

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MULLIGAN, FEBBO, and WOLFE
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant EDDIE ELLIS, JR.
United States Army, Appellant

ARMY 20160250

Headquarters, Fort Bliss
Michael J. Hargis, Military Judge
Colonel Charles C. Poché, Staff Judge Advocate (pretrial & recommendation)
Lieutenant Colonel Casey Z. Thomas, Acting Staff Judge Advocate (addendum)

For Appellant: Captain Joshua B. Fix, JA (argued); Lieutenant Colonel Christopher D. Carrier, JA; Captain Katherine L. Depaul, JA; Captain Joshua B. Fix, JA (on brief); Lieutenant Colonel Christopher D. Carrier, JA; Captain Joshua B. Fix, JA (on reply brief); Captain Heather M. Martin, JA.

For Appellee: Major Edward J. Whitford, JA (argued); Lieutenant Colonel Eric K. Stafford, JA; Major Michael E. Korte, JA; Major Edward J. Whitford, JA (on brief); Captain Austin L. Fenwick, JA.

27 March 2018

OPINION OF THE COURT

WOLFE, Judge:

Appellant was convicted of a single specification of raping his wife, Ms. LE.¹ Critical to this appeal is that the day prior to the offense Ms. LE hit appellant's

¹ A panel with enlisted representation sitting as a general court-martial convicted appellant, contrary to his pleas, of one specification of rape, in violation of Article 120, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 920 (2012 & Supp. II). The convening authority approved the adjudged sentence of a dishonorable discharge, five years confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

parked car during an argument with appellant. Appellant asserts that the government's failure to provide a copy of the accident report was a disclosure violation entitling him to relief on appeal. Appellant assigns both constitutional and non-constitutional error. We address both. In so doing, we address when a law enforcement investigation is separate from the investigation into the charged offense under *Brady v. United States*, 397 U.S. 742 (1970). We also discuss what constitutes a "specific request" for disclosure under Rule for Courts-Martial [R.C.M.] 701(a), triggering a heightened standard of review. In the end, we resolve all issues against appellant and affirm the findings of guilty and sentence.

BACKGROUND

A. The Relationship.

Appellant and Ms. LE first met in 2007 and were married in 2009. The marriage had several difficult periods to include at least two separations, appellant filing for divorce in one instance, and several reconciliations. Even after appellant was convicted, Ms. LE sent him correspondence indicating a desire to reconcile. This correspondence included writing "Hopefully, one day we all can just go hang out at the lake as friends and family . . . I still wear [a tattoo with appellant's name] with pride."

B. The Offense.

On the day of the assault, 21 August 2015, Ms. LE testified that she and appellant had not been on speaking terms and that she was planning to leave him. As she lay in bed watching television, appellant entered the room and placed his hand on her leg. She rejected his advance and pushed his hand away. Declaring that she "technically [] was still his wife" appellant then forcibly anally and vaginally raped Ms. LE whilst spitting on her and telling her that all she was good for was having his kids. Ms. LE testified she fought and scratched appellant during the assault while appellant had his arm across her throat.

When appellant left to use the bathroom, Ms. LE grabbed her cell phone and called 911. A law enforcement investigation immediately ensued.

In addition to physical and forensic evidence seized from the crime scene, the government introduced pictures showing scratch marks on appellant's neck and bruises on Ms. LE's neck consistent with her description of the assault.

C. The Collision and the Defense Theory.

Appellant's theory of the case was that Ms. LE had fabricated the rape in order to gain an advantage in any divorce or child custody dispute. Because of the

immediate report, physical and forensic evidence (to include DNA, torn clothing, and the pictures discussed above) was collected and tended to corroborate Ms. LE's story. Accordingly, appellant's theory of fabrication essentially required a belief that Ms. LE had purposefully baited and then framed appellant for rape.

Central to appellant's defense and the issues concerning this appeal was a vehicle collision the day prior to the rape. Appellant asserts that, as Ms. LE was backing out of the driveway, she intentionally rammed into appellant's parked car. He further asserts that, as there were children in her car, Ms. LE was cited for child endangerment by military police. Under appellant's theory, evidence of this collision was critical to establishing Ms. LE's motive to fabricate. That is, appellant argues that his wife framed him for rape to ensure she would receive custody of the children notwithstanding her pending child endangerment investigation.

At trial, the defense cross-examined Ms. LE about her motives. She agreed she and appellant would be getting a divorce and that she wanted custody of the children. Regarding the collision, she stated she was arguing with appellant through the car window while backing out of the driveway. She further explained that she was not parked in her usual spot and because she was looking at appellant instead of where she was going, she accidentally hit appellant's car.

While Ms. LE admitted much of the substance surrounding the car collision she denied facts that appellant argues were key to the trial. First, she denied the collision was intentional. Second, while she admitted being taken to the police station, she denied she had been cited for child endangerment. She testified that she only became aware of a child endangerment issue a month later when Child Protective Services (CPS) became involved.

In closing, the defense argued their theory that Ms. LE fabricated the assault because she feared losing her children. In rebuttal, the government argued Ms. LE was aware of the child endangerment investigation only after she reported the assault and there was no motive to fabricate based on the car collision.

D. The Report.

Military police conducted a brief investigation into the collision in appellant's driveway. The report's summary concludes "investigation determined that by the intestinal [sic] movement of vehicle 1 towards vehicle 2, proves the intention of the driver of vehicle 1 to strike vehicle 2 in lieu of taking a normal direction of travel." A neighbor described to police that Ms. LE "gassed" the car.

The report states that Ms. LE was briefly apprehended and cited for child endangerment. The report includes a Department of the Army Form 3881 ("Rights

Warning Procedure/Waiver Certificate). The form appears to indicate that Ms. LE was advised that she was being investigated for child endangerment.²

Accordingly, evidence in the report contradicted Ms. LE's testimony at trial that she was unaware of the child endangerment investigation at the time she reported appellant had raped her.

E. The Discovery Request.

Appellant submitted a fourteen-page discovery request. Included in the request was a request for "all evidence affecting the credibility of witnesses . . ." including "any military apprehension, arrests . . . and titling."

In a supplemental discovery request, the defense sought a copy of three reports. One was a law enforcement investigation into an unrelated incident between appellant and Ms. LE that had happened at Fort Carson. A second was a law enforcement investigation into an incident that happened the week after the rape. The third request sought a copy of a "Texas Department of Family and Protective Services report" (CPS report) that had been initiated because of the driveway collision. However, the third request did not specifically ask for a copy of the associated law enforcement investigation into the collision.

LAW AND DISCUSSION

Appellant claims prejudice because the government did not provide a copy of the police investigation regarding the driveway collision. Appellant claims if his defense team had the report, they could have confronted Ms. LE on the stand and more thoroughly explored her bias. Specifically, the DA Form 3881 would have impeached her testimony that she was unaware she was under investigation for child endangerment. Accordingly, appellant seeks relief because the government did not disclose the report.

² We granted appellant's motion to attach to the appellate record a copy of the police investigation. However, the copy submitted was obtained through the Freedom of Information Act and was heavily redacted. Ms. LE's name, at every instance, is blacked out. For example, we describe Ms. LE as having been advised that she was under investigation for child endangerment when the actual name on the form is blacked out. For purposes of this appeal, rather than resolve this factual issue we accept, without deciding, that appellant's inferences regarding the content of the report are correct.

Complicating our analysis are certain facts that, while not litigated at trial, are included in the appellate record and do not appear to be disputed.

First, it seems certain the defense had independent knowledge of the driveway collision. Appellant himself was present when Ms. LE hit his car. The defense counsel's cross-examination also clearly reveals knowledge about the collision and subsequent law enforcement investigation.

Second, nothing in the record suggests the trial counsel ever had the report of the driveway collision or that it had become part of the rape investigation. It is not clear when, or if, the trial counsel became aware the investigation of the driveway collision would be a key part of the defense's theory of the case. In his R.C.M. 1105 submission the defense counsel concedes that the trial counsel was unaware of the driveway collision.³

Third, before trial appellant personally obtained a redacted copy of the law enforcement investigation into the driveway collision through a Freedom of Information Act request. For reasons that are not known to this court, appellant only provided a copy of the report to his counsel after trial.

We first address appellant's claim the government had an independent duty to find and provide the investigation into the collision. That is, the "collision investigation" was constitutionally required to be turned over pursuant to *Brady* or R.C.M. 701(a)(6). Second, we address appellant's claim that the defense made a specific request for the report and the government was, therefore, required to provide the report under R.C.M. 701(a)(2).

A. Was the Failure to Provide the Collision Investigation a Brady Violation?

The government violates *Brady* when they withhold favorable and material information from the defense. *United States v. Behenna*, 71 M.J. 228 (C.A.A.F. 2012). Evidence is favorable if, among other things, it impeaches the government's case. *Id.* at 238. "Evidence is material when 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.* (quoting *Smith v. Cain*, 565 U.S. 73, 75 (2012)).

Because "*Brady* evidence" has the twin requirement that the evidence be both favorable and material, a *Brady* violation is *always* prejudicial. Although this court

³ We granted appellant's unopposed motion to attach the R.C.M. 1105 submissions to the record. See generally *United States v. Cade*, 75 M.J. 923 (Army Ct. Crim. App. 2016).

has not always spoken clearly on the issue, there is no such thing as a harmless *Brady* violation. *Id.*; *United States v. Shorts*, 76 M.J. 523, 531 (Army Ct. Crim. App. 2017). “Prejudice” is baked into every *Brady* violation.

1. Was the Collision Investigation Related to the Rape Investigation?

Our superior court has answered the question of when a trial counsel must look for exculpatory evidence in police investigations.

Although the core files that must be reviewed are readily ascertained, the outer parameters must be ascertained on a case-by-case basis. The core files that must be reviewed include the prosecution’s files in the case at bar. Beyond those materials, the prosecution 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.

United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999) (citations and quotations omitted). That is, the requirement for *Brady* is limited to police files “in the case.” The court continued:

The scope of the due-diligence requirement with respect to governmental files 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; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity[.]

Id. (citations and quotations omitted); *see also Shorts*, 76 M.J. at 533.

Here it is not disputed that the collision investigation was a law enforcement investigation maintained by the United States Army. However, nothing in the record indicates the collision investigation had ever become part of the rape investigation. The record reveals few clues that would have signaled to the trial counsel the existence of the investigation or its importance to the defense case. In his R.C.M. 1105 submission the defense counsel conceded the trial counsel was unaware of the

collision investigation until after the trial was over. While the car collision in appellant’s driveway was a key part of appellant’s theory of the case, little in the record reveals when the trial counsel should have become aware of this fact.⁴

In the quoted language of *Williams* above, the Court of Appeals for the Armed Forces (CAAF) limited the scope of a trial counsel’s due diligence to three types of cases. Addressing the first two, we do not find the collision investigation to be part of “the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses” or “investigative files in a related case maintained by an entity closely aligned with the prosecution.” *Id.* As the duty is on the government, we understand the term “related case” to be viewed from the trial counsel’s perspective. We address the third category of cases in Part B, below, where we discuss whether the defense made a specific request for information.

While both investigations were law enforcement investigations conducted by military law enforcement at Fort Sill, Oklahoma, that is where the connection ends. The rape investigation, conducted by the U.S. Army Criminal Investigation Command, was relatively substantive, included numerous interviews, physical evidence, and forensic testing. The collision investigation was completed by the military police officer who initially responded to the scene. Other than appellant and Ms. LE, the investigations do not appear to share witnesses or investigators. Accordingly, we find that the investigation into the driveway collision did not fall within the ambit of evidence the trial counsel was required to turn over to the defense under *Brady*.

2. *Did the Defense Already Have the Information?*

Even if we presume the trial counsel should have found and provided the collision investigation we still would not find a *Brady* violation. Our superior court has stated:

The purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him. Irrespective of whether the statement here was exculpatory evidence under *Brady*, a question we do not reach, there is no *Brady* violation when the accused or his counsel knows before

⁴ We note there was almost no pretrial motions practice in this case and the defense reserved their opening statement.

trial about the allegedly exculpatory information and makes no effort to obtain its production.

United States v. Lucas, 5 M.J. 167, 171 (C.M.A. 1978) (quoting *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir. 1976)).

“The State has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence.” *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997); *See also Pippin v. Dretke*, 434 F.3d 782, 790 (5th Cir. 2005); *United States v. Payne*, 63 F.3d 1200, 1208 (2nd Cir. 1995); *United States v. Bermudez*, 526 F.2d 89, 100 (2d Cir. 1975).

“Certainly, *Brady* does not require the government to conduct discovery on behalf of the defendant.” *United States v. Baker*, 1 F.3d 596, 598 (7th Cir. 1993); *see also United States v. Flores*, 540 F.2d 432, 437 (9th Cir. 1976) (noting the government has no duty to fish through public records equally accessible to defense to collate information).

Here, it is clear that both appellant and his counsel were aware Ms. LE hit appellant’s car and a police investigation ensued. Appellant knew about the investigation because he witnessed it and had received a copy of the investigation. Appellant’s counsel was aware of the incident because he requested the CPS report and his questions to Ms. LE demonstrate specific knowledge of the incident and subsequent investigation.

B. Was there a Specific Request for the Collision Investigation?

Appellant asserts that even if the non-disclosure of the collision investigation did not amount to a *Brady* violation, the government failed to provide the collision investigation in response to a specific defense request.

We first address the standard of review and then turn to whether appellant submitted a specific request.

1. Standard of Review for Certain Non-Constitutional Discovery Violations.

Without a doubt, the regulatory and statutory discovery rights of an accused at court-martial are greater than the minimum prescribed by the constitution. We first address what is the standard of review for a discovery violation where the defense makes a specific request for evidence. Appellant asserts that we must determine any violation is harmless beyond a reasonable doubt even if it does not amount to a constitutional violation. We agree.

In *United States v. Eshalomi*, our superior court suggested that “when defense-requested information is withheld by the prosecution, we should impose a heavier burden on the Government to sustain a conviction than is constitutionally required” 23 M.J. 12, 24 (C.M.A. 1986).

Four years later, in *United States v. Hart*, our superior court adopted the suggestion in *Eshalomi*, holding that “where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, the evidence will be considered material unless failure to disclose can be demonstrated to be harmless beyond a reasonable doubt.” 29 M.J. 407, 410 (C.M.A. 1990) (internal quotations omitted).

The *Hart* decision eliminated the requirement for “materiality” and therefore the effect of our superior court’s decision in *Hart* was to test for constitutional harmlessness in cases where there was no constitutional violation. *Brady* requires a material non-disclosure whereas *Hart* does not. Put differently, *Hart* eliminated the requirement for an appellate court to find a “material prejudice” to a substantial right as would ordinarily be required by Article 59(a), UCMJ, in assessing non-constitutional error. Thus, when the government fails to disclose information specifically requested by the defense, it is not enough for the government to demonstrate that the information was not material or had not resulted in prejudice. Under *Hart*, prejudice is presumed and can be rebutted only by a demonstration of constitutional harmlessness. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

Indeed, the difference in standards of review played out in our review of *United States v. Cano*, ARMY 20010086, 2004 CCA LEXIS 331 (Army Ct. Crim. App. 4 Feb. 2004) (mem. op.) (“*Cano I*”), and our superior court’s decision in *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005) (“*Cano II*”). In that case, the defense specifically requested the notes taken by a Dr. Lao, an on-base psychologist, while treating the alleged victim.⁵ *Cano I*, 2004 CCA LEXIS 331, at *3 n.1. At this court, we determined a failure to disclose “must be tested for ‘material prejudice’ pursuant to Article 59(a), UCMJ.” *Id.* at 8 n.4. The CAAF held that we applied the wrong standard and tested for constitutional harmlessness citing *Hart*. *Cano II*, 61 M.J. at 76.

The *Hart* decision is arguably unusual. First, it is the only circumstance we are aware of where a military appellate court tests for constitutional harmlessness for non-constitutional error. For example, while we test for constitutional

⁵ The appellate history of the case makes clear that the issue decided by CAAF was one of discovery, not privilege. *Compare Cano II*, 61 M.J. at 75 n.1 *with Cano I*, 2004 CCA LEXIS 331, at *3.

harmlessness in cases of unlawful command influence, it is only after our superior court determined that “unlawful command influence was an error of constitutional dimension.” *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986)).

Second, the test for constitutional harmlessness outlined in *Hart* is stricter (from the government’s perspective) than the test prescribed for actual constitutional error under *Brady*. To obtain relief under *Brady* there must be “a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.” *Behenna*, 71 M.J. at 238 (quoting *Smith*, 565 U.S. at 75). Whereas for a *Hart* violation, the test is whether “the undisclosed evidence *might have affected the outcome of the trial.*” *Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (citing *Hart*, 29 M.J. at 409 (dictum)). Thus, an appellant faces a *higher* hurdle in obtaining relief for an alleged *Brady* violation (“reasonable probability”) than for certain non-constitutional violations of Article 46, UCMJ, and R.C.M. 701 (“might have”).

One reading of *Hart* is that it was based on the concept of “military due process.” At the start of the opinion, our superior court plainly stated that they were considering applying a higher constitutional burden on military discovery violations than for comparable violations in civilian court. “We have considered that, in the military, there may be ‘a heavier burden on the Government’ than that imposed upon civilian prosecutors ‘to sustain a conviction’ when evidence has been withheld from an accused.” *United States v. Green*, 37 M.J. 88, 90 (C.M.A. 1993) (quoting *Eshalomi*, 23 M.J. at 24); *see also Hart*, 29 M.J. at 409-10.

If the *Hart* decision was based on the concept of military due process, then it was implicitly called into question by the CAAF’s later decision in *United States v. Vasquez*, 72 M.J. 13, 19 (C.A.A.F. 2013). In *Vasquez*, the CAAF considered whether “servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM.” *Id.* The court answered the question in three words: “They do not.” *Id.*

Under the broad reasoning in *Vasquez*, we would review constitutional error under the standard prescribed by the Supreme Court (*Brady*) and non-constitutional error under the standard prescribed by Congress (Article 59(a), UCMJ). Article 59(a), UCMJ, states that “[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Unless a higher authority set a different bar (i.e. the Constitution), we would be required to apply the statutory test for prejudice when considering statutory violations (i.e. Article 59(a), UCMJ, for violations of Article 46, UCMJ).

However we might read *Hart* in light of *Vazquez*, our reading is constrained by a case the court decided just a few months after *Vazquez*. In *Coleman*, the CAAF reiterated the *Hart* test. *Coleman*, 72 M.J. at 187. The court began with the well-settled finding that “Article 46 and its implementing rules provide greater statutory discovery rights to an accused than does his constitutional right to due process.” *Id.* The court then restated the two standards of review as follows:

[W]e have established two categories of disclosure error: (1) cases in which the defense either did not make a discovery request or made only a general request for discovery; and (2) cases in which the defense made a specific request for the undisclosed information. For cases in the first category, we apply the harmless error standard. For cases in the second category, we apply the heightened constitutional harmless beyond a reasonable doubt standard. Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.

Id. (citations and quotations omitted); *see also United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (restating the *Hart* test in *Coleman*).

Indeed, the very thrust of the *Hart* test is to *presume* the materiality of the evidence in question. “[T]he evidence will be considered ‘material unless failure to disclose’ can be demonstrated to ‘be harmless beyond a reasonable doubt.’” *Hart*, 29 M.J. at 410 (quoting the Army Court of Military Review decision in *Hart*, 27 M.J. 839, 842 (A.C.M.R. 1989)). The *sine qua non* of the *Hart* test is the non-requirement for finding “materiality” and thereby alleviating any requirement to find constitutional error under *Brady*. Thus, while *Hart* is inconsistent with *Vasquez* and we see a tension in the law when we test non-constitutional disclosure violations for constitutional error, it is not for this court to decide. Although we might welcome additional clarity, we follow the more recent and specific guidance of our superior court.

Accordingly, we apply three different standards for assessing prejudice for alleged disclosure violations.

At the apex is the *Hart* test, which is applicable when the defense has made a specific request for disclosure. To provide relief to appellant we must first find that the government was required to disclose the information under the Constitution, the UCMJ, or the Manual for Courts-Martial. If the government fails to disclose the information, the appellant is entitled to relief unless the government can show that the effect of non-disclosure is harmless beyond a reasonable doubt. If the non-

disclosure “might have” effected the verdict, the government’s non-disclosure will not be harmless beyond a reasonable doubt.

Receiving lesser appellate scrutiny are alleged *Brady* violations. Unlike a *Hart* violation, to find a *Brady* violation we must first find that the information in question is material to appellant’s case. We will provide relief to an appellant upon finding a reasonable probability that the verdict would have been different had the government provided the information in question.

Finally, if the government violates any other disclosure requirement we will test for material prejudice to a substantial right in accordance with Article 59(a), UCMJ. Such an example would be if the government were to fail in its disclosure obligation under R.C.M. 701(a)(1)(A). See *United States v. Brassell*, ARMY 20160746, 2018 CCA LEXIS 45, *6 (Army Ct. Crim. App. 31 Jan. 2018) (summ. disp.) (citing *United States v. Stone*, 40 M.J. 420, 422 (C.M.A. 1994), for the proposition “[h]aving determined the government committed a disclosure violation under R.C.M. 701, [the court] must nevertheless determine if the error materially prejudiced appellant’s substantial rights.”).

2. *What Constitutes a Specific Request for Disclosure?*

Since *Hart* was decided, the CAAF has had numerous opportunities to consider when a defense discovery request is a “specific request,” triggering the higher standard of review under *Hart*.

In *United States v. Roberts*, the defense learned the lead investigator in the case had previously been disciplined for an unknown reason. 59 M.J. 323, 324 (C.A.A.F. 2004). The defense then made a request for the disciplinary record of the lead investigator. *Id.* The government denied the request. *Id.* The defense then pursued the request with the military judge who, after reviewing the disciplinary record in camera, likewise denied the request. *Id.* at 325. The defense’s request identified a specific file, the location of the file was obvious from the context, and the possible impeachment value of the file was plain. The CAAF found that the defense had made a “specific request” and reviewed the case under *Hart*.

In *United States v. Green*, the CAAF also addressed the failure of the government to disclose a disciplinary record of an investigator. 37 M.J. at 89. However, in *Green* the defense did not identify the specific agent and instead “requested exculpatory evidence in possession of the Government” that “may be favorable to the defendant to include “[a]ny record of prior conviction, and/or nonjudicial punishment of’ any prosecution witness.” *Id.* A special agent in the case had been given non-judicial punishment for several offenses including larceny and fraud. *Id.* The court noted the special agent was “not specifically named in the request.” *Id.* Although the court did not explicitly determine whether the discovery

request constituted a “specific request,” the majority in *Green* did not test for constitutional harmlessness under *Hart*, but tested for materiality under the reasonable-probability standard of *Brady*. *Id.* at 90. This suggests the majority did not view the request as a “specific request.” Thus, while in *Roberts* a request for a disciplinary file of a named individual was a “specific request,” in *Green* the defense did not make a specific request when they asked for all conviction and non-judicial punishment evidence for all government witnesses.

In *Coleman* and *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997), the CAAF similarly addressed defense requests for evidence affecting witness credibility. In *Coleman*, the government had orally promised to recommend reducing a co-accused’s sentence by twelve months in exchange for the co-accused’s truthful testimony in the *Coleman* case. 72 M.J. at 185. The defense had submitted a specific request for any promises of immunity or leniency as it related to the named co-accused. *Id.* (“Specifically the defense is requesting immediate disclosure of any agreement with PFC Jarvis Joshua Pilago to cooperate with the government in any way.”). Not surprisingly, the CAAF treated such a detailed request as a specific request for disclosure and applied *Hart*.

In *Romano*, however, the CAAF did not find a specific request for evidence. In that case, the defense requested “that the Government produce any known evidence tending to diminish credibility of witnesses. . . [and] any impeachment evidence relating to such [prosecution] witnesses [].” *Id.* at 271. The government failed to disclose statements made by a key witness. *Id.* The CAAF treated the failure to disclose as a violation of *Brady*, not *Hart*, thereby testing for the materiality of the evidence and assessing whether the evidence was constitutionally harmless by determining whether there was a “reasonable probability of a different verdict.” *Id.* at 273.

Likewise in *United States v. Cano*, the court similarly found an accused’s by-name request for clinical post-assault notes taken during a therapy session by an on-base clinical psychologist constituted a “specific request.” *Cano II*, 61 M.J. at 76. The file and its custodian were specifically identified. The relevance of post-assault therapy notes was plain. *Id.* at 76-78. As we noted above, the CAAF found this court erred by not testing for harmlessness beyond a reasonable doubt under *Hart*. *Id.* at 76.

In *United States v. Behenna*, the CAAF appeared to split on whether a discovery request was a “specific request,” providing insight into the majority’s resolution of the issue. 71 M.J. at 237-39, 246-47. The defense had requested the disclosure of all exculpatory evidence. *Id.* at 237. In his dissent, Judge Effron found that the request constituted a “specific request” that would trigger a higher burden than *Brady*. *Id.* at 246. The majority apparently disagreed and analyzed the non-disclosure under *Brady*, not *Hart*. Applying the test under *Brady* the court

found its “confidence in the results of trial--both for findings and sentencing--[was] not undermined by the Government’s failure to disclose [the evidence].” *Id.* at 239.

Finally, in *United States v. Claxton*, the defense requested the “names addresses and phone numbers of all confidential witnesses . . . including undercover informants.” 76 M.J. at 357. The court summarized both the test under *Brady* as well as the higher *Hart* standard when the defense has made a specific request for evidence. *Id.* at 359. Although the court did not explicitly determine whether the discovery request constituted a “specific request,” in concluding that the non-disclosure was constitutionally harmless the court applied the *Brady* “reasonable probability” test and not the *Hart* “might have” test indicating that the defense had not made a “specific request” under *Hart*.

Although the prosecution did not disclose that the two witnesses were confidential informants, there is *no reasonable likelihood* that this evidence could have affected the judgment of the trial court.

We further conclude that there is *no reasonable likelihood* that the disclosure of the two witnesses as confidential informants would have affected Appellant’s sentence. Although an appellant may present evidence in extenuation and mitigation during sentencing, we discern no reason that the status of two witnesses as confidential informants would have led the members to conclude that there was a legal justification for Appellant’s misconduct or a reason to reduce Appellant’s punishment.

Id. at 361 (emphasis added).

After reviewing each of the cases in which our superior court has applied *Hart*, we first hold that it is the substance of the defense discovery request that controls, not the form. To trigger *Hart*, a defense discovery request need not contain the talismanic words that “this is a specific request.” A specific request for discovery is not rendered unspecific merely because the defense fails to incant what is obvious from the request itself. Nor, however, does a statement that “this is a specific request” transmogrify a general request into a specific request. Therefore, in this case we give no weight to the fact the defense’s discovery request did not, at the point in question, intone “this is a specific discovery request.”

Whether a request for disclosure is a specific request is instead determined by its substance, which we hold has three parts. First, the request must, on its face or by clear implication, identify the specific file, document or evidence in question. Second, unless the request concerns evidence in the possession of the trial counsel,

the request must reasonably identify the location of the evidence or its custodian. Third, the specific request should include a statement of the expected materiality of the evidence to preparation of the defense’s case unless the relevance is plain. In addition to our synthesis of controlling case law, the first two requirements were specifically stated by the CAAF in *Williams*. 50 M.J. at 441 (“as designated in a defense discovery request [involving] a specified type of information within a specified entity”). The third requirement comes directly from R.C.M. 701(a)(2) (requiring materiality).

Our holding above is limited to determining what qualifies as a “specific request” under *Hart* and R.C.M. 701(a)(2). The lack of a specific request does not alter other disclosure requirements with which the government must comply, even without any defense request. And, of course, that a request is a specific request only matters if the information is otherwise already subject to disclosure under the Constitution, the UCMJ, or the Manual for Courts-Martial.

C. Was Appellant’s Request for Disclosure a “Specific Request?”

Determining whether the defense request is a “specific request” is critical as there is a substantial difference in our analysis if we determine the request to have been a “specific request.” First, under *Hart*, if the defense request was a “specific request” we presume the materiality of the specific request. Second, if the request is a “specific request” we will order relief if the non-disclosure “might have” altered the verdict; a low threshold.

As noted above, Ms. LE’s motive to fabricate was central to the defense case. As the government argued in rebuttal, the child endangerment investigation could not create a motive to fabricate in Ms. LE if she was unaware of its existence. Under appellant’s argument, he was unable to confront Ms. LE with documentary proof that she knew she was facing a child endangerment allegation when she made the rape accusation. This allowed the panel to conclude, based on Ms. LE’s testimony, that the child endangerment investigation was initiated only after Ms. LE had reported the rape.

The initial defense discovery request ran over fourteen single-spaced pages. Appellant cites the underlined language in the following paragraph as a specific request for disclosure under *Hart*:

19. Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, and persons deceased (“these persons”) who were in any way involved with the instant case and/or any charged or uncharged related offenses, including but not limited to:

a. Prior federal, state and foreign civilian arrests, investigations, and convictions as well as any military apprehensions, arrests, and court-martial convictions, and any titling of any of these persons, including a check with the National Crime Information Center (NCIC), National Records Center, Interpol, all local military criminal investigatory agencies, and any state criminal justice data centers and department of motor vehicles in which the person has resided or has some connection (e.g. home of record, situs of entry on active duty, situs of college/university and post-graduate education, etc.). *U.S. v. Agurs*, 427 U.S. 97 (1976).

As we understand it, appellant argues that as Ms. LE: a) was a witness; b) was apprehended; and c) the apprehension affects her credibility, this request was a specific request for the report into the driveway collision. We disagree.

First, consider the class of persons subject to this request. Any potential witness who was “in any way” connected to the case or related offenses falls under the ambit of the request. Similar to the requests in *Green* and *Romano*, this general request does not identify any specific individual, let alone Ms. LE.

Second, consider *where* the government was being asked to look for matter responsive to the request. In addition to three specific databases, the request asked the government to search through four databases (the state, local, military, and department of motor vehicles) for every location where each potential witness has resided or has some connection.

Third, consider the scope of the *what* for which the defense asked the government to look. The defense asked for all evidence affecting the credibility of the person. While a perjury conviction would appear to meet the request on its face, a police investigation into a minor car collision involving an allegation of child endangerment would only be recognizable as something affecting the credibility of the witness if an individual already had detailed knowledge about the collision investigation, the rape investigation, and the defense’s theory on how the investigations were related.

Finally, it is notable that the defense did make specific requests for disclosure of three other reports. Two were law enforcement investigations in which the defense specifically identified the parties involved and the installation that conducted the investigation. The third request was for the CPS report in which the parties were again identified, the date of event was stated by reference, and the report was identified by the eight digit case number.

Accordingly, we do not find appellant made a specific request for discovery of the driveway collision report. The *Hart* standard does not apply.

Finding neither a violation of *Brady* nor a specific request under *Hart*, there is no error of law that materially prejudiced the substantive rights of appellant. UCMJ art. 59(a).⁶

CONCLUSION

The findings of guilty and the sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge FEBBO concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "John P. Taitt".

JOHN P. TAITT
Acting Clerk of Court

⁶ Among other claims, appellant’s submission pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), argues his counsel was ineffective for failing to “adequately investigate Ms. LE’s . . . arrest by military police for child endangerment.” Appellant asserts that his counsel should have “done more to investigate the incident” and the “defense team failed to make sufficiently diligent efforts to secure this vital piece of evidence.” We note that in his reply brief to this court, appellant specifically asserts that “appellant and his trial defense counsel exercised reasonable diligence” in attempting to get the report. The reply brief was responding to the government’s assertion that there was no *Brady* violation if the defense could have found the evidence through the exercise of their own diligence. Accordingly, we are left with a filing in which appellant argues both that counsel was diligent as part of the assigned error (to support their argument regarding *Brady*) and also personally asserts that his counsel were not diligent. We have been unable to find any case that would guide us on how to reconcile these conflicting claims. In any event, we do not find that appellant has met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), for establishing a constitutional violation to his right to counsel. Having considered appellant’s entire *Grostefon* submission, we determine no relief is warranted on this issue or any others that appellant raised.