA at 104. Moreover, the picture itself appears to be a sheet of paper with some prescription information, not a label as the Government characterizes it. JA at 038, 040. Contrary to the Government's argument, it is not reasonable to infer from the presence of this paperwork that A1C Navarro Aguirre "took Ambien in his vehicle after he picked up the prescription and before he returned home." Gov. Br. at 21. He could have left the paperwork in the car or brought it back after moving it. The inference is unreasonable because there is no reason to think he had to have this paperwork with him when he lawfully used his medication.

The Government also suggests that it is reasonable to infer that another picture showing a brown paper bag with something in it is a picture of the bottle containing Ambien. *Id.* (citing JA at 037). The picture at issue does not show what is in the paper bag, which is shown next to a larger paper bag from Office Depot. JA at 37. Despite the Government's confident assertions, its evidence does not prove that this is a bottle at all, much less the prescription bottle containing Ambien. Not every possibility is a reasonable inference. An ambiguous picture of a paper bag is not enough to reasonably infer that A1C Navarro Aguirre wrongfully used a lawfully prescribed medication. Further, the *Care* inquiry dispels

any doubt about this possibility because A1C Navarro Aguirre testified that he fell asleep in bed in his apartment after taking Ambien. JA at 073.

The next inference pushed by the Government is based on testimony that a witness saw A1C Navarro Aguirre in his military uniform when he was in his car. Gov. Br. at 21 (citing JA at 092). This, the Government claims, could support a reasonable inference that he took Ambien before he got home because "a person who was planning to sleep through the night and wanted to get restful sleep would not normally remain in his or her utility duty uniform." *Id.* The Government's brief overstates the strength of this evidence, as further questioning of this witness, an Army Specialist, clarified that he saw A1C Navarro Aguirre wearing "OCPs [(operational camouflage pattern)] without the top, just a shirt," not his full uniform. JA at 092.

Despite the Government's preconceived notion, a person could take Ambien to aid sleep before removing all uniform items, such as their undershirt. A person experiencing the effects of Ambien could also don some uniform items without knowing what they are doing. JA at 064 (warning patients that "[a]fter taking AMBIEN, you may get up out of

bed while not being fully awake and do an activity that you do not know you are doing"). It is not reasonable to infer A1C Navarro Aguirre was abusing Ambien based on what he was wearing, just as a factfinder could not reasonably infer an alleged victim was promiscuous based on their clothing. *United States v. Morris*, No. ARMY MISC 20180088, 2018 CCA LEXIS 192, at *6 (A. Ct. Crim. App. Apr. 18, 2018).

Finally, the Government points to the presence of supposed aerosol inhalants and argues that this supports an inference that A1C Navarro Aguirre wrongfully used Ambien to get high by taking it while also using inhalants. Gov. Br. at 22. The allegations involving aerosol inhalant abuse both resulted in acquittals. The court-martial acquitted A1C Navarro Aguirre of both wrongfully and knowingly using aerosol inhalants to alter his mood or function and driving after using aerosol inhalants, all on the same date on which he was charged with wrongfully using Ambien. JA at 024–26. A1C Navarro Aguirre was not convicted of any offenses involving aerosol inhalants. JA at 024–28.

Despite acknowledging this, the Government still argues that aerosol inhalants are relevant to the alleged wrongful Ambien use. Gov. Br. at 22. But the evidence simply does not show he abused aerosol

inhalants that day. A police officer who spoke to him testified that he "admitted to huffing Dust Off," but the officer quickly added that he did not know when this purportedly happened, saying, "At what point he was doing the huffing, I am not sure." JA at 097. This was not enough for the officer to arrest him for anything, just as it was not enough for the court-martial to convict him. JA at 098.

The Government's argument regarding aerosol inhalants amounts to impermissible character evidence. The argument is, in essence, that A1C Navarro Aguirre abused aerosol inhalants, meaning he has a character for abusing substances, which leads to the inference that he abused Ambien on the charged date. Such reasoning is prohibited by Mil. R. Evid. 404(a)(1). The factfinder also could not have used any findings about aerosol inhalants to make inferences about Ambien use because doing so would have constituted impermissible spillover. *United States v. Hogan*, 20 M.J. 71, 73 (C.M.A. 1985) (setting aside guilty findings and sentence because of risk that evidence of one allegation "spilled over" to another allegation). The Government's argument on aerosol inhalants seeks more than just an unreasonable inference; it advocates for using

impermissible reasoning to affirm a conviction. This Court must reject this argument.

There is significant evidence about the potential side effects of Ambien, including complex sleep behaviors like sleep driving. JA at 041, 043, 061–62, 064, 115–16. The Government's brief largely dismisses this important evidence, asserting that "no party presented evidence that [A1C Navarro Aguirre] was actually sleep driving." Gov. Br. at 14. This argument constitutes a burden shift. The burden is never on A1C Navarro Aguirre to prove that he was sleep driving or experiencing other side effects of Ambien use. *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) (stating that a suggestion that an accused has an obligation to prove their own innocence is "an error of constitutional dimension").

To further its argument, the Government points to witness testimony from the Army Specialist that he saw A1C Navarro Aguirre "rocking back and forth and smiling, appearing to be high – not asleep." Gov. Br. at 37–38 (citing JA at 092). This argument relies on the faulty premise that a person who is sleep driving as a side effect of Ambien would appear to be sleeping. There is no evidence of how such a person

would appear, and it is entirely possible that someone experiencing complex sleep behaviors could appear "high" to an untrained observer. There is no evidence that this witness was equipped to tell the difference between someone experiencing side effects of Ambien and someone who was otherwise "high" from using an intoxicating substance. Nevertheless, the Government leans on this testimony to try and overcome the direct evidence about Ambien and its side effects.

Evidence about the potential side effects of Ambien provides context in which the inferences sought by the Government become all the more unreasonable. Inferring wrongful drug use based on the time of day or the clothes A1C Navarro Aguirre was wearing is even less reasonable when it becomes clear that lawful Ambien use can cause a person to do things they do not know they are doing, including driving. JA at 064. In this way, evidence of Ambien's side effects is "some evidence in the record which makes the inference[s] unreasonable or irrational." *United States v. McCrary*, 1 C.M.R. 1, 7 (U.S. C.M.A. 1951). The evidence regarding these side effects cements the legal insufficiency of A1C Navarro Aguirre's conviction for wrongfully using his prescription medication.

B. A *Care* inquiry is evidence found in the record of trial, meaning this Court can consider it as part of its legal sufficiency analysis, and statements from the *Care* inquiry confirm that Airman First Class Navarro Aguirre's Ambien use was not wrongful.

Evidence from the *Care* inquiry also helps demonstrate the legal insufficiency of the conviction because A1C Navarro Aguirre described lawfully using his prescription, not wrongful drug use. He testified that he had not slept in almost two days and fell asleep in his bed at his apartment after taking Ambien. JA at 073. The next thing he remembered is being behind the wheel of his car and speaking with a police officer. *Id.* The Government encourages this Court to ignore that evidence because the testimony came during a *Care* inquiry, arguing that a *Care* inquiry cannot be considered as part of legal sufficiency review because it is not evidence presented at the trial. Gov. Br. at 24–25. However, this argument disregards the nature of a *Care* inquiry.

"Before accepting a plea of guilty, the military judge must conduct a thorough inquiry and determine that the accused understands his plea, it is entered voluntarily, and the accused is in fact guilty." *United States v. McCrimmon*, 60 M.J. 145, 152 (C.A.A.F. 2004) (citing *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980); *Care*, 18 C.M.A. at 535).

Unlike in civilian courts, "inconsistencies and apparent defenses must be resolved by the military judge or the guilty pleas must be rejected." *Id.* (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). The military judge must question the accused, who is placed under oath, and has a responsibility to ensure the testimony provided fully and accurately presents the basis for the plea. That is exactly what happened here. JA at 069–82.

Statements from a *Care* inquiry are not information culled from the depths of a record of trial; they are testimony given under oath, on the record, in open court, and in response to required, comprehensive questioning by the military judge. A *Care* inquiry is evidence presented at trial, which is why it can be the basis for a conviction. Because of this, consideration of a *Care* inquiry as part of a legal sufficiency review is consistent with the precedents cited by the Government. Gov. Br. at 24–26 (citing *United States v. Bethea*, 46 C.M.R. 223 (C.M.A. 1973); *United States v. Beatty*, 64 M.J. 456 (C.A.A.F. 2007)).

Contrary to the Government's argument, trial counsel also had an opportunity to assess and refute A1C Navarro Aguirre's testimony if they saw fit. Gov. Br. at 26. After questioning A1C Navarro Aguirre, the

military judge asked if "counsel for either side believe[d] any further inquiry is required." JA at 080. If trial counsel believed there was reason to question or refute A1C Navarro Aguirre's testimony, they could have addressed it then, but they simply answered "no." *Id.* Since the *Care* inquiry is admitted evidence found in the record of trial, it should be included in this Court's consideration of the entire record as part of legal sufficiency review. *United States v. Jessie*, 79 M.J. 437, 440 n.6 (C.A.A.F. 2020). Testimony from the *Care* inquiry here bolsters the conclusion that A1C Navarro Aguirre's conviction for wrongfully using his lawfully prescribed medication is legally insufficient.

II.

Airman First Class Navarro Aguirre's guilty plea for reckless driving was improvident because his testimony did not establish the requisite actus reus or mens rea.

The evidence regarding A1C Navarro Aguirre's conviction for reckless driving leaves a substantial basis in law and fact for questioning the guilty plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A1C Navarro Aguirre clearly testified that he did not remember anything between falling asleep in bed in his apartment and speaking with a police

officer while behind the wheel of his car. JA at 073. His testimony about what happened in the intervening period is all based on witness observations and his own presumptions and beliefs about his actions. JA at 140–43. Such testimony may help fill in the timeline, but it fails to establish criminal culpability. None of the testimony shows that he knew what he was doing when he drove after taking Ambien, and his lack of memory indicates he did not. A1C Navarro Aguirre stated during the *Care* inquiry that he believed he was voluntarily controlling his actions because he would have had to take certain steps to end up where he did. JA at 141. But he could have taken all those steps without knowing what he was doing because of the effects of Ambien. JA at 064.

A1C Navarro Aguirre's guilty plea did not establish the requisite actus reus for reckless driving because it left a substantial basis to question whether he was voluntarily controlling the vehicle. *United States v. Torres*, 74 M.J. 154, 156–57 (C.A.A.F. 2015). Similarly, it did not establish the requisite mens rea because it left a substantial basis to question whether he was culpable for any disregard for the foreseeable consequences to others when he was not conscious of his actions. *See Manual for Courts-Martial, United States* (2019 ed.), Part IV, ¶ 51(c)(7)

(stating that recklessness requires a "culpable disregard" for the "foreseeable consequences to others").

The Government attempts to refute this primarily by repeating A1C Navarro Aguirre's testimony. Gov. Br. at 33–37. But repeating this testimony does not resolve its insufficiencies or the bases to question the providence of the guilty plea. The Government also highlights his testimony that he did not feel like he was waking up from sleep when his memories began again, arguing that this means he was not experiencing sleep driving. Gov. Br. at 34 (quoting JA at 142). This still leaves reason to question the providence of the plea because there is no evidence that a person who is experiencing the end of Ambien side effects would feel like they are waking up from regular sleep.

The Government also claims that considering evidence regarding sleep driving would be "speculat[ing] post-trial as to the existence of facts which might invalidate [A1C Navarro Aguirre's] guilty pleas." Gov. Br. at 38 (quoting *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995)). The evidence about Ambien and its side effects, including complex sleep behaviors like sleep driving, was admitted at trial as Defense Exhibit A. JA at 041–66, 084. No speculation is required to know that

this is a possible side effect of lawful Ambien use, and A1C Navarro Aguirre bears no burden to prove that he actually was sleep driving. *Mason*, 59 M.J. at 424. This evidence simply provides an explanation for his actions that is consistent with his lack of memory, which in turn creates a substantial basis in law and fact to question the guilty plea. *Prater*, 32 M.J. at 436. The court-martial was obligated to resolve the inconsistencies raised by this evidence under Article 45, Uniform Code of Military Justice, 10 U.S.C. § 845. The military judge recognized this by reopening the *Care* inquiry. JA at 137. Unfortunately, the new *Care* inquiry did not resolve the inconsistencies raised, leaving the substantial basis to question the plea. Consequently, this court should set aside the findings of guilty on the specification of reckless driving.

Conclusion

A1C Navarro Aguirre requests that this Court set aside the finding of guilty as to Specification 2 of Charge II and dismiss that Specification with prejudice. Further, A1C Navarro Aguirre requests that this Court set aside the findings of guilty as to Charge III and its Specification.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on January 17, 2025.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) & 37

This supplement complies with the type-volume limitation of Rule 24(b) because it contains 3,409 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared using Microsoft Word with Century Schoolbook 14-point typeface.

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