UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22033**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Bryce T. ROAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Applicant	)	

An application for grant of review pursuant to Article 69(d)(1)(B), Uniform Code of Military Justice, 10 U.S.C. § 869(d)(1)(B), was filed in the above styled case with this court on 15 May 2023.

Accordingly, it is by the court on this 24th day of May, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 1. Further, no briefs in response to this application will be filed unless ordered by the court.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

Law Offices of David P. Sheldon, PLLC
Admitted in DC, MD, & MT
100 M St. SE, Suite 600
Washington, D.C. 20003

May 12, 2023

Clerk of the Court
U.S. Air Force Court of Criminal Appeals
1500 West Perimeter Road, Suite 1900
Joint Be Andrews, MD 20762

Through

Judge Advocate General of the Air Force
AF/JAJM
Appellate Records
1500 West Perimeter Rd. Ste 1130
Joint Base Andrews, MD 20762

Sent by email to AF.JA.JAJM.Appellate.Records@us.af.mil and by certified mail to the AF/JAJM address

Subject: Application for Grant of Review by the United States Air Force Court of Criminal Appeals in the Case of United States v. SrA Bryce T. Roan

Dear Sir or Madam:

My office represents Senior Airman Bryce T. Roan. On his behalf, I submit the attached brief in support of his application for grant of review by the Air Force Court of Criminal Appeals. The Court has jurisdiction over this matter, as stated in AFCCA Rule of Practice and Procedure 5(b)(3). This application for grant of review is filed in accordance with Article 69(d)(1)(B) of the Uniform Code of Military Justice.

On September 8, 2022, SrA Roan submitted a Request for Review by the Judge Advocate General to the Judge Advocate General of the Air Force in accordance with Article 69 of the Uniform Code of Military Justice. On September 12, 2022, SrA Roan submitted a Petition for New Trial to the Judge Advocate General of the Air Force, in accordance with Article 73 of the Uniform Code of Military Justice. On March 15, 2023, the Judge Advocate General of the Air Force denied relief for both submissions. This application and brief are filed to the Court through the Judge Advocate General of the Air Force on May 12, 2023, thus this application is timely.

As explained in our brief, the government possessed exculpatory information related to the charge against SrA Roan. The Government deleted this information from investigatory files of SrA Roan's co-accused and never provided it to either defendant. It was not until after SrA Roan was convicted and his co-accused was preparing for trial that the exculpatory information and the Government's treatment of it came to light. In the co-accused's case, the Military Judge called

the Government's actions "grossly negligent." While SrA Roan's co-accused had the information available for trial and was acquitted, the discovery of the information was too late for SrA Roan. The Government's grossly negligent behavior should not be allowed to stand. We respectfully urge this Court to take up SrA Roan's case on appeal

If you have any questions, please feel free to contact me at or by telephone at .

Very Respectfully,

David P. Sheldon, Esq.
Attorney for Bryce T. Roan

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **BRYCE T. ROAN** United States Air Force *Appellant*	))))))))))	**BRIEF ON BEHALF OF APPELLANT**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Issue Presented:

I.

DID THE GOVERNMENT VIOLATE *BRADY* AND R.C.M. 701(a)(6) BY FAILING TO INFORM APPELLANT OF EXCULPATORY EVIDENCE AND DESTROYING AN INVESTIGATIVE CASE FILE?

Statement of the Case

On 6-9 December 2021, Appellant was tried at a Special Court Martial by a panel of officers at Little Rock Air Force Base, Arkansas. Contrary to his plea, he was found guilty of one charge and specification of Unlawful Use of Cocaine in violation of Article 112a, Uniform Code of Military Justice. R. Vol 1 at 5. Appellant was sentenced to Reduction to E-2, restriction to residence for 45 days, hard labor without confinement for three months, and reprimand. *Id*. The Convening Authority disapproved the restriction to residence for 45 days. *Id*. at 7. The rest of the sentence was not reduced.

Statement of Facts

On July 6, 2021, Lt Col D H commander of the , ordered a 100% urinalysis sweep of the entire squadron. *Id*. at 52. SrA Bryce T. Roan reported to the designated location and provided a urine sample, as required. *Id*. at 53. On July 20, 2021, the Little Rock AFB Drug Demand Reduction Program office received information from the Air Force Drug Testing Laboratory that the sample provided by SrA Roan tested positive for cocaine. *Id*. at 62. SrA Roan was stunned by the result, as he had never taken cocaine.

On November 9, 2021, charges that SrA Roan violated Article 112a of the Uniform Code of Military Justice were referred for a special court martial. *Id*. at 112-13. On November 19, 2021, SrA Roan's defense team submitted Defense Discovery Request #1, in which they asked for, inter alia, all personal or business notes prepared by agents or investigators in the case. *Id*. at 182-197. In addition, the request asked for "[a]ny evidence in the Government's possession, including trial counsel or any military authorities, that may reasonably tend to: Negate the Accused's guilt." ROT Vol 2 at 187. In its response, the prosecution stated: "A copy of the entire SFOI case file will be provided to Defense" *Id*. at 199. Responding to the request for information that may negate guilt, the prosecution wrote: "The Government is providing the case file information for SSgt N W SSgt W tested positive for cocaine the same day as SrA Roan. SSgt W told SFOI that he was at a party with SrA Roan duirng [sic] the Fourth of July weekend but did not see any drugs at the party." Id. at 203.

On December 6, 2021, a Special Court-Martial began in the case United States v. SrA Bryce Roan. After a series of 39(a) sessions, the trial began on December 7, 2021. (ROT Vol 3 at 174). Opening statements began on December 8, 2021. *Id*. at 191. The prosecution presented witnesses who were Air Force members who served as trusted agents, collectors, and observers

during the urinalysis collection, the managers from of the Little Rock AFB Demand Reduction Program, and an individual from the Air Force drug testing laboratory at Lackland Air Force Base, TX, which was the site where SrA Roan's urine sample was analyzed. Following their testimony and cross-examination from the Defense, the Prosecution and Defense rested. *Id*. at 237, 239. The court-martial closed for deliberations at 1712 hours on December 8, 2021. *Id*. at 246. At 1752 hours on December 8, 2021 the court-martial reconvened at the members had reached a decision. *Id*. at 250. The President announced that the court-martial found SrA Roan guilty. *Id*. On December 9, 2021, after reviewing exhibits and hearing from a defense witness, the panel provided the Military Judge with the sentencing worksheet and the Military Judge pronounced the sentence. *Id*. at 268.

Argument

The government deliberately withheld exculpatory information from SrA Roan's defense team, violating the disclosure requirements of *Brady*.

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). With these words, the Supreme Court affirmed the duty of a prosecutor to provide the defense with exculpatory information in its possession. This responsibility was incorporated into military justice:

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

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

Here, the government violated the requirements under *Brady* and R.C.M. 701(a)(6). During the same unit sweep in which Appellant provided his urine sample that tested positive, two other members of the also tested positive. Like SrA Roan, they too were surprised by the result. One of the members was SrA Roan's roommate, SSgt N W During the investigation of these cases by the Little Rock AFB Judge Advocate General and the Security Forces Squadron, information was uncovered that would have provided SrA Roan with evidence that his urinalysis results may have been a false positive. However, Security Forces investigators, against regulations, deleted parts of an investigative file and trial counsel, though aware of this evidence, failed to provided it to SrA Roan's defense attorneys.

The exculpatory information obtained by Security Forces investigators, their actions in deleting an investigatory file, and the Government's failure to provide the information to SrA Roan's defense are documented in two rulings from the court-martial of SrA Roan's roommate in the case United States v. SSgt N W These documents, a Ruling on Defense Motion to Dismiss for Failure to Disclose and Produce Exculpatory Evidence, dated January 25, 2022 and Ruling on Defense Motion to Dismiss for Lost or Destroyed Evidence, also dated January 25, 2022, are appended to a Motion to Attach Documents that accompanies this Application for Grant of Review and brief.

As noted by the Military Judge in her rulings in U.S. v. W , the following facts took place during the Little Rock AFB investigation into the positive urinalysis results from the unit sweep of the

> 1. On 9 November 2021, the Charge and its Specification were referred to this special court-martial. The accused is alleged to have wrongfully used cocaine on one occasion, within the continental United States, between on or about 22 June 2021 and on or about 6 July 2022, in violation of Art. 112a, U.C.M.J.
> 2. On 6 July 2021, SSgt W was ordered to provide a urine sample during a unit-wide inspection. On 20 July 2021, SSgt W urine sample tested positive

for the metabolite of cocaine at a level of 168ng/ml. See Appellate Exhibits II, attachment 3.

3. On 20 July 2021, Security Forces Office of Investigations (SFOI) investigators, specifically Investigator B , the NCOIC and only fully qualified investigator, interviewed SSgt W about his positive urinalysis. During this interview, SSgt W stated, "I have no idea, why would I…I take pre-workout, I don't know if that could make me pop…my roommate brought [the pre-workout] back from Africa. I ran out of mine and took his." See Appellate Exhibit II, attachment 2.

4. SFOI did not take any further investigative steps and the original Report of Investigation (ROI) was published on 23 July 2021.

5. Upon review of the ROI, the Captain A the Chief of Justice at Little Rock AFB, asked SFOI to conduct further investigation to see if they could find any corroborating evidence to support the positive urinalysis. As his first task as a brand new, untrained and not yet qualified investigator, Investigator M reviewed SSgt W interview from 20 July 2021, and began interviewing various people, to include SSgt W roommate, SSgt B and other people who attended the 4th of July party the weekend prior to SSgt W urinalysis. While all video-taped, the ROI summarizes the interviews for all but one witness interview as "…did not provide additional pertinent information." Although not listed in the ROI summary of his interview, during his interview on 14 September 2021, SSgt B discussed a pre-workout from "Blackstone Labs" that he purchased online while he was deployed. SSgt B returned from deployment in early 2021. This "pre-workout" was stored in a central location and SSgt W could have had access to it.

6. On either 14 or 15 September 2021, Inv M began an internet search of pre-workouts manufactured by "Blackstone Labs". During that search, he only found one "pre-workout" available for sale online and researched the ingredients. That product contained a stimulant called "dimethylhexylamine" or DMHA. On 14-15 September 2021, Inv M contacted Ms. H from the Drug Demand Reduction Program (DDRP) to ask about the substance. In response, Ms. H sent Inv M an email on 15 September 2021, providing a hyperlink to the banned supplement list as well as the names of the two Medical Review Officers (MRO) who could discuss whether the banned substance could cause a positive result for cocaine.

7. Later that day, Inv M contacted someone from the MRO list given to him by Ms H Inv M did not document this conversation or any of the investigative steps in his attempt to establish whether the pre-workout could cause a positive result for the metabolite of cocaine. Inv M believes he spoke with then Captain B , but took no notes, made no documentations and is not sure that is with whom he spoke.

8. During the conversation, Inv M recalls 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. According to now Major B he has no recollection of that conversation, has no documentation of any search for DMHA and does not believe he was contacted about this issue.

9. The conversation between investigators and the MRO and the information gleaned from the MRO was never documented in any investigative case file.
10. Sometime between 14 September 2021 and 20 September 2021, investigators from SFOI contacted Capt A from the Little Rock legal office. It was decided there was sufficient evidence to open a case with SSgt B as a subject for violating Article 92, using a substance on the banned substance list and enlarging the investigation into SSgt W to include the same.
11. On 20 September 2021, SSgt B was called in, read his Article 31 rights for Article 92, requested a lawyer and was subsequently "arrested and booked".
12. During the month of September 2021, Investigator B the NCOIC of SFOI was temporarily assigned to various places to include teaching for the state of Arkansas and was not available for the reopening of the investigation. During this time, Inv M , a still uncertified investigator, was the temporary NCOIC of SFOI. Inv M had been an agent for approximately six months at the time Inv B was temporarily assigned elsewhere and had access to both create and delete files from the Air Force Justice Information System database.
13. At some point between 20 September 2021 and 4 October 2021, the republication date of the ROI, SFOI consulted again with Capt A and it was determined SFOI would no longer pursue the Article 92 case against neither SSgt B nor SSgt W
14. At some point after the closure of the case file, Inv M as the temporary NCOIC of SFOI, with permissions as such in AFJIS, deleted the electronic case file from AFJIS and subsequently destroyed the hard copy case file regarding the Article 92 investigation into SSgt B
15. At the same time the SSgt B case file was deleted, any reference to the Article 92 investigation with regard to SSgt W was also removed from his investigative case file. There is no evidence the conversations between investigators and the MRO and the between investigators and Ms. H were ever documented in SSgt W investigative case file. While they were arguably exculpatory, they lack of documentation definitely calls into question the training, ethical practices and integrity of investigators as those conversations were never documented.
16. It is not clear all that was deleted regarding SSgt B however, it is clear that deletion of any case file, regardless of whether it was substantiated against the subject is against SFOI policy, as investigative case files are required to be maintained for 75 years. At a minimum, the court is aware the manilla folder, the internal tabs, the investigator notes from SSgt B interview on 20 September 2021
17. Upon his return, Inv B was made aware of the deleted case file of SSgt B and verbally counseled Inv M regarding its deletion. Inv M was not made aware of SSgt W second interview until early January during a defense interview. Shortly thereafter, he also provided a verbal counseling to Inv M No documentation of either counseling, if any exists, was ever provided by trial counsel to the defense through the discovery process.

Motion to Attach Documents, Attachment A, Ruling on Defense Motion to Dismiss for Failure to Disclose and Produce Exculpatory Evidence, p. 1-3.

The Military Judge's ruling makes several things clear. As early as July 20, 2021, the Government was aware of the existence of pre-workout powder at the residence of SSgt W – a residence shared by SrA Roan. As of September 14, or 15, 2021, the Government was aware that the pre-workout powder in SrA Roan's residence contained dimethyl hexylamine or DMHA. On September 15, 2021 the Government knew that DMHA, an ingredient in the pre-workout powder that was kept in SrA Roan's residence, could cause a positive result for the metabolite of cocaine. None of that information, though known by the Government, was ever provided to SrA Roan's defense team.

In addition, the ruling makes clear that, based on direction from the Little Rock AFB JAG office, SrA Roan's other roommate would not be the target of further investigation regarding any violation of Article 92 of the Uniform Code of Military Justice. Based on that decision, SFOI deleted the entire case file on SrA Roan's other roommate, as well as the part of case file of SSgt W related to DMHA and the Article 92 investigation. Thus, the case file information on SSgt W that the Government provided to SrA Roan's defense team in response to the defense's discovery request, contained no information about pre-workout powder, DMHA, or it's potential to cause a false positive for a metabolite of cocaine. Indeed, all of the grossly negligent actions of the Government took place long before the defense request for discovery; thus, all Government responses were flawed.

Responding to SSgt W Motion to Dismiss, the Military Judge stated that the Government's discovery violation was "grossly negligent". *Id*. p 6. The Military Judge held: "Despite the grossly negligent aspect of trial counsel's handling of discovery, notice, and motion

practice related to this evidence, the prejudice suffered by the Defense from the discovery error can be remedied without a dismissal of this case." *Id*.

Unfortunately for SrA Roan, the discovery of the Government's grossly negligent handling of this evidence regarding the pre-workout powder came too late to aid him. By the time that this *Brady* and R.C.M. 701(a)(6) violation was discovered by SSgt W attorneys, SrA Roan had already been tried and convicted.

The benefit to SrA Roan of having this information before he went to trial is obvious. Given the facts available to the defense team at the time of the court-martial, there was no defense to present, other than cross-examining the Government's witnesses regarding the conduct of the urinalysis, the handling of the evidence, and the administration of the testing process.

Had the defense known of Investigator M and M interview with SSgt B about the pre-workout drink and the MRO statement that DMHA could cause a positive test for cocaine metabolites, they could have presented evidence from those two individuals that would have served to refute the charge. Namely, that SrA Roan never used cocaine and the test results were an error. Thus, the members could have found that reasonable doubt certainly existed to overcome the government's presumption that SrA Roan used cocaine.

Although no two court-martials are alike, it is important to note that SrA Roan's roommate, SSgt W was also court-martialed in United States v. SSgt N W for the same offense. However, SSgt W had the benefit of knowing the information that Investigators M and M and Government prosecutors already knew about the pre-workout drink and DHMA creating a false positive but failed to provide to SrA Roan. SSgt W was acquitted.

The Government had information that could reasonably demonstrate that SrA Roan did not ingest cocaine, despite the urinalysis result. That information would provide a believable counter to the presumption that the urinalysis results were correct. The grossly negligent actions of the Government precluded SrA Roan from presenting that information to his court-martial panel, depriving him of a viable defense. The government's failure cannot be allowed to stand.

WHEREFORE, Appellant respectfully requests this Court grant appropriate relief.

Submitted on: May 12, 2023

Respectfully submitted,

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DAVID P. SHELDON
Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC

Washington, D.C. 20003

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **BRYCE T. ROAN** United States Air Force *Appellant*	)))))))))))	**APPELLANT'S MOTION TO ATTACH DOCUMENTS**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

NOW COMES Appellant, by and through undersigned counsel, who submits this Motion to Attach Documents to the Application for Grant of Review and brief submitted on behalf of Appellant in accordance with AFCCA Rule 23.3(b). The documents to be attached are a Ruling on Defense Motion to Dismiss for Failure to Disclose and Produce Exculpatory Evidence, dated January 25, 2022 and Ruling on Defense Motion to Dismiss for Lost or Destroyed Evidence, also dated January 25, 2022. These documents are rulings from the Military Judge in the case of United States v. SSgt N W , SrA Roan's co-accused. The rulings explain how the Government withheld exculpatory information from SSgt W defense team and describe the specifics of the information that was withheld. This information was exculpatory in SSgt W case and also was exculpatory in SrA Roan's case. The co-accused's discovery of the Government's failure to provide this exculpatory information did not take place until after SrA Roan was convicted and sentenced. Thus, none of the information is contained in the Record of Trial for SrA Roan's court-martial. Granting this motion will provide Appellant with the vehicle to ensure the Court is fully aware of the information that was in the

Government's possession, its exculpatory nature, the timing of when the Government learned the information, and its relevance to Appellant's Application for Grant of Review and appeal. Both documents are attached to this motion.

Submitted on: May 12, 2023

Respectfully submitted,

_____

DAVID P. SHELDON
Civilian Defense Counsel
Law Offices of David P. Sheldon, PLLC

Washington, D.C. 20003

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

United States	)	
	)	RULING ON DEFENSE MOTION TO
v.	)	DISMISS FOR FAILURE TO DISCLOSE
	)	AND PRODUCE EXCULPATORY
SSgt N W	)	EVIDENCE
	)	
Little Rock AFB, Arkansas	)	25 January 2022

On 14 January 2022, the defense moved the Court to dismiss the Charge and its Specification with prejudice for violation of the accused's due process and in accordance with Rule for Courts-Martial (R.C.M.) 703(e)(2). The government submitted its response opposing the defense request on 21 January 2022. On 24 January 2022, an Art. 39(a), Uniform Code of Military Justice (U.C.M.J.), hearing was held where additional evidence was submitted.

Having received the pleadings and evidence presented, the Court finds these essential facts by at least a preponderance of the evidence and rules as follows.

ESSENTIAL FINDINGS OF FACT

1. On 9 November 2021, the Charge and its Specification were referred to this special court-martial. The accused is alleged to have wrongfully used cocaine on one occasion, within the continental United States, between on or about 22 June 2021 and on or about 6 July 2022, in violation of Art. 112a, U.C.M.J.

2. On 6 July 2021, SSgt W was ordered to provide a urine sample during a unit-wide inspection. On 20 July 2021, SSgt W urine sample tested positive for the metabolite of cocaine at a level of 168ng/ml. *See* Appellate Exhibits II, attachment 3.

3. On 20 July 2021, Security Forces Office of Investigations (SFOI) investigators, specifically Investigator B , the NCOIC and only fully qualified investigator, interviewed SSgt W about his positive urinalysis. During this interview, SSgt W stated, "I have no idea, why would I…I take pre-workout, I don't know if that could make me pop…my roommate brought [the pre-workout] back from Africa. I ran out of mine and took his." *See* Appellate Exhibit II, attachment 2.

4. SFOI did not take any further investigative steps and the original Report of Investigation (ROI) was published on 23 July 2021.

5. Upon review of the ROI, the Captain A , the Chief of Justice at Little Rock AFB, asked SFOI to conduct further investigation to see if they could find any corroborating evidence to support the positive urinalysis. As his first task as a brand new, untrained and not yet qualified investigator, Investigator M , reviewed SSgt W interview from 20 July 2021, and began interviewing various people, to include SSgt W roommate, SSgt B and other people who attended the 4th of July party the weekend prior to SSgt W urinalysis. While all video-taped, the ROI summarizes the interviews for all but one witness interview as "…did not provide additional pertinent information." Although not listed in the ROI summary of his interview, during his interview on 14 September 2021, SSgt B discussed a pre-workout from "Blackstone Labs" that he purchased online while he was deployed. SSgt B retruned from deployment in early 2021. This "pre-workout" was stored in a central location and SSgt W could have had access to it.

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8. During the conversation, Inv M recalls 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. According to now Major B he has no recollection of that conversation, has no documentation of any search for DMHA and does not believe he was contacted about this issue.

9. The conversation between investigators and the MRO and the information gleaned from the MRO was never documented in any investigative case file.

10. Sometime between 14 September 2021 and 20 September 2021, investigators from SFOI contacted Capt A from the Little Rock legal office. It was decided there was sufficient evidence to open a case with SSgt B as a subject for violating Article 92, using a substance on the banned substance list and enlarging the investigation into SSgt W to include the same.

11. On 20 September 2021, SSgt B was called in, read his Article 31 rights for Article 92, requested a lawyer and was subsequently "arrested and booked".

12. During the month of September 2021, Investigator B , the NCOIC of SFOI was temporarily assigned to various places to include teaching for the state of Arkansas and was not available for the reopening of the investigation. During this time, Inv M , a still uncertified investigator, was the temporary NCOIC of SFOI. Inv M had been an agent for approximately six months at the time Inv B was temporarily assigned elsewhere and had access to both create and delete files from the Air Force Justice Information System database.

13. At some point between 20 September 2021 and 4 October 2021, the republication date of the ROI, SFOI consulted again with Capt A , and it was determined SFOI would no longer pursue the Article 92 case against neither SSgt B nor SSgt W

14. At some point after the closure of the case file, Inv M as the temporary NCOIC of SFOI, with permissions as such in AFJIS, deleted the electronic case file from AFJIS and subsequently destroyed the hard copy case file regarding the Article 92 investigation into SSgt B

15. At the same time the SSgt B case file was deleted, any reference to the Article 92 investigation with regard to SSgt W was also removed from his investigative case file. There is no evidence the conversations between investigators and the MRO and the between investigators and Ms. H were ever documented in SSgt W investigative case file. While they were arguably exculpatory, they lack of documentation definitely calls into question the training, ethical practices and integrity of investigators as those conversations were never documented.

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17. Upon his return, Inv B was made aware of the deleted case file of SSgt B and verbally counseled Inv M regarding its deletion. Inv M was not made aware of SSgt W second interview until early January during a defense interview. Shortly thereafter, he also provided a verbal counseling to Inv M No documentation of either counseling, if any exists, was ever provided by trial counsel to the defense through the discovery process.

18. On 25 January 2022, this court asked the trial counsel to confirm whether or not the investigative case files of both SSgt B and SSgt W were recoverable by anyone with higher permissions than the NCOIC of SFOI. Additionally, the court asked Trial Counsel to certify that all government discovery obligations have been satisfied.

19. Also on 25 January 2022, in light of the Article 39a session into discovery matters, the defense in this case requested the entire case file of a government witness, Amn Roan, who is testifying under a grant of immunity.

BURDEN OF PERSUASION AND PROOF

18. The burden of persuasion in this matter rests with the defense as the moving party. R.C.M. 905(c)(2)(A). The burden of proof is a preponderance of the evidence. R.C.M. 905(c)(1).

CONCLUSIONS OF LAW AND ANALYSIS

19. R.C.M. 701(a)(2)(A)(iv) requires the prosecution to disclose to the Defense or allow inspection, in advance of trial, upon request, any data, photographs, or tangible objects within the possession, custody, or control of military authorities that the Government intends to use during their case-in-chief at trial, anticipates using in rebuttal, or any item that was obtained from or belongs to the accused.

20. As noted in the discussion section of R.C.M. 701(a)(6) and R.C.M. 701(d), the duties of discovery are continuing duties throughout the trial process and require the trial counsel to exercise due diligence and good faith in learning about the evidence within is custody and control, including the material in the possession of military law enforcement.

21. M.R.E. 304(d) requires the prosecution to disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the Armed Forces, and all evidence derived from such statements that the prosecution intends to offer at trial. This disclosure must be made prior to arraignment, absent good cause shown for the late disclosure.

22. In this case, the Government failed to comply with their discovery and notice obligations for the material contained in Prosecution Exhibits 2 and 3.

23. Military courts possess the authority to impose sanctions for noncompliance with discovery requirements. In the military justice system, R.C.M. 701(g)(3), Manual Courts-Martial, governs the sanctioning of Rule 701 discovery violations and provides the military judge with a number of options to remedy such violations. These sanctions are: (A) Order the party to permit discovery; (B) Grant a continuance; (C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (D) Enter such other order as is just under the circumstances.

24. "Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated." *United States v. Dancy,* 38 M.J. 1, 6 (C.M.A. 1993).

25. As a general rule, courts do not generally favor exclusion of relevant evidence in the absence of grossly negligent or knowing failure of the proponent of the evidence to provide the requisite

notice, coupled with a demonstrable and substantial prejudice to the opposing counsel's orderly presentation of the case. Exclusion is a strong remedy intended for extraordinary circumstances, not as a routine response to regrettable derelictions which occur in trial practice from time to time. *United States v. Townsend*, 23 M.J. 848, 851 (A.F.C.M.R. 1987).

26. In *United States v. Stellato*, 374 M.J. 473, 488-89 (C.A.A.F. 2015), the Court reviewed a military judge's decision to dismiss a case with prejudice for discovery violations. The Court noted that when a party fails to meet its discovery obligations, a military judge has broad discretion in crafting an appropriate remedy. In holding that the military judge did not abuse his discretion in dismissing the case, the Court noted that:

> bad faith certainly may be an important and central factor for a military judge to consider in determining whether it is appropriate to dismiss a case with prejudice. However, as the above summary of our case law regarding dismissal with prejudice demonstrates, a finding of willful misconduct is not required in order for a military judge to dismiss a case with prejudice. *(internal citations omitted).*

27. The *Stellato* court continued,

> In cases involving discovery violations, Article III courts have held that the proper inquiry is whether there was "injury to [an accused's] right to a fair trial." *United States v. Garrett*, 238 F.3d 293, 299 (5th Cir. 2000); *United States v. Valentine*, 984 F.2d 906, 352 910 (8th Cir. 1993) (noting that discovery sanctions are warranted where violations prejudice the defendant's substantive rights). In making this determination, these courts have examined: (1) whether the delayed disclosure hampered or foreclosed a strategic option, *United States v. Mathur*, 624 F.3d 498, 506 (1st Cir. 2010) (belated Brady disclosure); (2) whether the belated disclosure hampered the ability to prepare a defense, *United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) (noting that belated discovery disclosure did not interfere with ability to prepare a defense), and *Golyansky*, 291 F.3d 1245, 1250 (10th Cir. 2002) ("To support a finding of prejudice, the court must determine that the [discovery disclosure] delay impacted the defendant's ability to prepare or present its case."); (3) whether the delay substantially influenced the fact-finder, *United States v. De La Rosa*, 196 F.3d 712, 716 (7th Cir. 1999); and (4) whether the nondisclosure would have allowed the defense to rebut evidence more effectively. *United States v. Stellato*, supra at 490.

28. The *Stellato* court then concluded, "As can be seen then, pursuant to this case law, prejudice can arise from discovery violations when those violations interfere with an accused's ability to mount a defense. We conclude that these cases are grounded in sound reasoning, and we adopt this approach in the court-martial context." *Id*. 373

29. In *United States v. Gore*, 60 MJ 178 (2004), the Court of Appeals for the Armed Forces noted that a "dismissal is a drastic remedy and courts must look to see whether alternative remedies are available. When an error can be rendered harmless, dismissal is not an appropriate remedy. This Court explained in *United States v. Green*, [however], that dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings." *Id*. at 187 (internal citations omitted).

30. In this case, the Government's discovery violation was grossly negligent, but was not willful or intentional. The uncertified investigators failed to properly document interactions with witnesses that could be deemed exculpatory. Additionally, trial counsel failed to exercise due diligence in reviewing the evidence in the Government's possession, specifically information held by investigators which was not disclosed, failed to adequately evaluate or comply with Defense discovery requests, and failed to accurately represent the evidence in their response to Defense motions.

31. Despite the grossly negligent aspect of trial counsel's handling of discovery, notice, and motion practice related to this evidence, the prejudice suffered by the Defense from the discovery error can be remedied without a dismissal of this case.

32. The Government's failure could be remedied with a continuance and additional time for the Defense expert to evaluate all evidence within the Government's possession. While a continuance of this case and additional expert assistance may be an appropriate remedy and one this Court would consider providing, the court will only do so at the Defense's request. As the defense is now making such a request, the remedy of a continuance will be considered favorably.

RULING

For these reasons, the defense motion for a dismissal with prejudice is **DENIED**, however, the Defense request for the adequate remedy of a continuance is hereby **GRANTED**.

The Court, however, will consider any requests for reconsideration supported with additional evidence or argument if timely raised by either party. This ruling also remains subject to revision and clarification until authentication of the record and I reserve the right to supplement the ruling as necessary and appropriate.

So ordered on this 25th day of January, 2022.

JULIE L. PITVOREC, Colonel, USAF
Military Judge

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

United States	)	
	)	RULING ON DEFENSE MOTION
v.	)	TO DISMISS FOR LOST
	)	OR DESTROYED EVIDENCE
SSgt Nikkolas M. Wolf	)	
		25 January 2022
Little Rock AFB, Arkansas	)	

On 14 January 2022, the defense moved the Court to dismiss the Charge and its Specification with prejudice for violation of the accused's due process and in accordance with Rule for Courts-Martial (R.C.M.) 703(e)(2). The government submitted its response opposing the defense request on 21 January 2022. On 24 January 2022, an Art. 39(a), Uniform Code of Military Justice (U.C.M.J.), hearing was held where additional evidence was submitted.

Having received the pleadings and evidence presented, the Court finds these essential facts by at least a preponderance of the evidence and rules as follows.

ESSENTIAL FINDINGS OF FACT

1. On 9 November 2021, the Charge and its Specification were referred to this special court-martial. The accused is alleged to have wrongfully used cocaine on one occasion, within the continental United States, between on or about 22 June 2021 and on or about 6 July 2022, in violation of Art. 112a, U.C.M.J.

2. On 6 July 2021, SSgt W was ordered to provide a urine sample during a unit-wide inspection. On 20 July 2021, SSgt W s urine sample tested positive for the metabolite of cocaine at a level of 168ng/ml. *See* Appellate Exhibits II, attachment 3.

3. On 20 July 2021, Security Forces Office of Investigations (SFOI) investigators, specifically Investigator B , the NCOIC and only fully qualified investigator, interviewed SSgt W about his positive urinalysis. During this interview, SSgt W stated, "I have no idea, why would I…I take pre-workout, I don't know if that could make me pop…my roommate brought [the pre-workout] back from Africa. I ran out of mine and took his." *See* Appellate Exhibit II, attachment 2.

4. SFOI did not take any further investigative steps and the original Report of Investigation (ROI) was published on 23 July 2021.

5. Upon review of the ROI, the Captain Ad the Chief of Justice at Little Rock AFB, asked SFOI to conduct further investigation to see if they could find any corroborating evidence to support the positive urinalysis. As his first task as a brand new, untrained and not yet qualified investigator, Investigator M , reviewed SSgt W interview from 20 July 2021, and began interviewing various people, to include SSgt W roommate, SSgt B and other people who attended the 4th of July party the weekend prior to SSgt W urinalysis. While all video-taped, the ROI summarizes the interviews for all but one witness interview as "…did not provide additional pertinent information." Although not listed in the ROI summary of his interview, during his interview on 14 September 2021, SSgt B discussed a pre-workout from "Blackstone Labs" that he purchased online while he was deployed. SSgt B retruned from deployment in early 2021. This "pre-workout" was stored in a central location and SSgt W could have had access to it.

6. On either 14 or 15 September 2021, Inv M began an internet search of pre-workouts manufactured by "Blackstone Labs". During that search, he only found one "pre-workout" available for sale online and researched the ingredients. That product contained a stimulant called "dimethylhexylamine" or DMHA. On 14-15 September 2021, Inv M contacted Ms. H from the Drug Demand Reduction Program (DDRP) to ask about the substance. In response, Ms. H sent Inv M an email on 15 September 2021, providing a hyperlink to the banned supplement list as well as the names of the two Medical Review Officers (MRO) who could discuss whether the banned substance could cause a positive result for cocaine.

7. Later that day, Inv M contacted someone from the MRO list given to him by Ms H . Inv M did not document this conversation or any of the investigative steps in his attempt to establish whether the pre-workout could cause a positive result for the metabolite of cocaine. Inv M believes he spoke with then Captain B , but took no notes, made no documentations and is not sure that is with whom he spoke.

8. During the conversation, Inv M recalls 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. According to now Major B , he has no recollection of that conversation, has no documentation of any search for DMHA and does not believe he was contacted about this issue.

9. The conversation between investigators and the MRO and the information gleaned from the MRO was never documented in any investigative case file.

10. Sometime between 14 September 2021 and 20 September 2021, investigators from SFOI contacted Capt A from the Little Rock legal office. It was decided there was sufficient evidence to open a case with SSgt B as a subject for violating Article 92, using a substance on the banned substance list and enlarging the investigation into SSgt W to include the same.

11. On 20 September 2021, SSgt B was called in, read his Article 31 rights for Article 92, requested a lawyer and was subsequently "arrested and booked".

12. During the month of September 2021, Investigator B , the NCOIC of SFOI was temporarily assigned to various places to include teaching for the state of Arkansas and was not available for the reopening of the investigation. During this time, Inv M , a still uncertified investigator, was the temporary NCOIC of SFOI. Inv M had been an agent for approximately six months at the time Inv B was temporarily assigned elsewhere and had access to both create and delete files from the Air Force Justice Information System database.

13. At some point between 20 September 2021 and 4 October 2021, the republication date of the ROI, SFOI consulted again with Capt A , and it was determined SFOI would no longer pursue the Article 92 case against neither SSgt B nor SSgt W

14. At some point after the closure of the case file, Inv M , as the temporary NCOIC of SFOI, with permissions as such in AFJIS, deleted the electronic case file from AFJIS and subsequently destroyed the hard copy case file regarding the Article 92 investigation into SSgt B

15. At the same time the SSgt B case file was deleted, any reference to the Article 92 investigation with regard to SSgt W was also removed from his investigative case file. There is no evidence the conversations between investigators and the MRO and the between investigators and Ms. H were ever documented in SSgt W investigative case file. While they were arguably exculpatory, they lack of documentation definitely calls into question the training, ethical practices and integrity of investigators as those conversations were never documented.

16. It is not clear all that was deleted regarding SSgt B , however, it is clear that deletion of any case file, regardless of whether it was substantiated against the subject is against SFOI policy, as investigative case files are required to be maintained for 75 years. At a minimum, the court is aware the manilla folder, the internal tabs, the investigator notes from SSgt B interview on 20 September 2021

17. Upon his return, Inv B was made aware of the deleted case file of SSgt B and verbally counseled Inv Me regarding its deletion. Inv M was not made aware of SSgt W second interview until early January during a defense interview. Shortly thereafter, he also provided a verbal counseling to Inv M . No documentation of either counseling, if any exists, was ever provided by trial counsel to the defense through the discovery process.

PRINCIPLES OF LAW

18. The burden of persuasion in this matter rests with the moving party and its burden of proof is a preponderance of the evidence. *See* R.C.M. 905(c)(1) and 905(c)(2)(A).

19. Art. 46(a), U.C.M.J., holds: "The counsel for the Government, the counsel for the accused, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

20. "Each party is entitled to the production of evidence which is relevant and necessary." R.C.M. 703(e)(1). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and when the fact is of consequence in determining the action. *See* M.R.E. 401. "Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." R.C.M. 703(e)(1), *Discussion.*

21. Moreover, "the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). The government must disclose evidence favorable to the accused that is material to either guilt or punishment, including during any sentencing proceeding. *See Brady v. Maryland*, 373 U.S. 83 (1963). "Evidence is favorable if it 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). The accused's right to discovery is not limited to evidence that would be known to be admissible at trial and includes materials that would assist the defense in formulating a strategy. *See United States v. Luke*, 69 M.J. 309, 319-20 (C.A.A.F. 2011).

22. Following the service of charges, the government must permit the defense to inspect "tangible objects… which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense." R.C.M. 701(a)(2)(A).

23. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

24. R.C.M. 703(e)(2) states: "Notwithstanding subsection (e)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, *if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence*, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, *unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party*." (emphases added). Additionally, "any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence." R.C.M. 703(f)(3).

25. "[I]n determining whether an adequate substitute for lost or destroyed evidence is available, a military judge has broad discretion. It is when no adequate substitute is available… that military judges do not have discretion to vary from the prescribed remedy." *United States v. Simmermacher*, 74 M.J. 196, 202 (C.A.A.F. 2015).

26. The government's constitutional duty to preserve includes "evidence that has an apparent exculpatory value and that has no comparable substitute." *United States v. Stellato*, 74 M.J. 473, 483 (C.A.A.F. 2015) (citing *Simmermacher*, 74 M.J. at 199; *California v. Trombetta*, 467 U.S. 479, 489 (1984)). Additionally, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

27. "However, where the evidence is not 'apparently' exculpatory, the burden is upon an accused to show that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed and that he is unable to obtain comparable evidence by other reasonably available means. To require the Government to prove that the lost evidence was not exculpatory would be an insurmountable burden as the peculiar value of the otherwise apparently inculpatory evidence would be solely within the knowledge of the accused." *United States v. Kern*, 22 M.J. 49, 51-52 (C.M.A. 1986).

CONCLUSIONS OF LAW

28. The appropriate analysis for this timely motion to dismiss comes from the rules and decisions outlined above. Regarding the defense's constitutional challenge under the Due Process Clause, the accused is able to obtain comparable evidence contained in the case file, though wide latitude in the direct and cross examination of government witnesses, most specifically Investigator M . The evidence that is of most concern, the information allegedly provided by the Medical Reviewing Officer, regarding whether or not the presence of DMHA coud cause a positive urinalysis for the metabolite of cocaine was neither lost nor destroyed. It was never appropriately documented. *See* Art. 46, U.C.M.J.; *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). The defense has also failed to demonstrate the exculpatory value of these items was apparent before being lost. *See United States v. Kern*, 22 M.J. 49 (C.M.A. 1986). Moreover, the defense has failed to demonstrate bad faith on the part of the government through any actor and within the plain meaning of that term. *See Arizona v. Youngblood*, 488 U.S. 51, 56 n.* (1988) ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

29. Under R.C.M. 703(e)(2), the previously mentioned items are not of such central importance to an issue that any are essential to a fair trial. The investigative case file regarding the supposed violation of Article 92 by SSgt B 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 B 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. Based on the evidence and testimony presented, there are adequate substitutes for all such evidence too, though the unavailability of the items is concededly neither the fault of nor could it have been prevented by the defense. *See United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015).

RULING

For these reasons, the defense motion is **DENIED**.

The Court, however, will consider any requests for reconsideration supported with additional evidence or argument if timely raised by either party. This ruling also remains subject to revision and clarification until authentication of the record and I reserve the right to supplement the ruling as necessary and appropriate.

So ordered on this 25th day of January, 2022.

JULIE L. PITVOREC, Colonel, USAF
Military Judge

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22033**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Bryce T. ROAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 1 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

United States	)	**No. ACM 22033**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Bryce T. ROAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Applicant	)	**Panel 3**
	)	

On 9 December 2021, Applicant was convicted by a special court-martial composed of officer members, contrary to his pleas, of one specification of wrongful use of a controlled substance (cocaine) in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.* The court-martial sentenced Applicant to reduction to the grade of E-2, hard labor without confinement for three months, restriction to his residence for 45 days, and a reprimand. The convening authority disapproved the restriction and provided the adjudged reprimand, but otherwise took no action on the findings or sentence. The military judge entered the judgment of the court-martial on 27 December 2021.

On 20 March 2022, a designated judge advocate completed a review of the record of trial pursuant to Article 65(d), UCMJ, 10 U.S.C. § 865(d). The judge advocate concluded the general court-martial had jurisdiction over Appellant and the offense, the charge and specification stated an offense, the sentence was within the limits prescribed as a matter of law, and the findings and sentence were correct in law and fact.

On 7 September 2022, Applicant requested The Judge Advocate General (TJAG) set aside the findings and sentence pursuant to Article 69(a), UCMJ, 10 U.S.C. § 869(a), asserting that the Government had failed to disclose and had destroyed exculpatory evidence. On 3 March 2023, TJAG denied Applicant relief under Article 69(a), UCMJ. On 15 March 2023, the Military Justice and

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* References to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

Discipline directorate sent a memorandum to Applicant's counsel notifying Applicant of TJAG's decision.

On 15 May 2023, this court received Applicant's application for grant of review pursuant to Article 69(d)(1)(B), UCMJ, dated 12 May 2023, accompanied by a brief in support of his application. Applicant has also submitted a motion dated 12 May 2023 to attach copies of two written rulings by a military judge in a separate but related court-martial.

Accordingly, it is by the court on this 22d day of August, 2023,

ORDERED:

Applicant's application for grant of review is **GRANTED**. Going forward, parties shall refer to Applicant as "Appellant."

Appellate government counsel may file an opposition to Appellant's motion to attach, dated 12 May 2023, **not later than 29 August 2023**.

Appellate government counsel shall file on behalf of the United States an answer to Appellant's brief **not later than 22 September 2023**. Appellant may file a reply brief **not later than 7 days** after the filing of the Government's answer.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

United States	)	**No. ACM 22033**
Appellee	)	
	)	
	)	
v.	)	**ORDER**
	)	
	)	
Bryce T. ROAN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**
	)	

On 15 May 2023, Appellant filed an application for grant of review pursuant to Article 69(d)(1)(B), Uniform Code of Military Justice, 10 U.S.C. § 869(d)(1)(B). Included with Appellant's application was a Motion to Attach Documents, dated 12 May 2023. Specifically, Appellant moved this court to attach two documents: (1) a Ruling on Defense Motion to Dismiss for Failure to Disclose and Produce Exculpatory Evidence and (2) a Ruling on Defense Motion to Dismiss for Lost and Destroyed Evidence, both dated 25 January 2022.

On 22 August 2023, this court issued an order granting Appellant's application for grant of review and permitting the Government to file an opposition to Appellant's pending motion to attach not later than 29 August 2023. This court has not received an opposition to Appellant's motion to attach.

Accordingly, it is by the court on this 31st day of August, 2023,

ORDERED:

Appellant's Motion to Attach Documents dated 12 May 2023 is **GRANTED**.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF**
v.	)	
	)	Before Panel No. 3
Senior Airman (SrA) **BRYCE T. ROAN,** United States Air Force	)	No. ACM 22033
Appellant	)	22 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (m)(4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file a reply to the Government Answer, filed on 22 September 2023. Appellant requests an enlargement for a period of seven days, which will end on **6 October 2023**. The record of trial was docketed with this Court on 24 May 2023. From the date of docketing to the present date, 121 days have elapsed. On the date requested, 135 days will have elapsed.

From 6-9 December 2021, at a special court-martial at Little Rock Air Force Base, Arkansas, a panel of officer members convicted Appellant, Senior Airman Bryce T. Roan, of a single specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 27 Dec. 2021.) The members sentenced SrA Roan to three months' hard labor without confinement, restriction to his residence for 45 days, reduction to the grade of E-2, and a reprimand. (R. at 155.) The convening

authority disapproved the restriction. (Convening Authority Decision on Action, ROT Vol. 1, 22 Dec. 2021.)

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 27 appellate exhibits. The summarized transcript is 156 pages. SrA Roan is not confined.

Counsel is currently assigned 24 cases and will prioritize this reply. Mr. David Sheldon is lead counsel and has several scheduling issues that require the enlargement of time. He has a brief due to the Navy-Marine Corps Court of Criminal Appeals on 30 September 2023, has a number of previously scheduled depositions in another case, and has upcoming hearings for an MEB/PEB appeal. As a consequence, an extra seven days are required for Mr. Sheldon to evaluate the Government's Answer, confer with SrA Roan, and file an appropriate reply.

Through no fault of SrA Roan, counsel will not be able to complete the reply in the current timeframe. SrA Roan was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. An enlargement of time is necessary to allow counsel to fully review the Answer and advise SrA Roan on how to respond.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division

1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 22 September 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

22 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTIONT TO ATTACH DOCUMENT
v.	)	
	)	ACM 22033
Senior Airman (E-4) BRYCE T. ROAN, USAF *Appellant.*	)	Panel No. 3

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States submits the following document in support of the government's Answer to Appellant's Assignment of Error brief in the above referenced case:

Declaration of Maj AN, dated 20 September 2023, 3 pages.

This document provides additional information and context outside the record but are relevant and necessary for the United States to answer Appellant's brief. Specifically, Maj AN's declaration provides this Court necessary background and context to the discovery process of both Appellant's case and that of United States v. W , a case Appellant has placed as a central part of his sole issue before this Court. In doing so, Appellant relies entirely on two motion rulings from W , devoid of any context as to the background or surrounding circumstances at issue in that case. This context is necessary where, as here, Appellant attempts to directly compare his case to the facts, circumstances, and ultimate disposition in W .

Moreover, as the trial counsel for Appellant's case, Maj AN's declaration provides further clarification as to the materials provided to Appellant during the course of discovery for this case.

Our superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (*quoting* United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Here, Appellant raised new issues outside the record of trial to petition the Judge Advocate General for relief under Article 69, UCMJ. Now that this Court has granted review of Appellant's case, additional facts are necessarily to answer Appellant's new claims and provide this Court with the full context of what happened at Appellant's court-martial. Thus, this Court may consider this document under Jessie.

WHEREFORE, the United States respectfully requests this Honorable Court grant this Motion to Attach Document.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

MARY ELLEN PAYNE
Associate Chief, Government
Trial and Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 22 September 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (SrA) **BRYCE T. ROAN,** United States Air Force *Appellant*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (SECOND) OUT OF TIME TO FILE REPLY BRIEF** Before Panel No. 3 No. ACM 22033 4 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(6) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) out of time to file a reply to the Government Answer, filed on 22 September 2023. The first enlargement of time was granted until 6 October 2023. Appellant requests an enlargement for a period of six days, which will end on **12 October 2023**. The record of trial was docketed with this Court on 24 May 2023. From the date of docketing to the present date, 133 days have elapsed. On the date requested, 141 days will have elapsed.

From 6-9 December 2021, at a special court-martial at Little Rock Air Force Base, Arkansas, a panel of officer members convicted Appellant, Senior Airman Bryce T. Roan, of a single specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 27 Dec. 2021.) The members sentenced SrA Roan to three months' hard labor without confinement, restriction to his residence for 45

days, reduction to the grade of E-2, and a reprimand. (R. at 155.) The convening authority disapproved the restriction. (Convening Authority Decision on Action, ROT Vol. 1, 22 Dec. 2021.)

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 27 appellate exhibits. The summarized transcript is 156 pages. SrA Roan is not confined.

Counsel is currently assigned 24 cases and will prioritize this reply. Mr. David Sheldon is lead counsel and will also prioritize this reply. However, counsel have been unable to contact Capt J S , one of Appellant's trial defense counsel and the counsel with the most information about the case. Her input and potential declaration are important because this Court has granted a motion to attach a statement from the trial counsel, Maj AN. ORDER, *United States v. Roan*, ACM 22033, 4 October 2023. The declaration contains numerous factual assertions that are central to this Court's resolution of the issue but relate to matters entirely outside the record. Counsel cannot adequately reply without first speaking to Capt S and determining whether a declaration from her is required. Capt S has been on leave since approximately 27 September 2023, and her out-of-office reply states she will return on 5 October 2023. Because counsel has been unable to reach her by phone or email, counsel does not know whether she will be able to provide a declaration on 5 October; even if she could, it leaves an extremely tight timeframe to prepare the brief in light of a possible declaration. As a consequence, Appellant requests an additional six days (many of which are subsumed by the holiday weekend) in order to confer with Capt S , confer with SrA Roan, and file an appropriate reply.

This filing is out of time because counsel hoped to be able to reach Capt S by duty cell or email over the past week and assess whether she could provide assistance and on what timeframe. Repeated efforts to contact Capt S have failed, thus leading to this filing two days before the pleading is due. This constitutes good cause for filing out of time.

The Government consents to this delay.

Through no fault of SrA Roan, counsel will not be able to complete the reply in the current timeframe. SrA Roan was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. An enlargement of time is necessary to allow counsel to fully review the Answer and advise SrA Roan on how to respond.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 October 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (THIRD) OUT OF TIME TO FILE REPLY BRIEF**
v.	)	
Senior Airman (SrA) **BRYCE T. ROAN,** United States Air Force *Appellant*	)	Before Panel No. 3
	)	No. ACM 22033
	)	10 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(6) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) out of time to file a reply to the Government Answer, filed on 22 September 2023. The first enlargement of time was granted until 6 October 2023. The second was granted until 12 October 2023. Appellant requests an enlargement for a period of five days, which will end on **17 October 2023**. The record of trial was docketed with this Court on 24 May 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 146 days will have elapsed.

From 6-9 December 2021, at a special court-martial at Little Rock Air Force Base, Arkansas, a panel of officer members convicted Appellant, Senior Airman Bryce T. Roan, of a single specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 27 Dec. 2021.) The members sentenced SrA Roan to three months' hard labor without confinement, restriction to his residence for 45

days, reduction to the grade of E-2, and a reprimand. (R. at 155.) The convening authority disapproved the restriction. (Convening Authority Decision on Action, ROT Vol. 1, 22 Dec. 2021.)

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 27 appellate exhibits. The summarized transcript is 156 pages. SrA Roan is not confined.

Counsel is currently assigned 24 cases and will prioritize this reply. Mr. David Sheldon is lead counsel on the case. Over the past two weeks counsel have attempted to contact Capt J S , the trial defense counsel on the case. Counsel finally received a reply today, 10 October 2023, and set up a call to discuss the case. Capt S did not answer at the time of the call or respond to subsequent efforts to contact her. The turnaround time for the brief has narrowed again because counsel cannot adequately prepare the brief before speaking with Capt S Additionally, because contact with Capt S has been unprecedentedly difficult and has taken so long, Mr. Sheldon is now working on a murder case, *United States v. Becker*, which is on its final enlargement. This case was not mentioned before because, frankly, counsel never expected it would take so long to get an answer from a military attorney. This limitation for Mr. Sheldon will hamper any efforts to quickly turn around a reply once Capt S provides the information counsel need.

Again, the input from trial defense counsel is indispensable in responding to the declaration from Maj AN, which addresses what trial defense counsel knew before trial. This Court granted a motion to attach that declaration. ORDER, *United States v. Roan*, ACM 22033, 4 October 2023. The declaration contains numerous factual

assertions that are central to this Court's resolution of the issue but relate to matters entirely outside the record. Counsel cannot adequately reply without first speaking to Capt S and determining whether a declaration from her is required. Counsel is concerned that if Capt S again does not respond tomorrow (11 October), the timeframe to prepare a potential declaration is vanishingly short. As a consequence, Appellant requests an additional five days in order to contact Capt S , confer with SrA Roan, and file an appropriate reply.

This filing is out of time because counsel again hoped and expected to speak with Capt S to assess whether she could provide assistance and on what timeframe. Repeated efforts to contact Capt S have failed, thus leading to this filing two days before the pleading is due. This constitutes good cause for filing out of time.

The Government consents to this delay.

Through no fault of SrA Roan, counsel will not be able to complete the reply in the current timeframe. SrA Roan was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. An enlargement of time is necessary to allow counsel to fully review the Answer and advise SrA Roan on how to respond.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 10 October 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (SrA) **BRYCE T. ROAN,** United States Air Force *Appellant*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (FOURTH) OUT OF TIME TO FILE REPLY BRIEF** Before Panel No. 3 No. ACM 22033 17 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(6) and (m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) out of time to file a reply to the Government Answer, filed on 22 September 2023. The first enlargement of time was granted until 6 October 2023. The second was granted until 12 October 2023. The third was granted until 17 October 2023. Appellant requests an enlargement for a period of three days, which will end on **20 October 2023**. The record of trial was docketed with this Court on 24 May 2023. From the date of docketing to the present date, 146 days have elapsed. On the date requested, 149 days will have elapsed.

From 6-9 December 2021, at a special court-martial at Little Rock Air Force Base, Arkansas, a panel of officer members convicted Appellant, Senior Airman Bryce T. Roan, of a single specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2018). (Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 27 Dec. 2021.) The members sentenced SrA Roan to three months' hard labor without confinement, restriction to his residence for 45

days, reduction to the grade of E-2, and a reprimand. (R. at 155.) The convening authority disapproved the restriction. (Convening Authority Decision on Action, ROT Vol. 1, 22 Dec. 2021.)

The record of trial consists of 14 prosecution exhibits, 13 defense exhibits, and 27 appellate exhibits. The summarized transcript is 156 pages. SrA Roan is not confined. Mr. David Sheldon is lead counsel on the case. Over the past several weeks Mr. Sheldon has been working to finalize an appellate brief to the Navy-Marine Corps Court of Criminal Appeals for a murder conviction in *United States v. LT Craig Becker*. Mr. Sheldon finally submitted the brief and associated motions on Sunday, 15 October. The appellate brief is 188 pages long. During the exhaustive effort to finalize the brief, Mr. Sheldon had limited time to work on SrA Roan's brief. Now that the *Becker* effort is over, Mr. Sheldon can give the reply the attention it needs.

However, Appellant's military appellate counsel has been working with Appellant's trial defense counsel, Capt J S , and still has not been able to obtain a declaration regarding the statements in the Maj AN's declaration. Again, the input from trial defense counsel is indispensable in responding to the declaration from Maj AN, which addresses what trial defense counsel knew before trial. This Court granted a motion to attach that declaration. ORDER, *United States v. Roan*, ACM 22033, 4 October 2023. The declaration contains numerous factual assertions that are central to this Court's resolution of the issue but relate to matters entirely outside the record. Capt S was tracking the deadline today but failed to

provide the declaration in time.

This filing is out of time because counsel again anticipated having a declaration from trial defense counsel signed by today. This constitutes good cause for filing out of time.

The Government consents to this delay.

Through no fault of SrA Roan, counsel will not be able to complete the reply in the current timeframe. SrA Roan was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. An enlargement of time is necessary to allow counsel to fully review the Answer and advise SrA Roan on how to respond.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 17 October 2023.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **BRYCE T. ROAN** United States Air Force *Appellant*	)))))))))	**APPELLANT'S REPLY BRIEF** Before Panel No. 3 No. ACM 22033 20 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Appellant, Senior Airman (SrA) Bryce T. Roan, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's Answer, filed on 22 September 2023 (Ans.). SrA Roan stands behind the arguments in his initial brief, filed on 12 May 2023 (App. Br.), and submits additional arguments for the issue listed below.

Issue Presented

DID THE GOVERNMENT VIOLATE *BRADY* AND R.C.M. 701(a)(6) BY FAILING TO DISCLOSE EXCULPATORY EVIDENCE AND DESTROYING AN INVESTIGATIVE CASE FILE?

Additional Statement of Facts

Appellant adopts his earlier Statement of Facts and by affidavit adds additional facts. As confirmed by Captain (Capt) JS, SrA Roan's defense attorneys received the case file of SSgt NW's investigation.[1] Declaration of Capt JS, Attachment 1 to Motion to Attach, 18 Oct. 2023. While that investigation referenced workout powder, there was no information regarding

[1] Capt JS's declaration is attached via a Second Motion to Attach that was filed contemporaneously with this reply.

Investigator NM's interrogation of SSgt B ; his search for Blackstone Labs; or his contact with Maj B, the Medical Review Officer (MRO) who told Investigator NM that the powder could cause a false positive.[2]

The judge's findings of fact in Staff Sergeant (SSgt) NW's case further illuminate just how important this evidence is:

ESSENTIAL FINDINGS OF FACT

1. On 9 November 2021, the Charge and its Specification were referred to this special court-martial. The accused is alleged to have wrongfully used cocaine on one occasion, within the continental United States, between on or about 22 June 2021 and on or about 6 July 2022, in violation of Art. 112a, U.C.M.J.

2. On 6 July 2021, SSgt [NW] was ordered to provide a urine sample during a unit-wide inspection. On 20 July 2021, SSgt [NW]'s urine sample tested positive for the metabolite of cocaine at a level of 168ng/ml. *See* Appellate Exhibits II, attachment 3.

3. On 20 July 2021, [SFOI] investigators, specifically Investigator [B], the NCOIC and only fully qualified investigator, interviewed SSgt [NW] about his positive urinalysis. During this interview, SSgt [NW] stated, "I have no idea, why would I...I take pre-workout, I don't know if that could make me pop...my roommate brought [the pre-workout] back from Africa. I ran out of mine and took his." *See* Appellate Exhibit II, attachment 2.

4. SFOI did not take any further investigative steps and the original Report of Investigation (ROI) was published on 23 July 2021.

5. Upon review of the ROI, the Captain [A], the Chief of Justice at Little Rock AFB, asked SFOI to conduct further investigation to see if they could find any corroborating evidence to support the positive urinalysis. As his first task as a brand new, untrained and not yet qualified investigator, Investigator [NM], reviewed SSgt [NW]'s interview from 20 July 2021, and began interviewing various people, to include SSgt SSgt [NW]'s roommate, SSgt [JB] and other people who attended the 4th of July party the weekend prior to SSgt [NW]'s urinalysis. While all video-taped, the ROI summarizes the interviews for all but one witness interview as "...did not provide additional pertinent information." Although not listed in the ROI summary of his interview, during his interview on 14 September 2021, SSgt [JB] discussed a pre-workout from "Blackstone Labs" that he purchased online while he was deployed. SSgt [JB] retruned from deployment in early 2021. This "pre-workout" was stored in a central location and SSgt [NW] could have had access to it .

6. On either 14 or 15 September 2021, Inv [NM] began an internet search of pre-workouts manufactured by "Blackstone Labs". During that search, he only found one "pre-workout"

[2] *Id.*

available for sale online and researched the ingredients. That product contained a stimulant called “dimethylhexylamine” or DMHA. On 14-15 September 2021, Inv [NM] contacted Ms. [H] from the Drug Demand Reduction Program (DDRP) to ask about the substance. In response, Ms. [H] sent Inv [NM] an email on 15 September 2021, providing a hyperlink to the banned supplement list as well as the names of the two Medical Review Officers (MRO) who could discuss whether the banned substance could cause a positive result for cocaine.

7. Later that day, Inv [NM] contacted someone from the MRO list given to him by Ms [H]. Inv [NM] did not document this conversation or any of the investigative steps in his attempt to establish whether the pre-workout could cause a positive result for the metabolite of cocaine. Inv [NM] believes he spoke with then Captain [B], but took no notes, made no documentations and is not sure that is with whom he spoke.

8. During the conversation, Inv [NM] recalls 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. According to now Major [B], he has no recollection of that conversation, has no documentation of any search for DMHA and does not believe he was contacted about this issue.

9. The conversation between investigators and the MRO and the information gleaned from the MRO was never documented in any investigative case file.

10. Sometime between 14 September 2021 and 20 September 2021, investigators from SFOI contacted Capt [A] from the Little Rock legal office. It was decided there was sufficient evidence to open a case with SSgt [JB] as a subject for violating Article 92, using a substance on the banned substance list and enlarging the investigation into SSgt [NW] to include the same.

11. On 20 September 2021, SSgt [JB] was called in, read his Article 31 rights for Article 92, requested a lawyer and was subsequently “arrested and booked”.

12. During the month of September 2021, Investigator [B], the NCOIC of SFOI was temporarily assigned to various places to include teaching for the state of Arkansas and was not available for the reopening of the investigation. During this time, Inv [NM], a still uncertified investigator, was the temporary NCOIC of SFOI. Inv [NM] had been an agent for approximately six months at the time Inv [B] was temporarily assigned elsewhere and had access to both create and delete files from the Air Force Justice Information System database.

13. At some point between 20 September 2021 and 4 October 2021, the republication date of the ROI, SFOI consulted again with Capt [A], and it was determined SFOI would no longer pursue the Article 92 case against neither SSgt [JB] nor SSgt [NW].

14. At some point after the closure of the case file, Inv [NM], as the temporary NCOIC of SFOI, with permissions as such in AFJIS, deleted the electronic case file from AFJIS and subsequently destroyed the hard copy case file regarding the Article 92 investigation into SSgt [JB].

15. At the same time the SSgt [JB] case file was deleted, any reference to the Article 92 investigation with regard to SSgt [NW] was also removed from his investigative case file. There is no evidence the conversations between investigators and the MRO and the between investigators and Ms. [H] were ever documented in SSgt [NW]'s investigative case file. While they were arguably exculpatory, they lack of documentation definitely calls into question the training, ethical practices and integrity of investigators as those conversations were never documented.

16. It is not clear all that was deleted regarding SSgt [JB], however, it is clear that deletion of any case file, regardless of whether it was substantiated against the subject is against SFOI policy, as investigative case files are required to be maintained for 75 years. At a minimum, the court is aware the manilla folder, the internal tabs, the investigator notes from SSgt [JB]'s interview on 20 September 2021.

17. Upon his return, Inv [B] was made aware of the deleted case file of SSgt [JB] and verbally counseled Inv [NM] regarding its deletion. Inv [NM] was not made aware of SSgt [NW]'s second interview until early January during a defense interview. Shortly thereafter, he also provided a verbal counseling to Inv [NM]. No documentation of either counseling, if any exists, was ever provided by trial counsel to the defense through the discovery process.

(Ruling on Defense Motion to Dimisss for Failure to Disclose and Produce Exculaptory Evidence ("Ruling"), Attachment to Motion to Attach, 25 January 2022).

Additionally, Blackstone Labs, the manufacturer of the preworkout powder in question, was investigated by the Department of Justice and Blackstone Labs executives were indicted for conspiring to sell unlawful products marketed as dietary supplements.[3] Two executives and the company pleaded guilty. In their plea, they admitted to falsely characterizing their products as safe and legal dietary supplements, falsely represented that the products were made in "FDA-approved" facilities, and controlling a manufacturing facility that fraudulently imported raw ingredients from China.[4]

[3] *United States v. Blackstone Labs, et al.*, Docket No. 19-CR-80030-WPD (S.D.Fla. 2019), ECF No. 1.

[4] Information regarding the Blackstone Labs pleas was taken from the website of the Food and Drug Administration and is included in the Motion to Attach that was filed contemporaneously with this reply. https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/press-releases/florida-corporation-and-executives-plead-guilty-conspiracy-sell-anabolic-steroids-and-unlawful, last accessed on October 16, 2023.

Argument

The government's arguments only confirm it violated *Brady*.

In its answer, the government tries to overcome the *Brady* violation by first argument that "[a]ppellant had ample opportunity to explore such a theory [regarding the pre-workout powder causing a false positive] prior to trial" because the SSgt NW file had information about pre-workout powder. (Ans. at 7). Of course, it is the actions of the government, not the potential actions of the defense, that are subject to *Brady* and its progeny. Whether the defense made the connection that the pre-workout powder mentioned by SSgt NW could cause a false positive or had anything tested, once the government knew that it was possible that the pre-workout powder could cause a false positive, it had information that was exculpatory and should have turned it over.

In his affidavit, trial counsel Maj AN stated that he did not know that Investigator NM had information about the possibility of a false positive stemming from the pre-workout powder. (Declaration of Maj AN at 1). That misses the point, however, as the Supreme Court made clear in *Kyles v. Whitley*:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable…[Louisiana] suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about

> boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

514 U.S. 419, 437-38 (1995).

Several things are clear from the military judge's findings in *United States v. [NW]*. Investigator NM performed an investigation that yielded potentially exculpatory evidence in mid-September 2021. (Ruling at 2). The SFOI then met with the Chief of Justice at Little Rock AFB in that same timeframe to discuss SSgt B 's case (*Id.*) Several weeks later, the Government decided not to move forward with charges against SSgt JB or SSgt NWfor using a substance on the banned list. (*Id.*) The Government had an obligation to find out what the investigators knew. Either the Chief of Justice did not ask or Investigator NM failed to tell him. Either result is unacceptable.

Next, the government makes the stunning claim that trial counsel, even if he knew about the information, had no obligation to disclose the information obtained by Investigator NM because it was not favorable to the defense and did not negate or reduce SrA Roan's guilt. As "proof" of this claim, the government wrote that "nothing connected Appellant to SSgt JB's pre-workout supplement. While Appellant, SSgt NW, and SSgt JB were roommates, the Government had no evidence that Appellant had ever come into contact with the pre-workout supplement." (Ans. at 8.) This is an interesting leap of logic.

SrA Roan, SSgt NW, and SSgt JB share an apartment. SrA Roan, SSgt NW, and SSgt JB all take pre-workout powder. SSgt JB and SSgt NW share SSgt JB's pre-workout powder. The government knew all this. And still the government claims it would not have value at a court-martial. But such knowledge would clearly have benefitted the defense. SrA Roan lived in a home with a substance that could cause a false positive for cocaine—the very crime for which

SrA Roan was charged—and yet somehow this was not material or favorable to his defense and did not negate or reduce his guilt.

Next, the government claims that even if it had disclosed the information in its possession, it would not have mattered because the powder Investigator NM researched may not have been the same powder that SSgt JB had, the MRO did not recall the conversation with Investigator NM, and the government would have called a toxicologist who would have testified that the ingredient in the pre-workout powder could have caused a positive result.

But this misses the mark. The government knew that pre-workout powder in SrA Roan's home was shared by at least two roommates. (Ans. at 2). The powder was made by Blackstone Labs. A police investigator found that a Blackstone Lab product contained DMHA. (Ans. at 2). That investigator spoke with a Medical Review Officer who, according to the investigator, said that the powder could cause a false positive. (Ans. at 3). Those facts are material to the case. Any weight given to them was up to the members to decide.

At trial, with that specific information, the defense could have done a number of things. It could have called Investigator NM to explain his findings, specifically that a MRO stated the powder could cause a false positive. They could have inquired of the government why it did not seize and test SSgt JB's pre-workout powder. They could have inquired of the government's toxicologist if he or she had tested the actual powder in question- since no one tested, the testimony would have been speculative and only limited to the DMHA issue. The defense could have asked if the toxicologist knew that the manufacturer of the powder had been indicted for selling adulterated products.

All of this could have been done in a case where the entirety of the government's case was the positive result of the commander-directed urinalysis. There was no witness to testify to

selling cocaine to SrA Roan. There was no witness to testify to seeing SrA Roan ingest cocaine. There was no witness to testify that SrA Roan had previously ingested any illegal material. There was no evidence that SrA Roan had previously abused drugs. The government case rested only on the reliability of the process. Members could lose confidence in the reliability of the process if they are aware that investigators discovered and then destroyed exculpatory evidence in a parallel case.

With the knowledge that SrA Roan could have ingested pre-workout powder from Blackstone Labs, that the MRO told Investigator NM that DMHA could cause a false positive, that Blackstone Labs was under indictment for selling adulterated products in the past, and that no one had tested SSgt JB's actual pre-workout powder, members would have had some evidence that countered the single piece of evidence in the case—the laboratory result. This provides a reasonable possibility of a different result at trial had the evidence been disclosed. This undermines confidence in the verdict. SrA Roan is entitled to relief. As the government failed to seize the powder in question, a new trial is unlikely to come to a successful conclusion. The charges should be dismissed with prejudice. This remedy is appropriate given the magnitude of the government's gross negligence and SrA Roan's difficulty mounting a defense on rehearing because of the government's failure to seize evidence and the simple passage of time.

WHEREFORE, SrA Roan respectfully requests this Court set aside the charge and dismiss with prejudice.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 October 2023.

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
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Joint Base Andrews NAF, MD 20762

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Senior Airman (E-4) **BRYCE T. ROAN** United States Air Force *Appellant*	))))))))))	**APPELLANT'S SECOND MOTION TO ATTACH** Before Panel No. 3 No. ACM 22033 20 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

COMES NOW Appellant SrA Bryce T. Roan, through undersigned counsel, pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure and hereby moves to attach the following documents:

1) Declaration of Captain (Capt) JS, 18 October 2023 (1 page)
2) U.S. Food and Drug Administration notice of guilty pleas in *United States v Blackstone Labs, LLC, et al*., 19 November 2021 (3 pages)

As stated in *United States v. Jessie*, a Court of Criminal Appeals may "supplement the record when deciding issues that are raised by materials in the record but not fully resolvable by the materials in the record."[1] In this case, for the reasons below, the materials listed provide information regarding issues that are raised in the record but not fully resolvable by the materials in the record.

[1] 79 M.J. 437, 442 (C.A.A.F. 2020).

Attachment One

Capt JS served as one of SrA Roan's trial defense counsel. Her declaration attests to the fact that she was never informed by the government regarding the Blackstone Labs pre-workout powder; nor of Investigator NM's internet research that showed a Blackstone Labs product contained DMHA; or that Investigator NM contacted a Medical Review Officer who told him that, in the right quantities and at the right time, the powder containing DMHA could cause a false positive for cocaine. The government's answer to Appellant's Assignment of Error stated that Appellant's counsel had the opportunity to explore a theory that pre-workout powder could have caused a false positive. (Ans. at 8). The government also stated that the information about SSgt JB's pre-workout powder was "neither material nor favorable to the defense and did not reasonably tend to negate or reduce Appellant's degree of guilt." (*Id*.). Capt JS's affidavit provides the Court with information regarding how the information of Blackstone Labs was material and how it could have been used to negate SrA Roan's guilt.

Attachment Two

In its answer to Appellant's Assignment of Error the government states a government toxicologist, after trial, opined that it would be "almost completely implausible that DMHA could cause a positive cocaine result." (Ans at 8-9). The FDA document shows the Court that, if it knew the specifics regarding the manufacturer of SSgt JB's pre-workout powder, SrA Roan's defense team could have easily found about the criminal history of Blackstone Labs and its selling products containing illegal substances and raw materials imported from China. Armed with that information, had the government produced a toxicologist to testify to the "almost complete" implausibility of DMHA causing a false positive, his defense team could have pointed out the

flawed manufacturing process and, given that the government did not preserve SSgt JB's pre-workout powder, no one could attest to what was really in it.

Conclusion

Both of the documents are relevant and necessary to resolving key questions that are raised by, but not resolved by, the record of trial.

WHEREFORE, SrA Roan respectfully requests this Court grant this motion to attach.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 20 October 2023.

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