Filed on April 14, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

CAMERON N. HOGANS,
Senior Airman (E-4),
United States Air Force,
Appellant.

Crim. App. Dkt. No. 22091

USCA Dkt. No. 25-0119/AF

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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Senior Airman (E-4),	)	USCA Dkt. No. 25-0119/AF
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ERRORS ASSIGNED FOR REVIEW

I.

Whether the military judge abused his discretion when he denied a defense motion to exclude a video that the Government had in its possession for over a year for a related case but which it had failed to disclose until the night before trial.

II.

Whether the military judge abused his discretion and abandoned his neutrality in sua sponte moving for a finding of not guilty and then allowing the Government to reopen its case to establish the missing element that he identified.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C.

§ 866(d).[1] This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

In May 2022 at a special court-martial, Senior Airman (SrA) Cameron N. Hogans (Appellant) pled guilty to two specifications of drug use before a miliary judge. Entry of Judgment. SrA Hogans pled not guilty to two other specifications of drug use and was tried before members for those specifications. Entry of Judgment. He was ultimately found guilty of all four specifications under Article 112a, UCMJ. Entry of Judgment.

The military judge sentenced SrA Hogans to confinement for a total of three months, forfeiture of $1,222.00 pay per month for three months, reduction to the grade to E-1, and a reprimand. R. at 447. The Convening Authority took no action on the findings in the case and approved the sentence in its entirety. Convening Authority Decision on Action Memorandum.

On November 14, 2022, review under Article 65(d), UCMJ, 10 U.S.C. § 865(d), was completed. SrA Hogans had not yet submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ, 10 U.S.C. § 869, at the time he submitted a notice of direct appeal under Article 66(b)(1)(A), UCMJ, 10

[1] All citations to the UCMJ, Rules for Courts-Martial (R.C.M.), or Military Rules of Evidence (M.R.E.) are to the versions in the *Manual for Courts-Martial* [*MCM*], *United States* (2019 ed.) unless otherwise noted.

U.S.C. § 866(b)(1)(A),[2] to the AFCCA on August 14, 2023. The AFCCA docketed SrA Hogans's case on August 29, 2023, as a direct appeal.

At the AFCCA, SrA Hogans raised three assignments of error, two of which are errors assigned for review here. Appendix at 2. The AFCCA found no error that materially prejudiced SrA Hogans and affirmed the findings and sentence. *Id*.

STATEMENT OF FACTS

SrA Hogans pled guilty to using cocaine and marijuana on divers occasions. R. at 90; Entry of Judgment. However, he pled not guilty to using lysergic acid diethylamide (LSD) and 3,4-methylenedioxymethamphetamine (MDMA). R. at 90; Entry of Judgment. The day before trial began, the Government provided the defense a video purporting to show SrA Hogans's hand holding LSD, which was combined in a short montage with other videos showing alleged drug use. R. at 19-20, 35; Appellate Ex. XVI at 4. The Government intended to offer the video montage of alleged drug use as M.R.E. 404(b) evidence. R. at 19-20; Appellate Ex. XIV at 2. However, the portion of the video purportedly showing people holding LSD in their hands was ruled as evidence of the charged offense, rather than M.R.E. 404(b) evidence.[3] Appellate Ex. XVI at 13.

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[2] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544(b)(1)(A), 136 Stat. 2395, 2582 (Dec. 23, 2022) (amending Article 66, UCMJ, at the end of 2022 and expanding jurisdiction for direct appeals).

[3] All other portions of this video, Appellate Exhibit X, containing what appeared to be drug use were excluded under M.R.E. 404(b). Appellate Ex. XVI at 13. The video

This video had been in the Government's possession since at least March 16, 2021, when it seized Airman Basic (AB) Breanah Moon's phone; AB Moon was SrA Hogans's friend and also under investigation for drug use. R. at 24, 37, 51; Appellate Ex. XVI at 4; *see* R. at 23 (showing AB Moon was convicted of drug use). The search authorization for the phone stated the Government could search AB Moon's phone for "any multimedia that's specific to the narcotic use." R. at 38, 56. This was the same narcotic use of which SrA Hogans was accused. *See* R. at 23-31 (showing that AB Moon testified she did drugs with SrA Hogans and took videos and pictures of it). Despite finding other videos and pictures on AB Moon's phone and maintaining a Cellebrite extraction since at least March 2021 (which purportedly copied the contents of AB Moon's phone), the Government apparently never found the video depicting hands holding LSD. R. at 54-56.

Airman Moon agreed, under a grant of immunity, to testify against SrA Hogans regarding his drug use. R. at 25, 295. In interviews with law enforcement, Airman Moon stated she had videos and pictures on her phone—the one that had been seized, copied, and searched by the Government—involving drug use. R. at 38, 48. She was interviewed multiple times in 2021 prior to receiving immunity, and then following receipt of immunity in November or December 2021, she was

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itself, Appellate Exhibit X, is missing from the record of trial. Appendix at 2 n.4. However, the portion of the video that was not excluded and is relevant to this issue is part of a seventeen-second video that was admitted as Prosecution Exhibit 1.

interviewed five or six times more times. R. at 39-40, 45, 48. Notwithstanding her statements in her interviews, there was no indication the Government found any drug-related video files when it searched AB Moon's phone. Appellate Ex. XVI at 4.

On April 22, 2022, AB Moon received her phone back from the Government. R. at 37. During an interview with defense the day before trial, the defense asked if she had a certain picture. R. at 41. AB Moon looked through her camera roll and could not find that photo. *Id*. She then looked at the pictures and videos associated with her messages. *Id*. There, she found the video that alleged to show SrA Hogans's hand holding what was purportedly LSD. R. at 41, 43. She provided it to her defense counsel, and her counsel provided the video to the Government on the same day—the day before trial. R. at 40-41; Appellate Ex. XVI at 4. The Government immediately provided the video to defense, and then noticed its intent to admit the video under M.R.E. 404(b). R. at 20; Appellate Ex. XVI at 3-4.

On May 2, 2022, the morning of trial, the defense moved for the entire video to be excluded, both as impermissible character evidence under M.R.E. 404(b) and for a discovery violation. R. at 20. Long prior to the motion and court-martial, on October 6, 2021, defense had submitted a discovery request. Appellate Ex. XII. There, defense specifically requested the following:

> e. Access to, copies of, and a descriptive list of any physical evidence or photographs, in the Government's custody or control, seized,

> recorded, or reviewed during this investigation of this case, whether relied upon in charging or not. A list/copy of documents and other real evidence and location the Government intends to use at any trial findings, or presentencing, including rebuttal. This includes the substance of any conversations which occurred that contained any evidence not disclosed under another paragraph.
>
> f. Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities and are material to the preparation of the Defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief or presentencing, or were obtained from or belong to the Accused. R.C.M. 701(a)(2)(A). Please provide copies of any photographs taken to include the alleged crime scene and witnesses, if any.
>
> g. Disclosure of the existence of and copies of any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever on this case. This includes those which may later become discoverable under the Jencks Act, 18 U.S.C. [§] 3500.

Id. at 1-2. The defense argued, "So, the video has been in the possession of the Government for over a year, without prior discovery to the Defense until late last night, at approximately 10:00 p.m. So, coupled with the 404(b), the Defense also raises the discovery violation for this video." R. at 20.

The military judge issued a ruling on the defense motion in limine, denying the defense's request to exclude the video on the basis of a discovery violation. Appellate Ex. XVI at 13. He found that the defense had not met its burden to show that the Government's failure to provide the video prior to May 1, 2022, constituted a discovery violation, reasoning that "the Defense broadly requested discovery in

many forms of evidence which would reasonably encompass the video contained in Appellate Exhibit X, [but] the Defense has not demonstrated the evidence was requested with sufficient precision to enable the trial counsel to locate it." Appellate Ex. XVI at 11. Additionally, the military judge held that, even if a discovery violation occurred, the remedy of exclusion was too severe considering the circumstances of the late disclosure. *Id*. As support, he reasoned that the trial counsel was unaware of the video's existence until May 1, 2022, when AB Moon essentially volunteered it. *Id.* The military judge wrote: "The reason for the late discovery [was] the witness searching for the video and voluntarily providing it following pretrial interviews. Even if a discovery violation occurred, the truth-finding function of a court-martial would not be served by exclusion of this evidence." *Id*.

As a result, the Government admitted the video snippet that showed hands holding what AB Moon would later testify was LSD. R. at 285; Pros. Ex. 1. AB Moon testified that Prosecution Exhibit 1 consisted of "mainly LSD" and that SrA Hogans was in the video. R. at 275-78.

During its case-in-chief, the Government called only one witness, AB Moon, to testify as to the contested charges. R. at 262-99. Aside from explaining the video, AB Moon testified that she witnessed SrA Hogans use LSD and MDMA. R. at 263-64, 286-88. But she admitted she never actually *saw* him use MDMA, instead assuming he did. R. at 292-93. A forensic psychologist testified that drugs like

MDMA and LSD can affect memory formation. R. at 347-51. Every time AB Moon said she saw SrA Hogans use LSD or MDMA, she was also taking and under the influence of these drugs. R. at 263, 265, 268-69, 292, 294, 296-97. The only other evidence that supported SrA Hogans's use of LSD was the video. R. at 285.

Following the close of the Government's case and right before the defense rested, the military judge sua sponte raised a R.C.M. 917 motion. R. at 358. He pointed out that the Government failed to introduce any evidence that MDMA is a Schedule I controlled substance, despite it being alleged as such in the specification. R. at 358-59. After hearing arguments from counsel, the military judge ruled that he would allow the Government to reopen its case, once the defense rested, "based upon RCM 917, indicating that it's ordinarily appropriate for the military judge to permit the trial counsel to reopen the case." R. at 363. The military judge explained:

> As to, you know, the fairness or the propriety of sort of flagging this, or the judge *sua sponte* raising the issue, the alternative would be for me to permit the case to go to the panel when there's no legal possibility for the panel members to reach a finding of guilty on that specification. So it just doesn't seem appropriate for the members to be charged with deliberating on an offense that they cannot legally find the member of guilty of.
>
> *Id.*

Over defense objection, the military judge allowed the Government to reopen its case to allow an Office of Special Investigations (OSI) agent to testify. R. at 362, 369. The agent testified that MDMA was a Schedule I on the Drug Enforcement

Agency's list of controlled substances. R. at 370. The members found SrA Hogans guilty of using both LSD and MDMA. Entry of Judgment.

REASONS TO GRANT REVIEW

This case raises two important questions. The first concerns the Government's discovery obligations related to a cellphone in its possession, specifically its obligation to search for requested evidence about an accused when the cellphone was seized during a related investigation. C.A.A.F. R. 21(b)(5)(A); *see also United States v. Secord*, No. 24-0217/AR, 2024 CAAF LEXIS 623 (C.A.A.F. Oct. 16, 2024) (granting review of a discovery issue about the accused's cellphone in the Government's possession); *United States v. Braum*, No. 25-0046/AF, 2025 CAAF LEXIS 83 (C.A.A.F. Feb. 4, 2025) (granting review of a discovery issue about a witness's cellphone in the Government's possession). The second deals with the correct interpretation of R.C.M. 917. C.A.A.F. R. 21(b)(5)(C). The military judge's erroneous interpretation demonstrated his lack of neutrality and bias for the Government's case, which the AFCCA sanctioned through a similarly erroneous reading of the rule.

I.

The military judge abused his discretion when he denied a defense motion to exclude a video that the Government had in its possession for over a year for a related case but which it had failed to disclose until the night before trial.

Standard of Review

A military judge's rulings on whether a discovery violation occurred and his decision to admit challenged evidence are viewed under an abuse of discretion standard. *United States v. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023); *United States v. Norwood*, 81 M.J. 12, 17 (C.A.A.F. 2021) (citation omitted).

Law and Analysis

Article 46, UCMJ, provides that trial counsel, defense counsel, and the court-martial have equal opportunity to obtain witnesses and other evidence in accordance with the rules prescribed by the President. 10 U.S.C. § 846. R.C.M. 703 also provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence."

Related to the Government's discovery obligations, R.C.M. 701(a)(2)(A) provides that, upon defense request, "the Government shall permit the defense to inspect any . . . data, photographs, tangible objects . . . or copies of portions of these items, if the item is within the possession, custody, or control of military authorities" if "relevant to defense preparation" or if the Government intends to use such material at trial. Relevant evidence refers to evidence having any tendency to make the

existence of any fact that is of consequence more or less probable than it would be without the evidence. M.R.E. 401(a). Additionally, R.C.M. 701(a)(6) requires trial counsel to disclose evidence that is favorable to the defense.

There are two categories of disclosure error: (1) cases in which the defense made no discovery request or merely a general request for discovery, and (2) cases in which the defense specifically requested the information. *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (citing *United States v. Roberts*, 59 M.J. 323, 326-27 (C.A.A.F. 2004)). Under R.C.M. 701(g)(3), when a party has failed to comply with its discovery obligations, the military judge may take one or more of the following actions: "(A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances." Regarding exclusion of evidence, the Discussion to R.C.M. 701 provides factors for a miliary judge to consider including: "the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors."

In this case, it is undeniable that Prosecution Exhibit 1—the video purportedly showing SrA Hogans using LSD—was material and relevant in this case, was used as one of the main pieces of evidence to convict SrA Hogans for LSD use, and served

to corroborate AB Moon's testimony against SrA Hogans. It is also undeniable that Government had this video in its possession for over a year and the Government only disclosed the video the night before trial. Thus, the military judge erred when he improperly found that there was no discovery violation and that exclusion was not the proper remedy.

i. Both the military judge and the AFCCA focused on the wrong discovery rules to avoid finding a discovery violation.

The military judge did not find a discovery violation because he determined the defense did not make a precise enough request to allow the Government to find the video. Appellate Ex. XVI at 11. But the Government's discovery obligations are not so narrow. As this Court has recognized, "Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004)); *see also* Article 46, UCMJ (requiring that the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence); R.C.M. 703(a) (requiring both the prosecution and defense to have equal opportunity to obtain witnesses and evidence).

Despite the liberal requirements for discovery, the military judge incorrectly focused his ruling on whether the defense's discovery request was made "with

sufficient precision" to establish a violation under R.C.M. 701. Appellate Ex. XVI at 11. There are several problems with this conclusion. For one, trial defense counsel did make a specific request: "any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing [on the case] whatsoever." Appellate Ex. XII at 2. This request clearly includes the video in question here: it was in the possession of the Government, including OSI.

Even if the defense's request were to be treated as a general one, the nature of the request does not change the Government's discovery obligations. Trial counsel have a duty under R.C.M. 701(a)(6), to search beyond his or her prosecution files to include "(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; [and] (2) investigative files in a *related* case maintained by an entity 'closely aligned with the' prosecution." *Stellato*, 74 M.J. at 486 (emphasis added) (quoting *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999)). The entirety of AB Moon's phone—and the video therein—was squarely within the possession of the Government as it investigated SrA Hogans and AB Moon, his alleged and immunized co-actor. It was obligated to thoroughly search the phone in its possession—independent of a defense request.

The pertinent question therefore is not whether the defense requested the video with "sufficient precision," but rather at what point should the Government be imputed to have had knowledge of the video within the meaning of R.C.M. 701. This

question guides whether the Government's late disclosure of the video was tantamount to a discovery violation. Indeed, a late disclosure of evidence can amount to a discovery violation. *See United States v. Behenna*, 70 M.J. 521, 527-28 (A. Ct. Crim. App. 2011) (determining whether a late disclosure of favorable evidence to defense on the day a verdict was rendered violated R.C.M. 701 and *Brady v. Maryland*, 373 U.S. 83 (1963)); *see also Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) ("[T]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for [defense] use.").

Here, knowledge of the video prior to May 1, 2022, should be imputed to the Government in light of its review and digital analysis of the phone, along with multiple interviews of AB Moon. *See, e.g.*, *United States v. Mansfield*, NMCM 81 2379, 1984 CMR LEXIS 3573, at *8 (N.M.C.M.R. Sep. 27, 1984) ("[M]ilitary due process demands that, when such crucial information related to an accused's potential defense to a military crime is known to naval authorities . . . knowledge thereof must be imputed to the Government."). Indeed, the OSI agent who testified explained that he seized AB Moon's phone and conducted his review over a year earlier—in March 2021—and OSI specifically searched for evidence of drug use, including video evidence. R. at 51, 53-56. Not only did the Government have the video in its possession, but law enforcement also reviewed the multimedia on the

phone. Appellate Ex. XVI at 4. Nor was the Government blindly sifting through this data because, in either November or December of 2021, AB Moon told OSI what she had: "pictures and videos on her phone—which had been seized by OSI in March of 2021—which related to the subject of the investigation." Appellate Ex. XVI at 4. The Government was not operating in a vacuum; AB Moon was an immunized, cooperating witness willing and able to lead the Government to this evidence, but "neither OSI nor the trial counsel took steps to request AB Moon provide those images or photos from her phone." Appellate Ex. XVI at 4.

In light of the Government's control of AB Moon's phone and her multiple interviews with the Government prior to May 1, 2022, there is no apparent reason why the Government did not discover this video through an exercise of reasonable diligence, especially in light of the mandatory disclosure requirements under R.C.M. 701(a)(2) and (6). *See Stellato*, 74 M.J. at 486 (recognizing the trial counsel's duty to explore investigative files in a related case). The record reflects that there were multiple Government inspections of the phone prior to SrA Hogans's court-martial and that AB Moon alerted the Government to the existence of drug-related videos on her phone as early as November or December 2021. Thus, rather than focusing on whether the defense requested the evidence with "sufficient precision," the military judge should have addressed whether OSI's investigative

steps imposed a duty to the Government to disclose this evidence earlier than one day before trial.

The AFCCA made a similar but different error, focusing on the defense's ability to find the video rather than the Government's obligation to provide it. Appendix at 6-7. Defense access does not negate the Government's discovery responsibility,[4] which the Government appeared to recognize on appeal by conceding a discovery violation occurred. United States' Answer to Assignments of Error at 8; *see* Appendix at 6 (acknowledging the Government's concession). The AFCCA brushed this aside, though, putting the onus on the defense to find the incriminating video the Government had for over a year and which was only found through a Government witness who was inexplicably given seized evidence. Appendix at 7. Since the defense ostensibly had access to AB Moon's phone—"[t]he record does not reflect the Government inhibited in any way the [d]efense's ability to inspect [the phone]"—the AFCCA found no discovery error. Appendix at 7.

This makes little sense. In an interview, the defense specifically asked AB Moon for a certain photo she had. In searching for the photo, AB Moon found something incriminating, which she flagged for the Government; the Government

[4] *Cf. United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) ("It is well accepted that a prosecutor's lack of knowledge does not render information unknown for *Brady* purposes. . . . [This is true] where the prosecution has not sought out information readily available to it.").

was obligated to turn over this evidence to the defense. Under R.C.M. 701(a)(6), the Government is required to disclose information in its possession that reasonably tends to negate guilt, reduce punishment, or that affects a witness's credibility. This obligation requires the *Government* to search the phone for such evidence. Here, the defense did so through AB Moon in asking for a photo, but it resulted in AB Moon finding incriminating evidence for the Government. To be sure, the defense had no obligation to search AB Moon's phone for "audio/visual representations" that were exculpatory or incriminating. R.C.M. 701(a)(6).[5] This was the Government's obligation, which its prosecutors and law enforcement agents failed to do.

Rather than analyzing the Government's obligations, the AFCCA summarily determined the video was unfavorable to SrA Hogans and, therefore, there was no discovery problem. Appendix at 6-7. This is beside the point. The Government had the phone. It had an obligation to review it. But here, following an initial and cursory manual review and then downloading an apparently incomplete Cellebrite copy, R.

[5] If the AFCCA is correct that the defense had access to the phone, it would be ineffective assistance of counsel for them not to review it. However, the AFCCA's conclusion that the Defense had access to the phone is unsupported by the record, especially considering the Government gave AB Moon her phone *back* more than a week before trial. R. at 37. And, even if the defense had access, it is unlikely they would have found the video—after all, the Government apparently did not have a complete Cellebrite extraction, R. at 54, and there is no indication that defense ever received that incomplete extraction. Ultimately, the Government had the obligation to review the entirety of AB Moon's phone for any and all evidence related to not only AB Moon's case, but also SrA Hogan's case. It failed to do this.

at 54, the Government avoided its discovery obligations and the AFCCA sanctioned this behavior. Based on the AFCCA's holding, the Government has no obligation to search a cellphone in its possession for information, whether favorable or incriminating, unless the defense specifically requests something of which it has no knowledge. *Cf. United States v. Braum*, No. ACM 40434, 2024 CCA LEXIS 419, at *8-17 (A.F. Ct. Crim. App. Oct. 10, 2024) (evaluating a similar issue concerning a witness's phone that contained favorable information but which the Government refused to search or disclose); DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR xiii (2011) ("[T]here are also unknown unknowns—the [things] we don't know we don't know."). This flouts the broad discovery principles in the military justice system. *See Jackson*, 59 M.J. at 333 ("Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial.").

This misunderstanding of discovery rules at the trial and appellate level allowed the Government to be rewarded for its lack of due diligence and bolster its only witness as to the actus reus. Excluding the evidence, the only meaningful remedy here, would have weakened the Government's case substantially since it would have been left with only a single immunized witness's testimony who was under the influence of drugs at the time of the allegations. Whether intentional or

not, this last-minute provision of evidence amounted to an unfair disadvantage that unquestionably required the defense to alter its strategy at the eleventh hour. Notably, there were other individuals in the video montage who may have been able to testify as to SrA Hogans' alleged drug use. R. at 31; Pros. Ex. 1. Undoubtedly, the surprise of this new, material evidence impacted defense strategy the day of trial. Correcting these errors through a grant of review ensures the Government is properly held to its discovery obligations in the context of digital evidence in its possession.

ii. This is yet another iteration of the cellphone discovery problems that this Court is already reviewing.

Two cases already before this Court, *Secord* and *Braum*, relate to cellphone discovery. This is the next iteration of both. *Secord* deals with the accused's own phone. *Secord*, No. 24-0217/AR, 2024 CAAF LEXIS 623. *Braum* deals with a witness's phone. *Braum*, No. 25-0046/AF, 2025 CAAF LEXIS 83. This case is about an accomplice's phone. While *Secord* and *Braum* have additional search and seizure issues, this case does not. *See Secord*, No. 24-0217/AR, 2024 CAAF LEXIS 623 (questioning whether the data at issue could be lawfully and equally accessed by the parties); *Braum*, No. 25-0046/AF, 2025 CAAF LEXIS 83 (questioning whether the Government could lawfully access certain evidence on the phone in its custody). Here, the Government lawfully possessed AB Moon's phone through a search authorization. R. at 38, 55-56. That search authorization allowed the Government to search for any and all multimedia related to "narcotic use," which would include the

video here. R. at 56. Consequently, SrA Hogans's case presents a clean fact pattern to resolve some of the discovery related problems regarding cellphones under R.C.M. 701.

Granting review of SrA Hogans's case would also provide clarity to the field regarding how specific discovery requests have to be along with whether access is sufficient when dealing with needle-in-a-haystack-type evidence. The defense asked for "copies of any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever on this case." Appellate Ex. XII at 2. It is the Government's responsibility to search its own files, to include those of law enforcement, to confirm it meets its discovery obligations. *See Stellato*, 74 M.J. at 486 (recognizing the trial counsel's duty to explore investigative files in a related case). When, as here, a witness repeatedly states she has videos and pictures of drug use, it was incumbent on the Government to ensure it met its discovery obligations. This requirement should not be flipped to the defense when it does not have knowledge of what could be on the phone the Government seized.

WHEREFORE, SrA Hogans requests this Court grant review.

II.

The military judge abused his discretion and abandoned his neutrality in sua sponte moving for a finding of not guilty and then allowing the Government to reopen its case to establish the missing element that he identified.

Standard of Review

"'When a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of [the] trial, a court-martial's legality, fairness, and impartiality were put into doubt' by the military judge's actions." *United States v. Quintanilla*, 56 M.J. 37, 78 (C.A.A.F. 2001) (quoting *United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000)). The military judge's decision on the issue to reopen is reviewed for an abuse of discretion. *United States v. Satterley*, 55 M.J. 168, 169 (C.A.A.F. 2001).

Interpretation of a Rule for Courts-Martial is a question of law reviewed de novo. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008) (citation omitted).

Law and Analysis

"An accused has a constitutional right to an impartial judge." *United States v. Wright*, 52 M.J. 136, 140 (C.A.A.F. 1999) (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). A military judge is charged to "avoid undue interference with the parties' presentations or the appearance of partiality." R.C.M. 801(a)(3), Discussion. "In the military, a judge may not abandon his role as an impartial party and assist in the conviction of a

specific accused." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987) (citing *United States v. Lindsay*, 12 C.M.A. 235 (C.M.A. 1961)).

R.C.M. 917(a) provides, "The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty . . . after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected." R.C.M. 917 is based on Rule 29 of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.). *See MCM, United States* (2016 ed.), A21-66 ("This subsection is based on Fed. R. Crim. P. 29(a) and on the first two sentences of paragraph 71 *a* of MCM, 1969 (Rev.)."). Rule 29(a) provides that "[t]he court may on its own consider whether the evidence is insufficient to sustain a conviction." The analysis to R.C.M. 917(a) notes that the application of R.C.M. 917(a) is similar to practice in U.S. District Court, which would apply Rule 29(a). *See MCM*, A15-17. Rule 29 does not allow the court to sua sponte reopen the case to allow the Government to establish the elements based on a lack of due diligence. Fed. R. Crim. P. 29; *see also United States v. Finch*, 79 M.J. 389, 395 (C.A.A.F. 2020) (finding that the federal courts' interpretation of an identical rule to a Military Rule of Evidence was "instructive"). Neither does, nor should, R.C.M. 917.

The plain language of R.C.M. 917 allows the military to sua sponte enter a finding of not guilty, not sua sponte identify a particular failing and reopen the

Government's case so that it can rectify its failure. *See United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) ("It is a well established rule that principles of statutory construction are used in construing the [MCM] in general and the [M.R.E.s] in particular."). This interpretation is consistent with Rule 29.

Some inconsistency between the rules appears to come into play where Rule 29 does not require, as R.C.M. 917(b) does, for the movant to "indicate wherein the evidence is insufficient." *See United States v. Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993) (citing *United States v. Gjurashaj*, 706 F.2d 395, 399 (2d Cir. 1983)) ("[S]pecificity of grounds is not required in a Rule 29 motion . . . ."). However, when R.C.M. 917's subsections are read together, that inconsistency does not extend to the military judge's sua sponte finding of not guilty. The plain language of R.C.M. 917(a) dictates the military judge shall enter a *finding of not guilty* sua sponte, not move to sua sponte *identify the Government's failure* in evidence. *Compare* R.C.M. 917(a), *with* R.C.M. 917(b). The plain language of R.C.M. 917(b) does not mention the military judge sua sponte identifying the failure in evidence whereas parts (a) and (c) do specifically mention the military judge operating sua sponte. *Compare* R.C.M. 917(a), *and* R.C.M. 917(c), *with* R.C.M. 917(b). To be consistent with R.C.M. 917(a) and (c), R.C.M. 917(b) should be read to mean that only a motion by the *accused* shall indicate where there is a deficiency in evidence. Thus, the military judge has no obligation to identify the insufficient evidence when entering a finding

of not guilty; he or she only needs to let the parties be heard before making that ruling. R.C.M. 917(c). By reading in such a requirement to R.C.M. 917(b), the military judge abandoned his neutral role by telling the Government how to fix its case and then letting them do so—all before the defense had even closed their case.

R.C.M. 917 was not designed as a conduit to correct the Government's errors. Rather, the plain language makes clear it is a mechanism to find the accused not guilty when the Government has failed to present evidence sufficient to sustain a conviction. R.C.M. 917(a). Both the military judge's and the AFCCA's interpretations of R.C.M. 917 subvert this purpose and turn it into a way for the Government to perfect its case with assistance from the military judge.

Here, the military judge erred when he sua sponte raised a motion for the Government to reopen its case for the sole purpose, without good reason or excuse, of curing the Government's lack of diligence. There is simply no reason as to why the Government failed to present evidence of all the elements of its charged offense. Yet, the military judge not only identified the issue but failed to conduct an inquiry as to the Government's failure to exercise due diligence in prosecuting its case. R. at 358-63.

The AFCCA excused the military judge's actions in two interrelated ways. The AFCCA determined, first, that the military judge complied with procedural

requirements and, second, that he did not misapply R.C.M. 917 or R.C.M. 913(c)(5). Appendix at 10. Both conclusions are erroneous.

First, the military judge did not follow the procedural requirements when he identified the missing element the Government failed to prove, thereby abandoning his neutral role. R.C.M. 917(b) does not apply to the military judge sua sponte entering a finding of not guilty. Under such a reading, the military judge becomes an additional prosecutor, fixing the Government's case when there was otherwise no possibility the trier of fact could find the accused guilty. When a party moves to reopen a case, it raises potential concerns of lack of due diligence and "sandbagging" the court. *See United States v. Barrett*, ARMY 20170354, 2019 CCA LEXIS 96, at *4-5 (A. Ct. Crim. App. Mar. 5, 2019) (citing *United States v. Fisiorek*, 43 M.J. 244, 247 (C.A.A.F. 1995); *United States v. Ray*, 26 M.J. 468, 473 (C.M.A. 1988) (Everett, C.J., concurring)). The military judge cleansed the Government's lack of due diligence and ensured a conviction where none was possible after the Government had already rested its case. This assistance by the military judge was a misapplication of R.C.M. 917 and eliminated his neutrality.

Second, under R.C.M. 913, the military judge was required to evaluate the Government's reason for failing to prove the controlled substance element. The AFCCA determined otherwise because the text of R.C.M. 917 and R.C.M. 913 do

not require that.[6] However, case law analyzing R.C.M. 913(c)(5) does.

As noted in *Ray*, "This procedural rule implies that the moving party should proffer some reasonable excuse for its request to reopen its case." *Ray*, 26 M.J. at 471 (C.M.A. 1988) (citing *United States v. Kennedy*, 8 C.M.A. 251, 253 (C.M.A. 1957); *United States v. Kelm*, 827 F.2d 1319, 1323 (9th Cir. 1987); *United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985); *United States v. Walker*, 772 F.2d 1172, 1183-84 (5th Cir. 1985)). This makes sense under an abuse of discretion standard where the military judge must have some basis for his or her decision to allow the case to be reopened. *See United States v. Shelby*, No. 24-0186, __ M.J. __, 2025 CAAF LEXIS 64, at *3-4 (C.A.A.F. Jan. 28, 2025) (noting an abuse of discretion occurs when rulings are based on findings of fact not supported by the evidence or important facts are not considered); *see also Fisiorek*, 43 M.J. at 248 (noting general factual bases to consider for reopening a case). Without a proffered reason, the decision to reopen is inherently arbitrary and unreasonable.

Identifying the Government's failure then excusing it without an explanation of good cause was a misapplication of R.C.M. 917 and R.C.M. 913 that put the court-martial's fairness in doubt. The military judge interfered with the Government's

[6] The AFCCA inaccurately characterized *Ray* by saying there was no proffered justification for reopening the case. There was. *Ray*, 26 M.J. at 471 ("One reason proffered by trial counsel at this court-martial was that, although he had rested his case, the judge had not yet ruled on an earlier defense motion to dismiss because of a failure to show wrongfulness.").

presentation of evidence to such a degree that he abandoned his neutral role to assist in SrA Hogans's conviction.

WHEREFORE, SrA Hogans requests this Court grant review.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on April 14, 2025, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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CERTIFICATE OF COMPLIANCE
WITH RULES 21(b) & 37

This supplement complies with the type-volume limitation of Rules 21(b) because it contains 6,583 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.

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Appendix

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 22091

UNITED STATES
Appellee

v.

Cameron N. HOGANS
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary[1]

Decided 22 January 2025

Military Judge: Elijah F. Brown.

Sentence: Sentence adjudged on 5 May 2022 by SpCM convened at Luke Air Force Base, Arizona. Sentence entered by military judge on 21 June 2022: Confinement for 3 months, forfeiture of $1,222.00 pay per month for 3 months, reduction to E-1, and a reprimand.

For Appellant: Colonel Anthony D. Ortiz, USAF.

For Appellee: Colonel Zachary T. Eytalis, USAF; Major Brittany M. Speirs, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and PERCLE, *Appellate Military Judges*.

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge PERCLE joined.

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[1] Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A). *See Manual for Courts-Martial, United States* (2024 ed.).

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

DOUGLAS, Judge:

Appellant entered mixed pleas at a special court-martial. A military judge found Appellant guilty after accepting his pleas of guilty as provident to two specifications of wrongful use of drugs, specifically cocaine and marijuana, each on divers occasions, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[2] At the same court-martial a panel comprised of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of wrongful use of lysergic acid diethylamide (LSD), on divers occasions, and one specification of wrongful use of 3,4-methylenedioxymethamphetamine (MDMA), a Schedule I controlled substance, in violation of Article 112a, UCMJ. The trial judge sentenced Appellant to confinement for three months, forfeiture of $1,222.00 pay per month for 3 months, reduction to the grade of E-1, and a reprimand.[3] The convening authority took no action on the findings or sentence; he provided the language for the reprimand.

Appellant raises three issues on appeal which we have rephrased: whether (1) the trial judge abused his discretion by denying a defense motion to exclude video evidence based upon a late discovery notice; (2) the trial judge abused his discretion, and abandoned his neutral role, when he allowed the Government to reopen its case to establish a missing element of wrongful use of MDMA; and (3) the conviction for wrongful use of MDMA was legally and factually sufficient.

We find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.[4]

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[2] Unless otherwise noted, all references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] The trial judge specifically sentenced Appellant to three months' confinement for using cocaine on divers occasions, one month's confinement for using marijuana on divers occasions, three months' confinement for using LSD on divers occasions, and two months' confinement for wrongfully using MDMA, a Schedule I controlled substance, with all periods of confinement to run concurrently.

[4] We note Appellate Exhibit X, described in the record as containing a video montage, instead includes over three hours of witness interviews. Appellant does not assert prejudicial error, and we find none.

I. BACKGROUND

Appellant was stationed at Luke Air Force Base (AFB), Arizona. He and his friends socialized together during their off-duty hours. On multiple occasions, between March 2020 and March 2021, Appellant wrongfully used cocaine and marijuana with these friends. One of his friends, Airman Basic (AB) BM, testified against him, under a grant of immunity, after she had served her sentence issued by a summary court-martial for her own drug use. She witnessed Appellant wrongfully use LSD on multiple occasions in 2020, as well as use MDMA, a Schedule I controlled substance.

At trial, trial defense counsel moved to exclude video evidence of Appellant's hands with LSD tabs in his palms due to a purported discovery violation. The Government objected and explained they had provided the evidence to the Defense as soon as they received it; they had only received the evidence the night before trial. The trial judge ruled the discovery of the evidence on the eve of trial was not due to a discovery violation because the Defense did not request the evidence with "sufficient precision to enable the trial counsel to locate it." Nonetheless, the trial judge offered the Defense a continuance, which they rejected due to Appellant's desire "to pursue justice." Trial defense counsel's preferred remedy was exclusion. The trial judge determined exclusion of the evidence would be "too severe considering the circumstances of the late disclosure" and "hinder the truth-finding function" of the court. The trial judge admitted the 17-second video as Prosecution Exhibit (PE) 1.

II. DISCUSSION

A. Defense Motion to Exclude Video Evidence Based Upon a Late Discovery Notice

On appeal, Appellant submits the trial judge erred by not finding the late disclosure a discovery violation. Consequently, Appellant claims the appropriate remedy was exclusion of the evidence. We find the trial judge did not abuse his discretion when he admitted PE 1.

1. Additional Background

In March or April of 2020, Appellant's friend, AB BM, had recorded a video on her cell phone of several sets of hands, palms up, stacked above each other, holding LSD tabs. The video of these hands does not show the faces of the persons in the video.

The Air Force Office of Special Investigations (OSI) at Luke AFB had seized AB BM's cell phone in March 2021 and performed an extraction of the contents of the phone utilizing the Cellebrite tool, including video evidence of drug use. However, the extraction may not have been complete at OSI due to the limited

storage capacity at OSI. The cell phone was over five years old and contained at least 7,000 photos and 1,000 videos. Although OSI searched the contents for evidence of drug use by AB BM, they did not find this particular video (PE 1). OSI maintained possession of AB BM's cell phone for over 13 months, as well as the extraction report.

On 6 October 2021, trial defense counsel submitted their initial discovery request. Among other listed items, the Defense requested:

> Access to, copies of, and a descriptive list of any physical evidence or photographs, in the Government's custody or control, seized, recorded, or reviewed during this [sic] investigation of this case, whether relied upon in charging or not. A list/copy of documents and other real evidence and location the Government intends to use at any trial findings, or presentencing, including rebuttal.
>
> Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities and are material [sic] to the preparation of the Defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief or presentencing, or were obtained from or belong to the Accused. [Rule for Courts-Martial (R.C.M.)] 701(a)(2)(A).
>
> Disclosure of the existence of and copies of any audio/visual representations or renditions in the possession of any governmental agency or employee which could have any bearing whatsoever on this case.

Later, in November or December 2021, AB BM specifically informed OSI, during the course of the investigation against her, that her cell phone contained photographs and videos of illicit drug use by herself and others.

Approximately ten days before Appellant's trial, on 22 April 2022, AB BM received her cell phone back from OSI. On 1 May 2022, the day before trial, AB BM was interviewed by trial defense counsel. Trial defense counsel asked AB BM to look for a particular photo. Consequently, the night before Appellant's trial, AB BM was looking through her phone's photographs, videos, and text messages for the photo trial defense counsel requested, when she found the video now identified as PE 1. The same evening that she discovered this video, she provided it to her defense counsel. Her defense counsel then sent it to the trial counsel, who in turn, disclosed it to Appellant's trial defense counsel, who received it at approximately 2200 hours the same evening. Previous to this disclosure, trial counsel had disclosed other photos and another video from AB BM's phone to trial defense counsel.

Upon questioning from the trial judge, trial defense counsel admitted they had not "seen the extraction pull." However, they did not explain if they had been to OSI and tried to review the extraction pull or AB BM's cell phone. Neither at trial, nor on appeal, does Appellant proclaim he was not permitted to inspect relevant documents, photographs, videos, tangible objects, or reports maintained by military authorities.

2. Law

A trial judge's ruling on discovery and choice of remedy for a discovery violation is reviewed for an abuse of discretion. *United States v. Vargas*, 83 M.J. 150, 153 (C.A.A.F. 2023) (citing *United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015)). "An abuse of discretion occurs when the military judge either applied the law erroneously or clearly erred in making findings of fact. An abuse of discretion must be more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Black*, 82 M.J. 442, 451 (C.A.A.F. 2022).

"In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Article 46, UCMJ, 10 U.S.C. § 846.

Military discovery practice is broad and liberal. *See United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). After service of charges and upon request of the defense, "the Government shall permit the defense to inspect any books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items, if the item is within the possession, custody, or control of military authorities;" however, (1) "the item [must] be relevant to defense preparation;" (2) "the government intends to use the item in the case-in-chief at trial;" (3) "the government anticipates using the item in rebuttal;" or (4) "the item was obtained from or belongs to the accused." R.C.M. 701(a)(2)(A)(i)–(iv).

An accused's right to discovery "includes materials that would assist the defense in formulating a strategy." *United States v. Luke*, 69 M.J. 309, 320 (C.A.A.F. 2011) (citing *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008)). "A request for information under R.C.M. 701(a)(2) must be specific enough that the trial counsel, through the exercise of due diligence, knows where to look (or where to provide the defense access)." *United States v. Shorts*, 76 M.J. 523, 535 (A. Ct. Crim. App. 2017).

Whenever during a court-martial proceeding it is brought to the attention of the trial judge that a party has failed to comply with R.C.M. 701(g)(3), *Failure to comply*, the trial judge may take one or more of the following actions: (1)

"[o]rder the party to permit discovery;" (2) "[g]rant a continuance;" (3) "[p]rohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed;" or "[e]nter such other order as is just under the circumstances." R.C.M. 701(g)(3)(A)–(D).

Trial counsel must, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which reasonably tends to: (1) "[n]egate the guilt of the accused of an offense charged;" (2) "[r]educe the degree of guilt of the accused of an offense charged;" (3) "[r]educe the punishment;" or (4) "[a]dversely affect the credibility of any prosecution witness or evidence." R.C.M. 701(a)(6); *see also Stellato*, 74 M.J. at 486–87 (where "a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory . . .").

3. Analysis

On appeal, Appellant avers the Government had a duty to search for and provide PE 1, pursuant to R.C.M. 701(a)(2)(A), because it was relevant to defense preparation, and because the Government intended to use this evidence in their case-in-chief at trial. Appellant would have us determine the Government committed a discovery violation by failing to adequately search for PE 1, after the Defense's discovery request specifically requested the items listed in R.C.M. 701(a)(2)(A), as well as "any audio/visual representations or renditions in the possession of any government agency or employee which could have any bearing whatsoever on this case."

On appeal, the Government appears to concede they committed a discovery violation stating, "The failure of trial counsel to provide either access to AB [BM]'s phone or a copy of the data extracted from it therefore represented a violation of trial counsel's obligation to provide discovery to Appellant under R.C.M. 701(a)(2)(A)." Despite Government's attempt to concede error, the record simply does not support the contention the Government failed to provide access to the extraction. No one—not the trial judge, not the trial counsel, nor the trial defense counsel—suggested trial counsel failed to provide access to AB BM's phone, or the copy of the data extracted from it. Regardless of this position on appeal, the Government maintains the remedy the trial judge chose was appropriate.

As a threshold matter, we consider whether PE 1, the video evidence, could be characterized as favorable to the Defense. If favorable to the Defense, the analysis pivots to include other facts, circumstances, and rules (*e.g.*, R.C.M. 701(a)(6); *Stellato*, 74 M.J. at 486–87). Neither Appellant, nor the Government, describe PE 1 as favorable to the Defense. Here, PE 1 inculpated Appellant, as well as others, in that AB BM testified Appellant's hands were shown with LSD tabs on his palms. Notably, the video excerpt that was admitted as PE 1,

while relevant and otherwise admissible in Appellant's trial, went unnoticed by law enforcement and both trial and defense counsel, until provided by AB BM the evening before trial. AB BM provided the video as evidence supporting her testimony against Appellant. Her review of her cell phone was initiated due to a request from Appellant's trial defense counsel. Importantly, this evidence was never withheld by the Government, nor was notice of its existence, once discovered, withheld.

The Government is required to provide to the Defense *access to inspect* documents, tangible objects, and reports. R.C.M. 701(a)(2)(A). The Government's requirement to provide access does not vitiate Appellant's opportunities to inspect the documents, tangible objects, and reports of Appellant case, or those of closely related cases, such as AB BM's. In this case, the investigation into AB BM and her drug use was related to Appellant's offenses because, as the record reflects, they wrongfully used drugs together. The record does not reflect the Government inhibited in any way the Defense's ability to inspect AB BM's cell phone or the Cellebrite report maintained by OSI.

The trial judge determined that the late notice of the discovery of the video on AB BM's cell phone, PE 1, was not a discovery violation, because the Defense did not request it "with sufficient precision to enable the trial counsel to locate it," citing *Shorts*, 76 M.J. at 535. But more simply, the record does not reflect the Government failed to provide material that would assist the Defense in formulating a strategy. *Luke*, 69 M.J. at 319–20. First, the Defense was aware of this evidence by the time Appellant entered his pleas. Second, the strategy employed by the defense team was to attack the ability of AB BM to recall and state with accuracy her memory of Appellant's use of these drugs. The Defense also called a memory expert to provide opinion evidence as to one's ability to recall when she too was wrongfully using drugs. Further, the Government clearly was not intending to use PE 1 in their case-in-chief at trial until they learned of its existence the night before trial began. After certain defense objections, trial counsel removed portions of the exhibit before final admission and publishing. Finally, at the time they were specifically provided this video, through AB BM, the Government immediately disclosed it to Appellant, without delay, and before arraignment. For all the above reasons, we find the trial judge's conclusion that the notice of the video was not a discovery violation was not an abuse of discretion.

Additionally, the trial judge's decision to admit the evidence, rather than exclude it, was also not an abuse of discretion. Despite determining the notice on the eve of trial was not a discovery violation, the trial judge offered trial defense counsel a continuance, which they summarily rejected. The trial judge's decision that exclusion would be too severe a remedy also was not an

abuse of discretion. Neither decision is arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *Black*, 82 M.J. at 451.

B. Trial Judge's Ruling Allowing Government to Reopen Its Case to Establish a Missing Element

On appeal, Appellant submits the trial judge misapplied R.C.M. 917 by allowing the Government to reopen its case, without first inquiring as to the reasoning for their failure to present evidence on this aspect of Specification 2 of the Additional Charge. Appellant argues that the trial judge's decision to identify the deficiency for the Government gave the appearance of impartiality. The Government disagrees and submits that R.C.M. 917(a) clearly allows the trial judge to *sua sponte* make the motion for a finding of not guilty. We find the trial judge did not abuse his discretion when he allowed the Government to reopen its case.

1. Additional Background

After the Government rested its case in findings, and just before the Defense rested its case in findings, the trial judge raised *sua sponte* a motion for a finding of not guilty of Specification 2 of the Additional Charge (wrongful use of MDMA) pursuant to R.C.M. 917. His rationale was that "no evidence had been offered for the members to find that [MDMA] was a controlled substance." He added:

> As to, you know, the fairness or propriety of sort of flagging this, or the judge *sua sponte* raising the issue, the alternative would be for me to permit the case to go to the panel when there's no legal possibility for the panel members to reach a finding of guilty on that specification. So it just doesn't seem appropriate for the members to be charged with deliberating on an offense that they cannot legally find the member [ ] guilty of. So, so that was the alternative, which I don't think serves the interests of justice.

The trial judge offered each party an opportunity to be heard. The Government did not object to the trial judge's offer, cited R.C.M. 917(c) and its discussion, and requested to reopen its case. The Defense did object, and advocated the trial judge is not required to allow the Government to reopen its case, and if the trial judge did, it would be an injustice to "the system."

Once the Government requested to reopen its case in findings, the trial judge allowed the Government to do so. Special Agent (SA) JF, a member of the local OSI unit, testified that he was familiar with the Drug Enforcement Administration (DEA) list of controlled substances due to his role as a criminal investigator, and his training. He identified MDMA as being on the DEA list of Schedule I controlled substances. Trial defense counsel cross-examined SA

JF, who confirmed he had not investigated "an MDMA case" even though SA JF did investigate Appellant for allegations of wrongful use of controlled substances.

2. Law

A trial judge's decision to allow a party to reopen its case is reviewed for abuse of discretion. *See United States v. Satterley*, 55 M.J. 168, 171 (C.A.A.F. 2001) (citations omitted); *United States v. Martinsmith*, 41 M.J. 343, 348 (C.A.A.F. 1995). "This abuse of discretion standard is a strict one, calling for more than a mere difference of opinion—[t]he challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. St. Jean*, 83 M.J. 109, 112 (C.A.A.F. 2023) (alteration in original) (citing *United States v. Hendrix*, 76 M.J. 283, 288 (C.A.A.F. 2017)).

A trial judge "may, as a matter of discretion, permit a party to reopen its case after it has rested." R.C.M. 913(c)(5); *see also Satterley*, 55 M.J. at 171 (recognizing the "discretionary power of [a] judge to reopen a case"). The trial judge, "on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged at any time after the evidence on either side is closed but prior to entry of judgment if the evidence is insufficient to sustain a conviction of the offense affected." R.C.M. 917(a).

In the case of a motion for a finding of not guilty, "[t]he motion shall specifically indicate wherein the evidence is insufficient." R.C.M. 917(b). "Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the military judge shall give each party an opportunity to be heard on the matter." R.C.M. 917(c). For such a motion, "the military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion before findings on the general issue of guilt are announced." R.C.M. 917(c), Discussion.

3. Analysis

Appellant states in his written brief that the trial judge's identification of the Government's insufficiency of proof in its case gave the appearance of his impartiality. We disagree. Indeed, from our review of the record, we find no facts indicating the trial judge acted with any personal bias, prejudice, or partiality in this case.

Next, we consider whether the trial judge abused his discretion when he (1) *sua sponte* moved for a finding of not guilty when the Government had not admitted evidence of MDMA being a Schedule I controlled substance relating to Specification 2 of the Additional Charge, and (2) granted the Government the opportunity to reopen its case. We find he did not abuse his discretion in either respect.

The trial judge *sua sponte* raised the issue of insufficiency of proof as to Specification 2 of the Additional Charge because the Defense had not raised the issue. Explaining that he was concerned about allowing the members to deliberate upon Appellant's guilt for wrongful use of MDMA without any evidence admitted regarding it being a Schedule I controlled substance as charged, the trial judge properly followed the procedural aspects of R.C.M. 917(c). Specifically, this procedural rule outlines that before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the trial judge shall give each party an opportunity to be heard on the matter. This trial judge complied with this procedural requirement. The trial judge did not misapply R.C.M. 917 or R.C.M. 913(c)(5) by allowing the Government to reopen its case, without first inquiring as to its reason for their failing to present evidence on the Controlled Substances Act because that is not required. Our superior court's predecessor, in *United States v. Ray*, similarly did not require an explanation despite its recognition of the historical context of R.C.M. 913(c)(5). 26 M.J. 468, 469 (C.M.A. 1988) (citations omitted) (offering a party moving to reopen its case "should proffer some reasonable excuse for its request").

In being afforded the opportunity to be heard, the trial counsel requested to reopen its case; trial defense counsel objected and advocated the trial judge not allow the Government to reopen its case.

As it was in his "discretionary power," the trial judge allowed the Government to reopen its case. *Satterley*, 55 M.J. at 171. The discussion to R.C.M. 917(c) guides trial judges to ordinarily permit trial counsel to reopen their case as to the specific insufficiency identified. Accordingly, this trial judge allowed the Government to reopen its case to introduce evidence supporting the charged element that MDMA was a Schedule I controlled substance pursuant to the schedules of the Controlled Substances Act.[5] Through the testimony of SA JF, the trial counsel admitted evidence that MDMA is listed on Schedule I. The Defense was permitted to and did cross-examine the witness, SA JF.

The trial judge's decision to raise *sua sponte* a motion for a finding of not guilty based upon a lack of evidence as to MDMA being a Schedule I controlled substance pursuant to the Controlled Substances Act was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *St. Jean*, 83 M.J. at 112. Further, his decision to allow the Government to reopen its case and introduce evidence on the insufficiency was similarly not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *Id.* The trial judge did not abuse his discretion in either decision. *See id.* at 469 (holding that the trial judge who allowed the

[5] *See* 21 U.S.C. § 812(c), *Schedules of controlled substances* (2018).

Government to reopen its case to admit evidence of wrongfulness was not an abuse of discretion).

C. Legal and Factual Sufficiency of Specification 2 of the Additional Charge (Wrongful Use of MDMA)

1. Additional Background

As described above, AB BM testified that between on or about 1 June 2020 and on or about 30 September 2020, within the state of Arizona, she witnessed Appellant use MDMA. She stated Appellant snorted it through his nostril on one occasion and ingested it in pill form on another occasion, chasing it with either water or alcohol. Appellant's wrongful use of MDMA spanned two different residences, each his own, in Arizona. She described MDMA as a colorful pill and said that they thought it was MDMA because that is what they were told when they were provided it. AB BM also explained that she and Appellant had the effects that they were expecting with the use of MDMA. She explained that their use was voluntary and planned for the weekends, to provide enough time for the drug to leave their bodies.

Additionally, SA JF testified that MDMA is included as a controlled substance in Schedule I of the Controlled Substances Act. Trial defense counsel did not object to SA JF's knowledge of the Controlled Substances Act.

2. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "Our assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

"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) (citation omitted). "[T]he term 'reasonable doubt' does not mean that the evidence must be free from any conflict . . . ." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Thus, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *King*, 78 M.J. at 221 (alteration in original) (citation omitted).

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed

the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

In order to convict Appellant of wrongful use of MDMA, a Schedule I controlled substance, as alleged in Specification 2 of the Additional Charge, the Government was required to prove that within the state of Arizona, between on or about 1 June 2020 and on or about 30 September 2020, Appellant wrongfully used 3,4-methylenedioxymethamphetamine, a Schedule I controlled substance. The term "wrongful" means without legal justification or authorization. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 50.c.(5). A "controlled substance" means any substance that is included in Schedules I through V established by the Controlled Substances Act of 1970 (21 U.S.C. § 812). *MCM*, pt. IV, ¶ 50.c.(1).

3. Analysis

On appeal, Appellant submits SA JF's testimony was not competent evidence demonstrating MDMA is a Schedule I controlled substance. The Government disagrees and offers that Appellant's conviction for Specification 2 of the Additional Charge is both legally and factually sufficient. We agree with the Government.

Through its immunized witness, the Government admitted eyewitness evidence of Appellant's ingestion of MDMA, in the charged timeframe, at the charged location. AB BM described with specificity how she witnessed Appellant ingest MDMA, by either snorting it through his nostril, or ingesting it whole in pill form. She described what MDMA looked like, and that its effects were as expected. She also explained that Appellant's use was voluntary in that he was in control of his own ingestions. Further, the Government admitted evidence, through SA JF, that MDMA is included in Schedule I of the Controlled Substances Act.

We find the Government presented sufficient evidence for any rational trier of fact to find Appellant guilty beyond a reasonable doubt of wrongful use of MDMA, a Schedule I controlled substance. Further, we find we are ourselves convinced beyond a reasonable doubt Appellant wrongfully used MDMA, a Schedule I controlled substance.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court