IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. James H. BASS Gunnery Sergeant (E-7) U.S. Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 25-0149/MC Crim. App. Dkt. No. 202300185

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

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Issues Presented

I.

Whether the military judge abused his discretion in admitting evidence under M.R.E. 404(b) of prior positive urinalysis results for which Appellant had been previously acquitted at court-martial.

II.

Whether the military judge erred in relying on the "permissive inference" to convict Appellant under article 92 of knowing use of a non-controlled, commonly available substance.

Statement of Statutory Jurisdiction

The lower court had jurisdiction under Article 66(b)(1)(A), UCMJ.[1]

Appellant invokes this Court's jurisdiction under Article 67(a)(3), UCMJ.[2]

Relevant Authority

Military Rule of Evidence 404(b), UCMJ, provides:

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[3]

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[1] 10 U.S.C. § 866 (b)(1)(A) (2024).
[2] 10 U.S.C. § 867 (a)(3) (2024).
[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III (2024).

ALNAV 074/20 provides in relevant part:

2. On December 20, 2018, the President signed into law the Agriculture Improvement Act of 2018, removing industrial hemp from the Controlled substances Act . . . and excluding from the definition of marijuana those hemp products containing up to 0.3 percent tetrahydrocannabinol (THC).

3. Due to this change in the law, new hemp products are commercially available in the United States, the normal use of which could cause a positive urinalysis result. The [FDA] does not determine or certify the THC concentration of commercially available hemp products, such as cannabidiol (CBD). Accordingly, these products may contain appreciable levels of THC, yet omit any reference to THC on the product label and/or list an inaccurate THC concentration. Consequently, Sailors and Marines cannot rely on the packaging and labeling of hemp products in determining whether the product contains THC concentrations that could cause a positive urinalysis result.

4. [T]he knowing ingestion . . . of products containing, or made or derived from, hemp is prohibited . . . . The prohibitions . . . are general intent offenses. This means that a violation of this ALNAV occurs whenever a Service Member intends to use any product made or derived from hemp . . . .

5. Effective immediately:

(a) Sailors and Marines are prohibited from using any product made or derived from hemp . . . including CBD . . . .

(b) This prohibition does not apply to use . . . without knowledge that the product was made or derived from hemp, including CBD, where the lack of knowledge is reasonable.[4]

[4] J.A. at 18.

Statement of the Case

A military judge, sitting as a special court-martial, convicted Appellant, contrary to his pleas, of two specifications of violating a lawful general order in violation of Article 92, UCMJ.[5] The court-martial sentenced Appellant to reduction to paygrade E-5 and a reprimand.[6] The convening authority approved the sentence as adjudged.[7] The lower court affirmed the findings and sentence.[8] Appellant then timely petitioned this Court for review, which this Court granted.

Statement of Facts

A. Hemp is commercially available and may be lawfully purchased.

In July 2020, the Secretary of the Navy (SECNAV) issued ALNAV 074/20 in response to the enactment of the Agriculture Improvement Act of 2018 ("Farm Bill").[9] The Farm Bill removed industrial hemp from the Controlled Substances Act, making products derived from it legal and commercially available.[10]

But these products have the potential to cause servicemembers to test positive for THC-8 on a urinalysis, indicating use of a hemp-based (non-controlled) product.[11] Because use of these hemp-based products was no longer

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[5] J.A. at 240.
[6] J.A. at 245.
[7] J.A. at 247.
[8] J.A. at 13.
[9] J.A. at 18.
[10] J.A. at 18; 21 U.S.C. § 802(16).
[11] J.A. at 18 ¶ 3.

unlawful, the Navy was unable to initiate disciplinary action against service members who tested positive for THC-8.

Recognizing this gap in the law, the SECNAV issued ALNAV 074/20.[12] The ALNAV prohibits the "knowing ingestion . . . of products containing, or products made or derived from, hemp including CBD, regardless of the THC concentration or that fact that they're legal in many states."[13]

B. The government charged Appellant with violating ALNAV 074/20 based solely on two positive urinalysis test results for THC-8.

In November and December 2022, Appellant tested positive for THC-8, indicating the ingestion of a hemp-based product, rather than the use of a controlled substance. The government subsequently charged him with two specifications of disobeying a lawful general order (Art. 92, UCMJ) for violating ALNAV 074/20.[14]

The government's case against Appellant consisted of the lab report indicating THC-8 levels of 84 ng/ml and 68 ng/ml respectively.[15] Trial counsel also called the lab expert who testified that, while THC-8 can be derived from hemp, she could not tell when Appellant was exposed to it, how the exposure

[12] J.A. at 18 ¶ 4.
[13] J.A. at 18 ¶¶ 4, 5a.
[14] J.A. at 17.
[15] J.A. at 126.

occurred, or how much he ingested.[16] Nor was she able to opine whether the levels of THC-8 detected in Appellant's system would have caused him to experience any physiological effects.[17]

But the government's expert did testify that the products that could have produced Appellant's positive results are available at gas stations, grocery stores, tobacco stores, and homeopathic stores.[18] She also testified that the urinalysis results in this case cannot distinguish the source of THC-8, which can be synthetically produced or derived from naturally occurring cannabis sativa plants that do not meet the definition of hemp.[19]

Defense counsel cross-examined the government's expert, attempting to elicit testimony demonstrating it did not meet its burden of proof.[20] The government presented no witnesses to testify that Appellant knowingly used a hemp product the ALNAV banned.[21]

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[16] J.A. at 124-25, 128-29.
[17] J.A. at 125.
[18] J.A. at 133-34.
[19] J.A. at 138, 141.
[20] J.A. at 128-30 (cross-examination regarding the knowledge element); J.A. at 132, 140-41 (cross-examination on whether the THC-8 compound was made or derived from a hemp product).
[21] J.A. at 67-83 (five government fact witnesses testified); J.A. at 128-29 (government expert stating she cannot determine how the metabolite entered the body and cannot tell intent or rule out unknowing ingestion based on the urinalysis results).

At the close of the government's case, the defense counsel raised an R.C.M. 917 motion, arguing the government failed to prove the knowledge element of the charged specifications.[22] The defense counsel argued there was no evidence to support an inference that Appellant knowingly used a hemp-based product.[23] The military judge denied the motion.[24]

Appellant's case consisted of a general denial of the charges. During its case, the defense called an expert witness who testified similarly to the government's expert.[25] Three witnesses testified to Appellant's good military character.[26] Appellant did not testify. And at no time did Appellant raise an innocent ingestion defense.

In rebuttal, the government moved to introduce three positive urinalysis results from Appellant's 2021 court-martial pursuant to Military Rule of Evidence (M.R.E.) 404(b).[27] In that case, Appellant was charged with, and acquitted of, three

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[22] J.A. at 207.
[23] J.A. at 208-212.
[24] J.A. at 212.
[25] J.A. at 177 (THC-8 can be derived from a hemp product, marijuana plant, or chemically synthesized from scratch); J.A. at 179-80 (THC-8 products can be purchased at convenience stores, gas stations, and pharmacies); J.A. at 181-82 (positive urinalysis cannot provide information on how much of a particular substance was ingested, what amount the person was exposed to, whether or not the person felt the effects, or whether the person was aware they were using the substance).
[26] J. A. at 199, 202, 206.
[27] J.A. at 50, 83.

specifications of using THC-8 in violation of Article 92, UCMJ.[28] The government also moved to introduce a portion of Appellant's testimony from that trial during which he described the "monumental" impact the prior positive result had on his life.[29] The trial counsel sought to introduce this evidence to demonstrate knowledge, absence of mistake, and lack of accident in this case, even though Appellant never claimed these defenses at trial.[30]

Applying the *Reynolds* test, the military judge found the evidence reasonably supported the fact that Appellant ingested THC-8.[31] Although he found that none of the circumstances in the prior urinalyses were "significantly similar" to the current case, he admitted the evidence based on his sua sponte probability calculation.[32] Specifically, he found "[t]esting positive on two prior occasions and going through the court-martial process, that makes it less probable that any ingestion was *mistaken*."[33] The military judge also found that this evidence was not unduly prejudicial, and it was admitted over Appellant's objection.[34]

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[28] J.A. at 92.
[29] J.A. at 50.
[30] J.A. at 50, 91-93.
[31] J.A. at 98-99.
[32] J.A. at 99.
[33] J.A. at 99 (emphasis added).
[34] J.A. at 99 (the military judge concluded the probative value is greatly diminished because Appellant was acquitted in accordance with *United States v. Hoffman*, No. 201400067, 2018 CCA LEXIS 326 (N-M. Ct. Crim. App. July 9, 2018).

C. The military judge relied on the M.R.E. 404(b) evidence and the "permissive inference" to convict Appellant.

The military judge convicted Appellant of both Article 92 specifications.[35] He noted in his special findings that he relied on the "permissive inference" to prove knowing use.[36] He also found that the M.R.E. 404(b) evidence of prior use demonstrated Appellant was "on notice to avoid the mistake of accidental or knowing ingestion."[37]

[35] J.A. at 240.
[36] J.A. at 242-43 ¶¶ 12, 17.
[37] J.A. at 243 ¶ 16.

Summary of Argument

Appellant made a general denial of using THC-8. He did not present an innocent ingestion defense. Yet the military judge admitted Appellant's prior urinalyses because he found that, on their own, they made it less probable that the subsequent positive urinalyses could have been the result of mistake. This Court rejected this logic in *United States v. Graham* and has continued to reject it in subsequent cases.[38] Therefore, the military judge abused his discretion.

He compounded this error by erroneously relying on the "permissive inference" to satisfy the element of "knowing use" required by ALNAV 074/20.[39] Applying a permissive inference to a substance that is readily available to consumers and not controlled cannot be squared with this Court's opinion in *United States v. Ford*.[40] Without this permissive inference, there is not a scintilla of evidence that Appellant knowingly ingested a prohibited hemp product. Therefore, his conviction must be overturned.

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[38] *United States v. Graham*, 50 M.J. 56, 59 (C.A.A.F. 1999); *see United States v. Diaz*, 59 M.J. 79, 95 (C.A.A.F. 2003); *United States v. Tyndale*, 56 M.J. 209, 212 (C.A.A.F. 2001) (citing *Graham* to explain "[T]he Court has rejected the notion that evidence of a prior ingestion alone rebuts a claim that a subsequent ingestion was unknowing"); *United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000); *United States v. Roberts*, 52 M.J. 333, 335 (C.A.A.F. 2000).
[39] J.A. at 243 ¶¶ 12, 19.
[40] *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987).

Argument

I.

The military judge abused his discretion in admitting evidence of Appellant's prior urinalysis results pursuant to M.R.E. 404(b).

Standard of Review

A military judge's decision to admit evidence under M.R.E. 404(b) is reviewed for an abuse of discretion.[41]

Discussion

A. The government cannot introduce M.R.E. 404(b) evidence to rebut a defense the defense did not raise.

M.R.E. 404(b) states evidence is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[42] This evidence may not be introduced "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[43]

To be admissible under M.R.E. 404(b), *United States v. Reynolds* requires (1) a finding that the evidence reasonably supports the accused committed the acts; (2) that evidence makes a fact of consequence more probable; and (3) the probative

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[41] *United State v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000).
[42] MIL. R. EVID. 404(b)(2).
[43] MIL. R. EVID. 404(b)(1).

value must not be substantially outweighed by the danger of unfair prejudice.[44] Evidence of Appellant's prior urinalyses do not meet the second and third prongs.

The *Reynolds* Court went on to explain that such evidence is best used to rebut an appellant's defense noting:

> [I]t is wise for the court to decline to admit evidence of other acts to prove [mens rea] until the defendant has an opportunity to put on evidence. If the defendant challenges [mens rea], then on rebuttal the prosecution can offer the evidence of the other acts.[45]

This Court applied the *Reynolds* test in *United States v. Graham* and found the military judge abused his discretion by admitting evidence of a prior positive urinalysis to rebut an appellant's *possible* surprise at a second positive result for the same substance.[46] The Court noted that the appellant made no such claim at trial, did not present an innocent ingestion defense, but rather generally denied the charge.[47] The Court found, in this context, the prior urinalysis result was not logically relevant to the government's case at trial.[48]

This Court reinforced this principle in *United States v. Thompson* and *United States v. Diaz*. In *Thompson*, the government introduced evidence of prior

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[44] *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).
[45] *Id*. at 110 (finding the prior acts admissible because they were significantly similar for the court to draw a logical inference).
[46] *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999).
[47] *Id*. at 59.
[48] *Id*. at 60.

controlled substance use in the appellant's pending drug trial. This Court again found that the military judge abused his discretion when he admitted this evidence because the defense never raised lack of knowledge or innocent mistake of fact at trial.[49] In *Diaz*, this Court held "the prosecution cannot introduce uncharged misconduct to rebut a defense that was never raised or presented by the defense."[50]

In *United States v. Tyndale*, this Court drew a distinction from *Graham* and found prior urinalysis results relevant to the court-martial. In that case the appellant, for a second time, alleged a *specific* instance of innocent ingestion similar to what he asserted at the first trial.[51] The divided Court meticulously compared the circumstances of the appellant's prior use and the one at issue in the subsequent court-martial. The majority noted that the circumstances presented a "close case" that hinged on the specific factual similarities of the alleged innocent ingestion.[52] Relying on the doctrine of chances, the majority found that the prior result had "logical relevance" to the current case after finding the two innocent

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[49] *United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006).
[50] *United States v. Diaz*, 59 M.J. 79, 95 (C.A.A.F. 2003) (applying *Graham* to find "The prosecution attempted to create an act by Appellant, an accidental injury to Nicole, and then to rebut it by offering uncharged misconduct. The root of the problem with this prosecution strategy is that *there was no fact of consequence or act of Appellant for the prosecution to rebut or explain*. The prosecution was not permitted to create an act by Appellant and then to offer uncharged misconduct evidence to rebut or explain it.") (emphasis added).
[51] *United States v. Tyndale*, 56 M.J. 209, 216 (C.A.A.F. 2001).
[52] *Id*.

ingestion theories "substantially similar."[53] But the Court went on to caution that this doctrine was limited to "sufficiently similar" actions, should only be applied in rare circumstances, and that its holding in *Graham* "remains valid."[54]

B. The military judge misapplied the second *Reynolds* prong in Appellant's case.

The second *Reynolds* prong is not met. Similar to *Graham*, *Thompson*, and *Diaz*, Appellant in this case did not provide evidence of mistake. Rather, his defense consisted of a general denial of the charges, cross-examination of the government's expert regarding the elements, and testimony regarding his good miliary character.[55] And there were no factual similarities between the prior court-martial and the current case.[56] The prior urinalyses did not make a fact or consequence more or less probable; there was no fact, consequence, or act for the government to rebut or explain. Therefore, the military judge abused his discretion.

C. The military judge's M.R.E. 404(b) ruling conflicts with this Court's opinion in *Graham*, *Thompson*, and *Tyndale*.

The military judge's ruling in this case not only conflicts with *Graham* and *Thompson*, it relies on the same logic this Court has repeatedly rejected. Similar to those cases, here Appellant made a general denial of the charge and did not allege

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[53] *Id*.
[54] *Id*. at 214.
[55] J.A. at 227-34, 129, 199, 202, 206.
[56] Indeed, the military judge found that none of the circumstances in the prior urinalyses were "significantly similar" to the current case. J.A. at 99.

any specific instance when he ingested hemp. Nevertheless, the military judge found Appellant's prior urinalyses makes it "less probable that any ingestion was mistaken," a logical leap this Court rejected in *Graham*:

> We have no clue from this record, nor from our experience, what the statistical probability is for "innocent ingestion" to occur, nor can we say what the percentage might be for laboratory error, errors in the chain of custody, or other like errors. These questions are of such concern that we have repeatedly required more than a mere paper case to prove knowing and wrongful ingestion.[57]

As in *Graham*, there was no evidence regarding the "likelihood" of a military member testing positive twice in the same period due to innocent ingestion.[58] Nor does the record support any inference concerning the likelihood of an unknowing exposure in the time frame at issue. Rather, if anything, Appellant's subsequent urinalyses makes it far more likely that he simply had not correctly identified the source of his exposure. Indeed, the more logical inference is that if a person does not know how he is exposed to a substance, he will continue to be exposed (and test positive) until he has identified the source. Particularly when such substances are readily available at any convenience store. This is true no matter how "monumental" the court-martial experience may be for them.[59]

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[57] J.A. at 98-99; *Graham*, 50 M.J. at 59.
[58] *Id*.
[59] J.A. at 231 ¶ 16.

Moreover, the prior positive urinalyses in this case are even more irrelevant than the ones in *Graham* and *Thompson* because they were for hemp-based products rather than controlled substances.[60] There is simply no evidence in the record concerning the probability or improbability of unknowing exposure to hemp, from which THC-8 can be (but is not necessarily) derived.

Unlike in *Tyndale*, here Appellant did not put on evidence of a specific incident of innocent ingestion at the later court-martial.[61] Accordingly, there is no "substantially similar" factual predicate that makes the prior urinalyses logically relevant. Therefore, Appellant's case does not present the "close call" or "rare circumstance" at issue in that case.[62]

Instead, as in *Graham*, Appellant simply denied the charge and argued the government did not satisfy its burden of proving knowing ingestion.[63] And as the Court explained in *Graham*, Appellant's "good soldier" defense is distinct from an innocent ingestion defense.[64] Therefore, the prior urinalyses in this case cannot rebut claims of innocent ingestion because Appellant made no such claim at trial.

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[60] 21 U.S.C. § 802(16).
[61] J.A. at 92.
[62] *Tyndale*, 56 M.J. at 214, 216.
[63] J.A. at 93.
[64] *Graham*, 50 M.J. at 59.

Holding otherwise would run afoul of *Graham*, *Thompson*, and *Tyndale*. Accordingly, the military judge's ruling was clearly erroneous, and admitting the prior test results was an abuse of discretion.

D. The military judge misapplied the third *Reynolds* prong in Appellant's case.

The third *Reynolds* prong is not met. The government failed to produce any evidence that Appellant knowingly and voluntarily violated the ALNAV. Its case was limited to the testimony of urinalysis coordinators and observers, as well as an expert who testified as to what was found in Appellant's urinalyses, but who offered no opinion on how the substance may have gotten there.

Yet by introducing the 404(b) evidence, the government was able to impute a wrongful intent to Appellant's subsequent urinalyses by demonstrating lack of mistake, even though the defense never put this at issue.[65] Without any factual support from the record, the military judge determined that testing positive on two prior occasions and going through the court-martial process makes it less probable that any subsequent ingestion was mistaken. This unsupported logical leap provided a basis for the military judge to convict Appellant based on his character and predisposition to commit the offense rather than the evidence offered at trial.

[65] J.A. at 235-36 (government arguing in closing that the prior urinalysis prohibits Appellant from claiming "unknowing ingestion" and his prior positive urinalysis results put Appellant on notice).

The urinalyses' probative value was substantially outweighed by the danger of unfair prejudice. Therefore, the military judge abused his discretion.

Conclusion

For these reasons, this Court should set aside Appellant's convictions with prejudice.

II.

The military judge erred in relying on the "permissive inference" to convict Appellant under Article 92 of knowing use of a non-controlled, commonly available substance.

Standard of Review

This Court reviews questions of law *de novo*.[66]

Discussion

In a court-martial, the use of a *controlled substance* "may be inferred to be wrongful in the absence of evidence to the contrary."[67] In *United States v. Ford*, this Court upheld the constitutionality of this "permissive inference" for *controlled substances* based on the following assumptions:

> (i) The probability of innocent ingestion of a controlled substance by a servicemember is greatly reduced because access to the contraband is greatly reduced;

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[66] *United States v. Merritt*, 72 M.J. 483, 486 (C.A.A.F. 2013).
[67] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 50(c)(5) (2024) [hereinafter MCM] (explaining "Wrongfulness" under Article 112a) (emphasis added).

(ii) The military had a publicized campaign to eliminate drug abuse, which puts servicemembers on notice to avoid contact with these substances;

(iii) The physiological effects of the internal presence of the drug in the body might serve to alert the user to the presence of a controlled substance in his system; and

(iv) Human self-preservation dictates that a person generally knows what he consumes.[68]

In *United States v. Lyons*, this Court permitted the use of a permissive inference to infer that the appellant unlawfully carried a concealed weapon.[69] The Court held that such an inference is permissible as long as "there is a *rational connection* between the fact proved and the ultimate fact presumed."[70] But, drawing on Supreme Court precedent, the Court noted that "[t]he inference *must not be so strained as not to have a reasonable relation to the circumstances of life as we know them*."[71] The Court explained, in that case, the permissive inference was reasonably related to the appellant's "circumstances of life."[72]

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[68] *United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987) (citations omitted) (emphasis added).
[69] *United States v. Lyons*, 33 M.J. 88, 91 (C.A.A.F. 1991).
[70] *Id*. at 90 (citations omitted) (emphasis added).
[71] *Id*. (citations omitted) (emphasis added).
[72] *Id*. (reasoning "At the time of his misdeeds, appellant was a sergeant (E-4) in the Air Force, assigned to an organizational maintenance squadron. All indications in the testimony and documents at trial were that *his military duties involved and were limited to stereotypical maintenance functions*. Under these circumstances, we are satisfied that to infer that the carrying of a concealed weapon by an airman of this rank and with this duty assignment was unlawful bears a reasonable relation to the circumstances of life as we know them in the United States Air Force. Thus,

The Navy-Marine Corps Court of Criminal Appeals addressed the application of permissive inferences to specific intent crimes in *United States v. White*.[73] The court looked to the Court of Military Appeals' decision in *United States v. Johnson*, which held that use of a permissive inference to prove intent will be "lacking unless the factfinder determines not only that the prohibited results were highly foreseeable, but also that the accused, in fact, knew they were almost certain and nonetheless went ahead."[74]

A. Article 112a's "permissive inference" does not and cannot apply to the ingestion of non-controlled substances.

Use of the permissive inference is logical in the context of an Article 112a trial because the substances at issue in those cases are illegal and their use commonly involves other wrongful behavior, such as associating with other drug users or possessing a controlled substance. But it has never been expanded to an offense requiring the government to prove knowing use of a non-controlled substance. Nor should it be. This is because the same logic employed by the *Ford* Court simply does not apply to an orders violation for engaging in the otherwise legal activities outlined in ALNAV 074/20.[75]

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the unlawfulness of appellant's carrying a concealed weapon was more likely than not.").

[73] *United States v. White*, 61 M.J. 521 (N-M. Ct. Crim. App. 2005).

[74] *Id*. at 523.

[75] J.A. at 18 ¶¶ 2-3.

First, regardless of whether hemp is considered contraband in the military, it has proliferated the civilian world. Indeed, unlike controlled substances, servicemembers encounter hemp products every day at their local grocery store or gas station.

Second, while ALNAV 074/20 arguably puts Sailors and Marines on notice that hemp is contraband, products containing it may not be labeled properly. The ALNAV addresses this issue:

> The [FDA] does not determine or certify the THC concentration of commercially available hemp products, such as [CBD]. Accordingly, these products may contain appreciable levels of THC, yet *omit any reference* to THC on the product label and/or list an *inaccurate* THC concentration. Consequently, Sailors and Marines *cannot rely* on the packaging and labeling of hemp products in determining whether the product contains THC concentrations that could cause a positive urinalysis result.[76]

At trial, the government's expert confirmed that such products can be mislabeled.[77] And while she had not come across a situation where a product was *not labeled*, she stated "that doesn't mean it doesn't happen."[78] Consequently, the product may provide zero notice to servicemembers that it contains hemp.

Third, the ALNAV prohibits hemp products regardless of their ability to produce any mental or physical effects.[79] Meaning, there are products incapable of

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[76] J.A. at 18 ¶ 3 (emphasis added).
[77] J.A. at 135.
[78] J.A. at 135.
[79] J.A. at 18 ¶ 4.

producing physiologic effects that may still result in a positive urinalysis for THC-8 and a violation of the ALNAV. Indeed, as the government's expert explained, the urinalysis results provide no indication of whether the person experienced any effects.[80] Accordingly, a servicemember may not be *alerted* to the presence of the non-controlled substance in their system.

Finally, unlike with controlled substances, "self-preservation" would not necessarily steer a servicemember away from the use of a legal product available at almost any grocery store, gas station, or convenience mart in the United States that is not labelled as containing hemp or CBD.[81]

This case is distinguishable from *Lyons* because being exposed to a hemp-based product is most decidedly unlike the circumstances surrounding the possession of an illegal firearm. In other words, although going to a gas station to buy snacks may relate to Appellant's "circumstances of life," it in no way indicates criminal activity.[82] Here, there is no rational connection between the fact proved and the ultimate fact presumed. Holding otherwise would be "so strained as not to have a reasonable relation to the circumstances of life as we know them."[83]

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[80] J.A. at 125, 131.
[81] *Ford*, 23 M.J. at 337.
[82] *Lyons*, 33 M.J. at 90.
[83] *Id*. (citations omitted).

B. The military judge was not permitted to read the permissive inference into ALNAV 074/20.

Nowhere in ALNAV 074/20 are the terms "permissive inference" or "inference" used. Rather, the instruction provides that "[t]his prohibition *does not apply to use . . . without knowledge* that the product was made or derived from hemp, including CBD, where the lack of knowledge is reasonable."[84] Therefore, in cases where the government charges a positive THC-8 result as a violation of ALNAV 074/20, it has the burden of proving the servicemember knew he used a prohibited hemp product.

The military judge relied on this Court's decision in *Lyons* to expand the permissive inference to "knowing and conscious" conduct rather than "wrongful use."[85] But this was error because neither Congress nor the President has authorized use of the permissive inference for general orders violations.

Moreover, importing Article 112a's permissive inference into the ALNAV directly conflicts with this Court's decision in *United States v. Taylor*. In that case, this Court refused to import language from Article 2(d)(1), UCMJ, into the plain language of Article 2(d)(2), UCMJ.[86] This Court reasoned that, while Congress

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[84] J.A. at 19 ¶ 5(b) (emphasis added).
[85] J.A. at 243 ¶ 13.
[86] *United States v. Taylor*, No. 24-0234, 2025 CAAF LEXIS 449, at *8, __ M.J. __, at *1-2 (C.A.A.F. June 10, 2025); *see United States v. Gifford*, 75 M.J. 140, 142 (C.A.A.F. 2016) (applying traditional rules of statutory construction to the general order at issue); *see also United States v. Cochrane*, 60 M.J. 632, 634 (N-M. Ct.

could amend Article 2(d)(2), it did not.[87] Drawing on its decision in *United States v. McPherson*, this Court noted "an unintentional drafting gap is insufficient to warrant judicial correction; correction is the province of Congress in cases where an admittedly anomalous result may seem odd, but is not absurd."[88]

SECNAV could have expressly incorporated Article 112a's permissive inference into the ALNAV. In addition, during the roughly five years since the ALNAV was published the President could have issued an executive order to address whether Article 112a's permissive inference can be used for non-controlled substances. But neither the SECNAV nor President have acted. Intentional or not, this Court should not read into the ALNAV what is not there.

C. The military judge erred by conflating Article 112a's permissive inference with the Benchbook's circumstantial evidence instruction.

The military judge further erred by using the circumstantial evidence instruction to support his use of the permissive inference.[89] In his view, he could draw Article 112a's permissive inference from the circumstantial evidence

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Crim. App. 2004) (citing *United States v. Womack*, 29 M.J. 88, 91 (C.M.A. 1989)) (explaining Article 92 orders and regulations "[A]re subject to the same rules of construction as are statutes and the punitive articles of the UCMJ").

[87] *Taylor*, 2025 CAAF LEXIS 449, at *15.

[88] *Id*. (citing *McPherson*, 81 M.J. 371, 378 (C.A.A.F. 2021)).

[89] J.A. at 243 ¶ 13.

instruction.[90] But the two are not the same. The Benchbook's circumstantial evidence instruction merely explains:

> [K]knowledge, like any other fact may be proved by circumstantial evidence. In deciding this issue you *must consider all relevant facts and circumstances* including, but not limited to (here the military judge may specify significant evidentiary factors bearing upon the accused's knowledge.[91]

The instruction allows the factfinder to use circumstantial evidence to "infer the existence or nonexistence of a *fact* in issue."[92] The instruction does not state—like Article 112a's explanation does—that such inference is "legally sufficient to satisfy the government's *burden of proof* as to knowledge."[93] Instead, the instruction allows the factfinder to merely *consider* the evidence. Such consideration is far different than *concluding* the government has met its burden of proof regarding an element. Accordingly, the circumstantial evidence instruction cannot be used as a vehicle to import Article 112a's explicit provision authorizing the permissive inference into a general orders violation.

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[90] *Id*.
[91] Benchbook 7-3, Note 3, https://www.jagcnet.army.mil/EBB/ (last accessed Sept. 10, 2025) (emphasis added).
[92] Benchbook 7-3, https://www.jagcnet.army.mil/EBB/ (last accessed Sept. 10, 2025) (emphasis added).
[93] MCM, pt. IV, ¶ 50(c)(10) (2024) (explaining "Use" under Article 112a).

D. Even if this Court finds a permissive inference can be drawn, the military judge's ruling is contrary to this Court's decision in *United States v. Green*.

In *United States v. Green*, this Court provided factors a military judge may, but is not required to, apply before considering the permissive inference.[94] They include "whether the evidence reasonably discounts the likelihood of unknowing ingestion," and "that a human being at some time would have experienced the physical and psychological effects of the drug."[95]

But here the government's expert testified that she could not determine the likelihood of unknowing ingestion.[96] Nor could she offer an opinion on whether Appellant would have experienced the physical and psychological effects of THC-8.[97] In addition, the ALNAV explicitly states its prohibitions do not apply to use without knowledge.[98] In short, the evidence did not provide a basis for the military judge to consider the permissive inference.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court set aside his conviction.

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[94] *Green*, 55 M.J. at 80 (C.A.A.F. 2001).
[95] *Id*.
[96] J.A. at 129.
[97] J.A. at 130.
[98] J.A. at 19 ¶5(b).

Respectfully submitted.

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This brief complies with the type-volume limitations of Rule 24(c) because it contains fewer than 14,000 words. This brief also complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font with one-inch margins on all four sides.

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I certify that I delivered the foregoing to this Court and opposing counsel on September 18, 2025.

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