

52ND MILITARY JUDGE COURSE

DISCOVERY

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REFERENCES.....	1
III.	DISCLOSURE REQUIREMENTS.....	1
IV.	DUE PROCESS: <i>BRADY V. MARYLAND</i>	7
V.	GOVERNMENT DUTY TO SEEK OUT EVIDENCE	12
VI.	RULE FOR COURTS-MARTIAL 703 – COMPULSORY PROCESS	14
VII.	MILITARY JUDGE’S REGULATION OF DISCOVERY.....	19
VIII.	REMEDIES FOR NONDISCLOSURE.....	22
IX.	ETHICAL CONSIDERATIONS.....	28
X.	THE JENCKS ACT.....	28
XI.	DESTRUCTION/PRESERVATION OF EVIDENCE.....	30
XII.	CONCLUSION	32
XIII.	APPENDIX.....	33

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MARCH 2009

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DISCOVERY

I. INTRODUCTION

“Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better-informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.” MANUAL FOR COURTS-MARTIAL, United States, RCM 701 analysis, app. 21, at A21-33 (2008) [hereinafter MCM].

II. REFERENCES

- A. Article 46, UCMJ. “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.”
- B. Rule for Courts-Martial (RCM) 701.
- C. RCM 703.
- D. RCM 914.
- E. Military Rules of Evidence (MRE) 301, 304, 311, 321, 404(b), 412, 413, 414, 807.
- F. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

III. DISCLOSURE REQUIREMENTS

- A. Mandatory Disclosure Requirements of RCM 701 for Trial Counsel.
 - 1. Rule for Courts-Martial 701(a)(1):
 - a) Any papers that accompanied the charges when referred;

- b) The convening orders; and
 - c) Any sworn or signed statement *relating to* an offense charged which is in the possession of the trial counsel.
2. Rule for Courts-Martial 701(a)(3). Before the beginning of the trial on the merits, the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:
- a) In the prosecution case-in-chief; and
 - b) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when the trial counsel has received timely notice of such a defense.
3. Rule for Courts-Martial 701(a)(4). Before arraignment, the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment.
4. Rule for Courts-Martial 701(a)(6). The trial counsel shall disclose evidence which reasonably tends to:
- a) Negate guilt;
 - b) Reduce the degree of guilt; or
 - c) Reduce the punishment.

B. Mandatory Disclosure after Defense Request for Trial Counsel.

- 1. Rule for Courts-Martial 701(a)(2)(A): books, papers, documents, photographs, tangible objects, buildings, or places, and
- 2. Rule for Courts-Martial 701(a)(2)(B): results or reports of physical or mental examinations, and of scientific tests or experiments.
 - a) Key requirements of both sections:
 - (1) *Intended for use* by the trial counsel as evidence in the case-in-chief; OR

- (2) *Material* to the preparation of the defense; and
 - (3) In the possession, custody, or control of military authorities.
 - b) *United States v. Jackson*, 59 M.J. 330 (2004). Defense counsel specifically requested “any reports, memos for record or other documentation relating to Quality Control and/or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab for the three quarters prior to [the accused]’s sample being tested, and the available quarters since [the accused]’s sample was tested.” The lab failed to identify a blind quality control sample by reporting a negative sample as a positive less than four months after the accused’s sample was tested and less than three months after the defense’s request. The trial counsel failed to discover and disclose the report to the defense. That failure violated the accused’s rights under RCM 701(a)(2)(B). The CAAF found prejudice because had the information been disclosed, the defense could have used the information to demonstrate the existence of quality control problems.
 - c) *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008). Military Judge erred when he refused to allow the defense experts to conduct independent testing of physical evidence admitted a trial. The NMCCA determined that the forensic evidence was material and relevant to the case and the defense experts should have been afforded equal access absent a showing by the government as to why they could or should not be allowed.
3. Sentencing information (if intended for use at the presentencing proceedings). RCM 701(a)(5):
- a) Written material; and
 - b) Names and addresses of witnesses.
- C. Trial Counsel’s rebuttal evidence. No requirement to disclose rebuttal evidence. *United States v. Clark*, 37 M.J. 1098 (N.M.C.M.R. 1993) (holding that at presentencing, the trial counsel was not required to disclose a letter from the City of Los Angeles indicating that a different defense-offered letter indicating that the city would hire the accused was not true; evidence which could have been introduced during the case-in-chief during presentencing but

is withheld does not fall within the rebuttal exception); *see also United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989) ((holding that rebuttal evidence of a private urinalysis should have been disclosed to defense because it was material to the preparation of the defense but exclusion was not the necessary remedy - a continuance was adequate). *But see United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002) (rejecting the *Trimper* court’s “narrow interpretation” of phrase “material to preparation of defense” and holding that *Trimper* should no longer be followed in Army courts-martial).

D. Disclosure Requirements of the Military Rules of Evidence.

1. Grants of Immunity or Leniency. Mil. R. Evid. 301.
2. Accused’s statements. Mil. R. Evid. 304(d)(1). Prior to arraignment, the prosecution shall disclose all statements of the accused, oral or written, that are relevant to the case *irrespective of intent to use at trial*.
3. Evidence. Mil. R. Evid. 311(d)(1). Prior to arraignment, the prosecution shall disclose all evidence seized from the accused or property owned by the accused, that it *intends to offer* into evidence against the accused at trial.
4. Identifications. Mil. R. Evid. 321(c)(1). Prior to arraignment, the prosecution shall disclose all evidence of prior identifications of the accused that it *intends to offer* into evidence against the accused at trial.
5. Notice of Uncharged Misconduct. Mil. R. Evid. 404(b). Upon defense request, the government must provide pretrial notice of the general nature of evidence of other crimes, wrongs, or acts which it intends to introduce at trial.
6. Rape Shield. Mil. R. Evid. 412. Proponent must give notice of intent to introduce evidence of victim’s past sexual behavior.
7. Similar Crimes. Mil. R. Evid. 413 and 414. If the government intends to offer evidence of similar crimes (sexual assault or child molestation), the trial counsel must notify the defense of its intent and disclose the evidence.
8. Residual Hearsay. Mil. R. Evid. 807. The proponent of residual hearsay must give the opponent notice of the intent to offer out-of-court statements as residual hearsay. *See United States v. Holt*, 58

M.J. 227 (2003) (holding that Air Force Court of Criminal Appeals abused its discretion when it affirmed the introduction of residual hearsay statement when there was no indication in the record as to whether the required notice was given and by misapplying the foundational requirement of necessity).

E. Mandatory disclosure requirements for Defense Counsel.

1. Rule for Courts-Martial 701(b)(1) – Witnesses and Statements. Before the beginning of trial on the merits, the defense *shall* notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief, *and* provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.
2. Rule for Courts-Martial 701(b)(2) – Notice of Certain Defenses. Defense *shall* give notice before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition. Notice shall include places, circumstances, and witnesses to be relied upon for these defenses.
 - a) *United States v. Lewis*, 51 M.J. 376 (1999). The trial judge erroneously prevented the accused from presenting an innocent ingestion defense because the defense could not give notice of places where the innocent ingestion occurred and witnesses to be relied upon. The judge prevented the accused from raising this defense herself by her testimony alone. CAAF reversed holding that RCM 701(b)(2) does not require corroborative witnesses or direct evidence as a condition for raising innocent ingestion.

F. Mandatory disclosure after Government Request by Defense Counsel.

1. Rule for Courts-Martial 701(b)(1)(B)(i) – provide the trial counsel with the names and addresses of any witness whom the defense intends to call at the presentencing proceeding under RCM 1001(c); and
2. Rule for Courts-Martial 701(b)(1)(B)(ii) – permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

- G. Defense Counsel's surrebuttal evidence. Defense not required to disclose surrebuttal evidence. *United States v. Stewart*, 29 M.J. 621 (C.G.C.M.R. 1989).
- H. Reciprocal Discovery. If the defense requests discovery under RCM 701(a)(2), upon compliance with such request by the government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect:
1. Papers, documents, photographs, objects within the possession, custody and control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief. RCM 701(b)(3).
 2. Reports of physical or mental examinations and scientific tests or experiments within the possession, custody and control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief or which were prepared by a defense witness who will be called at trial. RCM 701(b)(4).
- I. Continuing Duty to Disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material. RCM 701(d). *See United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986); *United States v. Jackson*, 59 M.J. 330 (2004).
- J. Information not subject to disclosure. Rule for Courts-Martial 701(f). Disclosure not required if information is protected under the Military Rules of Evidence or if the information is attorney work product (notes, memoranda, or similar working papers prepared by counsel or counsel's assistants or representatives).
1. *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987) ("Even though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney,'" quoting *Hickman v. Taylor*, 329 U.S 495, 510 (1947)).
 2. *United States v. King*, 32 M.J. 709 (A.C.M.R. 1991), *rev'd on other grounds*, 35 M.J. 337 (C.M.A. 1992). A defense expert is subject to a pretrial interview by TC, but a defense "representative" under MRE 502 is not. It was improper for TC to communicate with defense representative concerning interview with appellant.

3. *United States v. Vanderbilt*, 58 M.J. 725 (N-M. Ct. Crim. App. 2003) (holding that a civilian witness's agreement to testify pursuant to a pretrial agreement with the U.S. Attorney's Office does not waive that witness's attorney-client privilege regarding statement made to his attorney during the course of pretrial negotiations).

IV. DUE PROCESS: *BRADY V. MARYLAND*

- A. *Brady v. Maryland*, 373 U.S. 83 (1963). "[T]he suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution" (emphasis added). *Id.* at 87. The duty to disclose favorable evidence exists even without a request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976).
 1. **Favorable.** Includes exculpatory evidence *and* information that might be used to impeach government witnesses. *Banks v. Dretke*, 124 S. Ct. 1256 (2004); *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). This impeachment information may include:
 - a) Any promise of immunity or leniency offered to a witness in exchange for testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).
 - b) Specific instances of conduct of a witness for the purpose of attacking the witness's credibility or character for truthfulness. *See, e.g., United States v. Watson*, 31 M.J. 49 (C.M.A. 1990) (finding evidence that witness had monetary interest in outcome of case could have been material); *United States v. Mahoney*, 58 M.J. 346 (2003) (holding that trial counsel's failure to disclose a letter impeaching government's expert witness was reversible error).
 - c) Evidence in the form of opinion or reputation as to a witness's character for truthfulness.
 - d) Prior inconsistent statements. *See, e.g., United States v. Romano*, 46 M.J. 269 (1997); *Graves v. Cockrell*, 351 F. 3d 156 (5th Cir. 2003) (remanding case to district court for an evidentiary hearing to determine "(1) the substance of the alleged statement [by co-defendant made the day before trial], along with Carter's statement allegedly exonerating Graves; (2)

whether Graves was aware of these statements or exercised due diligence to discover these statements; (3) whether the state's failure to disclose these statements was material to Graves' defense under Brady; and (4) for a determination of whether Graves is entitled to relief on these claims.”).

- e) Information to suggest that a witness is biased. *See, e.g., Bagley*, 473 U.S. at 667; *Banks*, 124 S. Ct. 1256 (2004) (finding that the State’s failure to disclose that key state witness in capital sentencing proceeding was a paid government informant and played an important role in setting up Banks’ arrest was material).

2. **Material.** The government’s failure to disclose evidence only violates due process if the undisclosed evidence is material to guilt or punishment. The Supreme Court in *Banks*, 124 S. Ct. 1256 (2004) reiterated that the touchstone of materiality is the *Kyles* case. The *Kyles* Court noted that the materiality standard in *Brady* is met when “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S., at 435. Earlier, the Court in *Bagley*, 473 U.S. 667 (1985), announced two standards for determining materiality:

- a) First, in cases of knowing use of perjured testimony by the prosecutor, the failure to disclose favorable evidence is material unless the failure to disclose is harmless beyond a reasonable doubt. *Id.* at 682.
- b) Second, in cases where there is no discovery request, a general discovery request, or a specific discovery request, 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.* at 679-80.
- c) **What is a “reasonable probability?”**
 - (1) A reasonable probability is “a probability sufficient to undermine confidence in the result.” *Id.* at 682.
 - (2) “[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial,

understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 434.

- (3) “[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusion . . . the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 434-35.

d) **Higher standard of review in the military: look at the specificity of the defense request.** “Where an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.” *United States v. Roberts*, 59 M.J. 323 (2004) (citing, *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990). *See also United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993) (Wiss, J., concurring); *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993) (finding nondisclosure harmless beyond a reasonable doubt).

- (1) *See also United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government did not disclose unfavorable but *material* evidence to the defense. The Army Court held (1) that equal opportunity to obtain evidence under Article 46, UCMJ, as implemented by the President in the Rules for Courts-Martial, 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; and (2) that 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. The court also emphasized that 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.

- (2) *But see United States v. Figueroa* 55 M.J. 525 (A.F. Ct. Crim. App. 2001). Government failed to disclose favorable evidence that the defense had specifically requested. The Air Force Court found that this failure was error, regardless of good faith. There, however, was no reasonable probability that the result of trial would have been different if the evidence had been disclosed. In reaching this decision, the court discussed the impact of Article 46 and pointed out that in *Bagley*, the Supreme Court rejected a higher standard of review in cases involving specific defense requests. What about the statutory analysis? *See also United States v. Brozzo*, 57 M.J. 564 (A.F. Ct. Crim. App. 2002), *vacated by* 58 M.J. 284 (2003) *on remand*, 2003 CCA LEXIS 187 (A.F. Ct. Crim. App. 2003) (unpub. opinion), *pet. granted*, 59 M.J. 399 (2004). The CAAF vacated the Air Force Court's opinion on a question whether the defense counsel was ineffective for failing to exercise due diligence in securing an erroneous drug test report, the substance of which the government disclosed pursuant to a defense request for discovery. The Air Force Court found no ineffective assistance of counsel.
3. Although the government is required to be forthcoming with favorable evidence, it is not required to draw inferences from the evidence which defense counsel is equally able to draw. *See United States v. Grossman*, 843 F.2d 85 (2d Cir. 1988); *Todden v. Auger*, 814 F.2d 528 (8th Cir. 1987).
4. The prosecutor does *not* have to have **actual knowledge** of the evidence to commit a *Brady* violation. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346; *Bailey v. Rae*, 339 F.3d 1107 (9th Cir. 2003) (finding no evidence that prosecution intentionally withheld victim's therapy reports, but holding that prosecution's failure to disclose reports concerning victim's mental capacity was a *Brady* violation because such evidence was favorable as it tended to negate allegation that victim was mentally defective and incapable of consent).

B. The Components of a *Brady* Violation.

1. *Strickler v. Greene*, 527 U.S. 263 (1999) (holding there was no *Brady* violation when the state did not disclose notes taken by a detective of a

conversation with the main government witness; such notes likely to have cast serious doubt on portions of the witness's in-court testimony). There are three components of a *Brady* violation:

- a) The evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching;
 - b) The evidence must have been suppressed by the state; and
 - c) Prejudice must have resulted. The third prong is a materiality analysis. *See Strickler*, 527 U.S. at 297 n. 2 (“In keeping with suggestions in a number of our opinions [citations omitted] the Court treats the prejudice enquiry as synonymous with the materiality determination under *Brady v. Maryland* [citations omitted]. I follow the Court’s lead.”) (Souter, J., concurring in part and dissenting in part).
2. “Assuming that the information is of a type that is discoverable under RCM 701 and *Brady*, the threshold question is whether the information at issue was located within the parameters of the files the prosecution must review for exculpatory material.” *United States v. Williams*, 50 M.J. 436, 440 (1999).
 3. *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001). Whether disclosure is sufficiently complete or timely to satisfy *Brady* can only be evaluated in terms of “the sufficiency, under the circumstances, of the defense’s opportunity to use the evidence when disclosure is made.” *Id.* at 100. According to the Court of Appeals, the closer a disclosure is to trial, the less opportunity there is for use, and the more detailed that disclosure must be. *Id.* at 102.
- C. *Brady* and Guilty Pleas. *United States v. Ruiz*, 536 U.S. 622 (2002). “Fast track” plea bargain requires a defendant to waive, *inter alia*, the right to any impeachment information relating to any informants or other witnesses in exchange for the Government’s recommendation of a two-level downward departure from the mandatory federal sentencing guidelines. Ruiz turned down the offer, but ultimately pled guilty without the benefit of a recommended downward departure. At sentencing, she requested the downward departure; the Government opposed and the District Judge denied the request. The Ninth Circuit Court of Appeals noted that the Constitution requires the Government to make impeachment information available to a defendant before trial. It also decided that defendants are entitled to such information before they enter into a plea agreement and, further, that such a right was nonwaivable. The Supreme Court reversed, holding that the Constitution does not require the pre-guilty plea disclosure of impeachment

information. The Court noted that disclosure of impeachment information relates to the fairness of a *trial*, as opposed to the voluntariness of a plea. Impeachment information, the Court declared, is particularly difficult to characterize “as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.” Whether this ruling by the Supreme Court applies to military practice is undecided. *See also United States v. Garlick*, 2005 CAAF Lexis 905 (Aug. 25, 2005). Trial Counsel failed to disclose factual inconsistency in search affidavit in child pornography case. The Court of Appeals for the Armed Forces held that since problems with the affidavit were known to the defense in advance of guilty plea, and not litigated, any failure to disclose was harmless beyond a reasonable doubt.

V. GOVERNMENT DUTY TO SEEK OUT EVIDENCE

- A. *United States v. Williams*, 50 M.J. 436 (1999). The scope of the government’s duty to search with beyond the prosecutor’s own files generally is limited to:
1. The files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. *Id.* at 441.
 - a) *United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989). In a mail fraud case, the local IRS office and the National Office of the IRS investigated the defendant. The defense requested all witness interviews and opinion letters by IRS attorneys in the possession of all IRS officials. The trial court held the prosecutor only had to disclose records within the district. The appellate court vacated the convictions, holding that the “prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant.” *Id.* at 1036.
 - b) *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (holding that trial counsel must exercise due diligence in discovering the results of exams and tests which are in possession of CID).
 - c) *United States v. Sebring*, 44 M.J. 805 (N-M. Ct. Crim. App. 1996) (holding that trial counsel had a duty to discover quality control investigation into problems at Navy drug lab that tested the accused’s urine sample).

- d) *Kyles v. Whitley*, 514 U.S. at 437 (“This . . . means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).
2. Investigative files in a related case maintained by an entity closely aligned with the prosecution. *United States v. Williams*, 50 M.J. at 441.
 - a) *United States v. Hankins*, 872 F. Supp. 170 (D.N.J. 1995). After trial, the defense discovered an affidavit made by a co-conspirator during a civil forfeiture action that was inconsistent with her proffer to DEA agents after she became a cooperating witness. In the affidavit, the witness said she never used her van to facilitate drug transactions in any way. In her proffer to the DEA, she said she did use the van to pick up drugs. The affidavit was not disclosed to the defense. The District Court found the civil division of the U.S. Attorney’s office was “closely aligned with the prosecutor.” “Thus, when the government is pursuing both a civil and criminal prosecution against a defendant stemming from the same underlying activity, the government must search both the civil and criminal files in search of exculpatory material.” *Id.* at 173.
 - b) *United States v. Romano*, 46 M.J. 269 (1997). The trial counsel had a duty to disclose statements by witnesses at the Art. 32 investigation of co-accuseds, where the prior statements were inconsistent with the government’s main witness’s testimony at trial.
3. Files designated in the defense discovery request that involved a specified type of information within a specified entity. *United States v. Williams*, 50 M.J. at 441.
 - a) *United States v. Shelton*, 59 M.J. 727 (Army Ct. Crim. App. 2004), *rev’d on other grounds*, 64 M.J. 32 (2006). Defense made a timely request to review the CID Agent Activity Summaries. The special agent in charge did not permit either the trial counsel or the defense counsel (or the CID brigade JA) to review the AAS. The trial counsel argued that the documents were internal, administrative CID work product focused on internal supervisory reviews of the case agent’s progress on investigative plans. The military judge reviewed the documents *in camera*, determining that none were relevant. One of the entries stated, “We’ll never get anything from the Pastor, he’s got problems of his own.” Appellant claimed that this entry

implied the existence of derogatory information that could have possibly been used to impeach this potential government witness (appellant pled guilty but preserved several issues for appeal with a conditional guilty plea). The Army Court determined that the military judge's failure to release the AAS was error, but there was no reasonable probability that defense discovery of the comment in the AAS at trial would have resulted in additional impeachment evidence rendering the pastor unbelievable. The court in a footnote made it very clear that AAS should be made available to defense: "In a typical criminal case, after the investigation has been completed the CID AAS should routinely be available for defense inspection and photocopying." *Id.* at 734 n.14.

- b) *United States v. Veksler*, 62 F.3d 544 (3d Cir. 1995). In a tax evasion case, the defense requested and received post-trial information regarding the status of the grand jury investigation of one of the government's main witnesses. The defense did not request this information before trial, even though the defense knew of the proceedings. "Constructive knowledge can only be found where the defense has made a specific request for the information." *Id.* at 550.
- c) *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993). The defense requested "[a]ny record of prior conviction, and/or nonjudicial punishment of" any government witness. With respect to a CID agent, the trial counsel responded to the discovery request without comment. By responding without comment, the trial counsel was asserting there was no record of a prior conviction or NJP. The CID agent had an Art. 15 for fraternization, false claim, and larceny. Error was harmless beyond a reasonable doubt because the CID agent was only used to authenticate physical evidence.

VI. RULE FOR COURTS-MARTIAL 703 – COMPULSORY PROCESS

- A. RCM 703 provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." This rule is based on Article 46, UCMJ and implements the accused's Sixth Amendment right to compulsory process.
 - 1. If evidence is under the control of the government, trial counsel need only notify the custodian of the evidence of the time, place, and date evidence is required and requesting custodian to send or deliver the evidence. RCM 703(f)(4)(A).

2. What if the evidence the defense requests is not in the government's control? Rule for Courts-Martial 703(f)(4)(B) permits a trial counsel to issue a subpoena *after* referral IAW RCM 703(e)(2). *See e.g. Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002) (holding that there is no authority for issuing a subpoena for bank records to be produced at UCMJ art. 32 hearing).
 3. Rule for Courts-Martial 703(f) authorizes the use of a subpoena to obtain the requested material if the requesting party can establish that the evidence does exist and that it is relevant. *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *aff'd*, 60 M.J. 239 (2004).
- B. The defense must list the items of evidence to be produced and must include a description of each item sufficient to show its relevance and necessity; a statement where it can be obtained; and, if known, the name, address, and telephone number of the custodian of the evidence. RCM 703(f)(3).
1. No requirement on the part of the government to create the requested evidence. "Generally, the government has no responsibility to create records to satisfy demands for them." Judge did not err in denying defense request for negative urinalysis laboratory report in wrongful possession case. *United States v. Birbeck*, 35 M.J. 519, 522 (A.F.C.M.R. 1992).
 2. If the government refuses to produce defense requested evidence, the defense may make a motion for appropriate relief IAW RCM 906(b)(7). *See also* RCM 701(g)(3).
- C. Witnesses.
1. "The trial counsel shall obtain the presence of witnesses [for the prosecution] whose testimony the trial counsel considers relevant and necessary." RCM 703(c)(1).
 2. "The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests." RCM 703(c)(2). The request must include:
 - a) Name, address, phone number, and
 - b) A synopsis of the expected testimony sufficient to show its relevance and necessity. For sentencing, the request must also

show why the witness's personal appearance is necessary under standards set forth in RCM 1001(e)(2).

3. If the trial counsel contends that a witness's production is not required under the rule, the matter may be submitted to the military judge. *See* RCM 906(b)(7). If the judge orders production of the witness, the trial counsel shall produce the witness or the proceedings shall be abated. *See also United States v. Shelton*, 2005 CAAF Lexis 1094 (Sep. 27, 2005). (Factual analysis of production of witnesses under the "relevant and necessary" standard.)

D. Procedures for Producing Witnesses.

1. Military Personnel: Coordinate with the soldier's commander. RCM 703(e)(1).
2. Civilian Witnesses: Subpoena. RCM 703(e)(2).
 - a) Issued by the summary court-martial, trial counsel of a special or general court-martial, deposing officer, or president of court of inquiry. RCM 703(e)(2)(B).
 - b) Witness must be subject to U.S. jurisdiction (RCM 703(e)(2)(A), discussion) and may be served at any place within the United States, its Territories, Commonwealths, or possessions (RCM 703(e)(2)(E)); but, cannot compel civilians to travel outside United States (RCM 703(e)(2)(A), discussion).
 - c) May not be used for pretrial interview or investigation. RCM 703(e)(2)(B), discussion.
3. If the witness neglects or refuses to appear, a military judge or the convening authority if there is no military judge, may issue a warrant of attachment. RCM 703(e)(2)(G).
 - a) A warrant of attachment is issued only upon probable cause to believe that the witness was duly served with the subpoena, that fees and mileage were tendered, that the witness was material, that the witness refused or willfully neglected to appear, and that no valid excuse exists.
 - b) Only non-deadly force may be used.

- c) *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989). The military judge ordered a post-trial Article 39(a) to hear allegedly newly discovered evidence to be offered by defense witness. Trial counsel issued a subpoena to the defense witness, but the convening authority refused to pay expenses on the basis of bad advice from his SJA. The Court of Military Appeals determined that since the record of trial wasn't authenticated, the judge could order the government to show cause why the findings and sentence should not be set aside or the judge could order accused released from confinement pending the motion for new trial.
 - 4. Enforcement proceedings. Article 47, UCMJ.
 - a) Article 47. Criminal complaint brought in federal district court by U.S. Attorney.
 - b) Punishable by fine and/or imprisonment.
 - 5. If the witness has a valid excuse, one option is a deposition. *See* Article 49, UCMJ. In determining whether to admit a deposition when a witness is temporarily unavailable, the military judge should consider all of the circumstances, including (1) the importance of the testimony; (2) the amount of delay necessary to obtain the in-court testimony; (3) the trustworthiness of the alternative to live testimony; (4) the nature and extent of earlier cross-examination; (5) the prompt administration of justice; and (6) any special circumstances militating for or against delay. *United States v. Dieter*, 42 M.J. 697, 699-700 (Army Ct. Crim. App. 1995). The military judge erred in *Dieter*. The 100-mile rule is not an acceptable excuse for military witnesses.
- E. Experts.
- 1. Expert Witnesses. Rule for Courts-Martial 703(d).
 - a) When the employment of an expert at government expense is considered necessary by a party, the party shall, in advance of the employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation of the expert. The request shall include a complete statement of the reasons why employment of the expert is necessary and the estimated cost of employment.

- b) The government can provide an adequate substitute to the defense instead of employing a requested civilian expert.
- c) A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary.
- d) If the military judge grants the motion for employment, the proceeding shall be abated if the government fails to comply with the ruling.

2. Expert Assistance.

- a) *Ake v. Oklahoma*, 470 U.S. 68 (1985). In a capital case, the accused asked for a court-appointed psychiatrist to assist with the defense. The trial court denied the request. The Supreme Court held when an indigent accused makes a showing that expert assistance is needed on a substantial issue in the case both during case-in-chief and at sentencing, Due Process requires that the government provide that assistance.
- b) *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). In a capital murder case, the defense requested \$1,500 to hire a private defense investigator. The defense refused an offered OSI investigator to work under an order of confidentiality. The Court of Military Appeals held as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigence. Nonetheless, the military judge's denial of a private investigator was proper under the facts of the case. The defense had access to all reports and investigations completed. Importantly, the defense refused to make a record in open court regarding the necessity of the private investigator.
- c) *United States v. Ndanyi*, 45 M.J. 315 (1996). Expert assistance is provided only when the defense can establish necessity. There is a three-part test for establishing necessity:
 - (1) Why is the expert assistance needed;
 - (2) What would the expert assistance accomplish for the accused; and

- (3) Why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.
- d) *United States v. Warner*, 2005 CAAF Lexis 1110 (Sep. 30, 2005). In a shaken-baby case, the government assigned premier expert in the field to itself while at the same time providing the defense with an expert with no apparent experience in the area of shaken baby syndrome. As a result, the Court of Appeals for the Armed Forces held that the government improperly denied an expert with qualifications reasonably comparable to its own expert. The Court held that with the improper denial the government effectively denied the defense the “even playing field” required under Article 46’s guarantee of “equal access”. Findings and sentence set aside.
- e) *United States v. Bresnahan*, 2005 CAAF Lexis 1110 (Sep. 30, 2005). Military judge did not err when he refused the defense request for expert assistance in the area of false confessions. Defense did not show there was any evidence of a false confession and therefore failed to demonstrate why an expert in this area was necessary.

VII. MILITARY JUDGE’S REGULATION OF DISCOVERY

- A. **Time, place, and manner.** The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just. RCM 701(g).
- B. **Protective and modifying orders.** The military judge may order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the judge. If the judge grants relief after such an *ex parte* showing, the entire text of the party’s statement shall be sealed and attached to the record of trial as an appellate exhibit. RCM 701(g)(2).
- C. *In camera* review. The judge may require the evidence be subject to an *in camera* inspection in order to determine whether relief should be granted. See RCM 701(g) and 703(f)(4)(c). Courts are relying on the *in camera* review to balance the government’s interest in maintaining the confidentiality of records of certain categories of information with the accused’s right to present a defense and confront witnesses.

1. Cases.

- a) **Medical Treatment and Disciplinary Records of Minors.** *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). The military judge should have conducted an *in camera* inspection of the victims' treatment and disciplinary records. The defense counsel "made as specific a showing of relevance as possible, given that he was denied all access to the documents." Witness credibility would be central in this case because there were no eyewitnesses. The court held that the military judge abused his discretion in failing to order production of the requested records for an *in camera* review. *Id.* at 94-95. *See also Alderman v. United States*, 394 U.S. 165 (1969). Defense counsel may argue that they are in a better position to consider the relevancy of material sought in discovery than a judge considering the material *in camera*. *But see United States v. Cano*, 61 M.J. 74 (2005). (notwithstanding military judge's *in camera* review of therapists notes of child sex-assault victim, failure to disclose portions of said notes was error, but error was harmless beyond a reasonable doubt.)
- b) **Rape Victim's Medical Records.** *United States v. Briggs*, 48 M.J. 143 (1998). Military judge's denial of defense request for rape victim's complete medical record was not an abuse of discretion where the defense was unable to show relevance to the charged offense. The government had provided the medical records pertaining to the charged offense. The defense requested the victim's entire medical record. "[T]rial defense counsel could not point to any possibility that there was exculpatory material contained within the victim's medical records." The CAAF sets forth the *in camera* review as a **preferred** procedure for handling such issues at trial. *Id.* at 145.
- c) **Government Witness's Military Records.**
- (1) *United States v. Abrams*, 50 M.J. 361 (1999). The accused was convicted of pandering and soliciting another to engage in prostitution. The accused was alleged to have acted as a pimp for his live-in girlfriend and another female sailor. The female sailor was a critical government witness. The government provided adverse counseling entries and nonjudicial punishment for the female sailor's prostitution but the government opposed the production of the rest of the female sailor's

records. The defense counsel proffered that because the female sailor had been to therapy, he needed to see the entire record to determine if there was additional impeachment evidence. The trial judge ruled that the defense counsel had not made a showing of relevance or necessity and then reviewed the records *in camera*. The case was remanded because the judge failed to seal the records he reviewed *in camera* and append them to the record of trial as is required by RCM 701(g)(2). The Navy-Marine Court affirmed on remand (1999 CCA LEXIS 271 (N-M Ct. Crim. App. 1999)), which decision CAAF also affirmed (2000 CAAF LEXIS 959 (2000)).

(2) *United States v. Kelly*, 52 M.J. 773 (Army Ct. Crim. App. 1999). The court found that the trial judge abused his discretion by not reviewing the victim's personnel files *in camera*. However, instead of returning the record to the trial judge to conduct an *in camera* inspection, the Army Court found "no reasonable probability that the result of trial would have been different" if the files had been inspected by the trial counsel or military judge. The court made this finding despite the fact it is impossible to determine whether undisclosed evidence would have an impact on the verdict or sentence unless you know what the undisclosed evidence is.

d) **Inspector General's Report of Inquiry.** *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999). The defense requested the judge to compel production of all documents related to a previous IG Report of Investigation into a complaint made by a government witness against the base's senior enlisted advisor. The defense proffered that the investigation determined the witness was not credible. The trial judge neither ordered production nor conducted an *in camera* inspection. The appellate court returned the record, ordered the government to provide a copy of the report for inspection. Upon inspection of those records *in camera*, the AFCCA found no evidence favorable to the defense.

e) **Public Interest Privilege.** *United States v. Rivers*, 49 M.J. 434 (1998). On appeal, defense appellate counsel sought to view the contents of a sealed record the trial judge inspected and refused to disclose to trial defense counsel. The defense is not entitled to unrestricted access to government information.

“Where a conflict arises between the defense search for information and the Government’s need to protect information, the appropriate procedure is ‘in camera review’ by a judge.” The defense argued at trial that the confidential informant’s prior statements and CID agent notes should be disclosed. The judge, after reviewing the documents *in camera*, found that the evidence was irrelevant and that it was protected under Mil. R. Evid. 506 (detrimental to the public interest). The judge ultimately lifted the protective order as to two of the informant’s three sworn statements. On appeal, the Army Court of Criminal Appeals reviewed the sealed portion of the record *in camera* and refused to unseal the evidence.

f) **News Gathering Privilege:** *United States v. Wuterich*, No. 08-6006/MC (consolidated with No. 08-8020/MC and No. 08-8021/MC) (C.A.A.F. Nov. 17, 2008). Accused participated in a televised interview with CBS News describing the events surrounding the crimes for which he was charged. Accused did the interview prior to trial. Government subpoenaed the broadcasted footages as well as all audio and video of any footage not broadcasted. CBS only turned over the broadcasted footage citing a news gathering privilege for not turning over the other material. The military judge quashed the governments subpoena without reviewing the footage in question stating that the material was cumulative of the aired footage. The CAAF determined that the military judge abused his discretion when he granted CBS’ motion to quash the subpoena without conducting an *in camera* review of the outtake tapes. The CAAF did not decide whether a qualified newsgathering privilege protected the material not used in the broadcasted but they did stated that even if a qualified privilege exists, it “would not preclude an *in camera* review pursuant to RCM 703(f)(4)(C).

D. *Ex parte* hearing. *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991). Defense had calendar of child victim, which inculpated the accused. Defense counsel requested an *ex parte* hearing before the military judge for a ruling on their duty to disclose the calendar. The military judge’s *ex parte* hearing was proper given the defense counsel’s duty to protect client confidential communication.

VIII. REMEDIES FOR NONDISCLOSURE

A. RCM 701(g)(3). During trial, the judge can take one or more of the following actions:

1. Order discovery;
 - a) *United States v. Rodriguez*, 57 M.J. 765 (N-M. Ct. Crim. App. 2002), *aff'd*, 60 M.J. 239 (2004). At the invitation of agents from the Bureau of Alcohol, Tobacco, and Firearms, an NBC videographer taped the traffic stop and search of appellant's vehicle along Interstate 95. In support of his pretrial motion to suppress his statements given to ATF and Naval Investigative Service Command,¹ the accused sought all NBC videotape of the traffic stop. NBC provided a videotape of the broadcast material of the traffic stop. NBC also stated that it relied on its First Amendment privilege regarding the production of the video "outtakes" and reporter's notes. The trial defense counsel requested the military judge to order production of any remaining videotape. NBC's response referenced its earlier response and First Amendment privilege. The military judge denied the defense request to compel production. The military judge found that the requested videotape (the outtakes) was not of central importance to the accused's case. The military judge found the search was conducted some distance from the interview by law enforcement and on that the video crew focused its attention on the search of the vehicle. The Navy-Marine Court reviewed the military judge's determination for an abuse of discretion and found none. The appellant, the Navy-Marine Court noted, failed to demonstrate that the requested evidence was both necessary and relevant. The military judge viewed the broadcast portion of the tape and found that the outtakes were unnecessary and cumulative on the issue of voluntariness of the appellant's statements. The Navy-Marine Court found that the defense counsel failed to show how the outtakes would have been material to the determination of any material issue. Because of appellant's failures to show the necessity and relevancy of the requested information, compulsory process does not lie: "A party is entitled to compulsory process for the production of relevant and necessary information."

2. Grant a continuance (common remedy);
 - a) *United States v. Irwin*, 30 M.J. 87 (C.M.A. 1990). Defense counsel offered a continuance in response to CA's order

¹ As noted in a footnote of the opinion, from 1988 to 1992, the current Naval Criminal Investigative Service (NCIS) operated under the name Naval Investigative Service Command. *United States v. Rodriguez*, 57 M.J. 765, n.3 (N-M. Ct. Crim. App. 2002), *pet. granted*, 2003 CAAF LEXIS 805 (Aug. 5, 2003).

requiring the presence of a third party when the defense counsel interviewed the child/victims.

- b) *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989). Defense counsel moved to preclude use of the urinalysis report. The military judge denied the request for exclusion, but granted a continuance, which was an appropriate remedy.
- c) *United States v. Murphy*, 33 M.J. 323 (C.M.A. 1991). The Government did not disclose its sole witness (an eyewitness accomplice), but used the witness on rebuttal. Exclusion of testimony was not necessary. Violation of disclosure was adequately remedied by military judge's actions in granting accused a continuance for several hours.
- d) *United States v. Blanchard*, No. 20001110 (Army Ct. Crim Ap. Oct. 7, 2004) (unpublished). Military judge abused discretion by not granting a 30 minute continuance for defense witness testimony. In bench trial, the court, over defense objection, agreed to a stipulation of expected testimony for witness. The failure to wait for the witness to be produced by the government was "arbitrary and clearly unreasonable" under the circumstances.
- e) *United States v. Harding*, 63 M.J. 65 (2006) Defense counsel requested production of a rape victim's medical records during discovery. Trial counsel subpoenaed the requested records, however the custodian, a civilian social worker who had counseled the victim, refused to produce the records. Defense counsel filed a motion asking the military judge to order production of the records, which he agreed to do after a hearing where he considered M.R.E. 513 and decided an in camera review would be appropriate. When the social worker still declined to produce the records, the military judge issued a warrant of attachment IAW R.C.M. 703(e)(2)(G). The warrant of attachment authorized the United States Marshal service to seize the records and deliver them to the judge. The social worker sought a stay in the U.S. District Court for Colorado, and was unsuccessful. She then sought and was briefly granted a stay by the 10th Circuit Court of Appeals, however that court subsequently vacated its stay, concluding that the military judge was following appropriate procedure. Even after the appellate ruling, the U.S. Marshal Service failed to seize the records, instead merely asking the social worker to produce the records, and giving up when she declined to do so. Faced with

the government's failure to enforce the warrant of attachment, and deciding that the case could not proceed without *in camera* consideration of the records, the military judge abated the proceedings with regard to the rape charge.

3. **Prohibit introduction of the evidence, calling a witness, or raising a defense not disclosed.** *See* Discussion to RCM 701(g)(3)(c) (exclude defense evidence only where failure to comply is “willful and motivated by a desire to obtain a tactical advantage or conceal a plan to present fabricated testimony”).
 - a) The Sixth Amendment right to present witnesses is not absolute. The sword of Compulsory Process cannot be used irresponsibly. Surprise alibi witness excluded because defense counsel committed a “willful and blatant” violation of a discovery rule. However, alternative sanctions will be adequate and appropriate in most cases. *See Taylor v. Illinois*, 484 U.S. 400, 414 (1988).
 - b) *United States v. Nobles*, 422 U.S. 225 (1975). Defense expert testimony excluded because expert refused to permit discovery of a “highly relevant” report. “The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.” *Id.* at 241.
 - c) *Michigan v. Lucas*, 500 U.S. 145 (1991). The Court held that the state court of appeals erred in holding that the exclusion of evidence for the violation of a notice requirement under a state rape-shield law always violates the Sixth Amendment. The preclusion may be appropriate where willful misconduct is designed to gain a tactical advantage over the prosecution.
 - d) *United States v. Pomarleau*, 57 M.J. 352 (2002). Appellant convicted of drunk driving and involuntary manslaughter. Before trial, the trial counsel moved to compel defense discovery, but the record did not indicate the military judge's response. At trial, the trial counsel asserted that the defense had not disclosed a number of exhibits and other material and contended that he was being ambushed by the defense. The military judge sustained the objection, excluding the evidence and prohibiting the defense expert from referring to it in his testimony. The CAAF held that under the circumstances of the case, the military judge erred by excluding defense evidence as

a discovery sanction without conducting a fact-finding hearing or otherwise ascertaining the cause for untimely disclosure by the defense, and by not making findings of fact on the record as to whether less restrictive measures could have remedied any prejudice to the government.

- e) *United States v. Barreto*, 57 M.J. 127 (2002). Appellant caused a car accident, killing a passenger and injuring himself. The government was unable to locate two unknown witnesses to the fatal traffic accident whom the defense requested, despite efforts that included running ads in German and U.S. newspapers. The defense moved to compel their production, or, in the alternative, abate the proceedings until the witnesses could be produced. The CAAF agreed with the Air Force Court that these witnesses were unavailable within the meaning of RCM 703, and that other eyewitnesses with unobstructed views of the accident who testified at trial were an adequate substitute for the potential testimony of the unknown witnesses.
- f) *United States v. Weisbeck*, 50 M.J. 461 (1999). The Court of Appeals for the Armed Forces found that the military judge abused his discretion by not granting a continuance to allow the defense to call an expert witness, who would present testimony going to the heart of the defense; the continuation would not have an adverse impact on the government's case; and there was no cost to the government for producing the witness.
- g) *United States v. Preuss*, 34 M.J. 688 (N.M.C.M.R. 1991). Military judge abused his discretion by excluding the defense's alibi witness because the defense counsel failed to give notice of its intent to offer the alibi defense before the beginning of the trial.
- h) *United States v. Eiland*, 39 M.J. 566 (N.M.C.M.R. 1993). Military judge abated the proceedings when the government failed to produce two critical witnesses requested by the defense in a rape case. One witness was the doctor who examined the alleged victim and the other witness was another employee of the hospital who observed her demeanor. Defense refused to stipulate. No abuse of discretion in abating trial when testimony is "of such central importance to an issue that it is essential to a fair trial." *Id.* at 568.

- 4. Such other order as is just under the circumstances.

- a) Dismiss charges
 - b) Speedy trial. *United States v. Tebsherany*, 32 M.J. 351, 354 (C.M.A. 1991) “[T]ime requested by counsel to examine material not disclosed until the pretrial investigation might, under facts showing bad faith, be charged to the United States in accounting for pretrial delay.”
 - c) Instructions. *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988)(Stevens, J., concurring). Justice Stevens found the trial judge’s instructions significant: “If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State’s interest.” *See also United States v. Ellis*, 57 M.J. 375 (2002).
 - d) *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002). The government failed to disclose unfavorable but material evidence to the defense. A government witness then testified early on in the trial regarding this undisclosed evidence. The remedies fashioned by military judge for the government’s failure to disclose the evidence included making the assistant trial counsel lead counsel for the remainder of the case, with the “quiet assistance” of the lead counsel, and exclusion of the undisclosed evidence and some related evidence. The military judge failed, however, to instruct the members to disregard the testimony from the government witness, given five days earlier, about the evidence. The court held that while the decision not to instruct the members was “understandable under the circumstances,” the failure to instruct negated the validity of the other remedies.
- B. A trial judge contemplating a sanction for a discovery violation should consider (*State v. Coelho*, 454 A.2d 241, 145 (RI 1982)):
- 1. The reason for nondisclosure;
 - 2. The extent of prejudice to the opposing party;
 - 3. The feasibility of rectifying that prejudice by a continuance; and
 - 4. Any other relevant factors (defense v. prosecution).

- C. **Post-Trial:** A military judge has the authority under Article 39(a), UCMJ to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate to include ordering a new trial. See *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2007) and *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989).

IX. ETHICAL CONSIDERATIONS

- A. Ethical Issues – Special Responsibilities of trial counsel (Rule 3.8(d)). A trial counsel must make timely disclosure of *Brady* material known to him. See *United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994). Appellate court found that trial counsel’s discharge of his discovery duties (failure to timely provide two statements of key government witness) was “especially careless and an example not to be followed by other trial counsel.” See also *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).
- B. Fairness to Opposing Party and Counsel. Rule 3.4, AR 27-26. “Subject to evidentiary privileges, the right of an opposing party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant evidence is altered, concealed, or destroyed” (Comment to rule).

X. THE JENCKS ACT

- A. Rule for Courts-Martial 914. A witness, not the accused, testifies. Upon a motion by the party who did not call the witness, the judge shall order disclosure of any “statement” by the witness that relates to the subject of his testimony. See also 18 U.S.C. § 3500.
- B. A statement is a “written statement by the witness that is signed, adopted or approved by the witness.” A statement also includes a substantially verbatim account of an oral statement made by the witness that is recorded contemporaneously with the oral statement. See *United States v. Holmes*, 25 M.J. 674 (A.F.C.M.R. 1987).
- C. Remedy for non-disclosure. “The military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.” RCM 914(e).
 - 1. Rule for Courts-Martial 914 applies to:

- a) CID Agent Investigator Notes (28s). Unless defense can show they are relevant and necessary, nothing requires the automatic production of such notes as long as the investigator does not testify. If the agent testifies or if a witness who has reviewed and approved the agent's notes testifies, the notes must be produced under this rule. *See Goldberg v. United States*, 425 U.S. 94 (1976) and *United States v. Smaldone*, 484 F. 2d 311 (10th Cir. 1973).
- b) Witness interview notes by attorneys, potentially.
- c) Article 32 tapes.
 - (1) *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). CID agent testifies at trial. Defense motion to strike because tape recordings of his Article 32 testimony erased by legal clerk. The trial judge correctly denied the motion when the accused failed to show that the government acted in bad faith causing the destruction or loss of the Article 32 tapes and the agent's testimony was internally consistent and corroborated by other witnesses.
 - (2) *United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986). The Jencks Act applies to courts-martial and to statements made by witnesses at an Article 32 Investigation. Negligent loss of Article 32 tapes, without any intent to suppress, does not require the court to strike the testimony of the witness.
- d) Administrative Board Hearings. *United States v. Staley*, 36 M.J. 896 (A.F.C.M.R. 1993). Military judge found that statements made by witnesses before an administrative discharge board were within the general mandate of RCM 914. Destruction of the tape recording of the testimony was in good faith; thus, exclusion of the witnesses' testimony was not required.
- e) Confidential Informant's Notes.
 - (1) *United States v. Guthrie*, 25 M.J. 808 (A.C.M.R. 1988). No Jencks Act violation when a handwritten statement was destroyed after a typed version was created and adopted by the witness.

- (2) *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). An informant did not keep his notes about an investigation. Lesson to be learned: “Whenever military law enforcement agents request that an informant prepare written notes regarding an on-going investigation, those notes should be obtained from the informant and included in the investigative case file.” *Id.* at 698 n.2.

XI. DESTRUCTION/PRESERVATION OF EVIDENCE

A. Supreme Court.

1. *California v. Trombetta*, 467 U.S. 479 (1984). Respondents challenged their convictions for driving while intoxicated because the State did not preserve the breath samples taken by law enforcement personnel. As a routine matter and in good faith, the breath samples were not preserved after the Intoxilyzer measured the alcohol concentration in the sample. The Court noted that “[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense.” *Id.* At 488. Therefore, the Court held that such evidence “must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* at 489. In this case, the Court held that the evidence was likely to *inculcate* the respondents and there were other avenues of attack in raising reasonable doubt regarding the validity of the results. Under the facts of the case, there was no due process violation.
2. *Arizona v. Youngblood*, 488 U.S. 51 (1988). The Government did not preserve (by refrigeration or freezing) clothes or perform certain tests on physical evidence taken from a child victim who had been sodomized and sexually assaulted. The evidence marshaled against the respondent was the boy’s prior identification of him from a line-up; the Government did not make use of any of the materials in its case-in-chief. The Court held “that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process.” *Id.* at 58. The Court also noted to the extent that Arizona required the police to conduct certain tests, “we strongly disagree.” The Court stated, “the police do not have a constitutional duty to perform any particular tests.” *Id.* at 59.

3. *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam). Respondent challenged conviction for cocaine possession because the police acting in good faith and in accordance to established procedure destroyed the evidence he requested ten years earlier in a discovery motion. In 1988, he was charged with cocaine possession. After being charged, he filed a motion requesting all physical evidence the State intended to introduce at trial. The State responded that all such evidence would be made available on request. After being released on bond, respondent failed to appear in court and remained a fugitive for ten years. In the interim, the State destroyed the evidence that tested four times previously as cocaine. The Court determined that the evidence was “potentially useful,” but not exculpatory (rather it was inculpatory). Given the evidence’s nature and the lack of bad faith, the Court held that Fisher did not establish a due process violation. The Court also noted that the existence of a pre-existing discovery violation does not eliminate the necessity of showing bad faith required under *Youngblood*, which Fisher failed to do.

B. Military Cases.

1. *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986). “Under Article 46, the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory. . . . Thus, the better practice is to inform the accused when testing may consume the only available samples and permit the defense an opportunity to have a representative present.” *See also United States v. Kern*, 22 M.J. 49 (C.M.A. 1986).
2. *United States v. Manuel*, 43 M.J. 282 (1995). Destruction of accused’s positive urine sample one month after testing violated Air Force regulation and DoD directive. Lower court’s suppression of positive results not an abuse of discretion where court concluded that standards for preserving samples conferred a substantial right on the accused.
3. *United States v. Ellis*, 57 M.J. 375 (2002). Appellant convicted of involuntary manslaughter and assault upon a child. After an autopsy was performed on the victim, the brain and its meninges were stored pursuant to laboratory regulations. Several months later, the specimen container was accidentally discarded when the laboratory was moved to a new location. The defense expert was never able to examine the specimens. At trial, the military judge never gave an adverse inference instruction relating to the lost specimen, and did not stop the trial counsel from commenting on the defense’s inability to examine it. The CAAF did not decide whether this was plain error, because there was

no reasonable likelihood that the members would have reached a different conclusion even had the military judge taken these steps.

4. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). The court held that the car contained crucial evidence to which an accused should have access under Article 46. Witnesses, reports, physical evidence, and photographs were available to the defense.
5. *United States v. Gill*, 37 M.J. 501 (A.F.C.M.R. 1993). The accused is not entitled to relief on due process grounds for the government's failure to preserve evidence.
6. *United States v. Madigan*, 63 M.J. 118 (2006). Where the blood sample was subject by regulation to authorized destruction before the defense requested access to it, the judge did not err in ruling that the positive lab test for diazepam was admissible. The court reasoned that the government is not responsible for ensuring the availability of the sample beyond the two years specified by AFIP procedure, in the absence of a defense request for access or retention. Without such a request, responsibility for the unavailability of the evidence rests with the party who could have prevented the destruction with a timely request, here the defense.
7. *United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008). R.C.M. 703(f)(2) eliminates the requirement for the government to have acted in bad faith. An accused need only to establish that such evidence is of such central importance to an issue that it is essential to a fair trial and that there is no adequate substitute.

XII. CONCLUSION

XIII. APPENDIX

Discovery in the Military Justice System

Preferral, Article 32 Investigation, Referral (Until Arraignment)

***This document is intended to give a general framework to help counsel understand how discovery works in court-martial practice. It is only a starting point and is not a substitute for the rules and cases actually governing discovery.*

I. Preferral

After the accused is informed of the charges against him or her, the trial counsel should provide a copy of the charge sheet and associated documents (sworn statements etc.) to the defense counsel. If the accused does not have a defense counsel assigned, this is the time to get one detailed (work with your Chief of Justice). This will foster good working relations with the Trial Defense Service, streamline the process, and make it work better for all concerned.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 308	Government	As soon as practicable after preferral	Identification of accuser

II. Article 32 Investigation

There is no formal requirement for disclosure under RCM 701 before the Article 32 hearing. However, RCM 405 does require that witnesses and evidence against the accused be produced. From a practical standpoint, the defense counsel should be provided with a packet that includes all charge sheets, sworn statements, evidence custody documents, and copies of pictures. This will streamline the process. You should always use a tracking document when you turn something over to the defense so that there is a paper trail.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 405(j)(3)	Government	Promptly after report is completed	Article 32 Investigating Officer's Report

III. Referral

Note that many of these rules have different triggers. In practice, all evidence should be disclosed before arraignment, according to the dates set by the Military Judge. The Military Judge regulates discovery once a case is referred to trial.

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(1)	Government	As soon as practicable after service of charges	Papers accompanying the charges; convening orders; & statements
<i>Brady, Bagley, Roberts, and Adens</i>	Government	As soon as practicable	Evidence favorable and material to the defense
<i>Trombetta, Youngblood, and Garries</i>	Government	Before evidence used up in testing	Inform accused that testing may consume all available samples of evidence (even if that evidence is apparently not exculpatory)
R.C.M. 701(a)(2)	Government	Defense Request	Documents, tangible objects and reports etc.
R.C.M. 701(a)(3)(B)	Government	Defense notice under RCM 701(b)(1) or (2); Before start of trial	Witnesses to rebut certain defenses
R.C.M. 701(a)(5)	Government	Defense Request	Information to be used at sentencing
M.R.E. 404(b)	Government	Defense Request	Uncharged misconduct
M.R.E. 505	Government and Defense	Defense request or government claim of privilege	Classified Information
M.R.E. 506	Government	Defense Request	Privileged information other than classified information
M.R.E. 507	Government (claim of privilege); Defense (motion to disclose)		Identity of informant
M.R.E. 609	Proponent	Sufficient advance notice	Notice of intent to impeach w/ > 10 year old conviction

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 706(c)(3)(B)	Government	Completion of sanity board	Mental examination of accused – distribution of the report
R.C.M. 701(b)(1)(B)	Defense	Government request	Pre-sentencing witnesses and evidence
R.C.M. 701(b)(3)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Documents and tangible objects
R.C.M. 701(b)(4)	Defense	Reciprocal Discovery (once government has responded to earlier defense discovery request, <i>and</i> has affirmatively requested this information pursuant to this rule)	Reports of results of mental examinations, tests, and scientific experiments

Discovery in the Military Justice System

Arraignment

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(4)	Government	Before arraignment	Prior convictions of accused to be offered on the merits for any reason, including impeachment
M.R.E. 301	Government	Before arraignment or within reasonable time before witness testifies	Immunity
M.R.E. 304(d)	Government	Before arraignment	Statements of accused relevant to case, <i>regardless</i> of whether government intends to use them
M.R.E. 311(d)	Government	Before arraignment	Property seized from accused
M.R.E. 321(c)	Government	Before arraignment	Identifications of accused
R.C.M. 1004(b)(1)	Government	Before arraignment	Capital cases – notice of aggravating factors under RCM 1004(c)
M.R.E. 311(f)	Defense	Accused to testify in motion to suppress evidence seized from accused	Notice that accused will testify for limited purposes of the motion
M.R.E. 321(e)	Defense	Accused to testify in motion to suppress out of court identification	Notice that accused will testify for limited purposes of the motion

Discovery in the Military Justice System

Trial

Authority	Burden On	Trigger/Deadline	What is Required
R.C.M. 701(a)(3)(A)	Government	Before start of trial	Witnesses in case-in-chief
M.R.E. 412(c)	Proponent (normally defense)	Minimum of 5 days before entry of pleas	Rape shield
M.R.E. 413/414	Government	Minimum of 5 days before scheduled date of trial	Evidence of similar crimes (child molestation and sexual assault cases)
R.C.M. 914 (Jencks Act)	Proponent of witness	After witness testifies on direct, on motion of opposing party	Production of statements concerning which witness testified (could be CID Agent Activity Summaries; Article 32 tapes; witness interview notes; Administrative board proceedings; confidential informant's notes, etc.)
R.C.M. 701(b)(1)(A)	Defense	Before trial on the merits	Names of witnesses and statements
R.C.M. 701(b)(2)	Defense	Before trial on the merits	Notice of certain defenses (alibi; lack of mental responsibility; innocent ingestion, etc.)

Post-Trial

Remember that the duty to disclose is a continuing duty. Even if something covered by these rules is discovered after trial, it must be disclosed.