IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL IDENTIFICATION OF**
	)	**BRADY MATERIALS**
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 10 May 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 701(a)(6), respectfully requests that the Government be compelled to identify *Brady* material when providing discovery to the Defense.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to 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, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

4. To date the Government has provided the Defense with twelve (12) pages of *Brady* material taken from an assessment/investigation/working document review by the Office of the National Counterintelligence executive (ONCIX), Office of the Director of National Intelligence (ODNI), and the Information Review Task Force (IRTF) of the Defense Intelligence Agency (DIA). *See* Attachment to Appellate Exhibit XXXI.

5. Additionally, the Government has provided the Defense with 458 files, totaling 6,905 pages, from the Federal Bureau of Investigation ("FBI"), which, "at a minimum", contains *Brady* material.

WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the following evidence in support of the Defense's motion:

a. Charge Sheet.

b. Government assertions during various R.C.M. 802 sessions.

LEGAL AUTHORITY AND ARGUMENT

7. The Defense submits that the Government's obligations under R.C.M. 701(a)(6) and *U.S. v. Brady*, 373 U.S. 83 (1963), should require it to provide applicable disclosures to the Defense independent of other disclosures. That is, this Honorable Court should require the Government to separate or identify *Brady* material due the circumstances of PFC Manning's case.

8. R.C.M. 701(a)(6) and *Brady* require that the Government disclose to the Defense all evidence that reasonably tends to negate guilt, reduce the degree of guilt or reduce an accused's punishment. *See also* AR 27-26, para. 3.8(d). While the rules and case law do not specifically require the Government to *identify* what material is *Brady*, it is clear that, under certain circumstances such a requirement would be warranted. *U.S. v. Skilling*, 554 F.3d 529 (C.A. 5th Cir., 2009). Indeed, it is well within this court's discretion to order such. *U.S. v. Salyer*, 2010 WL 3036444 (E.D.Cal.). Case law supports the Defense's position that, given the circumstances, specific identification of *Brady* material is warranted in PFC Manning's case.

9. *U.S. v. Hsia*, 24 F.Supp.2d 14 (D.D.C. 1998) is instructive on how the Government should go about fulfilling their obligation under *Brady* when there is voluminous discovery. There, the accused was provided with access to 600,000 documents. The court held, "[t]he government cannot meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to Ms. Hsia." *Id*. at 29-30. *See also, U.S. v. Rubin*, -- F.Supp.2d--, 2011 WL 5448066 (S.D.N.Y. 2011).

10. The court's ruling in *U.S. v. Salyer* also provides guidance. *Salyer* involved a case with millions of pages of discovery. The prosecution argued that its discovery obligations were satisfied by simply disclosing the voluminous documents to the Defense and pointed to several cases supporting their position that the Government has no duty to *identify Brady* material. While acknowledging the cases cited by the Government, the court rejected the Government

position and held that Government did have an obligation to both *disclose and identify Brady* material under the circumstances facing Salyer. The court was particularly persuaded by the sheer volume of discovery, the relatively small size of the Defense team, the accused's pre-trial confinement, the lack of parallel civil litigation with overlapping evidence and the lack of corporate assistance to sift through volumes of discovery. *Id.* at 7. *See also, U.S. v. W.R. Grace*, 401 F.Supp.2d 1060, 1080 (D.Mont 2005).

11. The factors set forth by the *Salyer* court were later adopted by the court in *U.S. v. Rubin*, *supra*. *Rubin* involved allegations of conspiracy to illegally rig bids, fix prices and manipulate the market investment instruments. *Id.* at 1. There were a total of 210 transactions that allegedly substantiated the alleged crimes and the discovery was voluminous. *Id.* While holding that the prosecution did not need to specifically identify *Brady* material, the court nonetheless weighed the factors considered by the *Salyer* court. In addition to noting that the discovery provided to the Defense was searchable, the court was also persuaded that the Defense had corporate assistance in the defense, there was "ongoing parallel civil litigation with overlapping documents and evidence" and there were multiple defendants with "overlapping discovery needs", the accused was not in pre-trial confinement, and there was not a small Defense team. *Id.* at 4. Clearly, the *Rubin* court adopted the factors set forth in *Salyer* in determining whether an exception to the general rule was warranted.

12. The circumstances of PFC Manning's case warrant a requirement that the Government specifically identify *Brady* material. Indeed, each of the factors discussed by the *Salyer* and *Rubin* courts weigh in favor of such a requirement.

a. PFC Manning has been in pre-trial confinement for nearly two years and has been denied the opportunity to participate in his defense in a truly meaningful way. PFC Manning has no opportunity to review much of the discovery in this case because the Joint Regional Confinement Facility ("JRCF") lacks the SCIF requisite for such review. Indeed, the discovery in question is only available in Rhode Island and Maryland, both thousands of miles from PFC Manning's location in Kansas.

b. The discovery provided by the Government is not text searchable. Moreover, the documents are not readily available to the Defense, as no member of the Defense team has easy access to the documents. Mr. Coombs is required to drive over 30 miles to gain access to the material in question, while CPT Tooman can currently only access the material by going TDY for several days at a cost of thousands of taxpayer dollars.

c. There are not multiple defendants, nor is there parallel civil litigation with overlapping discovery needs.

d. As a Soldier in the U.S. Army, PFC Manning has no corporate assistance with his defense.

e. The Defense team is relatively small compared to the Government. The Government has at least four (4) Officers working full time, one (1) Officer working part time, two (2) legal administrators and an unknown amount of paralegal support. By contrast, the Defense consists solely of Mr. Coombs, CPT Tooman, a legal administrator (who is currently in the process of

completing a PCS move) and the newly detailed counsel, MAJ Tom Hurley. Whereas the Government attorneys are geographically located in one place, the Defense is spread throughout the country with varying levels of access to evidence and PFC Manning.

f. The discovery in this case is already voluminous and, presumably, there is more to come.

13. There is incentive to rule in favor of the Defense so as to prevent the Government from burying *Brady* material in mountains of voluminous discovery. The courts in *Hsia* and *Salyer* each warned of the possibility of such a practice. At issue presently are nearly 7,000 pages of discovery, but there are, no doubt, tens of thousands of pages looming on the horizon. Ruling against the Defense on this motion creates the incentive for the Government to bury *Brady* material and force the Defense to sift through stacks of paperwork in order to prepare a competent defense – all while the Government has actual knowledge of *Brady* material. This is not in accordance with the spirit of *Brady*.

14. The Government has already set a precedent for itself when disclosing *Brady* material. Until the FBI documents, the Government had been providing *Brady* materials separately. When the Government specifically identifies *Brady* material in some instances (like the Government's first 12 page disclosure) and fails to do so in others (like the FBI documents), the implication is that no *Brady* material is present when the documents aren't identified as such.

15. The Government has made clear that they are already identifying *Brady* material as part of their due diligence requirement. It would not be overly arduous for the Government to specifically identify *Brady* material for the Defense when they are already doing it for themselves. It would be quite easy for the Government to simply identify *Brady* material before turning documents over to the Defense.[1] Any resistance to such a request would only suggest that either:

a) The Government is not actually specifically identifying *Brady* material, or

b) That the Government wishes to place a burden on the Defense so as to gain a tactical advantage.

16. The circumstances of PFC Manning's case warrant requiring the Government to identify *Brady* material. PFC Manning is a lone accused in pre-trial confinement, he has a relatively small Defense team, there is no concurrent civil litigation and much of the voluminous discovery is either not searchable or not easily accessed by the Defense. The burden of this requirement on the Government will be minimal and, perhaps most importantly, will ensure that the Government does not bury *Brady* material within its discovery disclosures.

[1] Indeed, when the Government expressed concern about the difficulty of comparing original and redacted motions, the Defense voluntarily adopted a system that would make it easier for the Government to meaningfully compare the documents.

CONCLUSION

17. For the foregoing reasons, the Defense requests this Court require the Government to specifically identify all *Brady* material when providing discovery to the Defense.

Respectfully submitted,

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel