

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

UNITED STATES)	Motion for Order Directing the
)	Government to Identify
v.)	Material Provided to the
)	Defense Without Justification
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	15 August 2016

RELIEF SOUGHT

The Defense moves for an order directing the Government to identify documents provided to the Defense without justification. The Defense does request oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Pursuant to Rule for Courts-Martial (RCM) 905(c)(2), the Defense, as the moving party, has the burden of proof. The standard of proof is a preponderance of the evidence. RCM 905(c)(1).

EVIDENCE

The Defense requests that the following material, classified at the SECRET level, be produced for the Court:

1. BATES S000033598 through S000033949, located in CENTCOM BATCH II
2. INDEX for CENTCOM BATCH II

Given the classification level, the Defense will include this material as enclosures separately in a supplement to the motion.

Although the Defense disputes it, according to the Government's index, the bates numbers above represent only one document. It is the Defense's position that the index is insufficient and the material represents multiple documents.

FACTS/ARGUMENT

The Government dumped thousands of pages of irrelevant and superfluous documents on the Defense. This dump was unjustifiable, will lead to substantial and unnecessary delays, and raises serious *Brady* concerns. Previous relief provided by the Court has been helpful but not sufficient to resolve the issue. The Defense requests that under RCM 701(g), the Court direct the Government to identify the material provided to the Defense without justification.

I. THE GOVERNMENT DUMPED THOUSANDS OF PAGES OF IRRELEVANT AND SUPERFLUOUS DOCUMENTS UNJUSTIFIABLY ON THE DEFENSE

Rather than put thousands of pages of classified material into evidence, the Defense relies on the above specified “document” as a sample. Of the 352 pages that make up the “document”, only 9 are even remotely relevant to the instant case. As far as the Defense can tell, the rest are either redacted or have absolutely nothing to do with the case of *United States v. Bergdahl*.

The Discovery requirements in the military have been clearly and efficiently set forth in Rule for Court-Martial (RCM) 701. The rule incorporates principles found in case law and ethical requirements of trial counsel. Material dumped on the Defense absent any basis in RCM 701 or ethical requirements of the trial counsel is material that has been provided without justification. To the extent that it was not clear from previous filings or court appearances, the Defense objects to the Government providing any material not requested or material provided without justification.

II. THE DUMP OF THOUSANDS OF PAGES OF IRRELEVANT AND SUPERFLUOUS DOCUMENTS WILL CAUSE SUBSTANTIAL AND UNNECESSARY DELAYS

The Defense has an obligation to conduct a thorough investigation. That obligation is clearly spelled out in case law and ethical standards. See *United States v. Alves*, 53 M.J. 286 (C.A.A.F. 2000); ABA Standards for Criminal Justice, Standard 4-4.1 (4th ed. 2015). Therefore, when the Government provides the Defense with material, it is our duty to investigate such material.

The Defense cannot operate under the assumption that the material provided by the Government is provided without justification. That would risk overlooking evidence that is favorable on a mere supposition. If the Defense were to simply glance at every page provided by the Government and make a superficial assessment of whether or not further investigation is required, the Defense would be able to skim through all of the material rather quickly. Ethical

and legal obligations, however, forbid such a course of action. Government attorneys have a task that is separate and distinct from that of Defense counsel. They can breeze through such material with the knowledge that they already identified what evidence they will use for their case. The Defense has no such luxury.

When the Government provides us with material that is irrelevant and superfluous, the time spent investigating such material is wasted time. It also prejudices SGT Bergdahl in that it distracts the Defense from using its time and resources on matters that are important. In this case, the problem has been exponentially increased given the volume of irrelevant and superfluous material provided. Take for example, the sample “document” used in this motion. Some documents contain information about countries that the Defense assumes is totally irrelevant and superfluous. There is also information about a number of individuals that the Defense assumes is totally irrelevant and superfluous. Given our legal and ethical obligations, however, the Defense cannot simply ignore such material. To rule out the materiality of such material takes time. And because of the way that the Government has conducted its Discovery in this case, it will take years for the Defense to rummage through the trash that has been dumped.

III. THE DUMP OF THOUSANDS OF PAGES OF IRRELEVANT AND SUPERFLUOUS DOCUMENTS RAISE SERIOUS BRADY CONCERNS

Aside from substantial delay, there are serious *Brady* concerns with the Government’s course of action. In federal courts, dumping irrelevant and superfluous documents on the Defense has been said to raise serious *Brady* issues. See *United States v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) (noting that evidence that the government “padded” an open file with pointless or superfluous information to frustrate a defendant’s review of the file might raise serious *Brady* issues and that creating a voluminous file that is unduly onerous to access might raise similar concerns); See also *United States v. Warshak*, 631 F.3d 266, 297-98 (6th Cir. 2011) (declining to find a violation where there was no proof that the government larded its production with entirely irrelevant documents and did not make access to the documents unduly onerous).

It is important to note a significant distinction between the matters in this case and *Warshak*. In *Warshak*, the evidence came from the Defendant and the Government did not review everything that was turned over to the Defense. *Id.* Furthermore, there was no indication that the Government was willfully blind as to the pertinence of the materials that it was handing over. *Id.* Here, the Government has reviewed all of the material. In their original proposal for a new pretrial order, they described a large team of attorneys performing document review. In their review, the Government made conscious decisions to redact much of the material. Indeed, the review was so specific that many pages were

only partially redacted. Therefore, it cannot be said that the Government is unaware of what they have turned over to the Defense. Furthermore, a result of the extensive redactions is that it has created an assumption that what was not redacted is material that was provided for a justifiable reason.

When determining whether a *Brady* violation has occurred, it is not necessary that the Government acted in bad faith. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Green*, 37 M.J. 88 (C.A.A.F. 1993). In this case, while the Defense is not aware of evidence that the Government acted in bad faith, the dump was done intentionally in that the Government was familiar with the documents that they provided and chose to provide them anyway. Furthermore, the problems that have arisen were entirely foreseeable. It appears as if the Government decided to take a shortcut by simply dumping an unorganized mess of documents on the Defense and leaving it for the Defense to figure out what is relevant and not relevant without any concern for what was requested or what was required to be disclosed. It appears that no consideration was given to the consequences of padding a document dump with irrelevant and superfluous material with the knowledge that it was irrelevant and superfluous. These are exactly the kind of serious *Brady* concerns contemplated by the federal courts in *Skilling* and *Warshak*.

IV. PREVIOUS RELIEF PROVIDED BY THE COURT IS NOT SUFFICIENT

When issues related to this motion were first brought to the Court's attention, the Government was directed to provide indices, specify "hot docs", and to specify what material is responsive to Defense discovery requests. To date, the Government has provided poorly drafted indices. The Government has also specified "hot docs" from among the documents provided (the sample used for this motion is one such "hot doc"). The Government, however, still has not specified what material is actually responsive to our Discovery requests.

While the relief granted by the Court has been and will be helpful (assuming that the Government actually does abide by the Court's previous directives at some point in the future), it would still not resolve the issues identified in this motion. The Defense would still be required to investigate all of the material that was provided by the Government despite it being completely irrelevant and superfluous to the case.

V. THE GOVERNMENT SHOULD BE DIRECTED TO IDENTIFY DOCUMENTS PROVIDED TO THE DEFENSE WITHOUT JUSTIFICATION

No matter what relief is provided by the Court, the volume of material in this case will take a substantial amount of time to investigate. The relief provided

has helped the Defense hone in on matters of particular importance. However, in order to resolve the issues created by the Government's dump without causing the substantial delay described in the instant motion, the Defense would need the Government to specify what material was provided without justification. That way, the Defense can focus its attention on material that we specifically requested or should have received according to the rules.

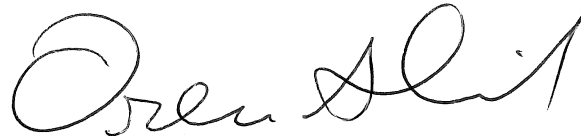
Previously, the Court decided not to require the Government to indicate what material is *Brady*. The reason was that it would put the Government in a bind. If they did not specify that a document was *Brady* and the Defense had a different opinion, the Defense could find fault with the Government. In this instance, the Defense does not ask the Government to specify what material is *Brady* or not *Brady*. The Defense only asks the Government to identify what material they have provided without any justification. Any argument that the Government could not possibly make this determination rings hollow given the extensive full and partial redactions. For every redaction, the Government has made the determination that nothing favorable to the Defense is contained in the redacted material. The Government should perform that same evaluation for the rest of the material. If they cannot do so, every redaction should be removed and the trial date should be set in accordance with the substantial investigation that will be required.

CONCLUSION

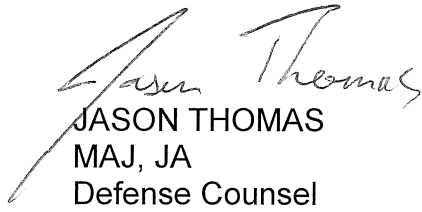
For the foregoing reasons, the Court should direct the Government to identify material that was provided to the Defense without justification.




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I certify that I have served or caused to be served a true copy of the above on the Trial Counsel on 15 August 2016.


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