IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**RECORD AND TRANSCRIBE**
	)	**ALL R.C.M. 802 CONFERENCES**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	2 June 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense requests that this Court order that all future R.C.M. 802 conferences be recorded and transcribed for the record.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

EVIDENCE

3. The Defense does not request any witnesses or evidence be produced for this motion.

FACTS

4. On several occasions the parties have held R.C.M. 802 conferences in order to discuss case related issues. These conferences have mostly been held either in a conference room adjacent to the courtroom or by telephone when the parties are not centrally located.

5. The Court has discussed the content of the various R.C.M. 802 conferences on the record at the following Article 39(a) session. The Court has also invited the parties to add any detail either party desired to the Court's summary.

ARGUMENT

6. The Defense submits that this Court should order that all future 802 sessions be recorded and transcribed for the record for four reasons: (1) The Government often uses the 802 sessions to re-litigate matters already decided by the Military Judge under the auspices of "clarification"; (2) the Government often takes positions in 802 sessions which are inconsistent with its motions and what is says in open court; (3) the Government makes admissions in the 802 sessions which are relevant to the Defense's discovery requests; and (4) there is sometimes confusion as to exactly what was said at the 802 session.

7. First, the Government has used the opportunity that the 802 sessions provide to re-litigate issues already decided by the Military Judge under the guise that it was simply "clarifying" something. For instance, in its 23 March 2012 Ruling, the Court ordered that the Government produce the Department of State damage assessment. Appellate Exhibit XXXVI. The Government then sought "clarification" as to what it had to produce, given that the Department of State "had not completed a damage assessment." The Government then used that opportunity to argue that a draft damage assessment is not discoverable under *Giles* because it is speculative. Appellate Exhibit LXXI. Far from clarifying the Court's ruling, the Government was attempting to take issue with it. This happened again during the latest 802 session. The Court once again ordered the Government to provide a Department of State witness to testify as to what documents the department had that were responsive to the Defense's repeated discovery requests. The Government once again took this as an opportunity to re-litigate the issue, insisting that the Defense did not have the right to ask a Department of State witness questions about what they possess because this is a classic "fishing expedition." Again, when the Government disagrees with the Court's ruling, it simply asks for an 802 for "clarification."

8. Second, the Government will often say something in an 802 session that is inconsistent with what it says in its motions and what it says in open court. In one 802 session, the Defense asked what material from the FBI file the Government intended to produce since its motion was unclear in this respect (and the Court had not ruled on this issue, given that the Government represented that it was in the process of producing all discoverable material). In the 802 session, the Government explained that some portions of the FBI file do not deal with PFC Manning at all – accordingly, those would not be produced. Everything else would be. In its subsequent motions and in open court, it changed its position and said that only *Brady* was discoverable from the FBI file. Similarly, the issue regarding ONCIX and "damage assessments" vs. "investigative" files was dealt with during an 802 session. The Government claimed that the Defense was using the wrong terminology in its discovery requests and that's why it was not getting what it was looking for. Appellate Exhibit LXXII. Now, the Government is using the term "damage assessments" in the way that it told the Defense was incorrect. *See* Attachment. This Court and an appellate court should have the benefit of the Government's shifting litigation positions.

9. Third, the Government makes admissions or statements during these 802 sessions that it later denies – which is made easier by the fact that there is no transcript of exactly what the Government said during that session. For instance, the Government said during the latest 802 conference that the requested Department of State materials were simply not discoverable under R.C.M. 701(a)(2) or R.C.M. 701(a)(6). The Defense asked how the Government could make this statement, given that it had not even reviewed the files? Now, it its Response to the Defense

Motion to Compel Discovery #2, it states at p. 2, "The prosecution has never stated that the defense is not entitled to any information discoverable under RCM 701(a)(6), and has consistently stated that the prosecution intends to review all documents for Brady and RCM 701(a)(6) material that is provided by the DoS that are responsive." Obviously, if the parties and the Court had a transcript of what was said, issues as to "who said what" could be easily resolved.

10. Fourth, there is sometimes confusion about what exactly was decided during the 802 session. At the latest 802 session, the Defense understood the Court to have ordered the Government to provide a list of all evidence is seeks to introduce in aggravation. The Government does not believe it needs to compile a list, but simply to give the Court a sense of the type of information it plans on introducing in aggravation. There was also some confusion on the dates when this needed to be produced. With the benefit of a transcript, both parties can have access to exactly what was decided at the 802 session.

11. As the Court is aware, there is a push for greater openness in this proceeding. At present, too many issues are being said and litigated behind closed doors. Accordingly, the Defense requests that this Court order a recording and transcript of all future 802 sessions.

CONCLUSION

12. The Defense requests that this Court order that all future R.C.M. 802 conferences be recorded and transcribed for the record.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel