IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Captain (O-3),
ROSS E. DOWNUM,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLANT

Docket No. ARMY 20220575

Tried at Fort Hood, Texas, on 25 July, 19 August, and 7-10 November 2022 before a general court-martial appointed by Commander, Headquarters, 1st Cavalry Division, Colonel Steven Henricks, Lieutenant Colonel Scott Hughes, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

DANIEL CONWAY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
[redacted]

MATTHEW S. FIELDS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
[redacted]

Assignments of Error

I. WHETHER TRIAL COUNSEL'S IMPROPER ARGUMENTS CONSTITUTED PLAIN ERROR.

II. WHETHER APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

III. WHETHER APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO CALL THE TESTING EXPERT OR ADMIT ANY TESTING DOCUMENTS.

Table of Contents

Assignments of Error ..... **ii**
Statement of the Case **1**
Table of Contents ..... **ii**
Statement of Facts **1**
Argument **5**
I. TRIAL COUNSEL'S IMPROPER ARGUMENTS CONSTITUTED PLAIN ERROR. **5**
Standard of Review 5
Law 6
Argument 13
II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL. **26**
Additional Facts 26
Standard of Review 28
Law 28
Argument 30
III. APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO CALL THE TESTING EXPERT OR ADMIT ANY TESTING DOCUMENTS. **32**
Additional Facts 32
Standard of Review 34
Law 34
Argument 36

Conclusion **40**
Grostefon Matters ..... **- 1 -**
1. APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT BECAUSE THE EVIDENCE FAILED TO ESTABLISH THAT ANY INGESTION OF COCAINE WAS KNOWING. ..... **- 1 -**
Standard of Review ..... - 1 -
Law ..... - 1 -
Argument ..... - 1 -
2. APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY BY THE GOVERNMENT. ..... **- 3 -**
Standard of Review ..... - 3 -
Law ..... - 4 -
Argument ..... - 6 -
Certificate of Service ..... **- 9 -**

Table of Authorities

Supreme Court of the United States
Brooks v. Tennessee, 92 S.Ct. 1891, 406 U.S. 605 (1972) 30
Bullcoming v. New Mexico, 564 U.S. 647 (2011) n.7
Crawford v. Washington, 541 U.S. 36 (2004) n.7
Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) n.7
Strickland v. Washington, 466 U.S. 668 (1984) 28, 29, 31

United States Court of Appeals For the Armed Forces
United States v. Andrews, 77 M.J. 393 (C.A.A.F. 2018) 5, 23
United States v. Barner, 56 M.J. 131 (C.A.A.F. 2001) 35
United States v. Blazier ("Blazier I"), 68 M.J. 439 (C.A.A.F. 2010) n.7
United States v. Blazier ("Blazier II"), 69 M.J. 218 (C.A.A.F. 2010) n.7
United States v. Bodoh, 78 M.J. 231 (C.A.A.F. 2019) 10, 18, 19
United States v. Bond, 46 M.J. 86 (C.A.A.F. 1997) n.7
United States v. Brewer, 61 M.J. 425 (C.A.A.F. 2005) 38
United States v. Captain, 75 M.J. 99 (C.A.A.F. 2016) 28, 29, 32
United States v. Carpenter, 51 M.J. 393 (C.A.A.F. 1999) 6
United States v. Carter, 61 M.J. 30 (C.A.A.F. 2005) 6, 7, 9, 15
United States v. Cavitt, 69 M.J. 413 (C.A.A.F. 2011) n.7
United States v. Clark, 69 M.J. 438 (C.A.A.F. 2011) 7, 8

United States v. Clifton, 15 M.J. 26 (C.M.A. 1983) 10, 11
United States v. Dollar, 69 M.J. 411 (C.A.A.F. 2011) n.7
United States v. Edwards, 82 M.J. 239 (C.A.A.F. 2022) 32
United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) 12
United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005) 12, 13, 21, 23, 24, n.4
United States v. Garcia, 59 M.J. 447 (C.A.A.F. 2004) 29
United States v. Green, 55 M.J. 76 (C.A.A.F. 2001).....37
United States v. Harper, 22 M.J. 157 (C.M.A. 1986) 37
United States v. Hunt, 33 M.J. 345 (C.M.A. 1991) 38
United States v. Lewis, 69 M.J. 379 (C.A.A.F. 2011) 8
United States v. Long, 81 M.J. 362 (C.A.A.F. 2021) 35
United States v. Lusk, 70 M.J. 278 (C.A.A.F. 2011) n.7
United States v. Mason, 59 M.J. 416 (C.A.A.F. 2004).....8, 9
United States v. McConnell, 55 M.J. 479 (C.A.A.F. 2001).....29
United States v. Mobley, 31 M.J. 273 (C.M.A.1990) 7
United States v. Moran, 65 M.J. 178 (C.A.A.F. 2007).....6
United States v. Murphy, 23 MJ 310 (C.M.A. 1987)..... 37, 38
United States v. Paxton, 64 M.J. 484 (C.A.A.F. 2007) 10
United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998).....6
United States v. Rankin, 64 M.J. 348 (C.A.A.F. 2007) n.7
United States v. Robinson, 77 M.J. 294 (C.A.A.F. 2018).....34
United States v. Rosario, 76 M.J. 114 (C.A.A.F. 2017).....34
United States v. Sewell, 76 M.J. 14 (C.A.A.F. 2017) 13, 26
United States v. Toro, 37 M.J. 313 (C.M.A. 1993) 7, 11
United States v. Voorhees, 79 M.J. 5 (C.A.A.F. 2019)..... 5, 12, 13
United States v. Washington, 57 M.J. 394 (C.A.A.F. 2002) 34

Service Courts of Criminal Appeals

United States v. Carr, 25 M.J. 637 (A.C.M.R. 1987) 7
United States v. Garcia, ARMY 20130660, 2015 WL 4940266 (Army Ct. Crim. App. 2015) (memm. op.) 7
United States v. Harvey, __ M.J. __, 2023 WL 3589717 (N.M. Ct. Crim. App. 2023) 36
United States v. Hudson, No. ACM 38846, 2017 WL 435735 (A.F. Ct. Crim. App. 2017) (unpub. op.) 38
United States v. Robinson, ARMY 20220043, 2023 WL 3834822 (Army Ct. Crim. App. 2023) (summ. disp.) 35

United States v. Spann, 24 M.J. 508 (A.F.C.M.R. 1987) 37

Federal Courts

Hutchins v. Wainwright, 715 F.2d 512 (11th Cir. 1983) 11
United States v. Molina-Guevara, 96 F.3d 698 (3rd Cir. 1996)..... 11, 18
United States v. Reed, 724 F.2d 677 (8th Cir. 1984)..... 43, 47, n.22
United States v. Vargas, 583 F.2d 380 (7th Cir. 1978) 7

State Courts

Covington v. State, 842 So.2d 170 (Fla. App. 3 Dist. 2003) 9
Gore v. State, 719 So.2d 1197 (Fla. 1998) 9
Harris v. State, 645 P.2d 1036 (Okla. Crim. App. 1982) 8
Hauwiller v. State, 295 N.W.2d 641 (Minn. 1980) 29
Servis v. State, 855 So.2d 1190 (Fla. App. 5 Dist. 2003) 12
State v. Loher, 398 P.3d 794, 140 Hawaii 205 (Hawaii 2017) 31

Statement of the Case

On 25 July, 19 August, and 7-10 November 2022, Captain (CPT) Ross E. Downum (appellant) was tried by officer members at a general court-martial at Fort Hood, Texas. Appellant was convicted, contrary to his pleas, of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ. The military judge sentenced appellant to be reprimanded, to forfeit $1000 pay per month for one month, and to be restricted to post for 30 days. (Record (R.) at 678; Statement of Trial Results). The convening authority reduced the restriction to the confines of Bell County but otherwise did not take action on the findings or the sentence. (Convening Authority Action).

Statement of Facts

1. *The Two Uranalysis Tests*

On Wednesday, 8 September 2021, appellant's unit conducted a 100% urinalysis (UA). (R. at 254-55, 257). Appellant received notification of this UA in the early morning hours of 8 September 2021, via a group text message from the unit First Sergeant. (R. at 366, 380-81; Def. Ex. A). This message was part of a unit "leader chat" which appellant was included in due to his position in the S3 shop. (R. at 380-81). The unit prevention leader (UPL) was also part of this group chat. (R. at 253-57). Appellant *did not* attend the 8 September 2021 UA because he was excused from work that day for personal reasons. (R. at 382).

On 13 September 2021, the unit conducted another UA. (R. at 211). The UPL testified that this was "a makeup . . . for personnel who had missed the previous test." (R. at 212, 257). The unit's procedure was that members who missed a UA would be scheduled for a make-up UA. (R. at 258-59). The UPL testified that the timing of make-up would "depend[]" on logistical factors, such as the number of people who missed the test and their availability to be re-tested in a group. (R. at 213). For example, the make-up test might be scheduled when the unit could gather "a good group" of those who missed the previous test, due to return from leave/pass/etc. (R. at 260). Make-up test participants were not informed in advance of the exact date of the make-up test. (R. at 260). For example, if a member missed a test due to being on leave, they would not know if they were going to be scheduled for a make-up test "the day [they] got back or two weeks later". (R. at 260).

Appellant testified that he was aware that members who missed a 100% UA would be required to make it up upon return to duty. (R. at 382, 385). In accordance with appellant's stated expectation, appellant was notified of a make-up UA on 13 September 2021, the first day he returned to work after being excused the prior week. (R. at 385; Def. Ex. B). Appellant's sample from this test allegedly reflected the presence of BZE, a metabolite of Cocaine. (R. at 320).

2. *Appellant's Activities Prior to the Positive Uranalysis*

The weekend of 11-12 September 2021 (between the first and second UAs), appellant went to Austin, Texas to attend a birthday party for his friend [redacted]. (R. at 387-88). That Saturday night (11 September 2021), the group went to a bar after dinner (392-93, 429-32, 460-62, 467-68). [redacted] had arranged "bottle service" for his birthday, so the group was pouring their own drinks from the provided bottles. (R. at 388, 392-94, 430-31, 461). While at the bar, appellant testified that he took a drink and then noticed a white powder in his glass – or what he "assumed to be" his glass – after leaving it unattended to use the restroom. (R. at 396-97). His first thought was that it was a prank, and maybe one of his friends had put sugar or salt in his glass. (R. at 396-97, 401).

Appellant testified that he looked at his friend [redacted], who was standing to appellant's right, and made a gesture at [redacted]. (R. at 397-99). [redacted] confirmed this interaction, testifying that appellant looked at him and made a gesture that [redacted] interpreted as meaning "what did you do?" or "did you do something[?]". (R. at 474-76). Appellant testified that, thereafter, he spoke to another friend ([redacted]), and asked if [redacted] had seen anyone put anything in appellant's drink. (R. at 399-400, 412-14). [redacted] testified that he did not recall appellant mentioning his drink or bringing up any concerns about his drink. (R. at 435, 438-41).

Nobody who observed appellant during the night of the party testified that they had seen appellant engage in any behavior indicative of drug use or being under the influence of drugs. *See* (R. at 436, 466).

Attendees from the party described it as crowded (R. at 433) and loud to the point of making intelligent conversation difficult (R. at 441-42). There was not much in the way of barriers or security separating the "bottle service" area from the rest of the bar. (R. at 433, 469-70). As a result, other patrons intermixed with the group and helped themselves to the bottles intended for the party. (R. at 432-33). Appellant testified that he could not be sure that the drink he picked up after using the restroom was his own drink. (R. at 400). The glasses in the bar where the birthday party was happening "all [looked] the same." (R. at 480).

3. Appellant's Actions After the Second UA

After participating in the 13 September 2021 UA, appellant became concerned about the foreign substance he saw in his drink the weekend prior and sought out his company commander, and later his battalion commander, to disclose what happened at the bar. (R. at 403-04, 416-18).[1]

4. Character Evidence

[1] Neither the company nor the battalion commander were called as witnesses.

Numerous witnesses testified to appellant's character as a "rule follower" (R. at 488, 499, 505, 509), a dedicated officer (R. at 499-500, 520-21), law-abidingness (R. at 488, 499, 505, 509), and truthfulness (R. at 489, 505-06, 510, 513, 521-22). The government presented no character evidence to rebut appellant's strong character in these areas.

5. Procedural History of Disciplinary Proceedings

On 17 February 2022, appellant's brigade commander, Colonel [redacted], offered appellant an Article 15, which appellant turned down, demanding trial by court-martial. (DA FORM 2627, 17 February 2022).[2]

Argument

I. TRIAL COUNSEL'S IMPROPER ARGUMENTS CONSTITUTED PLAIN ERROR.

Standard of Review

This Court reviews prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, it reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). To prove plain error, Appellant has the burden of establishing (1) there was error; (2) it was plain or obvious; and (3) the error

[2] This document is contained on page 62 of the electronic record of trial (eROT).

materially prejudiced a substantial right. *Id.* (quotations omitted). When the error is of constitutional dimensions, after the first two prongs of the plain error test are established, "the burden shifts to the Government to convince [the Court] that this constitutional error was harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 33-35 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463–65, n.* (C.A.A.F. 1998); *United States v. Carpenter*, 51 M.J. 393, 396 (C.A.A.F. 1999)).

Law

"A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Norwood*, 81 M.J. at 19 (cleaned up). Caselaw has defined several categories of improper argument, to include the following relevant to the present case.

1. <u>Comment on Exercise of Constitutional Rights</u>

It is constitutional error to comment upon accused's exercise of his or her constitutional rights. *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007) (noting that argument mentioning an accused's invocation of constitutional rights "may serve to hinder the free exercise of such rights – rights that carry with them the 'implicit assurance that [their] invocation . . . will carry no penalty.'") (quoting

United States v. Daoud, 741 F.2d 478, 480 (1st Cir.1984) (alterations in original)). As this Court has stated, "It is fundamentally unjust to incriminate an appellant by improperly commenting on his invocation of a constitutional right. *United States v. Garcia*, ARMY 20130660, 2015 WL 4940266, at *7 (Army Ct. Crim. App. 2015) (memm. op.);[3] *see also United States v. Carr*, 25 M.J. 637, 639 (A.C.M.R. 1987) ("[I]t is inappropriate that any party to a court-martial should be allowed to profit, directly or indirectly, by argument on findings or sentence regarding an exercise of a constitutionally protected criminal due process right." Nowhere have courts more resoundingly emphasized this principle than in the context of comment on the accused's right to remain silent. *United States v. Clark*, 69 M.J. 438, 443 (C.A.A.F. 2011) (finding plain and obvious error and explaining "it is settled that the government may not use a defendant's exercise of his Fifth Amendment rights as substantive evidence against him."); *Carter*, 61 M.J. at 33 ("'[i]t is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.'" (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A.1990) (alteration in original)); *United States v.*

---

[3] Available at: https://www.westlaw.com/Document/I7548f5f0469711e580f3d2d5f43c7970/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

Toro, 37 M.J. 313, 318 (C.M.A. 1993) ("It is axiomatic that the prosecution may not comment on the defendant's right to remain silent . . . .") (citations omitted). The right to silence is not tied to a particular stage in the proceeding and, therefore, "any comment or reference to a defendant's pre-trial silence is an improper infringement on the defendant's right against self-incrimination." *See, e.g.*, *Harris v. State*, 645 P.2d 1036, 1036-38 (Okla. Crim. App. 1982) (reversing for plain error based on prosecutors' suggestion that appellant should have come forward with exculpatory evidence prior to trial); *see also* Mil. R. Evid. 304(a)(2) ("Failure to deny an accusation of wrongdoing is not an admission of the truth of the accusation if at the time of the alleged failure the person was *under investigation* or was in confinement, arrest, or custody for the alleged wrongdoing.") (emphasis added). An accused's decision to make a statement at one juncture does not excuse improper comment about his or her failure to make statements at prior junctures. *Clark*, 69 M.J. 445-46 (finding plain and obvious error in [redacted] invocation of appellant's pre-advisement silence even though the government properly elicited evidence of appellant's post-advisement statements).

2. *Burden Shifting*

"An improper implication that the defendant carries the burden of proof on the issue of guilt constitutes a due process violation." *United States v. Lewis*, 69 M.J. 379, 384 (C.A.A.F. 2011) (citing *United States v. Mason*, 59 M.J. 416, 424

(C.A.A.F. 2004)). Burden shifting is error of constitutional dimensions and is therefore subject to the harmless beyond a reasonable doubt standard of prejudice. *Mason*, 59 M.J. at 424. The suggestion that appellant may be "obligated" to take a certain action, "and therefore obligated to prove his own innocence" constitutes burden shifting. *Id.* (finding it was burden shifting to suggest that appellant should have requested a retest of forensic evidence); *See also Carter*, 61 M.J. at 34 (finding plain and obvious error of constitutional dimensions where "trial counsel improperly implied that [the appellant] had an obligation to produce evidence to contradict the Government's witness. This essentially shifted the burden of proof to [the appellant] to establish his innocence—a violation of protections of the Fifth Amendment.").

Argument that the factfinder should convict if they disbelieve the accused's testimony is improper burden shifting. *Gore v. State*, 719 So.2d 1197, 1200 (Fla. 1998); *see also Covington v. State*, 842 So.2d 170, 172 (Fla. App. 3 Dist. 2003) ("[A] closing argument is objectionable if it asks the jury to determine the issue of guilt on the basis of whether the defendant (or a witness) was lying") (citations omitted). "This form of argument is improper because it involves a distortion of the government's burden of proof." *United States v. Reed*, 724 F.2d 677, 681 (8th Cir. 1984); accord *United States v. Vargas*, 583 F.2d 380, 387 (7th Cir. 1978) (finding plain and obvious error in such arguments and explaining they are improper because they exclude the possibility that even if "the jurors believed . . . [the defendant was]

probably was lying . . . it would have been proper to return a verdict of not guilty because the evidence might not be sufficient to convict defendant beyond a reasonable doubt.").

3. Going Beyond Evidence of Record

Counsel should limit their findings arguments to the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Bodoh*, 78 M.J. 231, 237 (C.A.A.F. 2019) (quotation marks and citations omitted). Therefore, when argument goes "beyond the facts established in the record" or the reasonable inferences "drawn from the evidence," this "constitute[s] error." *Id.* at 237-38 (quoting *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F. 2007)). An exception to this general rule allows trial counsel to comment during argument on contemporary history or matters of common knowledge within the community. *Id.* at 238 (quotation marks and citations omitted). These matters include routine personnel actions such as military status and permanent change of station moves, a military branch's "zero tolerance" drug policy during sentencing, and any other matter upon which servicemembers in general have a common fund of experience and knowledge, through data notoriously accepted by all. *Id.* If trial counsel were allowed to argue facts not in evidence, the result would be "an accused's right of confrontation would be abridged, and the opportunity to impeach the source denied." *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983). "When counsel argues facts

not in evidence, or when he discusses the facts of other cases, he violates both of these principles." *Id.* at 29-30.[4] Similarly, "[i]t is axiomatic that the prosecution may not . . . mischaracterize the evidence . . . ." *Toro*, 37 M.J. at 318.

When the government goes beyond the evidence of record by making a representation of what someone who was not called as a witness would say *if* they had been called at as a witness, it violates the confrontation clause of the Sixth Amendment. *United States v. Molina-Guevara*, 96 F.3d 698, 703 (3rd Cir. 1996) ("The Confrontation Clause of the Sixth Amendment is violated when a prosecutor informs the jury that there is a witness who has not testified, but who, if he had testified, would have given inculpatory evidence.") (citing *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir. 1983), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984)). This is error of constitutional dimensions. *Id.*

4. Disparaging Defense Counsel / Defendant

---

[4] While this language (abridgment of the "accused's right of confrontation") suggests error of constitutional dimension, appellant is unaware of caselaw applying the harmless beyond a reasonable doubt standard to improper argument of this sort. In *United States v. Fletcher*, the CAAF found plain error and reversed for, *inter alia*, trial counsel's reference to facts not in evidence during argument, but did not invoke the harmless beyond a reasonable doubt standard. 62 M.J. 175, 183-86 (C.A.A.F. 2005)

"[I]t is ... improper for a trial counsel to attempt to win favor with the members by maligning defense counsel," including accusing the defense counsel of fabrication. *See Fletcher*, 62 M.J. at 181–82 (citations omitted); *see also Voorhees*, 75 M.J. at 10. This category of improper argument risks both turning the trial into a "popularity contest" and influencing the members such that they may not be able to objectively weigh the evidence. *Id*. Rather than deciding the case solely on the basis of the evidence presented, as is required, this category of improper argument invites the members to decide the case based on which lawyer they like better. *Id.* (quotations marks and citations omitted). Disparaging comments are also improper when they are directed to the defendant himself. *Fletcher*, 62 M.J. at 182. While improper disparagement can take many forms, one form of such impropriety is repeatedly telling the panel "the defense wants you to believe" or variations thereon. *See Servis v. State*, 855 So.2d 1190, 1193 (Fla. App. 5 Dist. 2003) (finding that the prosecution "disparaged the defense" by, inter alia, "'stating several times 'the defense wants you to believe ...'") (ellipsis in original).

5. Prejudice

In assessing prejudice, the Court will look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing Fletcher, 62 M.J. at 184). This determination is based on "(1) the severity of

the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12).

When evaluating the severity of the misconduct, the CAAF has held that: "Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any rulings from the military judge." *Fletcher*, 62 M.J. at 184.

Reversal is warranted only when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (quotation omitted).

Argument

1. *Comment on Appellant's Failure to Make Statements / Collect Evidence After Initiation of Investigation*

Trial counsel began a "chapter" of closing argument with the proposition: "Let's talk about some rational things that someone who found himself in the accused's situation would have done that the accused did not do." (R. at 577). Trial counsel then listed appellant's failure to make numerous statements which the

government urged an innocent man would have made. (R. at 577-78). This is perilous ground. Trial counsel stepped directly on to a landmine with the last item in the list: that appellant "didn't even try to figure out what happened when he was notified several weeks later that he had tested positive for cocaine. He didn't reach out to [redacted] and [redacted] about it." (R. at 577-78). Trial counsel then asserted that the reason appellant did not make any post-investigation statements or inquires is because appellant knew that he was guilty: "And why would he have not inquired into how he could have tested positive, because he knew he was going to test positive, because he knowingly used cocaine that weekend." (R. at 578).

It is plainly erroneous for trial counsel to fault the accused for failing to make statements or personally conduct an investigation after being notified that he is under governmental investigation.[5] Indeed, it would be exceedingly foolish for the accused to do so. Nor was this argument in any way invited by the evidence that appellant had *informed* [redacted] that he had tested positive. It is neither uncommon nor improper for a servicemember to inform friends or other interested parties that they have been placed under investigation, and why. This by no means invites the response that the individual *should have* also made additional statements or

[5] Obviously, the notification that appellant had tested positive – as referred to by trial counsel – would occur simultaneously with the initiation of an investigation.

inquires about the underlying facts, nor that the failure to do so is evidence of guilt. Additionally, though not fully developed, it seemed from appellant's testimony that the only reason he informed [redacted] of the results of the uranalysis was to facilitate putting [redacted] in touch with his legal team after the investigation was underway. (R. at 417). Appellant testified that his only contact with [redacted] after the weekend in question was "pertaining to getting in contact with my lawyers, and kind of, facilitating that coordination." (R. at 417).

2. Burden Shifting

Trial counsel's comments that the panel should infer guilt based on appellant's failure to "try and figure out what happened" after being notified he had tested positive also plainly constituted burden shifting. *See Carter*, 61 M.J. at 34. Appellant had no duty to "try to figure out what happened" or to personally interrogate his friends about it. Just as in *Carter*, this argument "improperly implied that [appellant] had an obligation to produce evidence" and "shifted the burden of proof . . . ." Just as the CAAF found in *Carter*, this was plain and obvious error here as well.

Additionally, trial counsel argued the panel should convict if they disbelieved the accused's testimony: ". . . most importantly, the inconsistencies in his story are more than sufficient for you to find the accused guilty beyond a reasonable doubt of The Charge and Its Specification." (R. at 583). The

government bore the burden of proving the elements, not the truth or falsity of appellant's testimony. As held in the above cited cases, this form of argument is improper and constitutes burden shifting.

Finally, it was improper burden shifting (or misstatement of the burden of proof) for the trial counsel to argue that only one element was "before this court" for the panel's consideration: "The judge just read instructions to you and outlined the elements of the offense, but really, with the evidence that has been presented so far, the only question before this court is the question of knowledge." (R. at 575). The government's burden extended to every element, and it was a plainly erroneous statement of the law to suggest that a single element was "the only question before the court".

3. Going Beyond Evidence of Record

A major component of the defense case was that appellant knew he was pending a make-up UA, and it was therefore unreasonable that he would take the risk of knowingly using drugs while he knew he was about to be tested. Appellant testified that he was aware that members who missed a 100% UA would be required to make it up upon return to duty. (R. at 382, 385). *All of the evidence* presented at trial supported the conclusion that this was, in fact, the SOP within the unit. The UPL testified that the unit SOP was to hold make-up tests for personnel who missed 100% UAs. (R. at 211-13, 257-59). The government presented no

evidence to question the fact that this was standard practice within the unit. To the contrary, the UPL was the government's own witness. Furthermore, appellant's familiarity with the unit's procedures was logical given, *inter alia*, that he, as a unit leader, was on the same group message thread about UA scheduling as the UPL. *See* (Def. Ex. A, B).

Nonetheless, despite the *consistent and uncontroverted* evidence confirming this practice within the unit, the government urged the panel to disbelieve it and instead base their decision on their personal experience with UAs rather than the evidence of record:

> While defense would have you believe that he knew that he was going to come up on a – that he was going to have to make up that UA. *You've all been in the Army for a considerable amount of time*. Generally, after a 100 percent UA even if *you've* been excused for a valid reason, *you* know that you won't be tested again for some time. *Most people* would say it's good fortune, good luck that *you're* not going to have to do it again. So, *you* don't have to sit there and wait, wait around for 30, 40 other people to pee in a cup ahead of *you*, only for *you* to be not doing whatever it is that *you* need to be doing that day.
>
> But the defense counsel wants *you* to think that the next time, after *you* miss a UA, the next time that *you* show up from work, that they're going to convene a special urinalysis just for *you* and that *you* would know about it. That just doesn't happen.

(R. at 581-82) (emphasis added). This argument was improper as it went beyond the evidence of record or the reasonable inferences therefrom.

There was *no evidence* presented that a member of appellant's unit who was excluded from a 100% UA would know that they "won't be tested again for some time." *See* (R. at 581). To the contrary, all the evidence presented (the UPL's testimony and appellant's testimony) said the exact opposite. The government nonetheless urged the panel to draw upon the specifics of their personal experiences *in other units* to disbelieve the uncontested evidence of record. Similarly, trial counsel's personal assertion that "generally" those who missed UAs would not have to make them up later was improper (counsel testifying).

One of the first questions asked during voir dire was: "Does anyone have any prior knowledge of the facts or events in this case? Negative response from all members." (R. at 70). It was clearly improper for trial counsel to subsequently ask the members to decide the case based on their own prior knowledge as opposed to the uncontested evidence of record. While caselaw allows general references to matters of common knowledge within the military community, appellant is aware of no precedent that would allow an argument anywhere near as specific as that the government made here. *See Bodoh*, 78 M.J. at 238.

Trial counsel went on to argue that: "*Most people* would say it's good fortune, good luck that you're not going to have to do it again." (R. at 581) (emphasis added). Trial counsel's invocation of non-existent testimony was improper, exceeded "the evidence of record," and infringed on appellant's right to

confront witnesses by invoking what non-testifying witnesses would supposedly say. *See Bodoh*, 78 M.J. at 237; *Molina-Guevara*, 96 F.3d at 703. If the government had witnesses who would testify to this effect, it should have called them. The only two witnesses who did testify, however, said the exact opposite: that those who missed a 100% UA test *would* have to do it again.

Trial counsel also mischaracterized appellant's testimony in closing to make it appear less credible. Trial counsel characterized appellant's testimony as: "There was so much cocaine in his drink that it was thicker than salt and thicker than wet sand." (R. at 557). Nowhere in appellant's testimony about noticing the foreign substance in his drink did he state anything to this effect. *See* (R. at 396-97, 412). To the contrary, appellant said the exact opposite: "it was *too fine* to be salt or even sand or something like that." (R. at 397) (emphasis added). The implication of trial counsel's testimony was that appellant's testimony was far-fetched and the panel should disbelieve it. Resorting to mischaracterizing the defendant's testimony to make it sound incredible is improper.[6]

---

[6] Trial counsel also stated in closing that "Captain Downum himself acknowledged that cocaine use is prevalent there in use[] there [at the bar in question], and that is the situation Captain Downum chose to place himself in." (R. at 576). To the contrary, appellant actually stated: "I did not have previous knowledge that people had done cocaine at that bar." (R. at 409). Appellant acknowledged in response to

4. Disparaging Defense Counsel / Defendant

Trial counsel repeatedly used variations on the phrase "the defense wants you to believe . . ." throughout closing argument:

- It is a story that the accused is asking you to believe that does not make any sense. (R. at 574-74);
- Defense counsel wants you to believe that someone either put something in his drink or that he picked up someone else's drink that night. (R. at 579);
- While defense would have you believe that he knew that he was going to come up on a -- that he was going to have to make up that UA. (R. at 581);
- ". . . they want you to believe that he consumed enough to test positive over 36-hours later." (R. at 606);
- "They want you to believe that his drink was so laced with cocaine that it was no longer a regular liquid and that he took a huge gulp of it, but at the same time, he felt no effects." (R. at 606);
- "The reasonableness that the defense counsel wants you to believe, I want to talk about that next." (R. at 606);
- "They want you to believe the accused knew that he had a urinalysis coming up when he was in downtown Austin for the weekend and that he eventually came forward out of a sense of moral obligation." (R. at 606);

---

a leading question ("sometimes people use cocaine there?") that "Yes, I would assume so. Yes." (R. at 408). A far cry from the government's characterization of his testimony.

- "They also want you to believe that he's never – that because he's never failed a UA, why would he have failed this one . . . ." (R. at 607);

- "They also want you to believe, based off of the several witnesses that they called, that good Soldiers don't use drugs." (R. at 607);

- "And the accused wants you to believe that he did ask at least one person who was around him that night, but that person, when he was called to testify, said that never happened." (R. at 607);

- "The accused never asked anybody that night about what happened, about if there was anything in his drink, because he knew that he had consumed cocaine and he wanted this panel to believe that he had no idea that it was in his drink." (R. at 607-608) (this was the concluding line of trial counsel's rebuttal argument).

These arguments disparaged appellant, his counsel, and his defense, suggesting that the defense was trying to deceive the panel. This type or argument has "the potential for a trial to turn into a popularity contest." *Fletcher*, 62 M.J. at 181. Trial counsel would be better served to stick to the facts rather than focusing on the supposed motives of the other side.

5. Prejudice

a. Severity of the Misconduct

The misconduct was severe and pervasive. Trial counsel's comment on appellant's failure to make statements after testing positive, and suggestion that appellant was obligated to produce evidence to rebut the government's case, was particularly severe. Trial directly urged the panel to conclude, based on these improper arguments, that appellant's failure to make the post-investigations

statements the government averred he should have was: "because he knew he was going to test positive, because he knowingly used cocaine that weekend." (R. at 578) (emphasis added). The government's direct connection between these improper considerations and the element of knowing use is telling. Whether the evidence established the element that any ingestion of cocaine was "knowing" was a major focus of the litigation. Indeed, this element was so central to the outcome that trial counsel averred "the only question before this court is the question of knowledge." (R. at 575). Additionally, while not intending to jump ahead to the third factor (the weight of the evidence), the reason this element was so central to the controversy was because the evidence suggested a rationale alternative hypothesis: unknowing ingestion.

The impropriety in trial counsel's extra-record argument that the panel should consider their own experience with UAs in other units, rather than the testimony, was also notably severe. Whether or not appellant knew he was pending a make-up UA was vital to the outcome of the proceeding. If the panel accepted that appellant knew he was pending a UA, it would almost certainly have been case dispositive, as it would be clearly unreasonable for appellant to knowingly use drugs when he knew he was about to be tested. As such, the government's response to this evidence was of great importance. However, the entirety of the government's response to this defense argument consisted of this

improper line of argument. The fact that this improper argument was the government's only rebuttal to a case-dispositive defense demonstrates prejudice.

The *Fletcher* factors also favor a finding of severity. In less than fifteen pages of findings and rebuttal argument (R. at 574-84, 605-08), trial counsel made numerous improper arguments, which "persisted throughout the entirety of trial counsel's closing argument, including through the rebuttal." *See Andrews*, 77 M.J. at 402. The merits portion of the trial lasted only two days. *See* (R. at 196-97) (opening statements begin on 8 November 2022); (R. at 617) (findings reached on 9 November 2022). As such: "The improper comments do not stand as isolated incidents in an otherwise long and uneventful trial." *Fletcher*, 62 M.J. at 184-85. The panel deliberated for only an hour and thirty-eight minutes (including admin time). *See* (R. at 613) (Court closed at 1751, 9 November 2022); (R. at 615) (Court called to order for findings at 1929, 9 November 2022). This is shorter even than other deliberations the CAAF has found indicative of severity. *See Andrews*, 77 M.J. at 402 (less than three hours of deliberation indicated severity); *Fletcher*, 62 M.J. at 185 (less than four hours of deliberation indicated severity).

b. Curative Measures

In the present case, no specific curative measures were taken, with the military judge giving only generic instructions prior to sending the panel into deliberations. *See Andrews*, 77 M.J. at 403 (finding "the military judge's failure to

offer any specific, timely curative instructions also weighs in favor of finding prejudice."); *Fletcher*, 62 M.J. at 185 (finding the military judge's curative efforts to be "minimal and insufficient" where he gave only a generic limiting instruction, chastised trial counsel on a single occasion, and failed to sua sponte interrupt trial counsel). Here, as in *Norwood*, "the defense counsel could have done more to meet their duty to their clients to object to improper arguments early and often, as could have the military judge to fulfill his *sua sponte* duty to ensure that an accused receives a fair trial but because they did not, there was a total lack of curative measures to redress this misconduct." *Norwood*, 81 M.J. at 21 (cleaned up).

c. Weight of the Evidence

The weight of the evidence was far from overwhelming. The only affirmative evidence was the UA results. Despite a considerable amount of testimony about appellant's activities within the usage window, there was a complete absence of evidence of appellant engaging in any behavior indicative of drug use or being under the influence of drugs. On the other hand, the defense put on a strong case to include (1) considerable evidence that appellant had, in fact, unknowingly ingested a foreign substance on 11 September 2021 that would have explained the UA result two days later; (2) an impressive amount of unrebutted character evidence; and (3) corroborated evidence that appellant was aware that he

would be required to take a make-up UA soon after the weekend in question. More detail on the weight of the evidence is included within appellant's *Grostefon* matters challenging factual sufficiency.

Additionally, the weaknesses in the evidence correspond to the exact areas where the government employed improper argument. The defense case focused largely on attacking the "knowing" element and arguing an alternative hypothesis of innocent ingestion. Trial counsel directly tied the improper arguments about appellant's failure to make statements after testing positive, and the suggestion that appellant was obligated to produce evidence to rebut the government's case, to this very issue. The government itself at trial stated that these improper considerations showed "he knowingly used cocaine that weekend." (R. at 578). The government cannot now meet its burden to prove beyond a reasonable doubt that these considerations did not influence the panel's conclusion on "knowing" use, when the government itself argued that the panel should decide the issue based on these very same considerations.

Similarly, a major weakness in the government case was that the evidence aligned to suggest that appellant knew he was pending a make-up UA. The government's invocation of considerations beyond the evidence of record went to this area where the government's evidence was already weak. If the panel accepted the uncontroverted evidence that appellant knew he was pending a make-

up UA, it is difficult to imagine a conviction. Given that the government's only counter to this evidence was the improper argument, this Court should not be confident that the members convicted the appellant on the basis of the evidence alone. *See Sewell*, 76 M.J. at 18.

The impact of improper argument is assessed cumulatively. See *Erikson*, 65 M.J. 224. There is also interplay between these two weaknesses in the government's case, as they both involve the weight of the evidence going to the same element: "knowing" use.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the finding of guilty and the sentence.

II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

Appellant testified that, immediately after noticing the foreign substance in his drink, he spoke to [redacted] and asked if [redacted] had seen anyone put anything in appellant's drink. (R. at 399-400, 412-14). Defense counsel was well aware from pretrial preparation that appellant would testify to this effect. (Def. App. Ex. A). [redacted], however, directly contradicted appellant's testimony on this point. (R. at 435, 438-41). Defense counsel never informed appellant that appellant's testimony on this crucial point would be contradicted by [redacted]. (Def. App. Ex. A). Indeed, after

appellant testified, defense counsel himself called [redacted] and elicited the directly contradictory testimony, impeaching his own client. (R. at 435, 438-41).

The government made full use of this inculpatory evidence at trial. Within the first page of cross examination of [redacted], the government latched on to the inconsistency:

> Q. Okay Did the accused ever say anything to you about someone putting something into his drink?
> A. Not that I recall, sir.
> Q. And you just testified that had he said something like that to you, that would have been something that would have stood out. Correct?
> A. It seems like it, sir.
> Q. Something, in other words, that you probably would have remembered?
> A. I believe so.

(R. at 440-41). In closing, the government went on to characterize this testimony as the "first big inconsistency" in the defense case:

> [redacted] further testified that if the accused had asked him a question, he probably would have remembered that as it would have stood out as a strange thing for Captain Downum to have asked him that night, if anything had happened to his drink. But according to the accused, he immediately asked [redacted] that night if anybody had tampered with his drink. Our first big inconsistency.

(R. at 578). The government further argued: "But unfortunately, [appellant's testimony] simply just doesn't make sense. And it isn't corroborated by his friends, by the witnesses that he called to testify to his defense." (R. at 582). The government again returned to this evidence in the very first lines of rebuttal argument:

> Panel Members, all he said that night was that someone put something in his drink. That is what defense counsel just told you. But that didn't happen. He didn't tell anybody. You heard the testimony of the witnesses that the accused called to testify. He never told anyone that some – that something was in his drink that night, not until after the urinalysis.

(R. at 605). A page later, the government again argued that appellant failed to "ask[] any of his friends if anything was in his drink or if he saw anything in his drink or if they saw anyone put anything in his drink." (R. at 606). On the next page, the government argued in the concluding lines of rebuttal argument:

> . . . he should have at least asked the people around him. And the accused wants you to believe that he did ask at least one person who was around him that night, but that person, when he was called to testify, said that never happened. The accused never asked anybody that night about what happened, about if there was anything in his drink, because he knew that he had consumed cocaine and he wanted this panel to believe that he had no idea that it was in his drink.

(R. at 607-08).

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016).

Law

To establish deficiency, appellant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts "must indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance." *Id.* at 689. This presumption can be rebutted by "showing specific errors [made by defense counsel] that were unreasonable under prevailing professional norms." *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Prejudice is established by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different." *Captain*, 75 M.J. at 103 (quotation omitted).

Defense counsel's duties extend to "fully inform[ing] [the accused] of all relevant facts bearing on his decision whether or not to testify. . . ." *Hauwiller v. State*, 295 N.W.2d 641, 644 (Minn. 1980) (reversing conviction for ineffective assistance of counsel where "counsel failed to adequately inform [the accused] of facts relevant to his decision whether or not to testify."). When an accused's testimony has potentially damaging consequences, defense counsel has the responsibility of explaining the options to the client and obtaining fully informed consent about the way forward. *See, e.g., United States v. Garcia*, 59 M.J. 447, 452 (C.A.A.F. 2004) ("defense counsel had the responsibility of explaining these options to his client and obtaining the client's fully informed consent as to which path to follow." (citing *Strickland*, 466 U.S. at 688)).

Argument

Defense counsel failed to inform appellant that a key witness would directly contradict a vital point of appellant's testimony. (Def. App. Ex. A). In the absence of this vital information, appellant was unable to make a fully informed decision about his right to testify or not testify. Nor did defense counsel discuss or take any steps to limit appellant's testimony to avoid this contradiction. (Def. App. Ex. A). To the contrary, after eliciting appellant's testimony, defense counsel himself called [redacted] and elicited the directly contradictory testimony, impeaching his own client. Defense counsel allowed appellant to walk unsuspectingly into an ambush and then personally sprung the trap. These are specific errors that are unreasonable under prevailing professional norms. Nor can these decisions be explained by any conceivable tactical considerations.

The Supreme Court has stated that: "The decision as to whether the defendant in a criminal case shall take the stand is . . . often of utmost importance, and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf." *Brooks v. Tennessee*, 92 S.Ct. 1891, 1893, 406 U.S. 605, 607–08 (1972). As such, "[i]n the context of deciding whether to testify or not testify, a fully-informed determination requires the defendant to have knowledge of and intelligently weigh the advantages and disadvantages of testifying and being subject to cross-examination, which the

defendant may be unable to assess" without knowledge of the other evidence in the case. *State v. Loher*, 398 P.3d 794, 807, 140 Hawaii 205, 218 (Hawaii 2017) (quotation marks and citations omitted). CPT Downum was denied the opportunity to make such a "fully-informed determination" because he did not have knowledge of facts necessary to "intelligently weigh the advantages and disadvantages of testifying". This gap in knowledge was due to his counsel's failure to inform him that another witness would directly contradict his testimony on a key point. Defense counsel's duties include "consult[ing] with the defendant on important decisions and to keep the defendant informed of important developments . . . ." *Strickland*, 466 U.S. at 688. Defense counsel fails in this duty when, as here, they do not provide the accused with the proper information upon which to make a decision "of the upmost importance". It was an "important development" in the case when defense counsel learned that [redacted] would directly contradict appellant's version of events. Defense counsel did not inform appellant of this important development. Similarly, defense counsel did not meaningfully consult with appellant on the important decision of appellant's testimony, given that defense counsel failed to inform appellant of facts necessary to "intelligently weigh the advantages and disadvantages of testifying".

Appellant was prejudiced by these errors. Appellant's right to exercise his rights in a fully informed manner was prejudiced. Additionally, the resulting

presentation of evidence was highly inculpatory. The prosecution made full use of this gift from the defense, immediately exploiting it on cross examination (R. at 440-41) and hammering it home at least five times in argument (R. at 578, 582, 605, 606, 607-08), including the very first and very last words of rebuttal argument (R. at 605, 607-08). As the CAAF has recently stated, the materiality and quality of evidence to the Government's case may be illustrated by the Government's use of that evidence. *United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). In this case, the government's extensive use of this evidence illustrates its materiality. Indeed, the government made this defense-presented evidence a central theme of its case. On these facts, there is "a reasonable probability that, but for counsel's [deficient performance] the result of the proceedings would have been different." *Captain*, 75 M.J. at 103 (quotation omitted).

WHEREFORE, appellant respectfully requests this Honorable Court set aside the finding of guilty and the sentence.

III. APPELLANT'S CONVICTION IS LEGALLY AND FACTUALLY INSUFFICIENT WHERE THE GOVERNMENT FAILED TO CALL THE TESTING EXPERT OR ADMIT ANY TESTING DOCUMENTS.

Additional Facts

The government marked various versions of the 13 September 2023 UA results (primarily consisting of the machine-generated data) as prosecution

exhibits, but never attempted to enter them into evidence. *See* (Pros Ex. 7 for ID) (machine-generated data); (Pros. Ex. 9 for ID) (machine-generated data accompanied by chain of custody documents); (Pros. Ex. 8 for ID) (chain of custody documents). The only documentary evidence the government *did* admit were the testing roster from the UA (Pros. Ex. 2), the DD Form 2624 documenting portions of the chain of custody but not noting any test results (Pros. Ex. 3), and the physical specimen collection bottle (Pros. Ex. 5).

The government did not call the lab expert who had conducted the testing as a witness. Instead, the government called a surrogate expert,[7] who testified that she had reviewed the litigation packet and, in her expert opinion, appellant's sample had tested positive for cocaine. (R. at 277). After being qualified as an expert witness in "forensic toxicology and drug testing," the surrogate expert provided an overview of the testing lab's operations (R. at 282-84), explained the lab's processes for receiving and testing samples – intermixed with testimony about chain of custody procedures (R. at 284-89, 304-312), and explained what cocaine was and how it is detected in drug tests (R. at 312-18). The surrogate expert testified that she had reviewed "the entire packet" containing appellant's

[7] [redacted], the technical director of the testing laboratory.

sample and "went through all the machine generated data and analysis." (R. at 312, 318). Based on this review, the surrogate expert testified that, in her expert opinion, appellant's sample tested positive for cocaine on the initial screening. (R. at 318-19). Similarly, she testified that "based on [her] review of the litigation packet" she formed "an opinion" that further testing, via gas chromatography mass spectrometry ([redacted]), had been conducted, and that this confirmatory test "was positive for BZE[8] at 295 nanograms per milliliter." (R. at 320).

Standard of Review

Issues of legal and factual sufficiency are reviewed de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted).

Law

"The test for legal sufficiency is 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." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (quoting *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017)). "[I]n resolving questions of legal sufficiency, [a CCA is] bound to draw every reasonable inference from the evidence of record

[8] A metabolite of cocaine.

in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). The evidence supporting a conviction can be direct or circumstantial. *See United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021) (citations omitted).

The National Defense Authorization Act for Fiscal Year 2021 amended Article 66(d)(1)(B) regarding factual sufficiency review as follows:

> (B) FACTUAL. SUFFICIENCY REVIEW
>
> (i) In an appeal of a finding of guilty under subsection (b), the Court [of Criminal Appeals] may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to-
>
> (1) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (2) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

Pub. L. No. 116-283, § 542(b), 134 Stat. 3611-12. *See United States v. Robinson*, ARMY 20220043, 2023 WL 3834822, at *2 (Army Ct. Crim. App. 2023) (summ.

disp.);[9] *see also United States v. Harvey*, __ M.J. __, 2023 WL 3589717 (N.M. Ct. Crim. App. 2023) (discussing new factual sufficiency standard).

The amendment to Article 66(d)(1)(B) applies only to courts-martial, where, as here, every finding of guilty in the Entry of Judgment is for an offense that occurred on or after 1 January 2021. *Id.* at 3612.

Argument

Given the military's unique practice of prosecuting drug *use*, often based exclusively on evidence from a positive UA, military appellate courts have developed a body of caselaw on the sufficiency of such evidence to sustain a conviction. Ideally, such prosecutions include testimony from the laboratory expert who performed the actual testing on the sample at issue. However, this is not always possible. In the absence of testimony from testing expert, precedent holds that the presentation of (1) positive UA results[10] and (2) interpretative

---

[9] Available at: https://www.westlaw.com/Document/I8e6dc97004b711eea9d4ca29979d76a1/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

[10] Under *Crawford v. Washington* and its progeny, case law has established that portions of laboratory reports, such as cover memoranda, are testimonial (and therefore inadmissible in the absence of testimony from the testing expert personally), but the actual test results (often referred to as "machine-generated data") are not testimonial (and therefore admissible regardless of the presence or

"surrogate" expert testimony to explain the results provides a legally sufficient basis upon which to convict for wrongful drug use. *See United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001) ("A urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required by *Murphy*, supra, provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use . . . .") (citing *United States v. Murphy*, 23 MJ 310, 312 (C.M.A. 1987)); *United States v Bond*, 46 M.J. 86, 89 (C.A.A.F. 1997) ("[E]vidence of urinalysis tests, their results, and expert testimony explaining them is sufficient to permit a factfinder to find beyond a reasonable doubt that an accused used marijuana."); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986); *United States v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987) (Conviction for drug use affirmed where government

---

absence of the testing expert). 541 U.S. 36 (2004); *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *United States v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007); *United States v. Blazier* ("Blazier I"), 68 M.J. 439 (C.A.A.F. 2010); *United States v. Blazier* ("Blazier II"), 69 M.J. 218, 222-24 (C.A.A.F. 2010) (". . . it is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay—machines are not declarants—and such data is therefore not 'testimonial.'"); *United States v. Dollar*, 69 M.J. 411 (C.A.A.F. 2011); *United States v. Cavitt*, 69 M.J. 413 (C.A.A.F. 2011); *United States v. Lusk*, 70 M.J. 278 (C.A.A.F. 2011).

introduced lab report and stipulation explaining the report). On the other hand, precedent is equally clear that the results of UA alone, with no expert testimony explaining the results, are insufficient to establish guilt. *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005); *United States v. Hunt*, 33 M.J. 345 (C.M.A. 1991); *Murphy*, 23 M.J. 310. As such, the proper course of action in such cases is clear: the prosecution should enter the test results into evidence and provide expert testimony to explain the raw data. *See, e.g., United States v. Hudson*, No. ACM 38846, 2017 WL 435735, at *1 (A.F. Ct. Crim. App. 2017) (unpub. op.)[11] (explaining in detail how the government presented (1) the positive UA results and (2) interpretative surrogate expert testimony explaining the results).[12]

The present case presents the inverse of the situation in *Brewer, Hunt*, and *Murphy*. In those cases, the government entered the test results into evidence but failed to present expert testimony explaining the results. In the present case, the government presented expert testimony but failed to enter the test results

---

[11] Available at: https://www.westlaw.com/Document/Idf8b0db0e94b11e6b79af578703ae98c/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

[12] Available at: https://www.westlaw.com/Document/Idf8b0db0e94b11e6b79af578703ae98c/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

themselves into evidence. While this Court need not determine why the government failed to enter the test results into evidence, it is notable that the government seems to have entered the trial with a plan to follow the well-established method of proving up a positive UA with surrogate expert testimony: the government had pre-marked the machine-generated data and seemingly planned to admit it along with the explanatory testimony from the surrogate expert. However, the government never attempted to admit its pre-marked exhibits. This Court should find this evidently inadvertent half-presentation legally insufficient. Expert testimony is intended to assist the factfinder in understanding *other evidence*. *See* Stephen A. Salzburg, Lee D. Schinasi, & David A. Schlueter, *Military Rules of Evidence Manual*, § 702.202[2] at p. no. 7-21-22 (7th Ed., Matthew Bender & Co. 2011) ("Such proof [expert testimony] is admitted because the experts have the knowledge and training to *help factfinders understand other evidence* in the case, or understand the way in which evidence relates to attended legal questions.") (emphasis added). The precedent on UA cases tracks this logic structure: the prosecution should introduce the test results, and then offer expert testimony to "assist the factfinder in understanding" the test results. Here, however, the government skipped the first of the two steps. This Court should find this half-presentation legally insufficient.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the finding of guilty and the sentence.

Conclusion

WHEREFORE, appellant respectfully requests this Honorable Court set aside the findings and the sentence.

[redacted]

DANIEL CONWAY
Civilian Appellate Defense Counsel
Daniel Conway and Associates
[redacted]

[redacted]

MATTHEW S. FIELDS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
[redacted]

Grostefon Matters

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, through appellate defense counsel, personally requests this Court consider the following matters:

1. **APPELLANT'S CONVICTION IS FURTHER FACTUALLY INSUFFICIENT BECAUSE THE EVIDENCE FAILED TO ESTABLISH THAT ANY INGESTION OF COCAINE WAS KNOWING.**

Standard of Review

Adopted from A.E. 1, above.

Law

Adopted from A.E. 1, above.

Argument

This Court should be clearly convinced that appellant's conviction was against the weight of the evidence because the evidence failed to establish the element that any ingestion of cocaine was "knowing."[13] Despite a considerable amount of testimony about appellant's activities within the usage window, there

[13] And, therefore, was not "wrongful." *See Manual for Courts-Martial, United States* (2019 ed.) (MCM), Pt. IV, ¶ 50.c.(10) ("Knowledge of the presence of the controlled substance is a required component of [wrongful] use.").

was a complete absence of evidence of appellant engaging in any behavior indicative of drug use or being under the influence of drugs.

To the contrary, there was considerable evidence that appellant had, in fact, unknowingly ingested a foreign substance on 11 September 2021 that would have explained the UA result two days later. Appellant testified that he noticed white powder in "his" drink after leaving it unattended. This was perfectly plausible given the descriptions of somewhat wild bar where the party occurred, particularly as "interlopers" had intermixed with the private event and were helping themselves to the "bottle service" drinks – all of which were served in glasses that looked the same. Another attendee, [redacted], confirmed that, *in the moment*, appellant looked at him and made a gesture to the effect of "what did you do?" or "did you do something[?]". (R. at 474-76). Appellant consistently disclosed this same, corroborated, version of events to his company commander after the urinalysis.

Furthermore, appellant's character and credibility were bolstered by an impressive amount of unrebutted character evidence.

Finally, the evidence showed that appellant was aware that he would be required to take a make-up UA soon after the weekend in question. The UPL confirmed that it was, indeed, the unit SOP to hold make-up tests for members who missed 100% UAs. Appellant's testimony that he was aware of this practice is perfectly credible given (1) his general experience as a member of the unit, (2) his

specific knowledge as a unit leader who was on the same group message thread about urinalysis scheduling as the UPL, and (3) the significant and unrebutted evidence that appellant was a truthful person. While the exact date the make-up test may have been uncertain, it is extremely difficult to believe that appellant would take the reckless risk of using illegal drugs while he knew he was pending a make-up UA. Notwithstanding the improper government argument discussed in A.E. II, above, the evidence that appellant knew he was pending a make-up UA was strong, consistent, and unrebutted.

This Court should be clearly convinced that it is against the weight of the evidence that an officer of appellant's unimpeachable character would knowingly use cocaine *while he knew he was pending a UA* and then repeatedly lie about it. This is particularly so given the complete absence of behavior indicative of drug use or being under the influence of drugs and, conversely, the presence of credible and corroborated evidence of unknowing ingestion.

WHEREFORE, appellant respectfully requests this Honorable Court set aside the finding of guilty and the sentence.

2. APPELLANT IS ENTITLED TO RELIEF FOR UNREASONABLE POST-TRIAL DELAY BY THE GOVERNMENT.

Standard of Review

Allegations of unreasonable post-trial delay are reviewed de novo. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F: 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

Prior to the implementation of the Military Justice Act of 2016 (MJA 2016) in January 2019, in pertinent part Article 66(d)(l), UCMJ granted this court the statutory authority to "affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Since at least 2002, the Court of Appeals for the Armed Forces (CAAF) has recognized that service level courts of appeal have two separate and independent avenues to provide relief for dilatory post-trial processing: (1) the Due Process Clause of the Fifth Amendment; and (2) the statutory basis under Article 66 when there is no showing of "actual prejudice." *See United States v. Grant*, 82 M.J. 814, 819 (Army Ct. Crim. App. 2022) ("Absent a due process violation, we still have authority under Article 66, UCMJ, to grant relief 'when appropriate under the circumstances"') (citations omitted). In *Toohey v. United States*, the CAAF adopted the four-factor balancing test from *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the post-trial delay constitutes a due process violation: "(1) length of the delay; (2) reasons for the delay; (3) the

appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant." 60 M.J. at 102.

MJA 2016 amended Article 66, UCMJ, to add a new section (d)(2), which provides in pertinent part that this court "may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of a court-martial after the judgment was entered into the record .... "

In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the CAAF established a presumption of reasonableness for post-trial processing where the convening authority took initial post-trial action within 120 days of trial, and the case was docketed with this court 30 days later. In light of the changes implemented by MJA 2016, this Court modified the *Moreno* timeline in *United States v. Brown* by holding that "this court will presume unreasonable delay in cases where more than 150 days elapse between final adjournment and docketing with this court." 81 M.J. 507, 510 (Army Ct. Crim. App. 2021). In *Brown* this Court also reiterated that "just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays .... "). *Id.* at 511.

In *United States v. Winfield* this Court overruled *Brown's* 150-day time limit, finding instead that some cases might justifiably take longer than 150 days to process for review and others should take significantly less time. 83 M.J. 662, 665 (Army Ct. Crim. App. 2023). Instead of imposing a bright-line time limit, this

Court reaffirmed the requirement for an explanation as set forth in *Brown*, and held that in determining the reasonableness of the delay, "we will scrutinize even more closely the unit-level explanations for post-trial processing delays." *Id.* Moreover, in *Winfield* this Court warned that "[s]taff judge advocates who decline to memorialize delays with thorough, credible, and relevant specificity do so at the peril of their units' cases on appeal." Id. at 665-66.

Argument

222 days elapsed from announcement of sentence to docketing.[14] Appellant submits this is excessive for a single specification case with a relatively short transcript (678 pages). The reasons for the delay also support relief. The government provided a "Letter of Lateness" to explain the delays in post-trial processing. (Letter of Lateness, 2 May 2023).[15] The largest delay was 138 days to transcribe the transcript, a pace of less than five (5) pages of transcription per day. The letter cites transcription caseload within the jurisdiction as the justification for this delay. Caselaw is clear that delays caused by "caseload" *cut against the*

---

[14] The sentence was announced on 10 November 2022 and the case was docketed with this Court on 20 June 2023.

[15] This document is contained on page 3 of the eROT. Of note, the letter states that the trial adjourned on 9 November 2022. The trial actually adjourned on 10 November 2022.

government rather than in its favor. *See Moreno*, 63 M.J. at 137 (holding that "other case load commitments" was a reason for delay that cut against the government, because: "caseloads are a result of management and administrative priorities and as such are subject to the administrative control of the Government. To allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the Article 66 and due process rights of appellants.") [16]; *United States v. Arriga*, 70 M.J. 51, 57 (C.A.A.F. 2011) (holding that "personnel and administrative issues, such as those raised by the Government in this case, are not legitimate reasons justifying otherwise unreasonable post-trial delay."). Additionally, appellate notes that the letter of lateness states that the case was not even sent out for "transcription assistance" until 18 January 2023, well over two months after adjournment. There is no reason why transcription caseload *within* the jurisdiction would impact how long it would take to send the case out to a different jurisdiction for transcription assistance.

---

[16] The CAAF found that these "case load commitments" cut against the government even though, in *Moreno*, it was the caseload of defense personnel that was at issue. Surely here, where it is government personnel at issue, caseload considerations cut even more strongly against the government.

Appellant requested speedy post-trial processing on 24 April 2023. (Speedy Post-Trial Demand, 24 April 2023).[17]

Appellant was prejudiced. Appellant's sentence did not include a discharge. As such, he has been left in a particularly anxious employment relationship with the prosecutorial authority during the entirety of the pendency of the post-trial processing of his case. Given the obvious significance of the ultimate disposition of this matter to appellant's career progression or termination, its speedy resolution is of particular importance to appellant's future.

WHEREFORE, appellant respectfully requests this Honorable Court grant appropriate relief for the post-trial delay.

[17] This document is contained on page 1146 of the eROT.

Certificate of Service

I certify that a copy of the foregoing was sent via electronic submission to the Army Court of Criminal Appeals and the Government Appellate Division on 18 September 2023.

MATTHEW S. FIELDS
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060