

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,

Appellee

v.

Captain (O-3)

**ROSS E. DOWNUM,**

United States Army,

Appellant

**APPELLEE MOTION FOR  
RECONSIDERATION AND  
SUGGESTION FOR  
RECONSIDERATION EN BANC**

Docket No. ARMY 20220575

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

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

COMES NOW, the undersigned appellate government counsel pursuant to  
Rules 27 and 31.2(b) and (e) of this court's Rules of Appellate Procedure to  
request that the court reconsider its 6 February 2024 Summary Disposition Opinion  
and suggest reconsideration of this case *en banc*. Reconsideration *en banc* is  
necessary because 1) this court misinterpreted and misapplied Court of Appeals for  
the Armed Forces [CAAF] precedent in drug urinalysis cases and created a new  
requirement that no other service court or the CAAF has ever used; 2) overlooked  
binding precedent regarding expert testimony; 3) misapplied and greatly expanded

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<sup>1</sup> Fort Hood was redesignated to Fort Cavazos on 9 May 2023. [Fort Cavazos  
Redesignation :: U.S. Army Fort Cavazos](#).

upon the holding in *United States v. Campbell*; and 4) conducted an improper factual sufficiency analysis. Army Court of Criminal Appeals Rules of Practice and Procedure Rule [A.C.C.A. R.] 27(b); 31.2(b)(1–3), (e).

### **Statement of the Case**

On 6 February 2024, this court set aside the findings and sentence and dismissed the charge and its specification with prejudice. *United States v. Downum*, ARMY 20220575, slip op. at 3 (Army Ct. Crim. App. 6 Feb. 2024). This court, pursuant to Article 66, UCMJ, concluded the finding of guilty was legally and factually insufficient. *Id.* at 1. The court set aside the finding and sentence and dismissed with prejudice the charge and its specification. *Id.* at 4. The government now files this motion within the required thirty-day timeline accompanied with a suggestion for reconsideration *en banc*. A.C.C.A. R. 31.2(a)(e). The government has not filed a certificate for review with the CAAF; therefore, this court has jurisdiction over this request for reconsideration. A.C.C.A. R. 31(b).

#### **I. This court’s legal sufficiency analysis overlooked and misapplied the law.**

##### **1. This court misapplied *Campbell* when creating a new requirement.**

In its ruling, this court asserted “[o]ur superior court has held expert testimony is required to *explain* the urinalysis results” and “[w]e interpret this to

require two things: *test results* and expert testimony.” *Downum*, slip op. at 4 (emphasis in original). This interpretation of *Campbell* is incorrect.

First, it ignores *Campbell*’s express holding, “[t]o sustain a prosecution in such cases, we have *required only that the results be supported by expert testimony* explaining the underlying scientific methodology and the significance of the test result.” *Campbell*, 50 M.J. at 159. Here, the finding of the test result came in substantively through the testimony of Dr. CO. (R. at 320). No where in *Campbell*, *Graham*, or the three preceding cases that they rest upon, does the CAAF state that the *paper document* is required, but only that expert testimony explaining the methodology and significance of the results is required for the permissible inference. *Campbell*, 50 M.J. at 159 (citing *United States v. Graham*, 50 M.J. 56, 58–59 (C.A.A.F. 1999) (“[T]here must be expert testimony or other evidence in the record providing a rational basis for inferring that the substance was knowingly used and that the use was wrongful.”); *see generally United States v. Harper*, 22 M.J. 157 (1986); *United States v. Murphy*, 23 M.J. 310 (1987); *United States v. Ford*, 23 M.J. 331 (1987).

Second, the Court of Military Appeals [CMA] has expressly found that a urinalysis case supported by an expert’s testimony and without the underlying drug test results is legally sufficient. *See United States v. Ford*, 4 U.S.C.M.A. 611, 615–16 (C.M.A. 1954) (rejecting the appellant’s claim that “the opinion of [the forensic

expert], standing alone, is insufficient to support a conviction”); *c.f. United States v. Ellibee*, 13 C.M.R. 416, 417–18 (A.B.R. 1953) (holding that while “the only evidence upon which the finding of guilty can be sustained is that elicited through the testimony of the [expert witness,]” the testimony of the defense expert witness weighed more heavily and thus warranted reversal). This court’s new requirement also directly conflicts with a case where the Air Force Court of Military Review found the same, and the CMA again affirmed that decision:

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

*United States v. Boulden*, 26 M.J. 783, 785 (A.F.C.M.R. 1988), *aff’d*, 29 M.J. 44 (C.M.A. 1989).

Ultimately, this court’s flawed interpretation of *Campbell* not only greatly expands upon the requirements established by the CAAF but is directly contradicted by the holding in *Campbell*; especially when considering this court’s interpretation in light of *Ford*, *Ellibee*, and *Boulden*. Reconsideration *en banc* is appropriate because a “material legal . . . matter was overlooked [and] misapplied in the decision.” A.C.C.A. R. 27.2(b)(2); 27.1(a) (“[U]niformity of the Court’s

decision refers to panels . . . of the other service courts of criminal appeals.”);

A.C.C.A. R. 31.2(b)(1, 3).

**2. The expert’s testimony regarding the test results came in substantively.**

Additionally, by ruling that the paper test results must be admitted for the government to prove wrongful drug use, this court overlooks an important and long standing principle of military evidence—unobjected to expert testimony regarding the results may be “given its natural probative value” and “may be considered as substantive evidence for any relevant purpose.”<sup>2</sup> This legal principle applies to evidence that would normally not be admitted substantively, but is especially true here, where the evidence was “nontestimonial” and would have been admitted

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<sup>2</sup> See *United States v. Olivares*, ARMY 20210125, 2023 CCA LEXIS 94, \*15 (Army Ct. Crim. App. 24 Feb. 2023) (“Prior inconsistent statements are generally only admissible for impeachment purposes but “may be considered [as substantive evidence] for any relevant purpose” when ‘admitted without objection.’”) (citing *United States v. Trisler*, 25 M.J. 611 (A.C.M.R. 1987) (holding hearsay admitted without objection allows the factfinder to give full probative value to the testimony); *United States v. Powell*, ARMY 20200006, 2022 CCA LEXIS 144, at \*5–6 (Army Ct. Crim. App. 8 Mar. 2022); *United States v. Semeniuk-Hauser*, ARMY 20110976, 2014 CCA LEXIS 220, at \*18–19 (Army Ct. Crim. App. 31 Mar. 2014) (“The general rule now is that where hearsay is admitted without objection, the fact finder may give that hearsay its natural probative value.”) (citing Mil. R. Evid. 802 analysis at A22-55; Dep’t of Army, Pam. 27-9, Legal Services: Military Judge’s Benchbook, para. 7-11-1 n.2 (1 Jan. 2010); see also *United States v. Reynoso*, 66 M.J. 208, 210–11 (C.A.A.F. 2008) (acknowledging that an expert witness’s testimony may summarize otherwise “voluminous writings, recordings, or photographs which cannot conveniently be examined in court”); Mil. R. Evid. 702 (stating that experts “may testify in the form of an opinion or otherwise”); but see *United States v. Zone*, 7 M.J. 21, 22 (C.M.A. 1979).

substantively regardless of an objection. *Downum*, slip op. at 4. This court's holding substantially diverges from prior holdings of other panels of this court and reconsideration is appropriate to "secure or maintain uniformity" regarding this issue and the probative value of expert testimony. A.C.C.A. R. 27.2(b)(1); 27.1(a) ("[U]niformity of the Court's decision refers to panels of this Court . . . .").

When this court found that "[t]here were no facts in evidence for [the expert] to explain and no results for her to interpret" it created a new standard regarding expert testimony that is unsupported by statute or case law. *Downum*, slip op. at 4. In fact, the CAAF has said just the opposite: "[the expert] could have arrived at an expert opinion based on training, education, experience and admissible evidence alone,<sup>3</sup> and considered, but not repeated, inadmissible evidence in arriving at an independent expert opinion." *United States v. Blazier*, 69 M.J. 218, 226 (C.A.A.F. 2010). Therefore, qualified experts may give their opinion based on evidence that is admissible or inadmissible, but there is no requirement to *admit* the underlying facts or data.

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<sup>3</sup> Regarding legal sufficiency, the CAAF went on to say that "[s]uch expert opinion and admissible evidence together could have been legally sufficient to establish the presence of drug metabolite in the urine tested," but never held that the machine generated data must be admitted for such a finding. *Id.* (emphasis added); see *Boulden*, 26 M.J. at 785; *Ford*, 4 U.S.C.M.A. at 615–16.

This court’s finding, as well as failing to consider material factual matters,<sup>4</sup> overlooks binding precedent regarding expert testimony: “This Court’s precedent makes clear that even when an expert relies in part upon ‘statements’ by an out-of-court declarant, the admissibility of the expert’s opinion hinges on the degree of independent analysis the expert undertook in order to arrive at that opinion.” *See United States v. Katso*, 74 M.J. 273, 282 (C.A.A.F. 2013); *supra* n.3.

Importantly, binding precedent, to include *Campbell*, requires and emphasizes the importance of *expert testimony* but does not support this court’s unprecedented finding— “[w]ithout the admission of the test results . . . the expert’s testimony lacked any relevance.” *Downum*, slip op. at 4. Therefore, this court’s finding that the “testimony lacked any relevance” is clearly erroneous, unsupported by any law or precedent, has broad reaching implications,<sup>5</sup> and should be reconsidered *en banc*. A.C.C.A. R. 27(b); 31.2(e).

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<sup>4</sup> Additionally, the following witnesses and testimony were facts in evidence that independently made Dr. CO’s expert testimony relevant for the fact finder’s consideration: SSG AP’s testimony that appellant provided a urine sample for testing, ((R. at 216–17); Pros. Ex. 2); SFC KL’s testimony—that he observed appellant provide a urine sample for testing, (R. at 264–66); and Ms. JS’s testimony that she properly maintained that sample in preparation for testing. (R. at 272–74, 316–20).

<sup>5</sup> Such a ruling could extend to all facets of expert testimony. For example, a medical professional’s testimony explaining her processes and procedures during a sexual assault forensic exam lack any relevance without the underlying paperwork documenting her findings.

**3. The testing methodology was not novel, nor was it contested at trial.**

Relying on *Campbell*, this court held that although “the government may use a positive urine test as part of its effort to prove illegal drug use,” the government failed to establish the scientific reliability of the testing procedure or account for the possibility of innocent ingestion. *Downum*, slip op. at 3. In *Campbell*, the court found appellant’s conviction legally insufficient where the government relied solely upon a “novel” testing procedure. 50 M.J. at 160. Notably, in 1999 the GC/MS testing *was* novel, and the record made clear that the testing procedure and facility was the only laboratory in the country using this novel method. *Id.* at 156. The court expressly predicated its ruling on this fact. *Id.* at 160 (“This case involves the novel use of the GC/MS/MS testing procedure for LSD, which according to the record was conducted by only one laboratory in the United States.”)

In contrast, here, there was no evidence that the testing methodology failed to reliably detect the presence and quantify the concentration of the drug or metabolite in the sample. Unlike *Campbell*, where the defense expert testified he would “‘disqualify the entire batch,’ including the results pertaining to appellant” based on the novel procedure and its lack of acceptance in the scientific community at that time; here, there was no evidence contradicting the reliability of the testing procedure. *Id.* at 158. In fact, as part of the defense team’s strategy,



trial defense counsel repeatedly conceded both Dr. CO's expertise and the detection of cocaine in appellant's urine through his questions and answers of Dr. CO, and his argument.<sup>6</sup> Appellant made the same concession during his direct examination:

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

(R. at 419).

Seemingly overlooked in this court's ruling, Dr. CO's testimony independently established the reliability of the tests conducted at her laboratory.<sup>7</sup>

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<sup>6</sup> (R. at 324) ("I hope it's clear that from our past working together, if I see something as a lay person who is not an expert in forensic toxicology, that its wrong or need correction, that you'll correct me."). (R. at 336) (Q. "So having reviewed the testing that folks at your lab did on this urine, are we correct to state – clearly and affirmatively, we can't say how much the subject who submitted this sample consumed in the way of cocaine? A. "Yes, I agree with that." Q. "All we can say is for certain, the subject consumed enough cocaine, then in the metabolic process it produced the metabolite that passed mustering the cut-off level that the lab sets?" A. "Yes."). (R. at 201) ("Because this case is not about whether or not there was BZE, the acronym for metabolite for cocaine, in Captain Downum's urine.").

<sup>7</sup> Dr. CO's testimony established that as the Technical Director of Tripler Army Medical Center's Laboratory, she oversaw the various processing sections who

That the government did not admit the machine generated data should go to the weight of the evidence rather than its relevance. *See Katso*, 74 M.J. at 284 (“That [the expert] did not himself perform aspects of the tests ‘goes to the weight, rather than to the admissibility’ of his opinion.”). Considering the validity of the tests were not contested by appellant, however, this court should find that the evidence was legally sufficient. *Id.* (“And given defense counsel’s limited cross-examination of [the expert] at trial, we decline to assume that they believed that there were grounds to attack the tests he did not personally perform.”). This is especially true when looking at Dr. CO’s testimony through the lens of legal sufficiency—“in the light most favorable to the prosecution.” *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017).

Dr. CO’s description of the testing methodology was sufficient. She describes the GCMS process as “a much more extensive analysis using gas chromatography mass spectrometry or GCMS.” (R. at 317). Her undisputed

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complete both the screening immunoassay test and the confirmation analysis using gas chromatography or liquid chromatography mass spectrometry. (R. at 277, 283). That all technical sections overseeing this process are trained and certified with annual recertification requirements. (R. at 283–85). The facility is certified as a military drug testing facility, that process is overseen by the Armed Forces Medical Examiner’s System, the facility is inspected three times per year, and has never failed an inspection. (R. at 284). That the laboratory receives 5000–6000 specimens per day, (R. at 288–89), first screening for the family of drugs—using the “quick and efficient” immunoassay test, then following on with the GC/MS test. (R. at 317).

testimony established that the “GCMS looks for the fingerprint of the drug. And much like the human fingerprint, each drug or the metabolite has a very unique fingerprint. And if you find the fingerprint in that urine, that means that the drug or the metabolite is in that urine.” (R. at 317–18).<sup>8</sup>

This court held that this testimony constituted “virtually no information about the test itself, whether it is regarded as scientifically sound, and whether it was conducted in accordance with prescribed procedures in this case.” *Compare Downum*, slip op. at 3, with *supra* n.9. Such an assertion fails to draw “every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018). Appellant’s concessions combined with Dr. CO’s above referenced testimony clearly established the reliability of the test results and procedures under both the legal and factual sufficiency standards. Ultimately, the only reasonable inference to be drawn from the entirety of the evidence regarding the testing methodology, procedure, and results is that they were, in fact, scientifically sound and reliable.

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<sup>8</sup> Dr. CO uses a second analogy to explain the purpose and reliability of the two tests, explaining that the immunoassay test screens for all presumptively positive specimens—like identifying a specific brand of vehicle in a parking lot, then the GC/MS test looks for the specific make of that vehicle. (R. at 319–20).

## **5. The expert testimony reasonably accounted for innocent ingestion.**

This court erroneously held that the government failed to “reasonably account[] for the possibility of innocent ingestion” by explaining the “cutoff level’s relevance, or any other evidence indicating test controls for the possibility of innocent ingestion.” *Downum*, slip op. at 3. This holding failed to consider material facts.

First, not only did the government rely on evidence other than expert testimony to establish knowing and wrongful use, but Dr. CO’s testimony expressly acknowledged that appellant’s nanogram level was above the “cutoff level,” and that it was nearly the exact median amount of every sample that tested above the “cutoff level” for 2021. (R. at 337). Dr. CO expressly stated that appellant’s sample was higher than nearly fifty percent of all test subjects (“close to 1500 positives”) who had more than the cutoff level of 100 nanograms per milliliter of cocaine in their system. (R. at 337). This is highly probative of knowing and wrongful use and a fact overlooked in this court’s holding. (R. at 337).

This evidence directly contradicted appellant’s theory that his sample was uniquely low and the reasonability of his innocent ingestion defense. Importantly, this evidence directly contradicts this court’s finding that “there was no explanation of the cutoff level’s relevance, or any other evidence indicating test

controls for the possibility of innocent ingestion.” *Downum*, slip op. at 3.

Ultimately, on its own, this evidence is sufficient “to rationally permit factfinders to find beyond a reasonable doubt that an accused’s use was knowing.” *Campbell*, 50 M.J. at 162. A.C.C.A. R. 27.2(b)(2).

**6. Appellant’s testimony supported the inference of wrongful use.**

*Campbell* expressly states that only in cases where the government solely relied on the presence of drugs in the body, then “only to the extent that the prosecution seeks to rely on the permissible inference of knowledge from the presence of the drug in the sample [] the cutoff level must be such as to rationally permit factfinders to find beyond a reasonable doubt that an accused’s use was knowing.” 50 M.J. at 162. Unlike *Campbell*, the results of appellant’s urinalysis were not the only evidence for the permissible inference of wrongful use; appellant’s false exculpatory statements to his command, implausible explanation of innocent ingestion, and concession as to the validity of the results provided ample evidence for any rational factfinder to find appellant guilty beyond a reasonable doubt. *Id.* at 160. *Campbell* expressly acknowledged that the government “may be able to prove wrongful drug use through an admission by the accused.” *Id.* at 159. This evidence was not present in *Campbell* but was present in this case. *Id.* (“In some cases, however, the prosecution has no direct evidence of use and no circumstantial evidence in the form of any effect on the conduct of

the accused.”). It is a well-settled principle that false exculpatory statements of an accused may be considered as substantive evidence of his guilt. *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021).

As this court stated in *United States v. Pleasant*, “[w]here some corroborative evidence of guilt exists for the charged offense . . . and the defendant takes the stand in her own defense, the Defendant’s testimony, denying guilt, may establish, by itself, elements of the offense.” 71 M.J. 709, 713 (Army Ct. Crim. App. 2012). Appellant’s testimony acknowledged that there was cocaine in his system, (R. at 419), but sought to explain its presence by the single sip of a nearly full beverage, which was allegedly so saturated with cocaine, that it caused him to have the median amount of cocaine in his urine nearly thirty-six hours later. (R. at 337, 396). This story was not credible, and the panel clearly rejected it. (R. at 567–69, 617).

## **II. This court erred in its factual sufficiency analysis.**

This court erred in its reliance on *United States v. Scott*, \_\_M.J.\_\_ (Army Ct. Crim. App. 27 Oct. 2023), *set aside*, 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024) (setting aside the judgment for failing to consider appellant’s *Grostepon* matters) in its interpretation of the new factual sufficiency standard. *Downum*, slip op. at 2. On 1 February 2024 the CAAF set aside *United States v. Scott*. 2024 CAAF LEXIS 68 (C.A.A.F. 1 Feb. 2024). With no standing precedent, this court

should rely upon and adopt the reasoning in *United States v. Harvey* for the proposition that “Congress has implicitly created a rebuttable presumption that in reviewing a conviction, a court of criminal appeals presumes that an appellant is, in fact, guilty.” 83 M.J. 685, 693 (N.M. Ct. Crim. App. 2023), *rev. granted*, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024).

This court has failed to give the “appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence” when failing to consider important facts in determining whether there was sufficient evidence to permit a rational factfinder to find knowing and wrongful use. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, sec. 542(b), 134 Stat. 3611–12. The evidence introduced at trial established motive, (R. at 212, 260, 382, 385), opportunity, (443, 473), and knowledge (R. at 403, 405, 483).<sup>9</sup> This court has summarily dismissed an important legal principle when substituting its judgment for the factfinder, “a defendant who chooses to present a defense runs


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<sup>9</sup> For example, appellant’s own witnesses testified that cocaine use was frequent and apparent at Buford’s and that they were there with appellant the weekend prior. (R. at 364, 443, 473). A proper inference was that appellant had the opportunity to knowingly use cocaine at this location and did. (R. at 576). Another reasonable inference was that appellant had a motive to use cocaine that weekend when he had just missed a one hundred percent urinalysis and figured he would not be tested again for some time. (R. at 581–82). Appellant’s statements to Mr. KG the week of, or shortly thereafter, regarding the results of his urinalysis prove knowing and wrongful use of cocaine. (R. at 483). Appellant’s statements to his company and battalion commander one day after his urinalysis show consciousness of guilt. (R. at 403, 405, 413).


a substantial risk of bolstering the Government's case." *Pleasant*, 71 M.J. at 713; *Downum*, slip op. at 4, n.7. Accordingly, this court should reconsider its prior ruling and find that appellant's conviction was legally and factually sufficient.

### **Conclusion**


WHEREFORE, the United States respectfully suggests this honorable court reconsider its ruling in this case *en banc*.



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MOTION FOR  
RECONSIDERATION

**Panel No. 3**

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

SUGGESTION FOR  
RECONSIDERATION EN  
BANC

ADOPTED: \_\_\_\_\_

NOT ADOPTED: \_\_\_\_\_

DATE: \_\_\_\_\_

**CERTIFICATE OF SERVICE, U.S. v. DOWNUM (20220575)**

I certify that a copy of the foregoing was sent via electronic submission to  
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