

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

UNITED STATES)
) Defense Motion for Subpoenas
) and *In Camera* Inspection
 v.)
)
)
 SGT Robert B. Bergdahl)
 HHC, Special Troops Battalion)
 U.S. Army Forces Command)
 Fort Bragg, North Carolina 28310) 16 August 2017

RELIEF SOUGHT

The defense respectfully moves for the issuance of subpoenas (1) requiring CNN to produce all outtakes from a 2015 Anderson Cooper interview with a government sentencing witness, SCPO (Ret) Hatch, and, in aid of that request, (2) requiring SCPO Hatch to testify. The defense further moves that the Court conduct an *in camera* inspection of the outtakes when CNN produces them.

Expedited consideration is respectfully requested.

EVIDENCE AND HEARING

In support of this motion, the defense submits the attached communications between it and Mr. Buddy Rake, who represents SCPO (Ret.) Hatch. [Enclosures 1-3] In light of those communications and for the reasons set forth below, the request for a subpoena to CNN should be granted on the present record. If those communications do not meet the concern expressed in AE 57, we move that SCPO Hatch be subpoenaed to testify.*

ARGUMENT

On 9 August 2017, the Court denied the defense's Seventh Motion to Compel (D APP 75), which, together with a supplement (D APP 88), had sought a subpoena to compel the production of the outtakes of the 2015 interview. The Court stated:

5. While it is true that the defense has established by a preponderance of the evidence that outtakes of the CNN interview with Hatch exist, they have

* To minimize inconvenience and expense, the defense will have no objection if that subpoena requires SCPO Hatch's appearance only if he fails or refuses to respond in writing, under oath, and by an early date certain to the defense's 11 August 2017 questions concerning the outtakes.

offered nothing beyond mere speculation that the outtakes are relevant and necessary -- that is not cumulative. While it may be safe to speculate that the outtakes have something to do with Hatch's involvement in and injuries from the mission he describes in the CNN interview involving searching for the accused, assuming that such outtakes would not be cumulative with the book Hatch wrote on the same subject is not a reasonable assumption. And, the defense has offered nothing to establish that Hatch has said or written anything different at any time than what he wrote in his book. In fact, logic would dictate that if a person were going to publish a book and give interviews to news shows about the facts from his book, the facts set forth in both media would be the same. The defense has offered no evidence otherwise. Consequently, they have not established the outtakes are necessary.

AE 57, at 2 (footnote omitted).

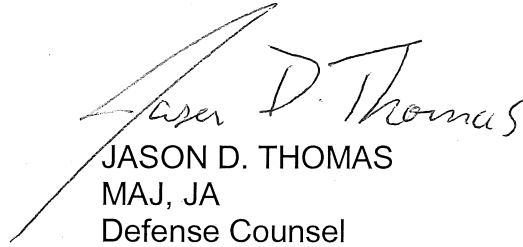
In light of the Court's ruling, the defense promptly approached SCPO Hatch's counsel to determine whether the information in the manuscript SCPO Hatch submitted to the Department of Defense and the outtakes is indeed "the same." Whether it is can only be determined by consulting them both. Since Mr. Cooper did not, so far as we know, have access to the manuscript at or before the 2015 interview, and use it to define the parameters and precise content of the interview, it cannot be presumed that the outtakes and the text of the manuscript are identical.

Nor can it be presumed, without comparing the two, that the outtakes are cumulative of the manuscript. A subpoena for outtakes cannot be refused on the basis of cumulativeness without an *in camera* review. *United States v. Wuterich*, 67 M.J. 63, 79 (C.A.A.F. 2008). The law does not presume that a witness's accounts of particular events will be consistent, much less identical, from one telling to another. That can only be determined by consulting the various accounts. Sometimes witnesses' prior statements are consistent; sometimes they are not. See MRE 801(d)(1). To indulge a presumption of consistency is to deny an opposing party the right to test the witness's account, which is the constitutional right of the accused in any criminal case. To deny the opposing party access to a witness's other accounts is to go a step further and make that presumption conclusive.

SCPO Hatch is the only person with knowledge of both what transpired in the portions of the CNN interview that were not aired and what he wrote in the manuscript. Approaching him was therefore the only way the defense could proceed, short of seeking compulsory process, in an effort to meet the concern expressed in AE 57 ¶ 5. We asked that he respond to a number of precise questions. Mr. Rake informed us on 14 August 2017 that, apart from confirming that neither he nor his client possesses a copy of the outtakes, neither of them would respond to the defense's questions.

The defense has done everything it can to meet the concern stated in AE 57. Sergeant Bergdahl has exhausted the available informal remedies. Orders of the Court are now requested.

For the foregoing reasons, subpoenas should be issued (1) requiring CNN to produce the outtakes and (2) requiring SCPO Hatch to testify in aid of the Seventh Defense Motion to Compel. The Court should conduct an *in camera* inspection of the outtakes when CNN produces them.


JASON D. THOMAS
MAJ, JA
Defense Counsel

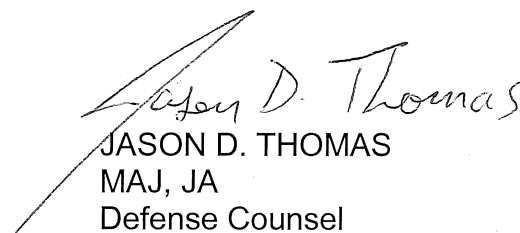
For

EUGENE R. FIDELL
LTC FRANKLIN D. ROSENBLATT
MAJ OREN GLEICH
CPT JENNIFER D. NORVELL
CPT NINA S. BANKS

P. SABIN WILLETT
CAITLIN M. SNYDACKER
CHRISTOPHER L. MELENDEZ

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 16 August 2017.


JASON D. THOMAS
MAJ, JA
Defense Counsel

Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US)

From: Gleich, Oren MAJ USARMY XVIII ABN CORPS (US)
Sent: Friday, August 11, 2017 12:13 PM
To: Buddy Rake
Cc: Eugene Fidell; Rosenblatt, Franklin D LTC USARMY (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY IMCOM HQ (US); Banks, Nina S CPT USARMY 1 CD (US)
Subject: Request for Information (UNCLASSIFIED)
Attachments: Letter for Mr Rake.pdf
Classification: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED

Dear Mr. Rake -

Please see the attached letter requesting information from SCPO (Ret.) Hatch.

v/r

OREN GLEICH
MAJ, JA
Defense Counsel

Trial Defense Services

O: [REDACTED]

CLASSIFICATION: UNCLASSIFIED



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
BUILDING 2-1731, ARMISTEAD AND MACOMB STREET
FORT BRAGG, NORTH CAROLINA 28310-5000

11 August 2017

Re: *United States v. Bergdahl*

Dear Mr. Rake:

As you know, we are seeking the outtakes from CNN of Senior Chief (Ret.) Hatch's interview with Anderson Cooper that aired on 11 September 2015. CNN has informed us that it possesses the outtakes and requires a subpoena to disclose the material. In light of Judge Nance's decision, a copy of which is attached in case you have not received it by other means, we request that Senior Chief (Ret.) Hatch respond to the questions set forth below. The video CNN aired can be viewed at the following links:

Part 1 – Duration: 6:16 - <http://www.cnn.com/videos/us/2015/09/11/navy-seal-speaks-bergdahl-mission-part-1-ac.cnn/video/playlists/bowe-bergdahl-hero-or-deserter/>

Part 2 – Duration: 6:24 - <http://www.cnn.com/videos/us/2015/09/11/navy-seal-speaks-bergdahl-mission-part-2-ac.cnn/video/playlists/bowe-bergdahl-hero-or-deserter/>

The questions for Senior Chief (Ret.) Hatch are as follows:

1. How long was the entire interview with Anderson Cooper? (That is, including the parts that aired and the parts that did not air.)
2. At 1:00 in part 1, prior to Mr. Cooper asking you about when you first heard the name Bowe Bergdahl, were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If yes, does that information appear in the draft of your book that was submitted for prepublication review to the Department of Defense [hereinafter draft of your book]?
3. At 1:26 in part 1, after you say "killed or hurt", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
4. At 1:44, in part 1, prior to saying "we had to plan", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
5. At 2:08 in part 1, after you say "it was on", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?

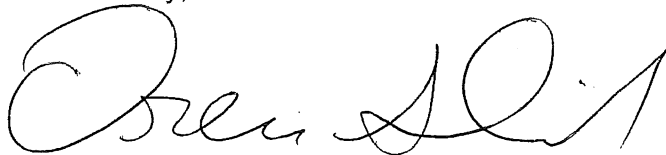
6. At 2:16 in part 1, prior to saying "guys had to", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
7. At 2:39 in part 1, after saying "it was chaos", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
8. At 2:59 in part 1, prior to saying "he was an American", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
9. At 3:09 in part 1, after saying "for sure", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
10. At 3:17 in part 1, prior to saying "at some point I got", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
11. At 4:40 in part 1, after saying "really bad", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
12. At 4:47 in part 1, prior to saying "I was laying there", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
13. At 5:09 in part 1, after saying "my buddies finished the job", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
14. At 5:21 in part 1, prior to saying "when I get hit", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
15. At 5:39 in part 1, after saying "back into that fight", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
16. At :27 in part 2, prior to saying "to me it was", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?

17. At 1:11 in part 2, after saying "cause of it", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
18. At 1:48 in part 2, prior to saying "pain meds", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
19. At 2:33 in part 2, after saying "away from me", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
20. At 2:44 in part 2, prior to saying "he's going to drive", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
21. At 3:33 in part 2, after to saying "twice", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
22. At 4:53 in part 2, prior to saying "I want", were you discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
23. At 5:44 in part 2, after saying "Americans know that", did you continue discussing matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
24. Were there any other parts of the interview that were filmed but not broadcast, where you discuss matters related to SGT Bergdahl and/or the hostage rescue mission that were not broadcast? If so, does that information appear in the draft of your book?
25. When we met in person, you said that you have no objection to CNN releasing the unaired portion of your interview with Anderson Cooper. We request that you confirm that in your response.
26. Are you aware of the name, address, email address and telephone number of any person other than yourself who knows the contents of *both* the draft of your book and the contents of the outtakes from your CNN interview? If so, we request that person's name and contact information.
27. Do you or Mr. Rake possess a copy of the outtakes from your CNN interview? If so, we request a copy.

As the trial date is fast approaching, we request that you email me Senior Chief (Ret.) Hatch's responses by Friday, August 18th. My email address is [REDACTED]

Thank you again for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Oren Gleich". The signature is fluid and cursive, with the first name "Oren" being larger and more prominent than the last name "Gleich".

Oren Gleich
Major, U.S. Army
Defense Counsel

Attachment

Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US)

From: Buddy Rake [REDACTED]
Sent: Monday, August 14, 2017 6:07 PM
To: Gleich, Oren MAJ USARMY XVIII ABN CORPS (US)
Cc: Eugene Fidell; Rosenblatt, Franklin D LTC USARMY (US); Thomas, Jason D MAJ USARMY XVIII ABN CORPS (US); Norvell, Jennifer D CPT USARMY IMCOM HQ (US); Banks, Nina S CPT USARMY 1 CD (US); Amy Davis
Subject: [Non-DoD Source] Re: Request for Information (UNCLASSIFIED)

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Major Gleich

Neither Senior Chief Hatch nor myself are in possession of outtakes.

I respectfully decline to have Senior Chief Hatch respond to the other questions addressed in your correspondence.

With best personal regards.

Buddy Rake
Rake Law Group

[REDACTED]

[REDACTED]

> On Aug 11, 2017, at 09:13, Gleich, Oren MAJ USARMY XVIII ABN CORPS (US) [REDACTED] wrote:
>
> CLASSIFICATION: UNCLASSIFIED
>
> Dear Mr. Rake -
>
> Please see the attached letter requesting information from SCPO (Ret.) Hatch.
>
> v/r
>
> OREN GLEICH
> MAJ, JA
> Defense Counsel

>
> Trial Defense Services
> O [REDACTED]
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> CLASSIFICATION: UNCLASSIFIED
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> If this email is spam, please report it to
> Caution-https://support.onlymyemail.com/view/report_spam/NTI5MDU6MjAyMjM0ODU4MjpicmFrZUBhenRyaWFsbGF3LmNvbTpkZWxpdmVyzWQ
> jM0ODU4MjpicmFrZUBhenRyaWFsbGF3LmNvbTpkZWxpdmVyzWQ
> <Letter for Mr Rake.pdf>