IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	
	)	**DEFENSE RESPONSE**
	)	**TO GOVERNMENT**
v.	)	**DUE DILIGENCE**
	)	**SUBMISSION**
MANNING, Bradley E., PFC	)	**DATED 20 JUNE 2012**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	22 June 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense moves for the Court to order the Government to provide a due diligence accounting of the steps it has taken to comply with its *Brady* obligations.

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).

WITNESSES/EVIDENCE

3. The Defense requests that this Court consider the following evidence: Attachment - SGT Bradley email on 27 February 2012.

4. The Defense has also requested 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.

The Court has denied this request as being untimely. The Court has also ruled that these witnesses are not relevant and necessary for the Court to rule on the Due Diligence Motion.

FACTS

5. The Defense incorporates the factual assertions from Appellate Exhibit XCVI (Defense Motion to Compel Discovery #2); Appellate Exhibit XCVIII (Defense Reply to Government Response to Motion to Compel Discovery #2); Appellate Exhibit XCIX (Supplement to Defense Motion to Compel Discovery #2); Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief); Appellate Exhibit CXX (Defense Response to Prosecution Notice to Court of ONCIX Damage Assessment); and the Defense's filings of 18 June 2012 and 21 June 2012 requesting witnesses for the purpose of this motion. 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).

ARGUMENT

6. The Government latest Response reveals its new strategy – if you can't respond to the issues at hand, change the topic. The Defense has chronicled, in painstaking detail, the serious questions that exist about all the outstanding discovery (particularly *Brady* discovery) in this case. *See* Appellate Exhibit XCVI (Defense Motion to Compel Discovery #2); Appellate Exhibit XCVIII (Defense Reply to Government Response to Motion to Compel Discovery #2); Appellate Exhibit XCIX (Supplement to Defense Motion to Compel Discovery #2); Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief); Appellate Exhibit CXX (Defense Response to Prosecution Notice to Court of ONCIX Damage Assessment); Defense's filings of 18 June 2012 and 21 June 2012 requesting witnesses for the purpose of this motion

7. Among the issues raised:

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 the Government get approval to tell the Defense about the impact statement?). 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 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?

8. After the Defense filed Appellate Exhibit CXX (Defense Response to Prosecution Notice to Court of ONCIX Damage Assessment) and Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief), the Government stated that it needed an additional two weeks to respond to matters raised therein. On 20 June, 2012, the Government filed its response. Shockingly, the Government has not responded *to a single* issue raised by the Defense. The Government does not mention the ONCIX damage assessment, the FBI impact statement, the DHS damage assessment, the HQDA memo – or anything factual about this case. Instead, the Government essentially asks the Court to, "trust us, we know what we are doing."

9. 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 its arguments 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) ("[redacted]").

10. 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.

11. To recap, the Government revealed for the first time a couple of weeks ago that the FBI had prepared a damage assessment/impact statement. In Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief), the Defense argued:

> Second, the Government casually mentions that it "discovered that the FBI conducted an impact statement, *outside of the FBI law enforcement file*, for which the prosecution intends to file an *ex parte* motion under MRE 505(g)(2)." Government Response to Supplement, p. 4. What does the Government mean that it "discovered" that the FBI conducted an impact statement? The Government and the FBI engaged in a joint investigation of the accused and are closely aligned. The Defense has repeatedly asked for documents from the FBI; moreover, the Government has a duty to turn over *Brady* even in the absence of a Defense Request. *See* Government Response to Supplement, p. 6 ("The prosecution shall, and will, disclose Brady ... even in the absence of a defense request.").
>
> On 20 January 2012, the Defense made the following discovery request: "Does the Government possess any report, damage assessment, or recommendation as a result of any joint investigation with the Federal Bureau of Investigation (FBI) or any other governmental agency concerning the alleged leaks in this case? If yes, please indicate why these items have not been provided to the Defense. If no, please indicate why the Government has failed to secure these items." *See* Attachment L to Appellate Exhibit VIII at paragraph 3(b). On 31 January 2012, the Government responded: "The United States will not provide the requested information. The defense has failed to provide any basis for its request. The United States will reconsider this request when provided with an authority that obligates the United States to provide the requested information." Attachment N to Appellate Exhibit VIII, paragraph 3(b).
>
> Apparently, despite the Defense's discovery request, the Government did not disclose the existence of the FBI impact statement in January. When was the impact statement prepared? Why is the Government only now "discovering" its existence, as if by happenstance, three months before trial? Presumably, the impact statement is something that has been in the works for a while. In other words, the FBI impact statement did not just magically appear out of thin air. Why has the Government not disclosed its existence to the Defense or to the Court? This latest revelation by the Government shows that the Court and the Defense are left completely in the dark about relevant documents that exist in closely aligned agencies until the Government decides, at its convenience, to

> confirm or reveal their existence. Further, the Government states that it intends to produce any *Brady* material "*as soon as possible*; however, the current case calendar outlines MRE 505 proceedings to take place a future date." Government Response to Supplement, p. 4. The subtext of this statement is that it will be months before the Defense gets access to the FBI's impact statement.

Id. p. 10-11.

12. At oral argument, the Court asked MAJ Fein *when* the Government learned about 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. MAJ Fein seemed to indicate that he would provide an answer to the Court's very straightforward question as part of the Government's due diligence submission, for which he had requested a two-week extension. MAJ Fein did not address the FBI impact statement *at all* in the Government's 20 June 2012 submission.

13. The Defense believes that the Government has known about this impact statement for a long time. It bases this belief on the fact that on 22 March 2012, the Government stated in its disclosure to the Court, "[redacted]" *See* Prosecution's Response to Court's Email Questions (22 March 2012). The Defense believes that the "impact statement" the Government was referring to on 22 March 2012 was the FBI impact statement (because all other documentation which assessed harm had been previously referred to as "damage assessments"). The Defense also believes that the Government was referring to the FBI impact statement on 20 April 2012 when it represented that "[redacted]" Appellate Exhibit LVI. The Defense believes that the limited disclosure which the Government anticipated the FBI seeking was in respect of the impact statement (not forensic results or investigative files).[1]

14. Moreover, the Government has still not explained other problematic issues in this case. For instance, the Defense raised the HQDA memo (which showed that the Government forgot about

[1] It is worth noting that the Government would use the terminology of "forensic results" or "investigative files" to refer to the impact statement. This underscores how the Government chooses to argue that certain terms are "terms of art" only when it suits the Government's purposes. The Government similarly used "damage assessment" to refer to documents that it previously had stressed must be referred to as "working papers." *See* Appellate Exhibit CI, para. 14.

its *Brady* search within the Department of the Army) as an illustration of the lack of due diligence on the part of the Government. The Defense argued that if the Government cannot be trusted to conduct a *Brady* search in its own backyard, it cannot be trusted to conduct a *Brady* search of numerous federal entities. The Government has not once responded to the Defense's argument – other than to say that responses to the HQDA memo should not be discoverable. It has not provided *any* explanation as to why it did not follow-up with HQDA for none months on the *Brady* search.

15. The Government has also not provided any written account of why it did not notify the Court that ONCIX was conducting a damage assessment. All the Court has to go on is the Government oral representations at the 6 June 2012 39(a) session that the Government simply repeated what it was told by ONCIX. For reasons discussed in more detail below, the Government's account simply does not ring true.

16. Similarly, the Government has not explained why it has not yet searched *any* non-investigative records at the Department of State, even though this case has been ongoing for over two years. By its own admission, the only document from the Department of State prior to 6 June 2012 was the Department of State damage assessment, which it reviewed only a couple of days before disclosing it to the Court. The Government has not answered – much less, satisfactorily answered – why it has not reviewed any non-investigative Department of State files (or even made inquiries) in the two years since PFC Manning was incarcerated. PFC Manning is charged with releasing hundreds of thousands of Department of State cables. One would think that a diligent prosecutor would, sometime in a two-year time period, think to review documents from the Department of State for *Brady*.

17. Equally, the Government has not explained why it is still "in the process" of conducting a *Brady* search of almost every agency involved in this case. As the Court went through each and every agency involved in this case, the Government's refrain was some variation of "we are in the process of conducting a *Brady* search." *See* Article 39(a) Audio Recording 6 June 2012. How can it be that two years into the case the Government is still "in the process" of conducting a *Brady* search?

18. In short, the Government has not answered any factual questions about its *Brady* search that would allay any of the Defense's or Court's concerns about the diligence of the Government. If anything, the more the Government says, the more the Defense is concerned that the Government is dropping the ball with respect to its *Brady* obligations. Fundamentally, there is one overarching fact that simply cannot be ignored: more than 24 months since PFC Manning was arrested, the Government has still not even begun searching some critical files. This fact alone – without knowing anything else – should give a Court great pause about the Government's diligence.

19. The Government maintains that it should not have to provide any factual detail, unless ordered to do so by the Court. In opposing the Defense's request for witnesses, the Government states:

Prosecution Response to Defense Motion to Request Reconsideration of Addendum #2 to Defense Motion to Compel Discovery #2: Request for Witnesses, p. 2. At bottom, what the Government is saying is that it simply will not answer any questions unless the Court orders it to.[3] The dates on which MAJ Fein made certain inquiries is not a national secret; it should not require an order from a military judge for MAJ Fein to disclose to the Court when he learned of the existence of, for instance, the FBI impact statement.

20. In light of the refusal of the Government to answer any factual questions in this case absent a Court order, the Court should take the Defense's factual statements as uncontroverted and order the relief sought by the Defense.

I. The Government's Account of Events Surrounding the ONCIX Damage Assessment Does Not Make Sense

21. The Government's version of events concerning the ONCIX damage assessment brings to mind the famous line: "Oh what a tangled web we weave, when first we practise to deceive!"[4] The Government here indeed has woven a tangled web, and it is only by parsing carefully through that web that the Government's story completely falls apart.

---

[2] The Government is incorrect with respect to the dates of requested relief. The Defense requested a due diligence statement as part of its 10 May 2012 Motion to Compel Discovery #2 (*see*, e.g., para. 1.c)). Consequently, the Government has had 40 days to respond to this aspect of the Motion to Compel Discovery #2. In that time, the Government has not provided any factual justification for any issues raised by the Defense (with the exception of ONCIX, addressed herein).

[3] The Government's position is, unsurprisingly, nonsensical. Answering the questions that the Defense and the Court raised would assist the Court in determining whether the requested relief is appropriate.

[4] Sir Walter Scott, *Marmion, Canto v. Stanza 17.* Scottish author and novelist (1771 – 1832); available at: http://en.wikipedia.org/wiki/Walter_Scott.

a) The Government's Phraseology Was Deliberately Designed to Mislead the Court

22. In the 15 March 2012 motions argument, the Government represented that the DOS had not "completed" a damage assessment and that ONCIX had not "completed" a damage assessment. In other words, the Government's representation with respect to DOS and ONCIX was identical. The Defense challenged this, at least with respect to DOS, noting that it was clear that the DOS was working on *something*, even though it was not completed. The Government refused to answer the Court's questions on the DOS damage assessment, saying that it was only authorized to state that the DOS had not completed a damage assessment.

23. After the motions argument, on 21 March 2012, the Court asked the Government to respond to questions regarding whether certain agencies had damage assessments. The Government's responses with respect to DOS and ONCIX were as follows:

a) DOS – "DOS has not completed a damage assessment."
b) ONCIX – "ONCIX has not produced any interim or final damage assessment in this matter."

See Prosecution's Response to Court's Email Questions dated 21 March 2012. In other words, the response with respect to ONCIX changed from its previous statement in the oral argument.

24. The Court and the Defense knew, based on previous oral argument and public statements, that the Government's statement regarding DOS meant that the DOS had something (i.e. a draft) – even though there was not a "completed" damage assessment. With respect to ONCIX, the Government's phraseology that ONCIX had neither a completed nor interim damage assessment was designed to deceive the Court and the Defense into believing that *nothing* existed in the hands of ONCIX.

25. If it is true that ONCIX did not have a draft damage assessment, there were many ways to phrase this. For instance, the Government could have said, "ONCIX has an ongoing damage assessment; however, they have represented to us that they do not have an interim or a final report at this time." The Government's representation to the Court on 21 March 2012 made it seem to a reasonable person that: a) ONCIX did not have a damage assessment, period; and b) the Government personally verified that ONCIX did not have anything. Neither one of these was true.

26. Moreover, the Government had numerous occasions to correct the misimpression it had created. In particular, after the Defense began receiving *Brady* materials from various agencies that were addressed to ONCIX, the Defense knew something was amiss. It broached this issue with the Government and the Court. *See* Attachment to Appellate Exhibit CXX. The Government, rather than coming clean and admitting that ONCIX had a damage assessment (albeit in some sort of draft form), continued its practice of obscuring the truth. This was when the Government conveniently and out of whole cloth fabricated definitions of "damage assessments" and "investigations." *See* Appellate Exhibit LXXII. It continued to maintain that ONCIX did not have a damage assessment (even though the Court had already concluded that

the Department of State draft/interim assessment was discoverable). And it maintained that the data collected by ONCIX, and presumably accumulated into some report, did not fall within the purview of the word "investigations." *See* Prosecution Brief Discussing Investigations and Damage Assessments.

b) The Government's Timeline For Its Initial Inquiries of ONCIX Does Not Make Sense

27. When one superimposes the Government's version of events upon the aforementioned, its story becomes even more suspicious. At the 6 June 2012 motions argument, the Court asked MAJ Fein a very straightforward question, which garnered a very evasive answer:

> COURT: Why did you tell me back on the 21st of March that NCIX or ONCIX had no damage assessment? Those were not the exact words you used but go ahead and tell me-
>
> MAJ Fein: Correct your Honor. Your Honor, frankly. Because we do not have access. Or even knowledge, absent us asking a question and receiving it to these files because of the nature of this type of assessment. We ask the questions based off of the Defense's discovery requests.

Article 39(a) Audio Recording 6 June 2012.

28. MAJ Fein implies that he did not have any "knowledge" of the damage assessment; he later admits that he knew the whole time that ONCIX was working on a damage assessment. So, if he knew that ONCIX was working on a damage assessment, why did he not tell the Court on 21 March? It was clear what the Court was asking at the time – did ONCIX have some type of damage assessment, whether in draft or final form? The Government deliberately mislead the Court in not supplying a full answer to the Court's question.

29. MAJ Fein then proceeds to lay out a timeline:

> Specifically your Honor, if it may please the Court to kind of lay out a time line. This is, this is somewhat reflected in the Defense's motion from Saturday. But, 16 February 2012 was the Defense's motion to compel discovery, their first motion. On 28 February 2012 was the first 802 conference. *After the 16 February 2012 motion to compel, we approached at some point, I don't have that date, NCIX through ODNI and said "we are required to produce the following, here is an example of what it is. What do you have?"* And then their response of course given was the department of, ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter. That is what they gave us and told us.

Id. (emphases supplied).

30. There are several problems with this statement. First, MAJ Fein indicates that sometime between 16 February 2012 and 28 February 2012, he approached ONCIX and said "we are

required to produce the following, here is an example of what it is. What do you have?" At this point, though, the Government was not required to "produce" anything. In fact, the Government's position was that the damage assessments were not relevant and necessary under R.C.M. 703. So it is unclear whether this conversation ever even took place – at least in the way that MAJ Fein relates.

31. MAJ Fein continues:

> MAJ Fein: And then their response of course given was the department of, ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter. That is what they gave us and told us.
>
> COURT: Did they do that orally or in writing?
>
> MAJ Fein: Orally your Honor. And so, by us writing that down, and inquiring is this all you have, is this what it is? And this is the response we received. That is ultimately what we – fast forward, at the motions hearing, on the record, both at the 802 conference after the motions hearing.

Id.

32. Apparently, the Government is saying that someone from ONCIX orally (presumably by phone) notified the Government that "ONCIX has not produced any interim or final damage assessments in this matter" and that the Government wrote it down and represented that to the Court verbatim in the February motions argument. Unfortunately for the Government, that is not what the Government said at the oral argument. Instead, it stated that ONCIX has not "completed" a damage assessment. Article 39(a) Audio Recording 15 March 2012. So even under its own version of events, the Government is not accurately relaying what ONCIX apparently told them. This is probably because these conversations did not happen – or at least did not happen in the way that the Government suggests.

33. The Government then states that, after the Court sent the email questions on 21 March 2012, it reached out to ONCIX again on this issue prior to responding on 22 March 2012:

> MAJ Fein: Yes, your Honor. And the prosecution did exactly that, your Honor. Even after the email from the Court, the prosecution reached out to ODNI and NCIX to ask the question again and this was the response we received.

Id.

34. So, apparently after reaching out to ONCIX a second time, ONCIX represented again that "ONCIX has not produced any interim or final damage assessments in this matter" and this time, the Government relayed that fact to the Court.

35. Sometime in this time period, the Government was also having conversations with the DOS and ONCIX about the differences between a "draft" and "interim" report. The Court asked MAJ Fein the following question:

> THE COURT: So the Government's position if I am understanding it then, is that you saw a distinction between the Department of State – which you told me the Department of State has not completed a damage assessment; and – I guess what is the difference between what the Department of State's position was at that time and what ONCIX's was at that time?

Id. Again, MAJ Fein was not able to provide an answer:

> MAJ Fein: Your Honor, to be honest, the Government does not necessarily know. We asked the questions and this is what we are given and what we relayed to the Court. To us, there is a difference between a draft and an interim. A draft is an ongoing document. An interim is something that is produced as a snapshot in time, to memorialize the information. *So we did have discussions with both entities on what the differences could be, but at the end of the day we asked "do you have any documentation or do you have a damage assessment, and if not, what do you have?"* And these were the responses that we were given and that we relayed to the Court. So again, we have never maintained that we didn't know they were doing one. In fact, I think it was publicly announced, and the Defense has notified the Court in one of the very first filings that it was publicly announced that they were doing one, but the extent of what they did – the prosecution had no clue, we had to rely on what they were told, or what we were told.

Id. (emphases supplied).

36. Importantly, MAJ Fein's statement reveals that at some point in the time period of February-March 2012, the Government actually had "discussions" with ONCIX "on what the differences could be [between a draft and an interim report]." If the Government and ONCIX are having conversations about the (self-imposed) distinctions between a "draft" and an "interim report" so as to formulate a less-than-truthful response to the Court, there is most certainly a problem. If the Government felt it necessary to discuss the differences between a draft and an interim report with ONCIX, then clearly it knew that while ONCIX might not have an interim report, it most certainly had a draft.

37. MAJ Fein also says "but at the end of the day we asked 'do you have any documentation or do you have a damage assessment, and if not, *what do you have*'?" *Id.* (emphases supplied). Apparently, even though MAJ Fein claims to have asked this question, either: a) ONCIX did not answer it; or b) the Government failed to communicate ONCIX's response to the Court.

c) <u>The Government's Timeline of Events Post-23 March 2012 Does Not Make Sense</u>

38. The Government says that, after the Court's ruling on 11 May 2012 regarding the DOS damage assessment, the Government went back to ONCIX to get ONCIX to reassess their position:

> MAJ Fein: … So, so the Government's position isn't that we didn't know that they weren't in the process of creating a damage assessment, but we were unaware that they had any other documentation created that would even qualify as a draft. Once we received the Court's Order on 11 May, we had them relook and reassess and that is when we started this process.
>
> …
>
> MAJ Fein: … the prosecution had no clue, we had to rely on what they were told, or what we were told. And then we remedied it the moment we realized that, that, we attempted to remedy it once we realized, and asked them to reassess their position based off the Court's Order of 11 May. But they had to come back to us to say "yes, what we read actually means we have something like that. Not what necessarily we told you before." Of course, everything changes as time goes on. So, once they told us, we then went through the procedures and we are here.
>
> …
>
> MAJ Fein: And so, going forward your Honor, after that Ruling and then after we re-litigated the Department of State, then we sent that and said listen, essentially as we have outlined in our memo to ODNI on behalf of NCIX, and then their response back. On 11 May the Court ruled even a draft damage assessment from the Department of State is discoverable in that form. We re-litigated that. Does this, does this information apply to ya-all (sic)? Based off of what you have previously told us. And at that point they said we need to have a meeting. We had the meeting within a week.

Id.

39. There are several things that do not make sense here. If ONCIX represented to the Government that it did not have an interim damage assessment, why it is necessary to "have them relook and reassess" after the Court's Order on 11 May? If the Government genuinely believed that ONCIX did not have a draft/interim damage assessment, there would be absolutely no need to go back to ONCIX to get them to "reassess their position" and ask whether "this information appli[es] to [ONCIX]."[5]

40. Moreover, the Court's order does not change the factual issue of whether ONCIX *has* a draft/interim report – all it says is that the DOS damage assessment is discoverable. But, in his statement, MAJ Fein makes it seem like there was something special in the Court's order which would provide guidance to ONCIX in determining whether what ONCIX had would qualify as a

[5] By way of illustration, the Government has represented that DOJ does not have a damage assessment. After the 11 May 2012 Ruling, the Government (presumably) did not go back to DOJ to make sure that they still did not have a damage assessment.

draft/interim report: "But [ONCIX] had to come back to us to say "yes, *what we read actually means we have something like that*. Not what necessarily we told you before." *Id.* (emphases supplied). The Court's ruling does not in any way help ONCIX in determining whether ONCIX has "something like [the DOS draft]" as the ruling does not describe the DOS damage assessment. All the ruling says is that the DOS damage assessment is discoverable, even in draft form. The substantive portion of the Court's ruling reads, in its entirety, "The Court has examined both the classified letter and the classified DOS Damage Assessment and finds that the DOS Damage Assessment is a draft damage assessment. The fact that it is a draft does not make the draft speculative or not discoverable under RCM 701." *See* Appellate Exhibit LXXXVI , p. 1. In others words, the only thing to be gleaned from the Court's ruling is that a draft damage assessment is discoverable, *not that* what ONCIX has in its possession qualifies as a draft.

41. In reality, the Defense believes that both the Government and ONCIX knew that ONCIX had a draft or interim report at the time that the Government made its misrepresentations to the Court. What the Government and/or ONCIX did was craft a very deliberate statement which would allow them plausible deniability: "ONCIX has not produced any interim or final damage assessments in this matter." If they were ever caught, they could simply say that they never represented that ONCIX did not have a draft (which, according to the Government is distinct from an "interim" damage assessment).

42. The only thing that changed on 11 May 2012 was the Government's (and perhaps ONCIX's) belief about the legal discoverability of a draft damage assessment. This, however, does not change the underlying factual issue that the Court asked about, i.e. does ONCIX have some sort of damage assessment? The Government should not be permitted to hide facts from the Court because of a belief that those facts will not be important in light of subsequent legal rulings.

d) The Government Cannot Be Permitted to Blindly Parrot Assertions from Other Agencies

43. The Government is hiding behind what ONCIX apparently told them on several occasions to disclaim any responsibility for not being forthright with the Court. Above all, the Court should not lose sight of the fact that the Government *knew* that ONCIX was working on a damage assessment and did not share this fact with the Court or Defense. At the end of the day, this is the most troubling omission.

44. MAJ Fein repeatedly casts blame on ONCIX for the misstatements, saying that the Government simply repeated what it was told:

> MAJ Fein: And then their response of course given was the department of, ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter. That is what they gave us and told us.
>
> …
>
> MAJ Fein: Orally your Honor. And so, by us writing that down, and inquiring is this all you have, is this what it is? And this is the response we received. That is ultimately what we – fast forward, at the motions hearing, on the record, both at

the 802 conference after the motions hearing, and on the email inquiry on 21 March, when asked. As you will notice from the Court's motion to compel discovery dated 23March 2012, the Court documented the email questions and those email questions were does the damage assessment essentially exist with ODNI, or excuse me with ONCIX. And we responded in an email ONCIX has not produce any interim or final damage assessments in this matter. We asked them the questions. We don't have any other access to their files. They answered it. So, at that point we relayed that to the Court, we relayed it to the Defense and the Court ruled. Then –

…

MAJ Fein: Correct your Honor. It is our belief, at that point, that they were compiling these other assessments we knew about because we started reaching out once they told us about it – to go get those. But, that they had no other documentation that would be subject to discovery – based off this response.

…

MAJ Fein: We asked questions, we give them the relevant cases, the case law, we show them the discovery requests and any other orders. And then they give us the answer. Or give us access and we go search them for the answer. And in this case, they gave us the answer. We relayed that to the Court.

…

MAJ Fein: Yes, your Honor, we did. And we were told that they were compiling the documents to do a damage assessment. We asked what is the status of the damage assessment so that we can relay it to the Court and this was the exact wording we were given.

…

MAJ Fein: … We inquired into what documentation they had, that we could report on whether they have a draft damage assessment. And they reported back again, to date ONCIX has not produced any interim or final damage assessment in this matter, when we asked them the question.

…

MAJ Fein: So we did have discussions with both entities on what the differences could be, but at the end of the day we asked "do you have any documentation or do you have a damage assessment, and if not, what do you have?" And these were the responses that we were given and that we relayed to the Court.

Article 39(a) Audio Recording 6 June 2012.

45. MAJ Fein would have the Court believe that the conversations consisted of him constantly probing ONCIX, only to be met with a robotic and repeated: "ONCIX has not produced any

interim or final damage assessments in this matter." Based on MAJ Fein's version of events, there were at least three conversations about the issue of what ONCIX had. MAJ Fein would have the Court believe that the conversation went something like this:

> MAJ Fein: We are calling to inquire as to what ONCIX has in terms of a damage assessment.
>
> ONCIX: ONCIX has not produced any interim or final damage assessments in this matter.
> MAJ Fein: I understand that. Can you tell me where you are in the process of working on the damage assessment?
> ONCIX: ONCIX has not produced any interim or final damage assessments in this matter.
> MAJ Fein: Even though you don't have an interim assessment, do you have a draft?
> ONCIX: ONCIX has not produced any interim or final damage assessments in this matter.
> MAJ Fein: How about this – I understand what you don't have. Can you tell me what you do have, so that we can relay that to the Court?
> ONCIX: ONCIX has not produced any interim or final damage assessments in this matter.
> MAJ Fein: Would it be correct to say that you are in the process of working on a draft damage assessment?
> ONCIX: ONCIX has not produced any interim or final damage assessments in this matter.

Id.

46. The above hypothetical colloquy is intended to illustrate the absurdity of MAJ Fein's latest representations to the Court that he had several (at least three) conversations with ONCIX and that "this was the exact wording [he was] given" time and again. *Id.* MAJ Fein states that he repeatedly probed into what ONCIX had, all to no avail ("We asked questions, we give them the relevant cases, the case law, we show them the discovery requests and any other orders."; "We asked what is the status of the damage assessment so that we can relay it to the Court"; "We inquired into what documentation they had"; "We asked the questions and this is what we are given"; "but at the end of the day we asked "do you have any documentation or do you have a damage assessment, and if not, what do you have?"). *Id.* To believe the Government is to utterly disregard common sense and to suspend disbelief as to how normal conversations take place.

47. Even if it is true that ONCIX communicated nothing but that one sentence – "ONCIX has not produced any interim or final damage assessments in this matter" (apparently over and over again), a prosecutor is not permitted to blindly rely on such an assertion when he has knowledge to the contrary. At the very least, the Government had an obligation to say something to the Court to the effect, "We know that ONCIX is working on a damage assessment, but they have told us that they do not have any final or interim reports in this matter." At that point, the Court

could have taken appropriate action (including, for instance, calling an ONCIX witness to discuss what ONCIX had or ordering the production of what ONCIX had).

48. The Government's parroting back of ONCIX's one-line statement casts serious doubts on other Government representations in this case. At this point, we do not know whether certain representations are based on first-hand knowledge of the Government, are based on unchallenged statements from other agencies, or are technically true but incomplete.

e) If the Government is to be Believed, ONCIX Completed a Draft Damage Assessment with Record Speed

49. The Government's story requires the Court to believe that from October 2010 until 21 March 2012, ONCIX did not have anything that would qualify as a draft or interim damage assessment. However, sometime between 21 March 2012 (when the Government made its representation that "[redacted]") and 17 May 2012, ONCIX created a draft damage assessment.

50. Otherwise stated, ONCIX did nothing with the information it had collected for nearly 18 months and then, in less than 2 months, created a draft damage assessment. As if that weren't enough, it planned on creating a final damage assessment by mid-July 2012. In short, the Government is representing that ONCIX had nothing for 18 months – and that 4 months later, ONCIX will have produced a final damage assessment.

51. This conflicts with the Government's account of how damage assessments are completed. At oral argument, MAJ Fein explained, "Damage assessment themselves are living documents that capture damage as the date of the document. It doesn't mean that damage can't happen the next day; which is why it is a very long process." Article 39(a) Audio Recording 15 March 2012 (unauthenticated record of trial at p. 165). As is clear from MAJ Fein's own words, damage assessments do not go from "zero" to "final" in a matter of four months.

52. Moreover, as pointed out by the Defense in oral argument, page 4 of DOS damage assessment shows that ONCIX did have a draft damage assessment at the time the Government made its representation to the Court. Additionally, the damage assessment completed by the Department of Homeland Security indicates that it is for ONCIX's damage assessment. [6] Thus, either ONCIX is lying or the Government is lying.

f) The Government's Account of its *Brady* Obligations With Respect to the 63 Agencies Does Not Make Sense

53. On 23 February 2012, the Government represented at an 802 session and on the record that it had been conducting a *Brady* search for approximately a year and that it found no *Brady* material. Article 39(a) Audio Recording 23 February 2012, (unauthenticated record of trial at p.

[6] As previously stated, the Defense was provided notification of the Department of Homeland Security's damage assessment for the first time on 8 June 2012. The Government has yet to provide notification to the Court.

39). It stated that it had searched different sub-agency files, even going so far as to the Department of Agriculture.[7] In this respect, the Court stated:

> MJ: The government advised the Court that although it has been extensively engaged in evaluating executive branch and sub-branch files for discoverable information prior to referral, the government's due diligence obligations under the *Brady Williams* case law; duty to find, evaluate and disclose favorable and material evidence to the defense will take additional time because of the need to cull through voluminous classified and unclassified information contained throughout executive branch [and] sub-branch agencies that have been involved in the classified information disclosure investigations.

Id. at p. 38.

54. The Defense added the following:

> Mr. Coombs: Just that the when government spoke about its *Brady* search they stated at that time they had not found any *Brady* material even though they had looked for over a year.

Id. at p. 39.

55. The Court asked, "Is that correct?" to which MAJ Fein responded:

> MAJ Fein: Your Honor, that is correct but also at the same time [we] stated that material continues to evolve because this is an on-going issue.

Id.

56. The Defense assumes that these sub-agencies that the Government represented it had been searching for a year prior to the February 2012 motions argument are the same 63 agencies that it refers to in Appellate Exhibit C.

57. The Government's latest admissions (below) prove that its previous statements about its *Brady* search were not truthful.

> MAJ Fein: … The NCIX as explained in the Government's filing to explain the difference between assessments and investigations. The NCIX is chartered to do a national level, national counterintelligence review – a damage assessment at a national level. That's what their – what the counter espionage act, excuse me, what the counterintelligence act set up. We briefed that in our filing. That is their charter. They do it government wide. They receive inputs from different government organizations. What Mr., excuse me, what the Defense has already

[7] "Mr Coombs: Even going so far as going to the Department of Agriculture to see if they had potential information there. And then they stated; and they even state it here, that they have not found any *Brady* material." Transcript at p. 106.

referenced and we have already produced to the Defense are different entities that have submitted their information to NCIX. We have not reviewed any document that belongs to NCIX. Period. *What we have done is, we have gone to the originator, the owner of the information that was submitted to NCIX. The original entities, to request approval to review their material, and if discoverable, turn it over to the Defense. And that is what the Defense has been receiving.* Specifically, the ultimate source your Honor of these documents is not NCIX. The source of the documents that the Defense is receiving in discovery are the actual agencies. *So as mentioned earlier on the record today, the Department of Agriculture or the, or any of the executive departments that the Defense has received, those organizations independently did their own and submitted those.* We have gone to those agencies for efficiency purposes. We have acquired the documents, or attempting to finalize acquiring all of the documents. And then once we obtain them or review them get approval to turn them over if discoverable and give them to the Defense immediately once we get that approval.

...

MAJ Fein: Correct your Honor. It is our belief, at that point [February 2012], that they were compiling these other assessments *we knew about because we started reaching out once they told us about it – to go get those*. But, that they had no other documentation that would be subject to discovery – based off this response. So, yes we did know that their individual organizations were submitting theirs, and *that is why we went out to those independent organizations to get them approval and disclose them.*

Article 39(a) Audio Recording 6 June 2012 (emphases supplied).

58. As is clear from the above passages, MAJ Fein states he became aware that ONCIX had received inputs from various agencies in February 2012, and it was at that point that the Government began reaching out to these different agencies. ("we knew about [these other agencies] because we started reaching out once they told us about it – to go get those."; "So as mentioned earlier on the record today, the Department of Agriculture or the, or any of the executive departments that the Defense has received, those organizations independently did their own and submitted those"). *Id.*

59. Indeed, this is confirmed in an email from [redacted] (a paralegal for the Government) to the EPA. [redacted] writes on February 27, 2012:

[redacted]. *See* Attachment.

60. It is clear that it wasn't until mid-February 2012 that the Government even began searching for *Brady* material from the 63 agencies. The search happened only because ONCIX told the Government that the Government could not "review copies of … [various] organization's documents in [ONCIX's] possession" and must go to the original source of the documents.[8] This begs the million dollar question: If the Government did not begin its search of the 63 agencies until mid-February 2012, how could the Government represent to the Court that it had *already* searched these same files in the year prior to referral? This simply does not make sense. The Government either did not search these files for the one-year prior to February 2012 (in which case, the Government will have misrepresented that it had conducted such a search) or the Government did search these files, but concluded that the information therein was not discoverable (in which case, this would reveal that: a) the Government did not understand the *Brady* standard at the time of the original search; and b) that the Government misrepresented when it learned of these other agencies' involvement). The Government's dates and representations simply do not line up and it should finally be held to account for its continued misrepresentations.

61. Moreover, [redacted] email reveals that the Government had been "[redacted]." *Id.* If this is the case, then the Government should have known what ONCIX had by way of a damage assessment. Moreover, how could the Government have been "coordinating" with ONCIX for a year and still not be reaching out to the individual agencies that provided inputs until February 2012? What was the Government doing for that year? Why did it take a year for the Government to figure out that they had to go back to the individual agencies for their respective damage assessments? None of this makes any sense.

g) The Letter from MAJ Fein to the General Counsel of ONCIX Demonstrates that The Government Did Not Just Learn of the ONCIX Draft on 17 May 2012

62. The letter from MAJ Fein to [redacted] at ODNI, reveals that the Government did not just learn that ONCIX had a draft damage assessment at the 17 May 2012 meeting as MAJ Fein suggests. MAJ Fein paints a picture where, after sharing the Court's 11 May 2012 ruling with ODNI/ONCIX, individuals at ONCIX determined that they did, in fact, have a draft damage assessment and convened a meeting with the Government to determine the way forward. If this was the case, the letter to [redacted] would have read quite differently. It might have read something to the effect:

> [redacted]:
>
> During the March 2012 motions argument and in subsequent emails to the Court, based on the input received from NCIX, the prosecution proffered to the Court

[8] The Government says that it began searching the 63 agencies for damage assessments once ONCIX "told [the Government] about it" in the February timeframe. However, the Government also says "We have not reviewed any document that belongs to NCIX. Period." *See* Article 39(a) audio recording 6 June 2012. Presumably, this means that ONCIX gave the Government the list of the 63 agencies that had submitted damage assessments to ONCIX orally. Again, it is hard to believe that a representative from ONCIX would be on the phone with trial counsel, while the latter wrote down each and every one of the 63 agencies. More likely than not, the Government had seen a copy of the ONCIX damage assessment, or at least a copy of the list of agencies that ONCIX had contacted.

> that NCIX had not completed any interim or final damage assessment. We have since learned, after a meeting on 17 May 2012, that NCIX does, in fact, have a draft damage assessment. Given this new information, we must inform the Court that NCIX does have a draft damage assessment. …

63. Nowhere in the letter does MAJ Fein say that he has just learned that ONCIX has a draft damage assessment. Instead, he speaks about the "draft" as though he has known about it all along. *See* Appellate Exhibit CXIX, Letter from MAJ Fein to [redacted], 24 May 2012 ("[redacted]"). In fact, MAJ Fein asks for access to "[redacted]" and asks ONCIX to "[redacted]." *Id.* This statement reveals that there are in fact, different versions of the draft damage assessment that MAJ Fein apparently just learned about. If a draft was just completed, how can it be that there are already multiple versions of it? If MAJ Fein had just learned that ONCIX had a draft damage assessment, he would have asked [redacted] for "the draft damage assessment" not for "the most recent version of the draft damage assessment."

* * *

64. The above facts, coupled with the Defense's submissions in Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief); Appellate Exhibit CXX (Defense Response to Prosecution Notice to Court of ONCIX Damage Assessment) should reveal that things did not happen as the Government claims they did.

65. The Defense urges this Court to use Occam's Razor[9] – the simplest explanation is most likely the correct one. The simplest explanation here is the following: Both the Government and ONCIX knew that ONCIX had a draft damage assessment. The Government did not tell the Court this because the damage assessment is favorable to the accused and the Government believed that a draft damage assessment should not be discoverable. When the Court ruled *for the second time* that a draft damage assessment was indeed discoverable and the Defense filed its Motion to Compel Discovery #2, the Government realized it had to fess up to the Court about concealing the ONCIX damage assessment. This is, in reality, the most likely version of events – and the only version of events that does not require the Court to completely suspend common sense and better judgment.

II) The Government's Latest Submission Does Not Refute Any of the Defense's Allegations

[9] "Occam's razor is the law of parsimony, economy or succinctness. It is a principle urging one to select from among competing hypotheses that which makes the fewest assumptions and thereby offers the simplest explanation of the effect." *See* http://en.wikipedia.org/wiki/Occam's_razor.

66. The Government's latest response says a whole lot of nothing. As indicated, the response does not even attempt to address any of the factual inconsistencies and issues raised by the Defense, including, but not limited to, the following:

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 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?

67. Instead of answering these questions, or even one or two of these questions, the Government used the two-week extension by the Court to repeat what it has already said over and over again – that it understands *Brady* and it is working diligently to produce *Brady* discovery. The undisputed facts belie any assertion that the Government is being diligent in it *Brady* search. If it were, it would have answers to the questions outlined above.

68. Since the Government has not actually addressed the issue that it had indicated it would address, the Defense is instead left to respond to a slightly more robust argument that the Government has already made in its 24 May 2012 submission. *See* Appellate Exhibit C (Prosecution Response to Defense Motion to Compel Discovery #2). In this respect, the Defense would specifically like to address the following:

1. The Defense is not clear on why the Government is arguing in this motion that "[redacted]" and providing case citations to that effect. Government Response, p. 2-3. That is not what this motion is about. This motion is about whether the Government should be held to account for the steps it has taken in complying with discovery obligations. Thus, the Defense is unclear what the purpose of the discussion on pp. 2-3 is.

2. The Government is not correct when it states at p. 3 that "[redacted]." Under the military's version of *Brady*, R.C.M. 701(a)(6), discovery must be produced "as soon as practicable" without reference to the date of referral. Other rules, including R.C.M. 701(a)(2) refer to "service of charges" as being the triggering date – but not R.C.M. 701(a)(6).

3. The Government's statement on p. 3 that "[redacted]" is laughable. The Government states that "[redacted]" The Government here is referring to the fact that it provided these records as part of the FBI investigative file. The Defense estimates that approximately 90-95% of the file is redacted. There are pages upon pages of black in the file the Defense has received. To claim that the Government has gone "above and beyond" in producing travel and bank records (records which the accused *already has* because they are *his records*) is disingenuous to say the least.

4. The Government suggests at p. 4 that [redacted] though it concedes that "[redacted]." The Government is getting caught up again in the wrong issue. For the purposes of this motion, the Defense is seeking an accounting for the Government's due diligence obligations because things simply "do not add up." Whether we call it a "*Brady* violation" or something else doesn't really matter. However, the Defense would submit that a failure to conduct a diligent *Brady* search would constitute a *Brady*/discovery violation.

5. The Government states at p. 4, "[redacted]." The Defense submits that, in light of the evidence at the time, the Court's ruling was very generous and gave the Government the benefit of the doubt. Many events have come to light *after* the Court's ruling in March 2012 (e.g. the lack of diligence with respect to the Department of State; the ONCIX damage assessment; the FBI impact statement; the HQDA memo). The Government cannot continue to rely on the Court's ruling from three months ago to shield it from current scrutiny.

6. The Government seems to suggest that the Defense does not have the right to call the Government to task for its *Brady* failures because the Defense is concurrently raising motions to further the interests of PFC Manning. *See* p. 4 ("[redacted]"). To the extent that this is the implication of the Government's statement, it is preposterous. A Defense counsel is entitled to do everything to advance the interests of his client; indeed, if he does not, he may be subject to a claim for ineffective assistance of counsel. To suggest that the Defense should not complain about the timing of discovery because it, itself, is raising critical motions is absurd.

7. The Government has once again misrepresented the Defense's argument regarding R.C.M. 701(a)(6). *See* p. 4. Despite clarifying this for the Government no less than three or four times, the Government still believes that the Defense is saying that "[redacted]." For the fifth time, the Defense's argument is that files belonging to agencies that are closely aligned with the Government in this case are in the "possession, custody or control" of military authorities for the purposes of R.C.M. 701(a)(6). The Government refers to this claim as "novel" and "unorthodox." It is not novel or unorthodox. It is the law in federal court – and the Defense submits, it is the law in military courts as well.

8. The Government makes a convoluted argument at p. 5 ("[redacted]"). First, how is the Defense to know what the Government is doing with respect to discovery absent using the Government's responses? Second, it self-evident how a due diligence accounting would "[redacted]" If the Government provides an accounting, the Court and Defense will know what is being searched and not searched, and how we should proceed from here.

69. Moreover, the Government requests that, should an accounting be ordered, it be permitted to file the accounting *ex parte*. The Court should not permit an *ex parte* due diligence filing by the Government. Answering questions about the steps it has taken in discovery does not implicate attorney work-product. Indeed, the Government has already provided sample letters sent to various agencies, examples of the specific requests that were made, and the dates on which certain requests were made.

70. The Defense believes that the Government's attempt to account for its diligence *ex parte* is an attempt to protect it from scrutiny by the Defense. To date, it has been the Defense that has alerted the Court to the numerous and varied problems in the Government's submissions such as, the Government's use of the words "alleged", "completed" and "unaware"; the Government's citing of the federal appellate standard for *Brady*; the Government's obfuscation with respect to the difference between a "damage assessment" and an "investigation"; the Government's failure to follow-up on the HQDA memo etc. By providing a due diligence accounting to the Court *ex parte*, the Government may be more inclined to take liberties with the truth, because there is no one but the Military Judge to challenge the Government.[10]

71. The Defense submits that if, for whatever reason, there is a limited portion of the due diligence accounting that is classified, the Government should redact that portion and the

[10] It is ironic that the Government is requesting to submit a due diligence statement *ex parte,* while citing *United States v. Bumgarner*, 49 C.M.R. 770, 772 (A.C.M.R. 1974) for proposition that "objecting" is essential to "maintain[ing] the adversarial system."

Military Judge should decide whether that portion should be provided for the Defense. At the end of the day, if the Government has nothing to hide, it should not be afraid to account to Defense, the Court and the public at large for all the steps it has taken in this proceeding.

72. The Defense believes that 30 days is an unreasonably long period of time to chronicle its due diligence efforts. The purpose of such an accounting is so that the Court and the Defense know what is still outstanding and can proceed accordingly (e.g. by ordering certain files to be searched, etc.). In fact, the request for 30 days to provide a statement of its due diligence itself speaks volumes about the slow pace of discovery and lack of diligence of the Government. If the Government has been keeping track of what it is doing, there is no reason it should not be prepared to provide the accounting in a matter of *days*.

73. The Defense submits that the following passage from *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), wherein the Ninth Circuit affirmed the district court's decision to dismiss the indictment due to reckless violations of the government's discovery obligations, is apposite:

> Here, although the case involved hundreds of thousands of pages of discovery, the AUSA failed to keep a log indicating disclosed and nondisclosed materials. The AUSA repeatedly represented to the court that he had fully complied with *Brady* and *Giglio,* when he knew full well that he could not verify these claims. When the district court finally asked the AUSA to produce verification of the required disclosures, he attempted to paper over his mistake, offering "in an abundance of caution" to make new copies "rather than find the record of what we turned over." Only when the court insisted on proof of disclosure did the AUSA acknowledge that no record of compliance even existed. Finally, the dates on many of the subsequently disclosed documents post-date the beginning of trial, so the government eventually had to concede that it had failed to disclose material documents relevant to impeachment of witnesses who had already testified. In this case, the failure to produce documents and to record what had or had not been disclosed, along with the affirmative misrepresentations to the court of full compliance, support the district court's finding of "flagrant" prosecutorial misconduct even if the documents themselves were not intentionally withheld from the defense. We note as particularly relevant the fact that the government received several indications, both before and during trial, that there were problems with its discovery production and yet it did nothing to ensure it had provided full disclosure until the trial court insisted it produce verification of such after numerous complaints from the defense.

Id. at 1085. There are several important things about this passage. First, the court indicates that a diligent prosecutor would have kept logs or records of discovery; thus, a prosecutor would not require 30 days to disclose such information to the court. Second, *Chapman* provides precedent for a court to require a prosecutor to provide a due diligence accounting when it becomes clear that there are issues with discovery. Third, it is interesting that the prosecutors in *Chapman* who were found to have committed discovery violations used the two of the same expressions that the Government is so fond of using ("we understand and are complying with *Brady*" and "in an abundance of caution").

74. Finally, the Government apparently has not thought very carefully about its request that any delay be attributable to the Defense for speedy trial purposes.[11] If the Court orders the Government to conduct a due diligence accounting, it is because the Court believes that *something is not be right* in the discovery process. In such circumstances, how can the delay then be attributable to the Defense for speedy trial purposes?

75. In short, the Court should regard the Government lack of candor in its latest submission as revelatory. After the Court expressed serious concerns about the ONCIX damage assessment at the last motions argument, one would think that the Government would be direct and forthright with the Court at this point about certain key issues such as the FBI impact statement, the HQDA memo, etc. The fact that the Government hasn't been forthright – and instead insists that it will not provide any details absent a Court order tells us that something is very wrong with the discovery in this court-martial.

CONCLUSION

76. For all the reasons stated herein[12] the Defense moves for the Court to order the Government to provide a due diligence accounting of the steps it has taken to comply with its *Brady* obligations.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

---

[11] This is illustrative of the numerous nonsensical positions the Government takes in this litigation. For instance, the Defense requested witnesses from ONCIX, the FBI and DHS in support of the 25 June 2012 motions argument. The Government opposed on the basis that this was a new issue that should be litigated in July, *after the motions argument in which the witnesses would have testified.* In the Government's zeal to oppose any Defense request or motion, the Government has lost all common sense.

[12] as well as the reasons stated in Appellate Exhibit XCVI (Defense Motion to Compel Discovery #2); Appellate Exhibit XCVIII (Defense Reply to Government Response to Motion to Compel Discovery #2); Appellate Exhibit XCIX (Supplement to Defense Motion to Compel Discovery #2); Appellate Exhibit CI (Defense Reply to Prosecution Response to Supplement to Defense Motion to Compel Discovery #2; Defense Motion for Modified Relief); Appellate Exhibit CXX (Defense Response to Prosecution Notice to Court of ONCIX Damage Assessment); and the Defense's filings of 18 June 2012 and 21 June 2012 requesting witnesses for the purpose of this motion)