

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, xxx-xx-9504)
Headquarters and Headquarters Company, U.S.)
Army Garrison, Joint Base Myer-Henderson Hall,)
Fort Myer, VA 22211)

**REQUEST FOR
RECONSIDERATION OF
ADDENDUM #2 TO DEFENSE
MOTION TO COMPEL
DISCOVERY #2: REQUEST
FOR WITNESSES**

21 June 2012

RELIEF SOUGHT

1. The Defense respectfully requests this Court reconsider its denial to produce certain witnesses for the Article 39(a) session on 25 June 2012 in light of the Government's 20 June 2012 submission.

2. The Defense requests that this Court order the Government to produce the following witnesses:

a) A witness from the Office of the National Counterintelligence Executive (ONCIX) who can testify to:

- i) the representation made to trial counsel in February 2012;
- ii) the representation made to trial counsel in March 2012;
- iii) what ONCIX had by way of a damage assessment in February and March 2012;
and
- iv) the contents of the 18 May meeting with ODNI.

b) A witness from the Federal Bureau of Investigation (FBI) who can testify as to when the FBI had something by way of a damage assessment/impact statement, and when trial counsel had knowledge of this fact.

c) A witness from the Department of Homeland Security (DHS) who can testify as to when the DHS had something by way of a damage assessment, and when trial counsel had knowledge of this fact.

3. Given the timing of this reconsideration request, the Defense does not object to the Court considering telephonic testimony from a witness from each of the above agencies.¹

FACTS

4. The Defense incorporates the factual assertions from its 18 June 2012 original request for witnesses. The Defense also requests the Court to consider the filing by the Government on 20 June 2012 (Prosecution Response to Defense Motion for Modified Relief for Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2) and the statements by the Government during oral argument on 6 June 2012.

5. On 6 June 2012, the Defense argued its request for a due diligence accounting by the Government. After the Defense's argument, the Court asked the Government if it had a reply or whether it wanted to reserve its reply. MAJ Fein responded "...we would like to reserve our reply for the diligence argument since we did just receive it this past weekend." Article 39(a) Audio Recording 6 June 2012.

6. The Government allowed the Government a two-week extension to brief the issues raised in the Defense's motions for a due diligence accounting (e.g. the FBI impact statement; the ONCIX damage assessment, etc.).

7. During oral argument, the Court asked the Government to explain its representations concerning the FBI impact statement.

COURT: Alright, we will be addressing that aspect of this motion at the next session. I understand the Defense's argument. Government, are you prepared to tell me when you did know about this impact statement or impact assessment?

MAJ Fein: Your Honor, the Government would like to at least have a chance to argue the due diligence argument first and then answer that in (inaudible) Court's order.

Article 39(a) Audio Recording 6 June 2012.

8. MAJ Fein then proceeded to give the following lengthy statement:

MAJ Fein: But what the Government would say, at least is that, the Defense again is confusing, the Defense seems to confuse the issues of what authorities they have asked. Pre-Referral they asked for any impact or damage assessment and they listed the FBI in a general request under 701(a)(2). The Government replied "you're not entitled to that under that proper authority or proper legal basis or factual basis." So once the Government learned of it, then we started working the approvals. But the Government is prepared today, because I happen to know that answer, your Honor, is it was just a few weeks ago, in fact I think that it was three weeks ago, but again this is I think, I will, I can confirm it at a different time, that we received approval based off of our proposed

¹ "Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance." R.C.M. 703(b)(1).

summaries, to turn it over to the Defense. In fact, the time it was, the time of the day we received it, I think was the 18th of May. Because that was the date we filed our 505(g)(2) for the other two damage assessments. So that was the day we received the approval, and then the next two days the Defense started objecting into this procedure we already litigated about disclosure of ex parte or not. At that point we needed to notify the FBI, like every other entity that might be entertaining giving approval under 505(g)(2) that this is the procedure that will likely occur. So that they can weigh that decision on how, how this Court is going to handle information in the future. And how they are going to disclose it or not. So since then your Honor, we have had the approval to turn it over. And as we have written in our motion there is no – the Defense even cited before, 701(a)(6) says as soon as practicable. As we cited, as we stated in our motions and on the record today, the moment this prosecution receives approvals to turn over information, unclass, classified, we as soon as possible, turn it over to the Defense. So, once we get it, we start working. This is an example of we didn't have a process in place. We notified the Defense and the Court in our filing, it's there. Once we have a process, and once we know how the Court wants to handle these, we are ready to go. And we can keep them ready to go.

Id.

9. Based upon MAJ Fein's lengthy response, the Defense again tried to focus the issue on when the Government knew about the FBI impact statement, and why it had not provided timely notice to the Court and the Defense:

Mr. Coombs: Okay, I guess if the Government is saying they found out about the FBI impact statement prior to or right at the time of their 18 May 2012 disclosures to this Court, then we have additional problems, based upon what the Government said about the FBI in that disclosure to this Court, indicating that they produce all classified and unclassified documents under 505(g)(1) that are relevant in this case with regards to the FBI. This goes back to the Government deciding on its own when it is going to enlighten the Court or the Defense when there is certain information out there. The Government became aware, now apparently from what he [MAJ Fein] just said, the Government was aware of or got approval to release this information on 18 May. So that still begs the question when they found out about it, but why are they not, at the very least, if they don't want to tell the Defense, they have to be alerting the Court to the existence of this information. What they are representing to the Court on 18 May is that they reviewed everything that is favorable to the accused or material to either guilt or punishment, and they have turned over everything. That is what they are representing on 18 May. If they were aware, obviously they were aware of this impact statement, they just didn't have authority apparently to turn it over. But, they should have stated in there, "oh by the way Ma'am, the FBI has an impact statement. We are currently working the process for approval to turn this over."

Id.

10. The Court once again asked the Government to provide clarification on when it knew about the FBI impact statement:

COURT: Alright, Government, what is your position on that?

MAJ Fein: Your Honor, we are trying to find the document.

Mr. Coombs: 18 May 2012. Prosecution disclosure to the Court.

[Court provides its copy to MAJ Fein]

COURT: Why don't you please announce for the record what appellate exhibit it is?

MAJ Fein: Yes your Honor, I have been handed Appellate Exhibit 125. I am also holding, what is this? So your Honor, I was just handed Appellate Exhibit 125 which is the prosecution disclosure to the Court on 18 May 2012, I am also holding because this will, it is a consistent application of your Honor of what the Government has been saying, the prosecution's response to the supplement to the Defense motion to compel discovery number 2 dated 31 May 2012. Which is Appellate Exhibit 100. Now, I am looking at page four of Appellate Exhibit 100, and page 2 of Appellate Exhibit 125.

COURT: Alright.

MAJ Fein: Your Honor, in both of these, the focus is, the Court's Order was to turn over forensic results and investigative files. This gets back to the issue that was already litigated last session. Investigative files have a specific terminology. We complied with the Court's Order and we disclosed it. As noted, to ensure the Court was properly informed and the Defense, in Appellate Exhibit 100 on page 4, the prosecution even gave notification, again about law enforcement files. And then in the second paragraph we also further requested that they search their entire records to disclose to the Court this information. It goes back to general requests and words do matter your Honor. The Government is not trying to play, to play fast and loose with terminology. We are trying to execute specifically what the Defense is requesting. It makes it much easier, we are told. And only once in pre-referral discovery, and as I have stated before, in a, in a, mass request was under 701(a)(2) any impact or damage from these organizations. We replied, "you did not provide an adequate basis, or legal basis, factual or legal basis," not "you are not entitled to it." It was never readdressed. We were on notice for Brady purposes. We started looking into it. We found it, we got approval, we notified on 18 May. Or, excuse me, on 31 May in this filing. And the prosecution is standing here today saying we are ready to actually turn over the summary to the Defense, once the Court reviews it, and if the Court authorizes the substitution. But it is not an investigative file. And although it is understandable that the FBI is the Federal Bureau of Investigation, it is a very large organization. It is a very large organization within the executive branch. The investigators are not directly tied to, and in fact, we were told by FBI headquarters that deals with the damage assessment, excuse me, the impact statement, that the investigating

office, the field office within the FBI, had no input or even contact with any aspect of the impact statement. It was a completely separate function.

Id.

11. Despite being given multiple opportunities to answer the question of when the Government was aware of the FBI impact statement, the Government never provided an answer to the Court.²

ARGUMENT

12. During the 6-8 June motions hearing, the Government requested additional time to respond to the Defense's motion for a due diligence accounting. The Court granted the request. The purpose of the additional time was for the Government to respond to the questions of the Defense and the Court concerning what the Government knew and when concerning the ONCIX damage assessment, the FBI impact statement, and any other due diligence issues raised by the Defense's motions.

13. At oral argument, the Court asked MAJ Fein: "Government, are you prepared to tell me when you did know about this impact statement or impact assessment?" MAJ Fein's response was that he was *not* prepared to answer the question at the time, but would address this in the Government's written submission for which the Government requested (and was granted) a 2-week extension ("Your Honor, the Government would like to at least have a chance to argue the due diligence argument first and then answer that in (inaudible) Court's order."³).

14. The Government filed its submission yesterday, on 20 June 2012. The Government's submission fails to mention the FBI impact statement that MAJ Fein represented to the Court he would address in his submission. It also fails to mention the ONCIX damage assessment, the DHS damage assessment, the HQDA memo, the Department of State documents, etc. In short, the Government has not responded *to a single* issue raised by the Defense. Instead, the Government essentially asks the Court to, "trust us, we know what we are doing."

15. The whole point of allowing the Government two weeks to respond was to provide answers to the factual issues raised by the Defense, not to allow the Government to rehash arguments to the effect that there is no basis for ordering a due diligence statement. The Government already made *those exact same arguments* on 24 May 2012. See Appellate Exhibit XCVII (Prosecution Response to Defense Motion to Compel Discovery #2) ("The prosecution respectfully requests

² In its 22 March 2012 statement to the Court, the Government stated "the United States is concurrently working with other Federal Organizations which we have a good faith basis to believe may possess damage assessments or *impact statements*...." See Prosecution's Response to Court's Email Questions (22 March 2012). The Government undoubtedly knew of the FBI impact statement prior to its 22 March 2012 disclosure to the Court. The Government, however, failed to notify the Court on that date of the FBI impact statement. The Government also failed to notify the Court of the FBI impact statement on 20 April 2012 when it represented what the FBI had in its possession and that "the United States anticipates that the FBI is the only government entity that is a custodian of classified forensic results or investigative files relevant to this case that will seek limited disclosure IAW MRE 505(g)(2)." Appellate Exhibit LVI.

³ The audio is inaudible at the end of MAJ Fein's statement; however, based on the context of the sentence, it is clear that MAJ Fein was deferring his answer until the Government's written submission.

that the Court deny the defense's request for the prosecution to respond to inquiries related to its due diligence search for discoverable information. There is no legal authority to support the defense's request. Should the Court be inclined to [grant the Defense's motion], the prosecution requests leave of the Court to require the prosecution to prepare internal memoranda and other attorney work-product, and present this information to the Court *ex parte* ... based on it being attorney work-product).

16. The purpose of deferring argument for two weeks was to enable the Government an opportunity to explain to the Court inconsistencies in the factual issues raised by Defense's motion. That is *the basis upon which* the Court granted a two-week extension. If the Government was going to use the two-week extension to simply regurgitate old arguments and repeat that "the prosecution continues to comply with its discovery obligations and will continue to do so" and "the prosecution has and continues to comply with its obligations under *Brady*" (See Government Response at p. 2), there was absolutely no need for this two-week extension.

17. It is clear that the Government has no plans to explain any of its conduct. It has not explained any of the following issues:

- a) Why didn't the Government tell the Court about the ONCIX damage assessment?
- b) Why did the Government represent that it had searched the files of 63 agencies prior to February 2012 and found no *Brady*, but now is saying that it did not begin its *Brady* search until February 2012 after ONCIX informed the Government that it needed to go to these agencies?
- c) When did the Government learn of the FBI impact statement? (not when did it get approval to tell the Defense). When did the FBI begin the impact statement? When did it complete the impact statement?
- d) When did the Government learn of the Department of Homeland Security damage assessment? Why didn't the Government tell the Court about this at the 6 June 2012 motions argument, given that the parties and the Court were in the process of discussing what damage assessments existed?
- e) Why didn't the Government ever follow-up with HQDA? Why did it take someone at HQDA, nine months after the original memo was circulated, to realize that nobody had conducted a *Brady* search?
- f) Why hadn't the Government already searched the files of the Department of State? How can it be that two years into the case, the only non-investigative document from the Department of State that the Government has seen is their Damage Assessment?
- g) Why has the Government not completed a *Brady* search of documents that it agrees are under military possession, custody and control?
- h) Why has the Government not yet completed a *Brady* search of closely aligned agencies?

At the upcoming oral argument, the Defense is certain that the Government will once again not provide any answers. Instead it will say (as it did at the last oral argument) something to the effect that it will "get back to the Court on that."

18. The Defense would also ask that the Court either read the limited transcriptions provided by the Defense in support of the request for witnesses or listen to the audio transcript itself. The

Government's responses are circular and evasive. It never once provides a direct answer – much less a believable answer – to any of the Court's questions.

19. In the Court's prior ruling that these witnesses were not "relevant and necessary" for the upcoming motions argument, the Defense assumes that the basis for this determination (at least in part) was that the Government would supply answers to the Court about the factual issues raised by the Defense. Thus, it was not necessary to ask questions of these witnesses because the Government would be supplying the answers in its submission. The Government has not done so, despite a two-week extension by the Court. The issues related ONCIX, the FBI, the HQDA memo, etc. *are not even mentioned* in the Government's submission.

20. The Defense believes that, in light of the Government's refusal to address even one of the factual issues raised by the Defense's motion and its evasive answers at the previous motions argument, these witnesses are now relevant and necessary to ascertain the factual predicate for the Government's diligence.

21. To anticipate a predictable argument by the Government, this Court should not defer its reconsideration of this issue until the next motions argument, as that would render the request moot. In other words, waiting until July to consider whether witnesses should appear for a June hearing (as the Government has suggested in the past) does not make sense. The Defense respectfully requests a timely ruling on this motion.

CONCLUSION

22. The Defense respectfully requests that this Court reconsider its ruling and order the Government to produce a witness from ONCIX, FBI, and DHS who can testify regarding the representations made to the trial counsel concerning any damage assessment/impact statement.

Respectfully submitted,

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