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	REPLY 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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Military Rules of Evidence

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.[1]

Discussion

A. Appellant's prior urinalyses are not relevant.

Before admitting evidence under M.R.E. 404(b) "the government must state exactly what issue it is trying to prove in order to see whether the evidence is probative . . . and whether it should be admitted in light of the other evidence in the case, and the ever present danger of unfair prejudice."[2]

Here, the Government provided notice of its intent to use Appellant's prior positive urinalysis results for THC-8 and his testimony from his prior court-martial—of which he was acquitted—to prove "knowledge, absence of mistake,

[1] *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000).
[2] *United States v. Graham*, 50 M.J. 56, 60 (C.A.A.F. 1999).

and lack of accident" under M.R.E. 404(b).[3] However, Appellant did not raise an innocent ingestion defense (i.e. lack of knowledge, mistake, or accident) so there was no permissible use for his prior testimony and test results.

Like *United States v. Graham*, Appellant generally denied his charges.[4] He did not testify and made no claim regarding the THC-8 source found in his urine. Unlike his first court-martial, he did not raise an innocent ingestion defense. An innocent ingestion defense arises when an accused suggests a potential source of his positive test.[5]

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[3] J.A. at 050 ("The Accused testified under oath that 'you only remember things in your life that mean something' and 'I remember those days (i.e., the days he learned of testing positive on a urinalysis) because they were monumental days to me [] because my career was almost going to get flushed down the drain.'").

[4] J.A. at 228 (Defense Counsel arguing the Government "has not provided . . . any evidence that Appellant knowingly consumed THC-8"); *see Graham*, 50 M.J. at 59 ("In essence, his defense was a general denial of the charge. Here, appellant did not allege any specific instance when marijuana was placed in food or drink that he subsequently ingested.").

[5] *See United States v. Roan*, No. 24-0104, 2025 CAAF LEXIS 760, at *14-15, __ M.J. __ (C.A.A.F. Sept. 15, 2025) ("Appellant is not required to show a link to himself and the protein powder. He need only point to [the protein powder] as a potential source to make a valid innocent ingestion claim, and, as such, provide a basis for the members to question whether to draw the inference that Appellant's drug use was wrongful."); *United States v. Brewer*, 61 M.J. 425, 429 (C.A.A.F. 2005) ("The very nature of an innocent ingestion defense means that [the defendant] could not prove the time or place of his innocent ingestion but could only suggest possible explanations."); *United States v. Ford*, 23 M.J. 331, 336 (C.M.A. 1987) ("Our case law has established that testimony by an accused that he did not knowingly use drugs and cannot honestly account for its presence in his body is sufficient to raise an issue of innocent ingestion.").

Appellant did not suggest a potential source or product he may have ingested nor allege "a specific instance" similar to what he asserted at the first court-martial.[6] Therefore, Appellant's prior test results and testimony are neither relevant nor probative of any issue before the court. This Court must "hold the Government to the highest standards of proof required by law."[7] The Government did not assert what caused Appellant's positive test result or that he had any knowledge of what caused it. Therefore, Appellant had no basis to raise a lack of knowledge, mistake, or accident. And no evidence—let alone M.R.E. 404(b) evidence—can rebut a defense not raised.[8] Therefore, Appellant's prior positive urinalysis could not rebut any fact or consequence at his court-martial.[9]

Accordingly, Appellant's prior urinalysis results were not logically relevant to the Government's case at trial. "Prior-use evidence is classic 'bad character' evidence."[10] Just because Appellant previously tested positive for THC-8 does not mean he later knowingly used THC-8. This is exactly what the rule on improper character evidence protects against.[11] Put another way, the Military Judge used the

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[6] *See United States v. Tyndale*, 56 M.J. 206, 216 (C.A.A.F. 2001).
[7] *Graham*, 50 M.J. at 60.
[8] J.A. at 229 (Defense Counsel arguing the Government did not investigate or execute a military search authorization to search Appellant for THC-8 or CBD products).
[9] *See Graham* at 59-60 (finding "[t]here is no fact of consequence that a positive result on a previous urinalysis, if resurrected at this trial, could rebut").
[10] *Id*. at 60.
[11] *See* MIL. R. EVID. 404(a).

M.R.E. 404b evidence to conclude that Appellant has a character for using drugs, and any positive test must be the result of knowing use, because he had tested positive before. But the Government did not prove knowing use at Appellant's previous court-martial—he was acquitted. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary."[12] Here, the Military Judge's error provides clear evidence to the contrary that he knew and followed the law. Thus, this Court should not apply this presumption because the Military Judge admitted propensity evidence. Therefore, the Military Judge's ruling was clearly erroneous, and admitting the prior test results was an abuse of discretion.

B. The Military Judge's ruling, admitting the improper M.R.E. 404b evidence, prejudiced Appellant.

This error materially prejudiced Appellant's substantial rights. This Court evaluates prejudice using the following four factors: (1) the strength of the government's case; (2) the strength of the appellant's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence.[13]

Here, the strength of the Government's case was weak. The only evidence the Government had was the positive urinalysis results. The Government did not investigate or provide evidence of knowing use. Appellant's case was strong. He

[12] *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007).
[13] *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

presented three good military character witnesses.[14] This posture highlights the materiality of the M.R.E. 404b evidence to Appellant's prejudice. Indeed, it doubled the amount of times Appellant tested positive for THC-8. Also, the Military Judge found the evidence relevant and specifically mentioned it in his special findings.[15] He found the evidence's probative value "included the absence of mistake of accidental or unknowing ingestion" which directly contradicted Appellant's good military character evidence.[16] Finally, the quality of the evidence was high because it consisted of two additional—undisputed—positive urinalyses for the same substance. Therefore, the Military Judge's ruling prejudiced Appellant.

Conclusion

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

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[14] J.A. at 195-206.
[15] J.A. at 242-43, ¶ 16.
[16] *Id*.; J.A. at 354-55 (defense counsel closing argument stating Appellant's good military character); *see Kerr*, 51 M.J. at 406 (finding the materiality prong met because the evidence "directly contradicted [the appellant's] evidence of good military character and attacked the major thrust of his defense.").

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*.[17]

Discussion

A permissive inference—on its own—does not and cannot sustain a conviction under Article 92. "Common-law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience."[18] The Supreme Court in *Barnes v. United States* found no due process violation and upheld a permissive inference because the underlying evidence satisfied the beyond a reasonable doubt standard.[19] The evidence in *Barnes* established that the appellant "possessed recently stolen checks payable to persons he did not know, and provided no plausible explanation for such possession consistent with innocence."[20] The Court reasoned:

> On the basis of this evidence alone common sense and experience tell us that [the appellant] must have known or been aware of the high probability that the checks were stolen. Such evidence was clearly

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[17] *United States v. Merritt*, 72 M.J. 483, 486 (C.A.A.F. 2013).
[18] *Barnes v. United States*, 412 U.S. 837, 844-45 (1973).
[19] *Id.* at 846.
[20] *Id.* at 845.

> sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen.[21]

Here the evidence consists of positive urinalyses indicating THC-8 *presence* with no plausible explanation of how it entered Appellant's body, whether he experienced any effects, or that Appellant knew what he consumed. Accordingly, the positive urinalyses alone cannot satisfy the government's burden to prove Appellant *knowingly* introduced THC-8 into his body. Therefore, use of the permissive inference here violated Appellant's due process rights.

The Government's reliance on *United States v. Pasha* is misplaced because the issue there concerned a "long sanctioned" instruction concerning the permissive inference as applied to a larceny charge.[22] This Court has not determined whether a permissive inference applies to a non-controlled substance. The *Pasha* Court found the facts of that case supported the inference because the evidence "established that the accused [was] in conscious, exclusive, and unexplained possession of recently stolen property."[23]

Here, Appellant's positive urinalysis results established only that THC-8 was present in his urine. The results provided no basis to infer conscious or

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[21] *Id.* at 845-46.
[22] *See* Appellee's Answer at 45-46; *United States v. Pasha*, 24 M.J. 87, 90 (C.M.A. 1987).
[23] *Id*.

knowing use.[24] Thus, there was not a sufficient evidentiary basis for the Military Judge to consider the permissive inference.

Moreover, Article 112a's permissive inference is stronger than the circumstantial evidence instruction—its use is "legally sufficient to satisfy the Government's burden of proof as to knowledge."[25] That is because the substances at issue under that article are illegal and merely possessing them constitutes unlawful behavior. But the Government still has the burden to prove each element beyond a reasonable doubt. Article 112a's permissive inference should not be used to fill a gap in the Government's case for a non-controlled substance—that is readily available and does not present physiological effects to alert a servicemember.[26] Accordingly, the evidence in this case did not provide a basis for the Military Judge to consider Article 112a's permissive inference. Therefore, the Military Judge abused his discretion.

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[24] J.A. at 125, 129 (Government's expert testifying that the results do not explain how the exposure occurred and cannot reveal intent).
[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 50(c)(10) (2024) (explaining "Use" under Article 112a).
[26] J.A. at 121, 125 (Government's expert stating THC-8 products are commercially available and can be found in vapes, gummies, and drinks; and the results do not provide information on whether Appellant would have felt any effects of THC-8); *see also United States v. Ford*, 23 M.J. 331, 337 (C.M.A. 1987) (upholding the permissive inference as applied to Article 112a in part because "access to the contraband is greatly reduced" and "[t]he physiological effects from 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").

Conclusion

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

Respectfully submitted.

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This brief complies with the type-volume limitations of Rule 24(c) because it contains 2,493 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 November 19, 2025.

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