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

UNITED STATES	)	
	)	
v.	)	RESPONSE TO FIRST DEFENSE
	)	MOTION TO COMPEL
BERGDAHL, ROBERT BOWDRIE	)	
(BOWE)	)	
SGT, U.S. Army	)	30 JUNE 2016
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

I. RELIEF SOUGHT

The Government requests the Court deny the First Defense Motion to Compel. Specifically the Accused has asked the Government (1) to identify all "specific documents [that] constitute *Brady* or *Giglio* material," (2) "copies of any indices the Government uses to organize material," and (3) "any documents marked as 'hot,' 'hot docs,' or any similar title." *See* D App 21. The requests seek attorney work product, evidence beyond the scope of Rules for Courts-Martial 701 and 703 and evidence already available to the Defense through an exercise of due diligence.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Accused, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is a preponderance of the evidence in accordance with RCM 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. 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.

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.

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.

Since 25 March 2015, the Government has disclosed or made available nearly 15,000 documents, totaling nearly 132,000 pages. 89,000 pages are classified, and the remaining 43,000 are unclassified. The Government expects to disclose another 20,000 documents, totaling 150,000 pages.

The Government reviewed over 300,000 documents in order to determine whether a document was disclosable and to apply redactions to those portions of the documents which were unrelated to the case. Frequently, documents which included disclosable material also contained classified information about matters totally unrelated to this case, including operations in different theaters. The Government redacted that material, as the Defense did not have a need to know the information. These determinations and the application of redactions are consistent with the Army Court of Criminal Appeals holding that "trial counsel is only required to disclose to the defense classified information that is material under RCM 701." *United States v. Bergdahl*, ARMY MISC 20160118 (A.C.C.A. 2016).

During the review of documents, Trial Counsel had an opportunity to mark a document as a "hot doc." A "hot doc" is an optional marking if the document reviewer believed that the document required attention from a secondary reviewer for a variety of reasons.

The Government has not created indices to organize material, nor does the Government plan on creating indices. However, when the Government provides discovery, all disclosures are electronic, searchable, and in PDF form. Each PDF file is one homogenous document; for instance, a 30 page report is one PDF file with 30 pages. Every page is Bates numbered, and each PDF file is titled by the Bates number of the document's first page.

All classified disclosures are disclosed in groups categorized by Original Classification Authority ("OCA"). Therefore, every time Defense receives an iteration of disclosures, Defense is advised that the group of discovery originated from a particular OCA. In addition, each PDF file is arranged in sequence to the best of the Government's ability to ensure continuity within the documents. For example, an email file will generally be followed by any attachment files.

III. EVIDENCE

No evidence is required for resolution of this motion.

IV. LAW AND ARGUMENT

An accused enjoys extensive rights of discovery under military practice, and is generally afforded a greater right to discovery than an accused in a civilian court. *United States v. Alford*, 9 M.J. 516 (A.C.M.R. 1979). The right of an accused to obtain favorable evidence is established in Article 46, and implemented through RCM 701 and 703, both of which establish the general parameters of disclosable information. In particular, RCM 701(a)(2)(A) defines the Government's duty to disclose information "material to the preparation of the defense," and RCM 703(f)(1) states that an accused is, "entitled to the production of evidence which is relevant and necessary."

However, there are pragmatic restrictions codified in the Rules for Courts-Martial and developed through case law. The Accused's requests are overbroad and go beyond the limitations of discovery. An accused cannot expansively define the Government's discovery obligation as "broad" and use it as a lynchpin to request discovery in whatever form they desire. The Government cannot be expected to conduct the Defense's own due diligence and cannot be made to handover its attorney work product.

A. Identify All Documents that Constitute *Brady* or *Giglio* Material

The Government is not required to specifically identify what it believes to be *Brady* or *Giglio* material. The Government understands its responsibility pursuant to *Brady*, *Giglio*, *Stellato* and the Rules for Courts-Martial. To that end, the Government is diligently pursuing its responsibility to disclose evidence favorable to the Accused, material to guilt or punishment, or relating to impeachment that is in the Government's control or possession.

Nevertheless, the Defense has asked that the Government go through every document and then notate and log every occasion that may be *Brady* or *Giglio*. "As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009). Moreover, "there is no authority for the proposition that the government's *Brady* obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over." *United States v. Estate of Parsons*, 367 F.3d 409 (5th Cir. 2004); see also *SEC v. Fin. Warfare Club, Inc.*, 425 Fed. Appx. 84 (3rd Cir. 2011); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2011); *United States v. Gray*, 648 F.3d 562 (7th Cir. 2011).

There is no precedent for such a request in any military court. The Defense cites a District Court case, *United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998), reversed in part on other grounds, 176 F.3d 517 (D.C. Cir. 1999)), which runs counter to the overwhelming majority of cases. Moreover, the facts here are distinguishable. In

Hsia the Government utilized open file discovery[1] and turned over approximately 600,000 documents.

By contrast, open file discovery is prohibited in this case because of the existence of classified information. Additionally, the Government has not simply engaged in a "discovery dump." Rather, the Government has reduced what was initially 300,000 documents and more than 1,500,000 pages to 15,000 documents totaling 132,000 pages, thus eliminating more than a million pages of material that was not disclosable. Because the documents in question are largely classified, the Government has also redacted information that is not related to this case, further reducing the amount of work that the Defense must complete. "Where potentially exculpatory information is available to the defendant through an exercise of due diligence, there is no suppression for the purposes of *Brady*." *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). The Defense presently has six attorneys, three paralegals, and an investigator, along with a pending request for three additional attorneys and an additional paralegal. The Government is in no better position than the Defense to review and identify *Brady* and *Giglio* in the disclosed materials.

B. Any Documents Marked Hot Docs and Copies of Indices.

The Defense has also requested, "copies of any indices the Government uses to organize material," and "any documents marked as 'hot,' 'hot docs,' or any similar title." In doing so, the Defense, again without precedent and again relying on an expansive understanding of "broad" discovery, has asked to delve into the Government's work-product, and once more is asking permission to excuse itself from due diligence. "Even though liberal, discovery in the military does not 'justify unwarranted inquiries into the files and the mental impressions of an attorney.'" *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987), citing *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947).

As the Government indicated in its response to the First Defense discovery request, there is no index of the material that has been turned over. Thus, the Defense motion to compel is an attempt to require the Government to create work product. An index and designated "hot docs" would both be the product of Trial Counsel reviewing, deliberating, compiling and categorizing evidence to be used in trial. Although indices and categorized "hot docs" may not be traditional work-product, "the theory behind the work-product rule is that, after an attorney has spent time preparing the case, assembling and sorting the facts, deriving a theory and theme for the case, and planning the strategy to be employed, the opponent, without some overriding interests,

[1] The Defense attempts to use the concept of open file discovery as both a sword and a shield, citing *Hsia* for the proposition that when the Government uses open file discovery in a high volume case it should be required to specifically identify *Brady* and *Giglio* material, D. App 21 at 5, and two paragraphs later chiding the Government for failing to utilize open file discovery in support of the claim that the Government should create an index. In any event, the Defense continues to fail to understand that in the context of classified information the practice of open file discovery is not only unwise, it is prohibited, as they do not have a "need to know" information that is not discoverable. *United States v. Bergdahl*, ARMY MISC 20160118 (A.C.C.A. 2016).

may not needlessly interfere with the thought processes used in creating the documents." *United States v. Romano*, 46 M.J. 269, 274-75 (C.A.A.F. 1997) (citing *United States v. Nobles*, 422 U.S. 225, 238, (1975)). The indices and "hot docs" would reveal the Government's preparation and organization for trial. They may not be the written or created word of an attorney, but their organization and compilation encompass the attorney's thought processes, including potentially the Government's judgments as to the significance of particular evidence, and its analysis of evidentiary gaps and other areas of concern. It would essentially require the Government to provide the Defense the framework of a prosecution memo. "Documents specifically compiled and prepared with a reasonable anticipation of trial will be encompassed within the privilege if they encapsulate the attorney's thought processes." *United States v. Bowser*, 73 M.J. 889, 898 (A.F.C.A. 2014) (citing *Nobles* at 275).

The Defense is also asking to excuse its due diligence responsibility. It again relies on *Skilling* to attempt to show why indices and "hot docs" are needed. In *Skilling,* the prosecution disclosed "several hundred million pages of documents." *Skilling* 554 F.3d at 576. There, the Court acknowledged that "the outcomes of these cases seem to turn on what the government does in addition to allowing access to a voluminous open file." *Skilling* at 577.

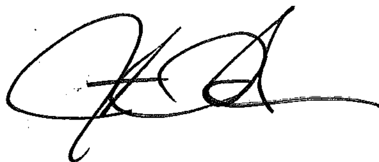
By contrast, the Government in this case has provided a fraction of the volume that was provided in *Skilling,* and has taken additional steps to make the material accessible. Specifically, the Government has provided all files in an electronic and searchable format, grouped and categorized all documents by OCA, provided documents which are in sequences with closely associated documents in the same sequence, and removed or redacted immaterial, irrelevant and unnecessary documents and information. These measures are more than sufficient to meet the requirements of the Rules for Courts-Martial and the applicable case law.

CONCLUSION

Contrary to the Defense's claims, they are not simply seeking a roadmap and a compass, but rather are asking the Government to provide the car, a detailed itinerary, and a chauffeur. The Defense requests are not supported by the Rules for Courts-Martial, any relevant case law, or the basic requirements of due diligence. Therefore, the Government requests the Court deny the First 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 30 June 2016.



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