IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, *v.* MICHAEL C. BEHENNA First Lieutenant (O-2) United States Army, Appellant.	BRIEF ON BEHALF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* Crim. App. No. 20090234 USCA Dkt. No. 12-0030/AR

INDEX

Page

TABLE OF AUTHORITIES iii

ISSUE PRESENTED 1

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

ARGUMENT 1

I. Trial Counsel Violated Their Constitutional and Regulatory Duty to Timely Disclose Favorable Information 3

II. The Army Court of Criminal Appeals Erred in Finding That the Prosecution Timely Disclosed Favorable Information 8

a. Dr. MacDonell's Comments to Defense Counsel Did Not Satisfy the Notice Requirements. 9

b. There Was a Specific Request for the Information Made by Defense Counsel. 14

III. Trial Counsel Breached Their Ethical And Statutory Duty to Disclose Under ABA And Military Rules Mandating Disclosure of Favorable Information in a Timely Manner 17

IV. The Prudent Prosecutor Shall Err on the Side of Seeking and Disclosing Information..... 21

V. Appellant Was Prejudiced by Trial Counsel's Argument, in Addition to the Loss of Dr. MacDonell's Trial Testimony.. 24

CONCLUSION..... 25

TABLE OF AUTHORITIES

Cases — Page

United States Supreme Court

Berger v. United States, 295 U.S. 78 (1935) 4

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Cone v. Bell, 556 U.S. 449 (2009) 4, 18, 19

Giglio v. United States, 405 U.S. 150 (1972) 6

Hartford Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) 13

Kyles v. Whitley, 514 U.S. 419 (1995) 6-8

Offutt v. United States, 348 U.S. 11 (1954) 5

Smith v. Cain, 132 S. Ct. 627 (2012) 5-7

Strickler v. Greene, 527 U.S. 263 (1999) 5, 10, 12

Court of Appeals for the Armed Forces

United States v. Baer, 53 M.J. 235 (C.A.A.F. 2000) 24

United States v. Brickey, 16 M.J. 258 (C.M.A. 1983) 14

United States v. Custis, 65 M.J. 366 (C.A.A.F. 2007) 13

United States v. Dancy, 38 M.J. 1 (C.M.A. 1993) 3, 12

United States v. Enloe, 35 C.M.R. 228 (C.M.A. 1965) 9

United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) 24

United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986) 9

United States v. Garlick, 61 M.J. 346 (C.A.A.F. 2005) 15

United States v. Graner, 69 M.J. 104 (C.A.A.F. 2009) 9

United States v. Hoesing, 5 M.J. 335 (C.M.A. 1978) 8

TABLE OF AUTHORITIES (Cont.)

Cases — Page

United States v. James, 63 M.J. 217 (C.A.A.F. 2006) 13

United States v. Lucas, 1 C.M.R. 19 (1951) 13

United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011) 11

United States v. Mahoney,
58 M.J. 346 (C.A.A.F. 2003) 10, 15, 21

United States v. Miller, 63 M.J. 452 (C.A.A.F. 2006) 17

United States v. Mustafa, 22 M.J. 165 (C.M.A. 1986) 7

United States v. Roberts, 59 M.J. 323 (C.A.A.F. 2004) 14

United States v. Simmons, 38 M.J. 376 (C.M.A. 1993) 10, 12

United States v. St. Jean, 45 M.J. 435 (C.A.A.F. 1996) 21

United States v. Stone, 40 M.J. 420 (C.M.A. 1994) 14

United States v. Thompkins, 58 M.J. 43 (C.A.A.F. 2003) 9, 10

United States v. Trigueros,
69 M.J. 604 (C.A.A.F. 2010) 3, 6, 15

United States v. Williams, 50 M.J. 436 (C.A.A.F. 1999) 3, 21

Service Courts of Criminal Appeals

United States v. Adens,
56 M.J. 724 (A. Ct. Crim. App. 2002) 9, 16

United States v. Behenna,
70 M.J. 521 (A. Ct. Crim. App. 2011) 10, 11, 14, 15

United States v. Figueroa,
55 M.J. 525 (A.F. Ct. Crim. App. 2001) 12

TABLE OF AUTHORITIES (Cont.)

Cases — Page

United States v. Fletcher, NMCCA 201000421, 2011 CCA LEXIS 149 (N-M Ct. Crim. App. Aug. 25, 2011) (unpub.) 2

United States v. Lawrence, 19 M.J. 609 (A.C.M.R. 1984) 9

United States v. Mott, NMCCA 2009001155, 2009 CCA LEXIS 424 (N-M Ct. Crim. App. Nov. 24, 2009) (unpub.) 1, 2

United States v. Turner, 17 M.J. 509 (A.F.C.M.R. 1983) 9

United States Circuit Court of Appeals

Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) 11, 12, 25

Clay v. Black, 479 F.2d 319 (6th Cir. 1973) 7

Coe v. Bell, 161 F.3d 320 (6th Cir. 1998) 11

D'Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008) 7

Horton v. Mayle, 408 F.3d 570 (9th Cir. 2005) 7

Leka v. Portuondo, 257 F.3d 89 (2nd Cir. 2001) 8, 21

United States v. Clarke, 928 F.2d 733 (6th Cir. 1991) 12

United States District Court

United States v. Safavian, 233 F.R.D. 12 (D.D.C. 2005) 26

United States v. Acosta, 357 F. Supp. 2d 1228(D. Nev. 2005) ... 18

Constitution, Statutes, and Rules

U.S. Const. Amend. V 3, 5

Article 46, UCMJ, 10 U.S.C. § 846 ..... 10, 11

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(16)(b) 13

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 ..... 10, 13, 14

TABLE OF AUTHORITIES (Cont.)

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(a)(6) 9, 10

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(d) 10

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701(e) 10

U.S. Dep't of Army, Reg. 27-26,
Rules of Prof'l Conduct for Lawyers (1992) ..... *passim*

U.S. Dep't of Army, Reg. 27-26,
Rules of Prof'l Conduct for Lawyers, R. 3.4(a) (1992)..12, 20

U.S. Dep't of Army, Reg. 27-26,
Rules of Prof'l Conduct for Lawyers, R. 3.8(d) (1992) . *passim*

U.S. Dep't of Army, Reg. 27-26,
Rules of Prof'l Conduct for Lawyers, R. 7.b (1992)..... 17

American Bar Association *Model Rules of Professional Conduct*,
R. 3.8(d) (2008) 4, 17-19

Other Authorities

ABA Formal Ethics Opn. 09-454,
Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense (2009) 17

ABA Standards for Criminal Justice, *The Prosecution Function,*
(3 ed.), Prosecution Standard 3-3.11(a), Disclosure of Evidence by the Prosecutor. 4, 18

Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*,
6 Ohio St. J. Crim. L. 467 (2009)..... 17

Capt. Elizabeth Hernandez and Capt. Jason Ferguson,
The Brady Bunch: An Examination Of Disclosure Obligations In The Civilian Federal And Military Justice Systems,
67 A.F. L. Rev. 187 (2011)..... 23

David Ogden, Memorandum, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group*, (Jan. 4, 2010)..... 23

Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hasting L. J. 1321 (2011)..... 1, 17

Joe Palazzolo, *Attorney General Promises Judges a New Day at DOJ*, Nat'l L. J. (May 5, 2009)..... 22

Dep't of Justice, Press Release. "U.S. Senator Indicted on False Statement Charges," (Jul. 29, 2008)..... 22

Dep't of Justice, United States Attorney's' Manual. §§ 1-1.100-600 (2009)..... 22

ISSUE PRESENTED

II.

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

ARGUMENT

The Context

> The subject of seemingly perpetual discussion, debate, scholarly articles, and conferences, prosecutorial disclosure obligations increasingly have become the focus in high publicity cases. Failure to disclose significant evidence to the defense in numerous cases has resulted in reversal, dismissal, and years of incarceration for the wrongfully convicted. Many ask why our legal system provides plenary disclosure policies in procedures in civil cases, where only money is at stake, but provides significantly limited disclosure in criminal cases, where liberty is at stake.

Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hasting L. J. 1321, 1322 (2011).[1]

In *United States v. Mott*,[2] appellant's mental competence at the time of the alleged offenses was at issue. Mott's counsel presented expert testimony that Mott did not understand the wrongfulness of his actions. The appellate issue was trial counsel's failure to disclose that their expert agreed with the defense expert.

> [The court] determined that the [case] file contained no discoverable reports, statements, or conclusions

[1] Available at, http://www.hastingslawjournal.org/wp-content/uploads/2011/06/Yaroshefsky_62-HLJ-1321.pdf, last visited 6 March 2012.

[2] *United States v. Mott*, NMCCA 2009001155, 2009 CCA LEXIS 424 (N-M Ct. Crim. App. Nov. 24, 2009)(unpub.).

> regarding the appellant. The Government concedes, however, that *Dr. Hagan informed the trial counsel verbally that he agreed with the opinion of the defense expert* that the appellant was . . . unable to understand the wrongfulness of his actions on the day of the stabbing.

Mott, Slip op. at 8-9 (emphasis added).

The Navy-Marine Corps Court of Criminal Appeals ("NMCCA") observed:

> We have no doubt that knowledge of the existence of a Government medical expert whose professional opinion wholly *supported the opinion of the defense expert* is a fact both favorable to the appellant and material to an assessment of his guilt and/or punishment.

Mott, Slip op. at 10 (emphasis added).

In *United States v. Fletcher*, the issue was:

> The allegation of prosecutorial misconduct . . . : a prosecutor representing the United States failed to disclose incriminating evidence that he was required to disclose under the Military Rules of Evidence. He then made affirmative misrepresentations to the court, improperly implying an admission of guilt and implicating a comment upon the accused's invocation of counsel.

United States v. Fletcher, NMCCA 2010000421 (N-M Ct. Crim. App. 25 Aug 2011), Slip op. at 8.[3] NMCCA said that trial counsel, "either by design or through inexperience, came needlessly close to dishonesty." Slip op. at 10. Fletcher is not a Brady case, but it is illustrative of trial counsel over-reaching and taking advantage of errors they create.

Mott and *Fletcher* are unpublished decisions. They are illustrative of an ongoing problem. Together with Appellant's

[3] *United States v. Fletcher*, NMCCA 2010000421 (N-M Ct. Crim. App. 25 Aug 2011)(unpub.), aff'd No. 12-0160/MC (C.A.A.F. Jan., 26, 2012).

challenge, they reveal why the resolution of this discovery issue is vital for fair trials and the perception of a fair military justice system. Appellant's case must be the last time a prosecutor learns of favorable (or unfavorable) defense information and then fails to disclose it in a timely fashion, neglects to exercise due diligence, takes advantage of that failure in closing argument, and finds vindication of her actions on appeal. These are the effects of the opinion below; they must be reversed in this case.

Amici's interest in this case is rooted in study and experience with the prevalence of *Brady* issues at court-martial and the need for a powerful statement of the prosecutor's discovery duty. Prosecutors need benchmarks and bright-line rules for when and what they must disclose, as well as certain knowledge that failing to properly disclose triggers consequences. By setting high standards, this court can 'zealously guard' the military justice system's 'preeminent' contributions to the 'truth-finding' process. *See United States v. Dancy*, 38 M.J. 1, 5 (C.M.A. 1993).

I. Trial Counsel Violated Their Constitutional and Regulatory Duty to Timely Disclose Favorable Information.

A prosecutor’s broad disclosure duty stems from several sources: the Fifth Amendment of the U.S. Constitution, by statute, and by regulation. *See Brady v. Maryland*, 373 U.S. 83

(1963); *see also United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Trigueros*, 69 M.J. 604 (C.A.A.F. 2010); AR 27-26, Rules of Professional Conduct for Lawyers ("Army Rules"). As an officer of the court, the prosecutor is more than an adversary; the prosecutor has a special duty to ensure procedural justice. *See* Comment, Rule 3.8, Army Rules.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [s]he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. [Sh]e may prosecute with earnestness and vigor -- indeed, [s]he should do so. But, while [s]he may strike hard blows, [s]he is not at liberty to strike foul ones. It is as much h[er] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). *Berger's* language and the Army Rules is the prism through which to view this trial counsel's delicts. In *Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769 (2009), the Supreme Court observed that the trial counsel's duty "may arise more broadly under a prosecutor's ethical or statutory obligations" than under *Brady*. *Id.* at 1783 n15. The court cited the ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) and ABA

Model Rule of Professional Conduct 3.8(d). The key is the ABA's Model Rule 3.8(d), adoption in the Army. Rule 3.8 represents a consensus among state bars for the best ethical practices for lawyers. Adoption of the Army Rules represents the Army joining that consensus.

Did Appellant and the public get a fair trial? It is a bedrock principle of our military justice system that it not only be a fair system of criminal justice, but that it always is perceived as fair. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.). Here, Trial Counsel failed to comply with *Brady*, the Rules of Court Martial (R.C.M.), and their ethical obligations. Not only did these actions fail to ensure Appellant received a fair trial, but a reaffirmation of these actions undermines perceptions of a just conviction.

Timely disclose of Dr. MacDonell's favorable material evidence to the defense violated Appellant's Fifth Amendment due process rights. *See Brady*, 373 U.S. at 85 (1963). The evidence tended to negate Appellant's guilt – it was favorable. *See Smith v. Cain*, 132 S. Ct. 627, 638 (2012); *see also Strickler v. Greene*, 527 U.S. 263, 281-282 (1999); Army Rule 3.8(d). The evidence was material because there was a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *See Smith v Cain*, 132 S.

Ct. at 630. A "reasonable probability" does not mean that Appellant must prove he "would more likely than not have received a different verdict with the evidence," but only that the likelihood of a different result is great enough to undermine confidence in the verdict. *Id.* (quoting *Kyles v Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted). As argued here, there is a nondisclosure violation irrespective of a *Brady* violation because of the broader military discovery rights. *See Trigueros*, 69 M.J. at 610. In military practice, favorable information need not be admissible; such information includes that which could help develop a strategy or lead to admissible evidence. *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).

There was no complete eyewitness testimony for the situation in question. The two witnesses present at the scene with Appellant were unable to see and describe the shooting, and could only hear parts of what was said. The prosecution did not present expert testimony of its own to explain the forensic evidence - they couldn't, the testimony was unfavorable to their cause. They had a forensic psychiatrist and pathologist, each present at Dr. MacDonell's demonstration. The prosecution's case against Appellant was wholly circumstantial.

When circumstantial evidence forms the basis of a conviction, and favorable material evidence is withheld, courts

have found cardinal *Brady* errors. *See, e.g., Cain,* 132 S. Ct. 627; *Giglio v. United States*, 405 U.S. 150, 154 (1972). In *Cain*, the prosecutor failed to disclose notes of the lead detective in a homicide case which affected the credibility of the prosecutions identification witness. 132 S. Ct. at 630. There was no other evidence linking Cain to the crime. *Id.* Because the notes could have directly refuted the only witness's testimony, the notes were favorable and material and their nondisclosure was a *Brady* violation. *Id* at 631. Similarly, in *Kyles*, the withheld evidence went to the "heart of the State's case." 514 U.S. at 430. Other cases have found a prosecutor "has a duty to disclose evidence in its possession which contradicts the testimony of the only eyewitness to the alleged crime." *Clay v. Black*, 479 F.2d 319, 320 (6th Cir. 1973); *D'Ambrosio v. Bagley*, 527 F.3d 489, 498 (6th Cir. 2008); *Horton v. Mayle*, 408 F.3d 570, 581 (9th Cir. 2005).

Appellant's conviction was based on the testimony of two witnesses who did not observe the actual events. Dr. MacDonell is a leading expert of international repute on the issues before the trial court. *See, e.g., United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986); *United States v. St. Jean*, 45 M.J. 435 (C.A.A.F. 1996). On direct examination by the defense he would have been a powerful witness for the defense. His testimony was not simply the same as the defense experts. His testimony would

have had the imprimatur of his being a prosecution expert. Dr. MacDonell's opinion would have substantially buttressed Appellant's testimony because it was coming from the government expert witness. As in *Kyles*, "[d]isclosure [and testimony] would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." 514 U.S. at 441. Because Appellant's case centered on circumstantial evidence and dueling witnesses, this court should follow the holdings in the above cases and find a prejudicial *Brady* violation.

A prosecutor *shall* make timely disclosure of favorable information. Military officers know "shall" is used in the imperative sense and brooks of no discretion. *See United States v. Hoesing*, 5 M.J. 355, 357 n.3 (C.M.A. 1978), UCMJ art. 1(28). The word "timely" means action be taken quickly, promptly, or within a reasonable time frame so that the information may be used. *See, e.g., Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001). Due to the customarily quick nature of military trials, a bright-line rule must be placed on the government to make immediate disclosures during trial, even if the information is limited or ambiguous.

The Specific Points of Argument

II. The Army Court of Criminal Appeals Erred in Finding That the Prosecution Timely Disclosed the Favorable Information.

Military courts argue with pride that "[t]he military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions." *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) (citing *United States v. Eshalomi*, 23 M.J. 12, 24 (C.M.A. 1986)); *United States v. Enloe*, 35 C.M.R. 228, 230 (C.M.A. 1965). Military discovery rules represent a deep philosophy imposing a heavy burden on the government to disclose (1) evidence favorable to the defense, (2) evidence requested and material to the issues of the case, and (3) evidence upon which the case against the accused is based. R.C.M. 701(a)(6); *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2009); *United States v. Turner*, 17 M.J. 509, 511 (A.F.C.M.R. 1983). Hiding the ball and "gamesmanship" are anathema to the open discovery mandate. *United States v. Lawrence*, 19 M.J. 609, 614 (A.C.M.R. 1984); *see also Adens*, 56 M.J. at 731 (broad discovery "essential to the administration of justice").

a. Dr. MacDonell's Comments to Defense Counsel Did Not Satisfy the Notice Requirements.

An appellate court usually defers to the military judge's witness credibility determination and a finding that the government's violation of discovery rules was not deliberate. Fault is irrelevant. *United States v. Lawrence*, 19 M.J. 609, 614 (A.C.M.R. 1984); *see also United States v. Thompkins*, 58

M.J. 43, 47 (C.A.A.F. 2003). UCMJ art. 46 is the root source for much of the military's discovery rules: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." UCMJ art. 46. R.C.M. 701 is the President's procedural directive on discovery. Instead of relying on the requirements of R.C.M. 701 and case law, the lower courts adopted erroneous findings of facts and found excuses for Trial Counsel's failure to disclose favorable evidence. Trial Counsel failed to follow three different rules: R.C.M. 701(a)(6), 701(d), and 701(e), in the process trial counsel impeded the defense's access to favorable information.

The lower court excused Trial Counsel's behavior because it was an "honest, good faith representation, albeit inaccurate as it relates to whether Dr. MacDonell actually possessed favorable information for the defense." *Behenna*, 70 M.J. 521, 527 (A. Ct. Crim. App. 2011). This was clearly erroneous – the prosecution knew prior to Friday morning. The ACCA finding is contrary to the rule in *Thompkins*. Discovery is not limited to matters already known to the prosecution. The prosecutor must be diligent and learn of favorable information including that in the possession of other military authorities. *United States v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003) (quoting *Strickler v.*

Greene, 527 U.S. 263, 281 (1999)); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993).

ACCA's reliance on *Carter v. Bell,* 218 F.3d 581 (6th Cir. 2000), misapprehends the evidence available to the counsel in *Carter* compared to the information available to Appellant's defense counsel. *Carter* follows a standard contrary to this court's own case law. *See United States v. Luke*, 69 M.J. 309 (C.A.A.F. 2011) (the military discovery focuses on equal access to evidence to aid defense preparation and enhance the orderly administration of military justice). Appellant's defense counsel knew nothing. Dr. MacDonell told them he would have been a good witness for them – that's all. J-A 303. Dr. MacDonell then declined to elaborate what he meant citing privilege. *Id.* There was later a specific denial by the Trial Counsel that nay favorable information existed. *Behenna*, 70 M.J. at 527. This is not like *Carter* where the Defendant possessed the medical files that had not been disclosed. ACCA erroneously relied on *Carter* because Appellant's defense could not have known nor "[could] have known the *essential facts* permitting him to take advantage of the information, and was not "*available to him from another source*." *Carter*, 218 F.3d at 601 (emphasis added).

In *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), cited by the court in *Carter*, the additional language further informs why

ACCA was in error: "where the evidence is available . . . from another source," there is no failure to disclose because in such cases *there is really nothing for the government to disclose*.". *Id*. at 344 (emphasis added)(citations omitted). Similarly, in *United States v. Clarke*, also cited to in *Carter*, the court found no error "because [the] evidence was disclosed at the earlier detention hearing in the presence of defendant and with the opportunity for inquiry by defense counsel." 928 F.2d 733, 738 (6th Cir. 1991). Here there was a great deal to be disclosed, and unlike in *Carter*, the Defense did not already possess the specific information in question.

It is the prosecution's burden to *inquire into* and *disclose* exculpatory material. *Simmons*, 38 M.J. at 381. When Defense Counsel asked if there was information and received a negative, he was entitled to rely on the government's assertion regarding discovery compliance. *United States v. Figueroa* 55 M.J. 525, 529 (A.F. Ct. Crim. App. 2001). The court below fails to address this issue of the prosecution's obligation of candor toward opposing counsel. *See Greene*, 527 U.S. at 283; Army Rule 3.4(a), (c). It was incorrect for the lower court to adopt the holding in *Carter* given Trial Counsel's responsibility to provide full and complete discovery. Hinting at facts, throwing clues, or relying on third-parties has no place in the military

system of discovery intended to ensure and protect a fair trial right. *See Dancy*, 38 M.J. at 5.

It was error for the lower court to find that the notice requirements of R.C.M. 701 were satisfied by a nonparty to the case. The principles of statutory construction apply to construing the *Manual for Courts Martial*. *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006); *United States v. Lucas*, 1 C.M.R. 19, 22 (1951). "[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The plain language of R.C.M. 701 requires a "party" to make a disclosure of information that comes to them during actual trial. *See* R.C.M. 103(16)(B)("Party" includes the accused and any trial or assistant trial counsel assigned to the case). Dr. MacDonell was clearly a member of the prosecution team and his information and knowledge should be imputed to the prosecution team. But that doesn't mean that he can be considered the agent of the prosecution for notice purposes here. Dr. MacDonell directed the defense to talk to the trial counsel. J-A 303. The burden is on T*rial Counsel* alone to make discovery to the other party: the nature of the military justice system demands that the

burden be placed on trial counsel to disclose discoverable information which is known only to them.

b. <u>There Was a Specific Request for the Information Made by Defense Counsel</u>

A prosecutors discovery failure is seldom, if ever, excusable. *See United States v. Brickey*, 16 M.J. 258 (C.M.A. 1983). Counsel made a specific information request in advance of trial, and on the Friday of trial about Dr. MacDonell's opinion. Affidavit, JA-303; JA-253-54; JA-271, Discovery Request, JA—285. During trial, the military judge reminded the Government of its continuing duty to disclose evidence. JA—38-39. The burden is on the government to show its failure was harmless beyond a reasonable doubt. *Roberts*, 59 M.J. at 327; *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).

When the Government fails to disclose discoverable evidence, the error is tested for prejudice "in light of the evidence in the entire record." *United States v. Stone,* 40 M.J. 420, 423 (C.M.A. 1994). The lower court incorrectly found that the statutory notice requirements of R.C.M. 701 had been satisfied by Dr. MacDonell's short ambiguous statement. But the evidence discloses trial counsel inexcusably denied knowledge of the expert witness's opinion. *Behenna*, 70 M.J. at 527.

The military judge's and ACCA's finding of "notice" is disconcerting. It is illogical to impute such knowledge to

Defense Counsel while at the same time finding it was acceptable for the Trial Counsel to deny knowledge of the discoverable information. *See United States v. Garlick*, 61 M.J. 346, 351 (C.A.A.F. 2005) (Baker, concurring); *United States v. Trigueros*, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010) ("The government cannot intentionally remain ignorant then claim it exercised due diligence.") This court must find Dr. MacDonell's comment inadequate and that the Government failed to exercise due diligence. *See United States v. Mahoney*, 58 M.J. 346, 348-349 (C.A.A.F. 2003).

The court below erred finding that "[b]oth parties were now on notice that Dr. MacDonell had asserted he possessed defense exculpatory information." *Behenna*, 70 M.J. at 529. The court continued to note that that either party could have stopped the proceedings and gathered more information. *Id.* This statement ignores the fact that the Defense investigated by specifically asking Trial Counsel what Dr. MacDonell meant when he alluded to being a defense witness. Having received a denial, there was nothing the defense could do to further 'investigate.' This defense request itself was a specific discovery request that the prosecution failed to investigate. There is no evidence that the prosecution tried to contact Dr. MacDonell or any of their other experts for more information. *Id.*

By using a faulty notice analysis, ACCA's harmlessness analysis was flawed. *Behenna*, 70 M.J. at 530. "When a trial counsel fails to disclose information pursuant to a specific request . . . the evidence is considered material unless the government can show that failure to disclose was harmless beyond a reasonable doubt." *Adens*, 56 M.J. at 733 (citations omitted). The military judge erred in finding the information cumulative rather than material.

The military judge reminded counsel that his rulings would not be based on proffers, but on evidence. JA-251. So it was erroneous to conclude that the prosecution did not learn of Dr. MacDonell's "revised opinion" until notified by the defense counsel on Friday morning. JA-10. They already knew prior to that from Dr. MacDonell's demonstration to them and their experts, their internal discussions, and Dr. MacDonell's comment, on hearing Appellant's testimony, that he again had told Trial Counsel of his expert opinion. JA-303. The military judge's finding was contrary to the evidence that it was a lack of available forensic evidence which was the reason for releasing Dr. MacDonell. JA-9. Rather it was Dr. MacDonell's agreement with the defense evidence and testimony that made him unavailable.

Dr. MacDonell's testimony would have severely weakened the government's case. He could testify that he was the

Government's expert, that he had been given incomplete facts by the Government, that having received full disclosure he agreed with the opinions of the defense experts, and that Appellant's testimony and the expert theory is "the only logical explanation consistent with the physical evidence." Most importantly, the prosecution would not have been able to argue their execution theory and ridicule the defense theory as they did.

III. Trial Counsel Breached Their Ethical And Statutory Duty to Disclose Favorable Information in a Timely Manner.

The American Bar Association ("ABA") standard, upon which military ethics rules are based[4] is more demanding than *Brady*'s materiality standard. The ABA standard requires disclosure of favorable evidence or information *regardless* of the anticipated impact of the evidence on the trial. ABA Rule 3.8(d) applies to Army prosecutors. Additional interpretation of Army Rule 3.8 is found in ABA Formal Ethics Opn. 09-454 *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense*, *at 12a*,(2009).[5] Military appellate courts refer to the ABA Standards for Criminal Justice ("ABA Standards") as persuasive. *See, e.g., United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). Various provisions of the ABA Standards promote broad disclosure of all exculpatory evidence, without regard to materiality.

[4] *See* Army Rule 7.b.

[5] For additional discussion and interpretations of ABA Model Rule 3.8, see Ellen Yaroshefsky, Prosecutorial Disclosure Obligations, 62 Hasting L. J. 1321, 1322 (2011), Bruce A. Green & Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 Ohio St. J. Crim. L. 467 (2009).

Opn. 09-454, at 4, 5 fn. 22. The ABA Standards provide that "[a] prosecutor should not intentionally fail to make *timely disclosure* to the defense, *at the earliest feasible opportunity*, of the existence of all evidence *or information* which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." ABA Standards, *The Prosecution Function,* (3 ed.), Prosecution Standard 3-3.11(a), *Disclosure of Evidence by the Prosecutor* (emphasis added).

ABA/Army Rule 3.8(d) is accepted in 49 states, the District of Columbia, the United States Virgin Islands, and Guam. Jurisdictional Survey of Provisions Analogous to ABA Model Rule of Professional Conduct 3.8(d).[6] Courts that have adopted the ABA standard recognize that *Brady*'s minimum materiality standard is irrelevant to federal attorneys who are held to higher standards. *United States v. Acosta,* 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005).

The prosecutor's disclosure duty "may arise more broadly under a prosecutor's ethical or statutory obligations" than under *Brady*. *Cone v. Bell*, 129 S. Ct. 1769, 1783 fn.15 (2009). In *Cone*, the prosecution suppressed witness statements and police reports indicating that the accused's appearance and

[6] http://www.americanbar.org/content/dam/aba/migrated/2011_build/amicus/smith_brief.authcheckdam.pdf, last visited 5 March 2012.

behavior near the time of the murders were bizarre and that the accused was a heavy drug user. *Id.* at 1777. The Court held that the suppressed evidence was not material to the accused's conviction for first-degree murder, but that the lower courts erred in failing to assess the effect of the suppressed evidence on sentencing. *Cone*, 129 S. Ct. at 1786.

The present case involves nondisclosure fitting squarely within Army Rule 3.8(d). The Rule imposed a duty to disclose Dr. MacDonell's expert opinion after the Wednesday evening demonstration, where he told the prosecution team that the only logical explanation of the forensic evidence was the defense theory. JA-302.

The prosecutor had several opportunities to disclose Dr. MacDonell's information. Dr. MacDonell informed the prosecution team that Appellant's account was the most logical explanation based on the forensic evidence on Wednesday night after a demonstration. He demonstrated to the prosecution team "the only logical" explanation was that Mansur was shot first in the chest with his right arm outstretched, and then in the head as he fell. JA-255-56, Affidavit, JA-302. He testified:

> I said the only thing that I can come up with consistent with all of the facts as I know them would be that he probably was shot in the side with his arm up—in the chest or side, and then as he dropped straight down the bullet went through his head because he passed in front of the muzzle at the exact moment though extremely unlikely that that's [sic] happened.

JA-255.

After Appellant's direct examination on Thursday the expert commented to another government expert "[t]hat's exactly what I told you yesterday." JA-257. Dr. MacDonell repeated this information to the government counsel before they excused him to leave the courthouse that day without testifying:

> [A]lthough the scenario I had presented to them the day before was unlikely, it still was the only theory I could develop that was consistent with the physical evidence. It was also exactly the way Lt. Behenna had described the events. Their reaction was noticeably cold. Affidavit, JA-303.

After this discussion, Dr. MacDonell, as he left the courthouse, said to the civilian defense counsel, "I would probably made a good witness for you." Affidavit, JA-253-54. When the defense inquired why, Dr. MacDonell said he could not say because he was retained by the government. Affidavit, JA-303. The defense counsel put the prosecutor on notice of the conversation with Dr. MacDonell on Friday, February 27, 2009, prior to the start of court that morning. JA-271. The defense counsel asked what the prosecutor what Dr. MacDonnel meant. *Id.* Trial Counsel said she did not know and that she was unaware of any exculpatory information. *Id.* The Army recognizes that "the right of an opposing party . . . to obtain evidence through discovery or subpoena is an *important* procedural right" and it is unethical to unlawfully obstruct another party's access to

evidence. Para. 3.4, Rule 3.4(a) and (d) (comment to rule) (emphasis added), *and see* UCMJ art. 98, UCMJ. Yet that is what occurred here.

The prosecutor had an ethical duty to inquire into whether exculpatory information existed. *Mahoney*, 58 M.J. at 348; *Leka v. Portuondo*, 257 F.3d 89, 102 (2nd Cir. 2001) (habeas corpus granted). It is the "prosecutor's burden to make full disclosure of exculpatory material, not the accused's." *Id.* The court in *Leka* observed that it would not decide on the question of what point in time the prosecution appreciated the significance of the exculpatory information, as "[i]t [was] clear enough, without deciding these questions, that *the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use*." 257 F.3d at 103 (habeas corpus granted) (emphasis added). Here, Trial Counsel clearly failed to disclose the information in time for it to be useful to the defense.

IV. The Prudent Prosecutor Shall Err on the Side of Seeking and Disclosing Information.

In *United States v. Williams*, the court observed that:

> We also have interpreted these rules to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a minimum, with the disclosure and *discovery rights available in federal civilian proceedings*.

50 M.J. at 440 (emphasis added).

Federal Rule of Civil Procedure 26(2) is the relevant rule for disclosure of expert opinions of those the party "*may* use at trial[.]" The rule requires a written report. Fed. R. Civ. Pro. 26(2)(A)(B). Were Rule 26(2) applicable to courts-martial, the prosecution would have been required to provide Dr. MacDonell's findings and potential testimony in advance of trial. The present litigation could have been avoided.

The Department of Justice ("DOJ")operates under the United States Attorney's Manual ("USAM"). The USAM encourages more liberal discovery than required by law. U.S. Dep't of Justice, United States Attorney's' Manual ("USAM"). §§ 1-1.100-600 (2009).[7] USAM policy encourages disclosure in advance of trial through the production of information that is inconsistent with any element of any charged crime. *Id.* Recently, discovery abuses and other prosecutorial misconduct have come under increased scrutiny in the aftermath of the Ted Stevens case. *See* Press Release, "Dep't of Justice U.S. Senator Indicted on False Statement Charges," (Jul. 29, 2008),[8] Joe Palazzolo, *Attorney General Promises Judges a New Day at DOJ*, Nat'l L. J., May 5, 2009.[9] In response, the Attorney General pledged to raise the bar of professionalism in the Justice Department. *Id.* The

[7] (*Available at* http://www.justice.gov/usao/eousa/foia_reading_ room/usam/title1/1mdoj.htm).
[8] http://www.justice.gov/opa/pr/2008/July/08-crm-668.html, last visited 5 March 2012.
[9] http://www.law.com/jsp/article.jsp?id=1202430445215, last visited 5 March 2012.

Department of Justice established more explicit, comprehensive policies regarding pretrial discovery than those contained in the USAM. *Id.*

In 2010 the DOJ issued pretrial discovery guidance. David Ogden, Memorandum, *Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group*, ["Ogden Memorandum"] (Jan. 4, 2010).[10] In *Issuance of Guidance and Summary of Actions in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group*, Ogden announced DOJ efforts to improve pretrial discovery practices. *Id.* That is because "Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases." *Id.*

DOJ is moving closer to the military practice of open and early discovery. Captain Elizabeth Cameron Hernandez and Captain Jason M. Ferguson, *The Brady Bunch: An Examination Of Disclosure Obligations In The Civilian Federal And Military Justice Systems*, 67 A.F. L. Rev. 187, 221 (2011). Federal prosecutors are encouraged to gather material from all members of the prosecution team including "the agents and law enforcement officers within the relevant district working on the case." *Ogden Memorandum*. When determining the prosecution team for

[10] http://www.justice.gov/dag/dag-memo.pdf, last visited 5 March 2012.

discovery purposes, "[p]rosecutors are encouraged to err on the side of inclusiveness." *Id.* DOJ policy would include Dr. MacDonnell on the team, and so should this court when requiring the prosecution to make disclosures.

V. Appellant Was Prejudiced by Trial Counsel's Argument, in Addition to the Loss of Dr. MacDonell's Trial Testimony.

Trial counsel's argument was potentially dishonest, which prejudiced Appellant. The nature of the prosecution argument is an element of why the discovery failure was not harmless beyond reasonable doubt. Trial Counsel could not argue as she did. When arguing, "the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Erickson*, 65 M.J. 221, 222 (C.A.A.F. 2007) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). Hard blows are based only on record evidence or by fair implication from that evidence. Dishonesty is a foul blow. It is dishonest to knowingly argue that the defense theory was unbelievable when the prosecution's own expert disagreed with their theory of guilt. A dishonest argument demonstrates more than an absence of candor toward the tribunal. The nondisclosure did more than insulate Trial Counsel from an objection to her argument.

Remedial Lines

This court should find that the trial counsel knew that their forensic expert's professional opinion supported the

opinion of the defense expert, that the opinion was a fact both favorable to the appellant and material to an assessment of guilt and/or punishment, and that it should have been disclosed *immediately*.

This court should reinforce that it is the duty of a prudent prosecutor to disclose early and fully. When disclosure is required it is the personal responsibility of the trial counsel to inform the defense by the most expeditious means possible in as much detail as is known.

This court must disavow ACCA's reliance on *Carter v. Bell*, and similar holdings. This court must apply a rule that whenever the prosecution fails or declines to provide disclosures as to potential expert witnesses substantially in the form of that found in Fed. R. Civ. Pro. 26(2), this court will presume prejudice.

CONCLUSION

Dr. MacDonell's opinion favored the defense by corroborating the deceased's position and order of shots. Thus the opinion contradicted the prosecution theory that the deceased was executed while siting on a rock.

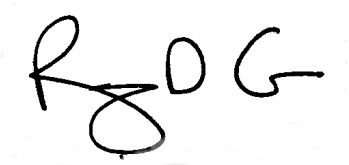
Prosecutors make trial decisions based on how they read appellate cases or how they anticipate an appellate court will view the case.

> The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed -- with the benefit of hindsight -- as affecting the outcome of the trial.

United States v. Safavian, 233 F.R.D. 12 (D.D.C. 2005).

By finding reversible prejudicial error, this court will remind prosecutors of their constitutional duty to ensure a fair trial. Appellant was not accorded a fair trial by these trial counsel.

Respectfully submitted,



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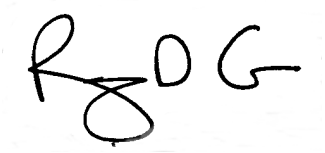
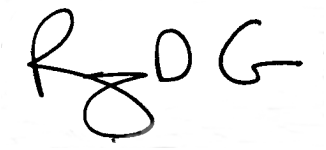


Certificate of Service

I certify that the forgoing BRIEF was eFiled with this court on 9 March 2012. At the time of eFiling civilian counsel for Appellant was copied at jack.zimmermann@zlzslaw.com, military counsel CPT E. Patrick Gilman, edward.p.gilman.mil@mail.mil, and counsel for Appellee was copied: CPT Steve Latino, steven.e.latino.mil@mail.mil and MAJ Ellen S. Jennings, Ellen.s.jennings.mil@mail.mil.



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