

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

UNITED STATES)	
)	
v.)	
)	First Defense
BERGDAHL, ROBERT BOWDRIE)	Motion to Compel
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	27 June 2016

RELIEF SOUGHT

The Defense moves to compel the Government: (i) to identify evidence that is favorable to the Defense, including evidence that constitutes *Brady* or *Giglio* material; (ii) to provide indices of materials that are turned over to the Defense; and (iii) to identify any documents that were marked as "hot" or as "hot docs" during the document review process. The Defense requests 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).

FACTS

Since 25 March 2015, the Government has disclosed some 12,000 documents totaling approximately 40,000 unclassified pages and 89,000 classified pages. In its 11 May 2016 request for a new pretrial order the Government described its continuing efforts to obtain additional material, some of which will be disclosed to the Defense. Although the precise amount of material that the Government will ultimately disclose is currently unknown, Government counsel have informally advised us that it will likely be hundreds of thousands of pages.

To sort through the enormous amount of material in this case, the Government mobilized additional Judge Advocates to perform document review using "Relativity," an expensive commercial document review software program. The program includes a feature that enables users to mark whether a particular document is "Hot", meaning particularly relevant to the matter at hand.

Paragraphs I(38) through I(41) of the Defense's second discovery request, dtd. 26 May 2016, stated:

38. Defense requests that all documents turned over electronically are in a searchable format. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).
39. Defense requests copies of any indices the Government uses to organize materials. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).
40. To the extent that the Government has determined that specific documents constitute Brady or Giglio material, the Defense requests that the Government specifically identify such material. *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998).
41. Defense requests that any documents marked as "hot", "hot docs", or any similar title, be disclosed to the Defense. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

The Government responded as follows on 14 June 2016:

38. The Government will provide all electronic discovery in a searchable format. The Government will also amend previously disclosed unsearchable discovery to ensure it is also in a searchable format.
39. The requested items do not exist. In addition, the request is prohibited in accordance with R.C.M. 701(f).
40. Denied, 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).
41. Denied. The request is prohibited in accordance with R.C.M. 701(f).

The second discovery request and the Government's response are attached as Exs. 1 and 2, respectively.

WITNESSES/EVIDENCE

Unless the Government disputes any fact listed above, no additional evidence or witnesses are required.

LEGAL AUTHORITY AND ARGUMENT

The Court should compel the Government to identify evidence that is favorable to the Defense, including items that constitute *Brady* or *Giglio* material. In addition, it should compel the Government to provide indices of items that are turned over to the Defense. Finally, it should compel the Government to identify any documents that were marked as "hot" or as "hot docs" during the document review process.

The argument section below sets forth (i) the authority by which a military judge may compel such disclosures; (ii) the requirement for broad discovery in the military, which favors the disclosure of the materials requested; and (iii) persuasive authority from federal jurisdictions that have granted similar requests.

I. A MILITARY JUDGE HAS AUTHORITY TO PRESCRIBE TERMS AND CONDITIONS OF DISCOVERY IN THE INTEREST OF JUSTICE

A military judge has authority to specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just. RCM 701(g)(1). Therefore, a military judge has the authority to compel the Government to comply with the requests outlined above.

II. MILITARY PRACTICE REQUIRES BROAD DISCOVERY IN THE INTEREST OF FAIRNESS AND EFFICIENCY

Military practice puts a premium on efficiency and requires broader discovery than is required in civilian federal practice. See RCM 701 analysis, at A21-33. Broad discovery at an early stage contributes substantially to the truth-finding process, efficiency, and the administration of military justice. *Id.* at A21-33, A21-34.

Military practice also requires the utmost in fairness and integrity of its practitioners. To that end, a trial counsel must disclose, as soon as practicable, evidence that is favorable to the defense. RCM 701(a)(6). See *Brady v. Maryland*, 373 U.S. 83 (1963); see also Army Regulation (AR) 27-26, para. 3.8(d). Under the Rules for Courts-Martial, favorable evidence includes evidence known to the trial counsel which reasonably tends to: (a) negate the guilt of the accused of an offense charged; (b) reduce the degree of guilt of the accused of an offense charged; or, (c) reduce the punishment. Trial counsel must also disclose information that can be used to impeach a prosecution witness. *Giglio*

v. United States, 405 US 150 (1972). These rules and ethical obligations are critical to a fair trial.

The requests at issue are consistent with the principles of efficiency and fairness described above. Each particular item is discussed below.

A. Access to indices of disclosed materials will promote efficiency and fairness.

Providing indices and descriptions of what material the Government is disclosing will ensure a more efficient review of the material. In conducting its own review, the Government has the benefit of knowing what prompted such disclosure from any specific agency, where the material came from, and what ultimately is being sought. Absent indices, the Defense will be left to wander blindly through hundreds of thousands of pages before being able to determine the purpose for the disclosure or why it is relevant to the instant case. It is difficult to imagine a more wasteful or ineffective process. It would be like driving across the country without a roadmap or, for that matter, a compass.

B. Specifying favorable material will promote fairness and efficiency.

Specifically identifying favorable material, or at a minimum, sharing with the Defense what has already been deemed to be favorable would further promote fairness and efficiency. Given that the Government is not providing open file discovery, it should be diligently searching its own files in order to ensure that the Defense receives such material from among the material the Government is not disclosing. Given the sheer volume of the disclosures to date in the instant case (which may be just the tip of the iceberg), failure to identify such material aids in its continued concealment. Furthermore, refusal to identify such material is a textbook illustration of the kind of discovery gamesmanship RCM 701 was designed to eliminate. See RCM 701 analysis, at A21-33.

C. Disclosing "hot" documents will promote fairness and efficiency.

Sharing documents that have already been labeled as "hot" or "hot docs" would allow the Defense to more quickly evaluate pertinent information, which again, would promote the type of fairness and efficiency that is contemplated by the Rules for Courts-Martial. Given the volume of the evidence the Government has disclosed and is expected to disclose in the future, identifying such material will help avert further need for potential delays.

III. FEDERAL DISTRICT COURTS HAVE COMPELLED THE GOVERNMENT TO PROVIDE SIMILAR DISCLOSURES

Even under the more restrictive discovery practice in the Article III courts, judges have granted relief along the lines the Defense seeks in cases involving large document disclosures. For example, in *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998), the court ordered the Government to specifically identify *Brady* material.

Open-file discovery does not relieve the government of its *Brady* obligations. The government cannot meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statement that constitute *Brady* material, it must identify that material to Ms. Hsia.

Id. at 29-30. Other courts have insisted on this as well. See, e.g. *United States v. Salyer*, 2010 U.S. Dist. LEXIS 77617 (E.D. Cal. 2010); *United States v. Cox*, 2006 U.S. Dist. LEXIS 17181 (D. Vt. 2006); compare *United States v. Rubin*, 825 F. Supp. 2d 451 (S.D.N.Y. 2011) (declining to order the Government to specifically identify *Brady* material in the particular circumstances, but noting that it had provided searchable electronic production and indices of disclosed materials).

The Government has cited *Skilling* for the proposition that it has no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence. The Fifth Circuit acknowledged in *Skilling* that the use of a voluminous file can indeed lead to a *Brady* violation. 554 F.3d at 577. The Court found that the Government, in the case before it, had done much more than drop several hundred million pages on the Defendant's doorstep. *Id.* Critically, the Court noted that: (i) the Government provided open file discovery; (ii) the open file was electronic and searchable; (iii) the Government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to the Defendant's case; (iv) the Government created indices to these and other documents; and (v) the Government provided the Defense with access to various databases concerning prior litigation involving the same materials. *Id.* Given the circumstances, the Government was in no better position than was the Defendant. *Id.* See also *United States v. Warshak*, 631 F.3d 266, 297-98 (6th Cir. 2011) (declining to find a violation where discovery came from the Defendant's computers and the Government did not identify material to which the Defendant already had access).

In sharp contrast with the prosecution's course of conduct in *Skilling*, the prosecution in the instant case (i) is not providing open file discovery; (ii) is not providing "hot documents"; and (iii) is not providing indices of documents that it is

planning to disclose. Furthermore, while the *Skilling* court was determining whether or not a violation of *Brady* occurred at the trial level, the Fifth Circuit's decision does not stand for the proposition that a trial court should never direct the Government to specifically identify *Brady* material. It simply stands for the proposition that a *Brady* violation did not occur on the specific facts of the particular case at hand. Here, the case should be evaluated in light of the broader discovery rules in military practice, the lack of open file discovery, and the recognition that the parties are on anything but an equal footing with respect to their ability to determine which particular documents among the tens of thousands the Government has received and will receive contain exculpatory information.

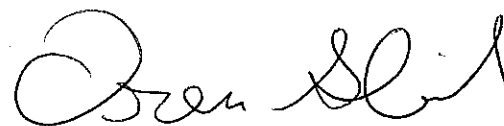
The Government also insists that disclosure of "hot documents" or indices is "prohibited" by RCM 701(f), essentially claiming that they are protected work product. The argument interprets work product too broadly. Any time the Government discloses exculpatory evidence, it is disclosing work product. The charge sheet itself can be considered work product, which of course is not protected. *Cf. United States v. Salyer*, 2010 U.S. Dist. LEXIS 77617 (E.D. Cal. 2010) (rejecting the notion that revelation of work product prohibits identification of *Brady/Giglio* material from among previously disclosed voluminous documents and materials). The Defense does not seek the prosecutors' memoranda discussing legal issues, planned courses of action, attorney or investigator reports, or anything that would be considered "work product" in the accepted sense of the term. *See Id.*

CONCLUSION

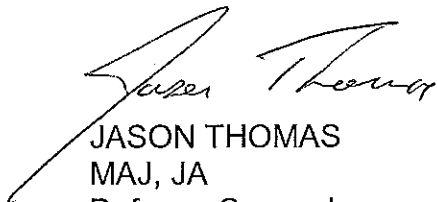
For the foregoing reasons, the Court should compel production of the information sought in Defense Requests 38-41.




for EUGENE R. FIDELL
Civilian Defense Counsel



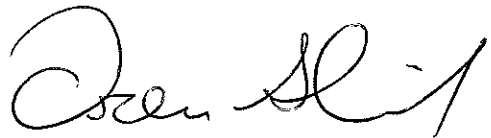
for FRANKLIN D. ROSENBLATT
LTC, JA
Individual Military Counsel


JASON THOMAS
MAJ, JA
Defense Counsel


OREN GLEICH
MAJ, JA
Defense Counsel


NINA S. BANKS
CPT, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Counsel on 27 June 2016.


OREN GLEICH
MAJ, JA
Defense Counsel

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

UNITED STATES)	
)	
v.)	Second Defense Discovery
)	Request
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	26 May 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

This is the Defense's Second Discovery Request. This request supplements and does not supersede the Defense's First Defense Discovery Request, dtd. 20 January 2016.

A. INSTRUCTIONS

1. The Accused, by and through his defense attorneys, hereby requests that the Government provide the following information with:
 - a. A written response to this request; and
 - b. Production of the requested matters; or
 - c. Notice of an inability or intent not to comply.
2. This requested evidence is relevant and material to the preparation of the defense and/or is exculpatory. The accused cannot properly provide effective assistance of counsel nor prepare for trial without the production of the documents and items requests. Requested information is information known, or should, with the exercise of due diligence, be known to the United States or its agents.
3. Production includes the opportunity to inspect, photograph, and photocopy.

B. DOCUMENTS/TANGIBLE EVIDENCE

4. Any documentation regarding financial costs associated with the crimes, charged or uncharged, allegedly committed or assisted by the accused.

5. Documentation related to the planning of missions where the prosecution contends that individuals died or were wounded while searching for the accused.
6. Documentation of planning of rescue missions for the accused, whether or not such missions were actually undertaken.
7. Documentation of any decision to NOT rescue the accused from June 2009 to May 2014.
8. CNN outtakes of their interview with James Hatch. A copy of his draft book and a copy of the DoD pre-publication review of that book. This is relevant for impeachment and to protect classified information.
9. Any materials from any persons provided to GEN Abrams in advance of the referral decision with information about SGT Bergdahl, Serial, victim impact, or whether a court-martial was warranted.
10. To the knowledge of defense, since FORSCOM's founding in 1973, the FORSCOM Commander has never before convened a GCM. Commander, FORSCOM is not a statutory GCMCA as it is not among those commands listed in UCMJ article 22(a)(5). We request a copy of the designation of FORSCOM as a GCMCA by the Secretary of the Army or the President.
11. For any witness statements or other evidence that is in voicemail format, the Defense requests that the voicemail be preserved and disclosed in its original format. If any evidence of the kind described above have been deleted, the Defense requests notice of such deletion as well as the contents of the voicemail.

C. STATEMENTS/WITNESSES

12. All hearsay statements, oral or written, intended to be offered at trial under M.R.E. 807, the particulars of the statements, and the name, address, and telephone number of the declarant.
13. All writings or documents, including transcripts and notes in whatever form, used by any witness to prepare for trial or any hearing, to include any writings, documents, and/or computer files used by any witness or potential witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying. M.R.E. 612.
14. Notice of whether any witness and/or potential witness has asserted or will assert any privilege (other than as to the identity of any informant(s)) as to any matters relevant to the instant case and/or any charged or uncharged related offenses, the evidence each witness and/or potential witness has asserted or will assert that establishes any privilege(s), and any legal authority relied upon to

support the claimed privilege(s). *United States v. Poole*, 3 C.M.R.(A.F.) 463 (B.R.1950).

15. Notice of whether the government has asserted or will assert any exception to any privilege as to any matters relevant to the instant case and/or any charged or uncharged related offenses, the evidence that the government has asserted or will assert that establishes any exception(s), and any legal authority to support the claimed exception(s). *United States v. Jenkins*, 63 M.J. 426 (C.A.A.F.), *cert. denied*, 127 S.Ct. 842 (2006).

16. Notice whether the government intends to impeach any witness at trial or any hearing with a criminal conviction older than ten years. M.R.E. 609(b).

17. The military and civilian medical and mental treatment records of any person alleged to have suffered any physical, mental, and/or pecuniary harm and/or any other suffering as a result of any crimes, charged or uncharged, allegedly committed or assisted by the accused. *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R.1976), *rev'd on other grounds*, 4 M.J. 118 (C.M.A.1977).

18. For any individuals that the prosecution contends were wounded or died on missions searching for the accused, the names and contact information of all witnesses involved in the planning of those missions.

19. Names and contact information of all witnesses present during missions where the prosecution contends that individuals were wounded or died searching for the accused.

20. The names and contact information of all members of the chain of command of the individuals that the prosecution contends were wounded or died searching for the accused. We request the information for both the chain of command at the time of the incidents and, if the witnesses are still in the military, the witnesses' current chain of command.

D. SEARCH AND SEIZURE

21. Whether the accused has been the subject of electronic surveillance, eavesdropping, search or seizure, or interrogation, and all documents or reports relating thereto; whether any application has been made to any court or commander for authorization to intercept or record any conversation by the accused, any conversation related to the accused, and any communication instrument controlled, owned, or used by the accused; and whether any other eavesdropping was authorized.

22. All affidavits/statements supporting requests, which pertain to the instant case, whether or not granted, for authorization to search, seize, and/or apprehend, and all granted authorizations, whether used or not.

23. Whether any "handoff" procedure by any law enforcement agency to another law enforcement agency in the investigation of this case or any related case was utilized and whether any "handing off" law enforcement agency engaged in any searches or seizures (e.g., wire tap) related to this case. *Whitaker v. Garcetti*, 486 F.3d 572 (9th Cir.2007).

24. Notice and a copy of all financial, business, and/or personal records (e.g., checking and savings accounts, investments, credit card, online transactions, retirement accounts, etc.) of or about the accused obtained from the accused or any source other than the accused whether by subpoena or otherwise along with a copy of all papers associated with the government's obtaining access to the records.

25. Notice of all evidence seized from the person or property of the accused or believed to be owned or controlled by the accused, which is intended to be offered at trial or any hearing. M.R.E. 311(d)(1).

26. Notice of government intent to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment. M.R.E. 311(d)(2)(B).

E. EVIDENCE REGARDING ACCUSED

27. The contents of all oral, written, and/or recorded statements made by the accused that are relevant to the instant case and/or any charged or uncharged related offenses, known to the government and within control of the government, regardless whether the government intends to use the statements at trial or any hearing. M.R.E. 304(d)(1); *United States v. Dancy*, 38 M.J. 1 (C.M.A.1993).

28. The contents of oral, written, and/or recorded statements made by the accused that were not disclosed prior to arraignment. M.R.E. 304(d)(2)(B).

29. Notice of whether the accused, while detained or held in custody and/or while or before being interrogated by any law enforcement agency and/or superior authority, was advised of his/her rights under UCMJ Art. 31(b) and/or *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), and/or requested to contact an attorney, military or civilian, American or foreign.

30. All evidence of any prior identification of the accused at a traditional line up, photo line up, show up, voice identification, or other identification process which the government intends to offer against the accused at trial or any hearing. M.R.E. 321(c)(1).

F. EVIDENCE MATERIAL TO THE PREPARATION OF THE DEFENSE

31. All evidence in rebuttal that is exculpatory in nature, impeachment in nature, or material to sentencing, punishment, and/or clemency, including all positive or negative victim impact statements, as well as any policy statements, resolutions, and the like from any organization or group, whether written, electronic, or in any other format which in any way relates to any punishment that might be imposed or to any clemency that might be given. This request covers all potential evidence received by or in the possession of the government in the instant case or any related case regardless whether the government intends to offer the potential evidence at any hearing in the instant case. *United States v. Dancy*, 38 M.J. 1 (C.M.A.1993); *United States v. Trimper*, 28 M.J. 460 (C.M.A.), *cert. denied*, 493 U.S. 965 (1989).

32. Where a particular location is the site of any of the alleged offenses or bears a relation to any of the alleged offenses, notice of all persons who had access to the site at all relevant times, including but not limited to the nature of the particular person's access, whether the particular person had a key, access code, or other access to the site, and whether the particular person was named on the property deed, lease, log, or any other document(s) relating to the site.

33. Notice of whether there was any perjured testimony or the government suspected there was any perjured testimony or there was any fabricated evidence or the government suspected that there was any fabricated evidence in any hearing or in the trial in the instant case and/or as to any charged or uncharged related offenses; and if the government suspected that there was any perjury or any fabricated evidence, whether the government investigated the matter, and the result of any such investigation. *United States v. Luke*, 63 M.J. 60 (C.A.A.F.2006); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406 (1935); *Morris v. Ylst*, 447 F.3d 735 (9th Cir.2006), *cert. denied*, 127 S.Ct. 957 (2007).

G. PRETRIAL CONFINEMENT/RESTRICTION TANTAMOUNT TO CONFINEMENT

34. For any pretrial confinement of the accused or any witness or potential witness in the instant case and/or any charged or uncharged related case, the decision memorandum prepared by the military magistrate and all documents considered by him/her. R.C.M. 305(h)(2); *United States v. McCants*, 39 M.J. 91 (C.M.A.1994).

35. The scope and terms of any restriction or condition on liberty and/or any conditions of confinement imposed on the accused and any witness or potential witness in the instant case and in any case involving any charged or uncharged related offenses.

H. PANEL SELECTION

36. All written matters provided to the convening authority concerning the selection of the members detailed to the court-martial. R.C.M. 912(a)(2).

37. All information known to the government as to the identities of potential alternate and/or additional panel members. *United States v. Beaulieu*, 21 M.J. 528 (C.G.C.M.R.1985).

I. MANNER OF DISCOVERY

38. Defense requests that all documents turned over electronically are in a searchable format. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

39. Defense requests copies of any indices the Government uses to organize materials. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

40. To the extent that the Government has determined that specific documents constitute Brady or Giglio material, the Defense requests that the Government specifically identify such material. *United States v. Hsia*, 24 F. Supp. 2d 14 (D.D.C. 1998).

41. Defense requests that any documents marked as "hot", "hot docs", or any similar title, be disclosed to the Defense. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).

J. ILLEGIBLE, MISSING, AND DOCUMENTS NOT BATES STAMPED

42. Documents turned over to the Defense have mostly been bates stamped. We are currently missing the following:

- a. 3249 – 3261
- b. 5489 – 5495
- c. 5951 – 5954
- d. 5790 – 5792

43. The following documents have been bates stamped. However, when they were disclosed, a memorandum was attached indicating what they should have been numbered. To ensure that the Defense has the same documents that the Government holds, we ask for numbered documents of what is purported to be bates numbers: 3999 - 4041 and 4042 – 4198.

44. The following documents are not legible. The Defense requests legible copies:

- a. Bates # 082 or 02591 / E2016

- b. Bates # 106 or 02615 – Bates # 112 or 02621/ E2039 – E2046
- c. Bates # 124 or 02633 – Bates # 130 or 02639 / E2058 – E2064
- d. Bates # 172 or 02681 – Bates # 178 – 02687 E2098 – E2104
- e. Bates # 182 or 02691 – Bates # 186 or 02697 / E2108 – E2114
- f. Bates # 190 or 02699 - Bates # 196 or 02705 / E2116 – E2122
- g. Bates # 203 or 02712 - Bates #209 or 02718 / E2129 – E2135
- h. Bates # 219 or 02728 - Bates #225 or 02734 / E2145 - E2151
- i. Bates # 243 or 02752 - Bates # 249 or 02758 / E2169 – E2175
- j. Bates # 251 or 02760 - Bates # 257 or 02766 / E2177 – E2183
- k. Bates # 267 or 02776 - Bates # 273 or 02782 / E2193 – E2199
- l. Bates # 275 or 02784 / E2201
- m. Bates # 283 or 02792 – Bates # 289 or 02798 / E2209 – E2215
- n. Bates # 306 or 02815 – Bates # 312 or 02821 / E2232 – E2238
- o. Bates # 317 or 02826 - Bates # 323 or 02832 / E2243 – E2249
- p. Bates # 367 or 02876 / Legible on MG Dahl's Document
- q. Bates # 370 or 02879 – Bates # 377 or 02886 / Legible on MG Dahl's Document
- r. Bates # 495 or 02925 – Bates # 496 or 02926 / Not in MG Dahl's report
- s. 03072
- t. 03076
- u. 03078
- v. 03082
- w. 03085
- x. 03086
- y. 03090
- z. 03104
- aa.03109

K. CONCLUSION

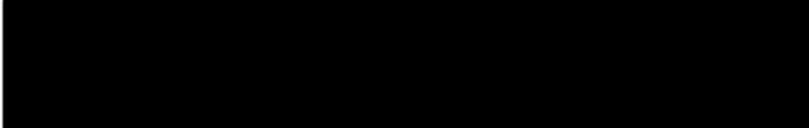
45. The defense requests equal and adequate opportunity to interview witnesses and inspect evidence. Specifically, the defense requests the trial counsel to instruct all of the witnesses and potential witnesses under military control, including those on any retired list to cooperate with the defense when contacted by the defense for purposes of interviewing these persons or otherwise obtaining information from them. Art. 46; R.C.M. 701(e).

46. If, before or during the court-martial, the Government discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under R.C.M. 701, the Government shall promptly notify the defense of the existence of the additional evidence or material. R.C.M. 701(d).

47. The discovery request is continuing and shall apply to any additional charges or specifications that may be preferred after this request for discovery is served upon the Government. Immediate notification is requested on all items the Government is unable or unwilling to produce.

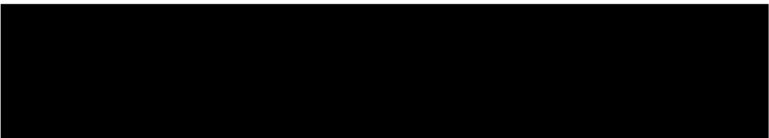
48. The defense acknowledges that certain of these requests may have been partially complied with prior to the motion. Those matters previously provided need not be duplicated.

49. The defense reserves the right to make additional and continuing discovery requests.



OREN GLEICH
MAJ, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Counsel on 26 MAY 2016.



OREN GLEICH
MAJ, JA
Defense Counsel

**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 Discovery Request
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	
SGT, U.S Army)	
HHC, Special Troops Battalion)	14 June 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

The Government responds as follows to the Defense's Second Discovery Request, dated 26 May 2016. The organization and paragraph numbers correspond to the Defense requests.

B. DOCUMENTS/TANGIBLE EVIDENCE

4. The Government is not aware of specific documents addressing financial cost to the Government related to charged or uncharged misconduct by the Accused. As to documentation regarding financial impact to other individuals, the Government will comply with the Court's pretrial order and R.C.M. 1001(b)(4).
5. The Government has provided and will continue to provide information responsive to the request. When additional items responsive to this request become available, the Government will supplement subject to M.R.E. 505.
6. The Government has provided and will continue to provide information responsive to the request. When additional items responsive to this request become available, the Government will supplement subject to M.R.E. 505.
7. The Government will provide information responsive to the request subject to M.R.E. 505.
8. Denied in part. Denied to the extent that the Government will not seek the prepublication review absent a particularized showing of relevancy, necessity or otherwise materiality to the preparation of the defense. To the extent the information contained therein is relevant and necessary, the Government will subpoena or request both the CNN outtake footage of James Hatch and a draft of James Hatch's book, in accordance with R.C.M. 703(f)(4)(B).

9. All information responsive to the request has been provided, which includes:

1. Charge Sheet
2. Article 32 Report
3. DD Form 457
4. Article 32 Transcript
5. Article 32 Defense Objections
6. Article 32 Exhibit List
7. Article 32 Government Exhibits
8. Article 32 Defense Exhibits
9. Article 32 Preliminary Hearing Officer Exhibits
10. 9 Jan 15 – Orders FORSCOM (UCMJ)
11. 22 Dec 14 – Memorandum (DAS)
12. 20 Jan 15 – Memorandum (FORSCOM to STB and STB as SPCMCA)
13. Flags (25 March 2015, 27 March 2015)
14. ERB (23 Nov 2015)
15. Administrative Exhibits (A001 – A225)
16. 2014 AR 15-6 Executive Summary and Findings and Recommendations
17. 2014 AR 15-6 Exhibits E0001 – E2443
18. Defense Post 32 R.C.M. 405(j)(5) Submission (9 Oct 15, 21 Oct 15, CA review 22 Oct 15)
19. "Recovery of SGT Bergdahl" (Secret/ACCM)
20. SPCMCA Transmittal

10. See attached disclosure, "HQDA, General Order No. 22, 26 June 1973," Bates _000042996-_000042997.

11. The Government is unaware of any witness statements or other evidence in voicemail format. If items responsive to this request become available, the Government will notify the Accused of their existence and provide access to those items that are within Government control.

C. STATEMENTS/WITNESSES

12. The Government will make known to the Accused any hearsay statement offered under M.R.E. 807 sufficiently in advance of trial to provide the Accused with a fair opportunity to prepare in accordance with the Court's Pretrial Order and the Rules for Courts-Martial.

13. The Government will produce before or at trial a writing used by a witness to refresh his or her memory for the purpose of testifying, in accordance with M.R.E. 612, the Court's Pretrial Order and the Rules for Courts-Martial.

14. The Government will provide advance notice of any known privileges a witness intends to assert at trial in accordance with the Court's Pretrial Order and the Rules for Courts-Martial.

15. The Government will comply with Section V, Military Rules of Evidence, the Court's Pretrial Order and the Rules for Courts-Martial.

16. The Government will give the Accused sufficient advance written notice of any evidence offered under M.R.E. 609(b) in accordance with the Court's Pretrial Order and the Rules for Courts-Martial.

17. The Government will comply and provide medical and mental health treatment records of victims subject to HIPAA, M.R.E. 513 and any other applicable laws, guidelines or restrictions in accordance with the Court's Pretrial Order and the Rules for Courts-Martial.

18. Denied in part. The Government will provide notice of witnesses, and their contact information, intended for use at trial in conformity with the Court's Pretrial Order.

19. Denied in part. The Government will provide notice of witnesses, and their contact information, intended for use at trial in conformity with the Court's Pretrial Order.

20. Denied in part. The Government will provide notice of witnesses, and their contact information, intended for use at trial in conformity with the Court's Pretrial Order.

D. SEARCH AND SEIZURE

21. The Government is not aware of any electronic surveillance or other activities described in the request. If items responsive to this paragraph become available, the Government will notify the Accused of their existence and provide access to those items subject to M.R.E. 505.

22. The Government is not aware of any affidavits/statements supporting requests for authorization to search, seize, and/or apprehend. If items responsive to this paragraph become available, the Government will notify the Accused of their existence and provide access to those items subject to M.R.E. 505.

23. The Government is not aware of any law enforcement "handoff." If items responsive to this paragraph become available, the Government will notify the Accused of their existence and provide access to those items subject to M.R.E. 505.

24. The Government has provided or will provide financial records from the Defense Finance Accounting Service. The Government is not aware of any additional financial, business, and/or personal records of or about the accused. If additional items responsive to this paragraph become available, the Government will notify the Accused of their existence and provide access to those items.

25. The Government previously provided its Section III Disclosures on 21 December 2015 which documented: (1) computer hard drive, (2) personal journal, (3) various personal items left at FOB Sharana and OP Mest which were returned to Robert and Jani Bergdahl, and (4) letters written by the Accused for his family and friends.

26. The Government previously provided its intent to offer evidence seized from the person or property of the Accused in its Section III Disclosures on 21 December 2015, and is not aware of any additional evidence seized from the person or property of the Accused.

E. EVIDENCE REGARDING ACCUSED

27. The Government will comply with M.R.E. 304(d) and the Court's Pretrial Order.

28. The Government will comply with M.R.E. 304(d) and the Court's Pretrial Order.

29. All information responsive to the request has been provided. The Government has already provided the advisal given to the Accused on 31 May 2014, and on 6 August 2014. The Government will continue to comply with the Court's Pretrial Order and the Rules for Courts-Martial.

30. The Government is not aware of any evidence of a prior identification of the Accused during a lineup or other identification process.

F. EVIDENCE MATERIAL TO THE PREPARATION OF DEFENSE

31. Denied in part. Denied to the extent that, "any policy statements, resolutions and the like from any organization or group, whether written, electronic, or in any other format which in any way relates to any punishment that might be imposed or to any clemency that might be given," is overbroad. The Government has provided and will continue to provide rebuttal information responsive to the request in accordance with the Rules for Courts-Martial and the Court's Pretrial Order.

32. Denied. The request is overbroad and the Government requests a more particularized showing of relevancy, necessity or otherwise materiality to the preparation of the defense.

33. The Government is not aware of any perjured testimony, suspected perjured testimony, fabricated evidence, or suspected fabricated evidence. If items responsive to this paragraph become available, the Government will notify the Accused of their existence and provide access to those items.

G. PRETRIAL CONFINEMENT/RESTRICTION TANTAMOUNT TO CONFINEMENT

34. The Accused was not subject to pretrial confinement. The Government is not aware of any witness or potential witness who was subject to pretrial confinement.

35. The Accused was not subject to any conditions of confinement. Without waiving any objections, see attached disclosures, Bates 000003873-000003874 and _000042998.

H. PANEL SELECTION

36. All information responsive to the request has been provided.

37. All information responsive to the request has been provided.

I. MANNER OF DISCOVERY

38. The Government will provide all electronic discovery in a searchable format. The Government will also will amend previously disclosed unsearchable discovery to ensure it is also in a searchable format.

39. The requested items do not exist, in addition the request is prohibited in accordance with R.C.M. 701(f).

40. Denied, 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).

41. Denied. The request is prohibited in accordance with R.C.M. 701(f).

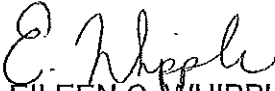
J. ILLEGIBLE, MISSING, AND DOCUMENTS NOT BATES STAMPED

42-44. All material responsive to this request was provided via AMRDEC on 31 May 2016.

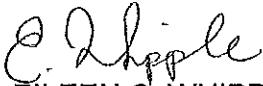
K. CONCLUSION

45. All witnesses interviewed have been advised that the Accused is entitled to "equal opportunity to interview witnesses," subject to the Court's Protective Order for Classified Information and any rules, guidelines or laws governing the disclosure of classified information. The Government requests that the Accused advise if any witness is not acting in conformity with R.C.M. 701(e).

The Government recognizes its continuing duty to disclose and will comply with the Rules for Court Martial and the Pretrial Order.


EILEEN C. WHIPPLE
CPT, JA
Assistant Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 14 June 2016.


EILEEN C. WHIPPLE
CPT, JA
Assistant Trial Counsel