UNITED STATES OF AMERICA	**)**	
	)	**Defense Reply to**
v.	**)**	**Government Response to**
	)	**Defense Motion to Compel Identification**
Manning, Bradley E.	**)**	**of Brady Materials**
PFC, U.S. Army,	**)**	
HHC, U.S. Army Garrison,	**)**	
Joint Base Myer-Henderson Hall	**)**	**29 May 2012**
Fort Myer, Virginia 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 this Court to compel the Government 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. The Defense relies on those facts set forth in its original filing on 10 May 2012.

4. The Defense stipulates to those facts set forth by the Government in their Response to Defense Motion to Compel Identification of *Brady* Material, dated 24 May 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 following evidence in support of the Defense's motion:

a. Charge Sheet.

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

c. Email chain, June 2011

LEGAL AUTHORITY AND ARGUMENT

6. 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 identify *Brady* disclosures to the Defense as part of

its ongoing discovery obligations. Whether employing the standard established by either the *Skilling* or *Salyer*, the circumstances are such that the requested relief is warranted.

7. The Government asserts that this court should weigh the factors considered by the *Skilling* court because *Skilling* is a published 5th Circuit opinion. While *Salyer*, cited by the Defense, is not a published opinion, the factors considered there have since been adopted by courts in cases that have resulted in a published opinion. *See, U.S. v. W.R. Grace*, 401 F.Supp.2d 1060, 1080 (D.Mont 2005). Moreover, it is important to note the test adopted by the *Salyer* court came into being when one of the scenarios contemplated by *Skilling* came before the court. The Defense's overarching position that the Government should be required to specifically identify *Brady* material is also one that is supported by cases that either are, or will be, reported. *See U.S. v. Hsia*, 24 F.Supp.2d 14 (D.D.C. 1998) and *U.S. v. Rubin*, --F.Supp.2d--, 2011 WL 5448066 (S.D.N.Y. 2011).

8. The factors set forth in *Salyer* are the appropriate factors for this Court's consideration. Again, each of these factors weighs heavily in the Defense's favor.

a. PFC Manning has no opportunity to participate in his Defense in a meaningful way. It is unreasonable to expect the Defense to conduct all of its trial preparation within the walls of the JRCF. The space available at the JRCF is not sound proof and lacks internet and printing capabilities for the Defense. Moreover, the voluminous nature of the discovery in this case makes it impracticable for counsel to take the material to PFC Manning. Defense requests to meet with PFC Manning at the Fort Leavenworth TDS office have been consistently met with Government resistance due to the logistical hurdles the Government and JRCF have created for themselves.

b. The Discovery provided by the Government is not text searchable and access requires travel by the majority of the Defense team.

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's team. Not only is the Defense team geographically separated, but it is worth noting that, unlike Government counsel who are working exclusively on this case, detailed Defense counsel also represent other clients and do not have the ability to donate 100% of their time to the instant case. Additionally, after two years, the Government waited until virtually the eve of trial to begin providing the Defense with *Brady* materials. As such, Defense counsel are forced to spend valuable time sifting through discovery at a critical juncture in PFC Manning's case. Given the timing of the Government's disclosures, it is appropriate that they should specifically identify the *Brady* material.

9. Even *Skilling*, championed by the Government, contemplated scenarios where the Government should be required to identify *Brady* material. There, the court listed a number of scenarios where identifying *Brady* information should be required including: padding an open file, creating a voluminous file that is unduly onerous to access, and operating in bad faith in performing its *Brady* obligations. 554 F.3d at 577. Assuming, arguendo, that the *Skilling* standard is appropriate, each of the contemplated *Skilling* scenarios face the court in PFC Manning's case and warrant specific identification of *Brady* material by the Government.

a. The Government appears to be padding an open file.

The Government mentions in a footnote that the instant Defense request would require them to re-review hundreds of thousands of pages of discovery. If the Government is doing their due diligence, certainly they must be keeping track of what material they have determined falls under the purview of *Brady*. The Government's frequent assertions that a disclosure contains "at a minimum *Brady*" or "at least *Brady*" without actually keeping track of the *Brady* material suggests that the Government is, indeed dumping discovery on the Defense without first verifying that it does actually contain *Brady*. Either the Government is not being diligent and is dumping discovery on the Defense on the eve of trial or they have been diligent and have closely tracked the *Brady* material they have uncovered. If the later is true, it would not be difficult at all for the Government to specifically identify *Brady* material.

b. Access to discovery in this case is unduly onerous on the Defense.

Not only are there hundreds of thousands of pages of discovery in this case, the Defense and, most importantly, PFC Manning have limited access to the discovery. The Government points to the fact that multiple safes have been provided to the Defense as evidence that the Defense's access to evidence is not unduly onerous. Of particular note to the Government is the existence of a safe at Fort Leavenworth. However, it must be noted that while CPT Tooman is currently stationed at Fort Leavenworth and has had an attorney-client relationship with PFC Manning for over a year, CPT Tooman was only officially detailed to PFC Manning's case last month. Until recently, CPT Tooman's involvement with the Defense was merely tangential. As such, placement of a safe at Fort Leavenworth did little to aid in the preparation of the Defense with PFC Manning's detailed counsel thousands of miles away for the lion's share of his stay at the JRCF.

Moreover, while the ability to store sensitive discovery at Fort Leavenworth has been in place, the mechanisms put in place by the Government for PFC Manning to actually see the sensitive discovery are unduly onerous. It is unreasonable to expect the Defense to conduct trial preparation involving voluminous, classified discovery, within a confinement facility. Ironically, throughout this case the Government has balked at Defense requests to meet with PFC Manning at the Fort Leavenworth TDS office due the hoops it has to jump through to make such a meeting happen. *See attached emails.* If it is unduly onerous for the Government to facilitate a meeting between PFC Manning and his counsel in a TDS office, certainly it must be unduly onerous for the Defense to prepare in the same operating environment.

While the Government has provided electronic copies of its discovery, these electronic copies are not text searchable, a factor considered by the court in *Skilling*. Moreover, for the reasons discussed above and in the Defense's original motion, access to this discovery requires

significant travel by the majority of the Defense team. Again, most importantly, gaining PFC Manning access to the evidence against him is unduly onerous, as the Government has itself asserted since his movement to the JRCF. Because the Defense's access to the complete discovery is unduly onerous, as contemplated by *Skilling*, the Government should be obligated to specifically identify *Brady* material going forward.

c. The Government's misunderstanding of its *Brady* obligation was tantamount to bad faith.

As recently as March 2012 the Government did not understand its requirements under *Brady* and R.C.M. 701(a)(6). This court acknowledged as much in its April 25, 2012 ruling on the Defense Motion to Dismiss All Charges With Prejudice, noting, "the Government disputed it was obligated to disclose classified *Brady* information that was material to punishment." For nearly two years the Government operated its discovery with a fundamental misunderstanding of what is required for disclosure. The fact that the Government took a wholly unsupported view of *Brady* and deliberately withheld what appears to be *Brady* material (i.e. damage assessments) for two years amounts to bad faith. Under the circumstances, the Defense believes that the Government's failure to apply the correct *Brady* standard warrants that they be required to specifically identify *Brady* material to the Defense.

10. Finally, the Government asserts that specifically identifying *Brady* material would result in the Government preparing the Defense case. The fact of the matter is that the Government is already reviewing every page of discovery and making a determination as to what should be redacted and what must be provided due to *Brady* or other discovery obligations. Requiring the Government to pick up a highlighter and mark what they have already identified as *Brady* material is not overly arduous. Indeed, it is not arduous at all. Given the fact that the Government has waited until this late date to begin providing the Defense with *Brady* material, requiring the Government to specifically identify *Brady* material is appropriate.

CONCLUSION

11. 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,

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CPT, JA
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