IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Index

Table of Authorities

Service Courts of Criminal Appeals

Uniform Code of Military Justice

Military Rules and Regulations

Issues Presented

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

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

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

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. This Honorable Court has jurisdiction over this matter under Article 67(a)(2), UCMJ, 10 U.S.C. § 867.

Statement of the Case

On November 9, 2022, an officer panel, sitting as a general court-martial, convicted Appellee, contrary to his plea, of one specification of wrongful use of a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912 (2019).

(JA 039). The military judge sentenced Appellee to be reprimanded, to forfeit $1,000 pay per month for one month, and to be restricted for thirty days to the limits of Fort Hood, Texas. (JA 039). On December 13, 2022, the convening authority reduced the portion of the sentence restricting Appellee to Fort Hood, Texas.[1] (JA 042). On January 16, 2023, the military judge entered judgment. (JA 044).

On February 6, 2024, the Army Court set aside the findings and sentence and dismissed the charge and its specification with prejudice. *United States v. Downum*, ARMY 20220575, 2024 CCA LEXIS 156, at 3 (Army Ct. Crim. App. 6 Feb. 2024) (JA 013). On February 15, 2024, the government filed a motion to reconsider and a suggestion to reconsider *en banc*. (JA 016). The Army Court granted the motion to reconsider but denied suggestion *en banc*. (JA 033). On March 29, 2024, the Army Court issued its decision on reconsideration and did not change its original holding. (JA 037). The Judge Advocate General, U.S. Army, certified this issue to this Court on May 15, 2024.[2] (JA 001).

Statement of Facts

Appellee spent Labor Day weekend, September 3–5, 2021, in Austin with

[1] The convening authority reduced the "portion of the sentence of restriction by restricting the accused to Fort Hood and Bell County." (Action).

[2] The government motioned to amend the Certificate for Review, with the amended certificate reflecting a certification date of May 20, 2024. (JA 005). That motion and additional briefing on this issue is currently pending with this Court.

his two friends, KG and BL, drinking on KG's boat, and drinking at a local bar called Buford's. (JA 184–85). On Sunday, September 5, 2021, Appellee totaled his vehicle when he fell asleep at the wheel driving home to Belton from Austin. (JA 186). Appellee was excused by his supervisor, the S3, from work that week in order to purchase a new vehicle. (JA 187). On Wednesday, September 8, 2021, there was a 100 percent urinalysis [UA] formation. (JA 187). That morning, Appellee was notified of the UA via a group text message that included officers and senior noncommissioned officers. (JA 187). Appellee was excused from the UA in order to go car shopping. (JA 191).

On Saturday, September 11, 2021, Appellee returned to Austin to spend time with KG and BL for KG's birthday. (JA 196–98). Appellee, once again, spent the day on KG's boat, drinking alcohol, listening to music, and talking with friends. (JA 198, 200). Appellee then ate a meal with KG and BL, before, again, going to Buford's bar. (JA 201). At Buford's, KG had arranged a special area of the bar where the group would receive bottle service for his birthday. (JA 201–02). Appellee was drinking Red Bull and vodka, which he mixed himself throughout the night. (JA 293).

1. Appellee's testimony at trial.

At trial, Appellee testified that the following occurred: Appellee made himself a new Red Bull and vodka, took one sip, put it down on the table where he

was sitting, and went to the bathroom. (JA 205). Upon returning from the bathroom, Appellee picked up his drink, took "a pretty good sip" and then "tasted something unfamiliar." (JA 205). He then looked at his glass and "noticed that there was some type of substance in it." (JA 205). Appellee alleged that he thought somebody poured salt in his drink as a joke. (JA 205). Appellee said the substance in his glass was white. (JA 205). When asked to describe the texture Appellee replied, "it wasn't, like you take a sip of something that you think is a liquid, it was not a liquid. I don't want to say it was salt because it was too fine to be salt or even sand or something like that." (JA 206).

Appellee initially stated he noticed the taste and texture. (JA 206). However, he later stated that there was no difference to the taste. (JA 210). Appellee did not testify that he felt the effects of the drug. Appellee testified he looked across the table towards KG and gestured nonverbally to say, "what is this?" (JA 208, 221). Appellee then alleged he set the drink down, turned to BL, and "plainly asked him if he saw anybody mess with [his]drink while [he] was at the bathroom." (JA 209). Appellee said he put the drink down and stopped drinking after that point. (JA 209).

Appellee testified on direct that he did not bring up the alleged substance in his drink again to either KG or BL because he thought it was a "bad joke." (JA 210). However, Appellee alleged that the day after the UA, Appellee said that he

felt obligated by [his] personal morals to come forward about it, other than let it hit [him]." (JA 212–13, 225). When describing his interaction with his company commander, Appellee testified that he told his company commander "it may come up hot as a uranalysis . . . [and] I just wanted to get out there, yes, this happened, this may cause an incident." (JA 213).

2. Mr. BL's testimony at trial.

Mr. BL recalled the evening similarly to Appellee. (JA 240–45). However, BL did not recall Appellee approaching him or asking him any questions about someone putting something in his drink. (JA 246). Mr. BL stated, "It seems like I would have remembered that." (JA 246). Defense counsel again asked whether BL did not recall the details or the conversation at all, and BL replied, "I don't recall a conversation at all." (JA 249–50).

Mr. BL did not notice any difference in Appellee's behavior or demeanor based on his prior observations of Appellee when he was drinking alcohol. (JA 247–48). Mr. BL was sober that evening because he was the designated driver. (JA 252). Appellee, BL, and KG, all testified that they were aware there was frequent drug use at Buford's. (JA 217, 254, 276).

3. Mr. KG's testimony at trial.

Mr. KG recalled Appellee making a hand gesture to him at some point in the evening but did not know what he was referencing. (JA 277–78). Mr. KG said

there was a good chance they discussed the incident afterwards, but he has no recollection of any such conversation. (JA 279, 286). Mr. KG did recall Appellee calling him later that week and telling him that he tested positive for cocaine. (JA 286). Mr. KG initially agreed on cross examination that this call occurred later that week but later stated on redirect that he was unsure exactly when this call occurred. (JA 286–87). This was significant because Appellee's sample was not even opened by the testing facility until October 2, 2021. (JA 128).

4. Appellee's alleged foreknowledge of the UA.

On Monday, September 13, 2021, Appellee was notified that he would be providing a sample for the UA that he had previously missed on September 8, 2021. (JA 194). Appellee testified that he had no prior "heads up" or "clue" that there was going to be a make-up UA on Monday, September 13, 2021. (JA 194). However, based on his "past observations," missing personnel were "generally" called upon to take the make-up UA when they were present. (JA 194).

Staff Sergeant [SSG] AP was the unit prevention leader [UPL] in charge of UA testing who conducted the UA on September 13, 2021, for Appellee. (JA 066, 068). When asked about the unit's policy for make-up UAs, SSG AP replied, "It depends." (JA 069). He elaborated that if multiple personnel missed a test, then the commander would have a majority of those personnel come in on a "certain date." (JA 069). No person testified to any policy that would require personnel to

come in and test on their first duty day back after missing a UA—in fact, SSG AP's testimony suggested the opposite. (JA 069, 096). Staff Sergeant AP, when asked, "if you miss the UA, you wouldn't know if you were going to take it the day you got back or two weeks later," replied, "Correct." (JA 096). Staff Sergeant AP testified to the authenticity of the Testing Register, which was admitted into evidence, showing Appellee's urine sample was the one that was provided to Tripler Army Medical Center [Tripler] for testing. (JA 388; 072–074, 079).

5. The expert's testimony at trial.

Dr. CO testified as an expert for the government in forensic toxicology and drug testing. (JA 104). Dr. CO is the technical director of Tripler, and although she was not the analyst who conducted the testing on Appellee's sample, she was familiar with the findings and oversaw the process. (JA 134, 140). As the Technical Director of Tripler, she oversaw the various processing sections who complete both the screening immunoassay test and the confirmation analysis using gas chromatography or liquid chromatography mass spectrometry. (JA 099–100, 105). All technical sections overseeing this process were trained and certified with annual recertification requirements. (JA 105–07).

A. The reliability of the testing facility.[3]

The facility was certified as a military drug testing facility, that process was overseen by the Armed Forces Medical Examiner's System, the facility was inspected three times per year, and had never failed an inspection. (JA 106). The laboratory received 5000–6000 specimens per day for testing. (JA 110–11). The procedure involved first screening for the family of drugs using the "quick and efficient" immunoassay test, then following on with the gas chromatography mass spectrometry [GCMS] test. (JA 139).

B. The reliability of the testing methodology.

Dr. CO's describes the GCMS process as "a much more extensive analysis using gas chromatography mass spectrometry or GCMS." (JA 139). She explained that the "GCMS looks for the fingerprint of the drug. And much like the human fingerprint, each drug or the metabolite has a very unique fingerprint. And if you find the fingerprint in that urine, that means that the drug or the metabolite is in that urine." (JA 140). Dr. CO used a second analogy to explain the purpose and reliability of the two tests, explaining that the immunoassay test screens for all presumptively positive specimens—like identifying a specific brand of vehicle in a parking lot, then the GCMS test looks for the specific make of that vehicle. (JA

[3] As noted in the Army Court's opinion, there was also extensive testimony regarding the chain of custody of appellee's sample. (JA 035 n.2).

141–42). Dr. CO testified that cocaine is not naturally produced by the body and requires the consumption of cocaine for the metabolite to appear in a urine sample. (JA 136).

As the record custodian and director, Dr. CO testified as to the chain of custody of Appellee's sample. (R. at 306–08). Dr. CO was familiar with Appellee's specific case because she reviewed all the physical evidence associated with his testing and came to her own conclusion that Appellee's urine sample tested "positive for BZE [cocaine metabolite] at 295 nanograms per milliliter." (JA 128–30). Although trial defense counsel challenged the admission of the underlying chain of custody documents on testimonial hearsay grounds, they did not challenge Dr. CO's knowledge or ability to testify to these matters. (JA 111).

C. Reasonably discounting innocent ingestion.

Dr. CO, in response to trial defense counsel's questions about appellee's sample having a uniquely low nanogram level, testified that "if you look at the statistics for 2021, for all the specimens that came up positive for cocaine, in 2021 we had . . . close to 1500 positives. That's . . . a very small percentage of our specimens that we test. The median, that's only looking at specimens that test 100 and above, 100 being the DOD cut-off. The median nanogram of the specimen was 297 nanograms per milliliter. That means of all the specimens tested in 2021, 50 percent were above the 297 and 50 percent of the positives were below 297.

So, if you talk statistics, not really." (JA 159).

6. Appellee's admissions and concessions.

At trial, defense counsel acknowledged in his opening that the evidence would show that there was cocaine in Appellee's urine "[b]ecause this case is not about whether or not there was BZE, the acronym for metabolite for cocaine, in [Appellee's] urine." (JA 057). He made a similar concession during his closing argument: "[Appellee's] not here because he intentionally or knowingly used cocaine, but because he got exposed to something that he had not been exposed to in his time when he was stationed at Fort Riley." (JA 368). Through his cross examination of Dr. CO, he implicitly conceded her expertise and the detection of cocaine in the urine sample linked to Appellee:

> Q. I hope it's clear that from our past working together, if I see something as a lay person who is not an expert in forensic toxicology, that it's wrong or need correction, that you'll correct me.

(JA 146).

> Q. So having reviewed the testing that folks at your lab did on this urine, are we correct to state – clearly and affirmatively, we can't say how much the subject who submitted this sample consumed in the way of cocaine?
>
> A. Yes, I agree with that.
>
> Q. All we can say is for certain, the subject consumed enough cocaine, then in the metabolic process it produced the metabolite that passed mustering the cut-off level that the lab sets?
>
> A. Yes.

(JA 158).

Appellee made similar concessions during his direct examination:

> Q. Okay, and you referenced a glass again, based upon all of the information you have now, can you say that certainly was the cause of why you popped positive?
>
> A. No, I cannot. That's just the weird incident of the weekend.
>
> Q. Okay, and having heard the testimony of Dr. [CO], the forensic toxicologist, in her testimony about how a small amount of cocaine can produce a positive weigh in above what you produced on the uranalysis with your urine [] can you say for sure that you weren't somehow exposed to a very small amount in some other setting that weekend?
>
> A. I cannot say that I was not exposed in any other setting. . . . I'm assuming that it was the incident with the glass.

(JA 228).

Certified Issue I:

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

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "Under the doctrine of stare decisis, the question is not whether the interpretation [at issue] is plausible; it is whether the . .

. decision is so unworkable or poorly reasoned that it should be overruled." *United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (quoting *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000)).

Summary of Argument

The Army Court erred when it held that *United States v. Campbell* requires the admission of the underlying urinalysis results. This error overlooked binding precedent, and greatly expanded upon the holding in *Campbell*. The Army Court's error in its interpretation of *Campbell* resulted in an improper legal sufficiency analysis which failed to draw every reasonable inference in favor of the prosecution and overlooked material facts based on its misapplication of *Campbell* to Appellee's case. This error warrants setting aside the Army Court's decision.

Argument

Findings of guilt are legally sufficient when "any rational factfinder could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When conducting a legal sufficiency review, the reviewing court is obligated to draw "every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (cleaned up).

In *Campbell*, the appellant challenged his conviction claiming that the sole evidence of wrongful use of lysergic acid diethylamide [LSD] consisted of a written report of results from a urinalysis test. 50 M.J. 154, 155 (C.A.A.F. 1999). At trial, the defense moved to exclude the test results on the ground that the scientific methodology used was novel and therefore unreliable. *Id.* at 155. This Court held that the prosecution failed to establish the reliability of the testing methodology, which was a novel methodology in 1999, and failed to establish knowing and wrongful use. *Id.* at 160. This Court developed a three-pronged analysis for cases that rely solely on the presence of a drug in an accused's urinalysis sample:

> 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; (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," and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. at 160 (internal citations omitted).

Upon reconsideration, this Court clarified that "the deficiency was the absence of evidence establishing the frequency of error and margin of error in the testing process," and "[s]ince the prosecution did not present any other direct or circumstantial evidence of knowing use," the conviction was legally insufficient.

United States v. Campbell II, 52 M.J. 386, 388 (C.A.A.F. 2000). The opinion also acknowledged that the prosecution "is not precluded from using evidence other than the three-part standard if such evidence 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." *Id.* at 389.

1. The Army Court expanded upon *Campbell* and overlooked binding precedent.

In its ruling, the Army Court properly asserted "[o]ur superior court has held expert testimony is required to *explain* the urinalysis results." *Downum*, 2024 CCA LEXIS 156, at *4; (JA 036). However, the Army Court went a step further by stating "[w]e interpret this to require two things: *test results* and expert testimony." *Id*. This interpretation of *Campbell* is incorrect. Regarding what is required, *Campbell*, relying on *United States v. Graham*, held that "[t]o sustain a prosecution in such cases, we have *required only that the results be supported by expert testimony* explaining the underlying scientific methodology and the significance of the test result." *Campbell*, 50 M.J. at 159 (emphasis added) (quoting *United States v. Graham*, 50 M.J. 56, 58–59 (C.A.A.F. 1999).

In *Graham*, this Court found the factfinder may infer the knowing and wrongful use once the following three steps were established: "First, the seizure of the urine sample must comport with law. Second, the laboratory results must be

admissible, requiring proof of a chain of custody sample, i.e., proof that proper procedures were utilized. And last, but importantly, there must be expert testimony *or* other evidence in the record . . . ." 50 M.J. at 58–59 (emphasis added). The government is unaware of any case law that has since expanded upon this precedent requiring the admission of the underlying test results, rather than just their admissibility.

In *United States v. Tearman*, this Court stated that the military judge abused his discretion in admitting the DD Form 2624 over defense objection, because it was testimonial hearsay. 72 M.J. 54, 62 (C.A.A.F. 2013). In *Tearman*, the admitted DD Form 2624 had "formal, affidavit-like statement[s] of evidence," which were written on the form.[4] *Id.* at 61 (quoting *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011)). However, this Court found that the error was harmless beyond a reasonable doubt because the evidence was cumulative with the properly admitted expert testimony which relied upon the machine printouts and expertise to reach the conclusion that the appellant reliably tested positive for THC. *Id.* It is difficult to reconcile this finding with the Army Court's opinion in this case—that the omission of the DD Form 2426 made the case legally and factually insufficient.

[4] The DD Form 2624 that the Army Court references in Appellee's case had no such formal affidavit-like statements of evidence, and thus likely would not be considered testimonial under this analysis. (JA 036, 434).

In fact, 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. *United States v. Ford*, 4 U.S.C.M.A. 611, 615–16 (1954). In *Ford*, the CMA rejected the appellant's claim that "the opinion of [the forensic expert], standing alone, is insufficient to support a conviction." *Id.*; *c.f. United States v. Ellibee*, 13 C.M.R. 416, 417–18 (A.B.R. 1953) (holding that while "the only evidence upon which the finding of guilty can be sustained is that elicited through the testimony of the [expert witness,]" the testimony of the defense expert witness weighed more heavily and thus warranted reversal).[5]

The Army Court's misapplication of *Campbell* also directly conflicts with *United States v. Boulden*, where the Air Force Court of Military Review found the same, and the Court of Military Appeals [CMA] again affirmed that decision:

> In this case, unlike most urinalysis cases we have reviewed, the written data concerning the test results were not proffered nor admitted into evidence. That, in and of itself, causes us no concern. It is not the written urinalysis data product which is of paramount value to factfinders . . . . As the Court of Military Appeals has noted, a urinalysis data product needs in-court expert testimony to assist the trier of fact in interpreting it if it is to rationally prove that an accused used marijuana or other controlled substances.

United States v. Boulden, 26 M.J. 783, 785 (A.F.C.M.R. 1988), *aff'd*, 29 M.J. 44 (1989) (affirming on other grounds while not directly addressing the issue of the

[5] The government is unaware of any case that has explicitly or implicitly overruled this precedent and does not interpret *Graham* or *Campbell* to do so.

omission of the paper test results).

Nowhere in *Campbell* or the preceding cases that it rests upon, does this Court state that the *paper document* is required, but only that expert testimony explaining the methodology and significance of the results is required for the permissible inference of knowing wrongful use.[6] Here, the urinalysis results were admitted through the unobjected to testimony of the expert witness, Dr. CO. (JA 142). As discussed *infra*, Dr. CO thoroughly testified regarding the reliability of the testing procedure and methodology. (JA 105, 111, 128–30, 136, 139–42, 159). The Army Court misapplied *Campbell* and overlooked binding precedent when finding that the evidence was legally insufficient.

Ultimately, the Army Court's flawed interpretation of *Campbell* and *Graham* expands upon the requirements established by this Court and increases the government's burden under a legal sufficiency analysis. This is especially true in light of *Ford*, *Ellibee*, and *Boulden*. 4 U.S.C.M.A. at 615–16; 13 C.M.R. at 417–18; 26 M.J. at 785. The fact that these cases are not "remotely recent" does not

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[6] *Campbell*, 50 M.J. at 159 ("[T]here must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful.") (citing *Graham*, 50 M.J. at 58–59)*; see generally United States v. Harper*, 22 M.J. 157 (1986); *United States v. Murphy*, 23 M.J. 310 (1987); *United States v. Ford*, 23 M.J. 331 (1987) (compiling a series of cases in which this Court "established the rules by which factfinders in courts-martial may infer from the presence of a controlled substance in a urine sample that a servicemember knowingly and wrongfully used the substance").

impact their precedential value. *Downum*, 2024 CCA LEXIS 156, at 5; (JA 037). "[I]t is for this Court, not the ACCA, to overrule our precedent." *United States v. Tovarchavez*, 78 M.J. 458, 465 (C.A.A.F. 2019). Especially not by implication. *Id.* These opinions are not "so unworkable or poorly reasoned that [they] should be overruled." *Andrews*, 77 M.J. at 399.

2. The Army Court misapplied *Campbell*.

In *Campbell*, this Court found that "[o]ften, the prosecution may be able to prove wrongful drug use through an admission by the accused or observations by witnesses capable of identifying use of a controlled substance . . . ." 50 M.J. at 159. This Court acknowledged that "[i]n some cases, however, the prosecution has no direct evidence of use and no circumstantial evidence in the form of any effect on the conduct of the accused." *Id.* Therefore, when "[t]he only evidence in such cases [is] the results of a drug test that identifies the presence of the drug or a metabolite in the accused's body fluids[,]" then the otherwise permissible inference of wrongful use requires "that the prosecution also establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample." *Id.* at 160.

Relying on *Campbell*, the Army Court found that although "the government may use a positive urine test as part of its effort to prove illegal drug use," the government failed to establish the scientific reliability of the testing procedure or

account for the possibility of innocent ingestion. *Downum*, 2024 CCA LEXIS 156, at 3; (JA 035). This finding overlooked material facts and failed to distinguish Appellee's case from *Campbell*. In *Campbell*, this Court found Appellee's conviction legally insufficient where the government relied solely upon a "novel" testing procedure. 50 M.J. at 160. Notably, in 1999, the GCMS testing *was* novel, and the record made clear that the testing procedure and facility was the only laboratory in the country using this method. *Id.* at 156. The scientific reliability of the results was thoroughly contested. *Id.* at 158. This Court predicated its ruling on this fact. *Id.* at 160 ("This case involves the novel use of the GC/MS/MS testing procedure for LSD, which according to the record was conducted by only one laboratory in the United States.").

Appellee's case is distinguishable from *Campbell*. In contrast, here, there was no evidence that the testing methodology failed to reliably detect the presence and quantify the concentration of the drug or metabolite in the sample. Unlike *Campbell*, where the defense expert testified he would "'disqualify the entire batch,' including the results pertaining to appellant" based on the novel procedure and its lack of acceptance in the scientific community at that time; here, there was no evidence contradicting the reliability of the testing procedure. *Id.* at 158.

In fact, as part of the defense team's strategy, trial defense counsel repeatedly conceded both Dr. CO's expertise and the detection of cocaine in

Appellee's urine through his questions and answers of Dr. CO, and his argument. (JA 057, 146). Appellee made the same concession during his direct examination while seeking to explain his positive results through an innocent ingestion defense, but just as in *Tearman*, his explanation was "dubious" and rebutted. (JA 228); *see Tearman*, 72 M.J. at 62 ("Moreover, Appellant's primary defense of possible passive marijuana exposure was 'dubious,' and effectively rebutted by trial counsel during closing argument.").

This is an important distinction overlooked by the Army Court. Afterall, this Court expressly contemplated that "[i]t may well be in a future case that the Government could make the necessary showing with respect to the significance of the concentration levels and the reliability of this particular GC/MS/MS test or a follow-on version of the test." *Campbell*, 50 M.J. at 161. In the years since *Campbell*, that reliability has indeed been established.

Here, the Army Court's reversal was based on issues that were undisputed. It is important to bear in mind the Supreme Court's admonitions against "the magnification on appeal of instances which were of little importance in their setting[:]"[7]

> In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends

[7] *Glasser v. United States*, 315 U.S. 60, 83 (1942).

of justice than to acquiesce in low standards of criminal prosecution. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)). As discussed *infra*, not only was there direct and circumstantial evidence of drug use, but the presence of cocaine in Appellee's system and the validity of the scientific methodology was undisputed at trial. The Army Court failed to heed the Supreme Court's admonishment and magnified on appeal this issue that was uncontested at trial.

3. The expert's testimony established the scientific reliability of the testing.

Seemingly overlooked in the Army Court's finding, Dr. CO's testimony also independently established the reliability of the tests conducted at her laboratory. (JA 104–11). Dr. CO's testimony established the annual training and certification requirements of the personnel conducting the testing (JA 105–07); the oversight and inspections establishing the reliability of the facility itself (JA 106); and the extensive number of samples tested each day (5000–6000 specimens). (JA 110–11).

Considering the validity of the tests were not contested by Appellee, however, the Army Court erred when it found the government failed to establish the scientific reliability of the testing procedure as a basis to find that the evidence was legally and factually insufficient. *See United States v. Katso*, 74 M.J. 273, 284

(C.A.A.F. 2013) ("And given defense counsel's limited cross-examination of [the expert] at trial, we decline to assume that they believed that there were grounds to attack the tests he did not personally perform.").

Dr. CO's description of the testing methodology was sufficient. (JA 139). Her testimony provided the factfinder with comprehensible analogies that took an otherwise complex process and translated it into a form a layperson could easily understand. *Compare* (JA 139–40, 141–42) *with Tearman*, 72 M.J. at 56. The Army Court held that this testimony constituted "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." *Downum*, 2024 CCA LEXIS 156, at *3; (JA 035). This finding was contrary to the evidence presented at trial. Appellee's concessions that he ingested cocaine (albeit his claim that it was an innocent ingestion which the panel fully considered as a defense after being properly instructed by the military judge) combined with Dr. CO's above referenced testimony clearly established the reliability of the test results and procedures under both the legal and factual sufficiency standards. Ultimately, the only reasonable inference to be drawn from the entirety of the evidence regarding the testing methodology, procedure, and results is that they were, in fact, scientifically sound and reliable.

4. The expert testimony reasonably accounted for innocent ingestion.

The Army Court erroneously found that the government failed to "reasonably account[] for the possibility of innocent ingestion" by explaining the "cutoff level's relevance, or any other evidence indicating test controls for the possibility of innocent ingestion." *Downum*, 2024 CCA LEXIS 156, at *3; (JA 035). This finding failed to consider material facts, let alone in a light most favorable to the government. *Robinson*, 77 M.J. at 298.

First, not only did the government rely on evidence other than expert testimony to establish knowing and wrongful use, but Dr. CO's testimony expressly acknowledged that Appellee's nanogram level was above the "cutoff level," and that it was nearly the exact median amount of every sample that tested above the "cutoff level" for 2021. (JA 159, 174–75). Dr. CO stated that Appellee's sample was higher than nearly fifty percent of all test subjects ("close to 1500 positives") who had more than the cutoff level of 100 nanograms per milliliter of cocaine in their system. (JA 159). This is highly probative evidence of knowing and wrongful use that was presented to the trial factfinder and evidence ignored in the Army Court's holding.

This evidence directly contradicted Appellee's theory that his sample was uniquely low and the reasonability of his innocent ingestion defense. (JA 371–72). Importantly, this evidence directly contradicts the Army Court's finding.

Downum, 2024 CCA LEXIS 156, at *3; (JA 035). Ultimately, this testimony regarding the amount of cocaine in Appellee's system in combination with his explanation of innocent ingestion is sufficient "to rationally permit factfinders to find beyond a reasonable doubt that an accused's use was knowing." *Campbell*, 50 M.J. at 162. This is especially true for the Army Court's legal sufficiency analysis considering "the standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (cleaned up). For those reasons, this Court should set aside the Army Court's decision.

Certified Issue 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

Questions of law are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Summary of Argument

The Army Court erred when it found that without the admission of the paper copy of the urinalysis test results, the expert's testimony lacked relevance.[8] This

[8] The Army Court originally stated that "[w]ithout the admission of the test results, commonly accomplished by offering them as non-testimonial business

legal conclusion is contradicted by established precedent regarding the admission and probative value of expert testimony, and the law regarding unobjected to testimony. The relevance of an expert's testimony does not hinge on the admission of the underlying evidence. Unobjected to testimony may be given its "natural probative value." Therefore, the Army Court's finding that the "testimony lacked relevance" is clearly erroneous and should be set aside.

Argument

When the Army Court found that "[t]here were no facts in evidence for [the expert] to explain and no results for her to interpret" it created a new standard regarding expert testimony that is unsupported by statute or case law. *Downum*, 2024 CCA LEXIS 156, at *4; (JA 036). In fact, this Court has said just the opposite: "[the expert] could have arrived at an expert opinion based on training, education, experience and admissible evidence alone,[9] and considered, but not repeated, inadmissible evidence in arriving at an independent expert opinion." *United States v. Blazier*, 69 M.J. 218, 226 (C.A.A.F. 2010). In other words,

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records under Mil. Rule Evid. 803(6), the expert's testimony lacked *any* relevance." *United States v. Downum*, 2024 LEXIS 70, *5 (Army Ct. Crim. App. 6 Feb. 2024) (emphasis added).

[9] Regarding legal sufficiency, this Court went on to say that "[s]uch expert opinion and admissible evidence together could have been legally sufficient to establish the presence of drug metabolite in the urine tested," but never held that the machine generated data must be admitted for such a finding. *Id*.; *see Boulden*, 26 M.J. at 785; *Ford*, 4 U.S.C.M.A. at 615–16.

qualified experts may give their opinion based on evidence that is admissible or inadmissible, but there is no requirement to *admit* the underlying facts or data. *See Graham*, 50 M.J. at 58–59.

Here, the expert did more than provide her expert opinion, she also provided the court with the results of the urinalysis. The expert's unobjected to testimony was legally sufficient and equivalent to the documentation that she relied upon. *See Tearman*, 72 M.J. at 63 ("[A]n expert witness, relying on nontestimonial statements, independently and conclusively established the presence of a drug metabolite in an amount above the DoD cutoff level in Appellant's urine.").

1. The relevance of the expert's testimony does not hinge on the admission of the underlying evidence.

The Army Court's finding overlooks established precedent regarding expert testimony: "this Court's precedent makes clear that even when an expert relies in part upon 'statements' by an out-of-court declarant, the admissibility of the expert's opinion hinges on the degree of independent analysis the expert undertook in order to arrive at that opinion." *Katso*, 74 M.J. at 282. Dr. CO testified that she independently reviewed the "entire laboratory packet," "all of the machine generated data," and formed an opinion as to the results of each phase of the analysis. (JA 140–42). This was in addition to her duties as the evidence custodian and director of the facility who oversaw the process generally. (JA 099–100). That the government did not admit the machine generated data should go to

the weight of the expert testimony rather than its relevance. *See Katso*, 74 M.J. at 284 ("That [the expert] did not himself perform aspects of the tests 'goes to the weight, rather than to the admissibility' of his opinion.").

This Court's precedent, to include *Campbell*, requires and emphasizes the importance of *expert testimony* but does not support the Army Court's unprecedented finding— "[w]ithout the admission of the test results . . . the expert's testimony lacked relevance." *Downum*, 2024 CCA LEXIS 156, at *4; (JA 036). The Army Court has, in essence, created a heightened legal sufficiency analysis for drug urinalysis cases when an expert testifies but the underlying paper results are not admitted into evidence.

2. The unobjected to expert testimony may be considered substantively.

By holding that the paper test results must be admitted for the government to prove wrongful drug use, the Army Court also overlooks an important and long-standing principle of military evidence—unobjected to testimony may be "given its natural probative value" and "may be considered as substantive evidence for any relevant purpose."[10] The Army Court concedes that this evidence was admissible

[10] *See* Mil. R. Evid. 103 analysis at A22-3 ("As indicated in the Analysis of Rule 802, Rule 103 significantly changed military law insofar as hearsay is concerned. Unlike present law under which hearsay is absolutely incompetent, the Military Rules of Evidence simply treat hearsay as being inadmissible upon adequate objection."); *United States v. Olivares*, ARMY 20210125, 2023 CCA LEXIS 94, *15 (Army Ct. Crim. App. 24 Feb. 2023) ("Prior inconsistent statements are generally only admissible for impeachment purposes but 'may be considered [as

and may be considered substantively,[11] but proceeds to dismiss this argument by speculating that the defense had a strategic purpose for not objecting to Dr. CO's testimony. *Downum*, 2024 CCA LEXIS 156, at *5 n.6; (JA 037). The government is unaware of any authority that would support diminishing the evidentiary value of the expert's testimony simply because the defense may have had a strategic purpose to waive the issue. The Army Court went on to erroneously find that this testimony was the only evidence presented to establish Appellee used cocaine which made the evidence legally insufficient. *Id.* at *5. The Army Court failed to cite any authority that stood for the proposition that an expert can only "interpret results" not provide them. *Id.* In fact, this Court's precedent would suggest the opposite. *See Tearman*, 72 M.J. at 62 ("The record indicates that [the expert] reviewed and relied upon the nontestimonial machine-generated data contained in the drug testing report as the basis for her independent conclusion that Appellant's

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substantive evidence] for any relevant purpose' when 'admitted without objection.'") (citing *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony); *see also Flores v. Estelle*, 513 F.2d 764, 766 (5th Cir. 1975) ("[U]nobjected-to hearsay may be considered by the trier of fact for such probative value as it may have."); *but see United States v. Zone*, 7 M.J. 21, 22 (C.M.A. 1979) (holding that the 1969 version of the Manual for Courts-Martial adopted a minority view that "hearsay is absolutely inadmissible . . . even if it is admitted without objection").

[11] This legal principle applies to evidence that would normally not be admitted substantively, but is especially true here, where Army Court acknowledges the evidence was "nontestimonial" and would have been admitted substantively regardless of an objection. *Downum*, 2024 CCA LEXIS 156, at *4; (JA 036).

urinalysis indicated a positive result for THC.").

Additionally, as stated *supra*, a plain reading of *Graham* would suggest that an expert's testimony may be considered substantively regardless of the admission of the underlying evidence the expert relied upon. *See Graham*, 50 M.J. at 58–59; *see also United States v. Reynoso*, 66 M.J. 208, 210–11 (C.A.A.F. 2008) (acknowledging that an expert witness's testimony may summarize otherwise "voluminous writings, recordings, or photographs which cannot conveniently be examined in court"); Mil. R. Evid. 702 (stating that experts "may testify in the form of an opinion or otherwise"). Here, the finding of the test result came in substantively through the testimony of Dr. CO. (JA 142). Not only was that portion of her testimony unobjected to (JA 140–42), but this Court's finding in *Tearman* would suggest that this was the appropriate means of introducing this evidence regardless of whether the underlying documentation was admissible. 72 M.J. at 62 (finding that the admission of the DD Form 2624 was harmless error because the document was cumulative with the properly admitted expert testimony). Therefore, the Army Court's finding that the "testimony lacked relevance" is clearly erroneous, unsupported by any law or precedent, and warrants setting the decision aside.

Certified Issue III:

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

Standard of Review

"This court reviews questions of statutory interpretation de novo." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017).

For factual sufficiency, after a specific showing of a deficiency in proof is made, "the Court may weigh the evidence and determine controverted questions of fact subject to [] appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and [] appropriate deference to findings of fact entered into the record by the military judge. [If] the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding." William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (1 Jan. 2021) [FY21 NDAA]; Art. 66(d)(1)(B).[12]

Summary of Argument

The Army Court erred in its interpretation of the new factual sufficiency

[12] "The amendment to Article 66(d)(1)(B) applied only to courts-martial, as here, where every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021." *United States v. Scott*, __M.J.__, 2024 CCA LEXIS 126, *4–5 (Army Ct. Crim. App. Mar. 14, 2024); (JA 503–04).

standard when it applied a de novo standard of review.[13] Additionally, the Army Court failed to give appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence when it found that the evidence admitted by the Government—in conjunction with the Appellee's incredible explanation of innocent ingestion—was factually insufficient to sustain a conviction.

Argument

The first step in statutory interpretation is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 438, 450 (2002)). "The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Id*. The plain language of a statute will control unless it is ambiguous or leads to an absurd result. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012). The ordinary meaning of words indicates legislative intent. *See United States v. Easter*, 981 F.2d 1549, 1558 (10th Cir. 1992). Ordinarily, courts will not read back into a statute language that Congress previously used but discarded from the current version. *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001).

[13] The government acknowledges that this issue is currently pending a decision by this Court in *United States v. Harvey*, 83 M.J. 474 (C.A.A.F. 2023), *rev. granted*, 2024 CAAF LEXIS 13 (C.A.A.F., Jan. 10, 2024).

Here, the Army Court erred in two significant ways. First, a plain reading of the statute clearly shows a divergence from a de novo standard of review. Second, the Army Court failed to give the "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence" when failing to consider important facts. Art. 66(d)(1)(B)(ii) (2021). These errors resulted in the Army Court erroneously finding that it was "clearly convinced that the finding of guilty was against the weight of the evidence." *Id.*

1. The standard of review is no longer de novo.

To reverse Appellee's conviction, the Army Court relied on *United States v. Scott*, which held, "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." *Scott*,__M.J.__, 2024 CCA LEXIS 126 at *5; (JA 504); *Downum*, 2024 CCA LEXIS 156, at *2; (JA 034). The Army Court's interpretation and subsequent application of a de novo standard of review is inconsistent with a plain reading of the statute. Congress removed the old de novo standard, which was subject only to "recognizing that the trial court saw and heard the witnesses." Art. 66(d)(1), UCMJ. This "recognizing" requirement gave "no deference to the decision of the trial court on factual sufficiency beyond the admonition . . . to take into account" that the factfinder "saw and heard the witnesses." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The amended Article 66 mandates

that the trial factfinder be given "appropriate deference." Art. 66(d)(1)(B)(ii), UCMJ. The "appropriate deference" standard applies not only to witness testimony, but to "other evidence" and "findings of fact . . . by the military judge." *Id.* The Army Court's analysis failed to give the factfinder appropriate deference and should be set aside.

2. Appellee's testimony supported the inference of wrongful use.

The government and defense presented the factfinder with their theories of the case. Defense counsel and Appellee repeatedly conceded the presence of cocaine in Appellee's system but maintained that he innocently ingested it. The factfinder had the opportunity to hear Appellee's account from him directly. The panel rejected his explanation and found him guilty. The Army Court failed to give the trial factfinder appropriate deference when it found otherwise and summarily dismissed Appellee's testimony in a footnote. *Downum*, 2024 CCA LEXIS 156, at *5 n.8; (JA 037).

Here, unlike *Campbell*, the results of Appellee's urinalysis were not the only evidence for the permissible inference of wrongful use; Appellee's false exculpatory statements to his command, implausible explanation of innocent ingestion, and concession as to the validity of the results provided ample evidence for any rational factfinder to find him guilty beyond a reasonable doubt. *Id*. at 160.

Campbell expressly acknowledged that the government "may be able to

prove wrongful drug use through an admission by the accused." *Id.* at 159. This evidence was not present in *Campbell* but was present in this case. *Id.* ("In some cases, however, the prosecution has no direct evidence of use and no circumstantial evidence in the form of any effect on the conduct of the accused."). It is a well-settled principle that false exculpatory statements of an accused may be considered as substantive evidence of his guilt. *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021). The Army Court fails to reconcile this fact with their factual sufficiency analysis under the lens of *Campbell*.

Appellee's statements to KG the week of, or shortly thereafter, regarding the results of his urinalysis prove knowing and wrongful use of cocaine. (JA 286). Appellee's statements to his company and battalion commander one day after his urinalysis show knowledge of wrongful use. (JA 212, 214, 224). Appellee and his friends testified that cocaine use was frequent and apparent at Buford's and that Appellee was at Buford's the weekend prior. (JA 185, 254, 284). Appellee had the opportunity to knowingly use cocaine at this location and did. (JA 357). Appellee's denials that he knowingly used cocaine were uncorroborated and not credible. (R. at 209, 246, 249).

As the Army Court stated, "a defendant who chooses to present a defense runs a substantial risk of bolstering the Government's case," and that is what happened here. *United States v. Pleasant*, 71 M.J. 709, 713 (Army Ct. Crim. App.

2012). "Where some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in her own defense, the Defendant's testimony, denying guilt, may establish, by itself, elements of the offense." *Id.* (quoting *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 1995).

In sum, Appellee's testimony acknowledged that there was cocaine in his system, (JA 228), but sought to explain its presence by the single sip of a nearly full beverage, which was allegedly so saturated with cocaine, that it caused him to have the median amount of cocaine in his urine nearly thirty-six hours later. (JA 159, 205). This story was not credible, and the panel clearly rejected it. (JA 346–48, 039). The Army Court's de novo review failed to give appropriate deference to the fact that the trial court saw and heard this testimony, had the opportunity to evaluate Appellee's credibility, and ultimately convicted him. Accordingly, this Court should set aside the Army Court's decision and affirm the trial court's finding and sentence.

Conclusion

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

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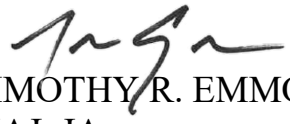

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains 8512 words.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 14, 2024.

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