

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)	
)	
v.)	DEFENSE REQUEST FOR
)	CLARIFICATION OF
)	COURT RULING ON
)	MOTION TO COMPEL
MANNING, Bradley E., PFC)	DISCOVERY #2
U.S. Army, xxx-xx-9504)	
Headquarters and Headquarters Company, U.S.)	
Army Garrison, Joint Base Myer-Henderson Hall,)	DATED: 23 June 2012
Fort Myer, VA 22211)	

RELIEF SOUGHT

1. The Defense respectfully requests clarification/elaboration on para. 7 of p. 5 of the Court’s Ruling: Defense Motion to Compel Discovery #2. The paragraph reads:

For files pertaining to PFC Manning within the possession, custody, or control of military authorities that the Government is aware of and has searched for *Brady* material, Trial Counsel must turn over to the Defense any information that is obviously material to the preparation of the defense. ...

FACTS

2. At oral argument, the Court and MAJ Fein had the following colloquy:

Court: So when you’re doing reviews then, are you looking at these reviews for both 701(a)(6) and 701(a)(2)?

MAJ Fein: [pause] Ma’am for DIA information, we have been reviewing it for 701(a)(2) as well in anticipation if the Court does rule in favor based off a specific request from the Defense so we do not have to review the documents again.

Court: Okay, let’s go a little bit more broadly here. When you are reviewing documents for 701(a)(2), if the Government is alerted that this could be material to the defense, the Government’s got an obligation to turn this over.

MAJ Fein: The Government’s ... the Government at least argues that it’s not just that the documents themselves are material, it would be certain information – just like the defense is arguing or proffered to the court in their response to the *ex parte* motions of 505(g)(2). Here are the categories of information. The prosecution makes the initial determination of material to the preparation of the defense and the defense argues – provides – as they’ve done and then it’s like “Okay, that’s what we’re on notice of.” We’re absolutely on notice that any type

of damage that resulted, for instance, is material to the preparation of the defense based off of the year and a half of requests. So as each discovery request comes in, we process it, we add it to our database of what we're reviewing and we start again, churning the review of these documents. We maintain still based off today's litigation that those documents are still not 701(a)(2), subject to the Court's order, but because we do not have a specific request. It's all documents at DIA with some caveats. Not any type, not anything directed at a certain type of information. I mean the Defense is in the best position to know exactly what was and was not compromised from their client. They could be making specific requests for what type of information they're looking for. So it's not that the Defense is in an odd position of not being aware of what could be out there and if, as the Defense just stated on the record, as if the Information Review Task Force, which it was, started to review all the possible compromised documents then they should know what was compromised. We would know from reviewing the files what's there and they can make specific requests. But it goes back to, it's a generic request that's copied and pasted from 701(a)(2) for pretty much every type of document out there.

Court: What volume of information are we talking about?

MAJ Fein: Your honor, we have probably keep going, about ... I'll get you that information before we close the Court today.

...

MAJ Fein: If the Court's willing to accept the Defense's argument, that means that any document that is in the possession, custody or control of military authorities that they simply request and make no other showing, then they are entitled to inspect. Your honor, especially dealing with classified information, it goes back to ... that this is a tactic in order to essentially slow this prosecution down, slow this court martial down, on one hand arguing that, for instance, in the upcoming *Brady* motion we've given too much information for them to identify stuff and now they want everything, just because they've made a request. We've maintained, the prosecution has maintained, from the very first request, "Provide us with the specific... provide us with an adequate basis and a specific factual basis and we'll be able to process it." All documents from DIA and IRTF is not sufficient. Yes, we have prepared because we do want to move this case and we do not want to have unneeded delay in order to do this. And I have to review thousands of pages of documents again, but again, these are classified documents and the Defense notes that. And yet they still maintain a general request just because they make the request that it must be material to the preparation of the defense with no other showing.

Court: I understand that, MAJ Fein, but when the Government is reviewing these documents, the Government has a burden, an obligation, under R.C.M. 701(a)(2) to disclose material to the preparation of the defense. So if the Government while observing, while looking through these documents, sees something that you think is material to the preparation of the defense, and you're not turning it over

because they didn't ask for it, I'm going to order everything turned over to me for *in camera* review.

MAJ Fein: Yes, ma'am.

Court: So is the Government going to look at this with an eye of the defense counsel and ...

MAJ Fein: We absolutely will, ma'am. Ah - to turn over material based off of just what the Defense gives us and what they consider material to the preparation of the defense, we will review the documents for that. Cause then, that would qualify as a specific request and we would do it.

Court: We're having a circular argument here again. If you're looking at document and you say, as MAJ Fein, "Boy, if I were a defense counsel, I would find this material to the preparation of the defense" are you going to hold onto it until they request it?

MAJ Fein: No, your honor, we're not.

Court: Okay.

Mr. Coombs: ... If I didn't understand him correctly, he's free to correct me. But, I believe he said, "We have documentation that we've identified that's material to the preparation of the defense and we're prepared, if the court orders us to hand it over, to hand it over. But until we receive a specific request, we're not doing so." And if now, based upon the Court's exchange with MAJ Fein, he now realizes, "Okay, we now need to turn this over" then that's a clarification that the Defense would want to nail down. Does he have documents right now that are material to the preparation of the defense that he's been holding onto because he believed that we needed to make a specific request for it?

Court: I'll ask you that question then.

MAJ Fein: Yes, your honor. I'd ask that we can get back to the Court because we'd have literally have to look at the computer system and we'll be able to answer the Court.

Audio from Article 39(a) session, 6 June 2012. The Government never did "get back to the Court" on two issues the Court asked about:

- a) "What volume of information are we talking about?" and;
- b) "Does [the Government] have documents right now that are material to the preparation of the defense that [the Government] been holding onto because [it] believed that [the Defense] needed to make a specific request...?"

Id. In addition, the Government did not state whether it has a similar database where it kept track of documents that are material to the preparation of the defense under R.C.M. 701(a)(2) with respect to documents from HQDA; Army Criminal Investigation Command (CID); Defense

Information Systems Agency (DISA); United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM) and U.S. Cyber Command (CYBERCOM).

ARGUMENT

3. The dialogue between the Court and MAJ Fein at the previous motions argument reveals that the Government is resisting producing information that is material to the preparation of the defense at all costs. The Defense finds particularly troublesome the following exchange:

Court: I understand that MAJ Fein but when the Government is reviewing these documents, the Government has a burden – an obligation under R.C.M. 701(a)(2) to disclose material to the preparation of the defense. So if the Government while observing, while looking through these documents, sees something that you think is material to the preparation of the defense, and you're not turning it over because they didn't ask for it, I'm going to order everything turned over to me for *in camera* review.

MAJ Fein: Yes, ma'am.

Court: So is the Government going to look at this with an eye of the defense counsel and...

MAJ Fein: We absolutely will, ma'am. Ah - to turn over material based off of just what the defense gives us and what they consider material to the preparation of the defense, we will review the documents for that. Cause then, that would qualify as a specific request and we would do it.

Id. The Defense would ask the Court to consider what would have happened if the Court simply left the conversation at "I'm going to order everything turned over to me for *in camera* review", to which MAJ Fein responded "Yes, ma'am." At this point, the Court would have assumed (quite properly) that MAJ Fein understood the Court's direction to provide any information that is material to the preparation of the defense absent a specific request. It is only because the Court fortuitously asked the follow-up question, "So is the Government going to look at this with an eye of the defense counsel and..." that the Court learned that the Government had *no intention* of actually complying with the Court's order. Instead, the Government was simply planning on maintaining its firmly-entrenched position that it would only review documents when it received a "specific request."

4. In light of this conversation, the Defense believes that the Government will interpret the Court's order as narrowly and as disingenuously as possible. The Defense also believes, based on previous discovery arguments the Government has made, that the Government will take an untenable position on what information is "material to the preparation of the Defense." By way of illustration, the Government believed that the FBI investigative file pertaining to PFC Manning was *not* material to the preparation of the defense or relevant and necessary. The Court quizzically asked MAJ Fein something to the effect, "How could an investigative file *not* be material to the preparation of the defense?" Based on the Government's extremely narrow and incorrect reading of the discovery rules; its position on the FBI investigative file not being material the preparation of the defense; its position in the 6 June 2012 motions argument; its

failure to get back to the Court on certain key issues; its failure to timely disclose to the Court the existence of certain critical discovery in this case (namely, the ONCIX and FBI damage assessments); and its repeated tendency to define itself out of its discovery obligations, the Defense requests that the Court provide the following additional guidance with respect to the Government's R.C.M. 701(a)(2) obligations:

a) Specifically name the organizations that have files that fall under the R.C.M. 701(a)(2) standard. The Defense believes that this would include at least the following:

- Headquarters Department of the Army (HQDA)
- Army Criminal Investigation Command (CID)
- Defense Intelligence Agency (DIA)
- Defense Information Systems Agency (DISA)
- United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM)
- U.S. Cyber Command (CYBERCOM)

b) Clarify the Court's statement that the Government must "turn over to the Defense" "files pertaining to PFC Manning ... that the Government is aware of and *has searched* for *Brady* material." (emphasis added). The Defense believes this sentence can be read as suggesting that the Government must *only* turn over only documents under R.C.M. 701(a)(2) that it has *already searched* that would qualify as "material to the preparation of the defense." The Defense thus believes that that the Government may state that the Court's order does not require the Government to turn over information that is material to the preparation of the defense for files that *it has not yet reviewed*. In other words, the Defense believes that the Government may read the Court's order as applying only retroactively and not prospectively.

c) Clarify that for files within the possession, custody and control of military authorities that that the Government has already reviewed (dating back to the beginning of the case), the Government must, if it has not already done so, review those files under the R.C.M. 701(a)(2) standard. In other words, the Defense does not believe that the Government has, for the past two years, been reviewing files within the possession, custody and control of military authorities under the R.C.M. 701(a)(2) standard. To the extent that it has not done so, the Defense requests that this Court order the Government to go back and re-review such documents under the R.C.M. 701(a)(2) standard. Any other order would reward the Government for its flagrant disregard for two years of the R.C.M. 701(a)(2) standard.

The Defense does not believe that the Government has kept a log or database for the past two years of every document within its possession, custody or control that it has reviewed and that would qualify as discoverable under R.C.M. 701(a)(2) in the event that the Government would have to produce these documents for discovery purposes. If the Government represents that it has kept such a log or database for the past two years, the Defense would ask that the Court order immediate production of that log or database; the Defense would even agree that such a document could be disclosed to the Court *ex parte* simply to demonstrate that the Government has, in fact, been keeping track of all discovery in its possession, custody and control under the R.C.M. 701(a)(2) standard for the past two years.

d) Clarify that the Court’s order applies not only to files the Government has reviewed for *Brady* purposes, but also to *all* files that the Government has reviewed for its own purposes (e.g. its case in chief; sentencing; etc.).¹ In other words, if the Government has encountered any document that is material to the preparation of the defense during its case preparation, broadly construed, it must turn that document over.

e) Clarify what the “material to the preparation of the defense” standard under R.C.M. 701(a)(2) entails. The Defense submits that the Court should instruct the Government that the “material to the preparation of the defense” standard should be equated as anything that would be “helpful” to the Defense. “Helpful” in this sense means anything that is relevant and would be *helpful for the Defense to know* – not evidence that is helpful, as in favorable, to the Defense. That is, information that is detrimental to the Defense could be, and usually would be, *helpful for the Defense to know*. As argued previously, the case law reaffirms that “material” under R.C.M. 701(a)(2)(A) is not a difficult standard to satisfy. In *United States v. Cano*, 2004 WL 5863050 at *3 (A. Crim. Ct. App. 2004), our superior court discussed the content of the “materiality” standard under R.C.M. 701(a)(2)(A):

In reviewing AE V in camera, the military judge said that he examined the records and AE III contained “everything . . . [he] thought was even remotely potentially helpful to the defense.” That would be a fair trial standard, but our examination finds a great deal more that should have been disclosed as “material to the preparation of the defense.” We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.

See also United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004) (“The defense had a right to this information because it was *relevant* to SA M’s credibility and was therefore material to the preparation of the defense for purposes of the Government’s obligation to disclose under R.C.M. 701(a)(2)(A).”(emphasis added); *United States v. Adens*, 56 M.J. 724, 733 (A. Ct. Crim. App. 2002) (“We respectfully disagree with our sister court’s narrow interpretation that the term ‘material to the preparation of the defense’ in R.C.M. 701(a)(2)(A) and (B) is limited to exculpatory evidence under the *Brady* line of cases . . . As noted above, R.C.M. 701 is specifically intended to provide ‘for broader discovery than is required in Federal practice . . . , and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ.”); *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are ‘material to the preparation of the defense.’ R.C.M. 701(a)(2)(A). Thus, an accused’s right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.”).

¹ At oral argument, the Court stated, “If you’re looking at document and you say, as MAJ Fein, “Boy, if I was a defense counsel, I would find this material to the preparation of the defense” are you going to hold onto it until they request it?” The Defense believes that the Court intended its ruling to apply to *all documents* with trial counsel’s possession, custody and control that it reviewed – and not simply that limited sub-set of documents that the Government reviewed for *Brady*.

5. The Defense would propose a clarification to the following effect:

Under R.C.M. 701(a)(2), the Government has an obligation to turn over to the Defense any “books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.”

Accordingly, for any documents² that the Government has previously reviewed or will review in the future, for any purpose, that is in the possession, custody or control of military authorities, the Government must apply the R.C.M. 701(a)(2) standard. To clarify, if the Government has reviewed a document in its possession, custody or control either for *Brady* purposes or for any other purpose, the Government must also determine whether the document satisfies the R.C.M. 701(a)(2) standard. To the extent that the Government has not been reviewing documents within its possession, custody and control under the R.C.M. 701(a)(2) standard, it must re-review the documents using the correct standard. To the extent that the Government has been reviewing documents within its possession, custody and control under the R.C.M. 701(a)(2) standard, it must disclose those documents to the Defense forthwith. The Court also orders the Government to certify to what extent the Government has already been applying (or not applying) the R.C.M. 701(a)(2) standard in accordance with this order.

The documents that are subject to this portion of the Court’s order are those possessed by: HQDA; Army Criminal Investigation Command (CID); Defense Intelligence Agency (DIA); Defense Information Systems Agency (DISA); United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM); CYBERCOM; and any other agencies under military authority that the Government has not disclosed to the Court but whose files the Government has searched or has an obligation to search.

The Court also provides guidance to the Government on the R.C.M. 701(a)(2) standard. The word “material” in the expression “material to the preparation of the Defense” should not be read as being synonymous with “game-changing” or “extremely important.” Rather, the Government is obligated to disclose anything that is relevant and would be *helpful for the Defense counsel to know* as it prepares its case. The Court instructs the Government to heed the words of the Army Court of Criminal Appeals in *United States v. Cano*, 2004 WL 5863050 at *3 (A. Crim. Ct. App. 2004), “We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.” In addition, to be material to the preparation of the defense, the documents do not need to be admissible at trial.

² Documents should be read broadly to include “books, papers, documents, photographs, tangible objects, buildings, or places.” It should also be read to include any electronic material.

United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are ‘material to the preparation of the defense.’ R.C.M. 701(a)(2)(A). Thus, an accused’s right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.”). Further, the documents do not need to be favorable – even unfavorable documents can be, and often are, material to the preparation of the Defense. If the Government has any doubt as to whether the documents should be disclosed, it should err on the side of caution and either disclose the documents or apply to the Court for *ex parte* review of the documents.

6. The Defense is certain that the Government will object to any clarification by the Court, claiming something to the effect that it “absolutely understands” the Court’s order and will comply with it. The Defense believes that the Court should not take the Government’s representations that it understands both the letter – and the spirit – of the Court’s order at face value. If the Government truly is planning on complying with the Court’s order, there should be nothing objectionable about additional clarification in this matter. The Defense submits that the Court should regard any objection by the Government to this clarification as evidence that the Government had not planned on complying with the Court’s order.

RELIEF SOUGHT

7. For the reasons identified herein, the Defense requests that this Court provide additional direction on para. 7, p. 5 of the Court’s Ruling: Defense Motion to Compel Discovery #2.

Respectfully submitted,

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Civilian Defense Counsel