

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, xxx-xx-9504)

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE MOTION FOR
APPROPRIATE RELIEF UNDER
R.C.M. 906(b)(6)**

BILL OF PARTICULARS

DATED: 16 February 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to R.C.M. 906(b)(6) and the Fifth, Sixth and Eighth Amendments to the United States Constitution to direct the Government to file a bill of particulars in the subject case on the ground that it is necessary for him to understand the charges against him so that he may adequately prepare his defense and not be subjected to unfair surprise at trial.

BURDEN OF PERSUASION AND BURDEN OF PROOF

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

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred without special instructions to a general court-martial on 3 February 2012.

WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referred charge sheet in support of its motion.

LEGAL AUTHORITY AND ARGUMENT

6. Under 906(b)(6) of the Rules for Courts-Martial, an accused is entitled to a bill of particulars at any time, subject to conditions as justice may permit. The discussion to this rule states in pertinent part:

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of the trial and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

This mirrors federal civilian criminal practice, and Rule 7(f) of the Federal Rules of Criminal Procedure sets out similar standards. *See Wong Tai v. United States*, 273 U.S. 77, 80-81, 82 (1927); *United States v. Rosa*, 891 F.2d 1063, 1066 (3d Cir. 1989) (explaining that the drafters of Rule 7(f) intended to “encourage a more liberal attitude by the courts toward bills of particulars”) (internal quotations omitted); *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987); *United States v. Birmley*, 529 F.2d 103 (6th Cir. 1976); *see also Coffin v. United States*, 156 U.S. 432 (1895) (“It is always open to the defendant to move the judge before whom trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid the danger of injustice.”) (internal citations omitted); *United States v. Miller*, 543 F.2d 1221 (8th Cir. 1976), *cert. denied*, 429 U.S. 1108 (1977).

7. In military practice, the defense typically needs to secure specific details by filing a bill of particulars “[b]ecause the military uses a short form of pleading and a recitation of the manner and means of committing the crime is not ordinarily contained in the specification[.]” *United States v. Newman*, 25 M.J. 604, 606 n.3 (A.C.M.R. 1987) (citing *Glasser v. United States*, 315 U.S. 60, 66 (1942), *partially superseded on other grounds by rule as stated in Bourjaily v. United States*, 483 U.S. 171 (1987)). While a bill of particulars should not be used to conduct discovery of the Government’s theory of the case, it can be used to find out “what the Government claims.” *Id.* In other words, a bill of particulars may be used to clarify the specific theory upon which the Government intends to rely. *Id.* Therefore, defense counsel may always use a bill of particulars to challenge an uncertain or vague specification. *United States v. Alef*, 3 M.J. 414, 419 n.18 (C.M.A. 1977); *United States v. Saintaude*, 56 M.J. 888, 889 n.2 (A.C.C.A. 2002). Or, put in another way, a “general averment of criminal conduct” is “always subject to a motion for further particularization.” *Newman*, 25 M.J. at 606 (citing *United States v. Williams*,

31 C.M.R. 269, 271 (C.M.A. 1962)); *see United States v. Paulk*, 32 C.M.R. 456, 458 (C.M.A. 1963) (explaining that “the purpose of a bill of particulars is to narrow the scope of the pleadings”). In addition to the standards set out in R.C.M. 906(b)(6), the following traditional test provides further guidance to determine sufficient specificity:

Not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Schwarz, 15 M.J. 109, 111 (C.M.A. 1983) (quoting *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)); *see Hamling v. United States*, 418 U.S. 87, 117 (1974). Finally, “a request for a bill of particulars has constitutional implications, as it is intended to avoid unfair vagueness in a charge and potential consequent due process and double jeopardy violations.” *United States v. Harris*, 52 M.J. 665, 667 (A. Ct. Crim. App. 2000).

Article 104 – Aiding the Enemy

8. In the instant case, PFC Manning is charged with one specification of aiding the enemy. The Specification of Charge I reads as follows:

In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, without proper authority, knowingly give intelligence to the enemy, through indirect means.

With regard to this charge, the Defense requests the following particulars:

a. Who is the alleged enemy? The charge sheet only states that PFC Manning knowingly gave intelligence to the enemy. Thus, it fails to specify who the alleged “enemy” is for purposes of the specification. Under R.C.M. 906(b)(6), this failure to state with “sufficient precision” the identity of the alleged enemy will hamper PFC Manning’s ability to adequately prepare for trial. Under the Military Judges’ Benchbook, “enemy” is defined as including not only organized opposing forces in a time of war, but also any other hostile body that our forces may oppose and any citizen of an enemy Government. In light of this broad definition, PFC Manning cannot adequately defend himself without knowing the identity of the alleged enemy. Therefore, PFC Manning needs to be informed of this information so that he can exercise his Sixth Amendment right to present a defense.

b. How did PFC Manning knowingly give intelligence to the enemy? The charge sheet states that PFC Manning did “knowingly give intelligence to the enemy.” Article 104 of the UCMJ prohibits any unauthorized communication with an enemy and identifies “[g]iving intelligence to the enemy [a]s a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence.” In order for PFC Manning to prepare for trial, he needs to be informed of how the Government claims this offense occurred. The Defense is not requesting disclosure of the Government’s theory of the case. Rather, the requested information

is necessary for the Defense to understand specifically what conduct of PFC Manning is considered by the Government to constitute “knowingly giv[ing] intelligence to the enemy.” Without such information, PFC Manning will not be able to adequately exercise his Sixth Amendment right to present a defense.

c. What was the “indirect” means allegedly used in order to aid the enemy? The charge sheet states that these offenses were allegedly committed through “indirect means.” The specification fails to specify by what manner the alleged offense of aiding the enemy was perpetrated. Knowledge of the means by which this crime is alleged to have been perpetrated is essential to the adequate preparation of PFC Manning’s defense. *See Schwarz*, 15 M.J. at 111. Therefore, the Government’s blanket allegation that PFC Manning aided the enemy through “indirect means” does not help PFC Manning in preparing his defense. In fact, PFC Manning is susceptible to unfair surprise at trial since he does not know what the Government will argue as to the indirect means through which he allegedly aided the enemy. Without clarification from the Government, PFC Manning will not know what type of evidence to present to refute the Government’s contentions at trial. Therefore, he may be forced to waste valuable time preparing for all contingencies due to the vagueness of the charge, while the Government hones in on its single theory. *See Bortnovsky*, 820 F.2d at 575 (finding that the accused must not be compelled to wade through thousands of documents in an effort to locate materials essential to his defense); *see also Newman*, 25 M.J. at 606; *Alef*, 3 M.J. at 419.

d. What “intelligence” is the Government alleging PFC Manning gave to the enemy? The charge sheet states that, without proper authority, PFC Manning knowingly gave intelligence to the enemy. The specification fails to specify what intelligence is alleged to have been given to the enemy. Knowledge of the specific intelligence allegedly given to the enemy is essential to the adequate preparation of PFC Manning’s defense. *See Schwarz*, 15 M.J. at 111. As with the term “indirect means,” the Government’s allegation that PFC Manning knowingly gave intelligence to the enemy does not help PFC Manning in preparing his defense. PFC Manning is susceptible to unfair surprise at trial since he does not know what intelligence information the Government believes supports the charged offense. Without clarification from the Government, PFC Manning will not know what type of evidence to present to refute the Government’s contentions at trial. *See Bortnovsky*, 820 F.2d at 575; *Newman*, 25 M.J. at 606; *Alef*, 3 M.J. at 419.

General Article 134 – Wrongfully and Wantonly Causing Intelligence to be Published

9. In addition to the charge of aiding the enemy, PFC Manning is charged with one specification of a violation of Article 134, UCMJ, in that he is alleged to have “wrongfully and wantonly cause[d] to be published on the internet intelligence belonging to the United States Government, having knowledge that intelligence published on the internet is accessible to the enemy[.]” The Defense requests a bill of particulars on the same areas detailed above. *See* discussion in paragraph 8, *supra*.

a. Who is the alleged enemy?

b. In what manner did PFC Manning wrongfully and wantonly cause intelligence to be published on the internet? In order for PFC Manning to prepare for trial, he needs to be

informed of how the Government claims this offense occurred. The requested information is necessary for the Defense to understand specifically what conduct of PFC Manning is considered by the Government to constitute “wrongfully and wantonly cause intelligence to be published.” Without such information, PFC Manning will not be able to adequately exercise his Sixth Amendment right to present a defense.

General Article 134 – Stealing, Purloining or Converting in Violation of 18 U.S.C. Section 641

10. PFC Manning is also charged with five specifications of a violation of Article 134, UCMJ dealing with 18 U.S.C. Section 641. With respect to these Specifications under Charge II, the Defense requests the following additional information:

a. What specific theory of culpability does the Government intend to rely upon? In other words, does the Government allege that PFC Manning “stole”, “purloined” or “converted”? While a bill of particulars should not be used to conduct discovery of the Government’s theory of the case, it may be used to clarify the specific theory upon which the Government intends to rely. See discussion in paragraph 7, *supra*. The Government’s general allegation that PFC Manning did “steal, purloin, or knowingly convert” the charged information does not help PFC Manning in preparing his defense. In fact, PFC Manning is susceptible to unfair surprise at trial since he does not know what the Government which theory the government will argue. Without clarification from the Government, PFC Manning will not know what type of evidence to present to refute the charged offense. Therefore, he may be forced to waste valuable time preparing for all contingencies due to the vagueness of the charge, while the Government hones in on its single theory. See *Bortnovsky*, 820 F.2d at 575; *Newman*, 25 M.J. at 606; *Alef*, 3 M.J. at 419.

b. If the government is alleging that PFC Manning stole, purloined and converted the charged items, does each theory of culpability apply equally to every charged item?

General Article 134 – Espionage in Violation of 18 U.S.C. Section 793(e)

11. PFC Manning is also charged with eight specifications of a violation of Article 134, UCMJ dealing with 18 U.S.C. Section 793(e). With respect to these Specifications under Charge II, the Defense requests the following additional information:

a. In Specification 3, the Government alleges “more than one classified memorandum produced by a United States Government intelligence agency...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

b. In Specification 5, the Government alleges “more than twenty classified records from the Combined Information Data Network Exchange Iraq database...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

c. In Specification 7, the Government alleges “more than twenty classified records from the Combined Information Data Network Exchange Afghanistan database...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

d. In Specification 9, the Government alleges “more than three classified records from a United States Southern Command database...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

e. In Specification 10, the Government alleges “more than five classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

f. In Specification 13, the Government alleges “more than seventy-five classified United States Department of State cables...”. The Defense requests that the Government identify the exact number and specific records it believes supports this specification for the Defense’s review.

General Article 134 – Knowingly Exceeding Authorized Access in Violation of 18 U.S.C. Section 1030(a)(1)

12. PFC Manning is also charged with two specifications of a violation of Article 134, UCMJ, alleging that he “knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct . . . obtained information[,]” namely, diplomatic cables, in violation of 18 United States Code Section 1030(a)(1). The Defense requests the Government to provide the following particulars:

a. How did PFC Manning “knowingly exceed[] authorized access on a Secret Internet Protocol Router Network computer in Specification 13 of Charge II?” This information is necessary so that PFC Manning may adequately prepare a defense to the offense charged in these two specifications. The Government fails to specify in what manner PFC Manning exceeded his authorized access to the Secret Internet Protocol Router Network computer. This information is essential to PFC Manning’s adequate preparation of his defense. *See Schwarz*, 15 M.J. at 111; *see also* discussion in paragraph 7, *supra*.

b. How did PFC Manning “knowingly exceed[] authorized access on a Secret Internet Protocol Router Network computer in Specification 14 of Charge II?”

Article 92 – Violation of a lawful general regulation

13. Finally, PFC Manning is also charged with five specifications of a violation of UCMJ Article 92. With respect to the Specifications under Charge III, the Defense requests the following particulars:

a. In Specification 1, what is the alleged conduct that the Government believes was an attempt to bypass network or information system security mechanisms?

b. In Specification 2 and 3, what is the unauthorized software alleged to have been added to the Secret Internet Protocol Router Network computer?

c. In Specification 2 and 3, which computer is the Government alleging the software was added to?

d. In Specification 2 and 3, how is the Government alleging the software was added to the computers?

e. In Specification 4, how does the Government allege PFC Manning used an information system in a manner other than its intended purpose?

Although the reasons for these narrowing questions appear self-evident due to the vagueness of the specifications as charged, further elaboration will be provided during argument upon this Court's request.

14. In sum, these vague specifications are unconstitutional in that they infringe upon PFC Manning's Sixth Amendment right to prepare and present a defense. *See United States v. Williams*, 40 M.J. 379, 380 (C.M.A. 1994) (citing *Fawcett v. Bablitch*, 962 F.2d 617 (7th Cir. 1992)). The failure of the Government to furnish the information sought, well in advance of trial, would be a denial of due process and a clear violation of the rights guaranteed by the Fifth, Sixth, and Eighth Amendments to the Constitution of the United States. *See generally Birmley*, 529 F.2d 108 (6th Cir. 1976); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Cole v. Arkansas*, 333 U.S. 196 (1948).

CONCLUSION

15. Based on the above, the Defense requests that the Court order the Government to file a bill of particulars on the above requested information.

Respectfully submitted,

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