New Developments in the Law of Discovery: *When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?*

Major Christina E. Ekman
Professor, Criminal Law Department
The Judge Advocate General's School, United States Army
Charlottesville, Virginia

"The prudent prosecutor will resolve doubtful questions in favor of disclosure." . . . Such disclosure will serve to justify the trust in the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[1]

Introduction

One of the hallmarks of our civilian justice system is the "special role played by the American prosecutor in the search for truth in criminal trials."[2] In the military criminal justice system, this special role is even more pronounced. Article 46, Uniform Code of Military Justice (UCMJ), mandates equal access to the evidence, placing an additional burden on the government.[3] Rule for Courts-Martial (RCM) 701 implements Article 46.[4] The purpose of the military's broad discovery rules, and specifically RCM 701, is "to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure [for example, Military Rule of Evidence (MRE)] 301; Section V] and to eliminate 'gamesmanship' from the discovery process."[5]

A trial counsel's good faith is generally irrelevant when a discovery issue arises. The best way for trial counsel to avoid potential disaster is to understand and follow both the constitutional and the statutory rules. Likewise, the defense counsel who understands these rules will be better equipped to represent the military accused effectively throughout the court-martial process. To this end, both trial and defense counsel, *particularly* the trial counsel, must understand significant new developments in the law of discovery. This article endeavors to assist counsel in understand these new developments and their implications for the military trial practitioner.

In any court-martial, the constitutional due process discovery requirements set out in the *Brady v. Maryland*[6] line of cases apply, as do Article 46, UCMJ; RCM 701; RCM 703; and other discovery rules triggered by particular facts and circumstances. A critical distinction in this area of court-martial practice is the difference between the constitutional discovery requirements and the statutory requirements that flow from Article 46, as reflected in RCM 701 and RCM 703.

This article first touches on the constitutional analysis, principally embodied in *Brady v. Maryland*, focusing on *Leka v. Portuondo*,[7] a federal court of appeals case addressing time requirements imposed by the *Brady* line of cases on government disclosure of favorable evidence. Second, to highlight the distinction between constitutional and statutory discovery requirements, this article addresses the impact of Article 46 on military discovery practice, focusing on a split between the Air Force and Army Courts of Criminal Appeals, as well as a Court of Appeals for the Armed Forces (CAAF) interlocutory order that sheds some light on the potential resolution of this conflict.

When Is Late Too Late—Timeliness of *Brady* Disclosures

According to the Supreme Court, a *Brady* due process violation has three important components. First, the evidence at issue must have been favorable to the defendant.[8] Favorable evidence is evidence that either negates guilt, reduces the

1. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976); Berger v. United States, 295 U.S. 78, 88 (1935)).

2. Strickler v. Green, 527 U.S. 263, 281 (1999).

3. UCMJ art. 46 (2000). "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." *Id*. (emphasis added).

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) (2000) [hereinafter MCM].

5. *Id*. R.C.M. 701 analysis, app. 21, at A21-32.

6. 373 U.S. 83 (1963).

7. 257 F.3d 89 (2d Cir. 2001).

8. *Brady*, 373 U.S. at 87.

degree of guilt, or reduces the punishment that should be imposed in a given case.[9] Such evidence can be either exculpatory or impeachment evidence.[10] Second, the government must have failed to disclose the favorable evidence.[11] Third, this nondisclosure must have prejudiced the defendant; that is, the undisclosed evidence must have been material to either guilt or punishment.[12]

The *Brady* rule attempts to ensure that defendants in the United States receive fair trials.[13] *Brady* requires the government to disclose favorable evidence, regardless of whether the defense has requested it.[14] This requirement also imposes an affirmative duty on the prosecutor to search for such evidence.[15] Although the *Brady* line of cases discusses, in depth, concepts such as materiality, favorable evidence, and triggers for the disclosure requirement, it has never established a particular timeline. *Leka v. Portuondo*[16] provides some helpful insight into this issue.

Leka v. Portuondo

In *Leka v. Portuondo*, the Court of Appeals for the Second Circuit tackled the issue of the timeliness for *Brady* disclosures.[17] The Supreme Court of New York, Kings County, convicted the appellant of one count of second-degree murder and two counts of criminal possession of a weapon for the 12 February 1988 shooting death of his relative, Rahman Feratia.[18] The State's case centered on the eyewitness testimony of two people who happened to be walking down the street when the shooting began.[19] According to the appellant's *Brady* claim, there were three other eyewitnesses, all of whom the police had interviewed, and whose stories contradicted the couple's testimony. One of these three witnesses was an off-duty New York City Police Department officer, Wilfredo Garcia.[20] Officer Garcia's testimony would have been favorable to the defense theory of misidentification;[21] however, despite the nature of Officer Garcia's potential testimony, the State did not disclose Officer Garcia's name until three business days before trial. The defense had requested discovery twenty-two months before the scheduled trial date.[22] This timeline became critical to the court's analysis.[23]

The court began its analysis by applying the first prong of *Brady*; that is, by determining whether the undisclosed evidence was favorable to the defense. In this case, Officer Garcia's potential testimony was favorable to the defense.[24] The court then applied the second *Brady* prong; that is, the court determined whether the government failed to disclose this favorable evidence, even though it ultimately disclosed Officer Garcia's name to the defense. In answering this question, the court considered both the substance and the timeliness of the

9. *Id*. at 87, 88.

10. United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972).

11. *Brady*, 373 U.S. at 87.

12. *Id*; *see also* Strickler v. Green, 527 U.S. 263 (1999).

13. *Bagley*, 473 U.S. at 675.

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

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

16. 257 F.3d 89 (2d Cir. 2001).

17. *Id*.

18. *Id*. at 91. At the time of the shooting, the victim and the appellant were involved in a bitter child custody dispute over the victim's two grandchildren. *Id*.

19. *Id*. at 91-92. As the couple walked down the street, they saw a car pull up, and the shooting started. The woman had noticed the car just a few moments earlier and remembered the driver because the driver's face was bandaged. She later identified the appellant as the passenger. Upon hearing the shots, the couple dove behind some parked cars. The man lifted his head twice to see what was happening. The first time, he saw an arm holding a gun sticking out of the car's passenger window. The second time, he saw a man, whom he later identified as the appellant, standing in the street shooting downward. *Id*.

20. *Id*. at 92. Although the defense identified three witnesses who were not disclosed, the court limited its opinion to the State's *Brady* violation *vis-à-vis* Officer Garcia. *Id*. at 97-98.

21. *Id*. at 99. Officer Garcia was in his second floor apartment, looking out his window for a friend who was coming over. When he heard the gunfire, he looked in the direction of the sound and saw a white car pull up in front of a man in the street. Officer Garcia said that he saw muzzle flashes coming from the passenger side of the vehicle and saw a bus drive around the white car. He ran into his bedroom to get his off-duty weapon and heard other shots. He looked out the window again and saw more muzzle flashes coming from the passenger side of the white car. He ran out of his apartment and heard more gunfire as he ran down the steps of his building. By the time Officer Garcia got to the main floor of the building, the shooting was over; by the time he left the building, the white car was gone. This took about fifteen to twenty seconds. Outside on the street, Officer Garcia saw a man lying in front of his car, a black revolver next to his body. *Id*. at 92-93.

22. *Id*. at 93.

disclosure. The State argued that disclosure of Officer Garcia's name and address alone, although close to the trial date, gave the defense enough information and time to investigate adequately. The court disagreed.[25] From the beginning of the case, the prosecutor knew what Officer Garcia had seen. Based on this fact, as well as the favorable nature of the evidence, the court decided that the State had suppressed information that it was required to turn over to the defense.[26]

In discussing the issue of timely disclosure, the court acknowledged that neither *Brady* nor its progeny established a strict timetable for favorable evidence disclosures. In fact, *Brady* permits disclosure of certain evidence during and even after trial.[27] Again, a critical question was when the prosecutor learned of the evidence. Also important to the inquiry was whether or not, under the circumstances, the defense had a sufficient opportunity to use the evidence once the State disclosed Officer Garcia's name.[28] The State argued that the defense had time to interview Officer Garcia in the business days leading up to trial and that the defense bore full responsibility for its "bungled" interview attempt. The court remained unconvinced, pointing out that the late disclosure had "created the hasty and disorderly conditions under which the defense was forced to conduct its essential business" in the first place.[29] The unfortunate circumstances of the defense attempt to interview Officer Garcia demonstrated why delayed disclosure of evidence diminishes its value to the defense.[30]

The court readily acknowledged that the *Brady* material that the State actually disclosed could have led to exculpatory or impeachment evidence; however, it went on to say that the defense could only have developed the evidence through further investigation, which the time constraints effectively prevented.[31] The court explained that *Brady* envisions the defense having a real opportunity to use with some degree of calculation and forethought favorable evidence that the government discloses. In this case, the State effectively foreclosed any possibility that the defense could call Officer Garcia to the stand with any responsible degree of forethought and planning.

Opting not to address the potential prosecutorial misconduct, the court held that the State did not make sufficient disclosure in sufficient time to afford the defense an adequate opportunity to use the evidence. Leaving open the possibility that more thorough disclosure may have satisfied *Brady*, the court held that the prosecutor had disclosed too little, too late. This constituted "suppression" under the *Brady* standard.[32] "It is not enough for the prosecutor to avoid active suppression of favorable evidence; *Brady* and its progeny require disclosure."[33]

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23. The appellant was arrested and charged with the murder on 8 March 1988. The case went to trial on 26 February 1990. At a pretrial hearing on 21 February 1990, three business days before the scheduled trial date, the prosecutor finally identified Officer Garcia to the defense, but mentioned neither Officer Garcia's inability to positively identify the appellant nor the fact that he had information favorable to the defense. During the unsuccessful plea negotiations, the State referred to Officer Garcia, without disclosing his name, claiming that he could positively identify the appellant as the shooter. A week after identifying Officer Garcia to the defense, the prosecutor requested a protective order, alleging to the court that the defense had tried to trick Officer Garcia into talking to them. The judge's remedy prevented the defense from interviewing Officer Garcia in the short time between the late disclosure and the trial date. *Id*. at 94-95.

24. *Id*. at 99. In deciding that this evidence was favorable to the defense, the court explained in detail why Officer Garcia's testimony would cast serious doubt on the testimony of both prosecution eyewitnesses at trial. First, if the shooting started as the car pulled over, it was not likely that the trigger puller was the same person identified by one of the eyewitnesses. According to the government eyewitness, this person had been idly joking immediately before the shooting started. Second, if the victim had also fired shots, it was unlikely that the person identified by one of the eyewitnesses as shooting downward was the appellant. *Id*.

25. *Id*.

26. *Id*. at 103. In reaching its decision on this point, the court made the following specific findings: (1) that in plea negotiations the State singled Officer Garcia out as a key witness who was able to positively identify the appellant without disclosing his name; (2) that Officer Garcia's observations would have undermined both prosecution eyewitnesses' testimony; (3) that Officer Garcia's police training in observation skills would likely have caused jurors to credit his testimony; (4) that after the prosecution identified Officer Garcia to the defense, it successfully prevented the defense from interviewing him; and (5) that the prosecution never disclosed the true nature of Officer Garcia's testimony to the defense. *Id*. at 98-99.

27. *Id*. at 100 (citing Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976)).

28. *Id*.

29. *Id*. at 101.

30. *Id*.

31. *Id*. The court pointed out that at this late stage in the trial process, new information can throw a carefully thought out and prepared defense case into disarray. Further, once the trial starts, defense resources are brought to bear on the trial, not on investigation. *Id*. at 101-03.

32. *Id*. The court also applied the third prong of *Brady*, concluding that the suppressed evidence was material to the defense. *Id*. at 103-07. That analysis is beyond the scope of this portion of the article.

33. *Id*. at 103.

Implications for the Military Practitioner

Although only persuasive authority, *Leka v. Portuondo* is an important reminder for counsel that disclosure must be both complete and timely. This is particularly important to the trial counsel in a busy jurisdiction, juggling cases at various stages of development.[34] The trial counsel must ensure that evidence is disclosed in a timely fashion and that there is an obvious paper trail, maintained in the original case file, proving that the evidence was disclosed.[35] If undisclosed evidence is allowed to pile up until the eve of trial, attempts to salvage the case will likely fail. Of course, the best solution is to timely disclose.

Does Article 46, UCMJ, Have Teeth?

While it is critical that counsel understand the *Brady* line of cases and the constitutional due process implications of nondisclosure, these cases do not encompass the entire body of knowledge necessary to succeed in military discovery practice. Article 46, UCMJ, the RCMs implementing Article 46, and the corresponding body of military case law are interrelated with *Brady*, but also distinct. In military practice, it is possible for the government to violate RCM 701 and Article 46, UCMJ, without violating *Brady* and committing a constitutional due process violation. Rule for Courts-Martial 701(a)(6) is based on *Brady v. Maryland*.[36] Rule for Courts-Martial 701(a)(2), while consistent with *Brady*, is not limited to favorable evidence; it requires disclosure of evidence material to the defense.[37]

Even with the differences, however, the first step in addressing a military discovery issue must be the constitutional analysis. To lay the foundation for the discussion of *United States v. Figueroa*,[38] *United States v. Adens*,[39]and *United States v. Kinney*,[40] this article next discusses the Supreme Court's materiality analysis in *United States v. Bagley*.[41] The focus is on the third component of a *Brady* violation; that is, whether the undisclosed evidence was material either to the defendant's guilt or punishment.[42] The article then addresses *United States v. Hart*,[43] a 1990 Court of Military Appeals (COMA) decision addressing the impact of Article 46, UCMJ, on military discovery practice, as well as some later cases that confuse the *Hart* materiality standard. Against this backdrop, the article finally

34. In that situation, it is important that the trial counsel "touch" each case file at least weekly, talk to the investigators regularly about cases and review their case files, interview all witnesses, and, most importantly, track evidence that is favorable to the defense that must be disclosed. Checklists are very helpful in this regard. Of course, the work does not end there.

35. The necessity of tracking documents is not limited to *Brady* evidence, of course. Both trial and defense counsel should never turn discovery over without attaching a transmittal document, listing what is being provided, the date, and requiring the receiving party's signature. This will eliminate confusion over what happened during discovery.

36. MCM, *supra* note 4, R.C.M. 701(a)(6) analysis, app. 21, at A21-33. This rule requires the trial counsel to,

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

Id. R.C.M. 701(a)(6).

37. *See id*. R.C.M. 701(a)(2).

> *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:
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> (A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof which are within the possession, custody, or control of military authorities, *and which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and
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> (B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, *and which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Id. (emphasis added).

38. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

39. 56 M.J. 724 (Army Ct. Crim. App. 2002).

40. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

41. 473 U.S. 667 (1985).

42. *See supra* notes 8-12 and accompanying text.

43. 29 M.J. 407 (C.M.A. 1990).

addresses the current state of the law and the resulting implications for practitioners.

Brady v. Maryland suggests that the standard for determining the materiality of favorable evidence not disclosed by the government can vary, depending on the facts and circumstances of the particular case.[44] In *United States v. Bagley*,[45] the Supreme Court identified a two-pronged test to be applied. If there is prosecutorial misconduct, undisclosed favorable evidence will be deemed material to the defense unless the failure to disclose is harmless beyond a reasonable doubt.[46] In all other cases, regardless of the specificity or existence of a defense discovery request, the undisclosed favorable evidence will be deemed material to the defense if there is a *reasonable probability* that, had the evidence been disclosed, the result at trial would have been different. The court defined *reasonable probability* as a probability sufficient to undermine confidence in the result of the trial.[47]

In articulating this standard, the Supreme Court specifically rejected holding the government to a higher "harmless beyond a reasonable doubt" standard, even when the government ignores a specific defense discovery request. [48] Again, in all of these cases, the Supreme Court was examining potential violations of a defendant's constitutional due process rights. Additionally, just as *Brady* did not establish a strict timeline for disclosure of favorable evidence, these decisions left open the issue of evidence that is unfavorable but still material to the defense.

In *United States v. Hart*,[49] the COMA addressed the issue of nondisclosure of evidence specifically requested by a military accused, focusing first on the constitutional analysis flowing from the *Brady* line of cases, and then addressing the impact of Article 46, UCMJ.[50] Following *Hart*, it appeared that Article 46 held the government to a higher standard than *Brady* and *Bagley*. Thus, violations of Article 46 would have consequences not found in civilian practice.[51] *Hart* suggests that both a constitutional and a statutory analysis are necessary in cases involving government failure to disclose favorable evidence to the defense.[52]

In the years since *Hart*, confusion has developed regarding both the necessity for a separate, statutory analysis in discovery cases and the appropriate standard of review in such cases.[53] In two recent cases, *United States v. Figueroa*[54] and *United States v. Adens*,[55] the Army and Air Force Courts of Appeals wrestled with this issue, reaching two very different results. The CAAF has also tangentially addressed this issue in *United States v. Kinney*,[56] shedding some light on this split of authority.

United States v. Figueroa

In *United States v. Figueroa*,[57] the Air Force Court of Criminal Appeals (AFCCA) examined the government duty to disclose favorable information to the defense when the defense has made a specific RCM 701 request for such disclosure. Determining the failure to disclose to be error, the court held that the undisclosed evidence was not material because there was no reasonable probability that, had the evidence been disclosed, the result at trial would have been different.[58]

On 20 July 1999, the appellant was randomly selected to provide a urine sample as part of the Air Force drug-testing program at Vandenberg Air Force Base (AFB) in California. His urine tested positive for the metabolite of cocaine at 56,717 nanograms per milliliter (ng/ml). The urine analysis was con-

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44. United States v. Agurs, 427 U.S. 97, 104 (1976) (construing Brady v. Maryland, 373 U.S. 83 (1963)); *see also Hart*, 29 M.J. at 409.

45. 473 U.S. 667 (1985).

46. *Id*. at 697-80. If the government can meet the burden of proof, then a defendant's due process rights were not violated by the improper withholding of evidence. *Id*.

47. *Id*. at 682. If there is no reasonable probability that the result at trial would have been different, then the defendant's due process rights were not violated by the improper withholding of evidence. *Id*.; *see also* Strickland v. Washington, 466 U.S. 668, 694 (1984).

48. *Bagley*, 427 U.S. at 682. The court reasoned that a higher standard of materiality was unnecessary even when the defense had made a specific request for the undisclosed evidence because under *Strickland* the reviewing court could consider directly any adverse effect that resulted from the suppression in light of the totality of the circumstances. *Id.* at 682-83.

49. 29 M.J. 407 (C.M.A. 1990).

50. *Id*. In *Hart*, the government failed to disclose DNA test results that were favorable to the accused, as well as the assault victim's inability to identify his assailant in a photographic lineup. There was no specific defense request for discovery. The primary issue at trial was the attacker's identity. The court specifically agreed with Judge Gilley and the court below that under Article 46 a military accused had much broader discovery rights than most civilian defendants. The court went on to say that "where the Government fails to disclose information pursuant to a specific request, the evidence will be considered 'material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id*. at 410 (quoting United States v. Hart, 27 M.J. 839, 842 (A.C.M.R. 1989)). In the absence of a specific request, the failure to disclose would only be material if there "'is a reasonable probability' that a different verdict would result from disclosure of the evidence." *Id*. (quoting *Hart*, 27 M.J. at 842).

51. *Id*. at 410.

52. *Id*. at 409-10; *see also* United States v. Green, 37 M.J. 88, 90-91 (C.M.A. 1993) (Wiss, J., concurring).

ducted at the Air Force drug-testing laboratory at Brooks AFB.[59] On 31 August 1999, the appellant's defense counsel made a discovery request, specifically requesting exculpatory evidence, evidence tending to negate the accused's guilt, and "evidence of a derogatory nature concerning the Brooks AFB drug-testing laboratory."[60] Less than two months later, the appellant provided another urine specimen for testing as part of a one-hundred percent unit inspection. This specimen, also sent to the Brooks AFB laboratory, tested positive for the metabolite of cocaine at 951 ng/ml.[61]

On 13 December 1999, the appellant was convicted, according to his pleas, of two specifications alleging wrongful use of cocaine and one specification of absence without leave. He was sentenced to a bad-conduct discharge, confinement for five months, and forfeiture of $500 pay per month for five months.[62] After trial, while preparing post-trial clemency submissions, the defense counsel obtained a report of investigation (ROI), dated 28 January 2000, from the drug-testing laboratory. The ROI cast doubt on the forensic integrity of urinalysis samples tested by one of the technicians. Several other documents were attached to the ROI, including the following: a 5 November 1999 letter de-certifying a technician who had performed part of the testing on both of the appellant's urine samples, a 19 November 1999 letter denying that same technician access to the Gas Chromatography/Mass Spectrography Laboratory area, and a 29 November 1999 letter restricting his access to the investigations room. The ROI concluded that while the samples handled by this technician were analytically sound, they had been forensically compromised.[63]

On appeal, the defense argued that the government failed to disclose evidence that was material to the defense, and that had this evidence been disclosed, there likely would have been a different result at trial.[64] The AFCCA's analysis started with a discussion of Article 46, UCMJ, and RCM 701(a)(2) and (6), as well as the *Brady* line of cases. The key question for the court was whether the withheld evidence was "material to the preparation of the defense."[65] Previous cases stated that both impeachment and exculpatory evidence could be material.[66] The court next addressed the issue of due diligence and the scope of a trial counsel's duty to search for information favorable to the accused. According to *United States v. Williams*,[67] this duty to search extends beyond the trial counsel's own files

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53. *Green*, 37 M.J. at 88. In *Green*, the defense made a specific request for evidence that the government failed to disclose. The majority held that "[i]f we have a 'reasonable doubt' as to whether the result of the proceeding would have been different, we grant relief. . . . If, however, we are satisfied that the outcome would not be affected by the new evidence, we would affirm." *Id*. at 90 (citation omitted).

In his concurring opinion, Judge Wiss pointed out that the burden is actually the reverse of what the majority articulated. According to Judge Wiss, the court had already recognized the broader discovery rights available to a military accused in *Hart*, when the majority agreed with Judge Gilley from the Army court that

> [w]here prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, *the evidence will be considered "material unless failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.*" Where there is no request or only a general request, the failure will be "material only if there is a reasonable probability that" a different verdict would result from disclosure of the evidence.

Id. at 91 (Wiss, J., concurring) (quoting *Hart*, 29 M.J. at 410 (citations omitted)). *See also* United States v. Williams, 50 M.J. 436 (1999); United States v. Morris, 52 M.J. 193 (1999); United States v. Stone, 40 M.J. 420 (C.M.A. 1994).

54. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

55. 56 M.J. 724 (Army Ct. Crim. App. 2002).

56. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

57. 55 M.J. at 525.

58. *Id*. at 530-31.

59. *Id*. at 526. The Department of Defense cutoff for the metabolite of cocaine is 100 ng/ml.

60. *Id*. at 527.

61. *Id*. at 526.

62. *Id*.

63. *Id*. at 527.

64. *Id*.

65. *Id*. at 528 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)).

66. *Id*. (citing United States v. Watson, 31 M.J. 49, 54-55 (C.M.A. 1990); *Bagley*, 473 U.S. at 676 (1985)).

to (1) files of law enforcement authorities who investigated the misconduct underlying the criminal charges, (2) investigative files in related cases, and (3) other files specifically designated in the defense discovery request.[68] The court then correctly laid out the test for prejudicial error under the *Brady* line of cases,[69] concluding that *Brady* was not violated.[70]

Applying the law to the facts of *Figueroa*, the AFCCA found that the government erred in failing to disclose the various memorandums to the defense. The court then applied the constitutional due process test set out in *Bagley.* To apply the test, the court considered all of the evidence in the case and the likely impact of the undisclosed memorandums on that evidence had the government properly disclosed them. Ultimately, the court concluded that even if the memorandums had been properly disclosed, there was no reasonable probability that the result of the trial would have been different. The court pointed out that given the overwhelming evidence against him, the appellant would probably have pled guilty even if he had known about the memoranda. The court also specifically found that there would have been no reasonable probability that the result of the trial would have been different even if the appellant had pled not guilty.[71]

The opinion becomes confusing, as the AFCCA wrestled with the issue of a separate, statutory analysis requirement under Article 46, UCMJ. The court characterized *Hart* as "raising the argument" that a higher standard of review was warranted when the government does not disclose evidence that is the subject of a specific defense discovery request.[72] As the AFCCA correctly noted, the Supreme Court talked about this issue at length in *Bagley* and *Agurs*. The AFCCA seems to have concluded that Article 46 is effectively indistinguishable from the constitutional due process analysis required by *Brady.* This conclusion ignores the COMA holding that the higher standard applied in such a situation flowed directly from the higher standard imposed by Article 46, *not* from the *Brady* line of cases.[73]

In *Figueroa*, the AFCCA correctly pointed out that in *Bagley*, the Supreme Court specifically rejected a higher standard of review in cases involving specific defense discovery requests.[74] The problem with the AFCCA's position is that the Supreme Court was simply addressing the constitutional due process analysis, not the higher standard imposed by Article 46, UCMJ. Thus, the Supreme Court's rejection of the higher standard of review does not apply when a court is applying the Article 46 statutory analysis. Once a court determines that government failure to disclose favorable evidence to an accused did not violate constitutional due process rights, the court must then apply the statutory analysis set out in *Hart* before resolving the discovery issue.

In *Figueroa*, even if the AFCCA had done an Article 46 analysis, the outcome would likely have been the same. The problem is, in a case involving government violation of Article 46, but with no corresponding constitutional due process or *Brady* issue, this misapplication of the law would be more likely to result in a bad decision because an Article 46 violation does not necessarily constitute a *Brady* violation. *United States v. Adens*[75] is just such a case.

United States v. Adens

The accused in *Adens* was convicted, contrary to his pleas, of wrongful use of cocaine. The convening authority approved the adjudged sentence to a bad-conduct discharge.[76] On appeal, the Army Court of Criminal Appeals (ACCA) held that

> trial counsel's failure to disclose material tangible objects as soon as practicable after discovery, along with the military judge's failure to give the members a curative instruction to disregard the already admitted testimony concerning the undisclosed evidence, materially prejudiced appellant's substantial right under Article 46, UCMJ, to have equal opportunity to the evidence

67. 50 M.J. 436 (1999).

68. *Id.* at 441.

69. This is the constitutional analysis to be applied when evidence that is both favorable and material to the defense has been improperly withheld.

70. *Figueroa*, 55 M.J. at 528.

71. *Id*. at 528-31.

72. *Id*.

73. United States v. Hart, 29 M.J. 407, 409-10 (C.M.A. 1990). Notably, *Hart* was a unanimous decision.

74. *Figueroa*, 55 M.J. at 528 (citing United States v. Bagley, 473 U.S. 667, 682 (1985); United States v. Green, 37 M.J. 88 (C.M.A. 1993)).

75. 56 M.J. 724 (Army Ct. Crim. App. 2002).

76. *Id.* at 725.

> against him, prejudicing his trial strategy and materially affecting both his counsel's presentation of the defense case and his credibility in front of the members.[77]

The government case against the appellant consisted of a registered government source's testimony and expert's testimony regarding the analysis of appellant's pubic hair samples. The government source was also a cocaine user. From the start, it became clear that a large part of the defense strategy was to either exclude or discredit the results of the scientific tests on the appellant's hair samples.[78] The central issue in the trial was whether the hair taken from the appellant was put in one or two ring-sized boxes.[79]

A controversy raged over this point. The litigation packet reported that the drug-testing laboratory received two ring-sized boxes, each containing the appellant's hair samples; however, during the pretrial hearings, the witnesses who were in the room when the appellant's hair sample was taken all testified that it was put in one ring-sized box. Further, two laboratory employees testified that their hair collection kits only contained one small hair sample box.[80]

Before opening statements, the defense admitted into evidence a sample hair collection kit that contained only one collection box. The defense had obtained this collection kit from the drug-testing laboratory. The defense had already made an ongoing request for discovery, specifically asking to inspect all real evidence that the government intended to offer at trial on the merits.[81] In spite of this request, the trial counsel waited until the government's case-in-chief to disclose that it had four hair sample collection kits in its possession. The Criminal Investigative Division (CID) had received these hair sample collection kits from the drug-testing laboratory in the same mailing envelope with the kit used to collect the appellant's pubic hair samples.[82] Each of these collection kits contained two ring-sized boxes for pubic hair collection.[83]

During the government's case-in-chief, on re-direct examination of a CID agent, the trial counsel elicited testimony regarding the four remaining hair sample collection kits and their contents. In the Article 39(a), UCMJ, session that immediately followed, the defense moved for a dismissal based on prosecutorial misconduct because of the trial counsel's failure to disclose this material physical evidence.[84] This failure to disclose was addressed at several additional Article 39(a) sessions.[85]

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77. *Id*. at 726.

78. *Id*. at 725. The issue appears to have first surfaced on 30 March 1998, during an Article 39(a) session, when the defense alleged that the Criminal Investigation Division may have tampered with the hair sample or contaminated it with someone else's. *Id*. at 726.

79. *Id*.

80. *Id*. at 727.

81. *Id.* at 726-27. The civilian defense counsel submitted the defense discovery request on 3 January 1998. It specifically cited to Article 46, UCMJ, RCM 702, Military Rule of Evidence 304(d)(1), and *Brady v. Maryland*. *Id*. at 726. Although the request should have cited to RCM 701 rather than RCM 702, the court found that it was clear from the title and content of the document, as well as from the government's response to the defense discovery request, that the government understood what the request meant. *Id*. at 726 n.2. The request included "any and all information which may be or become of benefit to the accused in preparing or presenting his defense at trial" and "the opportunity to inspect all real evidence that the government intends to offer at trial on the merits." *Id*. at 726-27.

82. *Id*. at 725. The timeline is very important.

On 18 July 1998, after visiting the CID evidence room, the trial counsel verified that two ring-sized boxes, not one, had been shipped to the drug-testing laboratory. On 20 July the defense counsel offered into evidence a collection kit that contained one ring-sized pubic hair sample collection box. On 21 July the parties began presenting evidence on the defense motion to suppress appellant's hair because the box or boxes had been tampered with. That afternoon, while court was still in session, the Funded Legal Education Program (FLEP) Officer who was assisting the trial counsel got the four hair sample collection kits that had come in the same mail envelope as the one used to collect the appellant's samples from CID. He passed a note to this effect to the trial counsel in court. After court had recessed for the night, the trial counsel and the FLEP examined the boxes and discussed their significance to the case. The trial counsel instructed the FLEP to verify the collection kits' authenticity and to figure out how to get them admitted into evidence. *Id*. at 727-28.

On 22 July the military judge admitted into evidence the defense collection kit that contained only one ring-sized box for hair samples. Later that day, the trial with members began. The trial counsel made his opening statement without mentioning the number of boxes in the collection kits. The defense counsel did discuss the issue in the opening statement. After opening statements, a CID agent testified about the collection of the appellant's hair sample. After direct examination of the agent, the court recessed for the night. The trial counsel did not disclose the existence of the four collection kits to the military judge or to the defense counsel. On 23 July the defense counsel cross-examined the CID agent regarding the number of boxes used to collect the pubic hair samples. On re-direct examination, the CID agent testified that the four collection kits that CID had received in the same mail envelope with the kit used to take the appellant's sample contained two ring-sized boxes. *Id*. at 728-29.

83. *Id*. at 725. The ACCA made very detailed findings of fact regarding the timeline, starting with the 8 January 1997 search authorization obtained from CID to seize the pubic hair samples, and ending with the military judge's ruling on the defense motion for a mistrial on 27 July 1998, after the government's failure to disclose the existence of the hair sample collection kits came to light. *See id*. at 726-30.

84. *Id*. at 729.

At the final session, the military judge announced extensive findings of fact, concluding that the trial counsel's failure to disclose the material evidence was error, but that a mistrial was not warranted. As a remedy, the military judge made the assistant trial counsel the lead counsel and prohibited the government from presenting any evidence regarding the four hair sample collection kits. Further, the government could not present evidence that the CID office had received five collection kits in the same envelope, one of which was used to collect the appellant's hair sample, and that each of these kits contained two small hair sample collection boxes. The military judge did not instruct the panel members to disregard the CID agent's earlier testimony regarding the four unused collection kits.[86]

The ACCA addressed several important discovery issues in this case: (1) whether the Article 46, UCMJ, guarantee to "equal opportunity to obtain evidence," as implemented in the RCMs, is a substantial right of a military accused; (2) the nature of a trial counsel's duty to disclose physical evidence under RCM 701(a)(2); and (3) how a military judge must remedy the situation when evidence withheld in violation of Article 46 makes its way in front of a military panel. A detailed discussion of each of these issues is required.

Does Article 46, UCMJ, Constitute a Substantial Right Under Article 59(a), UCMJ?[87]

The ACCA started its analysis of the Article 46 issue by explaining that *Adens* was unique in that it did not implicate *Brady* because the withheld evidence was material but not favorable to the defense. Because of this, the court found no constitutional error.[88] From here, the court launched into the statutory analysis, pointing out that a military accused has much broader discovery rights than those available under the Constitution.[89]

According to the ACCA, the issue of whether Article 46 imposes a heavier burden on the government than the Constitution has never been fully resolved.[90] The ACCA attributed this to courts generally resolving discovery issues by (1) findings of no prejudice,[91] (2) determinations of harmless error or no reasonable doubt as to the validity of the proceedings,[92] or (3) reversal for constitutional error.[93] Most discovery cases involve withholding favorable, material evidence under *Brady.* In this situation, because an Article 46 violation necessarily includes all constitutional due process violations, no separate statutory analysis is necessary.

Recognizing the importance of Article 46, UCMJ, the ACCA held that

> equal opportunity to obtain evidence under Article 46, UCMJ, as implemented . . . [in the RCMs] is a "substantial right" of a military accused within the meaning of Article 59(a), UCMJ, independent of due process discovery rights provided by the Constitution. Accordingly, violations of a soldier's Article 46, UCMJ, rights that do not amount to constitutional error under *Brady* and its progeny must still be tested under the material prejudice standard of Article 59(a), UCMJ.[94]

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85. *Id*. at 729-30.

86. *Id.* During these sessions, the trial counsel made several different statements regarding when he became aware of the four additional hair sample collection kits, and when he realized their materiality to the case. On four different occasions, the trial counsel told the military judge that he did not know until after opening statements that CID had four unused collection kits. *Id*. at 730. For a detailed discussion of the professional responsibility implications of trial counsel's statements, see Major David Robertson, *Truth Is Stranger than Fiction: A Year in Professional Responsibility,* ARMY LAW., May 2002, at 1.

87. Article 59(a), UCMJ, states that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (2000).

88. *Adens*, 56 M.J. at 731.

89. *Id*. (citing United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986); United States v. Enloe, 35 C.M.R. 228, 230 (C.M.A. 1965); UCMJ art. 46; MCM, *supra* note 4, R.C.M. 701, 703). This part of the opinion provides insight into the discovery rules, their legislative history, why they exist, and the benefits of open discovery.

90. *Id*. at 732. In the author's opinion, the COMA squarely addressed the issue in *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990), as Judge Wiss pointed out in his concurring opinion in *United States v. Green*, 37 M.J. 88, 90-91 (C.M.A. 1993).

91. *Adens*, 56 M.J. at 732 (citing United States v. Guthrie, 53 M.J. 103, 105-06 (2000)).

92. *Id*. (citing United States v. Stone, 40 M.J. 420, 421 (C.M.A. 1994); *Green*, 37 M.J. at 90-91; United States v. Watson, 31 M.J. 49, 55 (C.M.A. 1990); *Hart*, 29 M.J. at 410).

93. *Id*. (citing United States v. Romano, 46 M.J. 269, 273 (1997); *Eshalomi*, 23 M.J. at 28).

94. *Id*.

What Does RCM 701(a)(2) Really Require of Trial Counsel?

Recognizing that the President promulgated RCM 701(a)(2) to implement Article 46, the ACCA closely examined RCM 701(a)(2), paying particular attention to the materiality language.[95] The trial counsel argued to the military judge that according to the Air Force Court of Military Review (AFCMR) in *United States v. Trimper*,[96] RCM 701(a)(2) did not require the government to disclose the four remaining hair sample collection kits because they were rebuttal evidence.[97] *Trimper* holds that "rebuttal evidence is not discoverable under R.C.M. 701 unless it is exculpatory in nature or material to punishment."[98] What the *Adens* trial counsel neglected to tell the military judge was that in the COMA opinion affirming the AFCMR's decision, the court specifically stated that while unfavorable to the defense, the positive urinalysis was material to the preparation of the defense and thus should have been disclosed by the trial counsel, even though he did not plan to use it in the government's case-in-chief.[99] Perhaps in the interest of clarity, the COMA wrote:

> We respectfully disagree with our sister court's narrow interpretation that the term "material to the preparation of the defense" in R.C.M. 701(a)(2) (A) and (B) is limited to exculpatory evidence under the *Brady* line of cases and hold that our sister court's decision in *Trimper* should no longer be followed in Army courts-martial. There is no language in R.C.M. 701, or in its analysis, indicating any intent by the President to limit disclosure under Article 46, UCMJ, to constitutionally required exculpatory matters. As noted above, R.C.M. 701 is specifically intended to provide "for broader discovery than is required in Federal practice," (R.C.M. 701 Analysis, at A21-22), and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ.[100]

This was, in effect, a restatement of existing law. The court went on to explain how the trial counsel had violated RCM 701(a)(2). Because the existence and configuration of the four additional hair sample collection kits was unquestionably material to the preparation of the defense, whether the government intended to use this evidence in its case-in-chief, in rebuttal, or not at all was irrelevant.[101]

Did the Error Materially Prejudice the Accused's Substantial Right to a Fair Trial, or Were the Military Judge's Remedies Enough?

Finally, the ACCA focused on whether the failure to disclose was material in *Adens*. First, the court clarified the issue that seems to have confounded the courts of military review in the years following the *Hart* decision. According to the ACCA, "when a trial counsel fails to disclose information pursuant to a specific request or when prosecutorial misconduct is present, the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt."[102]

In determining whether the failure to disclose was material, the ACCA focused on the remedies implemented by the military judge. The court found that the steps taken by the military judge, which included (1) removing the trial counsel from the lead counsel role; (2) keeping the government from admitting any evidence of the four unused hair sample collection kits; and (3) excluding all references to the fact that CID had originally received five hair sample collection kits, all of which contained two ring-sized boxes for the pubic hair samples, were insufficient without a curative instruction to the members.[103] Under

95. *Id*. at 731-34.

96. 26 M.J. 534 (A.F.C.M.R. 1988), *aff'd*, 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989).

97. *Adens*, 56 M.J. at 733. The accused in *Trimper*, an Air Force judge advocate, was convicted of wrongfully using cocaine. After testing positive on a unit urinalysis, Captain (CPT) Trimper commissioned his own urinalysis at a local civilian hospital, which also came back positive. Captain Trimper also told a co-worker about both positive urinalyses. Although the government discovered both the positive civilian urinalysis and the statement to the co-worker, the government never disclosed either piece of evidence to the defense. At trial, when CPT Trimper claimed that he had never used drugs of any kind on his direct examination, thus putting his character as a nonuser of drugs in issue, the government brought in both the urinalysis and the statement as rebuttal evidence. The AFCMR decided that RCM 701(a)(2)(A) and (B) only require a trial counsel to disclose exculpatory evidence and evidence that the government intends to offer in its case-in-chief. *Trimper*, 26 M.J. at 536.

98. *Trimper*, 26 M.J. at 537.

99. United States v. Trimper, 28 M.J. 460, 468 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989).

100. *Adens*, 56 M.J. at 733.

101. *Id*. With regard to the first violation of RCM 701(a)(2), the court specifically found that the trial counsel knew that this evidence was material to the defense case two days before he personally learned about the existence of the four unused hair sample collection kits. The court also found that the trial counsel intentionally withheld disclosure until after opening statements and cross-examination of the CID agent to gain the maximum tactical advantage from the evidence. *Id*. at 733-34.

102. *Id.* at 733.

the circumstances, the military judge had a sua sponte duty to issue the curative instruction, even though the panel members had heard no mention of the four hair sample collection kits for five days.[104]

The ACCA explained that if the members considered the prohibited evidence that had already come in through the CID agent's testimony, the defense's credibility would undoubtedly have been undermined. Further, if the defense failed to execute either prong of its two-pronged defense of unreliability of the scientific hair sample testing because of chain of custody problems or tampering, the government would be able to prove its case beyond a reasonable doubt. Before the undisclosed evidence of the four hair sample collection kits came in through the CID agent's testimony, this was a viable defense; however, after it came before the members, the defense was no longer credible. This being the case, the court held that the appellant's substantial rights to a fair trial and to have equal access to the evidence against him were materially prejudiced by the government's nondisclosure of material physical evidence and by the military judge's failure to give a curative instruction to the members to disregard the testimony that the government presented regarding the four unused collection kits.[105]

Why Does All of This Matter?

Army trial practitioners, particularly trial counsel, must take heed of the *Adens* case. At least in the Army, Article 46, UCMJ, has teeth. For staff judge advocate offices taking a more "hard line" approach to discovery, the *Adens* opinion has serious implications. By recognizing Article 46 as a substantial right, and by mandating a separate statutory analysis, the ACCA has given Article 46 sharp teeth. On the positive side, *Adens* reinforces the benefits of the wide-open discovery policy in the military.

First, the *Adens* holding regarding the AFCMR *Trimper* opinion is a restatement of existing law rather than a new development. In light of the COMA opinion in *Trimper*, as well as the plain language of RCM 701(a)(2), this restatement likely applies to the Air Force and the other services as well. Trial counsel must be careful not to assume that potential rebuttal evidence in the form of documents, reports, or tangible evidence that is not favorable to the defense is not material to the preparation of the defense, as contemplated by RCM 701(a)(2). This also brings up the point that counsel on both sides of the courtroom need to be very thorough in their research and careful in the representations they make to military judges regarding case law.

Second, trial counsel must be mindful of the *Adens* requirement that the military judge give cautionary instructions sua sponte, along with other remedies that may be imposed to rectify a breach of the discovery rules, when evidence undisclosed in violation of either constitutional due process requirements or Article 46 makes its way to the panel. It is now clear that without such an instruction, the ACCA cannot determine whether an accused's substantial right to a fair trial was materially prejudiced and will err on the side of caution.

Third, *Adens* specifies that the Article 46 right to equal access to evidence is a substantial right under Article 59(a), UCMJ.[106] This means that even when a discovery issue does not result in a constitutional due process violation, a separate statutory analysis is required, and if an accused's right to equal access under Article 46 was violated, the findings or the sentence in that case could be set aside.

Finally, *Adens* articulates the standard for determining whether government failure to disclose evidence to the defense was material. It is now clear that in the Army, if there is a specific defense request for information, or if there is prosecutorial misconduct, and evidence is not disclosed to the defense, that failure will generally be deemed material unless the government can prove that the failure to disclose was harmless beyond a reasonable doubt.[107] This can be a significant hurdle for the government to overcome. In light of *Hart*, this standard is likely to apply to *all* failures to disclose evidence to the defense, not just failures to disclose physical evidence material to the preparation of the defense under RCM 701(a)(2).[108] If there is no specific defense request, the failure to disclose will be material only if there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been

103. *Id*. at 734.

104. *Id*. The failure to give the instruction was, in the court's words, "understandable." *Id*.

105. *Id*. at 734-35.

106. *Id.* at 732.

107. *See id*. at 733.

108. *See id*. at 732-33. Throughout this discussion, the term *material* has been used in two completely different contexts. In the context of constitutional due process violations and *Brady*, "material" refers to prejudice suffered by the defendant as a result of government nondisclosure. Specifically, was the undisclosed evidence material to the defendant's guilt or punishment? In other words, "material" refers to the effect of that failure on the accused's substantial right to a fair trial. *See* United States v. Bagley, 473 U.S. 667, 678-83 (1985). In the context of *Hart* and the statutory analysis, "material" also refers to the prejudice suffered by the defendant because of the government nondisclosure. United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990). Finally, in the context of RCM 701(a)(2), "material to the preparation of the defense" refers to the type of evidence that the government must disclose and is not limited to the favorable evidence that is constitutionally required to be disclosed. *Adens*, 56 M.J. at 733.

different.[109] Trial counsel must approach specific defense requests for information with care.

In light of the split between the Army and Air Force courts in *Figueroa* and *Adens* regarding the analysis of a discovery issue, the CAAF should clarify the issue. The real question is whether Article 46 provides a military accused greater discovery rights than a civilian defendant. If so, the discovery issue analysis should not end with the determination that there is no constitutional due process violation. Rather, a separate statutory analysis should be required to ensure that this substantial right was not violated to the prejudice of the military accused. Further, the CAAF should also clearly articulate the exact standard to be applied, as the COMA did in *Hart*. The interlocutory opinion the CAAF issued in *United States v. Kinney*[110] gives some insight into how the court might approach this issue in the future.

United States v. Kinney

In *Kinney*, the CAAF issued an interlocutory order on 28 September 2001, requiring the government to answer additional questions certified by the court regarding National Criminal Information Center (NCIC) checks.[111] Although the CAAF ultimately issued a summary disposition in the case,[112] the interlocutory order provides interesting insight into the CAAF's view of discovery issues.

The appellant in *Kinney* was convicted, contrary to his pleas, by a general court-martial of rape and adultery and was sentenced to a dishonorable discharge, confinement for two years, and reduction to the lowest enlisted grade. The appellant and the victim, one of his squad members, lived in the same barracks in Korea. They apparently had no social or personal relationship before the rape.[113]

The appellant's pretrial discovery request included a request for "[a]ny derogatory information, including criminal history or prior disciplinary record, for any witness the Government intends to call on the merits or on sentencing."[114] The defense specifically asked for "a criminal records check and a NCIC" check on nine potential prosecution witnesses.[115] The appellant later reduced his request to cover only two prosecution witnesses, one of whom was the victim. The trial counsel checked the personnel files of the witnesses and conducted a criminal records check (CRC) of the military criminal records, but refused to conduct the requested NCIC check. Initially, the military judge ordered the NCIC check; however, at a later Article 39a session, the trial counsel argued that the government did not have a responsibility to perform NCIC checks on potential prosecution witnesses, and that the steps already taken were sufficient. In response, the defense counsel argued that the NCIC checks were necessary because the victim's credibility was a critical factor in the case and because there were rumors that the other government witness had been involved in a prior sexual assault.[116]

Ultimately, the military judge denied the defense motion for NCIC checks on the victim and the other government witness. According to the military judge, the government had been duly diligent in granting the defense access to the witnesses' military files and to the chain of command. At the same time, the defense had not articulated any reasonable likelihood that the NCIC checks would reveal material information.[117] Rather, the defense appeared to be on a classic fishing expedition.

The CAAF stated in its order that "[o]ne of the hallmarks of the military justice system is that it provides an accused with a broader right of discovery than required by the Constitution . . . or otherwise available to federal defendants in civilian trials under Federal Rules of Criminal Procedure twelve and sixteen."[118] The CAAF then discussed both Article 46 and RCM 701 and the duties that they impose on the government, as well as the standard for due diligence set out in *United States v. Williams*.[119] The court pointed out that when the government disputes the relevance or necessity of disclosure or asserts a privilege, one course of action is to submit the material to the

109. *Adens*, 56 M.J. at 733.

110. No. 00-0633/AR, 2001 CAAF LEXIS 1553 (Sept. 28, 2001) (interlocutory order).

111. *Id.* at *12-15.

112. United States v. Richard A. Kinney, No. 00-0633/AR (C.A.A.F. Feb. 7, 2002) (summary disposition) (unpublished).

113. United States v. Kinney, No. 9800451 (Army Ct. Crim. App. June 6, 2000) (unpublished). The ACCA reviewed the case pursuant to Article 66, UCMJ. The appellant alleged factual insufficiency. The ACCA affirmed the findings and the sentence. *Id.*

114. *Kinney*, 2001 CAAF LEXIS 1553, at *6-7.

115. *Id.* at *7.

116. *Id.* at *7-8.

117. *Id.* at *9-10.

118. *Id.* at *1.

military judge for inspection and for a ruling in accordance with RCM 701(g)(2).[120]

The CAAF also discussed the standard under *Brady* and *Bagley* to determine whether a government failure to provide the defense with evidence that should be disclosed rises to the level of a constitutional due process violation. This, of course, is the "reasonable probability" standard set out in *Bagley.*[121] Citing to *Hart* and *Green*, the CAAF acknowledged that "the prosecution faces a heavier burden in the military justice system to sustain a conviction when evidence has been withheld,"[122] and it quoted language from *Green* discussing a reasonable doubt standard.[123] Interestingly, the quoted passage from *Green* is precisely the language Judge Wiss referred to in his concurring opinion as reversing the burden set out by the majority in *Hart.*[124] The page cited to in *Hart*, page 410, which Judge Wiss held out in his concurring opinion in *Green* as setting the correct standard,[125] says that when the government fails to disclose information in response to a specific request, the evidence will be considered material unless failure to disclose can be demonstrated to be "harmless beyond a reasonable doubt."[126]

The CAAF's opinion is only interlocutory; however, it is important because it gives practitioners an idea of where the CAAF stands on the issues of (1) whether Article 46 places a greater burden on the government to sustain convictions when the government has withheld evidence from the defense and (2) what that specific standard might be. There appears to be a higher standard; however, the issue identified by E. J. O'Brien in last year's article on new developments[127] apparently still exists and needs clarification, especially in light of the *Figueroa* and *Adens* decisions.

Practitioners and military judges need to understand the standard. In particular, defense counsel must know whether violations of specific discovery requests could result in potential windfalls to their clients on appeal. Trial counsel need to understand what is expected of them when they receive specific requests, as well as the consequences for not honoring the requests. Military judges must likewise know what standards will be applied on appeal. For the Army, in the wake of *Adens*, there is greater clarity, although it is still unclear how the CAAF would rule on this issue.

Conclusion

Discovery in the military justice system is a potential minefield for the military practitioner. Trial and defense counsel must work to understand both the constitutional and statutory rules that apply to discovery practice. Likewise, military judges, who regulate discovery practice under RCM 701(g), must have a clear understanding of the rules and the standards applied to discovery issues on appeal. To this end, the CAAF should strive to clarify those rules and standards when confusion arises in the service courts of appeal. Such is the situation in the wake of the *Figueroa* and *Adens* decisions. In the absence of clear standards, discovery practice more closely resembles a guessing game than the practice of law. Ultimately, both the accused's right to a fair trial and the credibility of the UCMJ are at issue.

119. 50 M.J. 436, 441 (1999).

120. *Kinney*, 2001 CAAF LEXIS 1553, at *5.

121. *See id*. (citing Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Bagley, 473 U.S. 667, 682 (1985)).

122. *Id*. (citing United States v. Green, 37 M.J. 88, 90 (C.M.A. 1993); United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990)).

123. *See id*. at *5-6.

124. *Compare id*. at *5 *with Green*, 38 M.J. at 91 (Wiss, J., concurring).

125. *Green*, 38 M.J. at 91 (Wiss, J., concurring).

126. *Hart*, 29 M.J. at 441.

127. Major Edward J. O'Brien, *New Developments in Discovery: Two Steps Forward, One Step Back*, ARMY LAW., Apr. 2000, at 38.