



Discovery and the VLC

Objectives

- Understand the sources of the discovery obligation
- Analyze *US v. Stellato* and the resulting effect on the landscape
- Understand if and when VLC are ever obligated to disclose information to the parties

Article 46

- 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. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

RCM 701

- (a) Except as otherwise provided, TC shall provide:
 - (1) Papers accompanying charges; convening orders; statements.
 - (2) Documents, tangible objects, reports.
 - Witnesses.
 - Prior convictions of accused offered on the merits.
 - Information to be offered at sentencing.
 - Evidence favorable to the defense.

RCM 701

701(a)(2)(A): provides for inspection of: “any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are in the **possession, custody, or control of military authorities,**

and which are **material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief** at trial, or were obtained from or belong to the accused.”

RCM 701

701(a)(2)(B) provides for inspection of: “any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are in the **possession, custody, or control of military authorities**, the **existence of which is known or by the exercise of due diligence may become known to the trial counsel**, and which are **material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief** at trial.”

RCM 701: evidence favorable to the accused

R.C.M. 701(a)(6) requires trial counsel to "as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment."

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

Brady involved a capital murder conviction where the prosecution failed to disclose that a co-accused had admitted to committing the actual homicide. Retrial was granted for sentencing only (the conviction stood).

What must be disclosed by the prosecution? "**evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment.**" 373 U.S. at 87.

When is evidence 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." *United States v. Begley*, 473 U.S. 667, 682 (1985). **Does the evidence undermine the confidence in the verdict or punishment?**

What do the Constitution, Art. 46, R.C.M. 701, & *Brady* cover?

- A letter between SJAs concerning a drug lab employee's past lackluster testimony, arguably leading to a motive to fabricate in the case at hand. *US v. Mahoney*, 58 M.J. 346 (C.A.A.F. 2003).
- A failure by the prosecutor to correct a cooperating witness's false testimony that he was not receiving anything for his testimony. *Napue v. Illinois*, 360 U.S. 264 (1959).
- A privileged communication to clergy after the holder consented to disclosure to TC, not knowing that a privilege existed. *US v. Jasper*, 72 M.J. 276 (C.A.A.F. 2013).

US v. Stellato (C.A.A.F. 2015)

○ Facts:

- Army Major accused of molesting a child.
- Child's mom (accused's ex-wife) had a "box" of evidence, including papers and objects. Most significant was notes taken by her when the child recanted
- TC knew the box existed, saw it at mom's house, did not inspect it.
- Mom made two thumb drives from evidence in the box, provided it to TC, TC provided to DC
- DC asked for a plastic banana allegedly used in one of the assaults and seized by local law enforcement.
- TC claimed banana had been destroyed. After being ordered by the judge, TC found the banana in the locals' evidence locker.

US v. Stellato

- Procedure:
 - Box of evidence compiled by mom in February 2013
 - TC is aware of the evidence February or March 2013
 - Continuances are granted in August and November 2013 based on discovery violations
 - Dismissal with Prejudice- filed by defense in April 2014
 - ACCA overturned the Dismissal with Prejudice in November 2014
 - CAAF reinstated trial judge's decision in August 2015

US v. Stellato & the “box”

- This is a particularly egregious example: trial counsel viewed the “box” of evidence and informed mom that evidence turned over to him would have to be provided to defense
- Defense was granted several continuances for numerous violations before the judge dismissed with prejudice

US v. Stellato

Dismissal with prejudice is a drastic remedy

- Under 701(g)(3), courts can:
 - Order discovery
 - Grant a continuance
 - Prohibit a party from introducing evidence, calling a witness, or raising a defense not disclosed
 - Enter such other order as is just under the circumstances
- “[D]ismissal of charges may be appropriate if a military judge determines that the effects of the Government’s discovery violations have prejudiced the accused and no lesser sanction will remedy this prejudice. US v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004)

US v. Stellato

- TC's obligations are not restricted to what they have in their possession. Military judge determined that the "box" was within the control of military authorities because he knew of it and had declined to take possession. Likewise, the judge ordered TC to seek out the plastic banana that was in the possession of the civilian authorities.

But what does this mean for us?

- In plain English, TC has to turn over stuff they know about or could find out about IF it would be useful to the defense or they plan to use it.
- VLCs do not have the same obligations as long as we do not act as an arm of the Government.

What does this mean for us?

- JAGINST 5803.1D- Rules of Professional Responsibility
 - Rule 3.4 Fairness to Opposing Party. Do not “unlawfully obstruct a party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value” or “counsel or assist another person to do any such act.” Do not “falsify evidence, counsel or assist a witness to testify falsely.” This rule applies the same to non-parties.
 - Rule 3.8 Special Responsibilities of Trial Counsel. This rule does *not* apply to us. 3.8 recognizes that because a TC represents the U.S., he has the responsibility of administering justice and is not merely an advocate.”
- JAGINST 5810.3- Our Manual. Section 7.4(g). Let trial counsel take the lead on trial strategy and witness prep, and focus on safeguarding the victim's rights. This is how you avoid being seen as an arm of the government.

What constitutes an arm of the government?

- The US v. Boyd, 14 M.J. 703 (C.M.A. 1981), line of cases determine that military police or investigators “were a natural and ancillary part of the ‘prosecutorial role’.” *Id* at 705.
- Line of decisions in the 1960s following a state law decision to determine “Witnesses are not parties...they do not belong to either side.” *State v. Papa*, 32 RI 453, 80 Atl 12, 15 (1911).

The VLC's role in discovery

- Most common areas where VLCs become gatekeepers of information:
 - The existence of mental health records
 - The cell phone (text messages, pictures, etc.)
 - Prior reports of sexual assault



The VLC role: best practices

- Balance between protecting privacy interests and professional responsibility, and remember the hard line stance isn't always the best.
- If information is ultimately going to be discovered, concealing it can make matters worse, e.g., if it were to be disclosed in open court for the first time.
- Talk to your client early and often about their desires and objectives.

The VLC role: best practices

- For mental health records, medical records, and prior reports of sexual assault, we can and should advise our clients of the right not to disclose this information absent a court order, and that in fact the best way to safeguard this info is to not disclose its existence.
- For cell phone records, we can and should advise clients of the limitations of NCIS forensic review of phones, and their right to refuse a search or consent to screen shots only.

Do we ever have an obligation to disclose?

- If you become an “arm of the government.”
- In accordance with JAGINST 5803.1D, Rule 3.4. Do not assist a witness in testifying falsely.

Do we ever have an obligation to disclose: victim witness interviews

- Article 46 guarantees “equal opportunity to obtain witnesses and evidence”
- RCM 701(e) “Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.”

Do we ever have an obligation to disclose: victim witness interviews

- Killebrew: Witnesses can refuse to answer questions in a pre-trial interview, if they do so without Government interference.
- Aycock: Accused and defense cannot be prohibited from contacting witnesses.
- Enloe: Government cannot impose conditions on pre-trial interview, e.g., having a third-party present.
- Morris: Parents of child victim can refuse to let defense interview the victim outside their presence.

Do we ever have an obligation to disclose: victim witness interviews

- *US v. Buchanan*: Judge Monahan ruled 1 September against defense asking the judge to either (1) restrict access to the victim witness by the TC until she submitted to a defense interview, or (2) order TC to record any interviews with the victim witness.
- Judge Monahan relied on *Morris* for the proposition: “A witness has no obligation to submit to a pretrial interview.”
- “The mandate of Article 46 and, in turn, R.C.M. 701(e) is that one party may not impede the access of the other party to witnesses or evidence. Here, the Defense does not allege, and the evidence does not support, that the Government has taken any action to impede the Defense's access to interview IT3 A.P. Thus, the Court finds that there has not been a violation of Article 46.”



Questions?