IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 22033
	)	
Airman (E-4)	)	USCA Dkt. No. 24-0104/AF
BRYCE T. ROAN	)	
United States Air Force	)	3 January 2025
Appellant.	)	

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v.	)	Crim. App. No. 22033
Senior Airman (E-4) **BRYCE T. ROAN** United States Air Force *Appellant.*	)	USCA Dkt. No. 24-0104/AF

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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 COURTS-MARTIAL 701(A)(6) -- VIOLATED BINDING PRECEDENT SET BY THIS COURT.

INTRODUCTION

This issue in this case centers around whether Appellant's roommate's pre-workout supplement had any relevance to Appellant's court-martial for cocaine use when there is *no* evidence that *Appellant* ever used it. Despite Appellant knowing before, during, and after his court-martial about the pre-workout supplement, Appellant has never claimed *he* used it. Nevertheless, he asks this Court to speculate that somehow information about a supplement that he did not use would have created a reasonable probability of a different result in his trial.

Appellant claims that the information about his roommate's pre-workout supplement that surfaced in other investigations should have been disclosed to him before his trial under his constitutional and statutory discovery rights to receive favorable and material evidence. But this information was speculative as applied to Appellant's case. Another investigation revealed that one type of pre-workout supplement manufactured by Blackstone Labs contained the banned substance Dimethylhexylamine (DMHA), but there is no evidence in the record that Appellant's roommate possessed *that* particular workout supplement. Then, in investigating a different case, an unqualified and untrained investigator spoke to an Air Force medical review officer (MRO) who allegedly stated that if taken in the right quantity in the right timeframe, DMHA could cause a positive urinalysis for cocaine. But the MRO denied ever having that conversation or doing any research

on DMHA, and the government's expert in forensic toxicology in that separate case opined that such a result would be completely implausible.

Appellant's claims fail for two reasons. First, they are speculative as to whether the pre-workout supplement even contained DMHA or would have caused a false positive for cocaine. Second, and most importantly, there was no logical link to connect the pre-workout supplement to the Appellant since there is no evidence that *he* ever used it. This Court should therefore deny Appellant's claims because there is no reasonable probability that this speculative information, even if known to his defense counsel, would have changed the result of his trial.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 69(d),[1] UCMJ.[2] This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

[1] Appellant's brief states that AFCCA reviewed this case under Article 66(d), UCMJ. (App. Br. at 1.) The United States disagrees. (JA at 2) (AFCCA order granting Appellant's application for grant of review under Article 69(d)(1)(B), UCMJ).

[2] 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.

STATEMENT OF THE CASE

On 9 December 2021, a special court-martial at Little Rock Air Force Base (AFB) convicted Appellant, contrary to his plea, of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ. (JA at 39.) The court members sentenced Appellant to restriction to his residence for 45 days, three months of hard labor without confinement, reduction to the grade of E-2, and a reprimand. (JA at 135.) The convening authority disapproved the adjudged restriction. (JA at 46.)

On 30 March 2022, a designated judge advocate completed a review of the record of trial under Article 65(d), UCMJ, and determined the findings and sentence were correct in law and fact. (JA at 40.) On 7 September 2022, Appellant submitted a request to The Judge Advocate General (TJAG) under Article 69, UCMJ, that he "vacate and set aside the court's findings and sentence" because of "newly discovered evidence consist[ing] of information that Security Forces investigators interviewed individuals and obtained evidence that was exculpatory for [Appellant], but never turned it over to the defense, instead destroying the notes that were made." (JA at 17.) On 3 March 2023, after

thorough consideration of the record and Appellant's petition, TJAG found no error prejudicial to Appellant's substantial rights and denied relief.[3] (JA at 27.)

STATEMENT OF FACTS

Squadron Urinalysis Inspection

On 6 July 2021, Appellant was ordered to provide a urine sample as part of a unit-wide inspection ordered by his commander after the Fourth of July weekend. (JA at 165.) Appellant's urine sample tested positive for the metabolite of cocaine at 574 ng/ml. (JA at 175.) The Department of Defense (DoD) cutoff level is 100 ng/ml. (Id.) SSgt NW, Appellant's roommate, was subject to the same urinalysis inspection and also tested positive for the metabolite of cocaine, but at a lower level of 168 ng/ml. (JA at 50.) On 20 July 2021, Investigator JB of the Security Forces Office of Investigations (SFOI) initiated separate investigations against Appellant and SSgt NW for suspected wrongful use of cocaine. (JA 50, 265.) Investigator JB was the SFOI Noncommissioned Officer in Charge (NCOIC) and the only fully qualified investigator at that time. (JA at 56.)

Investigator JB's Investigation into Appellant's Cocaine Use

On 20 July 2021, a member of the Little Rock AFB Drug Demand Reduction Program (DDRP), Ms. TS, notified Investigator JB that Appellant had

[3] On 7 September 2022, Appellant petitioned TJAG for a new trial under Article 73, UCMJ. TJAG denied the petition on 3 March 2023. (JA at 29-36.)

tested positive for the metabolite of cocaine at a level of 574 ng/ml. (JA at 265.) That day, Investigator JB attempted a subject interview with Appellant, with Investigator M[4] as his witness. (Id.) When Investigator JB attempted his interview, Appellant invoked his Article 31 rights, requested a lawyer, and declined to provide a statement. (Id.) Investigator JB took no other investigative steps in Appellant's case and closed the case that day. (JA at 266.) Appellant's Report of Investigation (ROI) did not mention SSgt NW, nor any other subjects or witnesses. (JA at 263-311.) Investigator NM, to whom Appellant devotes much of his brief, did not take any investigative steps, nor have any substantive participation in SFOI's investigation into Appellant's cocaine use. (Id.)

Investigator JB's Initial Investigation into SSgt NW's Cocaine Use

Following his investigation of Appellant, Investigator JB began to investigate SSgt NW's cocaine use. (JA at 50.) During his subject interview, SSgt NW told Investigator JB he had been at a party with Appellant during the Fourth of July weekend before the urinalysis but did not see any drugs there. (JA at 218.) He also said, "I have no idea why would I…I take pre-workout. I don't know if that could make me pop…my roommate [SSgt DB] brought [the pre-workout] back from Africa. I ran out of mine and took his." (JA at 50.)

[4] The United States agrees with Appellant that Investigator M's first initial is not apparent from the record. (App. Br. at 7, footnote 4.)

Investigator JB documented SSgt NW's statements in SSgt NW's ROI, which was provided to Appellant's trial defense team thirteen days before Appellant's court-martial. (JA at 45.)

What SSgt NW did not say to Investigator JB is as important as what he did say. SSgt NW never told Investigator JB, nor anyone else at SFOI, that *Appellant* had ever used, had access to, or even knew about SSgt DB's pre-workout supplement. In fact, SFOI never uncovered any information connecting Appellant to SSgt DB's pre-workout supplement in any of their investigations. After interviewing SSgt NW, SFOI did not take any further investigative steps in SSgt NW's investigation at that time, publishing his original ROI on 23 July 2021. (JA at 50.)

Investigator NM's Follow-Up Investigation into SSgt NW's Cocaine Use

In September 2021, the Little Rock AFB Chief of Justice asked SFOI to conduct further investigation in SSgt NW's case to see if they could find any corroborating evidence to support his positive urinalysis. (JA at 57.) Investigator JB was unavailable to reopen the investigation because he was temporarily assigned elsewhere throughout the month of September. (JA at 58.) Investigator NM, though untrained and not yet qualified as an investigator, assumed the responsibility as temporary NCOIC of SFOI. (Id.) Investigator NM had not participated in any substantive way in Appellant's earlier SFOI

investigation conducted by Investigator JB. So, as his first task as a brand new, untrained, and unqualified investigator, Investigator NM reviewed SSgt NW's interview from 20 July 2021 and began interviewing various people, including SSgt NW's roommate, SSgt DB, and other people who attended the Fourth of July party the weekend before the squadron urinalysis inspection. (JA at 57.) During Investigator NM's interview with SSgt DB on 14 September 2021, SSgt DB discussed a pre-workout supplement from "Blackstone Labs" that he claimed to have bought online while he was deployed. (Id.)

On either 14 or 15 September 2021, Investigator NM began an internet search of pre-workout supplements made by "Blackstone Labs" and identified one supplement containing DMHA. (Id.) DMHA is on the Department of Defense's banned substances list. (Id.) There is no evidence that this particular pre-workout supplement was the supplement SSgt DB bought.

On 14-15 September 2021, Investigator NM contacted Ms. SH from the Little Rock AFB DDRP who provided Investigator NM a hyperlink to the prohibited supplement list as well as the names of two MROs who could discuss whether the banned substance could cause a positive result for cocaine. (Id.) Later that day, Investigator NM contacted someone from the MRO list given to him by Ms. SH. (Id.) He believed he contacted Maj JB, the Little Rock AFB MRO, and 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.) But when Maj JB was later asked about the statement he purportedly made, he had no recollection of having a conversation about it, had no documentation of any search for DMHA, and did not believe he was ever contacted about this issue. (Id.) Investigator NM never documented his conversations with Ms. SH or the MRO. (Id.) Thus, there were no statements in existence from the MRO himself, nor any notes or documentation in any case file, about whether DMHA could cause a positive urinalysis for cocaine.

On 20 September 2021, Investigator NM tried to re-interview SSgt DB as a subject for violating Article 92, UCMJ, for using DMHA. (Id.) SSgt DB declined to provide a statement and requested counsel. (Id.) SFOI did not document any information relating to the internet search or conversations with either Ms. SH or the MRO. (Id.) The trial counsel in Appellant's court-martial did not find out about Investigator NM's internet search or his failure to document it until January 2022, a month after Appellant's court-martial. (JA at 43.)

Soon after Investigator NM tried to re-interview SSgt DB, he decided to terminate his follow-up investigations into SSgt NW and SSgt DB. (JA at 52.) Against SFOI policy, Investigator NM then shredded SSgt DB's case file, but it contained no substantive information because SSgt DB had invoked his right to

remain silent during the interview. (JA at 43.) SSgt DB's shredded "case file" consisted of a manila folder, a series of dividers, and blank agent notes with only SSgt DB's name and the date of the interview. (Id.) Investigator NM also deleted the electronic entry of SSgt DB's case in the SFOI database, AFJIS, which was against SFOI policy. (Id.) Still, the metadata recovered from the deleted database entries corroborated that there was no substantive information in SSgt DB's case file. (Id.)

Appellant's Court-Martial

On 19 November 2021, Appellant's trial defense counsel submitted her first discovery request to trial counsel. (JA at 198.) The defense discovery request included requests for: (1) "all personal or business notes . . . prepared by agents or investigators in the case;" (2) "any video or audio recording taken during the investigation of this case;" and (3) "all derogatory information on any investigator involved in the investigation of the Accused." (JA at 202.) The defense also requested "[a]ny evidence in the Government's possession, including trial counsel or any military authorities, that may reasonably tend to . . . [n]egate the Accused's guilt" citing R.C.M. 701(a)(6). (Id.) R.C.M. 701(a)(6) provides that 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 for 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.

In response, trial counsel disclosed both the ROI for Appellant's investigation, and the ROI, with attachments, for SSgt NW's investigation. (JA at 45.) This discovery included all the statements SSgt NW made to Investigator JB, including his belief that his use of SSgt DB's workout supplement may have caused his positive urinalysis test, as well as agent interview notes and the local DDRP documents. (Id.) In trial counsel's written response to trial defense counsel's request for R.C.M. 701(a)(6) evidence, trial counsel noted, "The Government is providing the case file information for SSgt [NW]. SSgt [NW] tested positive for cocaine the same day as SrA Roan. SSgt [NW] told SFOI that he was at a party with [Appellant] during the Fourth of July weekend but did not see any drugs at the party." (JA at 218.)

This discovery gave Appellant's trial defense counsel access to SSgt NW's interview with SFOI referencing the pre-workout supplement, as well as access to SSgt DB, the source of the pre-workout supplement. (JA at 42.) Appellant's defense team was also able to provide this discovery to a qualified forensic toxicologist for review and consultation before and during trial. (Id.) The trial defense counsel told the military judge at Appellant's court martial that she was "confident" in the qualifications of the defense expert, Dr. JN, and believed "they

should move with speed to proceed with the trial" upon his appointment. (JA at 94.)

During Appellant's court-martial, the Government's findings evidence consisted of testimony and exhibits related to Appellant's positive urinalysis result, the DDRP collection and testing process, and evidence showing he was not on leave during the charged time frame. (JA 136-188.) None of the government's findings evidence or exhibits mentioned SFOI or any investigative steps SFOI had taken in Appellant's case or SSgt NW's case. Though Appellant's trial defense team had pretrial access to all SFOI investigators, SSgt NW, and SSgt DB, they did not call any witnesses or introduce any exhibits for findings. (JA at 42-43, 133.)

SSgt NW's Court-Marital

About a month after Appellant's court-martial and shortly before SSgt NW's trial, SSgt NW's trial defense team discovered through their pretrial interview with Investigator NM that he had destroyed the case file for SSgt DB's Article 92, UCMJ, investigation. (JA at 43.) This is also when SSgt NW's defense team learned that Investigator NM had failed to document his internet search for Blackstone Labs supplements and his conversation with an MRO about the supplement he found on the internet. (JA at 50-51.) SSgt NW's trial defense team then moved to dismiss the charge and specification against SSgt NW for failure to disclose and produce exculpatory evidence, and for lost or destroyed evidence.

(JA at 50-61.) The military judge denied both motions to dismiss but granted SSgt NW's defense team a continuance as a remedy for the nondisclosure of evidence. (Id.) As to SSgt DB's destroyed case file, SSgt NW's trial judge held,

> The Investigative case file regarding the supposed violation of Article 92 by SSgt [JB] is not of such central importance to the case as to prevent a fair trial by its absence. At most, it gives a specific timeline of the investigative steps taken by SFOI regarding SSgt [JB], however, given the relative inexperience of the investigators in the absence of their NCOIC, it is doubtful any of the entries into the case file by the investigators held any value at all, let alone additional information of central importance to an issue such that it would be essential to a fair trial. The most important evidence obtained by the investigators was never documented, and therefore, while troubling, is not the subject of this motion.

(JA at 60.)

On the motion to dismiss for Investigator NM's failure to document his misunderstanding with the information allegedly provided by the MRO about whether the presence of DMHA could cause a positive urinalysis for cocaine, SSgt NW's trial judge ruled that such evidence "was neither lost nor destroyed" but "never appropriately documented" and that "the defense . . . failed to demonstrate the exculpatory value of these items was apparent before being lost." (JA at 60.)

SSgt NW's court-martial occurred in May 2022. (Id. at 43.) Though SSgt NW's trial defense team had access to all the discovery that is the subject of

Appellant's appeal, they did not call SSgt DB as a witness at trial, nor present any information related to SSgt DB's pre-workout supplement or the possibility of it causing a false positive. (Id.) Further, before SSgt NW's court-martial, the government's forensic toxicologist concluded that it would be "almost completely implausible" that the ingredient in the pre-workout supplement that Investigator NM found on the internet would cause a positive result for cocaine. (Id.) There was no evidence that the supplement Investigator NM researched on the internet was *the* supplement SSgt DB purchased. SSgt NW was acquitted of the sole charge and specification of wrongful use of cocaine. (Id.)

Defense Counsel's Declaration Regarding the Nondisclosed Information

In a declaration attached to Appellant's reply brief at AFCCA, Capt JS, Appellant's trial defense counsel, acknowledged having received the SFOI ROI on SSgt NW, which "did contain a reference to a pre-workout supplement that SSgt [NW's] roommate brought back" from his deployment. (JA at 45.) But Capt JS asserted that Appellant's defense team was unaware of the source of the supplement, that the supplement was on a "banned substances" list,[5] that

[5] The United States disagrees with the factual conclusions made in Capt JS's declaration to the extent they imply that the Blackstone Labs supplement

Investigator NM had begun to investigate SSgt DB, that Investigator NM had consulted an MRO who opined the substance might cause a positive urinalysis result for cocaine, or that the SFOI file on SSgt DB had been destroyed. (Id.) Capt JS stated that this unknown information "could have been valuable" in the defense's "preparation"—specifically the purported opinion of an MRO that a false positive was possible, and the erroneous destruction of a case file, which could have been used "to impeach the investigators at the SFOI, the MRO, and the process more generally." (Id.)

Appellant asserts on appeal that the nondisclosed information would have been more than just valuable to the defense's preparation, but "material to [his]

Investigator NM discovered on the internet, which allegedly contained DMHA, was *the* supplement purchased by SSgt DB. The only information in the record about SSgt DB's pre-workout supplement and Investigator NM's undocumented steps in SSgt DB's Article 92, UCMJ, investigation, are found in the rulings of the military judge who presided over SSgt NW's trial. (JA at 50-61.) In those rulings, the military judge's findings of fact reveal that Investigator NM never took any investigative steps to compare whether the product he researched on the internet was in fact the product purchased by SSgt DB. Capt JS was not SSgt NW's defense counsel and so she presumably had no personal knowledge of the evidence which was the subject of motions practice in that trial. The military judge's findings of fact in her rulings in SSgt NW's trial are the most persuasive evidence this Court has about what steps Investigator NM did and did not take in SSgt DB's investigation because the military judge found them by a preponderance of the evidence after personally reviewing the evidence and hearing arguments from counsel. (Id.) This Court should therefore afford no weight to any factual conclusions made in Capt JS's declaration to the extent they are inconsistent with the military judge's findings of fact in her rulings.

guilt or punishment." (App. Br. at 17.) The evidence highlighted by Appellant includes:

> (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[;][6]
>
> (4) a MRO told a Security Forces investigator that DMHA could cause a false positive for cocaine;
>
> (5) interviews with SSgt [NW] and SSgt [DB] were videotaped and the tapes were not provided to the defense;[7]
>
> (6) SFOI destroyed SSgt [DB]'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.

(Id.)

[6] Appellant did not include this evidence in his application to TJAG under Article 69, UCMJ. (JA at 16-26.)
[7] Id.

SUMMARY OF THE ARGUMENT

Issue I – Brady Challenge

The government did not have to disclose the information about the pre-workout supplement under Brady because it was neither favorable nor material to Appellant. Yet even if this Court finds that trial counsel's disclosure obligations were triggered, there is no reasonable probability the trial outcome would have been different had the information been disclosed.

The information Appellant argues should have been disclosed by trial counsel can be summarized as: (1) information that SSgt DB owned a pre-workout supplement made by Blackstone Labs; (2) one type of pre-workout supplement made by Blackstone Labs contained DMHA; (3) Investigator NM incorrectly described an MRO's opinion that DMHA could cause a positive urinalysis for cocaine, and (4) Investigator NM destroyed an empty casefile on SSgt DB's Article 92, UCMJ, investigation and failed to document his follow-up investigation on SSgt NW. (App. Br. at 17.) But none of the information was favorable to Appellant because it was neither exculpatory nor capable of impeaching the government's case. The information lacks any logical connection to Appellant's guilt or the prosecution's case because: (1) Appellant never used his roommate's pre-workout supplement; (2) there is no evidence that Appellant's roommate possessed the particular type of pre-workout supplement from Blackstone Labs

that allegedly contained DMHA; (2) no MRO or expert in forensic toxicology believed that DMHA in a pre-workout supplement could cause a false positive for cocaine; and (4) SFOI did not have any connection to the prosecution's evidence at Appellant's trial.

Even if the evidence is considered favorable, it was not material to Appellant's guilt. Before Appellant's trial, Appellant's defense team had access to information that SSgt NW believed his positive urinalysis result for cocaine could have been caused by his consumption of his roommate's pre-workout supplement. The defense team had the ability to share and discuss this explanation with Appellant and their expert consultant in forensic toxicology before trial. They also had access to interview Appellants' roommates, SSgt NW and SSgt DB, about this information and to specifically ask them whether they had ever seen Appellant use the pre-workout supplement. Further, SSgt NW's trial defense team litigated a motion about the nondisclosed information at issue in this case and was granted more time with their expert to explore using the information as a "pre-workout" innocent ingestion defense. Yet, SSgt NW's defense counsel did not call SSgt DB as a witness, nor did they offer any evidence of a "pre-workout" defense at SSgt NW's trial. The government's expert in forensic toxicology in that case also concluded that it was almost completely implausible that a pre-workout supplement containing DMHA could have caused a false positive for cocaine.

There was no likelihood then that the outcome of Appellant's trial would have been different had his defense team been provided the nondisclosed information.

Issue II – R.C.M. 701(a)(6) Challenge

Since R.C.M. 701(a)(6) implements the requirements of Brady, the trial counsel did not have to disclose the nondisclosed information pursuant to R.C.M. 701(a)(6) for the same reasons they did not have to disclose it under Brady. The evidence was not favorable in that it did not tend to negate Appellant's guilt nor was it capable of impeaching the government's case given that his roommate's pre-workout supplement and SFOI's actions had no logical connection to Appellant's case.

If the information is found to have been favorable and subject to disclosure, the applicable standard for prejudice is whether there was a reasonable probability of a different result. United States v. Jackson, 59 M.J. 330, 334 (C.A.A.F. 2004). The heightened harmless beyond a reasonable doubt test is inappropriate because there was no specific request for the nondisclosed information and no prosecutorial misconduct. United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004).

Appellant's discovery requests were not specific requests because they were broad requests for general categories of information and did not specifically include information about investigators in other investigations. There was no prosecutorial misconduct because the trial counsel did not intentionally or willfully

withhold the nondisclosed information from the defense. Also, the defense was already aware of and had access to the substance of the information and potential witnesses involved, and the SFOI investigator's failure to document investigative steps did not pertain to any follow-up investigations into Appellant. The nondisclosed information was neither related to the essence of the prosecution's case—which relied solely on evidence of the drug testing process—nor was it logically relevant to the issue of Appellant's guilt because he never used SSgt DB's pre-workout supplement. There was no reasonable probability of a different outcome had the nondisclosed information been disclosed to Appellant before trial. As a result, this Court should affirm the decision of AFCCA.

ARGUMENT

I.

THE GOVERNMENT WAS NOT REQUIRED TO DISCLOSE THE INFORMATION UNDER BRADY BECAUSE IT WAS NOT FAVORABLE NOR MATERIAL TO APPELLANT SINCE THERE IS NO REASONABLE PROBABILITY THE TRIAL OUTCOME WOULD HAVE BEEN DIFFERENT HAD IT BEEN DISCLOSED.

Standard of Review

When reviewing TJAG's findings on an application for relief under Article 69, UCMJ, this Court should review TJAG's decision for an abuse of discretion. Under Article 69, UCMJ, the nature of TJAG's review is

discretionary and fundamentally different from that of review by an appellate court. Article 69(c)(1)(A), UCMJ, provides that TJAG "*may* set aside the findings or sentence, in whole or in part" for "newly discovered evidence" or "error prejudicial to the substantial rights of the accused," among other reasons. (emphasis added). TJAG's Article 69, UCMJ, review is a collateral discretionary proceeding "not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201(h)(4)(B), Discussion. *See also* Curci v. United States, 577 F.2d 815, 818 (2d Cir. 1978) (TJAG's Article 69, UCMJ review is "a collateral proceeding akin to coram nobis" that is "an ancillary review procedure . . . not part of a direct appellate procedure"); McKinney v. White, 291 F.3d 851, 855 (D.C. Cir. 2002) (same).

Appellant submitted an application to TJAG under Article 69, UCMJ, requesting that he exercise his discretion to "vacate and set aside the court's findings and sentence" because of "newly discovered evidence consist[ing] of information that Security Forces investigators interviewed individuals and obtained evidence that was exculpatory for [Appellant], but never turned it over to the defense, instead destroying the notes that were made." (JA at 17.) Following his review of Appellant's application and record of trial, TJAG denied Appellant's requested relief, finding no error prejudicial to Appellant's substantial rights. (JA at 27.) AFCCA then granted review of Appellant's application for an appeal of

TJAG's denial of relief under Article 69(d)(1), UCMJ. AFCCA's grant of review was based on Appellant's application being timely filed and "demonstrat[ing] a substantial basis for concluding that the action on review . . . constituted prejudicial error." Article 69(d)(2), UCMJ. The action on review at AFCCA then was TJAG's exercise of discretion under Article 69, UCMJ.

When this Court reviews judicial action on a discretionary matter within the purview of the trial judge, it reviews the trial judge's decision for an abuse of discretion. *See* United States v. Flesher, 73 M.J. 303, 319 (C.A.A.F. 2014). A convening authority's decision in a discretionary matter is similarly reviewed for an abuse of discretion. *See* Stokes v. United States, 8 M.J. 819, 822 (A.F.C.M.R. 1979) ("Our review of [the convening authority's] discretionary decision is limited to whether he had properly considered all [the correct] factors in exercising his judgment.") (footnote omitted). Likewise, in acknowledging that TJAG's Article 69, UCMJ, review is not a part of appellate review, but an act of discretion in a collateral proceeding to the court-martial, this Court should review TJAG's denial of Appellant's application for Article 69, UCMJ, relief for an abuse of discretion. "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal citations omitted).

Law & Analysis

In Brady v. Maryland, 373 U.S. 83 (1963), the U.S. Supreme Court held that prosecutors must disclose evidence favorable to the accused when such evidence is material to guilt or punishment. Id. at 87. The purpose of the Brady rule is to protect due process for an Accused and ensure that a "miscarriage of justice does not occur." United States v. Bagley, 473 U.S. 667, 675 (1985). Good or bad faith on the part of the prosecution is irrelevant; the materiality of the evidence is what matters. United States v. Agurs, 427 U.S. 97, 110 (1976). Under Brady, favorable evidence is "exculpatory, substantive evidence or evidence capable of impeaching the government's case." United States v. Behenna, 71 M.J. 228, 238 (C.A.A.F. 2012). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith v. Cain, 563 U.S. 73, 75 (2012). The likelihood of a different result must be "great enough to undermine[] confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 435-36 (1995). Materiality is determined by an "assessment of the omission in light of the evidence in 'the entire record.'" United States v. Stone, 40 M.J. 420, 423 (C.M.A. 1994) (citing Agurs, 427 U.S. at 112).

"Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Bagley, 473 U.S. at 675. Once a

Brady violation has been established, there is no harmlessness analysis because prejudice is assumed with the nondisclosure of favorable evidence. Kyles, 514 U.S. at 435-36.

A. The nondisclosed information was not favorable to Appellant because it had no exculpatory value.

To trigger a prosecutor's duty to disclose under Brady, the evidence must first be "favorable to an accused." Brady, 373 U.S. at 87. Evidence of SSgt DB's pre-workout supplement was not favorable to Appellant because it was a far cry from rising to the level of "exculpatory, substantive evidence or evidence capable of impeaching the government's case." Behenna, 71 M.J. at 238 (emphasis added).

1. *The nondisclosed information was not exculpatory because there was no evidence that Appellant's roommate's pre-workout supplement contained DMHA or would cause a false positive for cocaine.*

First, there is no evidence that Appellant's roommate's pre-workout supplement was the one particular type of Blackstone Labs product that allegedly contained DMHA. In his follow-up investigation of SSgt NW, Investigator NM searched the internet and found a Blackstone Labs supplement that contained DMHA. (Id. at 57.) There is no evidence in the record of exactly when or from where SSgt DB bought his pre-workout supplement, or what specific type of supplement he bought. Appellant's argument therefore hinges on this Court speculating that, of all the supplements ever manufactured by Blackstone Labs, the

product bought by SSgt DB was in fact the one that contained DMHA. But with no connection between Investigator NM's internet search and the product purchased by SSgt DB, it is speculative as to whether SSgt DB's pre-workout supplement was even relevant to Appellant's case, much less exculpatory substantive evidence.

Appellant then asks this Court to further speculate that not only was the product SSgt DB bought the one Blackstone Labs product that contained DMHA, but that DMHA in the pre-workout supplement, if ingested as directed, could result in a false positive urinalysis result for cocaine. It bears noting though that at the time of SSgt NW's trial, the MRO who purportedly told Investigator NM that DMHA could cause a positive result for the metabolite of cocaine on a urinalysis, if ingested in the right quantity and in the right timeframe, had no recollection of that conversation every occurring, had no documentation of any search for DMHA, and did not believe he was ever contacted about the issue. (JA at 57.) Also, before SSgt NW's trial, the government's forensic toxicologist opined that "it would be almost completely implausible that the ingredient in the pre-workout could cause a positive result for cocaine." (JA at 43.) With no evidence connecting SSgt DB's pre-workout supplement to the brand of Blackstone Labs product that contained DMHA, or a plausible belief that DMHA would cause a positive result for cocaine, there was simply no reasonable basis for trial counsel to believe that the

information about the pre-workout supplement would have been favorable exculpatory evidence for Appellant. This Court should decline Appellant's invitation to suspend disbelief.

2. The nondisclosed information was not exculpatory because there was no evidence that Appellant ever used his roommate's pre-workout supplement.

Second, there is no evidence in the record that *Appellant* ever ingested or encountered, SSgt DB's pre-workout supplement. Appellant concedes this point, noting "there is no direct evidence that [Appellant] knowingly consumed SSgt D.B.'s pre-workout powder." (App. Br. at 19.) Yet, Appellant argues that "such a link is not required to mount an innocent ingestion defense." (App. Br. at 19-20.). The United States disagrees. Without such a link, the pre-workout supplement was merely speculatory and not relevant to Appellant's defense.

Speculative evidence is not favorable and material evidence under Brady. *See* Agurs, 427 U.S. at 109-10 ("mere possibility that . . . undisclosed information might have helped the defense, or might have affected the outcome of the trial" is not a Brady violation); United States v. Hart, 29 M.J. 407, 411 (C.M.A. 1990) (evidence that "might" have helped defense's case is "speculative"); Murphy v. Johnson, 205 F.3d 809, 914 (5th Cir. 2000) (claims of "potential exculpatory and material evidence are merely speculatory" and "cannot support a Brady claim") (internal citations omitted). Appellant's argument is speculative because there was

no evidence that SSgt DB's pre-workout supplement was of the type that contained DMHA, or that DMHA could cause a false positive for cocaine. Most importantly, there was no evidence that *Appellant* ever used or encountered his roommate's pre-workout supplement, so it would not have made the existence of any fact at issue—*Appellant's* knowing and wrongful use of cocaine—more or less probable. *See* MCM, part IV, para. 50.c(10) ("Use" means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance.); Mil. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action.").

Because there was no evidence connecting Appellant to the pre-workout supplement, the nondisclosed information about the pre-workout supplement was not logically relevant to whether Appellant knowingly and wrongfully used cocaine and was purely speculative. *See* United States v. White, 69 M.J. 236, 237 (C.A.A.F. 2010) ("Defendants do not have a constitutional right to present any and all evidence, but only that evidence which is logically and legally relevant."). In order for the defense to have been able to call SSgt NW to testify at trial that he had used SSgt DB's pre-workout supplement, or to call SSgt DB to testify that he owned a pre-workout supplement, the defense would have first been required to lay the foundation to make the evidence logically relevant to Appellant by establishing

that *Appellant* used the pre-workout supplement and that the pre-workout supplement could actually result in a positive urinalysis for cocaine. Without those foundational facts, the testimony would have been excluded as irrelevant as there was no logical connection between it and the charge against Appellant.

At best, Appellant could only argue the evidence made *SSgt NW's* knowing and wrongful use of cocaine less probable, because SSgt NW was the only individual who admitted to using it. But whether one Airman used cocaine at some time or place is utterly irrelevant to another Airman's cocaine use, with no facts linking their drug use together. Appellant's argument fails because his claim that the nondisclosed information about the pre-workout supplement might have helped the defense are speculative.

In another unconvincing attempt to weave together SSgt NW's explanation for his positive urinalysis to Appellant's case, Appellant argues that the urinalysis observer's testimony that Appellant appeared "like a guy that worked out, went to the gym every day, and walked around like he had a protein shake" was some evidence from which the members may have found Appellant's innocent ingestion defense plausible. (App. Br. at 20.) Appellant asserts that his innocent ingestion defense would have been believable if the members had known about SSgt DB's pre-workout supplement since Appellant "looks like the kind of guy who drinks 'protein shakes.'" (App. Br. at 20.)

It is highly speculative whether such evidence would have even been admissible for such purpose. In essence, it would have invited the members to speculate about whether Appellant used SSgt DB's pre-workout supplement based solely on his urinalysis observer's brief observation of him during his urinalysis without having any personal knowledge of whether Appellant had ever consumed a protein shake in his life. Just because Appellant appeared to have an athletic physique, does not mean he drank his roommate's pre-workout supplement. And more importantly, it doesn't mean that he drank SSgt DB's pre-workout supplement during the time frame of Appellant's squadron-wide urinalysis inspection. It would have been just as speculative and inappropriate for the members to have inferred that Appellant looked like the kind of guy who uses steroids just because he appeared fit. Thus, Appellant's argument that the urinalysis observer's testimony provided a link between Appellant and SSgt DB's pre-workout supplement lacks merit.

With no logical connection between SSgt DB's pre-workout supplement and Appellant, this evidence's only purpose then would have been to invite the factfinders to speculate about whether Appellant *may have* used SSgt DB's pre-workout supplement and about whether the pre-workout supplement contained DMHA. Such an invitation would have been misleading to the members by inviting them to make inferences not based on evidence.

More concerning is that it may have created the danger of unfair prejudice by causing the members to expect the Accused to testify, or present evidence in his defense, that he used SSgt DB's workout supplement. This would have been an unconstitutional shifting of the burden of proof at trial. *See* United States v. Partyka, 30 M.J. 242, 247 (C.M.A. 1990) (evidence that "would lead the factfinder to speculate" carries "the danger of unfair prejudice and of misleading the court-martial members"). The danger of unconstitutionally shifting the prosecution's burden of proof to the defense would have been a compelling reason for the trial judge to exclude the evidence on legal relevance grounds under Mil. R. Evid. 403, even assuming it had some limited probative value. Mil. R. Evid. 403 ("The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence."). For these reasons, Appellant's reliance on the urinalysis observer's testimony as evidence which could have linked the nondisclosed information about SSgt DB's pre-workout supplement to Appellant's defense is unpersuasive.

3. The nondisclosed information was not exculpatory because it did not provide a basis for an innocent ingestion defense.

Appellant attempts to further his argument that the nondisclosed information about SSgt DB's pre-workout supplement was favorable because without it he "did not have a basis to mount an innocent ingestion defense." (App. Br. at 19.) But Appellant's argument is misplaced, because this Court's decisions in United States v. Lewis, 51 M.J. 376 (C.A.A.F. 1999), and United States v. Brewer, 61 M.J. 425 (C.A.A.F. 2005), make clear there are various ways by which an accused can mount an innocent ingestion defense even without corroborating evidence or evidence of the drug's source.

To start, the Accused could have elected to testify—without offering any corroborating evidence or witnesses, that he did not knowingly and wrongfully ingest cocaine. *See* Lewis, 51 M.J. at 383 (corroborating evidence not required for accused to mount innocent ingestion defense with only his testimony). He also could have presented an innocent ingestion defense by offering testimony from witnesses who were with him and observed his behavior for much of the relevant time frame and saw no evidence of drug use. *See* Brewer, 61 M.J. at 429-30 (accused may mount innocent ingestion defense through witnesses' testimony that they were with the accused during the charged period and never saw him use drugs or observed him under the influence of drugs). Yet Appellant apparently chose not

to mount either defense. Appellant was therefore not precluded from mounting a defense of innocent ingestion because he did not have the nondisclosed information.

But even assuming that evidence about SSgt DB's pre-workout supplement was favorable to an innocent ingestion defense, Appellant already knew about it from the discovery he had received. Before Appellant's trial, his defense team knew that SSgt NW, the other roommate, told SFOI that he believed his positive urinalysis result for cocaine was because he took SSgt DB's pre-workout supplement. (JA at 45.) The defense also had access to interview both SSgt NW and SSgt DB, the source of the pre-workout supplement, before trial. (JA at 42-44.) And Appellant had sufficient time to consult with a qualified defense expert in the field of forensic toxicology before trial. (JA at 94) (trial defense counsel requested to "move with speed to proceed with the trial" upon their expert's appointment as they were "confident" in his qualifications).

Presumably, the trial defense team would have provided SSgt NW's ROI, along with his explanation about his positive urinalysis, to their expert forensic toxicologist for review. Yet even if the defense expert had known of the MRO's purported statement that DMHA could theoretically cause a false positive for cocaine, it would not have helped a potential innocent ingestion defense, because before SSgt NW's trial, the government's expert in forensic toxicology opined that

"it would be almost completely implausible that the ingredient in the pre-workout could cause a positive result for cocaine." (JA at 43.) It seems unlikely that the defense expert in forensic toxicology would have a different opinion from the government expert on such a straightforward question, especially considering the patchy nature of information allegedly obtained from the MRO. So, Appellant's argument that knowing about the MRO's purported statement would have informed the defense's cross-examination strategy of the government's expert witness is unconvincing. SSgt NW's trial defense team did not call SSgt DB as a witness at his trial, nor did they present any information related to SSgt DB's pre-workout supplement or the possibility of it causing a false positive, despite that being SSgt NW's explanation for his positive urinalysis result. (Id.) For these reasons, the pre-workout supplement had no exculpatory value to Appellant, and no Brady disclosure was required.

4. Even if the nondisclosed information was potentially exculpatory, trial counsel had no obligation to disclose it because the defense was already aware of its potential exculpatory value or could have obtained it through due diligence.

Trial counsel "has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence." United States v. Ellis, 77 M.J. 671, 676 (A.C.C.A. 2018) (citing Rector v. Johnson, 120 F.3d 551,

558-59 (5th Cir. 1997)). *See also* Pippin v. Dretke, 434 F.3d 782, 790 (5th Cir. 2005); United States v. Payne, 63 F.3d 1200, 1208 (2nd Cir. 1995); United States v. Bermudez, 526 F.2d 89, 100 (2d Cir. 1975). Thirteen days before Appellant's trial, the trial defense team was in possession of SSgt NW's ROI which contained SSgt NW's explanation for his positive urinalysis being that he consumed SSgt DB's pre-workout supplement. (JA at 42-45, 218.) They also had access to Appellant who would have known if he had ever taken the pre-workout supplement, as well as access to both SSgt NW and SSgt DB, the source of the pre-workout supplement, for pretrial interviews. (JA at 42-44.) Armed with the discovery about SSgt NW's explanation for his positive urinalysis, Appellant's defense team could have easily learned about the manufacturer of the pre-workout supplement and its contents by asking SSgt DB about it in a pretrial interview. (JA at 42-44.)

Further, the trial defense team could have requested that the government preserve, seize, and test SSgt DB's pre-workout supplement. The trial counsel was not obligated under Brady to either point the defense to pretrial interviews of witnesses listed in SSgt NW's ROI or make discovery requests on behalf of the defense. These interviews and more discovery requests were logical next steps Appellant's trial defense team could have taken to follow-up on the information they had received in SSgt NW's ROI and its attachments thirteen days before trial.

See Ellis, 77 M.J. at 676 (quoting United States v. Baker, 1 F.3d 596, 598 (7th Cir. 1993) ("Certainly, Brady does not require the government to conduct discovery on behalf of the defendant."). Since the defense would have known whether Appellant had actually taken the pre-workout supplement, they were much better positioned than trial counsel to recognize the supplement as a potentially viable defense and could have investigated from there. The nondisclosed information was therefore not suppressed or withheld, since trial counsel had no Brady obligation to disclose it.

For these reasons, the nondisclosed information about SSgt DB's pre-workout supplement was not favorable to Appellant because it had no exculpatory value. The information was speculative in relation to *Appellant's* case because there was no evidence that SSgt DB's pre-workout supplement was *the* type of pre-workout supplement made by Blackstone Labs that contained DMHA or that *Appellant* used SSgt DB's pre-workout supplement. The information would have been ineffective for an innocent ingestion defense because the MRO denied ever making the statement that DMHA could cause a false positive for cocaine and an expert's opinion was that such a result was completely implausible. Further, Appellant's trial defense team could have used the information they received about the pre-workout supplement in discovery to explore an innocent ingestion defense theory with the Appellant, their expert in forensic toxicology, and through pretrial

interviews of SSgt NW and SSgt DB. Consequently, trial counsel had no Brady obligation with respect to the nondisclosed information.

B. The nondisclosed information was not favorable to Appellant because it was incapable of impeaching the government's case.

The nondisclosed information about Investigator NM's actions in SSgt NW's and SSgt DB's investigations was incapable of impeaching the government's case against Appellant because it did not pertain to any witness testimony or evidence presented at Appellant's trial. Appellant asserts, "as [trial defense counsel] 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.'" (App. Br. at 22.) "Impeachment evidence . . . is 'evidence favorable to an accused' so that, if disclosed, it may make the difference between conviction and acquittal." Bagley, 473 U.S. at 676 (quoting Brady, 373 at 87). But the crux of impeachment evidence is that it must help impeach the credibility of the government's case. As for witnesses in a case, impeachment evidence generally exists of evidence of a witness's motive to fabricate, credibility or character for truthfulness, prior inconsistent statements, bias, or competency. *See, e.g.*, Giglio v. United States, 405 U.S. 150 (1972) (promise of immunity or leniency offered to a witness); United States v. Watson, 31 M.J. 49 (C.M.A. 1990) (witness's monetary interest in outcome of case); United

States v. Romano, 46 M.J. 269 (C.A.A.F. 1997) (prior inconsistent statements made by co-accuseds at preliminary hearing where the statements conflicted with the government's main witness's testimony at trial); United States v. Claxton, 76 M.J. 356 (C.A.A.F. 2017) (notice that two witnesses against the accused were confidential informants to show bias). *See also* Mil. R. Evid. 601; Mil. R. Evid. 602; Mil. R. Evid. 608; Mil. R. Evid. 609.

Neither SSgt NW, SSgt DB, nor any of the SFOI investigators testified at Appellant's trial. In fact, the only SFOI investigator even included on the government's potential witness list was Investigator JB. (JA at 234.) But even Investigator JB did not take any investigative steps in Appellant's case other than trying to interview Appellant as a subject. (JA at 265-266.) Most importantly, Investigator NM—to whom Appellant devotes much of his brief—did not take any investigative steps in or participate substantively in Appellant's investigation. (JA at 263-311.) Thus, information that Investigator NM did not document investigative steps in SSgt NW's follow-on investigation or that he deleted the empty casefile in SSgt DB's investigation would not have helped impeach any of the government's witnesses in Appellant's trial.

The prosecution's evidence at trial focused exclusively on the DDRP collection process and urinalysis testing done by the Air Force Drug Testing Laboratory (AFDTL). There is simply nothing in the record to link anything SFOI

did to *Appellant's* positive urinalysis and the evidence used against him at trial. As AFCCA correctly reasoned, Investigator NM's failure to follow SFOI policy and document his investigative steps in SSgt NW's and SSgt DB's cases "d[id] not relate directly to the urinalysis process or the integrity of the test results," therefore this evidence was not capable of impeaching the government's case against Appellant. (JA at 10.) Essentially, when the evidence against Appellant is considered with no weight given to the SFOI investigation or the missteps by Investigator NM, the government's case against him looks the same. For these reasons, the nondisclosed information was not favorable to Appellant because it was incapable of impeaching the government's case against him.

C. Even assuming the evidence was favorable, it was immaterial because there is no reasonable probability the outcome of the trial would have been different had it been disclosed.

Appellant argues that AFCCA failed to conduct the proper analysis of materiality for two reasons: (1) it based its analysis on the defense "[Appellant] mounted at trial," rather than "the impact the evidence, if properly disclosed, would likely have had on the outcome of trial," and (2) it "considered the materiality of the withheld evidence individually." (App. Br. at 16-17.) Appellant cites the Supreme Court's decision in Kyles, 514 U.S. 419, to support his argument that AFCCA erred in analyzing the materiality of the evidence. (App. Br. at 15-17.) But the critical difference between the Supreme Court's analysis of the

materiality of the nondisclosed information in Kyles and AFCCA's analysis in Appellant's case was the "significance of the evidence withheld." Kyles, 514 U.S. at 451.

In Kyles, the appellant was convicted of first-degree murder, and "the essence of the State's case" was eyewitness testimony identifying the defendant as the killer. Id. at 441. Among the nondisclosed information at issue were prior inconsistent statements of two of the four eyewitnesses about their description of the defendant as the killer which greatly contradicted their in-court testimony. Id. Also at issue was evidence that, if disclosed, would have allowed the jury to infer "the most damning physical evidence" against the defendant presented at trial was "subject to suspicion, that the investigation that produced such evidence was insufficiently probing, and that the *principal police witness* was insufficiently informed or candid." Id. at 454 (emphasis added).

The prosecution's nondisclosed information in Kyles was extremely favorable to the defendant because it struck directly at the "essence of the State's case" by undercutting the reliability of critical evidence presented at trial. Id. at 441. In Kyles, the nondisclosed information was significant and material in that it "resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." Id. at 441. The evidence would have impeached the eyewitnesses' testimony about a central issue in the case—the identification of the

defendant as the killer. It also tended to exonerate the defendant by revealing another person had a motive to commit the murder and may have planted evidence to frame the defendant for the crime.

Here, the nondisclosed information was decidedly insignificant because it did not cast doubt on or impeach any of the prosecution's witnesses or evidence at trial since Investigator NM did not do any substantive investigation in Appellant's case, and he did not testify. Even if Investigator NM had testified, and the defense had known about the MRO's purported statement to him, Investigator NM would not have been able to testify about the MRO's prior out-of-court statement to him because it would have been inadmissible hearsay. The only possible way the evidence might have been admitted is as a prior inconsistent statement of the MRO if the MRO had testified. Even in such case though, the MRO's prior out-of-court statement would only have been admissible to impeach the MRO's credibility, and not as substantive evidence of the truth of his purported statement to Investigator NM.

Likewise, its disclosure would not have created a stronger case for the defense given that there was no evidence to show Appellant ever used, or encountered, SSgt DB's pre-workout supplement. Like AFCCA, this Court should not be persuaded that "introducing evidence Inv[estigator] NM failed to record his purported conversation with an MRO and erroneously destroyed a virtually empty

case file on a different individual would have affected the outcome of what was essentially a bare urinalysis case." (JA at 10.) The essence of the government's case against Appellant was evidence about the urinalysis collection and drug testing process, so the nondisclosed information—which pertained to SSgt NW's investigation and SSgt NW's explanation for his positive urinalysis result—would not have impacted the integrity of the evidence used against Appellant.

The cumulative effect of this evidence when viewed "in light of the evidence in the entire record" is the same. Stone, 40 M.J. at 423 (internal citations omitted). This is not the case in which each piece of evidence at trial supported the basis for an incremental inference that was to the benefit of the prosecution or detriment of the defense, so that when aggregated, the strength of these inferences was enough to undermine confidence in the trial's outcome. *See* Cone v. Bell, 556 U.S. 449, 470-474 (2009). Here, the only inferences—if any—to be drawn independently or collectively from the nondisclosed information related to SSgt NW's urinalysis result, not Appellant's, because there was no evidence in the entire record linking Appellant to the pre-workout supplement or connecting SFOI to the evidence presented against him at trial.

Appellant points to SSgt NW's acquittal as evidence of a different outcome in a trial for the same offense, yet he fails to acknowledge that even though SSgt NW's trial defense team had access to the nondisclosed information he raises

here, they did not call SSgt DB to testify, nor did they present any information related to the pre-workout supplement in SSgt NW's defense. (JA at 43.) That tactical decision by SSgt NW's trial defense team should only strengthen this Court's confidence that the same evidence here was immaterial to Appellant's guilt.[8]

For these reasons, this Court should affirm AFCCA's decision because TJAG's finding that there was no error prejudicial to the Appellant's substantial rights was not an abuse of discretion. Appellant's Brady claims about the exculpatory value of the nondisclosed information are speculative because there was no evidence SSgt DB's pre-workout supplement was the type that contained DMHA nor evidence that Appellant used it. Furthermore, Investigator NM's failure to document had nothing to do with the investigation into Appellant or the prosecution's case against him. Appellant's attempt to correlate the outcome in his case to SSgt NW's acquittal fails because SSgt NW's defense team presented no information related to the "pre-workout" defense. There is no reasonable probability that the nondisclosed information would have affected the outcome of

[8] Appellant's Brady claim is that the nondisclosed information was material to his guilt. Appellant does not assert the evidence was material to his sentence. *See* Cone, 556 U.S. at 472-473 (reiterating that Brady evidence includes evidence material to guilt and punishment).

his trial, so TJAG's denial of his application for relief under Brady was not an abuse of discretion.

II.

THE GOVERNMENT WAS NOT REQUIRED TO DISCLOSE THE EVIDENCE UNDER R.C.M. 701(A)(6) BECAUSE IT WAS NOT FAVORABLE OR MATERIAL TO APPELLANT. EVEN IF DISCLOSURE WAS REQUIRED, THERE IS NO REASONABLE PROBABILITY OF A DIFFERENT RESULT AT TRIAL.

Standard of Review

When reviewing TJAG's findings on an application for relief under Article 69, UCMJ, this Court should review TJAG's decision for an abuse of discretion. *See generally* Article 69(c)(1)(A), UCMJ; Flesher, 73 M.J. at 318; Stokes, 8 M.J. at 822; R.C.M. 1201(h)(4)(B), Discussion.

Law & Analysis

Article 46 is "[t]he foundation for military discovery practice" and is Congress's mandate that trial counsel, defense counsel, and the court-martial have equal access to evidence. United States v. Williams, 50 M.J. 436, 440 (C.A.A.F. 1999). This Court has interpreted R.C.M. 701 to ensure compliance with Article 46 and to "provide the accused, at a minimum, with the disclosure and discovery rights available in federal civilian proceedings." Id. R.C.M. 701(a)(6) implements the Supreme Court's decision in Brady, setting forth specific

requirements about "*evidence favorable to the defense.*" Williams, 50 M.J. at 440 (emphasis in original). It states:

> The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the 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).

"[T]rial counsel must review their own case files and must also exercise due diligence and good faith in learning about any evidence favorable to the defense 'known to the others acting on the government's behalf in the case, including the police.'" United States v. Stellato, 74 M.J. 473, 486 (C.A.A.F. 2015) (quoting Williams, 50 M.J. at 441 (additional citation omitted)). Yet, trial counsel's obligations under Article 46, UCMJ, "do not relieve the defense of its responsibility to specify the scope of its discovery request." Williams, 50 M.J. at 442.

This Court has adopted two appellate tests for determining whether an Appellant is entitled to relief for erroneous nondisclosure of evidence. Roberts, 59

M.J. at 326 (citing Hart, 29 M.J. at 410). The first test applies when Appellant either did not make a discovery request or only made a general request for discovery. Roberts, 59 M.J. at 326. Under this test, "[w]hen an appellant has demonstrated error with respect to nondisclosure, the appellant will be entitled to relief only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed." Jackson, 59 M.J. at 334. A "reasonable probability of a different result" is a probability sufficient to undermine confidence in the outcome. United States v. Morris, 52 M.J. 193, 197 (C.A.A.F. 1999). The second test applies if an Appellant establishes that the government failed to disclose discoverable evidence in response to a specific request, or as a result of prosecutorial misconduct. Roberts, 59 M.J. at 327. Under this test, Appellant is entitled to relief unless the government can show that nondisclosure was harmless beyond a reasonable doubt. United States v. Gonzalez, 62 M.J. 303 (C.A.A.F. 2006) (citing Roberts, 59 M.J. at 327).

A. The nondisclosed information was not favorable and material to Appellant so disclosure was not required under R.C.M. 701(a)(6).

R.C.M. 701(a)(6) implements the Supreme Court's decision in Brady requiring disclosure of "evidence favorable to the defense." Williams, 50 M.J. at 440. For the reasons identified above in Issue I's Brady analysis, this Court should find that trial counsel's disclosure obligations under R.C.M. 701(a)(6) were not

triggered because the nondisclosed information had no exculpatory value and was not capable of impeaching the government's case. If this Court finds no Brady nor R.C.M. 701(a)(6) obligations were triggered, then no prejudice analysis is required, and Appellant's conviction should be upheld.

B. Even if the evidence did fall within the purview of R.C.M. 701(a)(6), the defense did not make a specific request for the nondisclosed information.

Appellant first argues that Appellant submitted specific discovery requests for the undisclosed information and so the harmless beyond a reasonable doubt test should apply. (App. Br. at 32.) Appellant points to four provisions in the trial defense counsel's discovery request to make his case. (App. Br. at 32.) The defense requested: (1) "all personal or business notes . . . prepared by agents or investigators in the case;" (2) "any video or audio recording taken during the investigation of this case;" and (3) "all derogatory information on any investigator involved in the investigation of the Accused." (JA at 202.) (emphasis added). The trial defense counsel also requested "[a]ny evidence in the Government's possession, including trial counsel or any military authorities, that may reasonably tend to . . . [n]egate the Accused's guilt." (Id.)

While this Court has not articulated a test for what constitutes a "specific request" for discoverable information, this Court should endorse the three-part test used by the Army Criminal Court of Appeals (ACCA) in Ellis, 77 M.J. at 680-681.

In Ellis, ACCA synthesized this Court's decisions applying the Hart test for prejudice, this Court's requirements for specific discovery requests in Williams, 50 M.J. at 441, and the materiality standard in R.C.M. 701(a)(2). Ellis, 77 M.J. at 680-681. The resulting three-part test for determining whether a request for discovery is a specific request is as follows:

> First, the request must, on its face, or by clear implication, identify the specific file, document or evidence in question.
>
> Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian.
>
> Third, the specific request should include a statement of the expected materiality of the evidence to preparation of the defense's case unless the relevance is plain.

Ellis, 77 M.J. at 681.

Appellant's discovery request does not even satisfy the first prong of the test. First, the request only applied to information in his case, not SSgt NW's case or SSgt DB's case, because the requests were limited to information in Appellant's investigation by the defense counsel's use of the phrases "prepared by agents or investigators *in the case*," "during the investigation *of this case*," and "in the investigation *of the Accused*." (JA at 198-200, 202.) By the plain language of the defense's requests, the information defense complains of not receiving was outside

the scope of the defense's discovery requests which were limited to *Appellant's* investigation.

Second, Appellant's requests did not identify any specific individuals but applied broadly to agents and investigators generally. Without the identification of a specific individual to whom impeachment evidence pertains, this Court has been reluctant to find that the defense made a specific request for discovery. *Compare* United States v. Green, 37 M.J. 88, 89-90 (C.M.A. 1993) (request for potential impeachment evidence was a general request where it did not identify specific agent by name), *and* Romano, 46 M.J. at 271 (same), *with* United States v. Coleman, 72 M.J. 184, 185 (C.A.A.F. 2013) (defense's discovery request was a specific request because it stated, "[s]pecifically the defense is requesting immediate disclosure of any agreement with PFC Jarvis Joshua Pilago to cooperate with the government in any way").

Appellant's contention that his investigation was a "joint" investigation with that of SSgt NW and SSgt DB is belied by Appellant's published ROI which does not mention it being a jointly conducted investigation, nor does it include any mention of other suspects or known associates of Appellant. (JA at 263-311.) Though trial counsel referred to the cases as "joint" in his affidavit, when compared to the investigative steps taken in Appellant's ROI, it appears as though that was a term of convenience and form, rather than substance, to reflect that both

cases were opened on the same day and involved roommates who tested positive during the same squadron urinalysis inspection. (JA at 42.) And even if Appellant's investigation and SSgt NW's investigation were at first joint, the joint nature of the investigation lasted only one day as Appellant's investigation was closed the same day it was opened and almost two months before SFOI conducted its follow-up investigation into SSgt NW and SSgt DB. (JA at 51.) For these reasons, Appellant's discovery requests were not specific requests for the nondisclosed information.

C. Even if the evidence did fall within the purview of R.C.M. 701(a)(6), there was no prosecutorial misconduct.

Appellant's next argument is that trial counsel's nondisclosure resulted from prosecutorial misconduct. (App. Br. at 35.) This Court applies the harmless beyond a reasonable doubt test for prejudice if evidence encompassed by R.C.M. 701(a)(6) is withheld as the result of prosecutorial misconduct. Roberts, 59 M.J. at 327. "Prosecutorial misconduct can be generally 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. Andrews, 77 M.J. 393, 402 (C.A.A.F. 2018) (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). Trial counsel has

"a duty to refrain from improper methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88 (1935).

There was no prosecutorial misconduct in Appellant's case for two reasons. First, the trial counsel was simply unaware of SFOI's follow-up investigations into SSgt NW and SSgt DB until after Appellant's court-martial, so they did not knowingly or intentionally withhold discovery. (JA at 42.) And the information was unknown to them not because they failed to exercise due diligence in searching the files of SFOI for it. Even a thorough search of all the case files and databases of SFOI would not have disclosed the information defense seeks because Investigator NM never documented his internet search about pre-workout supplements or the conversation he had with the MRO during his later investigations of SSgt NW and SSgt DB. (JA at 60.) A trial counsel's unawareness about undocumented steps taken by an investigator in an investigation of a different accused is categorically distinct from that of a prosecutor who has taken deliberate steps to conceal information from defense to obtain a wrongful conviction. The lack of willful or intentional actions by a prosecutor is a significant factor this Court considers in determining whether discovery violations rise to the level of prosecutorial misconduct because they suggest no calculation on the part of the prosecutor to thwart justice and obtain a wrongful conviction. *See* Andrews, 77 M.J. at 402.

Second, trial counsel did not commit prosecutorial misconduct because they did not fail to disclose evidence that fell under R.C.M. 701(a)(6). The expanded investigations into SSgt NW and SSgt DB, and information derived from them, had nothing to do with Appellant and did not tend to negate his guilt. Trial counsel learned of no information suggesting that Appellant used the pre-workout supplement or that SSgt DB's supplement contained DMHA. What trial counsel did know was that the MRO denied ever talking to SFOI or rendering an opinion that DMHA could cause a positive result for cocaine, and that their own expert in forensic toxicology in SSgt NW's case believed that such a result was completely implausible. The Appellant's ROI closed out nearly two months before SFOI reopened SSgt NW's investigation, and there was nothing from Appellant's original investigation, or SSgt NW's statements about his own use of the pre-workout supplement, that would have led trial counsel to believe that Appellant used the same the pre-workout supplement that SSgt NW claimed to have used. (JA at 51.) This is markedly different from the discovery situation in SSgt NW's trial where the trial counsel "failed to disclose the expanded SFOI investigation of *SSgt NW himself,* as well as SSgt DB, for a suspected violation of Article 92, UCMJ, in a matter related to the Article 112a, UCMJ, prosecution." (JA at 11) (emphasis in original). Unlike SSgt NW, Appellant did not face a follow-on investigation.

Appellant's reliance on this Court's decision in Claxton to support his prosecutorial misconduct argument is unconvincing. (App. Br. at 37.) In Claxton, this Court found gross governmental misconduct where trial counsel made no attempt to inquire as to the status of government witnesses as confidential informants as required by the defense's discovery request. 76 M.J. 256. But the key difference in Claxton is that the evidence of the witnesses' potential bias as confidential informants pertained to witnesses who testified for the government, and so the evidence was "favorable" to the accused because it was capable of impeaching the government's case. Id. This Court also found that while trial counsel was unaware of the witnesses' status, the Staff Judge Advocate, Chief of Justice, Commandant of Cadets, and Office of Special Investigations were aware and either did not inform the trial counsel, or if they did, failed to ensure trial counsel met their Brady obligations. Id. at 361-362.

The circumstances in Appellant's case could not be more different. The nondisclosed information about Investigator NM that Appellant claims was impeachment evidence was irrelevant to Appellant's case. Investigator NM did not testify for the prosecution, he did not take any investigative steps in Appellant's case, and SFOI generally had nothing to do with the integrity of the evidence used at Appellant's trial. Because the nondisclosed information in Claxton was favorable to the defense and readily accessible to trial counsel, trial

counsel was grossly negligent in failing to disclose it. Here, trial counsel was unaware of information that was not documented in any case file and ultimately irrelevant to Appellant's case. There was therefore no prosecutorial misconduct, and this Court should apply the less stringent reasonable probability test for prejudice under Roberts, 59 M.J. at 327.

D. Even if disclosure was required, this Court should apply the reasonable probability test for prejudice and find there was no reasonable probability of a different result.

Assuming this Court finds that trial counsel had a disclosure obligation under R.C.M. 701(a)(6), this Court should test for prejudice using the reasonable probability standard because there was no specific request for the nondisclosed information and no prosecutorial misconduct. Roberts, 59 M.J. at 326. For the same reasons stated above in the Brady analysis, there was no reasonable probability of a different result in Appellant's case even with the nondisclosed information. To begin, there is no proof that SSgt DB's pre-workout supplement contained DMHA. But even speculating that it did, any expert likely could not have testified that DMHA could cause a false positive for cocaine based on the MRO's denial of ever giving that opinion and the government expert's statement that such a result was completely implausible. (JA at 43, 57.) Finally, even if we speculate that some expert could have testified to such a result, there is still no

evidence to connect the pre-workout supplement to *Appellant*, so there is no reasonable likelihood of a different result at Appellant's trial.

AFCCA correctly identified two key considerations reinforcing this result. First, Appellant's trial defense team had the SFOI ROI for SSgt NW and knew about SSgt NW's explanation that SSgt DB's pre-workout supplement caused his positive urinalysis result, yet they still chose not to pursue a pre-workout defense at trial, even after consulting a competent expert in forensic toxicology. (JA at 11.) Second, though SSgt NW's trial defense team was armed with the nondisclosed information at issue and was given more time to explore a "pre-workout defense," they presented no evidence of the pre-workout supplement nor did they mount a pre-workout innocent ingestion defense at SSgt NW's trial. (Id.) Though the outcome of SSgt NW's trial was different from the outcome in Appellant's case, it was not because SSgt NW used the nondisclosed information in his defense. This Court can be confident that the outcome in Appellant's trial was not undermined by his lack of access to the nondisclosed information.

Thus, TJAG did not abuse his discretion in finding that there was no error prejudicial to the Appellant's substantial rights. The record supports that the evidence did not fall under R.C.M. 701(a)(6) because it was speculative and did not tend to negate Appellant's guilt. Further, Appellant's defense team was already aware of any potential exculpatory value it may have had to Appellant or

could have easily obtained it through their access to Appellant's roommates. But even if this Court finds that trial counsel should have disclosed the information, the Roberts reasonable probability test for prejudice should apply because there was no specific defense request for the information and no prosecutorial misconduct. 59 M.J. at 326-327. That SSgt NW's defense team had access to all the information at issue in this case and did not use it to mount a defense at his trial—a defense that would have corroborated his innocent ingestion explanation to SFOI—validates that there is no reasonable likelihood Appellant's trial result would have been different if the information had been disclosed. TJAG's finding denying Appellant's application for relief under R.C.M. 701(a)(6) therefore was not an abuse of discretion.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of AFCCA.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court, Air Force Appellate Defense Division, and Civilian Defense Counsel at emails davidsheldon@militarydefense.com and amorgan@militarydefense.com on 3 January 2025.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(b)

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Attorney for the United States (Appellee)

Dated: 3 January 2025