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

REPLY BRIEF ON BEHALF OF APPELLANT

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Pursuant to the briefing schedule established by this Court's order on September 19, 2024, Senior Airman (SrA) Bryce T. Roan, Appellant, hereby replies to the Government's Answer filed on January 3, 2025.

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*, 73 U.S. 83 (1963).

A. Standard of Review

Appellee appears to have repurposed their argument that Article 69, UCMJ, divests the Judge Advocate General (TJAG) and, by extension, appellate courts of jurisdiction. *See United States v. Parino-Ramcharan*, 84 M.J. 445 (C.A.A.F. 2024) (holding that the Courts of Criminal Appeals (CCA) and this Court have jurisdiction to consider a petition that arose from Article 69(c)(1)(A)). Instead, Appellee now invites this court to review cases arising under Article 69, UCMJ, under the abuse of discretion standard. This Court should decline.

According to Appellee, "[t]he action on review at AFFCA then was TJAG's exercise of discretion under Article 69, UCMJ." Appellee Br. at 22. Appellee

attempts to argue that this Court is limited to reviewing TJAG's discretionary decision to deny SrA Roan relief for the government's *Brady* and Rule for Courts-Martial (R.C.M.) 701 violations. However, Article 67(c)(1)(A) provides that in any case reviewed by it, this Court may act only with respect to "the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." Subsection (c)(3) states "[i]n a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review." And subsection (c)(4) states this Court "shall take action only with respect to matters of law." There is no indication in the statute that Congress somehow intended to curtail this Court's jurisdiction in cases arising from Article 69, UCMJ.

Here, the Court has specified two issues in the grant of review, and it is the questions of law underpinning those issues – not the fact that SrA Roan's case arose from Article 69 review – that determines the standard of review. This interpretation is consistent with this Court's recent practice. In *Parino-Ramcharan*, after satisfying itself of its own jurisdiction, this Court analyzed the merits of the case. 84 M.J. at 448, 451. There, Appellant sought review of a military judge's decision to admit Appellant's confession. *Id.* at 451-52. Reviewing that decision, this Court applied the abuse of discretion standard, citing *United States v. Whiteeyes*, 82 M.J. 168, 172 (C.A.A.F. 2022) (holding that a military judge's decision to admit or suppress an

admission is reviewed for an abuse of discretion). There is no indication that this Court applied the abuse of discretion standard because Parino-Ramcharan had appealed under Article 69, UCMJ, or that this Court believed its jurisdiction limited to a review of TJAG's discretionary decision. Rather, the standard of review was based on the legal question presented.

SrA Roan's case turns on the materiality of the withheld evidence. Materiality is a question of law reviewed de novo. *See United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Thus, the appropriate standard of review for both granted issues is de novo review.

B. The withheld evidence was material and favorable to SrA Roan and the failure to disclose resulted in prejudice.

Appellee failed to address the government's failure to disclose the following evidence: (1) that SFOI destroyed all references to the Article 92, UCMJ, investigation in SSgt N.W.'s case file; (2) that interviews with SSgt [NW] and SSgt [DB] were videotaped and the tapes were not discovered; and (3) that two Security Forces investigators were counselled for violating SFOI policies for destroying case files. *See* Appellant's Br. at 17 (outlining all evidence withheld); Appellee's Br. at 16 (same). *Kyles* is explicit: the effect of all withheld evidence favorable to SrA Roan must be considered cumulatively. *Kyles v. Whitley*, 514 U.S. 439, 434 (1995). Failing to address the cumulative effect of all withheld evidence, Appellee falls victim to the same error as the lower court.

According to Appellee, the withheld evidence was not material to SrA Roan's case for three reasons: (1) there was no evidence that SrA Roan's roommate's pre-workout supplement contained DMHA or would cause a false positive for cocaine; (2) there was no evidence that SrA Roan used his roommate's pre-workout supplement; and (3) the withheld evidence did not provide a basis for an innocent ingestion defense. Further, Appellee argues that even if the withheld information was exculpatory, trial counsel had no obligation to disclose it because SrA Roan possessed the information or could have obtained it.

First, while Appellee complains that there is no evidence that SSgt D.B.'s pre-workout supplement contained DMHA, that is a government-created problem. After learning that SSgt D.B. possessed questionable pre-workout powder in September 2021, investigators failed to examine, seize, or test the supplement. The government should not now benefit from their investigator's incompetence.[1]

SrA Roan acknowledges that it is not immediately clear from the record why a pre-workout powder containing DHMA was significant to Inv N.M. when Inv N.M. conducted his internet research. But is reasonable to conclude that Inv N.M.

[1] Appellee suggests that SrA Roan should have requested seizure of the pre-workout powder. Appellee Br. at 34. However, SrA Roan first learned of SSgt D.B.'s pre-workout powder – referenced generally by SSgt N.W. – following the government's disclosure of SSgt N.W.'s incomplete case file mere days before SrA Roan's court-martial. It is absurd to believe that such an effort would have been fruitful nearly four months after the positive urinalysis and three months after SSgt D.B. was investigated for use of a banned substance in violation of Article 92, UCMJ.

conducted his research based on the information SSgt D.B. provided to SFOI. SSgt D.B. was questioned by Inv M on September 14, 2021, as part of SFOI's effort to obtain corroborating evidence of drug use by SSgt N.W. and SSgt D.B. provided information about his pre-workout powder. JA at 51. Information from that interview was provided to Inv N.M., who, in turn, identified a single pre-workout powder produced by Blackstone Labs. Prior to this research, Inv N.M. lacked the scientific knowledge to understand the significance of DHMA. Indeed, prior to September 14, 2021, Inv N.M. was unaware that DHMA was on the banned substances list. Given the sequence of events, the only logical conclusion is that SSgt D.B.'s pre-workout powder was the same pre-workout powder that Inv N.M. researched.

While Appellee dismisses the destruction of SSgt D.B.'s case file because it "consisted of a manila folder, a series of dividers, and blank agent notes with only SSgt DB's name and date of interview," Appellee fails to address the government's failure to disclose SSgt D.B.'s September 14, 2021, videotaped interview (as well as other videotaped interviews), which would have resolved the question of whether the pre-workout powder identified by Inv N.M. was the same pre-workout powder identified by SSgt D.B. Appellee Br. at 10. SrA Roan specifically requested "any video or audio recordings taken during the investigation of this case[.]" JA at 202. The government cannot claim that this information was not relevant to SrA Roan.

SSgt D.B. was interviewed because SFOI was instructed by the legal office to find corroborating evidence of drug use in by SSgt N.W. In other words, this interview was related to the Article 112(a) allegation, not the Article 92 allegation. Following receipt of SrA Roan's initial discovery request, the government conceded that SSgt N.W.'s investigation was relevant to the allegation against SrA Roan. In response to defense counsel's discovery request, trial counsel responded, "[t]he Government is providing the case file information for SSgt [NW]. SSgt N.W. tested positive for cocaine on the same day as SrA Roan. SSgt [N.W.] told SFOI that he was at a party with [SrA Roan] during the Fourth of July weekend but did not see any drugs at the party." JA at 218. There is no explanation for why trial counsel failed to turn over SSgt D.B.'s videotaped interview, as well as the interviews of other witnesses, including SSgt N.W. It appears, rather than exercise due diligence and personally review SFOI's files, which included video tapes, trial counsel blindly trusted the SFOI's representation that the interviews "…did not provide additional pertinent information." JA at 57.

It bears noting that SFOI interviewed SSgt D.B. and other 4th of July partygoers at the direction of the Chief of Military Justice. *Id.* In other words, the prosecution was not only aware of the additional steps taken by SFOI; the prosecution directed those steps. After Inv N.M. relayed the results of SFOI's investigation, including his internet research and conversations with a DDRP representative and a MRO, the

prosecution determined there was sufficient evidence to open cases against SSgt N.W and SSgt D.B. for an alleged violation of Article 92, UCMJ. *Id.* Appellee cannot now plead ignorance of the steps that were taken at the government's behest. *Id.; see Strickler v. Green*, 527 U.S. 263 (1999) (quoting *Kyles*, 514 U.S. at 437) (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.'")

Further, the record supports the inference that DMHA might cause a false positive for cocaine. After learning that Blackstone Labs produced a pre-workout powder containing DMHA, Inv N.M. contacted the DDRP and learned that DHMA was a banned substance. JA at 57. Logically, substances are on the banned substance list because they have the potential to cause a positive drug test or to interfere with the integrity of the drug testing program. *Cf., United States v. Pugh*, 77 M.J. 1 (C.A.A.F. 2017) (holding that a ban on legal, commercially available hemp seed products did not advance the military purpose of ensuring military readiness by protecting the reliability and integrity of the drug testing program because hemp seeds do not contain enough THC to be detectable by the drug testing program). After learning DHMA was on the banned substances list, Inv N.M. contacted a MRO who informed him that DHMA could cause a positive drug test for cocaine. JA at 57.

Appellee's brief suggests that Inv N.M. either misremembered or fabricated this information because the MRO that testified during SSgt N.W.'s trial did not recall

the conversation.[2] Appellee's Br. at 33 (referencing the "patchy nature of information allegedly obtained from the MRO"). But that suggestion begs the question of what motivation Inv N.M. would have to fabricate this information. More reasonably, Inv N.M. spoke to a different MRO. Unfortunately, the email, listing the names of the two MROs identified by DDRP, was never provided to the defense and the second MRO's name is not apparent from the record.[3] JA at 51.

While Appellee claims "no MRO or expert in forensic toxicology believed that DMHA in a pre-workout supplement could cause a false positive for cocaine," that claim is inconsistent with the facts in the record. The military judge in SSgt N.W.'s case found as fact that at least one MRO represented that DMHA could cause a positive drug test for a cocaine metabolite. Appellee Br. at 18; JA at 51. Appellee attempts to bolster their claim, asserting that the government's expert in SSgt N.W.'s case, convened over a month after SrA Roan's court-martial, opined that "it would be almost completely implausible that the ingredient in the pre-workout could cause a positive result for cocaine." Appellee Br. at 25. What an expert did or did not opine to trial counsel, off the record, in SSgt N.W.'s court-martial is not before this Court,

[2] Appellee states, "the MRO denied ever making the statement that DMHA could cause a false positive for cocaine." Appellee Br. at 35. That is an inaccurate characterization of the facts in the record. The MRO did not recall the conversation. JA at 51.

[3] Even if Inv N.M. failed to document his conversation, there is no indication that this email would have been deleted and no explanation for why it was not provided to the defense or the trial court in SSgt N.W.'s case.

nor is it relevant. The unidentified government expert's testimony in SSgt N.W.'s case is not before this Court. The expert's purported assertion comes only from an affidavit from trial counsel, Maj A.N., written two years after SrA Roan's case. Even assuming, *arguendo*, the government expert did render such an opinion, that opinion is far from conclusive. JA at 43. Rather, divergent opinions regarding the plausibility of DHMA resulting in a positive test for cocaine might result in a "battle of the experts."

Appellee argues "there was no reasonable basis for trial counsel to believe that information about the pre-workout supplement would have been favorable exculpatory evidence for [SrA Roan]." Appellee Br. at 26. Appellee's argument is internally inconsistent: either trial counsel was unaware of the MRO's opinion, as Maj A.N. claims, or trial counsel knew and did not believe the information was discoverable. JA at 43. The government cannot have it both ways.

Regardless, Appellee's assertion is inaccurate; timelines matter. Prior to SrA Roan's court-martial, the MRO's opinion, that a false positive was possible, was the only expert opinion known to the government. It was not until after SrA Roan's trial, when SSgt N.W. filed his motion to dismiss for discovery violations that trial counsel sought input from their expert, who purportedly reached the opposite conclusion. JA at 43. At the time of SrA Roan's court-martial the government was only aware favorable exculpatory evidence and failed to disclose it. Moreover, even if the

government had consulted their expert prior to SrA Roan's court-martial, disclosure would have still been required because SrA Roan had the right to mount a defense in his court-martial – regardless of the trial counsel's subjective belief about the viability of that defense.

Third, Appellee asserts "there was no evidence connecting [SrA Roan] to the pre-workout supplement." Appellee Br. at 27. Thus, according to Appellee, the information is not relevant. While there is no direct evidence that SrA Roan consumed his roommate's pre-workout powder, there is evidence pre-workout powder was stored in the common area of the apartment and accessible to SSgt N.W. and SrA Roan. There is no requirement that SrA prove that he knowingly consumed the pre-workout powder. The mere fact a product containing an ingredient that might interfere with the drug testing program was in SrA Roan's home and accessible to him is relevant and has high probative value.

This Court addressed a nearly identical situation in *United States v. Brewer*, 61 M.J. 425, 429 (C.A.A.F. 2005). In *Brewer*, the defense did not claim to know how the innocent ingestion occurred, but rather offered the "possibility that [Brewer's] ingestion may have occurred in his home where his nephew had used the drug." *Id.* In that case, there was no direct evidence connecting Brewer to his nephew's drug use; however, the mere presence of the drug in his home was relevant. As this Court points out, "[t]he very nature of the innocent ingestion defense means that Brewer

could not prove the time or place of his innocent ingestion but could only suggest possible explanations. Part of the defense of innocent ingestion requires raising doubts in the minds of the members that the presence of a drug in [a criminal defendant's] system came from a knowing and wrongful use of the drug." *Id.* The same analysis applies here: SrA Roan is not required to prove the time or place of his innocent ingestion. That a seemingly legal pre-workout powder, which may have contained DMHA, was in SrA Roan's residence, coupled with the potential for DMHA to cause a positive result for a cocaine metabolite, is exactly the type of evidence that surely could raise doubts in the minds of the members of whether as to whether SrA Roan's drug us was knowing and wrongful. This is particularly true in a case where there was zero corroborating evidence of drug use. But without government disclosures, SrA Roan did not have a basis to mount an innocent ingestion defense.

Finally, Appellee argues that SrA Roan already know about the pre-workout powder from the discovery he received. According to Appellee, SrA Roan had SSgt N.W.'s explanation and access to SSgt N.W. and SSgt D.B. and, armed with that information, could have "easily learned about the manufacturer of the pre-workout supplement." Appellee's Br. at 34. While it is true that SrA Roan did have SSgt N.W.'s statement that SSgt N.W. might have consumed SSgt D.B.'s pre-workout powder, that alone was insufficient to put SrA Roan on notice. SrA Roan did not

have access to SSgt D.B.'s September 14, 2021, interview where SSgt D.B. explained the pre-workout powder and where it was stored. SrA Roan did not know that the pre-workout powder might contain DMHA. SrA Roan did not know that DMHA was on the banned substances list. SrA Roan did not know that a MRO opined that DMHA, if taken at the right time and in the right amount, might cause a positive result for a cocaine metabolite. The government did know all of this and failed in its obligation to disclose this critical evidence.

Even assuming SSgt D.B.'s pre-workout powder still existed in SrA Roan's apartment in late-November when SrA Roan first received discovery – which is unlikely, given the fact that SSgt D.B. was investigated for an Article 92, UCMJ, violation two months prior – it is unreasonable to believe that SrA Roan could have "easily learned" the facts discovered by Inv N.M. For example, even if SrA Roan located the pre-workout powder, he would not have known the significance of Blackstone Labs or DMHA. And, even if the prosecution believed that this information was somehow cumulative with evidence in SSgt N.W.'s statement, which it was not, disclosure was still required. *See United States v. Robinson*, 68 F.4th 1340, (D.C. Cir. 2023) (finding a *Brady* violation despite Government assertions that three withheld reports were cumulative with evidence in defendant's possession).

Appellee states that SrA Roan "had sufficient time to consult with a qualified defense expert." Appellee Br. at 32. But SrA Roan's qualified defense expert was

appointed on the literal eve of trial – something Appellee completely ignores. Assuming, *arguendo*, SrA Roan did have the benefit of an expert, it still does not remedy the situation. SrA Roan could not consult with his expert about whether DHMA might result in a false positive for cocaine because the government failed to disclose evidence of SFOI's investigation. Put bluntly, because of the government's "gross negligence" in failing to disclose favorable exculpatory information, the defense was deprived of the ability to consult with their expert regarding whether DHMA in pre-workout powder presented a viable defense.

According to Appellee, there is no reasonable probability the outcome of trial would have been different if the information was disclosed. Appellee Br. at 38. However, the "reasonable probability" test "is not a particularly demanding one." *See United States v. Agurs,* 427 U.S. 97, 112 (1976), *holding modified by Agurs*, 427 U.S. at 112. The Supreme Court held:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.

Id.

Plainly, SrA Roan does not need to prove that he would be acquitted. He is required only show that the withheld evidence would create a reasonable doubt in the

minds of the members as to his knowing and wrongful ingestion of cocaine. That standard is easily met here. Evidence related to SSgt D.B.'s pre-workout supplement, (1) that it was stored in the common area of SrA Roan's apartment; (2) that it may have contained DHMA; (3) that the MRO opined that DHMA might result in a positive test for cocaine; (4) that SFOI never seized the pre-workout powder; (5) that SFOI failed to document witness interviews and investigative steps; and (6) that SFOI destroyed SSgt D.B.'s case file and deleted information from SSgt N.W.'s, is exactly the type of evidence that, individually, might create a reasonable doubt in the minds of members and, in aggregate, most certainly would. A skilled defense attorney, armed with this compelling information, would have eviscerated the government's weak naked urinalysis case.

Appellee acknowledges that the "prosecution's evidence at trial focused exclusively on the DDRP collection process and urinalysis testing done by the Air Force Drug Testing Lab," thus, "[t]here is simply nothing in the record to link anything SFOI did to *Appellant's* positive urinalysis." (Appellee Br. at 37) (emphasis in original). Like the lower court, Appellee's focus is misplaced. The appropriate analysis does not turn on the evidence actually introduced at trial, but on what the defense could have done with the withheld information. *Kyles,* 514 U.S. at 419. The government's decision about how to prosecute its case, avoiding reference to SFOI's fraught investigation, does not somehow foreclose SrA Roan's ability to mount a

defense and present this information. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.")

Two things are worth noting. *First*, the prosecution's case was weak. There was no confession, no corroborating witnesses, and no physical evidence. SrA Roan's case was, in the truest sense, a naked urinalysis. *Second*, the prosecution's case was flawed. It appears that Little Rock Air Force Base has a problem with record keeping, as testing registries related to the urinalysis sweep conducted on July 6, 2024, had been destroyed and were determined to be unrecoverable. JA at 95. Additional evidence of irregularities, as well a potential source of innocent ingestion, would have been powerful evidence to combat such a bare-bones case.

Like the court below, Appellee fails to address the military judge's instruction on permissive inference and how that may have prejudiced SrA Roan. JA at 257-58. Maj A.N.'s affidavit acknowledges that the Government relied on the judge's instruction during findings argument. JA at 42. Had the defense been able to introduce some evidence that a pre-workout powder in SrA Roan's apartment might have interfered with his drug test, the members would have also been instructed on innocent ingestion. *See Military Judge's Benchbook* at 3a-36a-2. (Drugs – Wrongful

Use (article 112a)). A favorable defense instruction alone – changing the way the members considered the knowledge and wrongfulness elements of the charged offense and placing the burden on the Government to overcome the defense's evidence – creates a reasonable probability of a different outcome.

Appellee claims that SSgt N.W.'s acquittal is not persuasive because SSgt N.W. "did not call SSgt D.B. to testify, nor did they present any information related to the pre-workout supplement in SSgt N.W.'s defense." Appellee Br. at 41-42. SSgt N.W.'s record of trial is not before this Court. The only source of this information comes from Maj A.N.'s affidavit. Assuming, *arguendo,* Maj A.N.'s recollection is accurate, SSgt N.W.'s tactical decisions at trial related to SSgt D.B. and the pre-workout powder are immaterial. What matters is the SSgt N.W. had this information to prepare his defense. Maj A.N.'s affidavit is silent regarding whether SSgt N.W. called investigators as witnesses, silent as to whether he confronted those witnesses with their investigatory deficiencies and misconduct, and silent regarding SSgt N.W.'s cross-examination of the government expert. That silence is deafening. SrA Roan and SSgt N.W.'s courts-martial arose out the exact same alleged misconduct at the exact same time. The two Airmen lived in the same apartment and that is where the pre-workout powder was stored in a communal area. The sole difference between the two trials was that SSgt N.W. had the benefit of the government's evidence prior to trial and SrA Roan did not. That is sufficient to demonstrate a reasonable

probability of a different outcome.

Prejudice arises when a discovery violation interferes with an accused's ability to mount a defense. *See United States v. Stellato*, 74 M.J. 473, 490 (C.A.A.F. 2015). Here, the cumulative effect of the Government's withholding of exculpatory and impeachment evidence interfered with SrA Roan's right to mount a defense and impacted the outcome of trial. The right to present a defense is fundamental. The government's abdication of its discovery and disclosure obligations prevented SrA Roan from receiving a fair trial. As such, SrA Roan is entitled to relief, and his conviction should be set aside.

II.

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.

On November 19, 2021, the defense made specific requests for discovery and the nondisclosure of material evidence, favorable to SrA Roan, was the result of prosecutorial misconduct – namely, trial counsel's failure to apprise himself of SFOI's investigative steps and witnesses' derogatory data. The Government is required to prove that nondisclosure was harmless beyond a reasonable doubt. They cannot do so here. As such, this Court should grant relief.

To read Appellee's brief, one would assume that SrA Roan's case was

investigated by rogue investigators and prosecuted by an attorney who remained completely ignorant of basic investigative steps. Even if that were true, it does not relieve the government of its obligations. "[T]rial counsel must review their own case files and must also exercise due diligence and good faith by learning about any evidence favorable to the defense 'known to others acting on the government's behalf, including the police." *Stellato* at 486 (internal citations omitted). Here, trial counsel abdicated their duties, when they failed to exercise due diligence by failing to inspect SFOI files in a related case maintained by law enforcement, resulting in prejudice to SrA Roan. This includes failing to apprise themselves of basic investigative steps. *See United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (Articulating the scope of the due diligence requirement) (internal citations omitted).

Adopting the same argument posited in their *Brady* analysis, Appellee again asserts that disclosure was not required because the evidence was not favorable or material to the defense. Appellee Br. at 45. This argument is premised, in part, on Maj A.N.'s affidavit and his assertion that a government expert in SSgt N.W.'s court-martial opined that "it would be almost completely implausible that the ingredient in the pre-workout could cause a positive result for cocaine." Appellee Br. at 25. However, rather than support Appellee's argument, Maj A.N.'s affidavit illustrates exactly how SrA Roan was deprived his right to equal access to witnesses and evidence under Article 46, UCMJ. *Williams,* 50 M.J. at 436, 440 ("Congress

mandated that the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence[.]") While the government had the benefit of expert consultation regarding the plausibility of DMHA resulting in a false positive both before SrA Roan's court-martial (the MRO) and, again, before SSgt N.W.'s court-martial (the government expert), SrA Roan did not.

Appellant argues that this court should test for prejudice using the "reasonable probability" standard because SrA Roan did not make a specific request for the withheld discovery. Appellee Br. at 46. Acknowledging that this Court has not articulated a test for what constitutes a "specific request" for discovery, Appellee suggests that SrA Roan's requests for discovery were not sufficiently detailed. Appellee Br. at 46-48. SrA Roan requested, *inter alia*, (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. Plainly, SrA Roan asked for the case file, including statements and agent notes, videotaped interviews statements, and derogatory data. These are standard requests that any competent trial counsel would anticipate. It is difficult to imagine what additional details would be necessary for trial counsel to comply with their obligations. Yet, trial counsel in this case provided incomplete responses.

Appellee asserts that SrA Roan's request lacked specificity because SrA Roan

only requested information about his case, not SSgt N.W.'s. Appellee's Br. at 47-48 ("the information defense complains of not receiving was outside the scope of the defense's discovery requests which were limited to *Appellant's* investigation") (emphasis in original). That argument does not withstand scrutiny. Despite Appellee's protestations, this was a joint investigation. *Id.;* JA at 42 (affidavit of trial counsel referring to joint investigation). SrA Roan and SSgt N.W. were roommates and friends. They both tested positive for the same drug, during the same unit sweep, following attendance at the same 4th of July party. It is unreasonable for Appellee to suggest that somehow these investigations were unrelated.

More pointedly, even if this were not a joint investigation, trial counsel recognized that SSgt N.W.'s casefile contained discoverable information. In response to the defense discovery request, trial counsel indicated that it would provide SSgt N.W.'s complete ROI because trial counsel recognized that information in SSgt N.W.'s ROI was relevant to SrA Roan's defense. JA at 218. It is inexplicable that trial counsel did not provide *all* the information underpinning SSgt N.W.'s ROI, to include videotaped interviews of SSgt N.W. and SSgt D.B. Perhaps Appellee's argument that the defense already possessed the information about the pre-workout powder would have some merit if trial counsel had disclosed SSgt D.B.'s videotaped interview, conducted as part of SFOI's investigation into SSgt N.W., where SSgt D.B. discusses the specifics of his pre-workout powder. But they did not. Instead, trial

counsel either trusted the assertions made by SFOI in the ROI that SSgt D.B.'s interview did not contain any pertinent information and either did not verify whether that was accurate, or trial counsel purposefully withheld the information.

Similarly, the defense's request for "all derogatory information on any investigator" was sufficiently specific. JA at 267. Trial counsel was aware of the investigators involved in SrA Roan's investigation. Even if this Court agrees with Appellee that SrA Roan's request was limited to his case, despite the joint nature of the investigation, trial counsel was still required to turn over derogatory data about Inv M and they failed to do so. It is worth noting that this was not an isolated occurrence. At trial, defense was forced to litigate a motion to discovery, after finding out that trial counsel had failed to disclose derogatory data for a government witness. JA at 190-91. While trial counsel may have asserted to the trial court that "the government has complied with discovery requirements to look for derogatory data[,]" it is apparent from the record before this Court that trial counsel was either unaware of his discovery obligations or indifferent to abiding by them. JA at 71.

Like the lower court, Appellee asserts that there was no prosecutorial misconduct because "trial counsel was simply unaware of SFOI's follow-up investigations." Appellee's Br. at 50. Ignorance is not a defense against prosecutorial misconduct, nor is it plausible explanation here. The prosecution directed SFOI to conduct additional interviews to corroborate drug use by SSgt N.W. The prosecution

was aware that these interviews were recorded. After learning about SSgt D.B.'s interview and his pre-workout powder and the conversations that Inv N.M. had with DDRP and the MRO, the prosecution directed SFOI to open investigations into an alleged Article 92, UCMJ, violation, by SSgt D.B. and SSgt N.W. The prosecution was aware that a casefile would have been created for SSgt D.B. and that information related to the Article 92, UCMJ, allegation would have been added to SSgt N.W.'s. existing case file. Yet, when the legal office received SSgt N.W.'s case file, prosecutors failed to notice that information, including SSgt D.B.'s September 14, 2021, witness statement, was missing.

Appellee weakly tries to distinguish SrA Roan's case from this Court's precedent in *United States v. Claxton*, 76 M.J. 365 (C.A.A.F. 2017). (Appellee Br. at 52). However, the analysis in *Claxton* is directly on point. In *Claxton*, trial counsel was unaware of the status of government witnesses as confidential informants and consequently, did not disclose the witnesses' status to the defense. This Court held that such conduct constituted prosecutorial misconduct because while trial counsel remained unaware, the Staff Judge Advocate, Chief of Justice, Commandant of Cadets, and Office of Special Investigations were aware and either did not inform trial counsel, or if they did, failed to ensure trial counsel met their *Brady* obligations. *Id.* at 361-62. Here, Maj A.N. claims he was unaware of SFOI's investigation. However, both the Chief of Military Justice and the SFOI investigators were aware

of the additional investigatory steps taken and the information obtained, yet they failed to ensure trial counsel disclosed this information to SrA Roan. Applying *Claxton*, the government committed prosecutorial misconduct in SrA Roan's case. Additionally, analyzing a nearly identical set of facts, the trial judge in SSgt N.W.'s case found trial counsel's conduct was "grossly negligent." JA at 53. The same finding of gross negligence is required here.

SrA Roan both made a specific request for discovery and the withholding was the result of prosecutorial misconduct. Thus, this Court should apply the harmless beyond a reasonable doubt standard. As the Government is unable to prove that nondisclosure meets this heightened standard, SrA Roan's conviction should be set aside.

CONCLUSION

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

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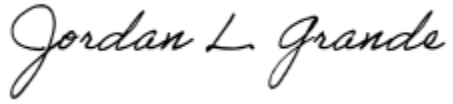
CERTIFICATE OF FILING AND SERVICE

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 January 13, 2025.

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 6,303 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.

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