

**IN A GENERAL COURT-MARTIAL  
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY  
FORT BRAGG, NORTH CAROLINA**

UNITED STATES	)	
	)	
v.	)	GOVERNMENT RESPONSE TO
	)	SECOND DEFENSE MOTION TO
BERGDAHL, ROBERT BOWDRIE	)	COMPEL
(BOWE)	)	
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	1 JULY 2016
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

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**I. RELIEF SOUGHT**

The Government requests the Court deny the Second Defense Motion to Compel as the Defense has not shown, by a preponderance of the evidence, that the items requested are material to the preparation of the defense.

The Government will complete the majority of its discovery disclosures by 1 August 2016. The Government will also submit, as appropriate, a motion by that date for in camera proceedings in accordance with M.R.E. 505(h). Additionally, the Government expects to file a motion for an extension of the 1 August 2016 deadline for additional documents for which the Original Classification Authority process is not yet complete.

**II. BURDEN OF PERSUASION AND BURDEN OF PROOF**

The Defense, as the moving party, has the burden of persuasion in accordance with R.C.M. 905(c)(2). The burden of proof is a preponderance of the evidence in accordance with R.C.M. 905(c)(1).

**III. FACTS**

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest, Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East (CJTF-82). After leaving the observation post, he was captured by enemy forces and remained in captivity until 31 May 2014, when he was returned to military control.

On 30 June 2009, the Accused's unit classified him as Duty Status Whereabouts Unknown (DUSTWUN) in a casualty report.

On 3 July 2009, BG Richard Mustion, The Adjutant General, after coordination with COL Michael Howard, the Task Force Yukon Commander and MG Curtis Scaparrotti, the CJTF-82 Commander, directed that the Accused's status be changed to "captured." The change was then reflected in eMILPO, the military electronic system used to reflect various types of personnel information.

Between 30 June 2009 and 31 May 2014, multiple entities from the United States Government gathered intelligence, physically searched for the Accused and attempted diplomatic solutions to affect his return.

On 14 June 2011, the Accused's ETS was administratively extended to 1 October 2012. On 24 June 2012, the Accused's ETS was administratively extended to 1 October 2022.

After return to military control on 31 May 2014, charges were preferred against the Accused on 25 March 2015, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The matter was referred to trial on 14 December 2015.

In an e-mail to LTC Rosenblatt on 24 November 2015, COL Holly Gay (Deputy Adjutant General) provided the Accused source documents<sup>1</sup> and specific dates and explanations regarding the transactions in eMILPO. The Government has already agreed to provide any additional source documents if they exist and a transaction log of transactions in eMILPO, including names of the individuals entering the transaction and the date/time it was entered.

### III. EVIDENCE

No additional evidence is necessary to resolve the motion.

### IV. LAW AND ARGUMENT

The right of an accused to obtain favorable evidence is established in Article 46, Uniform Code of Military Justice, and implemented through R.C.M. 701 and 703, both of which establish the general parameters of disclosable information. In particular, R.C.M. 701(a)(2)(A) defines the Government's duty, upon request, to disclose information within the possession, custody, or control of military authorities which is "material to the preparation of the defense." Additionally, R.C.M. 703(f)(1) states that an accused is "entitled to the production of evidence which is relevant and necessary."

#### A. ITEM 4 OF FIRST DEFENSE DISCOVERY REQUEST (HRC Communications)

The Defense has failed to show how e-mail communications within HRC are material to the preparation of the defense. The Government has already agreed to

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<sup>1</sup> "Source documents" as used in this motion generally refer to the substantiating records supporting or prompting a transaction in the military personnel system eMILPO.

provide, to the extent they exist and have not already been provided, any source documents prompting changes to the Accused's ETS as reflected in eMILPO, or documents capturing the ETS changes including a log of transactions within eMILPO. The Government has also already agreed to ensure that those with personal knowledge of the ETS extensions are free to speak with Defense.

Defense's claim that the requested material is relevant because of a potential personal jurisdiction motion fails for two reasons. First, the case law on jurisdiction is clear that an ETS date is not determinative of personal jurisdiction. *See generally United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978). Second, even if that were not the case, the only documents which would be discoverable are the actual documents which changed the Accused's status. The internal communication among HRC personnel has no bearing on whether the extensions complied with the applicable regulations, and are therefore neither relevant nor material.

#### B. ITEM 29 OF FIRST DEFENSE DISCOVERY REQUEST (DCS, G-1 Remedial Measures)

The Defense has failed to show how potential subsequent remedial measures regarding enlistment of Soldiers with prior service separations and behavioral health issues is material to their case. As Defense points out, they are already aware of MG Dahl's investigation and the Director of Army Staff's direction to the Deputy Chief of Staff to provide recommendations consistent with MG Dahl's findings. The potential recommendations are not relevant to any fact at issue on the merits (See M.R.E.s 401 and 407) nor would the recommendations be admissible in presentencing under R.C.M. 1001(c)(1)(b). Although the issue of admissibility is not necessarily tied to materiality under R.C.M. 701(a)(2), when the only reason Defense advances is specifically prohibited under the rules, the Defense has failed to show how the requested items are material.<sup>2</sup>

#### C. ITEM 39 OF FIRST DEFENSE DISCOVERY REQUEST (Witness and Potential Witness Files)

The Defense seeks to compel disclosure of a complete copy of witnesses' complete personnel files, criminal records, and any investigations into a witness "for each witness to the events described in the charges against the accused or whom the trial counsel intends to call during the government's case-in-chief or rebuttal or an any pre-sentencing proceeding." The Defense alleges they are "seeking evidence that can be used to impeach Government witnesses." However, the request is substantially broader and includes items "for each witness to the events described in the charges that are now pending against the accused or whom the trial counsel intends to call during the government's case-in-chief or rebuttal or at any pre-sentencing proceeding." (Emphasis added). There is no support for the proposition that the Government must provide the

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<sup>2</sup> By contrast, material which is inadmissible could be discoverable under the theory that the disclosure would lead to the discovery of admissible evidence. The Defense has not made any such claim with regard to the subsequent remedial measures.

requested information for individuals not listed on a Government witness list.

Even for individuals listed on a Government witness list, the Defense request amounts to a "fishing expedition." The Government has agreed to conduct NCIC checks on all of its witnesses (including a check for relevant Military Police Reports and CID reports), accreditation checks for all law enforcement witnesses, and local and OMPF/AMHRR checks for all military witnesses. The Government will provide any *Brady* and *Giglio* material it finds in any files within its possession, but should not have to provide copies of the entire OMPF and entire local personnel file of all Government witnesses. There is no rule that requires the Government to provide information that has nothing to do with truthfulness, dishonesty, or failure to properly follow procedures regarding duty performance. RCM 701(a)(6) only requires evidence favorable to the Defense, and RCM 701(a)(2) only requires evidence material to the preparation of the defense. The rules do not require discovery of the complete contents of a witnesses personnel file.

The Defense request for disclosure of any witness's mental health records should be denied pursuant to R.C.M. 701 and M.R.E. 513. The mere existence of such records is not sufficient to warrant production. *See United States v. Abrams*, 50 M.J. 361, 362 (C.A.A.F. 1999) (prior to granting an *in camera* review of confidential records, the military judge has "discretion to determine that the defense proffer was insufficient and deny the motion to compel discovery"). The Defense speculates that such records exist and further conjectures that the records contain statements concerning the charged offenses or victim impact. Even further, they assume that these records also contain statements that would be inconsistent with potential witness testimony. The interests of the patients and their rights to privacy outweigh the Accused's right to inspect health care records that *might* contain impeachment evidence. Defense speculation is not sufficient to meet the Defense's burden to compel production of these records nor sufficient to warrant an *in camera* review under M.R.E. 513.

D. ITEM 53 OF THE FIRST DEFENSE DISCOVERY REQUEST – Other DUSTWUN reporting and prosecutions

Despite generic assertions, the Defense has failed to show how information related to other DUSTWUNs is material. The information could not be used in mitigation under RCM 1001(c) and is not relevant to any issue that would be before the Court. DUSTWUN is a broad term and does not necessarily have any relationship to potential criminal charges (i.e. DUSTWUN is not synonymous with AWOL or desertion) and therefore is not relevant to a selective prosecution theory.

E. ITEMS 18-20 OF SECOND DEFENSE DISCOVERY REQUEST – Names and Contact information of witnesses and their chains of command


The Government has already agreed, and is required by the Court's pretrial order, to provide notice of witnesses along with contact information for those

witnesses intended for use at trial. There is no support in R.C.M. 701 or in related case law requiring the Government to create lists of potential witnesses and their contact information for the Defense.<sup>3</sup> The Government has already provided a list of potential victims and their contact information. The list is not all inclusive as many of the decisions regarding who are victims relate to trial strategy and decisions regarding case presentation. Further, under R.C.M. 1001A, the Government's conclusions about qualifying victims or victims called by the Government are not determinative of their status as victims.

To the extent the Government has documents already containing witness names and contact information the Government has or will disclose that information (subject to the provisions of M.R.E. 505). The Government should not be compelled to create lists of potential witnesses for the Defense. If the defense identifies a servicemember they cannot reach after reasonable efforts on their part, the Government will attempt to reach the servicemember using the information provided by defense.

### CONCLUSION

The Defense has failed to meet their burden for any of the items requested. Therefore, the Government requests the Court deny the Second Defense Motion to Compel.



JUSTIN C. OSHANA  
MAJ, JA  
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 1 July 2016.



JUSTIN C. OSHANA  
MAJ, JA  
Trial Counsel

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<sup>3</sup> The Government notes that even if we were required to create lists of potential witnesses our definition of a potential witness could vary significantly from that of defense. The Government should be entitled to wait until witness lists are due to conclusively identify our witnesses.