New Developments in the Law of Discovery

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Military appellate court decisions during the past year focused on several different aspects of military discovery practice. The decisions addressed witness production, destruction of evidence, government failure to disclose specifically requested favorable evidence, and defense failure to disclose evidence pursuant to reciprocal discovery. While none of the opinions constitute earth-shattering new developments, they do shed light on often-ignored—yet important—subtleties of military discovery practice. To focus practitioners on the practicalities of discovery, this article first touches on the witness production issues addressed in *United States v. Baretto*[1] and *United States v. Montgomery*.[2] Building on the discussion in last year's *Criminal Law Symposium*, the article then revisits the issue of government failure to disclose evidence favorable to the defense and the most recent case in this area, *United States v. Brozzo*.[3] Next, the article addresses evidence destruction and *United States v. Ellis*.[4] Finally, the article discusses *United States v. Pomarleau*,[5] focusing on appropriate sanctions for a defense counsel's failure to provide timely discovery.

I. Witness Production

A. Unavailability and Abatement

Article 46, Uniform Code of Military Justice (UCMJ), mandates that the trial counsel, the defense counsel, and the court-martial shall each have an equal opportunity to obtain witnesses and evidence.[6] Rule for Courts-Martial (RCM) 703 implements this requirement, specifying each party's rights and burdens with regard to witness production.[7] While the parties are generally entitled to witness production, they are not entitled to the presence of witnesses who are unavailable within the meaning of Military Rule of Evidence (MRE) 804(a).[8] If an unavailable witness is so centrally important as to be essential to a fair trial, however, and if there is no adequate substitute for the witness's testimony, the military judge shall grant a continuance or other appropriate relief to attempt to secure the witness's presence, or abate the proceedings. The law creates an exception for when the requesting party causes the witness to be unavailable or could have prevented the problem.[9] In *United States v.*

1. 57 M.J. 127 (2002).

2. 56 M.J. 660 (Army Ct. Crim. App. 2001).

3. 57 M.J. 564 (A.F. Ct. Crim. App. 2002).

4. 57 M.J. 375 (2002).

5. 57 M.J. 352 (2002).

6. UCMJ art. 46 (2002).

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2002) [hereinafter MCM].

8. This rule states as follows:

> *Definitions of unavailability.* "Unavailability as a witness" includes situations in which the declarant—
> (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or
> (6) is unavailable within the meaning of Article 49(d)(2).
> A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

Id. MIL. R. EVID. 804(a).

9. *Id*. R.C.M. 703(b)(3).

Baretto,[10] the Court of Appeals of the Armed Forces (CAAF) specifically addressed this aspect of witness production.

The appellant in *Baretto* was convicted, pursuant to his pleas, of reckless driving and negligent homicide, and was sentenced to a bad-conduct discharge (BCD), confinement for seven months, reduction in rank, and forfeitures.[11] The case resulted from a fatal multi-car accident in which the appellant, who was speeding while trying to pass several cars on a winding, hilly, two-lane road, lost control of his car. Despite losing control, the appellant managed to avoid the first two oncoming cars before hitting the third.[12]

Before trial, the defense counsel asked the government to produce the first oncoming driver the appellant managed to avoid, as well as the last car he passed before the accident. The defense counsel was unable to provide any specific information about the drivers' identities, but wanted them for the Article 32 investigation. The trial counsel likewise did not know the drivers' identities. In an effort to produce the witnesses, the trial counsel placed ads in several local area papers, requesting that the two drivers and anyone else who had witnessed the accident contact the Staff Judge Advocate's office. Four eyewitnesses responded to the ads, but not the two drivers whom the defense counsel had requested. Before trial, the defense counsel argued unsuccessfully that the two missing witnesses were necessary to a fair trial because they each had an unobstructed view of the accident.[13]

While the trial counsel did not produce the two specifically requested witnesses, he produced fourteen others, three of whom allegedly had unobstructed views of the accident. Additionally, the trial counsel provided the defense counsel with the findings of two accident reconstruction experts, physical evidence from the crash site, a computer simulation of the crash, and a defense accident reconstruction expert.[14] Upon hearing that the government would be unable to produce the two requested witnesses and before entering appellant's plea, the defense counsel moved to abate the proceedings.[15] The military judge denied the motion, finding (1) that the government had done all that was required to produce the witnesses, and (2) that the available evidence was more than an adequate substitute for the unknown witnesses.[16]

According to the CAAF, the primary issue under RCM 703[17] is whether a witness remains unavailable, despite the government's good faith efforts before trial to locate and produce the person. Then, according to the language of RCM 703, if a witness is unavailable, the court must decide how critical that witness is to a fair trial and whether there is any adequate substitute for that witness's testimony.[18]

In this case, although the government may have waited too long before acting on the defense request, the defense did not allege bad faith. The government only had sketchy information as it tried to locate the witnesses. The defense did not suggest any other means the government should have employed to find the witnesses and did not suggest the trial counsel lacked due diligence. Most importantly, the defense counsel provided no evidence that the witnesses were "critical and vital" to a fair trial. It was unclear whether one of the drivers even saw the accident. Also critical to the CAAF's decision was the number of other adequate substitutes for the requested witnesses' testimony. Based on these facts, the CAAF held the military judge did not abuse his discretion in denying the defense motion.[19]

Although this case is not a new or surprising development in discovery law, it does provide some valuable reminders for both trial and defense counsel. From a trial counsel's perspective, it is very important to begin looking for requested witnesses early on, to prevent problems such as those encountered in *Baretto*. On the positive side, trial counsel are well advised to take aggressive and innovative measures as they search for elusive witnesses, and to document these steps as the trial counsel did in this case. This will enable the military judge and the appellate courts to reconstruct what happened if they are faced with a witness production issue. On the other hand, defense counsel will be in a much stronger position to argue that abatement is

10. 57 M.J. 127 (2002).

11. *Baretto*, 57 M.J. at 128.

12. *Id*. at 128-29.

13. *Id*. at 132.

14. *Id*. at 129.

15. *Id*. The appellant also sought to abate the proceedings because he suffered from post-accident amnesia, which he claimed kept him from competently assisting his defense counsel. The competence issue is beyond the scope if this article. *Id*.

16. *Id*. at 132.

17. MCM, *supra* note 7, R.C.M. 703(b). In relevant part, RCM 703(b)(1) provides that "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." *Id.*

18. *Baretto*, 57 M.J. at 132.

19. *Id*. at 133.

necessary to remedy witness unavailability if they can show the court some evidence of the witness's expected testimony. This poses a difficult, sometimes insurmountable, problem for the defense counsel who is unable to locate a witness from the very beginning of a case. Finally, *Baretto* discusses the requirements of RCM 703, clearly articulating the facts a defense counsel must establish to support a motion to abate proceedings because of witness unavailability.[20]

B. Contents of Defense Witness Requests

Another aspect of witness production RCM 703(c)(2) addresses is the amount of information the defense must provide to the government to trigger the government's witness production burden. Generally, the defense witness request must be written and must contain the witness's name, address, and telephone number, if known, or other information that will enable the government to locate the witness with due diligence. The defense counsel must also provide a brief synopsis of the witness's expected testimony that demonstrates the witness's relevance and necessity to a fair trial.[21] The military judge must resolve any disputes involving witness production.[22] If the defense counsel has not provided the required information in a timely manner, the military judge may deny a motion to compel witness production. In the alternative, if the failure was for good cause, the military judge may grant relief.[23] The CAAF grappled with this very issue in *United States v. Montgomery.*[24]

The appellant in *Montgomery* was convicted of willfully disobeying a superior commissioned officer, assault consummated by battery, and adultery; he was sentenced to a BCD, confinement for ninety days, forfeitures, and a reduction in grade.[25] The principal government witness was a woman who claimed she had sex with the appellant for money and then ended the "relationship" because the appellant was married. She also alleged the appellant assaulted her after she ended the relationship. To the astonishment of no one, the defense theory relied heavily on impeaching the victim's credibility.[26]

The night before the members were impaneled, the trial counsel notified the defense counsel that two government witnesses, whom the government intended to call to prove the violation of the no-contact order, were missing and would not testify at trial. At that time, the trial counsel also gave the defense counsel copies of two notes the victim had delivered to the trial counsel that same day. Until this point, the two missing government witnesses were the only evidence of appellant's no-contact order violation. According to the victim, the appellant left the notes at her home after the officer issued the no-contact order. The victim also claimed she clearly recognized the handwriting as the appellant's.[27]

Before voir dire the next morning, the defense counsel requested a continuance based on the new government evidence.[28] The military judge denied the request, giving the defense counsel from 0956 until after lunch to solve the problem and interview the victim.[29] At the next Article 39(a) session, the defense counsel again requested a continuance, this time to obtain handwriting analysis on some checks made out to the appellant that the victim allegedly forged on a dead person's closed bank account. The defense theory was that the woman was biased under MRE 608(c).[30] The military judge denied the request without explanation and shortly thereafter, voir dire commenced.[31]

The main issue, however, had its genesis much earlier in the trial process. More than two months before the scheduled trial date, the military judge denied a defense motion to compel production of the woman's social work services (SWS) records. The military judge did not conduct an in camera review of the records in question.[32] During voir dire, the Trial Defense Service legal specialist handed the SWS records to the defense counsel.[33] The defense counsel immediately requested a con-

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20. *See id.* at 132-33.

21. MCM, *supra* note 7, R.C.M. 703(c)(2).

22. *Id.* R.C.M. 703(c)(2)(D).

23. *Id.* R.C.M. 703(c)(2)(C).

24. 56 M.J. 660 (Army Ct. Crim. App. 2001).

25. *Id*. at 660.

26. *Id*. at 662-63.

27. *Id*. at 663.

28. *Id*.

29. *Id*. at 663-64. The woman had previously refused to speak with defense counsel. *Id.*

30. *Id*. The defense was attempting to establish that the woman was biased because she owed the appellant money. *Id*.

31. *Id*. at 664.

tinuance to review the records, interview newly identified witnesses, and investigate new leads, explaining that the records might lead to witnesses who could testify about the woman's character for peacefulness. Again, the military judge denied the defense counsel's request without stating any reason on the record. As a final resort, the defense counsel requested a one-hour delay, which the military judge also denied.[34]

Scanning the thirty pages of SWS records, the defense counsel identified two witnesses who could potentially testify about the woman's character for both violence and untruthfulness.[35] Because of the time constraints, however, there were a number of deficiencies in the defense request, which clearly did not comply with the requirements of RCM 703(c)(2).[36] The defense counsel did not interview the witnesses, did not request their production before trial, and did not provide the government with sufficient information to allow the trial counsel to find them; the proffer was weak at best. The military judge denied the request for the production of the witnesses outright, again without explanation.[37]

Addressing this denial, the Army Court of Criminal Appeals (ACCA) first discussed military judges' authority to grant continuances and circumstances rendering continuances appropriate. These circumstances include insufficient opportunity for counsel to prepare for trial.[38] Noting that a military judge's decision to deny a continuance is tested for an abuse of discretion, the court applied the factors set out in *United States v. Weisbeck*.[39] Based on the sequence of events, a reasonable continuance would have been appropriate to allow the defense to investigate, based on the newly discovered SWS records and the allegedly forged checks. The ACCA found that the military judge abused his discretion. In his effort to "hold the defense's feet to the fire" and to move the trial along, the military judge violated the appellant's right to present a defense.[40] The military judge's repeated refusal to grant continuances hamstrung the defense's efforts to obtain the two potential witnesses to the victim's character for peacefulness and truthfulness. Because the weaknesses in the defense proffers in support of its witness requests were directly attributable to the earlier continuance request denials, the ACCA held that the military judge also abused his discretion in denying the defense requests for the two witnesses.[41]

Montgomery does not change the law; rather, it illustrates the relationship between witness production and other aspects of trial practice. The rules governing the contents of defense witness requests are not rigid and unyielding, and they do not apply in a vacuum; they must be considered within the context of the proceedings. A more open discovery policy from the government prevents problems such as this. If the government opposes a defense request for evidence, the parties should bring the issue to the military judge's attention, and the trial counsel should join the defense counsel in requesting an in camera review of the records in question. This can solve many problems before they even begin to surface. Moreover, if the defense justifiably requests a continuance, the trial counsel can avoid problems by not opposing the request. In other words, the government should not automatically oppose all defense-requested continuances.

Defense counsel should carefully document all requests for evidence and witnesses, be persistent, and discuss any problems on the record. Counsel for both sides must know the rules**.** Finally, while the military judge must focus on moving cases forward, this can never be at the expense of the accused's right to present a defense. The military judge must resolve disputes over evidence and witness production. If the solution involves any sort of in camera review, the military judge must seal and append the reviewed documents to the record unless he orders the trial counsel to produce them. The judge must also account for this action on the record, as well as his reasons for denying requested continuances on the record.[42]

32. *Id*. at 664 n.5.

33. *Id*. It is unclear from the opinion how the legal specialist obtained the records from SWS. *Id*.

34. *Id*. at 664. The military judge gave the defense counsel the option of delaying the opening statement until the start of the defense case, if necessary. *Id.* Of course, RCM 913 expressly gives the defense counsel this option. *See* MCM, *supra* note 7, R.C.M. 913(b).

35. *Montgomery*, 56 M.J. at 664 n.6.

36. *Id*. at 665.

37. *Id*. at 666.

38. *Id*.; *see* MCM, *supra* note 7, R.C.M. 906(b)(1).

39. 50 M.J. 461 (1999).

40. *Montgomery*, 56 M.J. at 665 (quoting United States v. McAllister, 55 M.J. 270, 276 (2001)).

41. *Id*. at 666.

42. *See* United States v. Briggs, 48 M.J. 143 (1998).

II. The Controversy Continues: Does Article 46, UCMJ, Have Teeth? Not in the Air Force!

The article on discovery in last year's *Criminal Law Symposium*[43] focused on the split that developed between the ACCA and Air Force Court of Criminal Appeals (AFCCA) following their decisions in *United States v. Adens*[44] and *United States v. Figueroa*.[45] This portion of the article continues that discussion in light of the recent AFCCA decision in *United States v. Brozzo*.[46] To address the issue properly, however, it will first be necessary to revisit the earlier discussion of this subject.

In *Brady v. Maryland*,[47] the Supreme Court held that the government's failure to disclose favorable evidence that is material either to guilt or innocence violates a defendant's constitutional due process rights. In *United States v. Bagley*,[48] the Court identified a two-pronged test to determine the materiality of such undisclosed evidence. If a court finds that there is prosecutorial misconduct, undisclosed favorable evidence will be deemed material to the defense, unless the failure to disclose the evidence is harmless beyond a reasonable doubt.[49] 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 the result of trial would have been different if the evidence had been disclosed. A reasonable probability is a probability sufficient to undermine confidence in the result of the trial.[50] The Supreme Court specifically rejected holding the government to a higher "harmless beyond a reasonable doubt" standard in the event of an ignored specific defense discovery request.[51]

While *Brady* and its progeny clearly apply to military courts-martial, they do not encompass the entire body of law applicable to military discovery practice. Article 46, UCMJ, the provisions in the Rules for Courts-Martial implementing Article 46, and the corresponding body of military case law are interrelated with *Brady*, but they are 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. This was the case in *United States v. Trimper*,[52] and more recently, in *United States v. Adens*.[53]

In *United States v. Hart*, [54] the Court of Military Appeals (COMA) addressed this distinction and gave it meaning, suggesting that in the military, both a constitutional and statutory analysis were required when the government failed to disclose evidence. In the years since *Hart*, confusion developed regarding both the necessity for a separate statutory analysis in discovery cases, and the appropriate standard of review in such cases.[55] This confusion culminated in an ACCA case, *Adens*,[56] and the AFCCA cases *Figueroa*[57] and *Brozzo*.[58] In *Figueroa*, the AFCCA rejected the notion that a higher standard of review

43. Major Christina Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?* ARMY LAW., May 2002, at 21-29.

44. 56 M.J. 724 (Army Ct. Crim. App. 2002).

45. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

46. 57 M.J. 564 (A.F. Ct. Crim. App. 2003).

47. 373 U.S. 83 (1963).

48. 473 U.S. 667 (1985).

49. *Id.* at 677-80. If the government can meet this burden of proof, then the improper withholding of evidence did not violate the defendant's due process rights. *Id.*

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

51. *Bagley*, 473 U.S. at 682. The Court reasoned that a higher standard of materiality was unnecessary when the defense made a specific request for the undisclosed evidence because under *Strickland*, the reviewing court could directly consider any adverse effect that resulted from the suppression, in light of the totality of the circumstances. *Id*. at 682-83.

52. 28 M.J. 460 (C.M.A. 1989), *cert. denied*, 493 U.S. 965 (1989). The evidence in issue in *Trimper* included an incriminating statement the appellant made to a co-worker regarding his drug use and a positive urinalysis that the appellant had done on his own at a local civilian hospital. None of this was disclosed to the defense counsel. Because the undisclosed evidence was not favorable to the appellant, there was no *Brady* violation, but there were Article 46, UCMJ, issues. *See id*.

53. 56 M.J. 724 (Army Ct. Crim. App. 2002). As in *Trimper*, the evidence at issue in *Adens* was not favorable to the appellant, but the government violated Article 46, UCMJ, by failing to disclose it. *See id*.

54. 29 M.J. 407 (C.M.A. 1990). In *Hart*, the government failed to disclose DNA test results that were favorable to the accused, as well as the fact that the assault victim could not 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 has 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)).

applies when the government, in violation of Article 46, UCMJ, and the applicable Rules for Courts-Martial, does not disclose evidence that is the subject of a specific defense discovery request.[59] The AFCCA seems to have concluded that Article 46 is effectively indistinguishable from the constitutional due process standard articulated in *Brady.* In *Adens*, the ACCA took the opposite approach, holding that

> [e]qual 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. . . . [W]hen 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.[60]

In *Brozzo*, an opinion that further complicated the already confusing case law in this area, the AFCCA once again examined the government's duty to disclose favorable information following a specific RCM 701 discovery request from the defense. The appellant in *Brozzo* was convicted of wrongful use of cocaine and was sentenced to a BCD, forfeitures, and reduction to the lowest enlisted grade. The appellant asserted that the government violated his due process rights by failing to disclose exculpatory evidence before trial.[61] In its formal discovery request, the defense requested all documentation relating to false positive and false negative drug test results, copies of documents relating to laboratory inspections, the quality control program, mishandling of samples, and other administrative errors in testing for the three months before the laboratory tested the appellant's sample, the month of the test, and the month after the test.[62]

After trial, appellant's counsel discovered that there was an internal blind quality control sample that should have been negative, but falsely tested positive for the metabolite of cocaine.[63] In its appellate brief, the government did not deny that this result was a false positive,[64] but argued that the evidence was not so material that non-disclosure constituted a due process violation under *Brady v. Maryland*.[65]

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55. *Id.*; *see also* United States v. Green, 37 M.J. 88, 90-91 (C.M.A. 1993) (Wiss, J., concurring). In *Green*, the government failed to disclose evidence that the defense had specifically requested. 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. In his concurring opinion, Judge Wiss noted 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 said 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 a disclosure of the evidence.

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

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

57. 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

58. 57 M.J. 564 (A.F. Ct. Crim. App. 2002).

59. United States v. Figueroa, 55 M.J. 525 (A.F. Ct. Crim. App. 2001).

60. *Adens*, 56 M.J. at 732-33.

61. *Brozzo*, 57 M.J. at 564. The accused was selected at random to provide a urine sample, as part of the regular drug-testing program on his base. The Air Force Drug Testing Laboratory at Brooks Air Force Base tested the urine sample and reported finding the metabolite of cocaine in his urine. *Id*. at 564-65.

62. *Id*. at 565.

63. *Id*.

64. *Id*. at 566. The AFCCA disagreed that this was a false positive because it was never reported as a positive, but rather was noticed on the first review and marked "redo." *Id*.

65. *Id*. at 565.

The AFCCA began its analysis by citing Article 46, UCMJ,[66] and discussing the impact of RCM 701 on discovery.[67] Citing the CAAF's interlocutory order in *United States v. Kinney*,[68] the AFCCA acknowledged that "the military justice system provides an accused with broader discovery rights than required by the Constitution."[69] The court went on to say that a government failure to disclose required evidence rises to the level of a due process violation only when the undisclosed evidence is "material either to guilt or to punishment."[70] Consistent with its opinion in *Figueroa*, the AFCCA ignored the "harmless beyond a reasonable doubt" standard of review that applies if the government fails to disclose evidence specifically requested by the defense.[71] Instead, the AFCCA chose the "reasonable probability" standard the Supreme Court articulated in *Stricker v. Green*[72] and *Bagley*.[73] This approach effectively ignored the separate statutory analysis required under Article 46, UCMJ.

After finding that the government had a duty to disclose the false positive, the court examined whether this error was a *Brady* violation; in the process, the court created further confusion. First, the AFCCA pointed out that "federal courts consistently hold that evidence is not suppressed if the defendant knew, or in the exercise of reasonable diligence should have known, of the essential facts that would have permitted him to take advantage of the evidence in question."[74] The AFCCA then argued that the CAAF "also found no *Brady* violation where reasonably diligent defense counsel would have discovered the evidence."[75] To support this position, the AFCCA cited *United States v. Lucas*[76] and *United States v. Simmons*.[77] On this authority, the court found that because the government disclosed information that would have led a diligent defense counsel to the falsely positive urinalysis, there was no *Brady* violation. The court did not conduct any statutory analysis.[78]

There are three interesting aspects to this line of reasoning. First, while many federal courts have undoubtedly reached the same conclusion the AFCCA articulates, it is important to remember that the federal system has no equivalent to Article 46, UCMJ, or RCM 701. Second, *Lucas* pre-dates the Rules for Courts-Martial, and its facts are easily distinguishable.[79] Finally, and most disturbing, although Judge Crawford's dissent supports the AFCCA's conclusion, the majority in *Simmons*, a case decided after the enactment of the Rules for Courts-Martial, reached precisely the opposite conclusion, on similar facts.[80] This third point requires a closer examination of *Simmons*.

In *Simmons*, one of two alleged rape victims failed a polygraph examination and then made a post-polygraph statement in which she admitted that she did not believe she had been raped because she could have stopped it at any time, and because she had enjoyed the sex.[81] She later testified consistently with her post-polygraph statement in a co-accused's Arti-

66. *See* UCMJ art. 46 (2002). Article 46, UCMJ, reads "[T]he 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." Rule for Courts-Martial 701 implements Article 46 with the purpose of promoting "full discovery to the maximum extent possible consistent with legitimate needs for non-disclosure and to eliminate 'gamesmanship' from the discovery process." MCM, *supra* note 7, R.C.M. 701 analysis, at A21-32.

67. *Brozzo*, 57 M.J. at 566.

68. 56 M.J. 156 (2001) (interlocutory order). The Air Force Court also cited a number of older cases on this point. *Brozzo*, 57 M.J at 566 (citing United States v. Simmons, 38 M.J. 376, 380 (C.M.A. 1993); United States v. Dancy, 38 M.J. 1, 5 (C.M.A. 1993); United States v. Green, 37 M.J. 88, 90 (C.M.A. 1993); United States v. Eshalomi, 23 M.J. 12, 24 (C.M.A. 1986)).

69. *Brozzo*, 57 M.J. at 565.

70. *Id*. at 566 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

71. *Id*.

72. 527 U.S. 263, 280 (1999). 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." *Id.* (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

73. 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

74. *Brozzo*, 57 M.J. at 566.

75. *Id*. at 567.

76. 5 M.J. 167 (C.M.A. 1978).

77. 38 M.J. 376, 385 (C.M.A. 1993) (Crawford, J., dissenting).

78. *Brozzo*, 57 M.J. at 567.

79. United States v. Lucas, 5 M.J. 67 (C.M.A. 1978); *see also* MCM, *supra* note 7, R.C.M. analysis, at A21-1.

80. United States v. Simmons, 38 M.J. 376, 382-86 (C.M.A. 1993).

cle 32 hearing. The defense knew of the substance of this testimony before trial.[82] The government gave the defense pretrial notice of the failed polygraphs, but the defense asserted that the government did not give the defense notice of the post-polygraph statement. Although the defense counsel was aware of the polygraph result, he did not talk to the polygrapher or learn of the post-polygraph statement until after trial.[83] Apparently, the trial counsel knew about the failed polygraph but was unaware of the victim's statement.[84] The majority initially considered whether the prosecutor had a duty under *Brady* to disclose evidence that could be discovered by a reasonably diligent defense counsel.[85] Because of the affirmative duty RCM 701(a)(2) placed on the trial counsel, however, the court held that it was unnecessary to determine whether a reasonably diligent defense counsel could have discovered the post-polygraph statement.[86] The trial counsel, likely with the best of intentions, simply failed to perform as required.[87]

Although the initial facts underlying *Simmons* and *Brozzo* are very different, the facts surrounding the discovery issues are similar. As in *Simmons*, the trial counsel in *Brozzo* provided the defense counsel with information that could have led him to the evidence in question. As in *Simmons*, the defense counsel in *Brozzo* neither looked for nor discovered the evidence in question until after trial. There was likely no *Brady* violation in either *Simmons* or *Brozzo* because a reasonably diligent defense counsel could have found the evidence in either case with some effort, given the disclosures that the government made. More importantly, RCM 701 required more from the trial counsel in both cases than *Brady* required. Because of RCM 701, the trial counsel had an affirmative duty to turn over the evidence in question, whether it was a post-polygraph statement, as in *Simmons*, or a "false positive" from the drug testing laboratory. As in *Simmons*, the trial counsel did not do what was required. That should end the inquiry, shifting the focus to whether the appellant was prejudiced by the trial counsel's failure.

Brozzo highlights the confusion regarding the appropriate standard of review in cases involving government failure to disclose specifically requested evidence to the defense. The issue is important because it strikes at the very heart of Article 46, UCMJ, and what it means for a military accused. *Brozzo*, a decision supported by dubious authority, dilutes the government's burden to disclose exculpatory evidence to an accused and permits government counsel to ignore the requirements of RCM 701(a)(2). As the ACCA said in *Adens*, Article 46, UCMJ, confers a substantial right upon a military accused, and places a greater burden on the government to ensure the defense has equal access to evidence.[88] In this instance, the statutory burden holds the government to a higher standard than the constitutional due process requirements in *Brady.* Now that this confusion is clearly in the forefront, the CAAF should clarify the matter in an appropriate case. This is important, not just for trial practitioners and military judges, but also for military service members facing trial by court-martial.

III. Destruction or Loss of Key Evidence

Rule for Courts-Martial 703(f)(2) deals with evidence that is either destroyed, lost, or otherwise rendered unavailable. The rule mirrors that for witnesses—if the unavailable evidence is

> of such central importance to an issue that it is essential to a fair trial, and there is no adequate substitute . . . the military judge shall grant a continuance . . . or shall abate the proceedings, unless the unavailability is the fault of or could have been prevented by the requesting party.[89]

81. *Id*. at 377.

82. *Id*. at 378.

83. *Id*. at 379.

84. *Id*. at 378-79.

85. *Id*. at 382.

86. *Id*. It is also noteworthy that the concurring opinion specifically agrees with the majority regarding RCM 701's impact on the issue. *Id.* at 383.

87. *Id*. at 382. In a footnote, the majority noted that the defense counsel's conduct raised "substantial questions" about ineffective assistance of counsel. *Id*. at 383 n.3. In another footnote, the majority answered concerns raised in one of the dissenting opinions, saying that this decision did not require trial counsel to search for the "proverbial needle in the haystack," but rather merely required the trial counsel to search in his own files and readily available police files. *Id*. at 383 n.4. Because of the close association between the drug testing laboratory and law enforcement in drug cases, it is entirely appropriate to require the trial counsel to disclose documents maintained at the laboratory. *See* United States v. Sebring, 44 M.J. 805, 808 (N-M. Ct. Crim. App. 1996).

88. United States v. Adens, 56 M.J. 724, 732 (Army Ct. Crim. App. 2002).

89. MCM, *supra* note 7, R.C.M. 703(f)(2)).

In *United States v. Ellis,*[90] the CAAF dealt with the issue of inadvertently destroyed physical evidence that the defense argued was critical to both the government and the defense cases.

In June 1995, a state court dismissed proceedings against the appellant in *Ellis* after the trial judge granted a pretrial motion to suppress the appellant's confession.[91] The Navy assumed jurisdiction, and a court-martial ultimately convicted Ellis of assaulting and murdering his two-and-a-half-year-old son, Timmy. He was sentenced to a BCD, confinement for six years, total forfeitures, and reduction to the lowest enlisted grade. One of the appellant's assignments of error on appeal focused on the military judge's failure to dismiss the charges or order other appropriate relief based on the government's inadvertent destruction of key evidence.[92]

The autopsy findings led the medical examiner to conclude that Timmy was killed by non-accidental blunt force trauma to his head.[93] The autopsy revealed not only a 9.5-centimeter skull fracture, but also injuries around both of Timmy's eyes, his right cheek, left jaw, upper neck, chest, left hip, back, right forearm, both knees, and both lower legs.[94] These injuries were well documented.[95] After completing the autopsy, the medical examiner arranged for the brain and its meninges to be stored, in accordance with a laboratory regulation, for at least one year. Unfortunately, the laboratory moved several months later, and the specimen container was accidentally thrown away during the move.[96] The appellant had confessed to beating Timmy severely on several occasions in the days before Timmy's death.[97]

Because of the loss of the specimens, a defense expert was never able to examine them as part of his own investigation. At trial, the defense counsel moved to dismiss the charges against the appellant, citing the right to present a defense under the Fifth Amendment,[98] the right to cross-examine witnesses under the Sixth Amendment,[99] the right to obtain witnesses under Article 46, UCMJ, and RCM 703(f)(2).[100] The defense theory was either that the appellant's daughter caused the fatal injuries several weeks earlier when she hit Timmy in the head with a baseball bat, or that Timmy caused it himself by banging his head against the wall. The appellant contended that the missing evidence was central to both parties' cases.[101]

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90. 57 M.J. 375 (2002).

91. United States v. Ellis, 54 M.J. 958, 960 n.1 (N-M. Ct. Crim. App. 2001).

92. *Ellis*, 57 M.J. at 376.

93. *Ellis*, 54 M.J. at 969. The medical examiner removed the brain from the cranium and sliced it at various depths to check for the presence of infarcts, or dead tissue caused by prolonged blood deprivation. She did not do a microscopic examination because there were no obvious signs of infarcts. Her assistant took photographs during the autopsy; however, none of the photographs showed the brain as it was being examined for infarcts. *Id.*

94. *Ellis*, 57 M.J. at 376.

95. *Id*. at 379-80.

96. *Id*. at 379.

97. *Id*. at 378. This confession was the subject of the appellant's other assignment of error. *Id*.

98. The Fifth Amendment to the Constitution states,

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

99. The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . ." *Id.* amend. VI.

100. This provision states,

> *Unavailable Evidence*. Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting partly.

MCM, *supra* note 7, R.C.M. 703(f)(2).

The military judge denied the motion to dismiss because the defense did not show that the missing evidence was apparently exculpatory when lost, and that comparable evidence was not available. The defense counsel next requested an adverse inference instruction to remedy the harm caused by the missing evidence.[102] This instruction would have allowed the members to draw an inference against the government's theory that Timmy's death resulted from the appellant beating him two days earlier. Although the military judge declined to give the instruction, he did caution the trial counsel not to use the missing evidence to impeach the defense expert.[103] The trial counsel disregarded the military judge's warning, and during cross-examination of the defense expert, emphasized that the witness had not examined the lost brain and meninges. The defense counsel, however, did not object. Likewise, the defense counsel did not object when the trial counsel bolstered the government expert's testimony during the findings argument, pointing out that she—unlike the defense expert—had based her testimony on an actual examination of the physical evidence.[104] After the arguments, the military judge gave a limiting instruction to the panel members.[105]

The evidence against the appellant consisted of the physical evidence, expert testimony, and the appellant's controversial confession.[106] In support of the defense theory, several witnesses testified that Timmy's sister hit him in the head with a baseball bat several weeks before his death, and that Timmy frequently engaged in self-abusive, head-banging behavior. Additionally, the defense expert testified that the baseball bat injury caused Timmy's death.[107]

The majority opinion held that even if the military judge erred by refusing to give the requested instruction, the error was rendered harmless by the confession and also by the weight of the evidence against the appellant.[108] According to the majority, even with the requested instruction and without the trial counsel's improper questions and argument, "by focusing on Timmy's other injuries, in addition to his brain injury, the members could not help but find appellant's confession voluntary and reliable as a matter of law."[109]

As with the cases already discussed, *Ellis* is not an important new development, but it does focus practitioners' attention on the relationship between the discovery rules and other aspects of court-martial practice, particularly the importance of preserving physical evidence. While the loss of evidence was unavoidable from the trial counsel's perspective, trial counsel must work closely with evidence custodians and carefully track matters like the impact of testing on evidence, giving defense counsel notice if evidence is likely to be consumed. From a defense counsel's perspective, it is important to see the evidence early, particularly if it may be exculpatory. As this case illustrates, it may be difficult for a defense counsel to establish that evidence was apparently exculpatory at the time it was lost or destroyed, as the rule requires. One final point, unrelated to discovery practice, is that trial counsel must scrupulously follow judges' instructions regarding impermissible lines of questioning and comments on the evidence. Likewise, defense counsel must ensure they object when trial counsel violate these instructions, to preserve such issues clearly for the appellate record.

IV. Defense Failure to Provide Reciprocal Discovery: What is Good for the Goose Is Good for the Gander

Rules for Courts-Martial 701(b)(3) and (4) contain the military's reciprocal discovery rules. Simply stated, if the defense counsel requests discovery under RCM 701(a)(2)(A) or (B), and if the government complies with the request and makes its own subsequent request of the defense counsel, the defense must disclose documents, tangible objects, and reports of examinations or tests.[110] Rule for Courts-Martial 701(e) says that "[e]ach party shall have adequate opportunity to prepare its

101. *Ellis*, 57 M.J. at 380. The evidence was important to the government's case because testimony about the brain tissue would establish the time of Timmy's death. On the other hand, the defense would rely on the scientific examination of the brain to impeach the government witnesses and also to establish time of death and cause of injury consistent with the defense theory. *See id.*

102. *Ellis*, 54 M.J. at 970.

103. *Id*. at 380.

104. *Id*. at 381.

105. *Id.* at 380. The judge instructed the panel members that they could not give less weight to the defense expert's testimony because he had been unable to examine the lost evidence, and also that they could consider the defense expert's testimony about what he would have expected a microscopic examination of the evidence to show. *Id*. at 380-81.

106. *Id*. at 381-82.

107. *Id*. at 380.

108. *Id*. at 382.

109. *Id*. at 380-82.

110. MCM, *supra* note 7, R.C.M. 701.

case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence."[111] The military judge regulates the time, place, and manner of discovery, and has the power to remedy the situation when a party fails to comply with discovery requirements.[112] Possible remedies include ordering discovery, granting a continuance, or prohibiting the offending party from introducing evidence, calling a witness, or raising an undisclosed defense, along with any other appropriate order.[113]

The exclusion of defense evidence is a drastic remedy with possible Sixth Amendment implications. In *Taylor v. Illinois*,[114] the Supreme Court said that in deciding whether the exclusion of evidence is an appropriate remedy when defense counsel or defendants fail to comply with discovery rules, trial judges must balance "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor" against "countervailing public interests."[115] The court further defined these interests as the presentation of reliable evidence, the rejection of unreliable evidence, the fair and efficient administration of justice, and the potential prejudice to the truth-seeking process.[116] The Supreme Court cited a case from the U.S. Court of Appeals for the Ninth Circuit, *Fendler v. Goldsmith*,[117] as an example of this balancing test. The court in *Fendler* considered factors including the importance of the witness or evidence to the defense case, the degree of surprise or prejudice to the prosecution, the effectiveness of less restrictive measures, and the willfulness of the violation.[118]

The holding of *Taylor v. Illinois*[119] was incorporated into the discussion following RCM 701(g), which specifies factors to be considered in determining whether to grant an exception to exclusion. These factors include the extent of the disadvantage that resulted from the failure to disclose, the reason for the failure, the extent to which later events mitigated the disadvantage caused by the failure, and any other relevant factors. These factors apply whenever the military judge is considering excluding evidence as a sanction. If the military judge is considering implementing this extreme sanction against the defense, however, the rule goes on to specify additional factors the judge must consider, including: (1) whether the defense counsel's failure to comply with discovery rules or orders was willful and motivated by a desire to obtain a tactical advantage, or to conceal a plan to present fabricated testimony; (2) whether alternative sanctions could minimize the prejudice to the government; and (3) whether the defendant's right to compulsory process outweighs the countervailing public interest, including the integrity of the process, the interest in fair and efficient administration of military justice, and the potential prejudice to the truth-finding function of the trial process.[120] In *United States v. Pomarleau*,[121] the CAAF dealt with these rules and the unusual circumstance in which the defense failed to disclose requested information to the government, and in which the military judge thus precluded the defense from introducing that evidence.[122]

Pomarleau involved an alcohol-related, single-car rollover accident that left two civilian passengers dead and the two military occupants seriously injured after they were thrown from the jeep in which they were riding.[123] The primary fact question was the driver's identity. Within this broader question were several related corollary questions, including the number of times the jeep rolled, and the trajectory of each occupant thrown from one of the vehicles.[124] The appellant had no memory of the accident or the events leading up to it, and the other

111. *Id.* R.C.M. 701(e).

112. *Id*. R.C.M. 701(g).

113. *Id*. R.C.M. 701(g)(3).

114. 484 U.S. 400, 409 (1988). Under Illinois rules, the defense was required to provide the state with a witness list before trial. At trial, the defense attempted to call a witness who was not on the witness list it had previously provided. The trial judge conducted a hearing on the issue and determined that the defense had willfully violated the applicable rule. In light of this finding, the trial judge precluded the witness from testifying. *Id*.

115. United States v. Pomarleau, 57 M.J. 351, 361 (2003).

116. *Id*.

117. 728 F.2d 1181 (9th Cir. 1983).

118. *Id*. at 1188-90.

119. 484 U.S. 400 (1988).

120. MCM, *supra* note 7, R.C.M. 701(g)(3)(D) discussion; *see also id*. R.C.M. 701(g) analysis, at A21-34.

121. 57 M.J. 351 (2002).

122. *Id*.

123. *Id*.

124. *Id*. at 357.

surviving soldier made several inconsistent statements about who was driving.[125] Other eyewitnesses reported seeing the jeep roll between one and five times.[126] Both the government and the defense cases largely hinged on expert testimony.[127]

The defense counsel initially requested discovery during the Article 32 investigation. The government later submitted its own discovery request to the defense under RCM 701(b)(3). At a subsequent Article 39(a) session, held to consider a defense motion to compel funding for an expert witness, the trial counsel first complained that the defense had provided insufficient synopses of the expected testimony of the defense experts, and that the defense had not yet provided a final witness list. The military judge ordered the defense counsel to provide the requested information. About a month later, the government moved to compel discovery, claiming that the defense had still not provided copies of the charts and diagrams that their experts would use at trial, and that they had been unable to interview the defense experts.[128]

The government did not receive the defense expert's diagram until the second day of trial, and did not receive a copy of the study until just before the defense called its expert to the stand for direct examination. Moreover, the trial counsel said he never received a copy of the computer simulation and other related materials. The trial counsel moved to exclude the exhibits and the study from evidence as a sanction against the defense, claiming that the defense was engaging in "trial by ambush." [129] The military judge asked the government how long it would take to review the materials. After the government gave a vague answer, the military judge sustained the objection, excluding the diagram and the study, and also precluding the defense expert from referring to them in his testimony. The military judge did not indicate the basis for this ruling or for the later ruling regarding the computer simulation and related calculations. During closing arguments, the trial counsel argued that the defense tried the case by ambush.[130]

The military judge never conducted a fact-finding hearing to determine whether the factors in the RCM 701(g) discussion militated in favor of excluding the evidence or toward less drastic sanctions. Although such discussion is not binding on military judges, the judge's failure to discuss the defense's reasons for the untimely disclosures made it impossible for the CAAF to determine from the record whether the failure was willful and designed to give the defense a tactical advantage.[131] Likewise, the military judge failed to explain whether he considered other, less damaging alternatives to exclusion of the evidence. Finally, the trial counsel's argument aggravated the damage. In the CAAF's opinion, all of these facts together resulted in prejudice under Article 59(a) and required reversal.[132]

Pomarleau is instructive for several reasons. Perhaps one of the main lessons from a trial practitioner's perspective is the importance of dealing professionally with opposing counsel, even in hotly-contested discovery battles. It also is important for defense counsel to remember that once a discovery requirement is triggered, they must disclose the requested evidence. If there is a dispute, the parties should bring it before the military judge for a ruling. It does not benefit either side to withhold evidence that must be disclosed. Defense counsel are on notice that if they attempt to subvert discovery rules to gain a tactical advantage, they could be endangering their own ability to use and benefit from that evidence. Both trial and defense counsel must understand the remedies military judges can impose for discovery violations, and the requisite findings of fact that military judges must make before excluding evidence—particularly defense evidence—at trial. This understanding is important for trial counsel because they must always protect the record, and for defense counsel because they must preserve issues for appeal.

V. Conclusion

This year's discovery cases demonstrate that practitioners cannot apply the discovery rules in a vacuum; they must consider them in the context of the circumstances of each individual case. The military's broad discovery rules were designed "to promote full discovery to the maximum extent possible consistent with legitimate needs for non-disclosure and to eliminate 'gamesmanship' from the discovery process."[133] Article 46, UCMJ, holds military counsel to a higher standard than their civilian counterparts. As *Pomarleau* makes clear, this

125. *Id*. at 353-54.

126. *Id*. at 357.

127. *Id*. at 363.

128. *Id*. at 355.

129. *Id*. at 356. The documents in question were a diagram simulating the motion of an unrestrained passenger in a rollover accident; a computer simulation of the ejection pattern of one of the victims from the vehicle, and the underlying calculations; and the study the defense expert relied on in preparing the computer simulation, and to which his testimony would refer. *Id*.

130. *Id*.

131. *Id*. at 363-65.

132. *Id*. at 365.

applies to defense counsel as well as trial counsel, although defense counsel arguably have more room for strategy in discovery practice. The most important lesson of this new crop of cases is that discovery practice, while not a particularly exciting part of trial practice, affects all aspects of a court-martial. It is important that all counsel understand the rules and how they interrelate. Doing so will avoid messy mistakes, promote understanding of opposing counsel's responsibilities, guide practitioners toward finding solutions to problems, and clarify what remedies the military judge can impose. Each of these cases sheds valuable light on often-overlooked aspects of military discovery practice.

133. MCM, *supra* note 7, R.C.M. 701 analysis, app. 21, at A21-32.