New Developments in Discovery: Two Steps Forward, One Step Back

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Introduction

Military appellate courts provide an important function. The appellate courts have a responsibility for filling gaps left by the Uniform Code of Military Justice (UCMJ), the *Manual for Courts-Martial*, and service regulations.[1] The military appellate courts took a step forward in two important areas of discovery: the trial counsel's duty of due diligence and the in camera inspection. These developments make these areas clearer than they were previously, but the courts have issues left to resolve. In one important area, *Brady* violations, the courts took a step backwards.

This article first reviews the developments in the trial counsel's duty of due diligence. This duty has two separate legal antecedents, one constitutional and one statutory. The constitutional basis for this duty comes from *Brady v. Maryland*[2] and its progeny. These cases collectively require a prosecutor, as a matter of due process, to disclose to the defense any evidence favorable to the accused,[3] to disclose favorable evidence whether the defense submits a request for discovery or not;[4] and to discover evidence favorable to the accused known to others acting on the government's behalf in the case.[5]

The statutory basis for the duty of due diligence is Article 46, UCMJ.[6] Rule for Court-Martial (R.C.M.) 701 implements Article 46, UCMJ. Rule for Court-Martial 701 codifies the requirements of *Brady* and its progeny.[7] It also requires the trial counsel to disclose reports of physical or mental examinations and scientific tests that are known, or *by the exercise of due diligence* may become known, to the trial counsel which are material to the preparation of the defense.[8] The statutory requirement is not limited to evidence favorable to the accused.[9] In *United States v. Williams*,[10] the Court of Appeals for the Armed Forces (CAAF) gave trial counsel guidance about the scope of the duty of due diligence.

This article also reviews several military appellate decisions addressing the power of the military judge to order in camera inspections to settle discovery issues. The CAAF designated the in camera review as the preferred method of balancing the privacy interests of witnesses with the accused's due process rights.[11] Although courts use the deferential abuse of discretion standard in reviewing the decisions of trial judges in this area, this year's appellate decisions have some teeth. In two cases, appellate courts found an abuse of discretion. However, the appellate courts have not established a clear standard for when judges should conduct in camera reviews.

Finally, this article reviews several cases dealing with *Brady* violations. A *Brady* violation has three elements: the undisclosed evidence must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the state; and the undisclosed evi-

1. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE 8 (1999).

2. 373 U.S. 83 (1963).

3. *Id.*

4. United States v. Agurs, 427 U.S. 97 (1976).

5. Kyles v. Whitley, 514 U.S. 419 (1995).

6. "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (LEXIS 2000).

7. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) (1998) [hereinafter MCM].

8. *Id.* R.C.M. 701(a)(2)(B) (emphasis added). *See, e.g.*, United States v. Simmons, 38 M.J. 376 (C.M.A. 1993).

9. United States v. Trimper, 28 M.J. 460 (C.M.A. 1989) (holding a positive urinalysis test report, which was totally unrelated to the charged offenses and used in rebuttal, was material to the preparation of the defense).

10. 50 M.J. 436 (1999).

11. United States v. Briggs, 48 M.J. 143, 145 (1998).

dence must be material.[12] Notwithstanding all of the cases dealing with *Brady* issues, the meaning of the word "material" is still beyond the grasp of mere mortals. Consequently, the results of *Brady* cases are unpredictable.[13] The state of the military law in this area is even more confusing. Military law purports to afford accused soldiers more protection than *Brady* and its progeny, based on the generous discovery provisions contemplated by Article 46, UCMJ.[14] This year's military cases ignore the additional protection based on Article 46 without explanation. The courts may be taking a step back.

This article attempts to explain these issues, critique the courts' analyses, and assist military practitioners in reacting to the impact of these cases.

Duty of Due Diligence

The CAAF addressed the prosecutor's duty of due diligence to learn of evidence favorable to the defense in *United States v. Williams*.[15] The court ultimately held that a prosecutor does not have a duty to search the unit files of government witnesses in the absence of a defense discovery request.[16] The court, in reaching this conclusion, reviewed where a prosecutor must look for evidence favorable to the accused.

Private First Class (PFC) Williams was convicted of two specifications of aggravated assault and false swearing. The discovery issue relates to an aggravated assault which occurred on 2 July 1995. Private First Class Williams was a passenger in a car driven by a female friend, PFC F. After PFC Williams exchanged derogatory comments with the passenger of another car, the two cars stopped, and a fight ensued. After the fight, PFC Williams's opponent, Mr. B, was bleeding severely from several stab wounds to the back. The government charged PFC Williams with aggravated assault for stabbing Mr. B.[17]

The government proved this specification with the testimony of Mr. B, PFC F, and a doctor who treated Mr. B. The defense theory was that PFC F stabbed Mr. B. The defense relied on the testimony of Mr. B that he did not see PFC Williams with a knife during the altercation. Moreover, Mr. B had initially told a law enforcement officer that he had been stabbed by a female. The defense asserted that PFC F had a motive to lie to conceal her own guilt.[18]

After trial, the defense counsel discovered an unrelated property damage investigation where the military police questioned PFC F about slashing the tires of another soldier in early August 1995.[19] Private First Class F denied she slashed the tires. The military police searched PFC F's barracks room and found a knife, which the police seized as evidence. The government disclosed neither the property damage investigation nor the knife to the defense counsel prior to trial.[20]

On appeal, the defense argued that the trial counsel failed to exercise due diligence by failing to discover evidence favorable to the defense after the defense requested "any and all investigations or possible prosecutions which could be brought against any witness the government intends to call during the trial."[21] The defense asserted that this request obligated the trial counsel to review the files relating to PFC F maintained by her unit.[22] The court framed the issue as whether the prosecution is obligated to review unit disciplinary files of government witnesses for information concerning investigations and possible prosecutions where the defense discovery request does not specifically request the trial counsel review the unit files.[23]

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12. Strickler v. Greene, 119 S. Ct. 1936, 1948 (1999). This case will be published in the United States reporter at 527 U.S. 263; however, the final published version has not been released. This article will cite to the Supreme Court reporter for all references to *Strickler v. Greene*.

13. The only predictable feature of the three *Brady* cases reviewed in this article is that the accused received no relief. In this writer's opinion, two of these cases warranted relief. In the third case, the court improperly used the *Brady* materiality standard to deny the accused relief.

14. *See* United States v. Hart, 29 M.J. 407 (C.M.A. 1990). *See also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993).

15. 50 M.J. 436 (1999).

16. *Id.* at 443.

17. *Id.* at 436-37.

18. *Id.* at 438.

19. The confrontation between PFC Williams and Mr. B occurred on 2 July 1995. The tire-slashing incident occurred in August 1995. The second charged aggravated assault occurred on 1 September 1995. The accused's court-martial convened after 1 September 1995. *Id.* at 436-38.

20. *Id.* A military police investigator (MPI) investigated the tire-slashing incident. The MPI seized the knife as evidence. *Id.* at 438. This investigation was completely separate from the investigation of the aggravated assault on 2 July 1995. *Id.* The knife was not in PFC F's unit file. Appellant's theory was the trial counsel was required to check the unit files, and "[h]ad the trial counsel reviewed the file or asked the commander about any criminal actions involving . . . PFC [F], he would have discovered the knife." *Id.* at 439.

21. *Id.* at 439.

The court noted that R.C.M. 701(a)(6) requires the trial counsel to disclose to the defense any evidence known to the trial counsel that reasonably tends to negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment.[24] Rule for Courts-Martial 701(a)(6) implements the requirements of *Brady v. Maryland*,[25] which held that due process requires a prosecutor to disclose information requested by a defendant that is material to the issue of guilt or sentence. *Kyles v. Whitley*[26] imposed a duty on a prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[27] In *Williams*, the CAAF assumed the undisclosed evidence was favorable to the defense,[28] and focused on whether the evidence was located within a file the trial counsel had a duty to review.[29]

The court held that the trial counsel did not have a duty to review unit disciplinary files in the absence of a defense request for discovery.[30] The court summarized a trial counsel's duty of due diligence. First, the trial counsel must review his own files pertaining to the case.[31] Beyond his own files, a trial counsel must review the files of law enforcement authorities that have participated in investigating the charged offenses.[32] A trial counsel must also review investigative files in related cases that are maintained by an entity closely aligned with the prosecution.[33] Finally, a trial counsel must review "other files, as designated in a defense discovery request, that involv[e] a specified type of information within a specified entity."[34] Because the defense did not specifically request the government review the unit disciplinary files for specific information, "neither Article 46 nor the *Brady* line of cases require[d] the prosecution to review records that are not directly related to the investigation of the matter that is the subject of the prosecution."[35]

Williams is an important case for trial counsel because the court clearly and coherently defined the limits of the trial counsel's duty to seek out evidence favorable to the accused. Trial counsel should develop a system that causes them to determine which files they must review and the location of those files; ignorance is not an excuse.[36] Law enforcement files include any files maintained by local law enforcement activities and law enforcement activities from other installations that partici-

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22. *Id.* at 439 n.2. The appellant did not assert that the prosecutor knowingly withheld favorable evidence from the defense even though the trial counsel who prosecuted the case also advised the military police investigator on the tire-slashing incident before the military police closed the tire slashing investigation. *Id.* at 438-39. The trial counsel submitted an affidavit that stated the tire-slashing incident occurred more than a month before he knew PFC F would be a witness against PFC Williams, and he did not remember the tire-slashing incident. *Id.*

23. *Id.*

24. *See id.* at 440. *See also* MCM, *supra* note 7, R.C.M. 701(a)(6).

25. 373 U.S. 83 (1963).

26. 514 U.S. 419 (1995).

27. *Id.* at 437.

28. *Williams*, 50 M.J. at 440. The court scolded the appellant for failing to provide any evidence showing the undisclosed knife was or could have been used in the assault. *Id*. at 441-42.

29. *Id.* at 440.

30. *Id.* at 443.

31. *Id.* at 441.

32. *Id. See, e.g.*, United States v. Simmons, 38 M.J. 376 (C.M.A. 1993). In *Simmons*, the trial counsel failed to disclose statements by a key government witness which were contained in a polygraph examination report in the Criminal Investigation Command (CID) file. *Id.*

33. *Williams*, 50 M.J. at 441; *see, e.g.*, United States v. Romano, 46 M.J. 269 (1997); United States v. Hankins, 872 F. Supp. 170, 172 (D.N.J.), *aff'd*, 61 F.3d 897 (3d. Cir. 1995).

34. *Williams*, 50 M.J. at 441. *See, e.g.*, United States v. Green, 37 M.J. 88 (C.M.A. 1993). In *Green*, the trial counsel failed to disclose an Article 15 imposed on a government witness after the defense requested "'[a]ny record of prior conviction, and/or nonjudicial punishment of any prosecution witness." *Id*. at 89.

35. *Williams*, 50 M.J. at 443.

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> We are . . . concerned with Captain B's views on disclosure based on his testimony that, 'I can't be held to a duty to disclose' evidence in a CID case file to the defense 'if I don't have knowledge of it.' We believe that Captain B's failure to immediately provide SSG Shattles' last two statements to the defense team when he became aware of them and his attitude about his duty to seek out and disclose evidence in a CID case file to the defense are the type of conduct condemned by the Court of Military Appeals . . . we find that Captain B's attempts to accomplish his duty in this regard were especially careless and an example not to be followed by other trial counsel.

United States v. Kinzer, 39 M.J. 559 (A.C.M.R. 1994).

pated in the investigation.[37] If the government plans to use evidence examined at a forensics laboratory, then the trial counsel must review the files of the laboratory.[38] If a civilian law enforcement agency participated in the investigation, trial counsel should inspect the law enforcement agency's files as well.

Files maintained by an entity "closely aligned with the prosecution" would certainly include files maintained by a trial counsel prosecuting a co-accused.[39] However, due diligence may require more. In *Williams*, the CAAF cited *United States v. Hankins*,[40] as legal support for the requirement to review files maintained by an entity closely aligned with the prosecution. In *Hankins*, the prosecutor failed to disclose statements made by a government witness in an affidavit pertaining to an assets forfeiture proceeding which contradicted statements made by the witness in a statement to a Drug Enforcement Agency agent.[41] The district court held that the prosecuting assistant U.S. attorney had a duty to review the assets forfeiture file maintained by another assistant U.S. attorney.[42] The court reasoned, "[c]ertainly the civil division of the United States Attorney's Office is 'closely aligned with' the criminal division of the United States Attorney's Office."[43] If we apply this criminal division-civil division template to a staff judge advocate's office, the duty of due diligence may affect files maintained by the "civil divisions" of a staff judge advocate's office, including relevant Article 139 claims,[44] Article 138 complaints,[45] reports of survey,[46] and, possibly, other files. Trial counsel will have to rely on future cases to further define the extent of the prosecutor's duty to search for evidence favorable to the accused in the files of entities closely aligned with the prosecution.

Williams is an important case for defense counsel because defense counsel can affect the scope of the trial counsel's duty of due diligence.[47] Defense counsel should not interpret *Williams* as a license to burden trial counsel with the review of clearly unrelated files. However, the CAAF did not address the issue of what showing of relevance, if any, the defense must make to trigger the duty for the trial counsel to review a file.[48] The CAAF focused on the specificity of the request:

> The prosecutor's obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as maybe [sic] needed to ensure that the defense has an equal opportunity to obtain evidence. . . . With respect to files not related to the investigation of the matter that is the subject of the prosecution, there is no readily identifiable standard as to how extensive a review must be conducted by the prosecutor in the preparation of a case. The defense need for such files is likely to vary significantly from case to case, and the defense is likely to be in the best position to know what matters outside the investigative files may be of significance. The Article 46 interest in equal opportunity of the defense to obtain such information can be protected adequately

37. United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989). The Ninth Circuit reversed the district court, which limited the U.S. Attorney's discovery responsibilities to information within the District of Oregon. "As with [Federal] Rule [of Criminal Procedure] 16(a)(1)(C)'s definition of government, we see no reason why the prosecutor's obligation under *Brady* should stop at the border of the district." *Id.* at 1037.

38. *See* United States v. Sebring, 44 M.J. 805 (N.M. Ct. Crim. App. 1996). The trial counsel failed to disclose reports of quality control inspections, which indicated problems with testing at the laboratory that tested Sebring's urine sample. "[T]he trial counsel's obligation to search for favorable evidence known to others acting on the Government's behalf in the case extends to a laboratory that conducts tests to determine the presence of a controlled substances for the Government." *Id.* at 808.

39. United States v. Romano, 46 M.J. 269 (1997). In *Romano*, the trial counsel failed to disclose statements made by a government witness at the Article 32 investigation of a co-accused which contradicted her in-court testimony against Romano. *Id.*

40. 872 F. Supp. 170, 172 (D.N.J.), *aff'd*, 61 F.3d 897 (3d. Cir. 1995).

41. *Id.* at 172.

42. *Id.* at 173.

43. *Id.*

44. Article 139 gives soldiers a means of redress for willful damage to property or the wrongful taking of property by another soldier. UCMJ art. 139 (LEXIS 2000); *see also* U.S. Dep't of Army, Reg. 27-20, Legal Services: Claims, ch. 9 (31 Dec. 1997).

45. Article 138 gives a soldier who feels he has been wronged by his commanding officer a mechanism to complain about the problem. UCMJ art. 138; *see also* U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice, ch. 20 (20 Aug. 1999).

46. U.S. Dep't of Army, Reg. 735-5, Property Accountability: Policies and Procedures for Property Accountability, ch. 13 (31 Jan. 1998).

47. "In short, the parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." United States v. Williams, 50 M.J. 436, 441 (1999).

48. *Id.* at 443 n.7.

> be [sic] requiring the defense to provide a reasonable degree of specificity as to the entities, the types of records, and the types of information that are the subject of the request.[49]

Defense counsel should aggressively use the discovery process, including the trial counsel's duty of due diligence, by making specific, good-faith requests for information and evidence to prepare the best possible defense for their clients.

Often the defense will request access to files that contain sensitive information.[50] Trial judges have to balance the privacy concerns of witnesses against the rights of the accused. Witnesses have an interest in keeping their private lives private and victims do not deserve to be traumatized a second time by the trial process. On the other hand, the accused is entitled to exculpatory evidence and information which the defense can use to impeach government witnesses.[51] A military judge has broad discretion when regulating discovery. A judge may prescribe the time, place, and manner for discovery.[52] A judge can also issue protective and other appropriate orders.[53] One judicial tool for regulating discovery is the in camera review.

In Camera Review

This year's cases focus on the military judge's authority to review disputed discovery materials in camera. The cases involve in camera inspections of information requested during discovery by the defense but not produced by the government. In these cases the defense then made a motion to compel discovery. In one case, the trial judge inspected the disputed information in camera; in the other cases, the judges did not. These cases are interesting when trying to determine what a defense counsel must do or show to get the trial judge to review the disputed evidence in camera. The in camera inspection is one tool the military judge has to regulate discovery;[54] however, the Rules for Courts-Martial do not offer military judges any guidance on how or when to conduct these reviews.[55]

In *United States v. Abrams*,[56] the court-martial convicted the accused of, among other things, pandering and soliciting another to engage in prostitution. The defense requested the entire military record for the government's witness on the pandering and solicitation specifications. The government agreed to turn over documents from the witness's military record related to her performance as a prostitute. The defense counsel insisted he needed to see her entire record to determine if there was anything else in the record which he could use to impeach the witness.[57] The military judge ruled that the defense had not made a showing that the information in the witness's file would be relevant or necessary to the defense. The judge ruled there was no basis to order the government to produce the records to the defense, but the military judge reviewed the records in camera.[58] The precise issue in *Abrams* was the failure of the judge to seal the records he reviewed in camera and attach them to the record of trial. The CAAF remanded the case to the Navy court with an order to produce the records reviewed in camera for appellate review.[59]

The interesting thing about *Abrams* is that the trial judge decided to conduct the in camera review even though the "defense counsel had not made any kind of threshold showing

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49. *Id.* at 442-43.

50. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39 (1987). In this case the defendant was accused of child abuse by his daughter. The defendant's daughter was interviewed by Child Youth Services. Because of privacy concerns, the government opposed an unsupervised search by the defense of the confidential files of the child welfare agency in order to discover exculpatory information. The trial judge did not conduct an in camera inspection of the records. The Court remanded the case to have the trial court review the file in camera to determine if it contained evidence favorable to the defense. The Court held "[the defendant] is entitled to have the C[hild] Y[outh] S[ervices] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." *Id.* at 59-61.

51. *See* United States v. Bagley, 473 U.S. 667 (1985).

52. MCM, *supra* note 7, R.C.M. 701(g)(1).

53. *Id.* R.C.M. 701(g)(2).

54. United States v. Abrams, 50 M.J. 361, 363 (1999) (recognizing the power of the judge to review evidence in camera to strike a balance between the accused's right to a fair trial and government confidentiality considerations); *see also* MCM, *supra* note 7, R.C.M. 703(f)(4)(C).

55. The only guidance on in camera inspections in the *MCM* is contained in MRE 505 (Classified Information) and MRE 506 (Government Information Other than Classified Information). These rules allow the government to request the in camera inspection and provide the judge a clear standard for when evidence falling within these privileges must be disclosed. MCM, *supra* note 7, MIL. R. EVID. 505, 506.

56. 50 M.J. 361 (1999).

57. The defense proffered that the witness had been to therapy prior to enlisting in the Navy. *Id.* at 362.

58. *Id.*

59. *Id.* at 364.

that what may be in there would be necessary and relevant to the defense."[60] Rule for Courts-Martial 703(f) states the defense is entitled to have evidence produced by the government if the defense can show the evidence is relevant and necessary.[61] The discovery rules do not specify the showing, if any, required of the defense counsel to entitle the defense to an in camera review.[62]

In *United States v. Sanchez*,[63] the government charged the accused with fraternization and adultery. The defense asked the trial judge to compel production of all documents concerning an investigation into the complaining witness's allegations against a senior noncommissioned officer. The defense believed that the officer who investigated the allegations concluded the witness was not credible. The trial judge denied the defense motion to compel discovery.[64] The Air Force court, in an earlier order, had ordered the government to provide a copy of the report for an in camera inspection. The Air Force court reviewed the records and did not find any information favorable to the defense.[65]

The interesting part of this case is that the trial judge denied the motion to compel discovery, implying the defense did not show the materials were relevant and necessary to the defense. However, unlike the trial judge in *Abrams*, the trial judge did not conduct an in camera inspection. Although the appellate court found error, the court did not specify a standard for when a judge should conduct an in camera review.

In *United States v. Kelly*,[66] the court-martial convicted the accused of larceny and communicating a threat. The defense counsel requested disclosure of the personnel and medical records of the person to whom the accused allegedly communicated the threat. The defense received an unfavorable letter and a redacted version of a physical profile, but was otherwise denied access to the records. The trial judge denied the trial counsel's motion to perform an in camera review of the records.[67]

The Army court found that the trial judge did not abuse his discretion by denying the trial counsel unfettered access to the records.[68] Beyond the unfavorable letter and the profile, the defense could not show the relevance or necessity of the requested records. However, the Army court found that the military judge erred by relying on the representations of the trial counsel as to what was in the requested records and not inspecting them for himself.[69] The Army court did not grant relief or return the record to the military judge to conduct the inspection because they found no prejudice to the accused.[70]

In all three of these cases, the defense was unable to make a showing of relevance or necessity for access to the records being sought.[71] In one of the cases, the trial judge conducted an in camera inspection anyway. In the two cases where the trial judge did not perform an in camera review, the appellate courts found that the trial judges abused their discretion. However, the cases do not set a standard that judges can apply in deciding when they should review records in camera. The only lessons from *Sanchez* and *Kelly* are based on the facts of the case. In *Sanchez*, the defense made a "hypothetical" showing of relevance: if the investigating officer found her incredible, then the records might contain evidence favorable to the defense.[72] The lesson from *Kelly* may be the military judge must conduct an in camera inspection where the defense counsel questions the trial counsel's representation of what is in the file.[73]

One benefit of conducting an in camera review is that the judge inspects the requested records for evidence favorable to

60. *Id.* at 362.

61. MCM, *supra* note 7, R.C.M. 703(f).

62. *But see* Pennsylvania v. Ritchie, 480 U.S. 39, 55-61 (1987) (holding that the defendant is entitled to have confidential files inspected in camera without a showing of relevance or necessity and suggesting denial of an in camera inspection may violate the Due Process Clause and the Compulsory Process Clause).

63. 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

64. *Id.* at 508-09.

65. *Id.* at 509.

66. United States v. Kelly, No. 9600774, 1999 CCA LEXIS 332 (Army Ct. Crim. App. Sept. 29, 1999).

67. The trial counsel requested an in camera inspection and the defense counsel initially opposed it. The defense counsel later withdrew her objection. *Id.* at*3-*5.

68. *Id.* at *8.

69. *Id.* at *8-*9.

70. *Id.* at *10. *See infra* note 158 and accompanying text for further discussion of this case.

71. If the defense counsel requests production of a piece of evidence, provides a description of the item, its location, and custodian, and can show the evidence is relevant and necessary, the defense is entitled to have the piece of evidence produced by the government. MCM, *supra* note 7, R.C.M. 703(f)(3). Since the defense counsel could not demonstrate the relevance of the evidence in these cases, the issue becomes whether the defense is entitled to inspect, or have the court inspect, the requested files absent any showing of relevance.

the accused and can eliminate potential *Brady* violations. When the defense specifically requests the government to produce or inspect certain files, the trial counsel's duty of due diligence arises.[74] If neither the trial counsel nor the trial judge inspect a specifically requested record, and the record contains evidence favorable to the accused, the result could be a *Brady* violation. If the trial counsel inspects a requested record and the trial counsel is unsure whether a document should be disclosed to the defense and the witness does not want the document disclosed, the trial counsel can ask the court to review the document in camera. By reviewing the requested files, the judge can eliminate potential *Brady* issues.

Brady Evidence

This year the United States Supreme Court decided *Strickler v. Greene*,[75] an important case building on the *Brady v. Maryland*[76] line of cases. In *Brady*, the Supreme Court held that the suppression by the government of evidence favorable to the defense, upon request by the defense, violated Due Process if the undisclosed evidence is material either to guilt or to punishment.[77] Later, the Court held that this duty to disclose applies even without a defense request for discovery.[78] The Court later expanded the meaning of evidence favorable to the accused to include impeachment evidence in addition to exculpatory evidence.[79] The Court also defined the term "material." Undisclosed 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."[80] Most recently, the Court imposed a duty on prosecutors to learn of favorable information known to others acting on the prosecution's behalf, including the police.[81] In *Strickler*, the Court focused again on the meaning of "material."

Tommy D. Strickler was convicted of abducting, robbing, and murdering Leanne Whitlock on 5 January 1990. Strickler was sentenced to death.[82] In a separate trial, Ronald Henderson, Strickler's co-defendant, was convicted of first degree murder, a non-capital offense.[83]

At trial, a key government witness, Anne Stoltzfus, described Whitlock's abduction at a shopping mall in Harrisonburg, Virginia. Stoltzfus testified that she had seen Strickler, Henderson, and a blonde girl together several times inside the mall before the abduction. She described the abduction in vivid detail. Stoltzfus testified that as she was leaving the mall parking lot to go to another store, she saw Strickler get into Whitlock's car, beat her, summon his friends into the car, and then force Whitlock to drive away. On 13 January 1990, police discovered Whitlock's dead body.[84]

After trial, the defense discovered notes taken by the police detective who interviewed Stoltzfus before trial as well as sev-

72. *Cf.* United States v. Briggs, 48 M.J. 143 (1998) (holding that the denial of a defense request for a rape victim's complete medical record was not an abuse of discretion where the defense was unable to point to any possibility that there was exculpatory material contained within the victim's medical records); United States v. Reece, v. Reece, 25 M.J. 93 (C.M.A. 1987) (holding that the military judge should have conducted an in camera inspection of the victim's treatment and disciplinary records where the defense counsel made as specific a showing of relevance as possible, given that he was denied all access to the documents).

73. The court in *Kelly* framed the issue as "whether a defense counsel is entitled to inspect the official personnel file of a victim when that counsel distrusts the government's response to a discovery request, with or without a showing that the file contains material relevant and necessary to the defense case." The court found the "military judge erred by 'relying upon a judicial determination by government counsel,' rather than inspecting the sought-after personnel records in camera and making his own decision on the need to furnish defense additional documentation." United States v. Kelly, No. 9600774 1999 CCA LEXIS 332, at *7 (Army Ct. Crim. App. Sept. 29 1999).

74. *See supra* notes 31-34 and accompanying text.

75. 119 S. Ct. 1936 (1999).

76. 373 U.S. 83 (1963).

77. *Id.* at 87.

78. United States v. Agurs, 427 U.S. 97, 107 (1976).

79. United States v. Bagley, 473 U.S. 667, 676 (1985).

80. *Id.* at 682. In cases involving knowing use of perjured testimony by a prosecutor, the undisclosed evidence is material unless the nondisclosure is harmless beyond a reasonable doubt. *Id.* at 680.

81. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

82. *Strickler*, 119 S. Ct. at 1941.

83. *Id.*

84. *Id.* at 1943-44. Ms. Whitlock apparently suffered a horrible death. Forensic evidence indicated she died of multiple blunt force injuries to the head. A sixty-nine pound rock, speckled with blood, was found near her body. The location of the rock and the blood on it suggest the rock was used to inflict the blunt force trauma that killed her. *Id.* at 1942.

eral letters written by Stoltzfus to the detective. These materials were not disclosed to the defense before trial.[85] The undisclosed documents cast serious doubt on the confident testimony Stoltzfus presented at trial.

At trial, Stoltzfus identified Strickler as the person who beat and abducted Whitlock in the mall parking lot. When asked if pretrial publicity influenced her identification, Stoltzfus confidently said "absolutely not."[86] Stoltzfus said she had an exceptionally good memory and had no doubt about her identification. She said that Strickler had made an emotional impression on her and that she paid attention.[87] The undisclosed documents indicated that Stoltzfus had not remembered being at the mall that day, but that her daughter had helped to jog her memory. The documents indicated her memory was vague and uncertain. A letter from Stoltzfus indicated she was not paying attention to what she observed. "I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at J[ames] M[adison] U[niversity]."[88] Moreover, an undisclosed summary of the detective's notes of his interviews with Stoltzfus indicated that two weeks after the abduction she was not sure if she could identify the two males involved in the abduction.[89]

At trial, Stoltzfus identified the victim, Ms. Whitlock, from a photograph. Stoltzfus described Whitlock as a college kid who was singing and happy. Stoltzfus even described her clothing. One undisclosed document indicated that during the first interview between the detective and Stoltzfus two weeks after the abduction, Stoltzfus could not identify the victim. A later note from Stoltzfus to the detective indicated that Stoltzfus spent several hours with Whitlock's boyfriend looking at recent photographs of Whitlock. Stoltzfus could not identify the victim during her first interview with police two weeks after the abduction, but she could identify Ms. Whitlock at trial.[90]

In contrast to her vivid, confident testimony, another undisclosed letter from Stoltzfus to the detective thanked the detective for his patience with her muddled memories. The letter also stated that if another student had not called the police, she would have never made "any of the associations that you helped me make."[91]

The Court followed the classic *Brady* analysis. A *Brady* violation has three elements: the undisclosed evidence must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the state; and the defendant must be prejudiced.[92] A defendant is prejudiced if the undisclosed evidence is material to either the issue of guilt or sentence.[93] In *Strickler*, there was no doubt that the undisclosed evidence was favorable to the defendant and that the police suppressed it.[94] The outcome depended on materiality.

The Court first announced a standard for determining whether undisclosed evidence was material in cases not involving prosecutorial misconduct[95] in *United States v. Bagley*.[96] If prosecutorial misconduct is not involved, undisclosed evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[97] A reasonable probability

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85. The appellant claimed that eight documents were not disclosed. The prosecutor maintained that three of the documents were in his file when he allowed the defense counsel open access to his file. The Court did not resolve this discrepancy. *Id.* at 1945 n.11.

86. *Id.* at 1944.

87. *Id.*

88. *Id.* at 1944-45.

89. *Id.*

90. *Id.* at 1944-45.

91. *Id.* at 1945.

92. *Id.* at 1948.

93. "[T]he Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland*." *Id.* at 1956 n.2. (Souter, J., concurring in part and dissenting in part).

94. *Strickler*, 119 S. Ct. at 1948. A lack of bad faith on the part of the prosecutor is immaterial. *Brady*, 373 U.S. at 87. A prosecutor is responsible for any favorable evidence in the possession of any governmental agency working on the case, including the police. United States v. Kyles, 514 U.S. 419, 437 (1995). In this case, the non-disclosure may have resulted from the fact that crime occurred and was investigated in one county but the prosecutor from another county tried the case. *Strickler*, 119 S. Ct. at 1945 n.12.

95. In a case involving knowing use of perjured testimony, the "fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. 669, 680 (1985). *See, e.g.*, Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

96. 473 U.S. 667 (1985).

is "a probability sufficient to undermine confidence in the outcome."[98]

After exhausting his appeals in the state courts, Strickler filed a federal habeas corpus petition in the federal district court for the Eastern District of Virginia.[99] The district court concluded that without the powerful trial testimony of Stoltzfus, the jury may have believed Henderson was the ringleader behind Whitlock's murder. The district court found the undisclosed documents were material because there was a reasonable probability of a different result at trial if the undisclosed evidence had been disclosed to the defense. The district court reasoned that without Stoltzfus's testimony, there was a reasonable probability that the jury may have convicted Strickler of first degree murder, a noncapital offense, and not capital murder.[100]

The Fourth Circuit Court of Appeals reversed the district court's decision. The Fourth Circuit Court of Appeals concluded the undisclosed evidence was not material because the record contained ample evidence of guilt independent of Stoltzfus's testimony. The court found the verdict and sentence worthy of confidence because even without Stoltzfus's testimony, the evidence supported the jury's finding of guilt to capital murder as well as the special findings of vileness and future dangerousness that warranted the sentence to death.[101]

The Supreme Court disagreed with both lower courts. The Supreme Court found that the Fourth Circuit applied the wrong standard. The test for materiality is not "whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions."[102] The Court disagreed with the district court's finding of a reasonable probability of a different result at trial.

> The District Court was surely correct that there is a reasonable *possibility* that either a total, or just a substantial, discount of Stoltzfus' testimony might have produced a different result, either at the guilt or sentencing phases. . . . [H]owever, petitioner's burden is to establish a reasonable *probability* of a different result.[103]

In *Kyles*, the Court emphasized that "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[104] "The question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[105] The Supreme Court found the verdict and sentence worthy of confidence based on the modicum of difference between a "reasonable possibility" and a "reasonable probability."[106]

Justice Souter wrote a separate opinion concurring in part and dissenting in part.[107] Justice Souter agreed that Strickler failed to show that the undisclosed evidence was material to Strickler's conviction for capital murder; however, Justice Souter believed that Strickler demonstrated that the undisclosed evidence was material to Strickler's sentence.

> [T]he prejudice enquiry does not stop at the conviction but goes to each step of the sentencing process: the jury's consideration of aggravating, death-qualifying facts, the jury's discretionary recommendation of a death sentence if it finds the requisite aggravating factors, and the judge's discretionary decision to follow the jury's recommendation. . . . It is with respect to the penultimate step in determining the sentence that I think Strickler carried his burden. I believe there is a reasonable probability (which I take to mean a significant possibility) that disclosure

97. *Id.* at 682.

98. *Id.*

99. *Strickler*, 119 S. Ct. at 1946.

100. *Id.* at 1953.

101. *Id.* at 1952.

102. *Id.*

103. *Id.* at 1953.

104. United States v. Kyles, 514 U.S. 419, 434 (1995).

105. *Strickler*, 119 S. Ct. at 1952. *Kyles*, 514 U.S. at 435.

106. Strickler was executed on 21 July 1999. *Student's Murderer Executed; Governor, U.S. Supreme Court Reject Last-Minute Appeals*, WASH. POST, July 22, 1999, at B8.

107. *Strickler*, 119 S. Ct. at 1955. Justice Kennedy joined Justice Souter.

> of the Stoltzfus materials would have led the jury to recommend life, not death.[108]

Justice Souter's opinion criticized the majority for using "the unfortunate phrasing of the shorthand version"[109] of the *Bagley* standard.

Justice Souter objected to the Court's use of "the familiar, and perhaps familiarly deceptive, formulation [of the test for materiality]: whether there is a 'reasonable probability' of a different outcome if the evidence withheld had been disclosed."[110] Justice Souter proposed substituting "substantial possibility" for the phrase "reasonable probability" in the shorthand formulation. Use of the phrase reasonable probability "raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.'"[111] Clearly, a defendant does not have to show that a different outcome is more likely than not in order to show materiality for a *Brady* violation.[112]

Justice Souter traced the evolution of the *Bagley* standard to make his point. *Brady* itself did not define the term "material." The first case to attempt to define materiality in the context of a *Brady* violation was *United States v. Agurs*.[113] *Agurs* defined three situations which could constitute a *Brady* violation. The first was the knowing use of perjured testimony by a prosecutor. The Court noted that a conviction based on perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[114] *Agurs*, like *Strickler*, did not involve perjured testimony. The second category consists of cases where the defense makes a specific discovery request and the prosecutor fails to disclose evidence favorable to the accused. The third category consists of cases where the defense makes a general request or no request for discovery and favorable information is not disclosed.[115]

The Court in *Agurs* never stated a specific standard for materiality for the second and third categories. The Court ruminated about what the standard should be, but at the end of the opinion all we know is what the standard is not. The Court rejected the standard that applies to motions for a new trial based on newly discovered evidence.[116] The Court reasoned that the standard for materiality should be less demanding on the defendant than the burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.

> If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.[117]

On the other hand, the Court determined that the standard is more demanding on the defendant than the usual harmless error analysis because the Court "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel."[118] After *Agurs* the defendant must show more than a "reasonable possibility" of a different result at trial, but the defendant does not have to show that the undisclosed evidence probably would have resulted in acquittal. The Court did not have to settle on a standard in *Agurs* because they found the nondisclosure to be harmless beyond a reasonable doubt.[119]

108. *Id.* at 1956.

109. *Id.*

110. *Id.*

111. *Id.*

112. *See infra* note 116 and accompanying text (discussing the burden on an appellant to establish a *Brady* violation).

113. 427 U.S. 97 (1976).

114. *Id.* at 103. This is the harmless beyond a reasonable doubt analysis.

115. *Id.* at 103-06. The *Strickler* opinion did not mention a defense request for discovery. The opinion discussed the prosecutor's open file discovery policy. *Id.* at 1945 n.11. Strickler's defense counsel may not have submitted a discovery request. *Strickler* appears to be a "no request" case.

116. "[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111. *See* MCM, *supra* note 7, R.C.M. 1210(f).

117. *Agurs*, 427 U.S. at 111.

118. *Id.* The harmless error analysis determines if a trial error is harmless beyond a reasonable doubt. "Harmless beyond a reasonable doubt" means there is no *reasonable possibility* that the trial error contributed to the verdict. *See* Brecht v. Abrahamson, 507 U.S. 619 (1993). Some formulations use the phrase *reasonable likelihood*. *Agurs*, 427 U.S. at 103. "Reasonable possibility" and "reasonable likelihood" are synonymous. *Strickler*, 119 S. Ct. at 1957.

119. *Agurs*, 427 U.S. at 114.

The shorthand "reasonable probability" formulation first appeared in *United States v. Bagley.*[120] *Bagley* decided the issue left open in *Agurs*: the standard for materiality when the prosecutor fails to disclose evidence favorable to the accused.[121] "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[122] The Court in *Bagley* borrowed the phrase "reasonable probability" from *Strickland v. Washington.*[123] Justice Souter pointed out that *Strickland* based its formulation on two cases, *Agurs* and *United States v. Valenzuela-Bernal*.[124] Neither *Agurs* nor *Valenzuela-Bernal* used the phrase reasonable probability, but both used reasonable likelihood.[125]

The review of the circuitous path by which the Court adopted the "reasonable probability" standard for *Brady* violations brought Justice Souter to three conclusions. First, "reasonable likelihood" and "reasonable probability" are distinct levels of confidence in the validity of a trial result. Second, the gap between "more likely than not" and "reasonable probability" is greater than the gap between "reasonable likelihood" and "reasonable probability." Finally, because of the larger gap, the Court should not use "reasonable probability" because it "is naturally read as the cognate of 'probably' and thus confused with 'more likely than not.'"[126] Justice Souter proposed describing the *Brady* materiality standard as a "significant possibility" of a different result.[127]

Justice Souter would have vacated the sentence because the undisclosed evidence raised a significant possibility of a different sentence. Justice Souter made two points about Anne Stoltzfus's testimony. First, her testimony identified Strickler as the ringleader. The evidence of the brutal nature of the crime "must surely have been complemented by a certainty that without Strickler there would have been no abduction and no ensuing murder."[128] Stoltzfus alone described Strickler as the instigator.[129] Second, Stoltzfus's testimony presented a gripping story. Justice Souter emphasized that the story format is a powerful key to juror decision-making. The power of Stoltzfus's testimony came not only from the content of her testimony but also in the confident, compelling manner in which she presented it.[130] The undisclosed evidence would have exposed Stoltzfus's memory as uncertain and vague. Her memory was, in part, reconstructed by conversations with the police and the victim's boyfriend. An informed cross-examination could have annihilated her testimony. Without the vivid picture of Strickler as the dominate aggressor, at least one juror may have hesitated to impose the death penalty. Justice Souter noted that would have been all it took to change the result.[131]

Strickler illustrates that the standard for materiality is hard to define with precision. The facts in *Strickler* illustrate that the government can fail to disclose compelling impeachment evidence which is crucial to the defense without committing a constitutional error. This case will help counsel understand the three components of a *Brady* violation and the application of the *Bagley* materiality standard. The most salient point of *Strickler* is a fine one: there is a difference between a reasonable possibility and a reasonable probability. Although the

120. 473 U.S. 667 (1985).

121. The Court prescribes the same test for both the second and third categories defined in *Agurs*. The test announced in *Bagley* is "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." *Id*. at 682. *But see* United States v. Hart, 29 M.J. 407 (C.M.A. 1990). The military courts afford accused soldiers more protection based on Article 46, UCMJ: "where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Hart*, 29 M.J. at 410; *see also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993) (nondisclosure harmless beyond a reasonable doubt).

122. *Bagley*, 473 U.S. at 682.

123. 466 U.S. 668 (1984) (describing the level of prejudice needed to establish a claim of ineffective assistance of counsel).

124. 458 U.S. 858 (1982) (holding that sanctions against the government for deporting potential defense witnesses were appropriate if there was a *reasonable likelihood* that the lost testimony could have affected the outcome (emphasis added)).

125. United States v. Agurs, 427 U.S. 97, 103 (1976); *see Valenzuela-Bernal*, 458 U.S. at 873-74. "Reasonable possibility" and "reasonable likelihood" are synonymous. United States v. Strickler, 119 S. Ct. 1936, 1957 (1999).

126. *Strickler*, 119 S. Ct. at 1957.

127. *Id.*

128. *Id.* at 1960.

129. *Id.* at 1959.

130. *Id.*

131. *Id.*

court struggled to describe the difference, the iota of difference between these two standards made the difference in this case.

The only *Brady* case the CAAF decided in 1999 was *United States v. Morris.*[132] Lance Corporal (LCpl) Morris was charged with false official statement and indecent assault. The alleged victim of the indecent assault was a female cook who worked with LCpl Morris. Both LCpl Morris and the alleged victim described a relationship that was very close. Lance Corporal Morris contended that the relationship had a romantic and sexual component, which the alleged victim denied.[133]

The alleged indecent assault occurred in the barracks room of the alleged victim. The alleged victim's testimony and LCpl Morris's pretrial statements describe a similar sequence of events but they disagree about whether the alleged victim consensually participated in the events.[134]

Prior to trial, the defense requested all inpatient and outpatient psychological and medical records of the alleged victim. The government opposed production, and the military judge conducted an in camera review of the records. The judge disclosed one document that contained a statement which the alleged victim made to her counselor about the alleged assault. The judge determined that the records did not contain any other information material to the defense. After trial, the defense discovered the records contained records diagnosing the alleged victim with post traumatic stress disorder (PTSD) and other records describing her as having difficulty controlling her impulses. The defense claimed these records were material because they related to the alleged victim's credibility and her motive to fabricate.[135]

A *Brady* violation has three components.[136] Here, the judge did not disclose evidence favorable to the accused to the defense. The issue in the case was whether the undisclosed evidence was material. The standard for materiality depends on the specificity of the defense's discovery request.[137] In *United States v. Hart*,[138] the military courts found additional protection for accused soldiers based on Article 46, UCMJ.[139] The CAAF appears to have applied the proper standard in its materiality determination. The court's convoluted approach makes it hard to tell whether the court's analysis was stealthful or accidental.

Morris is a confusing opinion because the court did not analyze the case using the *Bagley-Hart* formulation. Under *Bagley*, the test for materiality is whether there is a reasonable probability of a different result at trial. A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[140] However, *Hart* affords service members more protection than the constitutional minimum "where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'"[141] The pretrial discovery request in *Morris* specifically identified the records that the defense sought.[142] One would expect the court to find the undisclosed evidence is material unless the failure to disclose is harmless beyond a reasonable doubt.

In *Morris*, a majority of the court depended on *United States v. Eshalomi*[143] for its materiality standard. "Where the defense has submitted 'a general request for exculpatory evidence or information' but no request for any 'particular item' of evidence or information, failure to disclose evidence 'is reversible error only if the omitted evidence creates a reasonable doubt

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132. 52 M.J. 193 (1999).

133. *Id.* at 194-96.

134. The defense counsel's opening statement included:

> [B]efore I tell you what evidence you are going to hear from the defense and the Government in this case . . . I want to make one thing absolutely clear. Lance Corporal Morris did kiss Lance Corporal [CM] on the neck, on the cheek, between the breasts. No dispute. He did suck on her breasts as well. No dispute. And he did pull her hand to his erect penis. This is all going to be clear. Not in dispute. The only issue in dispute, an issue that you're really going to have to focus on during this week is whether he did it against her will and without her consent, with unlawful force and violence.

Id. at 197.

135. *Id.* at 196-97.

136. *See supra* note 92 and accompanying text (identifying the components of a *Brady* violation).

137. *See supra* note 121 and accompanying text (discussing the standards for materiality).

138. United States v. Hart, 29 M.J. 407 (C.M.A. 1990).

139. "[W]here prosecutorial misconduct is present or where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id.* at 410.

140. *See supra* note 122 and accompanying text.

141. *Hart*, 29 M.J. at 410; *see also* United States v. Green, 37 M.J. 88 (1993); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993).

that did not otherwise exist.'"[144] The court concluded that the undisclosed evidence did not create a reasonable doubt that did not otherwise exist. The court noted that the accused's second statement to investigators was inconsistent with the defense theory of the case at trial. Based on the entire record, the court had "no reasonable doubt [about] the validity of the proceedings."[145] The standard the court applied appears to be the same as the harmless beyond a reasonable doubt standard.

Under the *Bagley-Hart* formulation, the court will only apply the harmless beyond a reasonable doubt standard if the defense request is a specific request. However, the court characterized the defense's discovery request as a general request. The court did not explain the difference between a specific and a general request.[146] It is hard to imagine a request being any more specific than the one in *Morris*.[147]

The court may have applied the correct standard, however, the court's analysis raises two related issues. First, did the court commit the same error the Fourth Circuit committed in *Strickler*?[148] The Fourth Circuit approached the issue as "whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions."[149] In *Morris*, the court relied on the "compelling evidence of guilt" provided by the accused to find the error harmless beyond a reasonable doubt.[150] The court appears to be evaluating the evidence of guilt free of the taint from the disclosure problem to see if the untainted evidence is sufficient to sustain the conviction beyond a reasonable doubt. *Strickler* made clear that this is the wrong approach. The correct approach is whether "the [undisclosed] favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[151] This brings us to the second issue.

Regardless of whether the court's approach was correct or not, the court's conclusion that the accused provided compelling evidence of guilt is unconvincing. The court points to the accused's second statement to investigators as compelling evidence of guilt.[152] Lance Corporal Morris was tried by a panel of officer and enlisted members who heard this "compelling" evidence. The members apparently did not find the accused's statement all that compelling; they found him not guilty of the indecent assault. The accused was found guilty of the lesser included offense of assault consummated by a battery.[153] One would think that if LCpl Morris's statement was so damning, the members would have convicted him of the charged offense.

In dissent, Judge Effron approached the problem correctly. He considered the use the defense could have made of the undisclosed evidence to see if the failure to disclose put the case in such a different light as to undermine confidence in the ver-

142. The records the defense requested included:

> [A]ll psychological and medical records of the alleged victim in the subject case, to include inpatient and outpatient medical records, counseling records maintained by the Family Service Center at MCAS El Toro and all other Family Service Centers that rendered assistance to the alleged victim, and to include the personal notes of the counselors and Doctors and Psychologists who evaluated and/or provided treatment to the alleged victim.

United States v. Morris, 52 M.J. 193, 196 (1999). The records request was specific enough that when the military judge ordered an in camera inspection the trial counsel was able to produce the records. *Id.*

143. 23 M.J. 12 (1986).

144. *Morris*, 52 M.J. at 197-98 (citing *Eshalomi*, 23 M.J. at 22 (1986), quoting United States v. Agurs, 427 U.S. 97, 112 (1976)). A majority of the court seemed to think that the defense request was general. The dissent implicitly agreed by applying the *Bagley* standard for general requests. *Morris*, 52 M.J. at 198-200.

145. *Id.* at 198. If the court means the failure to disclose is reversible error only if the undisclosed evidence creates a reasonable possibility of a reasonable doubt, the court is applying the harmless beyond a reasonable doubt standard. If the court means the failure to disclose is reversible error only if the defense proves the undisclosed evidence creates a reasonable doubt, the court is applying a standard that is even more demanding than the reasonable probability standard.

146. *See Agurs*, 427 U.S. at 106. "In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired." *Id*.

147. *See supra* note 142 (enumerating the records requested by the defense).

148. *See supra* note 102 and accompanying text (characterizing the test erroneously applied by the Fourth Circuit Court of Appeals).

149. Strickler v. Greene, 119 S. Ct. 1936, 1952 (1999).

150. United States v. Morris, 52 M.J. 193, 198 (1999).

151. *Strickler*, 119 S. Ct. at 1952 (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

152. *Morris*, 52 M.J. at 198. "Appellant provided compelling evidence of his guilt. His second statement totally undermined the defense theory that CM consented to his sexual advances." *Id.*

153. "A special court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of making a false official statement . . . Appellant was also charged with indecent assault . . . but he was convicted only of the lesser-included offense of assault consummated by a battery." *Id.* at 194.

dict. The undisclosed evidence of PTSD would have been very useful to the defense.

> Appellant's version of the events in CM's apartment reflects her abrupt, unexplained, and seemingly unexplainable mood change—from sensual and consensual to a sharp demand to stop. Without the PTSD evidence, the members were left to wonder why a supposedly close and intimate friend would suddenly reverse moods in the midst of purportedly consensual sexual activity. With that information—and with expert testimony explaining PTSD and applying it to the events in the case—the members would have had the opportunity to consider a plausible explanation, which they could choose to accept or reject, for CM's conduct.[154]

Judge Effron noted the undisclosed evidence that the alleged victim had trouble controlling her impulses would have been equally helpful to the defense.

> Similarly, the psychological evidence that CM had "trouble controlling her impulses" would have provided the court members with an opportunity to consider a plausible explanation in support of the evidence that CM, while dating another man, permitted herself to be in a compromising position with appellant. The morning after the incident with appellant, CM's boyfriend inquired about marks on her neck, and she initially responded that she had been cheating on him, at which point he became enraged. This information would have set the stage for the members to consider whether CM fabricated the allegations of sexual [assault] to assuage the anger of her boyfriend.[155]

The undisclosed evidence was consistent with the defense's theory of consent. Moreover, the defense counsel could have used the undisclosed evidence to undermine the credibility of the alleged victim.

The case boiled down to the accused's word against the alleged victim's word. Both had credibility problems.[156] Clearly, the members had difficulty believing the alleged victim completely. If they believed her completely, they would have convicted LCpl Morris of indecent assault. However, the members must have believed that something happened; they compromised and found LCpl Morris guilty of a lesser included offense. Would the undisclosed information have been enough to cause the members to believe the accused, or to disbelieve the alleged victim? Does the undisclosed favorable evidence put the whole case in such a different light as to undermine confidence in the verdict? Judge Effron thought so; he presented the more persuasive argument.[157]

The Army court decided *United States v. Kelly*[158] on *Brady* grounds. Although the court found that the trial judge abused his discretion in failing to conduct an in camera inspection, the court granted no relief because the court found "no reasonable probability that the result of trial would have been different in this case if either the trial defense counsel or military judge had inspected SSG N's military personnel file."[159] This is a breathtaking conclusion given no one had reviewed the disputed record to see if it contained evidence favorable to the accused.

The court found a trial error but "mixed apples with oranges." The result denied the accused any possibility of receiving relief. Perhaps the proper disposition of this case would be to return the record to the trial judge to conduct the in camera inspection, which the judge should have done in the first place. If it turned out that the record contains evidence favorable to the accused, the court could conduct the *Brady* analysis knowing the magnitude of the impact of the nondisclosure. If the record contained no evidence favorable to the accused, the court could be confident in the trial result. The court conducted the *Brady* analysis before it could possibly know whether there was a *Brady* violation. Moreover, by disposing of this abuse of discretion by finding no *Brady* violation, the court is connecting two legal concepts which do not belong together.

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154. *Id.* at 199. To believe LCpl Morris's version, the members would have to believe that the alleged victim was capable of very erratic behavior. *See id.* at 196.

155. *Id.* at 199.

156. The accused had made inconsistent statements to investigators and was convicted of making a false official statement. *Id.* at 194-96. The alleged victim had initially told her boyfriend, who noticed marks on her neck that she had been cheating on him. This implies consensual sexual conduct. The alleged victim only claimed LCpl Morris sexually assaulted her after her boyfriend became angry. *Id.* at 195.

157. *Id.* at 199. The only curious part of Judge Effron's dissenting opinion is why he treated this discovery request as a general request and not a specific request. Judge Effron could have reached his decision based on statutory grounds instead of reaching the constitutional issue. If Judge Effron had treated the request as a specific request, he would have reached the same result, only he would have held the government to the more demanding harmless beyond a reasonable doubt standard. *See supra* note 138 and accompanying text.

158. No. 9600774, 1999 CCA LEXIS 332 (Army Ct. Crim. App. Sept. 29, 1999). *See supra* note 66 and accompanying text (discussing the court's conclusion that the military judge abused his discretion).

159. *Id.* at *10 (footnote omitted).

Not only did the court conduct the *Brady* analysis prematurely, the court conducted it badly. A *Brady* violation has three parts: evidence favorable to the accused, which is not disclosed to the defense, and causes prejudice to the accused.[160] The prejudice analysis is the materiality determination discussed above.[161] The standard applied to determine materiality depends on the specificity of the defense discovery request. If the defense made a general request for discovery, the undisclosed evidence is material if there is a reasonable probability of a different result at trial.[162] If the defense made a specific request, the undisclosed evidence is material unless the failure to disclose is harmless beyond a reasonable doubt.[163] To determine materiality "the omission must be evaluated in the context of the entire record."[164] To determine materiality, the court must know what the omission or undisclosed evidence is. In this case, the records were not disclosed to the defense, but no one knows if the records in question contained any evidence favorable to the accused. Because no one knows what the favorable evidence is (if any exists) how can the court possibly determine the impact (if any) the nondisclosure would have on the trial result?

Citing *Bagley*, the court found "no reasonable probability that the result of trial would have been different."[165] By using this standard, the court treated the defense's request as a general request. The court does not explain why the defense's request is not a specific request. The defense requested "the personnel and medical records of SSG N."[166] How much more specific could the defense counsel have been? The defense request made clear to the trial counsel what the defense wanted.[167] In addition to performing the *Brady* analysis prematurely, the court used the wrong standard for materiality. Of course, using the correct standard does not eliminate the problem of not knowing the contents of the undisclosed favorable evidence.

The Army court failed to act on the nondisclosure issue the first time the court reviewed this case. The CAAF directed the Army court to reconsider whether the trial judge abused his discretion by not conducting the in camera review.[168] The CAAF should return the case again and direct an in camera review of the contested records. If the record contains no evidence favorable to the accused, then no *Brady* violation occurred. If the record contains evidence favorable to the accused, then the court should determine if the failure to disclose is harmless beyond a reasonable doubt. The Army court may be right, but until someone reviews the records, the court is operating in the dark.

This year's *Brady* cases highlight the limitations of language to express ideas precisely. In *Strickler*, a man's life depended on the difference between a reasonable possibility and a reasonable probability. Justice Souter's review of the evolution of the reasonable probability standard reveals that the difference between the two standards is small. In *Morris*, the court's approach in conducting the materiality determination is crucial, but it is hard to conceptualize the difference between the approach the court applied[169] and the approach required.[170] *Kelly* demonstrates the peril of applying the *Brady* analysis prematurely. All of these nuances make the resolution of *Brady* issues unpredictable.

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160. *See supra* note 92 and accompanying text (discussing the components of a *Brady* violation).

161. *See supra* note 93 and accompanying text (discussing the materiality determination).

162. *See supra* notes 95-97 and accompanying text (discussing the standards for materiality).

163. "[W]here prosecutorial misconduct is present or where the government fails to disclose information pursuant to a specific discovery request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990); *see also* United States v. Green, 37 M.J. 88 (1993) (Wiss, J., concurring); United States v. Stone, 37 M.J. 558 (A.C.M.R. 1993) (finding the nondisclosure to be harmless beyond a reasonable doubt).

164. United States v. Agurs, 427 U.S. 97, 112 (1976).

165. United States v. Kelly, No. 9600774, 1999 CCA LEXIS 332, at *10 (Army Ct. Crim. App. Sept. 29, 1999).

166. *Id.* at *3.

167. "In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired." *Agurs*, 427 U.S. at 106.

168.

> On 29 April 1999, the Court of Appeals for the Armed Forces set aside our previous decision, and remanded the case . . . . Our superior court also asked that we give further consideration to the trial defense counsel's request to examine the personnel file of the alleged threat victim for impeachment material.

Kelly, 1999 CCA LEXIS 332, at **2-*3.

169. In *Morris*, the court relied on the "compelling evidence of guilt" provided by the accused to find the error did not raise a reasonable doubt that did not otherwise exist. This modified sufficiency of the evidence test is clearly wrong. *See supra* note 102 and accompanying text (discussing the appropriate test for a *Brady* materiality determination).

Conclusion

With language this malleable, the only certain way to prevail on a *Brady* issue is to avoid it. Trial counsel can avoid *Brady* issues by diligently reviewing the records he has a duty to inspect for evidence favorable to the accused. When a trial counsel is caught in the "no man's land" between a witness who demands that his privacy be respected by not disclosing his files, and the professional obligation to disclose the very same documents, the trial counsel can request that the military judge review the documents in camera and disclose any material information to the defense. Military judges can prevent *Brady* issues by liberally granting requests for in camera reviews. The adage, "an ounce of prevention is worth a pound of cure," may underestimate the value of prevention in the context of *Brady* violations.

170. In *Strickler*, the Court made clear that the test is not whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. The proper approach is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *See supra* note 104 and accompanying text (discussing the appropriate test for a *Brady* materiality determination).