No. _____

IN THE

Supreme Court of the United States

ADAM S. KELNHOFER,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

TREVOR N. WARD
Counsel of Record
United States Air Force
Appellate Defense Division
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
trevor.n.ward.1@us.af.mil

Counsel for Petitioner

QUESTION PRESENTED

Master Sergeant (MSgt) Adam S. Kelnhofer served over nineteen years in the United States Air Force. He was a respected non-commissioned officer with no history of substance abuse. On a random urinalysis test, MSgt Kelnhofer tested positive for cocaine at 116 ng/ml, just 16 ng/ml over the Department of Defense's cutoff level. This positive test result occurred less than a year before MSgt Kelnhofer was eligible to retire.

The Government prosecuted MSgt Kelnhofer for cocaine use but presented no evidence that MSgt Kelnhofer knowingly ingested cocaine, an element of that offense. Instead, the Government relied on a "permissive inference." This inference allows military triers of fact to find a servicemember knowingly used an illegal drug so long as a metabolite for that drug is in the servicemember's body. This inference may be used regardless of scientific evidence directly contradicting it.

The question presented is:

Whether the inference allowing a trier of fact to find knowing use of a drug based solely on the presence of a metabolite in a defendant's body, even when that inference is contradicted by the prosecution's scientific evidence, is unconstitutional?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for the purposes of Rule 14.1(b)(iii).

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INTRODUCTION

The due process clause of the Fifth Amendment tolerates permissive inferences in criminal prosecutions only when the Government satisfies certain safeguards. *Barnes v. United States*, 412 U.S. 837, 842 (1973).

But since at least 1969, military courts have perpetuated a permissive inference antithetical to the Fifth Amendment's guarantee. *Compare United States v. Harper*, 22 M.J. 157, 159 (C.M.A. 1986) (discussing the development of the inference), *with United States v. Green,* 55 M.J. 76, 87 (C.A.A.F. 2001) (Gierke, J., dissenting) (discussing the constitutional problems with the permissive inference).

For a brief, two-year period, the Court of Appeals for the Armed Forces (CAAF) imposed reasonable limitations on the use of the permissive inference—limitations that would have precluded a conviction in this case. *See United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999) [hereinafter *Campbell I*], *supplemented upon reconsideration*, 52 M.J. 386 (C.A.A.F. 2000) [hereinafter *Campbell II*]. In 2001, however, the same court removed those guardrails. *Green*, 55 M.J. 76; *see also United States v. Camacho*, 58 M.J. 624, 629 (N-M. Ct. Crim. App. 2003) (characterizing *Green* as "retreat[ing] from" *Campbell*'s requirements). The resulting unconstrained permissive inference violates servicemembers' Fifth Amendment due process rights.

To be found guilty of unlawful drug use in the military, the Government must prove the accused used the drug knowingly. *Manual for Courts-Martial* (*MCM*), Part IV, ¶ 50.c.(10) (2019 ed.). But the Government need not actually prove knowledge; this is because military courts authorize the inference of knowledge merely through the presence of a metabolite in the accused's body. *MCM*, Part IV ¶ 50.c.(10). This inference may be used regardless of evidence directly contradicting it.

While this Court has sometimes articulated conflicting standards for what makes a criminal inference constitutional, *Barnes*, 412 U.S. at 842, the Government cannot satisfy any such standard in this case. This is because the Government's evidence directly contradicted the inference.

PETITION FOR A WRIT OF CERTIORARI

Master Sergeant (MSgt) Adam S. Kelnhofer, United States Air Force, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF) denying review of the Air Force Court of Criminal Appeals' (Air Force Court) decision.

OPINIONS BELOW

The decision of the Air Force Court is unreported. It is available at 2024 CCA LEXIS 492 and is reproduced at pages 2a-18a. The decision of the CAAF is pending publication in *West's Military Justice Reporter*. It is available at 2025 CAAF LEXIS 156 and reproduced at page 1a.

JURISDICTION

The CAAF declined to grant review of the question presented here. The CAAF issued its order denying

review on February 13, 2025. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, provides: "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Article 112a, UCMJ, 10 U.S.C. § 912a, in pertinent part, provides:

> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following: (1) . . . cocaine.

The *MCM*, 2019 ed., Part IV, ¶ 50.c (10), in pertinent part, provides:

> "Use" means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the Government's burden of proof as to knowledge.

STATEMENT OF THE CASE

MSgt Kelnhofer was born at K.I. Sawyer Air Force Base, Michigan, to two Air Force members. Def. Ex. A at 1. In 2003, MSgt Kelnhofer followed in his parents' footsteps and joined the Air Force. Pet. 4a. MSgt

Kelnhofer deployed many times, including seven combat deployments. Def. Ex. A at 1; Pros. Ex. 6 at 1. Throughout his Air Force career, MSgt Kelnhofer was routinely rated as exceeding expectations. *See generally* Pros. Ex. 7.

MSgt Kelnhofer's brother got married on Saturday, June 4, 2022, in Richmond, Virginia; MSgt Kelnhofer was a groomsman. Pet. 8a. Festivities began on Friday evening, June 3, 2022, with a welcome party. R. at 349. The party had buffet-style food and a bar. R. at 350-51. No witness saw MSgt Kelnhofer possess or use cocaine at the party. *E.g.*, R. at 353. Similarly, no witness saw him exhibit signs of intoxication that would be consistent with the use of cocaine. *E.g.*, R. at 353. One witness testified that he did not believe MSgt Kelnhofer used any illicit drugs, to include cocaine, at the party. R. at 354.

The wedding took place the next day, Saturday. R. at 354. MSgt Kelnhofer spent most of the day with other members of the wedding party. R. at 354-56, 360-75. MSgt Kelnhofer gave a speech at the wedding. R. at 368. No witness saw him possess or use cocaine. *See, e.g.*, R. at 360-75. No witness saw him exhibit signs of intoxication that would be consistent with cocaine use. *E.g.*, R. at 360-75. One witness testified that MSgt Kelnhofer was not intoxicated during the wedding at all. R. at 368. The same witness testified that he did not believe there was any drug use at the wedding. R. at 384. Before MSgt Kelnhofer departed on Sunday, June 5, 2022, no witness saw him use cocaine or exhibit any signs of intoxication. R. at 374-75.

Shortly after the wedding, MSgt Kelnhofer was ordered to submit to a random drug test by his

military commander. Pet. 4a. Within ten minutes of being notified of this order, MSgt Kelnhofer reported to give a urine sample. R. at 251. Eight minutes later, MSgt Kelnhofer provided his sample. R. at 253. While providing his sample, MSgt Kelnhofer did not appear nervous; he was not fumbling or evasive.[1] R. at 274-75. On June 17, 2022, MSgt Kelnhofer's urine was reported positive for cocaine metabolites at 116 ng/ml, only 16 ng/ml over the Department of Defense's cutoff level. Pros. Ex. 3 at 11; R. at 329. This was the only positive test result for MSgt Kelnhofer. *Cf.* R. at 254 (implying that no subsequent test–often required of servicemembers who initially test positive—returned a positive result).

The Government charged MSgt Kelnhofer with one allegation of wrongful use of cocaine. Pet. 5a. As evidence, the Government presented: (1) an Air Force Drug Testing Lab (AFDTL) report; (2) the order to provide his urine sample for testing; (3) photos of a urine collection bottle; (4) his leave records; and (5) testimony from Air Force drug testing personnel. Pros. Exs. 1-4; R. at 223, 261, 283.

None of the evidence presented by the Government proved MSgt Kelnhofer knowingly used cocaine. Instead, the Government's expert testified that positive drug test results *do not* prove knowledge. R. at 332-33. The Government expert went on to explain that it is "totally feasible" that MSgt Kelnhofer could have accidentally ingested cocaine from food or drinks

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[1] Despite having an admittedly bad memory, R. at 274, the observer who watched MSgt Kelnhofer provide his sample specifically recalled these facts. R. at 274-75.

at the wedding. R. at 333-34. This is not "a crazy hypothetical." R. at 334. Rather, as the Government expert articulated, it is supported by real-world examples and scientific studies. R. at 334. The expert continued: "to determine whether somebody knowingly used cocaine, *you can't rely on a drug testing report itself*." R. at 334-35 (emphasis added).

Despite the Government expert's testimony, the trial judge instructed the panel members (the court-martial equivalent of jurors) that:

> Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of the metabolite of cocaine in the accused's urine that the accused knew he used cocaine. However, the drawing of any inference is not required.

R. at 401-02.

Despite evidence directly contradicting the so-called "permissive inference"—and no evidence of MSgt Kelnhofer's knowing use—MSgt Kelnhofer was convicted of using cocaine.

On appeal, MSgt Kelnhofer argued that his conviction violated his due process rights under the Fifth Amendment because the Government failed to prove that he knowingly used cocaine, an element of the offense. Pet. 12a. The Air Force Court rejected this argument, reasoning that permissive inferences—such as the one used to convict MSgt Kelnhofer—are always constitutional so long as they are permissive and rational. Pet. 12a-13a. The CAAF declined to review this case. Pet. 1a.

REASONS FOR GRANTING THE PETITION

I. The military's permissive inference contradicts both science and common sense. It is an irrational and arbitrary inference that is facially unconstitutional.

The drug use permissive inference is facially unconstitutional because it is not supported by common sense or science. In *Leary v. United States*, this Court reasoned that "a criminal statutory presumption must be regarded as . . . unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact." 395 U.S. 6, 36 (1969); *cf. Barnes*, 412 U.S. at 842 (summarizing this same standard).

An inference must be supported by "present-day experience." *Barnes*, 412 U.S. at 844-45. The drug use inference is facially unconstitutional because present-day experience does not demonstrate it is "more likely than not" true.

The drug use permissive inference states that military members know they ingested a controlled substance because a metabolite of that substance is detected in a drug test. *MCM*, Part IV, ¶ 50.c.(10). This is unsupported by present-day experience. Accidental, or otherwise unknowing, ingestion of controlled substances is exceedingly frequent. People who attend weddings are accidentally—or sometimes purposefully—dosed by their hosts. Maria Cramer, *Florida Wedding Guests are Sickened by Marijuana in Food*, Police Say, N.Y. TIMES, Apr. 21, 2022,. Others are routinely subjected to civilians using drugs near them as they walk through city streets or go out to public restaurants and bars. Amanda Michiko

Shigihara, *Health Behaviors in the Service Sector: Substance Use Among Restaurant Employees*, 14 J. SOCIAL, BEHAVIORAL & HEALTH SCIENCES 37 (2020). Military members are not even safe on military installations, where products sold by on-base vendors sometimes contain controlled substances. Military.com, *Protein Shakes Pulled from Military Base GNC Stores because they Contained Hemp Seeds*, (Jan. 2, 2025), available at https://www.military.com/daily-news/2024/09/23/pro-tein-shakes-pulled-military-base-gnc-stores-because-they-contained-hemp-seeds.html.

Consistent with such incidents, in this case, the Government's expert testified to several ways an unwitting servicemember could accidentally ingest controlled substances. For example, patrons at restaurants and bars may be served food and drinks contaminated with controlled substances. R. at 333-34. The Government's expert said that these and other similar examples are not "crazy hypotheticals"; rather, they are supported by present-day experience and scientific research. R. at 334.

As demonstrated by our present-day experience—and the testimony of the Government's expert in this case—servicemembers, no matter how vigilant, cannot avoid accidental or otherwise unknowing exposure to controlled substances. Therefore, it is not "more likely than not" true that a metabolite for a drug in one's system means that that person *knowingly* ingested the controlled substance.

Despite the inference not being supported by our present-day experience, military courts have long justified its use so long as the scientific report from the drug testing lab is reliable. *See Green*, 55 M.J. at 80; *Campbell I*, 50 M.J. at 160; ; *see also* Anthony Yim,

Drug Use Cases in the Military: The Problems of Using Scientific Circumstantial Evidence to Meet the Burden of Proof, 50 NAVAL L.R. 83 (2004) [hereinafter *Drug Use Cases in the Military*] (explaining the permissive inference's pervasive impact on the military justice system). This is a far cry from the Constitution's demand that a criminal permissive inference be supported by present-day experience. *Barnes*, 412 U.S. at 844-45; *Drug Use Cases in the Military* at 98. As Judge Gierke of the CAAF noted in his dissenting opinion in *Green*, "a reliable urinalysis test is relevant . . . to prove *use* of drugs. However, it does not prove *knowing use* unless it is supplemented by expert testimony or other evidence showing knowing use." 55 M.J. at 87 (Gierke, J., dissenting) (emphasis added).

The permissive inference was developed by the Court of Military Appeals (CMA)[2] "in the context of [the] longstanding recognition [of] the serious threat to military readiness posed by drug abuse." *Campbell I*, 50 M.J. at 159. But historic use by military courts cannot, on its own, justify an otherwise unconstitutional inference. *Barnes*, 412 U.S. at 844-45 (reasoning that history of courts' use of an inference does not make an inference constitutional). Even military courts have recognized that the permissive inference goes beyond the limitations prescribed by this Court. *Campbell I*, 50 M.J. at 159.

Despite this recognition, military courts are unwilling to apply the Constitution's protections to servicemembers when it comes to the use of controlled substances. This Court should grant review to decide

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[2] This is the predecessor court to the CAAF.

whether the military's permissive inference is facially unconstitutional.

II. Even if not facially unconstitutional, the permissive inference as applied to MSgt Kelnhofer violated the Fifth Amendment.

When an inference is the only proof of guilt, it must meet a standard higher than "more likely than not;" it must establish guilt beyond a reasonable doubt. *Turner v. United States*, 396 U.S. 398, 405 (1970); *cf. Barnes*, 412 U.S. at 846. In this case, the inference was insufficient to prove MSgt Kelhhofer's guilt beyond a reasonable doubt.

The inference in this case was the only proof that MSgt Kelnhofer knowingly used cocaine. As such, the inferred fact had to be proved beyond a reasonable doubt. At least as applied here, though, the inferred fact could not be proved beyond a reasonable doubt. Nevertheless, the Air Force Court affirmed the conviction, merely explaining that all permissive inferences are constitutional so long as they are permissive and rational. Pet. 12a-13a. In addition to conflicting with this Court's precedent, as discussed above, the Air Force Court's reasoning does not satisfy the factors that the CAAF identified in *Campbell I* to warrant application of the permissive inference. While the CAAF subsequently relaxed those requirements in *Campbell II*, *Drug Use Cases in the Military* at 91-92, this case demonstrates why such guardrails on application of the permissive inference are constitutionally required.

In *Campbell I*, the CAAF established certain safeguards for the permissive inference to protect against due process problems; these safeguards include expert testimony showing: (1) that an accused

reasonably experienced the effects of the drug; and (2) that the use of the drug was knowing. 50 M.J. at 160. Here, the Government failed to satisfy these safeguards. First, the Government did not present expert testimony to demonstrate that the cutoff level and reported concentration were high enough to discount the possibility of an unknowing ingestion. *Campbell*, 50 M.J. at 160. Instead, the Government's own expert directly contradicted this standard. The expert testified that there is "no difference between" the cutoff (100 ng/ml) and MSgt Kelnhofer's result (116 ng/ml). R. at 329. According to the expert, the 100 ng/ml cutoff is merely an "administrative line" that cannot demonstrate "what the effects of cocaine" are on an individual. R. at 329-30. To the expert, MSgt Kelnhofer could have unknowingly ingested cocaine, and neither his test level (116 ng/ml) nor the cutoff level (100 ng/ml) could inform whether the ingestion was knowing. R. at 331-34.

Second, the Government failed to present expert testimony to demonstrate that MSgt Kelnhofer experienced the physical or psychological effects of the drug. *Campbell*, 50 M.J. at 160. The expert testified that it is possible MSgt Kelnhofer never felt the effects of cocaine. R. at 331. He went further, testifying that there was "no evidence that MSgt Kelnhofer actually felt" the effects of cocaine, and that neither the cutoff level nor MSgt Kelnhofer's positive result of 116 ng/ml shows that he felt the effects of cocaine. R. at 331.

This failure is further illuminated by the Government's own expert, who testified that the positive test result of 116 ng/ml could not prove that MSgt Kelnhofer knowingly used cocaine or felt the effects of any such use. R. at 331-34. Even with a lower "more likely than not" standard, the inferred fact fails

for the same reasons. *See, e.g.*, R. at 334-35 ("[I]n order to determine whether somebody knowingly used cocaine, you can't rely on a drug testing report itself.").

The Constitution requires more than mere conjecture to convict. *Drug Use Cases in the Military* at 98. Yet, that's exactly what happened in this case. The permissive inference was not only unsupported by common sense and evidence admitted at trial, it was also contradicted by the Government's own scientist. When, as here, the permissive inference cannot be proved by any standard of proof, it is unconstitutional.

CONCLUSION

More than 75 years ago, the permissive inference was created to deal with the "serious threat" posed to military readiness by drug abuse. *Campbell I*, 50 M.J. at 159. But that inference was unconstitutional the day it was created, and modern science and common sense illuminate its unconstitutional nature. Despite repeated challenges to the inference over the past 75 years, and a recognition by military courts of the constitutional problems inherent to it, the military has declined to restrain its use. Only this Court can ensure servicemembers like MSgt Kelnhofer are convicted only of those crimes the Government proves beyond a reasonable doubt.

This Court should grant review either to hold that the permissive inference violates the Fifth Amendment or to summarily grant and remand the case to the CAAF for further consideration.

Respectfully submitted,

TREVOR N. WARD
Counsel of Record
United States Air Force
Appellate Defense Division
1500 West Perimeter Road
Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770
trevor.n.ward.1@us.af.mil

Counsel for Petitioner