IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Mary.c.finnen.mil@us.navy.mil
Bar no. 37314

K. MATTHEW PARKER
Lieutenant, JAGC, U.S Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8387, fax (202) 685-7687
kevin.m.parker36.mil@us.navy.mil
Bar no. 38087

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

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ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING THE 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 Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A) (2022). This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

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. 10 U.S.C. § 892 (2018). The Military Judge sentenced Appellant to reduction to pay grade E-5 and a reprimand. The

Convening Authority took no action on the sentence. The Military Judge entered the judgment into the Record. The lower court affirmed the findings and sentence.

Statement of Facts

A. The United States charged Appellant with violating a general order in violation of Article 92 of the Uniform Code of Military Justice.

The United States charged Appellant with two Specifications of violation of a general order and two Specifications of wrongful drug use. (J.A. 117.) The wrongful use Charge was withdrawn and dismissed. (J.A. 117.)

The Specifications for violation of a general order alleged Appellant—on or about October 19, 2022, and on or about December 13, 2022—failed to obey paragraph 5, ALNAV 074/20, by wrongfully using Tetrahydrocannabinol-8. (J.A. 117.)

B. By the time of Appellant's charged offenses, ALNAV 074/20 had been in effect for two years; in addition to prohibiting the use—introduction into the human body—of any product made or derived from hemp, the Order warned that these products are commercially available and may not be accurately labeled with a THC concentration.

ALNAV 074/20, dated July 24, 2020, expressly responded to the Agriculture Improvement Act of 2018, which "remov[ed] industrial hemp from the Controlled Substances Act[, 21 U.S.C. § 802(16)] and exclud[ed] from the definition of marijuana those hemp products containing up to .3 percent [THC] on a dry weight basis." ALNAV 074/20, para. 2. It acknowledged, "new hemp products are commercially available in the United States, the normal use of which could cause a

positive urinalysis result." ALNAV 074/20, para. 3.

Thus, ALNAV 074/20 prohibits sailors and Marines "from using any product made or derived from hemp . . . regardless of the product's THC concentration, claimed or actual, and regardless of whether such product may lawfully be bought, sold, and used under the law applicable to civilians." ALNAV 074/20, para. 5.a. Exceptions to this prohibition include any use "without knowledge that the product was made or derived from hemp, including CBD, where that lack of knowledge is reasonable." ALNAV 074/20, para. 5b. Hemp is defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 [THC] concentration of not more than .3 percent on a dry weight basis." 7 U.S.C. § 1639o.

C. Appellant moved to exclude evidence of his three September and November 2021 urinalyses, each of which tested positive for THC-8.

Appellant argued that the United States failed to identify a non-propensity purpose in its Mil. R. Evid. 404(b) Notice. (J.A. 021.) Appellant also claimed the Notice was deficient for failing to articulate the relevance of the positive urinalyses. (J.A. 021.) Appellant included in his Motion the United States' 404(b) Notice. (J.A. 23.)

D. The United States responded that it wanted to introduce the evidence if Appellant claimed he innocently ingested the THC-8.

In its Response, the United States argued that the evidence was admissible because through the process, Appellant "was placed on notice of his ingestion of THC-8, the ramifications for doing so, and the need for him to take greater care in terms of the sorts of substances he ingested." (J.A. 30.) The United States articulated that the Appellant was likely to assert an innocent ingestion defense, and the 2021 urinalyses would be used to contest it as Appellant had been "through the court-martial process" and was thereby "placed on notice that he needed to refrain from using illicit substances." (J.A. 31.) The evidence would be used to demonstrate Appellant's intent, absence of mistake, and lack of accident. (J.A. 31.) The United States also argued that the *Reynolds* factors supported the evidence's admission. (J.A. 30–32.)

During a Motions hearing, the United States argued that Appellant had testified in the previous court-martial that his wife had been giving him vitamin gummies that contained THC-8. (J.A. 36.) The United States pointed out that Appellant should have stopped taking the gummies, but instead, "just a week after that court-martial, he again tests positive for THC-8, the same substances that he was charged for in the first place." (J.A. 36.) The United States argued that it should be allowed to introduce the evidence if Appellant again claimed he innocently ingested the THC-8. (J.A. 37, 48.)

E. The Military Judge granted Appellant's Motion to exclude the Mil. R. Evid. 404(b) evidence but would reconsider his Ruling if Appellant presented an innocent ingestion defense.

The Military Judge granted Appellant's Motion to exclude the Mil. R. Evid. 404(b) evidence because the United States failed to provide proper notice. (J.A. 48.) He warned, however, that he would reconsider his Ruling if the United States provided proper notice and the Appellant raised a defense of innocent ingestion or accident. (J.A. 48.)

F. The United States provided an Amended 404(b) Notice.

The United States provided "Amended Notice" that it intended to offer "evidence concerning" Appellant's three 2021 failed urinalyses. (J.A. 50.) The purpose was to prove "knowledge, absence of mistake, and lack of accident." (J.A. 50.) The Notice also included that the Accused—in his previous court martial—testified under oath that his civilian defense counsel told him about the THC-8 (from the 2021 urinalyses). (J.A. 50.) The Notice quoted his testimony: "[Y]ou only remember things in your life that mean something . . . I remember those days (i.e., the days he learned of testing positive on a urinalysis) because they were monumental days to me be [sic] because my career was almost going to get flushed down the drain." (J.A. 50.)

G. Appellant, in his Opening, asserted that the United States had "absolutely no evidence today of knowledge."

Appellant, in his Opening, said that Appellant was not guilty because "the government's evidence will not prove that [Appellant] knew the product he may have used was made or derived from hemp, nor can they prove whatever substance caused the urinalysis result was made or derived from hemp." (J.A. 52.) He stated that the metabolite levels in the urinalyses samples were low and that the United States failed to corroborate the test results, so there was no evidence to show what substance caused the positive results, "and absolutely no evidence to cover knowledge or intent." (J.A. 53.)

Appellant previewed the good military character evidence he planned to present. (J.A. 143.) He also explained that the ALNAV's definition of hemp was important and that the United States would not be able to show the THC-8 metabolite is derived only from hemp; rather, "it can be extracted from non-hemp materials." (J.A. 55.) He reiterated that "there will be absolutely no evidence today of knowledge." (J.A. 56.) Further, he summarized that "the ALNAV itself has reasonable doubt baked into it" because it states that products "may contain appreciable levels of THC, yet omit any reference to the THC on the product label and list them inaccurately." (J.A. 56.) Appellant also claimed that his forensic chemistry expert would testify that the results of the urinalysis "are consistent with unknowing ingestion." (J.A. 57.)

H. Following Appellant's Opening, the United States moved for reconsideration of the 404(b) Ruling because Appellant's Opening forecast an intent to put on an unknowing ingestion defense.

After Appellant's Opening, the United States moved the Judge to reconsider the exclusion of Mil. R. Evid. 404(b) evidence. (J.A. 58.) The United States argued the Opening was a "forecast of [Appellant's] intent . . .[to present] an unknowing ingestion defense." (J.A. 58.)

Appellant responded that "as far as how it got into his system, he doesn't know and we don't know," but that, in its Ruling, "the Court used a very specific phrase, the one contained in the M.C.M on . . . innocent ingestion." (J.A. 60–61.) Appellant distinguished "[n]ow, if the Court ruled you can't argue ignorant ingestion or unknowing ingestion, then that would open the door to these prior acts or prior allegations." (J.A. 60.)

The United States provided details on how they would present the evidence of the prior urinalyses and Appellant's testimony from the first court-martial. (J.A. 62.) The United States articulated that the non-propensity purpose would be to show Appellant "was on notice, that he knew he was taking these substances, and that he continued to take them clearly because we're here today now trying two additional . . . urinalyses tests that are positive for THC-8." (J.A. 63.) The United States argued the evidence also went to lack of mistake because "this was not a

circumstance where the [Appellant] is mistakenly consuming these things." (J.A. 65.)

Appellant countered that this was a propensity argument. (J.A. 64.) The United States assured the Judge that they would not use the evidence for propensity but acknowledged Appellant's argument that five positive urinalyses presented a harder case for Appellant to defend against than two positive urinalyses. (J.A. 64.)

The Military Judge directed the United States to proceed with its case and said he would issue a ruling on the 404(b) evidence "as we near the end of [the] case." (J.A. 66.)

I. The United States presented evidence of the 2022 urinalyses underlying Appellant's Charge.

The United States presented the testimony of Gunnery Sergeant Bravo, the substance abuse control officer, who conducted urinalyses on October 19, 2022 and December 23, 2022. (J.A. 66–70.) The United States also presented the testimony of the urinalysis program coordinators, Corporal Kilo and Sergeant Hilo. (J.A. 71–73, 77–79.) Finally, it called the urinalyses observers—Mr. Bingo, (J.A. 74–77), and Corporal Alpha. (79–81.) Appellant did not cross-examine five of these six Witnesses, but conducted a brief cross examination of Corporal Alpha, an observer, as to whether Appellant displayed "odd behavior" during the December 2022 urinalysis. (J.A. 101.)

After Sergeant Hilo testified, the Military Judge advised the United States that the 404(b) evidence would "most likely be appropriate, if at all, during a rebuttal case." (J.A. 78.)

J. The United States presented the testimony of the senior chemist at the Navy Drug Screening Lab as an expert in the field of "forensic urinalysis for drugs of abuse."

The United States presented the testimony of the senior chemist at the Navy Drug Screening Laboratory who was qualified as an expert in the field of "forensic urinalysis for drugs of abuse." (J.A. 101–04.) She testified about the testing process for samples and Appellant's samples. (J.A. 105–18.)

She also testified about THC-8. Although THC-8 can naturally be found in the cannabis sativa plant at low levels, THC-9 exists at a much higher concentration in the plant. (J.A. 119.) THC-9 is what is colloquially referred to as marijuana. (J.A. 120.) THC-8 is "typically known as a synthetically derived compound" that has a different molecular structure than THC-9. (J.A. 120). THC-8 can be derived from hemp products and can "typically be detected in the urine [three] to [five] days following one exposure," although it can be detected up to thirty days in chronic users. (J.A. 121.)

The testing cutoff level for THC-8 is fifteen nanograms per milliliter. (J.A. 123.) Appellant's 2022 urinalyses samples had 84 nanograms and 68 nanograms. (J.A. 126.) The expert opined that based on the tests, Appellant was exposed to

THC-8 prior to providing each sample—but a single exposure would not have caused both positives. (J.A. 127.)

The United States also elicited that testing could not reveal whether Appellant's level was increasing or decreasing, how much he ingested, how the exposure occurred, or whether Appellant would have felt any effects from the THC-8. (J.A. 125.)

K. Appellant cross-examined the United States' Expert and elicited that the litigation reports could "not rule out unknowing ingestion."

Appellant cross-examined the Expert. (J.A. 128–35.) Appellant first asked whether the litigation reports revealed the "means of ingestion for the THC-8 that's present in the samples" or the mechanism by which it entered the body. (J.A. 129.) Appellant next asked: "So you can't rule out an unknowing ingestion?" (J.A. 129.) The Expert replied that tests "cannot tell intent." (J.A. 129.) Appellant also asked whether the litigation reports from the tests would reveal whether the use of THC-8 was intentional or where it was ingested. (J.A. 130–31.) The Expert indicated they would not. (J.A. 130–31.)

On cross-examination, the Expert also testified that a positive result for THC-8, from the test alone, would not reveal whether the source of the compound was hemp. (J.A. 132, 141.) She explained that the products were not regulated by the Food and Drug Administration and could be mislabeled. (J.A. 133–34.)

On redirect, the Expert clarified that the products she has seen that were "mislabeled" were labeled as hemp or as containing CBD, but they contained THC-9 and THC-8, which were not listed. (J.A. 136.) Typically, in her experience, when she saw products at grocery stores and gas stations, they have the word "hemp" or a reference to "delta8," "delta9" or "CBD." (J.A. 136.) She agreed with the characterization of the packaging as "pretty open and obvious." (J.A. 137.)

In surrebuttal, the Expert testified that although CBD can be synthetically produced, she did not know to what extent it was commercially available and, to her knowledge, it was only "small-scale commercial production." (J.A. 153.) Although THC-8 *can* be extracted from marijuana, that would also trigger a THC-9 positive urinalysis unless the solution was "chemically cleaned up," because the two compounds are extracted together and THC-9 is consistently present in marijuana at a higher concentration than THC-8. (J.A. 154–55, 165.) It is "very difficult to isolate THC-8 from marijuana" in a "commercial fashion." (J.A. 155.) It would not be any easier for a hobbyist scientist to isolate it, and that would not be "economical financially." (J.A. 155.) There was no THC-9 in Appellant's samples. (J.A. 157, 166.)

L. After Appellant's case, the United States moved the Military Judge to reconsider his Ruling on the Mil .R. Evid. 404(b) evidence based on Appellant's cross-examination of the Expert. The Military Judge admitted the evidence.

Appellant did not testify. (J.A. 83.) He presented three Witnesses to testify to his good military character. (J.A. 195–206.)

The United States moved to admit the positive results of Appellant's September and November 2021 urinalyses and Appellant's testimony from his last court-martial about his ingestion of gummies leading to the THC-8 in his urine. (J.A. 83–84, 87.) The United States argued Appellant "opened the door" by questioning the United States' Expert on knowing ingestion. (J.A. 84.)

Appellant responded that the scope of the evidence the United States sought to introduce was greater than he was notified of and the probative value of the evidence was diminished because Appellant was acquitted at the previous court-martial. And, he argued, the evidence only showed propensity. (J.A. 97–98.)

The Military Judge discussed the applicable law and applied it to the evidence in this case, citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). (J.A. 98–100.) First, he found that the United States intended to call the Substance Abuse Control Officer and their expert to testify about the prior urinalyses and results, which reasonably supported a finding that Appellant committed the prior act. (J.A. 98–99.) Second, the Military Judge found that the evidence of the prior urinalysis "does make the possibility of mistake less

probable" because "[t]esting positive on two prior occasions and going through the court-martial process, that makes it less probable that any ingestion was mistaken." (J.A. 99.)

Third, the Military Judge found that Appellant presented a theory of "unknowing or mistaken ingestion . . . on the cross-examination of the government's witness." (J.A. 99.) The Military Judge also found that, "because the accused was acquitted, the probative value of that evidence is greatly diminished." (J.A. 99.) He concluded that "the danger of unfair prejudice is substantially outweighed by the probative value, albeit a diminished probative value." (J.A. 99.) The Military Judge permitted the United States to present the evidence of the prior urinalyses and the limited portion of Appellant's trial testimony that the Government had quoted in its notice. (J.A. 99–100, 164.)

The United States presented the evidence of Appellant's two 2021 urinalyses and a brief portion of his testimony from the previous court-martial. (J.A. 16, 144–49. The United States called the Substance Abuse Control Officer for the September and November 2021 urinalysis to lay the foundation and chain of custody for Appellant's samples. (J.A. 170–72.) Then it recalled the United States' Expert to explain the results of the 2021 tests. (J.A. 144–49.) Finally, it presented a portion of Appellant's testimony from the prior court-martial. (J.A. 22, 50, 100, 164, 167.)

After the United States' Expert testified for the second time, Appellant presented his Expert Witness in chemistry and urinalysis certification. (J.A. 176.) Appellant's Expert testified that based on the 2022 test results, Appellant "absolutely" could have tested positive based on "some unknowing or incidental exposure." (J.A. 182.) The Expert opined that the levels "could be consistent with an unknowing ingestion." (J.A. 182.) He also testified that he thought THC-8 could come from the marijuana plant "without the presence of THC-9." (J.A. 194.)

After Appellant's Expert testified, the United States again called their Expert. (J.A. 165.) She testified that when THC-8 is from the cannabis sativa plant, THC-9 would also be present. (J.A. 165.)

M. Appellant moved under R.C.M. 917 for a finding of not guilty based on a lack of any evidence of knowing ingestion; the United States responded that the permissive inference applied. The Military Judge denied the R.C.M. 917 Motion and allowed the United States to use the permissive inference during closing.

Appellant moved for a finding of not guilty "based on the government's failure to provide any evidence of knowing ingestion." (J.A. 207.)

The United States argued that that it had "established the necessary foundation and evidence in order for the Court to be empowered with [the] permissive inference." (J.A. 207.) It also submitted a Bench Brief. (J.A. 213–15.)

Appellant, in turn, argued that unlike the explanation in Article 112a, the Manual for Courts-Martial did not allow for the use of the permissive inference for

an Article 92 violation or in the ALNAV prohibiting the ingestion of hemp products. (J.A. 208.) He drew a distinction between Article 92 violations and Article 112a violations because "to get these scheduled substances, [you] would have to engage in some sort of underlying criminality." (J.A. 209.)

The Military Judge denied Appellant's Motion because with the "government's introduction of two positive urinalyses for THC-8, there is some evidence that . . . the accused violated the ALNAV." (J.A. 212.)

The United States later requested to use the permissive inference in closing argument. (J.A. 216.) Appellant again argued that, "it's clearly articulated under Article 112a and noticeably absent in Article 92 and we would not grant permissive inference for any other violation of a lawful general order." (J.A. 217.)

The Military Judge reasoned that: (1) the circumstantial evidence instruction allowed inferences from circumstantial evidence "when knowledge is a matter in question;" (2) caselaw allowed application of the permissive inference for other violations of the UCMJ; (3) and there was nothing prohibiting its use. (J.A. 217.) He ruled "whether or not I draw the permissive inference is a matter that I have not deliberated on yet, but I will allow counsel to argue." (J.A. 217.)

N. The Military Judge convicted Appellant and made special findings.

The Military Judge found Appellant guilty of both Specifications of violating a lawful general order. (J.A. 240.) The Military Judge sentenced Appellant to reduction to the rank of E-5 and to be reprimanded. (J.A. 245.)

After returning his verdict, the Military Judge made special findings. (J.A. 241–43.) The Military Judge found that the proper urinalysis procedures were followed when Appellant gave his urine samples on October 19, 2022, and December 13, 2022. (J.A. 241.) The Military Judge also found that both of Appellant's urine samples tested positive for THC-8 and "that THC-8 is a product that is made or derived from hemp." (J.A. 242.)

The Military Judge summarized the Expert's testimony that THC-8 comes from CBD, and come from both marijuana and hemp; but if it came from marijuana, "it would most likely manifest in a urinalysis along with THC-9, since the ratio of THC-9 is so much greater in marijuana than THC-8." (J.A. 242.) He cited the "costly and difficult process" isolating THC-8 from marijuana and found the possibility that the THC-8 in Appellant's urine sample came from something other than hemp "speculative and fanciful." (J.A. 242.) The Military Judge was convinced beyond a reasonable doubt that the THC-8 in Appellant's urine came from a product made or derived from hemp. (J.A. 242.)

The Military Judge explained that the fact-finder may "infer from the presence of a controlled substance in an accused's urine that the accused's use was wrongful, that is both knowing and conscious." (J.A. 242.) Citing *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001), the Judge determined the permissive inference may apply to urinalysis cases "properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the required interpretation." (J.A. 243.) He highlighted that such an inference may be drawn even if contrary evidence is admitted. (J.A. 243 (citing *United States v. Bond,* 46 M.J. 86, 89 (C.A.A.F. 1997)). He also summarized that use of the permissive inference is "not limited to 112a cases." (J.A. 243.)

The Military Judge summarized the evidence from both Parties and that "[t]here was no evidence . . . that anyone had ever seen the [Appellant] possess or use a product made or derived from hemp." (J.A. 243.) The Military Judge also used the Mil. R. Evid. 404(b) evidence to find an absence of mistake and "that the [Appellant] . . . was on notice to avoid the mistake of accidental or unknowing ingestion" (J.A. 243.) The Military Judge found Appellant's use was knowing and conscious and, ultimately, wrongful. (J.A. 243.)

Summary of Argument

When the United States charged Appellant with violating ALNAV 074/20 for two positive urinalyses in 2022—out of five total positive urinalyses in slightly

more than a year—it had to prove Appellant's use was knowing. After notification and litigation about the admissibility of the evidence under Mil. R. Evid. 404(b), the Military Judge told Appellant that the earlier positive urinalyses would be admitted in rebuttal if Appellant presented an innocent ingestion defense.

In opening and via cross-examination of the United States' Expert Witness, Appellant presented a theory that THC-8 was readily available and in products that were not correctly labeled with the amount of THC-8 they contained. The Military Judge did not abuse his discretion when he then allowed admission of two of the prior urinalyses and Appellant's testimony in a previous court-martial about the "monumental" effect of those positive tests to rebut the innocent ingestion and mistake theory Appellant presented.

Permissive inference instructions affect the "beyond a reasonable doubt standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *County Court v. Allen*, 442 U.S. 140, 157 (1979). Courts consider all the evidence to determine whether a permissive inference may be used. The Military Judge was correct to consider the inference here, where scientific evidence and expert testimony showed the Appellant tested positive for THC-8 multiple times, there was no evidence that these products were not labeled as hemp or THC, and Appellant had previously testified at an earlier court-martial that prior positive urinalyses for the same

substance had a "monumental" impact on him because his career "was almost going to get flushed down the drain."

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING EVIDENCE UNDER MIL. R. EVID. 404(B) OF PRIOR POSITIVE URINALYSIS RESULTS FOR WHICH APPELLANT HAD BEEN PREVIOUSLY ACQUITTED AT COURT-MARTIAL. EVEN ASSUMING ERROR, APPELLANT SUFFERED NO PREJUDICE.

A. The standard of review is abuse of discretion.

This Court reviews a military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. Harrow*, 65 M.J. 190, 201–02 (C.A.A.F. 2007). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation and internal quotation marks omitted). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citations and quotations omitted).

B. The United States had to prove knowing use.

Article 92, UCMJ, makes it a crime for any member of the military to

"violate[] or fail[] to obey any lawful general order or regulation." 10 U.S.C. § 892. The elements of violating or failing to obey a lawful general order or regulation are:

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

Manual for Courts-Martial (MCM), United States (2019 Ed.), part IV, para. 18.b.(1); *see United States v. Davis*, 47 M.J. 484, 485–86 (C.A.A.F. 1998) (courts defer to President's "narrowing construction" of offense that limits "conduct subject to prosecution" when it (1) is "favorable to the accused" and (2) "not inconsistent" with Congress 'statutory language).

Charge I, Specification 1 in this case reads:

> In that Gunnery Sergeant James H. Bass, U.S. Marine Corps, on active duty, did, at an unknown location, on or about 19 October 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 5, ALNAV 074/20, dated 24 July 2020, by wrongfully using Tetrahydrocannabinol-8.

Charge I, Specification 2 in this case reads:

> In that Gunnery Sergeant James H. Bass, U.S. Marine Corps, on active duty, did, at an unknown location, on or about 13 December 2022, violate a lawful general order, which was his duty to obey, to wit: paragraph 5, ALNAV 074/20, dated 24 July 2020, by wrongfully using Tetrahydrocannabinol-8.

(Charge Sheet, Jan. 17, 2023.)

C. Evidence of crimes, wrongs, or other acts may be admitted to show intent and absence of mistake.

Mil. R. Evid. 404(b)(1) provides that "[e]vidence of a crime, wrong, or other 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." However, Mil. R. Evid. 404(b)(2) provides that evidence or other crimes or acts "may be admissible for another purpose, such as proving . . . absence of mistake, or lack of accident."

Mil. R. Evid. 404(b) "is a rule of inclusion" that "permits admission of relevant evidence of other crimes or acts unless the evidence tends to prove only criminal disposition." *United States v. Browning*, 54 M.J. 1, 6 (C.A.A.F. 2000) (internal citations and quotations omitted).

D. The Military judge correctly applied the *Reynolds* factors. He did not abuse his discretion.

Evidence offered under Mil. R. Evid. 404(b) must satisfy a three factor test: (1) it must reasonably support a finding that the appellant committed prior crimes, wrongs, or acts; (2) it must make a fact of consequence more or less probable; and (3) its probative value must not be substantially outweighed by the danger of unfair prejudice. *Reynolds*, 29 M.J. at 109.

1. Appellant does not contest that the Military Judge properly applied the first *Reynolds* factor. It was not clearly erroneous to conclude Appellant previously provided two urine samples that contained THC-8, even though he had been acquitted of the specifications stemming from those urinalyses at an earlier court-martial.

The Military Judge did not abuse his discretion when he found that Appellant previously provided two urine samples that contained THC-8. Similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Huddleston v. United States,* 485 U.S. 681, 689 (1988). "[T]he standard for meeting the [first *Reynolds*] factor is quite low." *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993). The United States need only show that the factfinder "could reasonably find the conditional fact . . . by a preponderance of the evidence." *United States v. Acton*, 38 M.J. 330, 333 (C.A.A.F. 1993) (quoting *Huddleston,* 485 U.S. at 690).

Because the standard of proof under Mil. R. Evid. 404(b), like its civilian Federal counterpart, "is significantly less stringent than the beyond a reasonable doubt standard required in criminal prosecutions," evidence of another crime is admissible under 404(b) even when an appellant was acquitted of that crime. *See Dowling v. United States,* 493 U.S. 342, 348–49 (1990); *United States v. Tyndale,* 56 M.J. 209, 213 (C.A.A.F. 2001); *United States v. Hazelett*, 32 F. 3d 1313, 1319–20 (8th Cir. 1994).

This court has long held that an acquittal on prior bad acts does not render them inadmissible. *See United States v. Hicks*, 24 M.J. 3, 9 (C.M.A. 1987); *United States v. Miller*, 46 M.J. 63, 66 (C.A.A.F. 1997). The *Hicks* court found evidence of sexual offenses and extortion of which appellant was acquitted at two earlier court-martials was admissible at appellant's third court-martial, at which he was charged with rape and extortion. *Id.* This Court first noted, as the Supreme Court reasoned later in *Dowling,* that 404b applies a lower standard than the beyond a reasonable standard required for a conviction. 24 M.J. at 9. It further reasoned that even non-criminal acts may be admissible under Mil. R. Evid. 404b, and that the "relevance of the act, not its criminality, is important." *Id.*

Here, the United States presented evidence of Appellant's prior urinalysis through the testimony of the Substance Abuse Control Officer who oversaw the procedures when Appellant provided the samples and the lab expert who explained the lab procedures and results—including that the 2021 tests revealed the metabolite for THC-8. (J.A. 144–49, 168–72.) The United States also entered into evidence the collection and testing documentation for both urinalyses and the Judge found that this evidence "reasonably support[ed] a finding that Appellant committed the prior act." (J.A. 98.) Finally, the United States entered Appellant's testimony from the previous court-martial—testimony in which he claimed the days he received positive test results "were monumental days" to him because his

"career was almost going to get flushed down the drain." (J.A. 50.) That testimony, which Appellant does not claim was admitted in error, would have made little sense without reference to the positive results. (J.A. 50; Appellant Br. at 11, Sept. 18, 2025); *see Tyndale*, 56 M.J at 213.

The Military Judge did not abuse his discretion when he found that this prong was satisfied. Appellant does not argue otherwise. (*See* Appellant Br. at 11.) That Appellant was ultimately acquitted of wrongful use under Article 92 in a prior court-martial does not render the evidence inadmissible under M.R.E. 404(b). *Hicks*, 24 M.J. at 9; *Miller*, 46 M.J. at 66; *see Hazelett*, 32 F.3d at 1319–20.

2. The Military Judge properly applied the second *Reynolds* factor. It was not clearly erroneous to conclude Appellant's two prior urinalyses that were positive for THC-8 were logically relevant to his knowledge that THC-8 is present in commercially available products. The evidence would have been admissible even if Appellant had not elicited evidence of unknowing ingestion.

To prove Appellant violated Article 92 by violating ALNAV 074/20, the United States had to prove that Appellant's ingestion was "knowing." ALNAV 074/20, para. 4.

a. Prior, similar bad acts reduce the possibility that the act in question was done with innocent intent.

Appellant's knowing ingestion was made more probable by the extrinsic evidence. "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind

and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston*, 485 U.S. at 685.

The threshold inquiry a court must make before admitting similar acts evidence is whether that evidence is probative of a material issue other than character. *Huddleston*, 485 U.S. at 686. This Court accepts "the doctrine of chances as a viable theory of logical relevance." *Tyndale,* 56 M.J. at 213 (citing *United States v. Matthews*, 53 M.J. 465, 470 (C.A.A.F. 2000)). "Once an act is assumed to be done, the prior doing of other similar acts . . . is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances . . . that satisfies our logical demand." *United States v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) (citing *Wigmore on Evidence*, § 302, at 245 (Chadbourn rev. 1979)). Stated differently, "it is unlikely a defendant would be repeatedly, innocently, involved in similar, suspicious circumstances." *Tyndale*, 56 M.J. at 213; *see also United States v. Walker*, 42 M.J. 67, 73 n.7 (C.A.A.F. 1995) ("The doctrine of chances and the experience of conduct tell us that accident and inadvertence are rare and casual; so that the recurrence of a similar act tends to persuade us that it is not to be explained as inadvertent or accidental[.]") (citations omitted).

The greater the similarity between the extrinsic act or state of mind and the charged offense, "the more relevance it acquires toward proving the element of intent." *Queen*, 132 F.3d at 996. This Court has held the doctrine's application is "limited to those circumstances where actions are sufficiently similar to demonstratively contribute to the truth-finding process." *Tyndale*, 56 M.J. at 213. But "sufficiently similar" doesn't mean the acts have to mirror one another; instead, they need to be "more than 'the crudest sort' of similarities between the two." *Id*. (quoting *United States v. Mayans*, 17 F. 3d 1174, 1183 (9th Cir. 1994)).

The "sufficiently similar" analysis includes a temporal component. *United States v. Henthorn*, 864 F.3d 1241, 1249 (10th Cir. 2017). Simply put, the closer in time the charged and uncharged acts, the more relevant the extrinsic evidence may become. But there is "no absolute rule regarding the number of years that can separate offenses" and "the degree to which factors such as temporal distance and geographical proximity are important to a determination of the probative value of similar acts will necessarily depend on the unique facts of each case's proffered evidence." *Id.* (internal citations removed).

In *Tyndale*, the circumstances were sufficiently similar when the appellant's urine tested positive for amphetamine in 1994—the extrinsic evidence—and again in 1996—the charged misconduct. *Id.* at 209. Appellant was acquitted of a charge based on the 1994 urinalysis at a previous court-martial but this Court considered

the test's admissibility for appellant's 1996 court-martial, after the appellant presented evidence toward an innocent ingestion defense. *Id*. at 211.

This Court found "any number of similarities" between the appellant's 1994 and 1996 accounts that his ingestion was unknowing and likely from accepting an open beverages at a party. *Id.* at 209. Both times appellant: performed at parties where drugs were used; accepted open beverages; was later unable to locate or identify the partiers because they moved; was unable to locate the apartment where the party was held; never requested government assistance in locating the individuals, and claimed each time that his brother was the only witness who could testify on his behalf about the parties. *Id.* at 213. Based on the similarities, the 1994 evidence was "clearly probative on the issue of whether appellant plausibly found himself in a similar circumstance in 1996 where he might unknowingly be given a controlled substance." *Id.* at 214.

But in an earlier case—*United States v. Graham*, 50 M.J. 56, 59 (C.A.A.F. 1999)—this Court deemed a single, four year old positive urinalysis, when appellant was stationed in a different country, and for which he was acquitted, was erroneously admitted in appellant's court-martial for another positive urinalysis. *Id.* at 58. In that case, however, the claimed relevance was to show "what the likelihood would be that the accused would test positive twice for unknowingly ingesting marijuana and for the likelihood that the accused was flabbergasted when

he was told he tested positive" (contrary to appellant's testimony)—but not "to prove that he knowingly ingested on [either] occasion." *Id.* at 59.

This Court found the relevance was not logical as the evidence from the first urinalysis was only entered through cross-examination and there were no laboratory results, chain of custody documents, or expert testimony. *Id.* at 58–59. Thus, there was no evidence in the record tending to prove or disprove what the "likelihood" is for two positive urinalyses in a four-year period due to innocent ingestion. *Id.* at 59. The evidence also failed logically to rebut the appellant's claim of being shocked when he found out about his second positive urinalysis, as appellant would be "even more outraged, flabbergasted, and angry" after a second time innocently ingesting a drug and testing positive. *Id.* Further, the military judge specifically instructed that the evidence was *not* to be used to show knowing use on either occasion and appellant did not claim innocent ingestion at trial. *Id.* (emphasis added). Ultimately, "the cursory explanation offered by trial counsel, and the confusing and contradictory instructions offered by the military judge, underscore[d] the failure to develop a clear relationship between the prior test result and the issues at stake in the . . . case." *Id.* at 60.

b. There was a clear non-propensity relationship between Appellant's prior two positive urinalyses for the same drug and his testimony that the effect of those tests on him was "monumental," and the issues in this case, including rebutting the possibility that Appellant's charged urinalyses were the results of innocent ingestion.

As in both *Tyndale* and *Graham*, Appellant tested positive for the same prohibited substance more than once. But Appellant's case is more like *Tyndale* than *Graham* because the United States drew a direct, but limited line between the uncharged and charged offenses.

Here, the uncharged urinalyses and Appellant's testimony about their "monumental" effects on him were admitted to rebut Appellant's suggestion that he might have consumed THC-8 in legal products without realizing how pervasive those products are or that he, as a member of the military, was prohibited from consuming them. (J.A. 50.) Thus, like the *Tyndale* appellant, the uncharged evidence was probative as to whether "appellant plausibly found himself in a similar circumstance" again. *See Tyndale*, 56 M.J. at 214.

In particular, Appellant's testimony that the 2021 positive test results were "monumental" was relevant to diminish Appellant's theory that he would have accidently ingested products available in gas stations and grocery stores. That testimony, which Appellant does not claim was admitted in error, would have made little sense without reference to the positive results. (J.A. 243; Appellant Br. at 11); *see United States v. Tyndale*, 56 M.J. at 213.

And unlike in *Graham*, the United States presented evidence for the 2021 urinalyses that included chain of custody documents and expert testimony. (J.A. 16, 144–49, 168–72.) Because it is more reliable than the evidence in *Graham*, this Court is not left to guess whether there might be laboratory errors or errors in the chain of custody that could cause a false positive. *See Graham,* 50 M.J. at 59.

Finally, although the United States could not supply the "any number of similarities" between the circumstances surrounding the substance use that led to the four urinalyses, there was only a year between the two charged and the two uncharged urinalyses. That there were two uncharged urinalyses rather than one made the relevance under the doctrine of chances stronger than in *Tyndale*. And that they were relatively close in time, for the same substance, and at roughly the same time of year are more than the "crudest sort" of similarity described as the required minimum in *Tynsdale*.

c. <u>The evidence would have been admissible even if Appellant had not suggested the possibility of innocent ingestion</u>.

"Evidence of intent and lack of accident may be admitted regardless of whether a defendant argues lack of intent because every element of a crime must be proven by the prosecution." *Harrow*, 65 M.J. at 202 (citing *Estelle v. McGuire*, 502 U.S. 62, 69 (1991)). In *Harrow*, the appellant did not argue accident when she was accused of murdering her child, "but evidence produced at trial, through

appellant's statements to investigators supported an argument that the injuries might have been accidently inflicted." *Id.* at 202. The *Harrow* court rejected the appellant's argument that intent evidence is inadmissible until the accused claims lack of the requisite intent or accident. *Id.* Instead, this Court examined whether "the relatively minor acts" of appellant's previous abuse of her daughter were relevant to appellant's intent to kill and found them "tenuous at best" but ultimately not prejudicial. *Id.*

Here, as in *Harrow*, evidence that appellant produced at trial "supported an argument"—and indeed Appellant made an argument—that he did not intend to consume hemp. *Id.* In opening argument, Trial Defense Counsel stated that the United States would not be able to prove knowledge, that THC-8 products are often mislabeled or not labeled at all, and that THC-8 products are sold in convenience stores or gas stations. (J.A. 55–56.) Appellant specifically previewed that his expert would testify that the level of THC-8 in Appellant's urine was "consistent with unknowing ingestion." (J.A. 57.)

Then, during cross-examination of the United States' Expert, Appellant asked whether the lab tests could "rule out . . . unknowing ingestion." (J.A. 129.) Trial Defense Counsel also confirmed with the expert that products containing THC-8 are sold at gas stations, grocery stores, tobacco shops, and homeopathic stores. (J.A. 133–34.) The Expert agreed that the Food and Drug Administration

does not regulate those products and that she was familiar with products being mislabeled. (J.A. 134–35.)

These arguments and cross-examination sufficiently raised the defenses of mistake or accident, and the prosecution was entitled to present evidence to rebut the defense. Regardless, the United States bore the burden of proving all elements of the offense beyond a reasonable doubt, including that Appellant knowingly consumed a product made or derived from hemp.

d. Appellant's reliance on *Diaz* and *Thompson* is misplaced because the United States had to prove knowing use and the Appellant elicited evidence of accident or mistake.

Appellant's reliance on *United States v. Diaz*, 59 M.J. 79, 95 (C.A.A.F. 2003) and *United States v. Thompson*, 63 M.J. 228, 231 (C.A.A.F. 2006) is misplaced. (Appellant Br. at 11–12.) In *Diaz*, this Court found error in the admission of extrinsic evidence of prior child abuse to prove unpremeditated murder of the child. 59 M.J. at 80, 94. The *Diaz* appellant claimed his daughter died from "unexplained causes" but never asserted that he accidently or mistakenly committed an act that caused the death of his daughter. *Id.* at 95.

The *Diaz* court faulted the prosecution for attempting to create an accidental injury to the child by the appellant, and then rebut that it was accidental through uncharged misconduct evidence. *Id.* Combined with "an egregious error" in an expert's testimony, this Court found the panel could not fairly evaluate the

uncharged misconduct. *Id.* At no time, however, did the *Diaz* court attempt to square the proposition that "there was no fact of consequence or act of [a]ppellant for the prosecution to rebut or explain" with the "basic tenet asserted by the Supreme Court [that a] simple plea of not guilty . . . puts the prosecution to its proof as to all the elements of the crime charged." *See Diaz*, 59 M.J. at 95; *Harrow*, 65 M.J. at 202 (citing *Estelle v. McGuire*, 503 U.S. at 69).

In *Thompson,* this Court held the military judge erred in admitting evidence of the appellant's pre-service drug use to show "knowledge of marijuana use and absence of mistake." 63 M.J. 228, 231 (C.A.A.F. 2006). This Court found "nothing in the record suggests that [appellant] was unknowledgeable when it came to the nature, effects or use of marijuana, [n]or is there evidence in the record of any mistake . . . ." *Id.* at 231. This Court found these matters were not in issue, and therefore the evidence served "no relevant purpose" when appellant challenged only the credibility of the witnesses against him. *Id.*

But here, unlike *Thompson* or *Diaz*, the Appellant's argument and cross-examination sufficiently raised the defenses of mistake or accident, and the prosecution was entitled to present evidence to rebut the defense. (*See supra* D.2.a.)

3. The Military Judge properly applied the third *Reynolds* factor. It was not clearly erroneous to conclude the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, and Appellant has not cited a case in which prejudice was found in judge-alone case.

The Military Judge did not abuse his discretion when he found that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Once the evidence satisfies the first two *Reynolds* factors, the military judge must apply the Mil. R. Evid. 403 balancing test to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading any members, undue delay, wasting time, or needlessly presenting cumulative evidence. Mil. R. Evid. 403; *United States v. Solomon*, 72 M.J. 176, 179–80 (C.A.A.F. 2013).

The test balances the non-exhaustive factors established in *United States v. Berry*, 61 M.J. 91 (C.A.A.F. 2005): (1) the strength of proof of the prior act, for example, a criminal conviction outweighs rumor; (2) probative weight of the evidence; (3) potential for less prejudicial evidence; (4) distraction of the factfinder; (5) time needed for proof of the prior conduct; (6) temporal proximity; (7) frequency of the acts; (8) presence or lack of intervening circumstances; and (9) the relationship between the parties. *Id*. at 95.

"A military judge enjoys wide discretion in applying Mil. R. Evid. 403" and "courts exercise great restraint in reviewing [such] decisions." *United States v.*

Manns, 54 M.J. 164, 166 (C.A.A.F. 2000) (citations and internal quotation marks omitted). In fact, if a military judge articulates the balancing test on the record, this Court will not overturn the decision "absent a clear abuse of discretion." *Solomon*, 72 M.J. at 179–80. This is because "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007).

Here, the Military Judge articulated his balancing test on the Record. Most importantly, he acknowledged that the probative value of the prior urinalyses was "greatly diminished" by the fact that Appellant was acquitted at a court-martial. (J.A. 99.) Indeed, the Military Judge cited *United States v. Hoffmann*, No. 201400067 2018 CCA LEXIS 326, *7–8, (N-M. Ct. Crim. App. July 9, 2018), which held that an acquittal is a factor that diminishes the probative value of the evidence. (J.A. 99.)

However, the Military Judge also concluded that the evidence still had "some probative value that was not substantially outweighed by the danger of unfair prejudice." (J.A. 243.) As strong proof that Appellant previously tested positive for THC-8, the United States presented the Substance Abuse Control officer to testify about the urinalysis collection procedures, an expert to testify about the testing and results, and the relevant testing registers, chain of custody

documents, and testing documentation. (J.A. 16, 143–49; 168–72); *see Berry*, 61 M.J. at 95.

Moreover, this was not a members trial. *See* Mil. R. Evid. 403 (listing the likelihood of misleading members as a factor). The Military Judge was the trier of fact, and he is presumed to apply the law correctly. *See United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011); *see also Solomon*, 72 M.J. at 182 (military judge's failure to provide a limiting instruction to the members, noting the appellant's acquittal for his prior charges, undermined his Mil. R. Evid. 403 balancing analysis such that admitting the evidence was an abuse of discretion).

And as previously discussed, Appellant presented argument and evidence suggesting that he might have unknowingly or mistakenly consumed a product containing hemp—whether because such products are widely available or because they are mislabeled. The Military Judge only considered this evidence to rebut that claim. Appellant has not shown that the Military Judge abused his discretion by admitting this evidence. *Solomon*, 72 M.J. at 179–80.

Finally, Appellant's claim that the evidence was unduly prejudicial because he "never put [mistake] at issue" is unsupported by caselaw. (Appellant Br. at 16.) The United States, with the burden of proving every element of the crime charged, "must have the freedom to decide how to discharge that burden." *Queen*, 132 F. 3d at 997.

In *Queen*, the United States introduced nine-year old evidence of an act—witness tampering—similar to that with which the appellant was charged. *Id.* The court found this evidence sufficiently probative because it was "positive to some degree" to prove appellant's intent, despite appellant's offer of a conditional stipulation. Despite the similarity of the uncharged and charged misconduct, the court also found there was "no suggestion the prior testimony would invoke emotion in place of reason as a decision-making mechanism" or would "cause any confusion with respect to the charges actually lodged against [appellant]." *Id.* at 998.

Here, the United States entered recent scientific evidence and an Expert's testimony under Mil. R. Evid. 404(b); the evidence was easily separated from the charged evidence and was not of a type that would invoke an emotional response, even if this had been a members case. As in *Queen*, the probative value of the evidence here—in particular Appellant's previous testimony about the impact of the urinalyses—was not substantially outweighed by the danger of unfair prejudice. The military judge did not abuse his discretion in admitting it.

E. Appellant suffered no prejudice and does not merit relief, even if the Military Judge had abused his discretion.

Under Article 59(a), UCMJ, "[a] finding . . . of a court-martial may not be held incorrect on the ground of an error of law unless the error materially

prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2018). Courts evaluate prejudice from an evidentiary ruling using four factors: (1) the strength of the United States' case; (2) the strength of the appellant's case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999).

1. The United States' case was strong.

For both urinalyses in question, the United States presented the testimony of the Substance Abuse Control officer, the Urinalysis Program Coordinator, and the observer. (J.A. 67–79.) The United States' Expert testified about the testing procedures and explained the results of the tests. (J.A. 101–67.) The Military Judge concluded that this circumstantial evidence supported a permissive inference that Appellant's ingestion of THC-8 was wrongful. (J.A. 243.)

2. Appellant's case was weak.

Appellant's case primarily suggested two things: (1) that the THC-8 in his urine might not have been derived from hemp; and (2) that hemp and THC-8 products are prevalent enough in the marketplace that Appellant might have consumed it by mistake. However, there was no evidence that the THC-8 was likely to have come from a synthetic source, and the United States' expert testified that it was also unlikely to have come from a marijuana source since Appellant's urine did not test positive for THC-9. (J.A. 132, 153–54, 177–78, 190–92, 166.)

Although there was evidence that products containing THC-8 are widely available, neither the United States' nor Appellant's expert had come across products containing THC-8 with no labeling to that effect. (J.A. 134–36, 179–80, 187–88.)

3. The evidence was material.

The Military Judge explained that the evidence showed "the absence of mistake and the fact that the accused was subjected to a prior court-martial and was on notice to avoid the mistake of accidental or unknowing ingestion. (J.A. 243.) However, the Military Judge also acknowledged that the fact Appellant was acquitted "reduced [the] probative value" of the evidence. (J.A. 243.)

4. The quality of the evidence was not prejudicial.

Finally, the evidence of the two prior urinalyses was limited to brief testimony and documents. It was not lengthy, inflammatory, or unreliable. Because all of these factors favor the United States, any error in admitting the evidence of Appellant's prior urinalyses was not prejudicial.

II.

THE MILITARY JUDGE DID NOT ERR BY CONSIDERING THE PERMISSIVE INFERENCE TO CONVICT APPELLANT UNDER ARTICLE 92 FOR KNOWING USE OF HEMP IN LIGHT OF THE EVIDENCE IN THE RECORD.

A. Standard of review.

This Court reviews legal sufficiency de novo, including the use of a permissive inference. *United States v. Pabon*, 42 M.J. 404, 406 (C.A.A.F. 1995). This Court determines "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The limited inquiry "reflects [the court's] intent to give full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* (internal citations and quotations removed).

Here, the permissive inference appeared in the Military Judge's special findings. This Court has not established a standard of review for an appellate court's review of a judge's special findings. *United States v. Clark*, 75 M.J. 298, 301 (C.A.A.F. 2016).

B. Permissive inferences are appropriate when there is a rational way the trier of fact can make the connection permitted by the inference.

The party challenging a permissive inference bears the burden of demonstrating its invalidity as applied to him. *County Court of Ulster County v. Allen,* 442 U.S. 140, 160 (1979); *see United States v. Berry*, 717 F.3d 823, 829 (10th Cir. 2013). While mandatory presumption instructions may violate due process by relieving the government of the burden of persuasion on an element of an offense, permissive inferences merely suggest [to the fact-finder] a possible conclusion to be drawn upon proof of predicate facts and do not shift the burden of persuasion. *Francis v. Franklin*, 471 U.S. 307, 314 (1985); *see United States v. Saul*, No. 24-0098, 2025 CAAF LEXIS 578, *8 (C.A.A.F. July 21, 2025) ("discussions of permissive inferences most often arise in contested cases in which members may need to consider whether circumstantial evidence has proved an element of an offense.") Permissive inference instructions do not invade the factfinding function "as long as there is a rational way the trier of fact could make the connection permitted by the inference." 442 U.S. at 157; *see also United States v. Lyons*, 33 M.J. 88, 91 (C.A.A.F. 1991).

In Appellant's case, the Military Judge applied a permissive inference, not a mandatory presumption. The Special Findings read:

> Military law *allows* the trier of fact to infer from the presence of a controlled substance in an accused's urine that the accused's use was wrongful, that is both knowing and conscious . . . . A permissive

> inference of wrongfulness *may* be drawn by a factfinder from a circumstantial showing of drug use based on such [scientific] evidence.

(J.A. 242–43) (emphasis added).

C. Under *Green,* to merit the permissive inference in Article 112a cases, the United States must provide scientific evidence and expert testimony.

Inferences based on circumstantial evidence have been expressly applied in the context of drug offenses under Article 112a, UCMJ. Specifically, the Manual for Courts-Martial explains, "Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the Government's burden of proof as to knowledge." MCM, United States (2019 Ed.), part IV, para. 50.c.(10). "A urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required by [*United States v.*] *Murphy*, [23 M.J. 310, 311 (C.M.A. 1987)], provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use." *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001).

Once the military judge finds the scientific evidence admissible, the prosecution may rely on the permissive inference. *United States v. Downum*, 24-0156, 2025 CCA CAAF LEXIS 828, *23–24 (C.A.A.F. Sept. 30, 2025) (Sparks, J.

dissenting) (citing *Green*, 55 M.J. at 81). It is then left to the fact-finder to determine whether to apply the inference or not, including consideration of contradictory evidence. *Id.* (citing *Bond*, 46 M.J. at 89). Although a military judge may consider factors such as whether the evidence "reasonably discounts the likelihood of unknowing ingestion, or that a human being at some time would have experienced the physical and psychological effects of the drug, those factors are not mandatory." *Green*, 55 M.J. at 80.

D. Permissive inferences are not limited to use in Article 112a cases or cases involving illegal substances.

The use of permissive inferences is not limited to substance abuse cases. In response to an appellant's challenge to an instruction in a larceny trial that allowed a permissible inference be drawn from conscious, exclusive, unexplained possession of recently-stolen property, this Court noted that the permissible inference is "in substance a circumstantial evidence rule that has existed since time immemorial." *United States v. Pasha*, 24 M.J. 87, 90 (C.M.A. 1987) (citing *Bollenbach v. United States*, 326 U.S. 607, 617 (1946) (Black, J. dissenting) (additional citations omitted)). The factual prerequisites in the instruction supported a "a logical deduction that the possession of the stolen property could have been acquired only by the possessor's theft of that property." *Id*. (citing *Pendergrast v. United States*, 416 F.2d 776, 787 (D.C. Cir. 1969)).

The instruction in *Pasha* was valid despite that the stolen property was "of the type normally traded in lawful channels." 24 M.J. at 90. This Court looked to the surrounding circumstances, finding that "it would be most unusual for such diverse items to be purchased collectively and in such quantities." *Id*. Additionally, the appellant had access to the property before it was stolen, was present near the scene of the thefts, and had financial problems at the time. *Id*. Thus, this Court found the conclusion suggested by the permissive inference was justified by "reason and common sense." *Id*. at 91 (quoting *Francis v. Franklin*, 471 U.S. at 315).

This Court again applied a permissive inference based on circumstantial evidence outside the context of Article 112a, UCMJ, in *United States v. Lyons*, 33 M.J. 88 (C.A.A.F. 1991). There, this Court held that the Government may rely on the permissive inference in the context of unlawfully carrying a concealed weapon. *Id*. at 89–90. In *Lyons*, the appellant's military duties involved "stereotypical maintenance functions," and there was no evidence indicating that he was carrying a concealed weapon for any lawful purpose. *Id*. at 90. "Thus, the unlawfulness of appellant's carrying a concealed weapon was more likely than not" and "may be inferred, absent some evidence to the contrary, from the fact of the carrying." *Id*. at 90–91.

In the context of a plea, this court considered whether "the deliberate avoidance theory permits an inference of knowledge" outside the context of an Article 112a, UCMJ, charge. *United States v. Adams*, 63 M.J. 223, 225 (C.A.A.F. 2006). The appellant argued that, because Article 112a's discussion section provided for the possibility of deliberate avoidance, and Article 86's discussion section had no reference to deliberate avoidance, the President must have "intended to preclude deliberate avoidance as a substitute measure of proof for the element of knowledge" in Article 86. *Id.* This Court disagreed. Instead, "in the absence of express language by the President to the contrary, [this Court] conclude[d] that knowledge may be inferred from evidence of deliberate avoidance in all Article 86, UCMJ, offenses." *Id.* at 226. This Court found the military judge properly accepted appellant's plea. *Id.* at 227.

E. The permissive inference was appropriate in Appellant's case; uncontested scientific evidence and expert testimony showed Appellant testing positive on multiple occasions and Appellant knew, because he had already been court-martialed, that hemp was unlawful for him.

Here, as in *Lyons* and *Pasha*, the wrongfulness of Appellant's use of a product derived from hemp can be inferred from the circumstantial evidence. The United States properly admitted evidence regarding the conduct of the urinalyses, chain of custody, and testing, and expert testimony interpreted the results. (J.A. 67–81, 101–128, 139, 142.) There was no evidence of irregularities or errors.

While a military judge may consider whether an appellant would have felt the physical and psychological effects of the drug, that is not a prerequisite for application of the inference. *Green*, 55 M.J. at 80; (*see* Appellant Br. at 20–21). Coupled with Appellant's testimony about how receiving the positive test results from the 2021 urinalyses were "monumental days" for him, a rationale factfinder, considering all the evidence in the case, could make the connection permitted by the inference. Thus, the evidence provides a legally sufficient basis upon which to draw a permissive inference of knowing, wrongful use. *See Green*, 55 M.J. at 81.

The United States charged the offenses under Article 92, UCMJ, because hemp is no longer a controlled substance, but the nature of the underlying conduct is analogous to offenses under Article 112a, UCMJ. No authority limits this permissive inference to charges brought under Article 112a. *See Adams*, 63 M.J. at 226. Nor would any such rule make sense, since the permissive inference is an application of the rule that "[f]indings may be based on direct or circumstantial evidence." R.C.M. 918(c); *United States v. Ford*, 23 M.J. 331, 333 n. 2 (C.M.A. 1987). And contrary to Appellant's claim, the readily available, legal nature of something does not take it outside the purview of a permissive inference; this Court already rejected that argument in *Pasha*. 24 M.J. at 90. Further, Appellant never challenged the lawfulness of ALNAV 074/20, and despite that hemp products are not necessarily contraband for the general public, Appellant knew he

was prohibited from using it. The Military Judge did not err by considering the permissive inference based on its application in Article 112a cases.

Conclusion

The United States respectfully requests that this Court affirm the findings and sentence as adjudged.

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7976, fax (202) 685-7687
Mary.c.finnen.mil@us.navy.mil
Bar no. 37314

K. MATTHEW PARKER
Lieutenant, JAGC, U.S Navy
Senior Appellate Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-8387, fax (202) 685-7687
kevin.m.parker36.mil@us.navy.mil
Bar no. 38087

IAIN D. PEDDEN
Colonel, U.S. Marine Corps
Director, Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7427, fax (202) 685-7687
Bar no. 37744

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on November 6, 2025.

MARY CLAIRE FINNEN
Major, U.S. Marine Corps
Appellate Government Counsel