

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee

v.

Collyn L. LAWRENCE,
Airman First Class (E-3),
United States Air Force,
Appellant

REPLY BRIEF

Crim. App. Dkt. No. ACM 24064

USCA Dkt. No. 26-0237/AF

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

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ARGUMENT

I. The permissive inference is facially unconstitutional for marijuana use cases because it is not supported by “present-day experience.”

“A permissive inference satisfies due process only if there is a rational connection between the fact proved and the fact inferred.” *United States v. Bass*, __ M.J. __, Dkt. No. 25-0149/MC, 2026 CAAF LEXIS 544, at *14 (C.A.A.F. June 24, 2026). This connection must be “more likely than not” true. *Id.* (quoting *Barnes v. United States*, 412 U.S. 837, 842 (1973)). To be constitutional, the inferred fact (e.g., the accused’s knowing use of marijuana) must “more likely than not” flow from the proved fact (e.g., a metabolite of marijuana present in the body). *See id.* This inference must be supported by “present-day experience,” regardless of courts’ historic use of that inference. *Barnes*, 412 U.S. at 844-45.

Today, the permissive inference for marijuana cases is not supported by present-day experience. Marijuana use and products are widespread. As a mainstream commercial food product, the risks of unknowing ingestion are so high that it undermines the constitutionality of the permissive inference. Br. on Behalf of Appellant [hereinafter “Opening Br.”] at 4-14; *see United States v. Hemani*, 146 S. Ct. 1677, 1701 (2026) (Alito, J., concurring) (“[M]arijuana use today . . . is widespread and increasingly considered socially acceptable [F]rom a practical standpoint, law enforcement widely tolerates [its] use.”). As this Court noted in *Bass*,

when a product is “lawful” with “widespread availability” there is a risk of mislabeling and innocent ingestion. 2026 CAAF LEXIS 544, at *13-14.

A. The premises supporting the permissive inference are no longer supported by present-day experience.

As the Government notes in its Final Brief on Behalf of the United States [hereinafter “Ans.”], the drug-use permissive inference rests on several premises. Ans. at 12-32; *see Bass*, 2026 CAAF LEXIS, at *15. Those premises are: (1) the controlled substance is illegal to possess; (2) the controlled substance is tightly regulated, even in lawful channels; and (3) ingestion of the controlled substance is associated with noticeable psychoactive effects. *Id.* These premises “make[] unknowing ingestion unlikely and a positive test a rational indicator of knowing, wrongful use.” *Id.* But, present-day experience does not support these premises.

1. Marijuana is legal to possess and use in most of the country. Its ubiquity undermines the permissive inference.

Marijuana is legal to possess and use in most of the country. Opening Br. at 19-20. Not only is it legal, it is ubiquitous; adults consume marijuana more than alcohol.¹ Opening Br. at 20 n.21. The widespread use of marijuana means that

¹ The Government contests this claim by attacking only one of the studies cited by Appellant. Ans. at 30. The Government argues instead that “[f]ar more [Americans] drink alcohol” than consume marijuana. Ans. at 30 (quoting Jonathan P. Caulkins, *Changes in Self-Reported Cannabis Use in the United States from 1979 to 2022*, 119 ADDICTION 1648 (2024)). However, this is contradicted by the *Hemani* Court, which had the benefit of significant amici filings. 146 S. Ct. at 1693 (“As a result, some

servicemembers are more likely to unintentionally and unknowingly encounter it. *See* Opening Br. at 11-12 (discussing the prevalence of accidental and unknowing consumption of marijuana). This undermines the first premise.

The Government spills much ink explaining that using marijuana is illegal for servicemembers. Ans. at 12-22. Appellant agrees with this uncontroversial position. But Appellant disagrees with the Government's conclusion that because servicemembers cannot *knowingly* consume marijuana, they are less likely to *unknowingly* consume it. Ans. at 19. Not so. The ubiquity of marijuana means that a person who chooses not to consume marijuana—either by threat of prosecution or by voluntary choice—is just as likely to accidentally ingest it as someone who intentionally uses it. The Government's argument to the contrary is not supported by evidence or common sense. It also ignores this Court's decision in *Bass*. 2026 CAAF LEXIS 544, at *15-16 (finding that the prevalence of hemp products, despite being illegal for servicemembers, undermines this premise). It further ignores studies that show how common accidental ingestion of marijuana is in American society.²

surveys suggest there now may be more adults in this country who regularly use marijuana than consume alcohol.”).

² The Government attempts to distinguish one of these studies—which looked at data from a poison center—arguing that poison centers are “not a random sample of people.” Ans. at 29-30 (analyzing Robert G. Hendrickson et al., *Acute cannabis toxicity in older adults*, 4 TOXICOLOGY COMMUNICATIONS 67, 67-70 (2020)). This is true. But this supports Appellant's position. People report to poison centers after consuming significant quantities of marijuana, which can cause undesired and severe psychoactive effects. People who accidentally ingest marijuana and have low or no

Nevertheless, the Government maintains that “increased civilian availability does not establish that servicemembers are likely to encounter marijuana unknowingly.” Ans. at 19. But the Government cites nothing for this proposition, while ignoring scientific data showing that accidental ingestions are common, and this Court’s decision in *Bass*.

2. Marijuana is not tightly regulated.

The premise that marijuana is tightly regulated is likewise unsupported by present-day experience. At best, the marijuana regulatory framework is patchy, executed differently from state to state. *See* State Medical Cannabis Laws, NAT. CONF. OF STATE LEGISLATURES (Sep. 2, 2026), <https://www.ncsl.org/health/state-medical-cannabis-laws> [permanent link unavailable]; David Carpenter et al., *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap* (2022) (available at <https://www.congress.gov/crs-product/R44782> [https://perma.cc/NK6V-T4AM]). This contributes to myriad problems with marijuana regulation. For example, as the Government’s expert testified, marijuana product labeling is inconsistent, incorrect, and misleading. JA 121.

But now the Government flees from its expert’s opinion. It claims that because some states impose age restrictions on consumers, accidental ingestion is unlikely.

psychoactive symptoms are unlikely to report to a poison center. Therefore, the rate of accidental ingestion from the study (11%) is likely much higher.

Ans. at 19. But age restrictions—which would prohibit a vendor from knowingly selling marijuana to someone under twenty-one years of age—does nothing to prevent a vendor from unknowingly selling such a product (such as when the product is mislabeled) to any person. The Government also points to licensing requirements as a reason why unknowing ingestion is unlikely. Ans. at 19. Again though, business licensing requirements impact marijuana retailers who knowingly sell such products. They do not affect businesses that, for example, sell mislabeled vapes to unwitting consumers.

To be sure, a patchwork of state regulations cannot cope with a multi-billion-dollar industry. Only the federal government has the reach and resources to adequately regulate a vast interstate business, such as marijuana. *See Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 76 (2008) (“Unlike the States, Congress has authority to create tailored . . . policies, and (also unlike the States) it can do so in a manner that preserves national uniformity without opening the door to a 50-state patchwork of inconsistent . . . policies.”). Its failure to do so has allowed a mostly inconsistent and poorly regulated market to bloom. This undermines the second premise.

3. Ingestion of marijuana does not always result in psychoactive effects. A metabolite of marijuana in one's body says nothing about knowing use.

The Government's trial expert testified that a positive urinalysis for marijuana cannot inform whether the member feels any effects from the drug. JA 122. This accords with the rationale in *United States v. Downum*: "[I]t is not possible to definitively state that the user 'experienced the physical and psychological effects of the drug.'" 86 M.J. 200, 209 (C.A.A.F. 2025).

The Government complains that the *Ford* Court never required the presence of the drug to have a psychoactive effect, only that it *might* have an effect. Ans. at 24 (citing *United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987)). Maybe so. But that is another reason to reverse *Ford* because, as the Government's expert recognized, a positive test cannot tell us if a member felt psychoactive effects. JA 122.

Moreover, this premise is illogical as an indicator of knowing use. Whether a person did or did not feel psychoactive effects says nothing about whether the ingestion that caused such a psychoactive effect was knowing. The individuals who reported to poison control centers after unknowing use presumably felt psychoactive effects—that is probably what led them to contact a poison control center. But that fact does not make their use any more or less accidental.

B. In light of our present-day experience, *Ford* should be overruled.

Because of fundamental changes in law and society, *Ford* must be overruled, in part. All four *Quick*³ factors counsel in favor of this: (1) *Ford* was poorly reasoned; (2) there have been significant changes to law and society since *Ford*; (3) the reasonable expectations of servicemembers will not be frustrated by overruling *Ford*; and (4) failing to overrule *Ford* risks undermining public confidence in the law. *See Quick*, 74 M.J. at 335.

First, *Ford* was poorly reasoned because it justified the permissive inference for marijuana cases based on its historic basis. *Ford*, 23 M.J. at 337 (reasoning that the inference was constitutional because it “ha[d] existed in military law for over 35 years” and this Court’s predecessor “repeatedly recognized its persuasive force”). While *Ford* relied on *Barnes* for this point, it ignored the Supreme Court’s admonition in the very same case that an “impressive historical basis . . . is not in itself sufficient to establish constitutionality.” *Barnes*, 412 U.S. at 844. The Government makes the same mistake, citing this Court’s historical support for the inference. *Ans.* at 34. This argument is not now, nor has it ever been, supported by Supreme Court precedent. The Government also argues that *Ford* was not poorly reasoned because, in *Bass*, “all five judges of this Court addressed *Ford* in positive terms.” *Ans.* at 34 (citing *Bass*, 2026 CAAF LEXIS 544, at *15-16, *26-29). But

³ *United States v. Quick*, 74 M.J. 332 (C.A.A.F. 2015).

Bass did not ask this Court to overrule *Ford*. That question is left for this case. *See Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821) (“It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”).

Second, significant changes to law and society inform that *Ford* should be overruled. In the forty years since *Ford* was decided, the social and legal framework surrounding marijuana has changed immensely. The assumptions of *Ford* no longer stand. *Supra* Argument § I.A; Opening Br. at 4-14. The Government largely ignores the impact of these dramatic changes, pointing instead to the uncontroversial fact that it is illegal for servicemembers to use marijuana. Ans. at 35. The Government’s silence here is deafening, especially in light of this Court’s decision in *Bass*. *See* 2026 CAAF LEXIS 544, at *15-16 (holding that, even though THC-8 is legal for civilians to possess and illegal for military members to use or possess, the Government cannot use the permissive inference for such cases).

Moreover, the military is no longer “a society apart from civilian society.” *Contra Parker v. Levy*, 417 U.S. 733, 744 (1974). “[A]bout two-thirds of service members in the U.S. live off base in local communities.” Government Accountability Office, *Military Housing: DOD Should Address Critical Supply and*

Affordability Challenges for Service Members 1 (Oct. 2024), <https://www.gao.gov/products/gao-25-106208>. Additionally, many morale, welfare, and recreation facilities—such as clubs, bowling alleys, and movie theaters—have disappeared from military bases in the United States. *See, e.g.*, Larry Copeland, *Officers' clubs near extinction*, USA Today (Aug. 3, 2009). Therefore, service members are more likely to socialize off base today compared to their Cold War era predecessors. This integration into civilian society makes today's service members especially vulnerable to unknowing ingestion of products that are prevalent in that society.

Third, overruling *Ford* would not frustrate servicemember expectations because, as the Government and Appellant agree, marijuana use remains unlawful. Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The Government is confused about this factor, arguing that servicemember expectations must be frustrated *by* the *Ford* decision to justify overruling it. Ans. at 35. Incorrect. This factor is about reliance on judicial decisions, and whether overruling a prior decision will frustrate servicemember reliance. *Cf. Quick*, 74 M.J. at 335 (creating the factors in light of the Supreme Court's guidance to “foster[] reliance on judicial decisions”). But overruling *Ford* changes nothing about the unlawful nature of marijuana use. If *Ford* is overruled, servicemembers must still abstain from marijuana use, will be

subject to random and command-directed drug tests, and will be prosecuted or discharged for using marijuana.

Fourth, convicting servicemembers by using an outdated permissive inference unsupported by present-day experience undermines public confidence in the law. Therefore, each *Quick* factor counsels in favor of overruling *Ford*. This Court should do so.

II. Even if not facially unconstitutional, the permissive inference was unconstitutional as applied to Appellant's case.

For a permissive inference to apply, the Government must prove “that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *Leary v. United States*, 395 U.S. 6, 36 (1969). If the permissive inference is the sole basis for the finding of guilty, the presumed fact must flow from the proved fact beyond a reasonable doubt. *County Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 167 (1979). Here, the permissive inference was the sole basis used to satisfy the knowledge element, which means the presumed fact must, beyond a reasonable doubt, flow from the proved fact. It does not. *See supra* Argument § I.

The Government contends that it offered more than just the permissive inference to prove knowledge. Ans. at 39-40. It points to three things: (1) evidence surrounding the drug test; (2) Airman (Amn) NM's testimony about vapes; and (3) Appellant's use of marijuana before entering the Air Force. None of these are evidence of knowledge.

Evidence of the test—and testimony about its efficacy—only shows a metabolite was in Appellant’s system. It does not prove knowledge; for that, the Government needed the permissive inference. Amn NM’s testimony about vapes only shows that the particular brand of vape Amn NM used did not, on the occasions he used them, contain marijuana. This does not prove Appellant’s knowledge, especially since the Government provided no evidence of Appellant’s alleged method of ingestion. And Appellant’s use of marijuana prior to his military service does not prove that he knowingly used marijuana in late 2023. For that, again, the Government needed the permissive inference.⁴

While the Government argues that Appellant’s leave history was also evidence that he knowingly ingested marijuana, Ans. at 40, it is unclear how this is so. In fact, the Government found no witness who could corroborate that Appellant knowingly consumed marijuana while on leave. Because Appellant’s leave history cannot inform whether he knowingly ingested marijuana, the Government needed the permissive inference to prove knowledge.

Because the Government offered no evidence of knowledge aside from the permissive inference, the presumed fact must flow from the proved fact beyond a

⁴ Never mind that the military judge said that “the probative value[]” of this evidence was “pretty darn low.” JA 94-96 (showing the military judge discussing the admissibility of Appellant’s preservice use, stating “I don’t know if this happened in 1989, you know, if this was just before coming in. So, without additional context, you know, the court will give that much more limited consideration”).

reasonable doubt. For the reasons discussed *supra* and in Appellant's opening brief, it does not.

III. Even if this Court holds the permissive inference constitutional both facially and as applied, Appellant's conviction is nevertheless legally insufficient.

Appellant's conviction is legally insufficient. In order to get the benefit of the permissive inference, the Government must present evidence at trial that "the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion." *Downum*, 86 M.J. at 204 (citing *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000)). The Government failed to do so.

The Department of Defense cutoff limit for reporting positive results of THC-9 is 15 nanograms per milliliter (ng/ml). JA 103. The Government's expert testified that this cutoff level is based on research from the 1990s⁵ and is purportedly high enough to separate the "non-using population" from "known users." JA 103. However, the expert's use of the terms "non-using" and "known users" is misleading.

⁵ See, e.g., Marilyn Huestis et al., *Urinary Excretion Profiles of 11-Nor-9-Carboxy- Δ^9 -Tetrahydrocannabinol in Humans after Single Smoked Doses of Marijuana*, 20 J. OF ANALYTICAL TOXICOLOGY 441, 450 (1996) ("[T]he 15-ng/mL GC-MS cutoff for THCCOOH was chosen for evaluation because of its required use in Department of Health and Human Services and Department of Transportation-regulated laboratories and in military drug-testing facilities.").

The cutoff level was set in 1988 and has remained at 15 ng/ml since.⁶ The cutoff levels for all drug confirmatory testing were determined by the “prevalence rate; cross-reactivity; state of the art in drug detection; and the experience of the Department of Defense and other groups in large-volume drug testing programs.” Mandatory Guidelines for Federal Workplace Drug Testing Programs; Final Guidelines; Notice, 53 Fed. Reg. 11970, 11973 (Apr. 11, 1988). For THC-9, the cutoff was set at 15 ng/ml because, for any concentration below 15 ng/ml, “the lab may not properly distinguish signal from noise^[7] on the chromatogram.”⁸ The cutoff level was not set to separate the “non-using population” from the “known users.” JA 103. The cutoff level was set for equipment sensitivity purposes to set apart a true

⁶ Compare Mandatory Guidelines for Federal Workplace Drug Testing Programs; Final Guidelines; Notice, 53 Fed. Reg. 11970, 11983 (Apr. 11, 1988) (setting the confirmatory testing cutoff for “[m]arijuana metabolite[s]” at 15ng/ml), with Mandatory Guidelines for Federal Workplace Drug Testing Programs—Authorized Testing Panels, 91 Fed. Reg. 12308, 12309 (Mar. 13, 2026) (requiring federal agencies set the confirmatory testing cutoff for “[m]arijuana metabolite[s]” at 15ng/ml), and 49 C.F.R. § 40.85 (2023) (Department of Transportation requiring drug laboratories to set the confirmatory testing cutoff for “[m]arijuana metabolites” at 15ng/ml); see Maj Nicholas Turner, *A Higher Calling: U.S. Military Cannabis Policy after Legalization*, 231 MIL. L. REV. 203, 216-19 (2024) (providing a history of cannabis use prohibitions and testing in the military).

⁷ John Dolan, *The Role of the Signal-to-Noise Ratio in Precision and Accuracy*, 19 LCGC EUROPE 1 (2006) (explaining the meaning of “noise” in liquid chromatographic testing and how it can impact accuracy); see JA 103, 107 (Government expert describing how the drug testing laboratory used liquid chromatographic testing on Appellant’s urine sample).

⁸ Ken Kulig, *Interpretation of Workplace Tests for Cannabinoids*, 13 J. OF MEDICAL TOXICOLOGY 106, 109 (2017).

positive presence of the marijuana metabolite from a false positive presence of the marijuana metabolite. The Government's expert later recognized this during cross examination:

Q. Dr. Holwitt, you can't tell us if this positive test resulted from knowing use, can you?

A. No.

....

Q. Dr. Holwitt, this sample is consistent with unknowing use, isn't it?

A. Yes.

JA 122.

Perhaps recognizing the weakness of its case about knowledge, the Government resorts to shifting its burden: "nothing in the evidence provided an alternative explanation for how marijuana entered Appellant's system." Ans. at 44. But it is the Government's obligation to prove a knowing use beyond a reasonable doubt. In this case, it failed to do so.

IV. Conclusion

The permissive inference is facially unconstitutional because it is not supported by present-day experience. Since *Ford*, the legal and social landscape in America has dramatically changed. The presumptions underlying *Ford* no longer apply to marijuana use cases and it should be overruled. At the very least, the permissive inference is unconstitutional as applied to Appellant because the

Government cannot show, beyond a reasonable doubt that the inferred fact (knowing ingestion) flows from the proved fact (the metabolite in Appellant's system). And even if constitutional, Appellant's conviction is legally insufficient. The Government did not present evidence to satisfy the second *Campbell* factor, nor could it overcome Appellant's significant good military character evidence.

Whether unconstitutional or legally insufficient, Appellant's conviction cannot stand. This Court should reverse the Air Force Court of Criminal Appeals' decision and set aside the conviction and sentence.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of C.A.A.F. R. 24(b) because it contains 3,937 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on October 13, 2026, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filing.workflow@us.af.mil on the same date.



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