IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

BRYCE T. ROAN,
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 24-0104/AF

Crim. App. Dkt. No. ACM 22033

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ISSUES PRESENTED

I.

WHETHER THE LOWER COURT'S ERRONEOUS RESOLUTION OF A QUESTION OF LAW – FINDING THAT WITHHELD EVIDENCE WAS IMMATERIAL AND THERE WAS NO PREJUDICE TO APPELLANT – VIOLATED *BRADY v.* MARYLAND, 373 U.S. 83 (1963).

II.

WHETHER THE LOWER COURT'S ERRONEOUS RESOLUTION OF A QUESTION OF LAW – FINDING THAT THE GOVERNMENT DID NOT VIOLATE APPELLANT'S RIGHTS UNDER RULE FOR COURT-MARTIAL 701(A)(6) VIOLATED PRECEDENT SET BY THIS COURT.

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 Honorable 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

On December 6-9, 2021, at Little Rock Air Force Base (AFB), a panel of officer members sitting as a special court-martial tried Appellant, Senior Airman

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the *Manual for Courts-Martial, United States* (2019 ed.) [*MCM*], unless otherwise noted.

(SrA) Bryce T. Roan. JA at 39, 65. Contrary to his plea, the members found SrA Roan guilty of one charge and specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. JA at 39. The members sentenced SrA Roan to be reduced to the grade of E-2, restricted to the limits of Little Rock AFB for 45 days, perform hard labor without confinement for three months, and a reprimand. JA at 39-40. The convening authority disapproved the adjudged restriction to base and approved the remainder of the adjudged sentence. JA at 46.

On September 7, 2022, SrA Roan requested the Judge Advocate General (TJAG) of the Air Force set aside the findings and sentence. JA at 28. After TJAG denied relief, Appellant filed an application for review at the AFCCA, which granted review on August 23, 2023. JA at 13-14. The AFCCA affirmed the findings and sentence on January 8, 2024. JA at 1-12.

On March 6, 2024, SrA Roan filed a Petition for Grant of Review with this Court. On September 19, 2024, this Court granted SrA Roan's petition on two issues.

STATEMENT OF FACTS

1. A unit-wide urinalysis sweep is ordered, resulting in concurrent law enforcement investigations for wrongful use of cocaine.

On July 6, 2021, SrA Roan's commander ordered a urinalysis sweep for the entire squadron. JA at 96. SrA Roan reported to the designated location and provided a urine sample. JA at 100. According to the urinalysis observer, SrA Roan did not appear nervous or concerned. JA at 101-102. The observer remembered SrA Roan as

someone who appeared "athletic," "like a guy who worked out, went to the gym every day, and walked around like he had a protein shake." *Id.*

SrA Roan and Staff Sergeant (SSgt) N.W., tested positive for a cocaine metabolite. JA at 42, 175. SSgt N.W. and SrA Roan were roommates and friends and attended the same social function over the Fourth of July holiday. JA at 42. Because of the relationship between SSgt N.W. and SrA Roan, investigations into their alleged wrongful use of cocaine were run concurrently. *Id.*

During the joint investigations, SSgt N.W. and SrA Roan were questioned by Security Forces Office of Investigations (SFOI). JA at 50, 263-265. SrA Roan invoked his Article 31(b) rights. JA at 263-265. SSgt N.W. waived his rights and made a statement. JA at 50. In relevant part, SSgt N.W. indicated that he did not use cocaine. *Id.* He explained that the positive test might have been the result of pre-workout powder that a third roommate, SSgt DB, purchased while deployed. *Id.* Following these interviews, the Chief of Military Justice at Little Rock AFB, Captain (Capt) W.A., asked SFOI to seek corroborating evidence of cocaine use. JA at 50-51. No evidence corroborating drug use by either SSgt N.W. or SrA Roan was found.

2. SrA Roan is charged and the defense requests discovery.

The Government referred a single charge and specification of wrongful use of cocaine, in violation of Article 112(a), UCMJ, against SrA Roan to a special court-martial on November 9, 2021. JA at 37-38. Ten days after referral of the charge, on

November 19, 2021, trial defense counsel submitted Defense Discovery Request #1, requesting exculpatory evidence, impeachment evidence, and evidence material to the preparation of the defense. JA at 189-190.

The defense requested, "[a]ny evidence in the Government's possession, including trial counsel or any military authorities, that may reasonably tend to: Negate the Accused's guilt." JA at 202. The Government responded it would "provide[] the case file information for [Staff Sergeant (SSgt)] [N.W.]." JA at 218. In addition to exculpatory material, the Defense requested, *inter alia*, (1) all personal or business notes prepared by agents or investigators; (2) any video or audio recording taken in the case; and (3) any derogatory information about any investigator in the case. [2]vvJA at 198-200. In its response the Government stated, "A copy of the entire [Security Forces Office of Investigations (SFOI)] case file will be provided to Defense." JA at 214. The Government stated that it would request derogatory data for SFOI investigators involved in the investigation. JA at 216.

3. Defense requests for outstanding discovery are litigated.

SrA Roan's court-martial took place from December 6 - 8, 2021.[3] JA at 1, 135. The defense filed two motions: a defense motion requesting reconsideration of a

[2] Three Security Forces members were listed in the ROI as having worked the investigation into SrA Roan's alleged drug use. JA at 267.
[3] After a series of 39(a) sessions on December 6-7, 2021, opening statements began on December 8, 2021.

previously filed and denied motion to compel a particular expert in the field of forensic toxicology and a motion to compel discovery. JA at 70-71, 75. Outstanding discovery included unit sweep documents and derogatory data for at least one government witness. JA at 70-71. Although trial counsel represented that "the government has complied with the discovery requirements to look for derogatory data," counsel later conceded that derogatory data remained outstanding and affirmatively stated that "the government will make efforts to get that information." JA at 71-72. Trial counsel provided derogatory data for one witness. JA at 74. However, information relating to "testing registries of the remainder of the accused unit involved in the sweep" had been destroyed and were determined to be unrecoverable. JA at 95. Derogatory data for SFOI investigators was neither disclosed nor produced.

Additionally, the defense litigated reconsideration of a motion to compel a substitute expert witness. JA at 75, 81-91. The defense's basis was that "there ha[d] been a breakdown in the relationship between the defense and the appointed expert and the expert requested to be released from the court." JA at 82. The defense expert, Capt P.K., had been appointed as an expert to assist the defense approximately two weeks prior to trial. *Id*. The Government had substituted Capt P.K. for the defense's by-name requested expert. According to Capt P.K., the defense had concerns about communication barriers because of Capt P.K.'s accent. JA at 83-84. Capt P.K. also

stated that he was concerned about negative impact regarding his support of SrA Roan. JA at 84. On December 7, 2021, the Military Judge granted the defense request for a substitute expert and stated that "[o]f all types of cases that are prosecuted, [naked urinalysis cases] rise[] and fall[] on the expert's testimony and the degree to which the expert's testimony is confronted or challenged." JA at 86-91. The defense provided their new expert "with the necessary materials for his preparation overnight." JA at 95. SrA Roan's court-martial convened on the merits the following morning.

4. SrA Roan is convicted based only on his urinalysis.

The Government's only evidence against SrA Roan was the positive urinalysis. JA at 10. There was no corroborating evidence of cocaine use. The Government relied on the permissive inference to prove guilt. The Defense did not present evidence at findings. JA at 133. The members convicted SrA Roan of one charge and specification of wrongful use of cocaine. JA at 134.

5. Material evidence favorable to SrA Roan is disclosed in a parallel court-martial.

Also on November 9, 2021, one charge and specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, was referred against SSgt N.W. JA at 50. SSgt N.W. was tried by a special court martial convened on January 24, 2022. *Id.*

At trial, SSgt N.W. filed a motion to dismiss the charge against him because of

prosecutorial misconduct. JA at 50. Specifically, SSgt N.W. alleged that the Government failed to disclose and produce exculpatory evidence. *Id*. Despite not granting the SSgt N.W.'s requested relief, the military judge found that the Government was "grossly negligent" and "failed to comply with their discovery and notice obligations." JA at 55.

On July 20, 2021, SFOI interviewed SSgt N.W. about his positive urinalysis for cocaine. JA at 50. SSgt N.W. told SFOI Investigator J.B., "I have no idea, why would I…I take pre-workout, I don't know if that could make me pop… my roommate brought [the pre-workout] back from Africa. I ran out of mine and took his." *Id.* SFOI did not take any further investigative steps, and the original ROI was published on July 23, 2021. JA at 51. Upon review of the ROI, the Chief of Military Justice asked SFOI to conduct further investigation. *Id.*

SFOI Inv M,[4] a "brand new, untrained and not yet qualified" investigator, conducted additional interviews to corroborate the July 6th drug tests. JA at 51. He interviewed SSgt N.W. and SrA Roan's other roommate, SSgt D.B., on September 14, 2021. *Id.* Although not listed in the ROI summary of his interview, during SSgt D.B.'s interview, SSgt D.B. discussed a pre-workout powder made by Blackstone Labs that he purchased online while deployed in early 2021. *Id.* He stored the pre-

[4] Inv M's first initial is not apparent from the record. For readability, this brief refers to him by last initial only. *See generally* JA at 267 (ROI listing of investigators).

workout powder in the home he shared with SSgt N.W. [and SrA Roan] in a central location where the other roommates had access to it. *Id.* SSgt D.B.'s videotaped interview was not disclosed or produced to SrA Roan.

On either September 14 or 15, 2021, a second untrained and uncertified SFOI investigator, Inv N.M., discovered that at least one of Blackstone Labs' pre-workout products contained a stimulant called "dimethylhexylamine" or "DMHA." JA at 51.[5] Inv N.M. then contacted the Drug Demand Reduction Program (DDRP), who informed him that DMHA was on the banned substance list and provided, via email, the "names of the two Medical Review Officers (MRO) who could discuss whether the banned substance could cause a positive result for cocaine." *Id.* DDRP also sent the investigator the banned substance list. *Id.*

That same day, Inv N.M. called one of the MROs. *Id.* Inv N.M. did not document that conversation but recalled the MRO stating it was "possible if taken in the right quantities, within the right timeframe, that the stimulant 'DMHA' could cause a positive result for the metabolite of cocaine on a urinalysis." *Id.*

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[5] *See United States v. Blackstone Labs, et al.,* Docket No. 19-CR-80030-WPD (S.D.Fla. 2019), ECF No. 1 (The Department of Justice investigated Blackstone Labs, the manufacturer of the pre-workout powder in question for falsely characterizing their products as safe and legal dietary supplements, falsely representing that the products were made in "FDA-approved" facilities, and controlling a manufacturing facility that fraudulently imported raw ingredients from China**.** Two executives of the company pleaded guilty to Conspiracy to Defraud the United States, Introduction of Unapproved new Drugs into Interstate Commerce, and Conspiracy to Distribute Controlled Substances.) JA at 47-49.

The conversation and email between the SFOI and DDRP were never documented in any investigative casefile. The conversation between SFOI and the MRO was never documented in any investigative casefile. However, Inv N.M. relayed the results of his investigation to the base legal office, who determined there was sufficient evidence to open cases against SSgt D.B. and SSgt N.W. for an alleged violation of Article 92, UCMJ, using a substance on the banned substances list. [6] The Government did not disclose information related to SFOI's expanded investigation to SrA Roan.

On September 20, 2021, SFOI read SSgt D.B. his Article 31, UCMJ, rights for violating Article 92, UCMJ. JA at 51. At some point between September 20, 2021, and October 4, 2021, SFOI, in coordination with the base legal office, declined to pursue the Article 92, UCMJ, case against SSgt D.B. or SSgt N.W. JA at 51-52.

Sometime between September 20, 2021, and October 4, 2021,[7] SFOI, in coordination with the base legal office, decided not to pursue the Article 92 violation. Inv N.M. closed the cases against SSgt D.B. and SSgt N.W. (the Article 112(a) investigation against SSgt N.W. remained open). *Id*. Then Inv N.M., contrary to SFOI policies that require files to be maintained for 75 years, deleted the electronic case file and the hard copy case file on the investigation into SSgt D.B.'s alleged

[6] Inv N.M. believes he spoke to Capt W.A.; however, Capt W.A. did not recall that conversation. *Id.*

[7] October 4, 2021 was the republication date of SSgt N.W.'s ROI.

Article 92, UCMJ, violation. *Id.*

At the same time, any reference to the Article 92 investigation regarding SSgt N.W. was also removed from his investigative case file. *Id*. Upon returning to the office from Temporary Duty, SFOI Inv J.B., the only qualified and certified investigator involved in the case, discovered the deletion, and verbally counseled Inv N.M. and Inv M. *Id.* No documentation of either counseling, if it exists, was ever provided to SrA Roan through the discovery process.

Ruling on SSgt N.W.'s defense motion to dismiss, the military judge ruled the conversations between SFOI and the MRO and the conversation between SFOI and DDRP were "arguably exculpatory" and, regarding SFOI's destruction of case files, stated "the lack of documentation definitely calls into question the training, ethical practices and integrity of investigators as those conversations were never documented." JA at 52. Further, the military judge found that "the Government failed to comply with their discovery and notice obligations." JA at 53. The military judge concluded that the Government was "grossly negligent, but not willful or intentional." JA at 55. The military judge found a continuance was an adequate remedy and denied the motion to dismiss. *Id.* SSgt N.W. was acquitted in his eventual court-martial for the Article 112a, UCMJ, violation. JA at 43.

6. Appeal at the Air Force Court.

Before the Air Force Court, SrA Roan asserted that the Government violated

his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963) and discovery rights under R.C.M. 701(a)(6). JA at 2. In its response, the Government attached the declaration of Maj A.N. JA at 5, 42-44. Despite being trial counsel for both SrA Roan and SSgt N.W.'s courts-martial and a supervisory attorney, Maj A.N. claimed that "No member of the trial counsel was aware that Inv [N.M.] had done this research or that he failed to document it." JA at 42. Maj A.N.'s only explanation for the Government's gross negligence was that his office was "dealing with minimal manning" at the time. *Id.* at 41-42.

SrA Roan attached a declaration from his trial defense counsel, Capt J.S. JA at 45. She explained that, at the time of trial, the Defense was:

> not aware the [SFOI] performed any investigation into SSgt Berger. We were not aware that SSgt Berger's supplements were on a "banned substance list." We were not aware that SFOI located [an MRO] that opined that the substance in SSgt Berger's possession, taken at the right time and in the right quantities, could cause a positive result for the metabolite of cocaine. We were not aware that SSgt Berger's file had been destroyed.

Id. She further explained that such information could have been valuable, especially that an MRO believed the pre-workout could create a false positive. *Id.* Additionally, the circumstances could have provided impeachment material for "SFOI, the MRO, and the process more generally." *Id.*

In its analysis, the AFCCA assumed without deciding that trial counsel should have known of the pre-workout powder investigation. JA at 9. However, the AFCCA

held the evidence was not material under *Brady* because there was no "reasonable probability" of a different result. JA at 8-9. It rejected the value of the pre-workout supplement because, to the AFCCA, the evidence only linked the pre-workout to SSgt N.W., not to SrA Roan. JA at 9-10. It also rejected the importance of the evidence as general impeachment because the investigators did not testify at trial. JA at 10.

The AFCCA also rejected SrA Roan's claim that the Government violated R.C.M. 701(a)(6), focusing on a purported lack of evidence that SrA Roan used the pre-workout. *Id.* The AFCCA held that, even if there was an R.C.M. 701 violation, there was no prejudice under a reasonable probability standard. JA at 10-11. It rejected a harmless beyond a reasonable doubt standard, finding that SrA Roan did not specifically request the information the withheld information. The Court also found no prosecutorial misconduct because the prosecutor's actions were not knowing or intentional. *Id.* The AFCCA affirmed the findings and sentence. JA at 11-12.

SUMMARY OF ARGUMENT

The Government violated both *Brady* and R.C.M. 701(a)(6) when it deprived SrA Roan of exculpatory evidence prior to his court-martial. Bluntly, the Government was aware of evidence that suggested SrA Roan's positive urinalysis might have been the result of something other than the knowing, wrongful use of cocaine and failed to disclose it as constitutionally and statutorily required.

As early as July 20, 2021, the Government was aware of the existence of pre-workout power in a centrally located area of SrA Roan's apartment. As early as September 14 or 15, 2021, the Government was aware that the pre-workout powder in SrA Roan's residence – although marketed to look FDA approved – contained DHMA, a banned substance. On September 15, 2021, the Government knew that DMHA, if taken at the right time and quantity, might cause a positive result for the metabolite of cocaine, benzoylecgonine. JA at 50-51. The Government intentionally or inadvertently failed to disclose this information to SrA Roan.

In assessing SrA Roan's constitutional discovery rights, the AFCCA erred when it found that the withheld evidence was not material. Further, the AFCCA erred when it failed to consider the cumulative effect of the withheld evidence and when it failed to consider how this evidence, if disclosed, might have impacted the SrA Roan's preparation and presentation of a defense at trial.

For the same reasons, the AFCCA erred when it found that the withheld evidence was not subject to disclosure under R.C.M. 701(a)(6). The AFCCA erred when it failed to consider the defense's specific requests for discovery and held that prosecutorial misconduct required knowing and intentional conduct. As a result, the AFCCA mistakenly applied the lower reasonable probability test for prejudice, rather than the heightened harmless beyond a reasonable doubt standard. Applying the correct standard, the Government is unable to show that their discovery violations

were harmless beyond a reasonable doubt.

The Government's gross negligence, failing to disclose material, exculpatory evidence as required by *Brady* robbed SrA Roan of the opportunity to mount a defense. As a result, his conviction should be set aside.

ARGUMENT

I.

THE LOWER COURT'S ERRONEOUS RESOLUTION OF A QUESTION OF LAW – FINDING THAT WITHHELD EVIDENCE WAS NOT MATERIAL AND THERE WAS NO PREJUDICE TO APPELLANT – VIOLATED *BRADY v. MARYLAND*.

A. Standard of Review

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Military Courts of Appeals review discovery and disclosure process violations under a two-step analysis: "first, [this Court determines] whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, [this Court tests] the effect of that nondisclosure on the appellant's trial." *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Materiality is a question of law reviewed de novo. *Id*. at 326. In cases involving constitutional error, the government must show that the error was

harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

B. Law and Analysis

Establishing a *Brady* violation requires an appellant show: (1) that the evidence at issue was favorable, either because of its exculpatory nature or value as impeachment evidence; (2) that the favorable evidence was suppressed, either intentionally or inadvertently, by the government; and (3) the failure to disclose resulted in prejudice. *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *United States v. Hawkins*, 73 M.J. 605, 610 (A. Ct. Crim. App. 2014).

1. The withheld evidence was material to SrA Roan's defense.

Materiality is a relatively low burden. "Evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009) (internal citations omitted). "[A] showing of materiality does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 439, 434 (1995). A reasonable probability does not mean that the defendant "would more likely than not have received a different verdict with the evidence," but only that the likelihood of a different result is great enough to

"undermine confidence in the outcome of the trial." *Id*. The Supreme Court has extended *Brady*, clarifying "that the duty to disclose such evidence is applicable even though there has been no request by the accused…and that duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler*, 527 U.S. at 280.

AFCCA erred when it found that the undisclosed information was not material. In reaching this conclusion, the lower court's analysis turns on the fact that there is no "indication in the record that Appellant used his roommate's supplement," thus it found "no reasonable probability that disclosure of the MRO's purported statement regarding DMHA would have produced a different result in Appellant's trial." JA at 11. The lower court failed to conduct the proper analysis. Resolution of this case does not turn on the defense SrA Roan mounted at trial. Rather, it turns on the impact the evidence, if properly disclosed, would likely have had on the outcome of trial. This is the analysis articulated by the Supreme Court in *Kyles*, where the Court overturned a conviction, based not on the evidence that was actually introduced by the defense in the record of trial but on what the defense could have done with the withheld information. 514 U.S. at 419.

To determine what the defense might have done with the withheld evidence, it's necessary to first outline exactly what evidence was withheld. Here, the Government failed to disclose the following evidence material to SrA Roan's guilt or punishment:

> (1) in the common area of Appellant's apartment there was workout powder that was manufactured by Blackstone Labs;
> (2) some pre-workout powder from Blackstone Labs contained a banned substance – DMHA;
> (3) despite containing a banned substance, Blackstone Labs marketed itself to appear FDA approved and, as a result, had been the target of a Department of Justice investigation.
> (4) a MRO told a Security Forces investigator that DMHA could cause a false positive for cocaine;
> (5) interviews with SSgt N.W. and SSgt Berger were videotaped and the tapes were not provided to the defense;
> (6) SFOI destroyed SSgt Berger's case a file and deleted all references to the Article 92, UCMJ, investigations in SSgt N.W.'s case file; and
> (7) two Security Forces investigators were counselled for violating SFOI policies and destroying case files.

The effect of all withheld evidence favorable to SrA Roan must be considered cumulatively. *Kyles,* 514 U.S. at 437. AFCCA erred when it considered the materiality of the withheld evidence individually. JA at 1-12.

The Government possessed all this information no later than October 4, 2021, when SFOI – in coordination with the legal office – declined to pursue charges for a violation of Article 92, UCMJ, against SSgt Berger and SSgt N.W. and the ROI was republished. JA at 51-52. In other words, the Government was aware of this information for at least two months (but probably longer) before SrA Roan's court-martial and failed to disclose the information "as soon as practicable." *See* R.C.M. 701(a)(6).

The cumulative effect here is that the Government's withholding of

exculpatory and impeachment evidence interfered with SrA Roan's right to mount a defense. Had the defense been aware of this evidence, they would have been able to present an innocent ingestion defense to rebut the Government's use of the permissive inference. It is more than reasonably probable that had SrA Roan been able to mount such a defense in the face of the Government's uncorroborated allegation, the outcome of his trial would have been different.

The AFCCA errs in assuming that to put forward such a defense, there must have been evidence connecting SrA Roan to the pre-workout supplement in the record. It should go without saying: withheld evidence will not appear in the record of trial. In its opinion AFCCA falls victim to the same misreading of R.C.M. 701 as the trial judge in *United States v. Lewis*, 51 M.J. 376 (C.A.A.F. 1999). Corroborating evidence of innocent ingestion is not required. In *Lewis*, this Court reversed a conviction for the wrongful use of cocaine based on the military judge's erroneous ruling that the innocent ingestion defense requires the defense to put on corroborating evidence. *Id.* at 376. The military judge's ruling, barring the defense from putting on uncorroborated evidence of innocent ingestion, improperly restricted Lewis' right to present a defense at his court-martial. Here, the Government improperly restricted SrA Roan's right to present a defense when it withheld evidence that might have connected SrA Roan to the pre-workout powder.

"The very nature of an innocent ingestion defense means that [the defendant]

could not prove the time or place of his innocent ingestion but could only suggest possible explanations. Part of a defense of innocent ingestion requires raising doubt in the minds of members that the presence of the drug in [the defendant's] system came from a knowing and wrongful use of the drug." *United States v. Brewer,* 61 M.J. 425, 429 (C.A.A.F. 2005). Without the Government's disclosures, SrA Roan did not have a basis to mount an innocent ingestion defense; thus, it is not in the record. However, evidence such as the presence of DMHA in SrA Roan's residence and the potential for DMHA to cause a positive result for a cocaine metabolite, would have supported such a defense and could have raised doubts in the minds of the members as to whether SrA Roan knowingly and wrongfully used cocaine.

This evidence is material and favorable. Had the defense been aware that there was a seemingly legal product in the common area of SrA Roan's apartment that could cause a positive urinalysis for a metabolite of cocaine, they would have had a strong basis to introduce an innocent ingestion defense. Such a defense provides a basis for the members to question whether to draw the inference that SrA Roan's drug use was wrongful, thereby raising a question as to an essential element of the charge. This is strong evidence that members would carefully weigh against the Government's bare accusation.

While there is no direct evidence that SrA Roan knowingly consumed SSgt D.B.'s pre-workout powder, such a link is not required to mount an innocent ingestion

defense. But, even without a direct link, there is at least some evidence in the record to suggest that SrA Roan consumes pre-workout type products. The urinalysis observer testified that they remembered SrA Roan as someone who appeared "athletic," "like a guy who worked out, went to the gym every day, and walked around like he had a protein shake." JA at 101-102. In other words, members may have found the explanation that SrA Roan either intentionally or accidentally consumed SSgt D.B.'s pre-workout powder plausible since SrA Roan looks like the kind of guy who drinks "protein shakes." *Id.* However, because the defense was unaware of SFOI's investigation into the pre-workout powder, SrA Roan was denied the opportunity to present this line of defense.

Further, disclosure of this evidence could have informed how the defense used their appointed expert. While trial counsel, Maj A.N., points to the fact that the defense had an appointed expert to consult with, context is important here. JA at 42. Approximately two weeks before trial, the defense was provided an expert consultant, Capt P.K., who they believed possessed sub-part qualifications and an accent that resulted in a language barrier. JA at 82-84. It is unclear how thoroughly defense counsel was able to consult with Capt P.K. However, the military judge ultimately granted reconsideration of the defense motion to substitute their appointed expert, the day before findings began. The defense had a single night to consult with their new expert. JA at 95. If the government had disclosed the information about DMHA in

the pre-workout powder in a timely fashion, the defense would have been able to more fulsomely consult with their experts to explore whether DMHA in pre-workout powder was a viable defense.

At a minimum, this evidence would have informed the defense's cross-examination strategy regarding the Government's expert witness. As the military judge noted, "[o]f all types of cases that are prosecuted, [naked urinalysis cases] rise[] and fall[] on the expert's testimony and the degree to which the expert's testimony is confronted or challenged." JA at 87-91. Had the Government disclosed the evidence, the defense would have been able to cross-examine the Government's witness more thoroughly about the exact metabolite that the lab tested for and whether there were any other substances that might result in the presence of that metabolite, other than cocaine. AFCCA failed to consider this.

The fact that the defense was aware of SSgt N.W.'s statement to SFOI does not relieve the Government of its burden to provide the discovery outlined above. Evidence of Inv N.M.'s investigation and its results, which were inspired by SSgt N.W.'s statement, is necessarily non-cumulative with SSgt N.W.'s statement. SSgt N.W.'s statement cannot be reasonably assumed to have apprised the defense of an innocent ingestion defense for SrA Roan. SSgt N.W.'s statement did not include the source of the supplement, any information about Blackstone Labs, did not indicate that the pre-workout powder contained DMHA, a banned substance, that could

possibly cause a positive urinalysis result, and did not indicate that the pre-workout powder was stored in a common area of the apartment.

There was no reason for the defense to pursue an innocent ingestion defense based on SSgt N.W.'s unscientific opinion that an unnamed pre-workout powder might have caused his positive urinalysis. More pointedly, even if the defense had wanted to investigate SSgt N.W.'s theory, there is no indication that the pre-workout powder referenced by SSgt N.W. and SSgt D.B. in July and September remained in the apartment for the defense to inspect when the defense received SSgt N.W.'s statement in November.

Further, as Capt J.S. points out in her affidavit, the information related to the destruction of the case could have been used "to impeach the investigators at the SFOI…and the process more generally." "Favorable" evidence under *Brady* includes "impeachment evidence…that, if disclosed and used effectively, … may make the different between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). AFCCA summarily disregards this use of favorable evidence because "[n]either Inv NM nor any other SFOI investigator testified at Appellant's trial."

AFCCA misses the point: the defense did not call these witnesses because they had no information with which to impeach the witnesses. Had the defense had this information, they might have called Inv N.M. (or another investigator or the MRO) to testify about the results of the SFOI investigation into the pre-workout powder or

Blackstone Labs, irregularities involved in the investigation, and to challenge Inv N.M.'s credibility, which might have tipped the scales in favor of the defense. The defense strategy at trial was to raise doubts as to the integrity of the process. Evidence that SFOI investigators failed to document critical investigative steps, destroyed evidence, and received reprimands for failing to follow established policy would have bolstered the defense theory and might have raised reasonable doubts among the members as to the strength of the Government's case.

Had the Government disclosed the information outlined above, findings instructions may have been different. It bears noting the Government's case against SrA Roan was not strong; there was no confession and no corroborating evidence of SrA Roan's alleged use of cocaine. *See* JA at 10 ("the Government's case consisted almost entirely of witnesses and documents related to the collection and testing of Appellant's urine sample.") The Government relied exclusively on the permissive inference that SrA Roan's urinalysis testing positive for a metabolite of cocaine was because he had knowingly and wrongfully ingested cocaine. As a result, the military judge instructed on permissive inference. JA at 257-258. However, had the defense been able to introduce some evidence that pre-workout powder manufactured by Blackstone Labs might cause a positive urinalysis test, the members would have also been instructed on innocent ingestion. *Military Judge's Benchbook* at 3a-36a-2. (Drugs – Wrongful Use (article 112a)). This would have changed the way the

members considered the knowledge and wrongfulness elements of the charged offense and placed a burden on the Government to persuade the factfinder to disbelieve the defense evidence or discount it when deciding to draw the permissive inference.

Taken cumulatively, these considerations easily satisfy the requirement that there be a reasonable probability of a different outcome. *Cone,* 556 U.S. at. 449. Indeed, while there is no requirement that SrA Roan prove that the disclosure of such evidence would result in an acquittal, such an outcome is likely given the instant facts. Understanding no two courts-martial are alike, it is important to note SSgt N.W. was also court-martialed for the same offense and acquitted. The critical difference between SrA Roan and SSgt N.W. is that SSgt N.W. had the benefit of having the evidence described above in advance of his trial and was able to use that information to both prepare and present his defense.

2. The Government intentionally or inadvertently suppressed this evidence.

There is no dispute: the Government did not turn over this evidence in advance of SrA Roan's trial. Before the AFCCA, the Government relied heavily on the affidavit of Maj A.N. As a supervisory attorney and the trial counsel for both SrA Roan and SSgt N.W.'s courts-martial, Maj A.N.'s statement that he was unaware of SFOI's actions strains credulity. While Maj A.N. claims that "no member of the trial counsel" was aware of the Security Forces investigation into the pre-workout powder,

SFOI investigated the Article 92, UCMJ violation for use of a banned substance at the direction of and in coordination with the Chief of Justice in the legal office. Maj A.N., as a supervisory attorney and trial counsel in both SrA Roan and SSgt N.W.'s courts-martial, certainly should have known what joint investigative steps were taken in the "companion cases" he was prosecuting. JA at 42.

However, even if Maj A.N.'s statement is sincere, a prosecutor's lack of knowledge is not controlling. "It is well accepted that a prosecutor's lack of knowledge does not render information unknown for *Brady* purposes." *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991); *see also, United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (finding it "improper for a prosecutor's office to remain ignorant about certain aspects of a case or to compartmentalize information so that only investigating officers, and not the prosecutors themselves, would be aware of it"). "This prohibition against willful ignorance has special force in the military justice system, which mandates that an accused be afforded the 'equal opportunity' to inspect evidence." *United States v. Stellato*, 74 M.J. 473, 487 (C.A.A.F. 2015) (citing Article 46, UCMJ, 10 U.S.C. § 846; R.C.M. 701(e)).

By failing to inspect the SFOI files in a related case, Maj A.N. effectively remained willfully ignorant as to SFOI's investigation into the pre-workout powder. If Maj A.N. had simply exercised reasonable diligence in preparing the Government's case, he would have been aware of the steps taken by SFOI, the destruction of the

case files, and the investigators' derogatory data and, and upon doing so, would have incurred the responsibility to turn over to the defense responsive material and exculpatory information. By not disclosing the existence of this information to the defense, Maj A.N. failed to disclose exculpatory evidence "as soon as practicable" and interfered with the SrA Roan's ability to prepare and present a defense at trial.

3. SrA Roan was prejudiced by the Government's discovery violations.

Because *Brady* evidence has the twin requirement that the evidence be both favorable and material, a *Brady* violation is always prejudicial ... there is no such thing as a harmless Brady violation. 'Prejudice' is baked into every *Brady* violation." *United States v. Ellis*, 77 M.J. 671, 675 (A.C.C.A. 2018). In cases involving discovery violations, prejudice turns on whether there was "injury to [an accused's] right to a fair trial." *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000); *United States v. Valentine*, 984 F.2s 906, 910 (8th Cir. 1993) (noting that discovery sanctions are warranted where violations prejudice the defendant's substantive rights). In *Stellato*, this Court adopted analysis from Article III courts, concluding that prejudice arises when a discovery violation interferes with an accused's ability to mount a defense. 74 M.J. at 490.

Applying *Stellato*'s analysis to the instant case, there is little doubt that the Government's withholding of evidence resulted in prejudice. And, simply put, the Government cannot prove beyond a reasonable doubt that such prejudice is harmless.

Taken cumulatively, the nondisclosure of discoverable evidence impacted the outcome of SrA Roan's trial. *First*, the discovery violations resulted in the defense not calling key witnesses, including Inv N.M. and the MRO. Inv N.M. could have testified to his investigation into the pre-workout powder and Blackstone Labs, his conversation with the MRO, and the fact that he destroyed portions of the case file. The MRO could have opined as to whether DMHA could result in a positive urinalysis test. Few rights are more fundamental than the right to present witnesses in one's defense and, because of the Government's discovery violations, SrA Roan was denied this right.

Second, because the defense did not know about the pre-workout powder, the DMHA, Blackstone Labs, or the potential for a positive urinalysis result, their ability to utilize their experts, cross-examine the government's expert, and ultimately prepare and present its defense was compromised. As such, SrA Roan is entitled to relief, and his conviction should be set aside.

II.

THE LOWER COURT'S ERRONEOUS RSOLUTION OF A QUESTION OF LAW – FINDING THAT THE GOVERNMENT DID NOT VIOLATE APPELLANT'S RIGHTS UNDER RULE FOR COURTS-MARTIAL 701(A)(6) – VIOLATED BINDING PRECEDENT SET BY THIS COURT.

A. Standard of Review

Military Courts of Appeals review discovery and disclosure process violations

under a two-step analysis: "first, [this Court determines] whether the information or evidence at issue was subject to disclosure or discovery; second, if there was nondisclosure of such information, [this Court tests] the effect of that nondisclosure on the appellant's trial." *Roberts*, 59 M.J. at 325. Materiality is a question of law reviewed de novo. *Id.* at 326.

There are two tests for determining materiality. *Id*. (citing *Hart*, 29 M.J. at 410). The first test applies where the defense "either did not make a discovery request or made only a general request for discovery." *Id*. "Once the appellant demonstrates wrongful nondisclosure under those circumstances, the appellant will be entitled to relief only by showing that there is a 'reasonable probability' of a different result at trial if the evidence had been disclosed." *Id*. at 326-27 (internal citations omitted).

The second materiality test applies when "an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct." *Id*. at 327. In such cases, "the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt." *Id*. (citing *Hart*, 29 M.J. at 410). The wrongful nondisclosure of discoverable evidence cannot be "harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial." *United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (quoting *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013)).

B. Law and Analysis

The military rules provide additional discovery rights to the defense. Article 46, UCMJ, provides that trial counsel, defense counsel, and the court-martial with the "equal opportunity to obtain witnesses and other evidence" in accordance with R.C.M. 701-703. Article 46, UCMJ 10 U.S.C. § 846 (2019). "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. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004) (citation omitted) (internal quotation marks omitted). This Court has held that trial counsel's "obligation under Article 46, UCMJ," includes removing "obstacles to defense access to information" and providing "such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence." *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

R.C.M. 701(a)(6) "implements the Supreme Court's decision in *Brady*." *Id.* At 440. R.C.M. 701(a)(6) states:

> Evidence favorable to the defense. Trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to trial counsel which
> reasonably tends to—
> (A) Negate the guilt of the accused of an offense charged;
> (B) Reduce the degree of guilt of the accused of an offense charged;
> (C) Reduce the punishment; or

(D) Adversely affect the credibility of any prosecution witness or evidence.

R.C.M. 701(a)(6), M.C.M. 2019.

Additionally, in accordance with R.C.M. 701(d), trial counsel has a continuing duty to identify and disclose information that is favorable to the defense throughout the prosecution. *See Strickler*, 527 U.S. at 280 (duty to disclose evidence favorable to the defense applies even in the absence of a request by the defense and encompasses impeachment evidence as well as exculpatory evidence). The rules "aid in the preparation of the defense and enhanced the orderly administration of military justice." *Roberts*, 59 M.J. at 325. And, as this Court has frequently reminded litigants, the prosecution is required to evaluate pretrial discovery and disclosure issues in light of this "liberal mandate." *See e.g.*, *Stellato*. 74 M.J. at 481 (citing *Roberts,* 59 M.J. at 325).

1. The AFCCA erred in its application of R.C.M. 701(a)(6).

Analyzing SrA Roan's non-constitutional discovery rights, the lower court erred in two ways. *First*, the Court held that there was no discovery violation because none of the four circumstances listed in R.C.M. 701(a)(6) applied. Using the same flawed logic as in the *Brady* aspect of its ruling, the AFCCA ruled that no discovery violation occurred because the lack of evidence of Appellant's use of the pre-workout meant that its qualities "did not 'tend' to 'negate' or reduce the degree of Appellant's guilt." JA at 10. Again, the AFCCA myopically confines its analysis to what the

defense did at trial *without* the information, rather than what the defense could have done *with* the information.

Second, "assuming *arguendo*, that R.C.M. 701(a)(6) did require disclosure," the AFFCA ruled that the error was not prejudicial. In reaching this conclusion, the AFCCA erroneously applied the lower standard of review, whether there is a "reasonable probability of a different result." JA at11. In doing so, the AFCCA violated precedent set by this Court, which requires the heightened "beyond a reasonable doubt" standard for discovery violations where the defense made a specific request for the information, or where there was prosecutorial misconduct. *Roberts*, 59 M.J. at 327. In the instant case, the defense both made a specific request for discovery and the discovery violation resulted from prosecutorial misconduct.

2. The Defense made specific discovery requests for the exculpatory evidence and the Government provided incomplete responses.

Trial counsel has an obligation to both review their own case files and "exercise due diligence and good faith in learning about any evidence favorable to the defense known to the others acting on the [G]overnment's behalf in the case, including the police." *Stellato*, 74 M.J. at 486 (cleaned up). An appellant can prevail "only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed." *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004). But "[w]here an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial

misconduct, the appellant will be entitled to relief unless the Government can show that non-disclosure was harmless beyond a reasonable doubt." *Roberts*, 59 M.J. at 327 (citation omitted).

AFFCA erred when it held that the defense had not made specific requests for the undisclosed information. JA at 10. Specific discovery requests were submitted and the Government provided incomplete responses.

In its first discovery request, submitted on November 19, 2021, the Defense specifically requested: (1) all personal or business notes prepared by agents or investigators in the case; (2) any video or audio recording taken in the case; and (3) any derogatory information about any investigator in the case. JA at 198-200. The Defense also requested any evidence that tended to negate SrA Roan's guilt. JA at 202. When the Government responded to the Defense's request, SFOI and the base legal office knew about the Inv N.M.'s investigation into SSgt D.B.'s pre-workout powder, yet the Government did not disclose it.

AFCCA found that because the expanded investigation about the pre-workout listed SSgt N.W. as the subject, not SrA Roan, the Government was not required to disclose it. That finding, however, contradicts Maj A.N.'s statement that the investigations were joint. Moreover, it inappropriately absolves Maj A.N. of his obligations under Article 46, UCMJ, including, *inter alia*, his obligation to search related case files for any evidence that would tend to negate SrA Roan's guilt.

Certainly, evidence in a co-accused's case file that. suggests the possibility that SrA Roan's positive urinalysis might be the result of something other than the knowing and wrongful ingestion of cocaine is evidence that would tend to negate SrA Roan's guilt and was required to be turned over. Again, there is no requirement that SrA Roan prove he consumed the pre-workout powder. The mere existence of the pre-workout powder in a common area of SrA Roan's apartment is sufficient to trigger disclosure.

Moreover, the defense specifically requested "[a] copy of any video or audio recording taken during the investigation of this case, to include the Accused, the Complaining Witness, *and any other person questioned*." JA at 215 (emphasis added). In its response, the Government stated "A video of the Accused wherein he invokes his Article 31 rights is the only video Trial Counsel is aware exists that is responsive to the request. It will be provided to Defense." *Id.* That was inaccurate. The Government had video recordings of interviews that the defense requested – including SSgt N.W. and SSgt D.B. – and the Government failed to turn them over. Although SFOI claimed that the recordings "did not provide additional pertinent information," there is no indication as to what was on the video. JA at 51. At a minimum, SSgt D.B.'s July 20, 2021, videotaped interview would have included details about his purchase of the pre-workout supplement, the brand, where it was stored, etc., all of which was "pertinent information" for SrA Roan. The lower court

failed to address the non-disclosure of video-taped evidence in response to a specific discovery request.

Even if there was no connection between the pre-workout investigation and SrA Roan, this Court can still find that the Government was required to disclose the mishandling of the investigation by SFOI investigators and the SFOI investigators' derogatory data. SFOI investigators, in a joint investigation, failed to document crucial conversations that led to exculpatory information, and then deleted case files in violation of SFOI policy. Two investigators were verbally counseled for their mishandling of the investigation. And here, specifically, the Government cannot plead ignorance. Not only did the defense make a written request for derogatory data for the SFOI investigators, but the Government's failure to provide derogatory data for its witnesses was the subject of motions practice.

It bears noting that the AFCCA failed to address the Government's withholding of derogatory data in response to a specific discovery request. However, this evidence raises doubts about the credibility of Government agents. Had the defense known about the mishandling of the investigation, it could have called into question the integrity of the investigation by putting on evidence of SFOI's mishandling of the investigation and/or called the SFOI investigators as defense witnesses. It could have used that information to further investigate whether any additional errors were made during the investigation. In a urinalysis case where the

Government relied on the presumptive inference, this evidence alone could have reasonably resulted in a different verdict.

The AFCCA was incorrect that the defense did not make specific requests for the withheld information. As a result, the AFCCA erroneously applied the reasonable probability standard. Under this Court's binding precedent articulated in *Roberts*, the Government's violations of SrA Roan's statutory discovery rights must be tested for harmlessness beyond a reasonable doubt.

3. The discovery violations were the result of prosecutorial misconduct.

In *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986), this Court's predecessor suggested that when defense-requested information is withheld by the prosecution, a court should impose a heavier burden on the Government to sustain a conviction. Four years later, in *Hart*, 29 M.J. 407, the CMA court adopted the reasoning in *Eshalomi* to hold that where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, the evidence will be considered material unless failure to disclose can be demonstrated to be harmless beyond a reasonable doubt. *See also, Roberts*, 59 M.J. at 327 (concluding that shifting the burden to the government "reflects the broad nature of discovery rights granted the military accused under Article 46[, UCMJ, 10 U.S.C. § 846 (2012)]").

"Prosecutorial misconduct can generally be defined as action or inaction by a

prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citations omitted). When the Government fails to disclose information specifically requested by the defense or commits prosecutorial misconduct, it is not enough for the Government to demonstrate that the information was not material or had not resulted in prejudice. Under *Hart*, prejudice is presumed and can be rebutted only by a demonstration of constitutional harmlessness. *Hart*, 29 M.J. at 15.

The AFCCA erred when it found that no prosecutorial misconduct had occurred. Specifically, the AFCCA based its conclusion on the fact that "[t]rial counsel in Appellant's case did not knowingly or intentionally withhold discovery; they were simply unaware of Inv NM's actions and the Article 92, UCMJ, investigations into SSgt DB and SSgt NW." Trial counsel's knowing and/or intentional withholding of discovery is not required. Trial counsel cannot be absolved of their discovery obligations because they are "simply unaware." Rather, binding precedent from this Court makes clear that trial counsel has an obligation to make themselves aware of potentially exculpatory information or risk imperiling their case. *See e.g*, *Stellato*, 74 M.J. at 473 (upholding dismissal with prejudice based on discovery violations -- cite to admonishment about trial counsel remaining ignorant).

As Justice Sutherland wrote, in the classic statement of prosecutorial responsibility:

> The [prosecutor] is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape, or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88.

This Court has previously opined on what level of discovery violation constitutes prosecutorial misconduct. In *Claxton,* this Court held that a failure to disclose the status of two witnesses as confidential informants (CI) – while harmless beyond a reasonable doubt – constituted "gross governmental misconduct." 76 M.J. at 361 ("we cannot allow the gross governmental misconduct which occurred in this case to escape unremarked.") Certainly, if the failure to trial counsel's failure to learn of disclose the identity of CIs constitutes gross governmental misconduct, then trial counsel's failure to learn of and disclose evidence suggesting innocent ingestion and the destruction of casefiles by Government agents would constitute prosecutorial misconduct. Here, as in *Claxton*, there is no evidence that the trial counsel made any

attempt to inquire into the conduct of investigators acting on the Government's behalf. *Id.*

Under R.C.M. 701(a)(6), trial counsel is required to review certain files, documents, or evidence for exculpatory information. *See Williams*, 50 M.J. at 440-41. It is trial counsel's "'duty to learn of any favorable evidence known to the others acting on the government's behalf …, including the police.'" *Strickler,* 527 U.S. at 281 (quoting *Kyles,* 514 U.S. at 437). In the instant case, there is ample evidence to suggest that responsible judge advocates including the Deputy Staff Judge Advocate and Chief of Military Justice did, in fact, know about the evidence in question. SFOI coordinated directly with the legal office regarding their investigations.

Here, there is simply no excuse for the trial counsel failing to apprise himself of the contents of a related investigation, which was being run concurrently with SrA Roan's investigation, for favorable information. It was his duty to learn the information and to disclose it, regardless of whether Maj A.N. believed that the pre-workout powder constituted a viable defense. Indeed, this Court has stated that trial counsel is required to inspect "investigative files in a related case maintained by an entity closely aligned with the prosecution." *Id.* (citations omitted) (internal quotations marks omitted). He failed to do so. Maj A.N.'s failure to undertake his obligations to learn of any favorable evidence known to law enforcement, constitutes a "blot on the Air Force legal system." *Claxton*, 76 M.J. at 362.

Despite SrA Roan's specific discovery request for derogatory information for SFOI investigators, trial counsel apparently never asked witnesses, including the three SFOI investigators, about derogatory data. Rather, SrA Roan only learned about outstanding derogatory data because a government witness voluntarily disclosed that fact during an interview. This resulted in the defense motion to compel discovery. JA at 190-191. However, even knowing that derogatory data was the subject of continued motions practice and that there was a specific request for the derogatory data of SFOI investigators, the Government withheld this evidence. Instead, trial counsel inaccurately represented to the Court that "the government has complied with the discovery requirements to look for derogatory data." JA at 71.

The AFCCA was incorrect when it found that prosecutorial misconduct required the knowing or intentional withholding of information. As a result, the AFCCA erroneously applied the reasonable probability standard. Under this Court's binding precedent articulated in *Robert*, the Government's violations of SrA Roan's statutory discovery rights must be tested for harmlessness beyond a reasonable doubt.

4. The Government cannot show that the discovery violations were harmless beyond a reasonable doubt.

With the withheld information, the defense could have changed the complexion of the trial. "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Chisum*, 77 M.J. 176, 179 (C.A.A.F. 2018) (quoting

Mitchell v. Esparza, 540 U.S. 12, 17–18 (2003)). Here, the Government cannot meet this standard.

The obvious utility of the withheld evidence was to show an alternative explanation for the positive urinalysis, or at the very least, call into question the credibility of the investigators and the investigation. With this information, the defense could have called the investigator to explain his findings and the MRO's determination that a false positive was possible. The defense could have challenged the investigators on the failure to seize and test the powder at issue. They could have asked the investigators why they did not document any of the conversation with the MRO, why they destroyed a case file, why they were disciplined, and why SFOI allowed untrained and uncertified investigators to act on their own. They could have introduced evidence that the manufacturers of the pre-workout powder were indicted for conspiracy to sell unlawful products marketed as dietary supplements, reinforcing the strength of an alternative explanation for the positive urinalysis. JA 47-49. They could have asked the Government's toxicologist whether the powder was tested; and, assuming it was not, it would have provided a viable alternate theory for the ingestion.

Each of these individual pieces of evidence on their own would have provided a basis for the defense to question the Government's case, but certainly, the cumulative effect of the defense presenting all the withheld evidence would have made a substantial impact in a case where the entirety of the Government's evidence

was the positive urinalysis. JA at 10. As Chief Judge Erdmann noted in his dissent in *Claxton*, this Court has, in nondisclosure cases, considered the cumulative effect of the nondisclosure, "rather than merely speculating as to what the result would have been without the confidential informants' testimony." *Claxton*, 76 M.J. at 362-363; see *Stellato*, 74 M.J. at 490.

5. **If SrA Roan had possessed the exculpatory evidence, there is a reasonable probability that the outcome of the trial would have been different.**

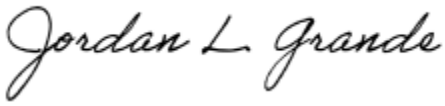
Even if this Court does not find that the defense made a specific discovery request for the exculpatory evidence or that there was prosecutorial misconduct such that the harmless beyond a reasonable doubt standard should apply, SrA Roan is still entitled to relief because there is a reasonable possibility that armed with the exculpatory information withheld by the Government, SrA Roan would not have been found guilty for all of the reasons articulated above.

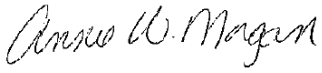
The Government's gross negligence, failing to disclose material, exculpatory evidence as required by R.C.M. 701(a)(6) robbed SrA Roan of the opportunity to mount a defense. As a result, his conviction should be set aside.

CONCLUSION

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt for the Charge and its Specification and set aside the sentence.

Respectfully Submitted,





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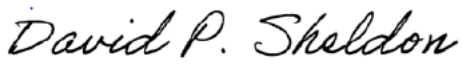

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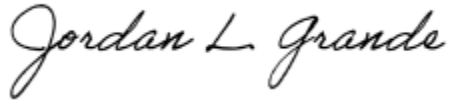
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on November 27, 2024.

Respectfully Submitted,



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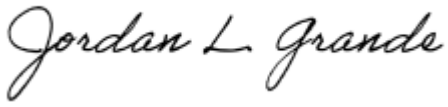
CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 10,932 words.

2. 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 Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,



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