UNITED STATES

v.

BRAND, WILLIE V.,
PFC, U.S. Army
HHB,
USAADACEMFB,
Fort Bliss, Texas

Request for Instruction

August 1, 2005

RELIEF REQUESTED – JURY INSTRUCTION

SPOLIATION of EVIDENCE

Currently pending before the Court is a Defense motion to dismiss the Charges and Specifications as a consequence of the Government's failure to produce the "logbooks" used at the Bagram detention facility to record significant events associated with suspected terrorist detainees. In the event the Court does not grant the aforementioned motion, the Defense respectfully asks that the following spoliation instruction be provided to the panel before they close to deliberate on findings:

"Members of the Court – During the course of the trial, you have heard or been presented with evidence that logbooks were maintained in the Bargram detention facility to maintain various entries associated with the suspected terrorist detainees. Although the Defense properly requested to be provided with a copy of those logbooks, they are no longer available.

The logbooks were in the exclusive possession of the United States Army at the time CID was actively investigating the underlying offenses in this case. The government has asserted that the logbooks were either lost or destroyed. From this, you may infer, though you are not compelled to do so, that the logbooks would be damaging to the prosecution's case. You may give this inference such force and effect as you think it should have under all of the facts and circumstances. You are permitted to make this inference even though there is no evidence at the US Army acted intentionally or negligently or in bad faith. You should not make this inference if you find that there is a fair, frank, and satisfactory explanation of what happened to the logbooks that were earlier in the possession of US Army law enforcement personnel

A hearing and oral argument on the Request for Instruction is requested.

JOHN P. GALLIGAN
Civilian Defense Counsel

APPELLATE EXHIBIT LVII

Certificate of Service

I certify that I served or caused to be served a true copy of the above on the Trial Counsel on August 1, 2005, by email. Original copies, together with the referenced photos, will be placed in the US Mail on August 1, 2005.

JOHN P. GALLIGAN
Civilian Defense Counsel

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES v. PFC Willie V. Brand 377th Military Police Company Cincinnati, OH 45237	Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion for Article 13 Pretrial Punishment Credit August 3, 2005

1. The defense has moved the Court to order appropriate credit for alleged pretrial punishment of the accused pursuant to Article 13, UCMJ. I have considered the briefs submitted by the parties, documents appended thereto, the testimony of witnesses, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. On 5 June 2004, the accused was administratively reduced from E-4 to E-3 for unsatisfactory participation, pursuant to AR 140-158, para 7-10(1)(b) (Enclosure 1 to Appellate Exhibit XL). Enclosures 8 – 38 of Appellate Exhibit XL are counseling statements, letters and envelopes relating to the accused's unauthorized absences from unit training and the administrative consequences relating thereto for the period of June 2003 through April 2004.

b. On 29 December 2004, two members of the accused's unit attempted to find the accused at his last known address to inform him that he had been ordered to active duty. On 8 January 2005, three members of the accused's unit attempted to locate the accused at his mother's last known address. On both occasions, the attempt to locate the accused was unavailing (Enclosures 2 and 3 to Appellate Exhibit XL).

c. On 7 February 2005, the accused was ordered onto active duty at Fort Bliss, Texas by the U.S. Army Human Resources Command, with a reporting date of 4 January 2005. The stated end date of the orders was 1 July 2005. The stated purpose of the orders was "UCMJ processing" (Enclosure 4 to Appellate Exhibit XL). Under the "additional instructions" section of the orders, "shipment of HHG and travel of DEP not applicable."

d. On 24 January 2005, the accused was issued the following counseling statement by 1SG Singletary, the HHB, USAADACENFB first

APPELLATE EXHIBIT LIX

sergeant: "PFC Brand while you are assigned to HHB CTR, your pass privileges are been [sic] revoked and you will reside in the barracks and limited to the boundaries of Ft. Bliss TX. Your pass privileges will be reviewed once a month to determine if you have earn [sic] them back. Violation of this counseling will result in transferring this counseling to the appropriate jurisdiction for their recommendation and actions. You will reside in room 142A." The accused agreed with the counseling and signed the counseling statement the same day.

f. The accused testified that although he was recalled to active duty on 4 January 2005, he was "AWOL" for several days, and did not report to his unit until 11 January 2005. The accused stated that he remained at his unit in Ohio for several weeks before he reported to Fort Bliss on 24 January. According to the accused, he was forced to quit his civilian job performing duties as a security guard when he was ordered onto active duty.

g. According to the accused, when he reported to Fort Bliss he was initially placed in the barracks. As the accused's spouse and four children were not authorized travel or government quarters, they remained in Ohio. The first week that the accused was at Fort Bliss he asked his chain of command if his family could come to Fort Bliss. The accused also related that he was told by his unit that payment of expenses for his family to travel to Fort Bliss was not authorized.

h. The accused testified that upon reporting to Fort Bliss, he was counseled that he could not leave post, and that as no on-post housing was available, even if his family came to Fort Bliss, he would not be able to see them.

i. The accused stated that he did not receive his first active duty pay until 15 March 2005. The accused stated that he did not request a casual pay, and when his commander brought the subject up, he told the accused that it would not be in his best interest to take a casual pay as it would put him further in debt. The also stated that his family was now several months behind in rent payments back in Ohio. At the time the accused stated he was paying $550 a month for a three bedroom apartment in Ohio. He also had monthly expenses of $500 for food, $150 for gas and electric utilities, and a $200 cell phone bill. The accused further related that his spouse did not work, and that as a result of his not receiving pay, the family was soon to be evicted and they had less money for food and other expenses.

j. According to the accused, his unit did nothing to help get him paid before his pay started on 15 March 2005. The accused asked his unit for help on several occasions to get his family to Fort Bliss, and he eventually

had to borrow "a few hundred dollars" to get his family to Fort Bliss by bus. The accused's family arrived at Fort Bliss on 2 May, at which time they moved into on-post military housing.

k. The accused's active duty orders and military identification card expired on 1 July 2005. Between 2 and 15 July, the accused did not have a valid military identification card in his possession, and his family was dropped from the DEERS system and thus not authorized military medical care. The accused testified that since his family has been removed from the DEERS system his wife has suffered from "an optometry problem, a dental problem, and an abnormal pap smear." As of 28 July 2005, the accused was unable to reinstate his family in the DEERS system for medical care. On 15 July 2005, the accused was furnished with new active duty orders, at which time he obtained a new military identification card.

l. The accused testified that since reporting to Fort Bliss he has not been able to work in his MOS as a military policeman. Instead, the accused stated that he works at the Garrison Command, cleaning restrooms and other areas. According to the accused, "only people facing UCMJ" are performing menial tasks like he is. He likened his duties to being "a janitor." He "cleans and moves furniture mostly." The accused stated that he also not been allowed to take leave, and that he needs the commander's permission and an E-6 escort in order to go off post. The accused stated that since he arrived at Fort Bliss on 24 January, he has been allowed off post on three occasions, twice for medical appointments.

m. The accused related that he was issued a Class A uniform 8 years ago, and when he reported to Fort Bliss, he had to pay for a new Class A uniform and awards. The accused's reserve unit in Ohio issued him two new sets of BDUs at no expense to the accused before he reported to Fort Bliss in January.

n. The accused does not have an automobile, and requires rides whenever he goes off post. The accused admitted that there are no restrictions on where he can go on post.

o. The accused denied that he has ever received a casual pay while he has been on active duty since January 2005. The accused also denied that he ever told anyone in his chain of command that he "threw away" his Class A uniform.

p. Enclosure 8 to Appellate Exhibit XXIX is an e-mail string between detailed defense counsel an a member of the Bagram prosecution team dated 7 February 2005 in which detailed counsel relates that the accused had not yet been paid. The trial counsel related that he had already started

working on the matter of the accused's pay status even before the accused reported to Fort Bliss.

q. Enclosures 9 and 10 to Appellate Exhibit XXXIX are an e-mail from trial counsel to detailed defense counsel dated 15 July 2005 in which a copy of an amendment to the accused's active duty orders are provided. Trial counsel also indicates that he was arranging for the unit to take the accused to finance and DEERS to get the accused's pay and medical care entitlements restated.

r. Enclosures 1 through 7 to Appellate Exhibit XXXIX are the accused's Leave and Earnings Statements (LESs) for the period of 1 February 2005 through 15 July 2005. The July mid-month LES (Enclosure 1) reflects that the accused received no pay. The accused's February 2005 LES (Enclosure 7) reflects that the accused received a casual pay of $1,700 on 11 February 2005, and that his active duty accession into the military pay system was started on 4 January 2005. The LES also reflects the accused's Basic Allowance for Housing (BAH) was initiated on 4 January 2005. Even after deduction of the casual pay, the accused received an end of month payment of $2,533.88 in February 2005. The accused's LESs for the months of March and April (Enclosures 4 and 5) appear to be correct, and the May LES (Enclosure 60 reflects that the accused's BAH was stopped on 29 April, which is presumably when he was assigned family housing on Fort Bliss. The accused's June LES (Enclosure 2) also appears to be correct, and contains a notice that upon the accused's ETS date of 1 July 2005 all pay and allowances would be suspended.

s. CPT Segarra, the accused's battery commander on Fort Bliss, testified that he revoked the accused's pass privileges when he reported to Fort Bliss. The accused was free to go anywhere on Fort Bliss without an escort. The accused was required to have an NCO escort if he left the post. CPT Segarra testified that he reviewed the accused's pass privileges every month, and he has made accommodations to allow the accused to leave post on occasion. The accused told CPT Segarra that he had "thrown away" his Class A uniforms when he left his old reserve unit. CPT Segarra then initiated paperwork for the accused to obtain a new Class A uniform on a pay voucher. CPT Segarra first became aware of the lapse in the accused's pay in July when he received an e-mail with the accused's amended orders attached. According to CPT Segarra, the accused never complained about his pay problems to him personally.

t. CPT Segarra testified that the accused performed the same duties as other junior enlisted soldiers in his unit, and the accused was not singled out because he was pending UCMJ action. CPT Segarra testified that even though the accused was not authorized to bring his family to Fort Bliss, he met with the accused and obtained an exception to policy from

the Garrison Commander to obtain on-post housing for the accused. When the unit could not obtain orders authorizing transportation for the accused's family to Fort Bliss, CPT Segarra "went outside military channels" to make arrangements for their travel. Because CPT Segarra knew that the accused did not have a vehicle, he coordinated with the housing office to obtain on-post quarters near the PX and commissary complex.

u. According the CPT Segarra, the accused does the work of "an E-4 and below," as he would expect. As CPT Segarra's unit, HHB, Center, is routinely subject to garrison taskings, CPT Segarra calls upon all junior enlisted personnel to perform such taskings. The accused was assigned to the headquarters, performing administrative functions such as filing paperwork and working in the unit supply room. When the accused was not directly tasked with duties, CPT Segarra released the accused to prepare for his court-martial. CPT Segarra was aware that the accused's DEERS eligibility had lapsed in July, and he told the accused "to take care of it." Asked if he would have authorized the accused time to reenroll his family in DEERS, CPT Segarra replied "family comes first, always." CPT Segarra also testified that the unit went out of its way to get the accused and his family around post, and he routinely authorized use of the unit vehicle to transport the accused and his family.

v. SSG Raymer has been the accused's first line supervisor since 5 February 2005. When the accused reported to Fort Bliss, SSG Raymer determined that the accused was missing various uniform items, and he personally took the accused to the post clothing sales store to "get him squared away" in mid-February. In mid-July SSG Raymer took the accused to the ID card section to obtain new ID cards for the accused and his dependents. SSG Raymer also attempted to get the accused's orders extended before they expired on 1 July. According to SSG Raymer, on 15 July he also drove the accused to various finance offices on Fort Bliss in order to get the accused's pay reinstated. SSG Raymer was not aware that the accused's family was not reenrolled in the DEERS system on 15 July, as the accused made no mention of it to him. SSG Raymer testified that he would have assisted the accused had he asked. SSG Raymer also testified that as of 15 July, the accused was reinstated in the pay system. SSG Raymer also assisted the accused in submitting a request for casual pay.

w. SSG Raymer became aware of the accused's initial pay problem in early February 2005, when he attempted to assist the accused, and made "four or five trips to finance." SSG Raymer recalled that the accused received his first pay in March 2005. According to SSG Raymer, the accused has been working on a detail for the garrison command sergeant major for the past month in conjunction with the relocation of the garrison

offices to a different building on Fort Bliss. Those duties have required the accused to move furniture and prepare a building for occupancy.

x. SSG Plummer, the unit administrator for the 377th Military Police Company in Cincinnati, Ohio, testified that when the accused reported to the unit in January 2005, he told he that he had thrown away his uniforms because he was close to his ETS date. SSG Plummer arranged for the accused to receive two new BDU uniforms at no cost. The accused had previously told SSG Plummer that he could not get his uniforms because they were at a storage facility and after he fell behind in paying rent, the items were repossessed and he no longer had access to them. SSG Plummer also testified that the accused's reserve unit had a Class A inspection every year during the December drill.

y. Having had an opportunity to not only hear the evidence presented by both sides on the issue, but also having had an opportunity to observe "how" the witnesses testified (e.g. demeanor, body language, sincerity), I found the testimony of CPT Segarra and SSG Raymer to be completely credible, while I found the testimony of the accused to be less credible.

Law and Analysis.

3. The defense asserts: "There is no legitimate government interest served in denying [the accused] pay, identification or a uniform, or in keeping him away from his family. There is no legitimate interest in denying him the ability to purchase basic personal items and military clothing needs. The conditions to which [the accused] has been subjected to at Fort Bliss – including his restrictions and the denial of any leave - - are not required to insure his attendance at court-martial . . .." The Government asserts that the accused has not stated a basis for relief under Article 13.

4. The test for determining whether Article 13 credit should be awarded for unlawful pretrial punishment is: was there an intent to punish or stigmatize a person awaiting disciplinary action, and if not, were the conditions in furtherance of a legitimate, non-punitive government objective. The Court concludes that there is no evidence that the accused's chain of command had any intent to punish or stigmatize the accused. As a member of the Army reserve ordered to active duty, the accused's orders made it clear that he was not entitled to have his family travel with him to Fort Bliss. Despite this limitation, the accused's commander went above and beyond what was required in obtaining an exception to policy which enabled the accused's family to reside on Fort Bliss. Further, any problems the accused had obtaining pay and associated entitlements were acted upon promptly by his chain of command. The accused's problems in obtaining pay, benefits and uniforms were substantially exacerbated by his own

actions in failing to maintain his uniforms as a member of the Army reserve, and his own inaction in attending to his pay and DEERS enrollment issues. The Court further concludes that there were legitimate, non-punitive reasons for the limitations placed upon the accused's liberty and his assigned duties.

5. Although not raised by the defense, the Court also considered whether the conditions of restriction placed upon the accused were tantamount to confinement. The Court considered the following factors in this regard: nature of the restraint; area and scope of the restraint; the typical junior enlisted types of duties performed during the restraint; the lack of any sign-in requirements; that the accused was not required to be under escort unless he left Fort Bliss; the accused's unlimited visitation privileges; all religious, medical, recreational, recreational and other support facilities were available to the accused; the location of the accused's sleeping accommodations (a barracks room and subsequent family housing); and that the accused was allowed to retain his personal property. The Court concludes that based upon the totality of the conditions imposed, the conditions of restriction placed upon the accused were not tantamount to confinement.

Ruling.

6. The defense motion for pretrial punishment credit is DENIED.

MARK P. SPOSATO
LTC, JA
Military Judge

UNITED STATES v. BRAND, Willie V., PFC, U.S. Army, HHB, USAADACENFB, Fort Bliss, Texas	GOVERNMENT RESPONSE TO SUPPLEMENTAL DEFENSE DISCOVERY REQUEST (2) DATED 11 MAY 2005 12 May 05

1. The government responds to the Supplemental Defense Discovery Request (2) Dated 11 May 05 as follows:

2. The accused requested that the Government provide four specific items of information: Three separate classes of ICRC communication with BCP personnel and incidental papers, and a videotape of COL David Hayden's comments to CLAMO.

3. The Government has previously addressed the first three items (ICRC) requested in its *Defense Discovery Request Response, Reciprocal Discovery Request, and Other Disclosure*, served on the Accused prior to his 5 May 2005 arraignment. The Government will nevertheless address those issues again here.

   i. A SECDEF Memo dated July 2004 (attached as Exhibit "1") prohibits the government from disclosing ICRC communications to any non-DOD personnel without the approval of SECDEF or a Deputy SECDEF. At the present time, the trial counsel is in email contact with OTJAG and the Office of General Counsel, OSD to coordinate a release of the ICRC information that the Accused requests. The process of coordination began around March 18, 2005, and has continued, culminating with the Government's present contact with the OGC, OSD. Those emails, constituting approximately one ream of printed paper will be provided for in camera inspection should the court wish to inquire into the Government's diligence in obtaining permission for Mr. Galligan to view the ICRC materials.

   ii. When a decision has been rendered by SECDEF or his Deputy, trial counsel will notify the Court and counsel for the Accused.

4. The Accused's request for COL David Hayden's video-taped presentation to CLAMO will be honored. On Thursday, 12 May 2005, LTC Stahl, at CLAMO, identified and secured the requested video and has orally confirmed to trial counsel that it will be mailed to USAADACENFB.

This is to certify that I have served the *Government's Response to Supplemental Defense Discovery Request (2)* Dated 11 May 05 and all attachments on Mr. John Galligan via email to galligan5646@sbcglobal.net, this 12th day of May, 2004.

DAVID R. TRAINOR
1LT, JA
Trial Counsel

APPELLATE EXHIBIT LXI

UNITED STATES v. Brand, Willie V. PFC, U.S. Army HHB, US ADA Center and Fort Bliss, Ft Bliss	)	NOTICE OF MOTIIONS 1 August 2005

****

NOTICE

Per the Military Judge's Pretrial Order, dated June 22, 2005, the following Notice is provided.

After being advised of his elections regarding plea and forum, PFC Willie V. Brand elects the following:

FORUM: Enlisted Panel

PLEA: Not Guilty of All Charges and Specifications

DEFENSES: The Defense anticipates the following affirmative defense will be raised by the evidence:

- Obedience to Orders (R.C.M. 916(d))
- Justification (R.C.M. 916 (c))

I certify that a copy of this was served, via email, on the trial counsel and the Military Judge on 1 August 2005.

John P. Galligan
Civilian Defense Counsel

APPELLATE EXHIBIT LXIII

UNITED STATES

v.

BRAND, WILLIE V.,
PFC, U.S. Army,
HHB,
USAADACEMFB,
Fort Bliss, Texas

Request for Instruction

August 1, 2005

RELIEF REQUESTED – JURY INSTRUCTION

DENIAL OF DISCLOSURE OF EVIDENCE

As this Honorable Court is aware, the Defense requested several months ago that various "classified" ICRC documents be made available for review by the civilian defense counsel. For several months, the parties awaited a decision by appropriate authorities to either declassify the affected documents or, alternatively, at least to afford the civilian defense counsel with an opportunity to review the documents at issue. Apparently, neither of the only individuals authorized to authorize dissemination of the ICRC documents at issue – the Secretary of Defense or Deputy Secretary of Defense – have taken any action on this important matter, notwithstanding the fact that a young African-American enlisted Reservist is pending a general court-martial where it is anticipated that repeated reference will be made about continuous complaints were made by ICRC officials to US Army legal personnel and others. Given the inaction by the aforementioned Department of Defense Secretary and Deputy Secretary, the trial judge was essentially forced to review the documents himself *in camera*. Following that review, the military judge made various findings to support his denial of defense access to the ICRC materials. The Defense immediately notified the Court and opposing counsel that it took issue with the military judge's essential findings and that an Extraordinary Writ would likely be filed.

In anticipation that the Army Court of Criminal Appeals may, in its discretion,

APPELLATE EXHIBIT LXXIII

determine not to grant extraordinary relief, the Defense requests that the panel members be provided the following instruction before they deliberate on findings:

"Members of the Court – During the pretrial stages of this case, the civilian defense counsel requested that he be permitted to examine certain documents associated with communications between the International Committee of the Red Cross (ICRC) and US Army officials. Those documents were considered by the AR 15-6 investigating Officer and were subsequently available for inspection by the Article 32 hearing officer, all of the numerous trial counsel assigned to the Bagram Prosecution Team, the detailed military defense counsel, and myself, as the military judge. However, the civilian defense counsel has not been permitted to examine these ICRC materials.

"You are advised that the "dissemination of ICRC communications outside of DoD is not authorized without the approval of the Secretary or Deputy Secretary of Defense." Since early May 2005, neither the Secretary nor Deputy Secretary of Defense have taken any action to permit the civilian defense counsel – a retired US Army Officer equipped with a Top Secret security clearance – to review the affected materials. Because of their inaction, the Court was obliged to make an independent in camera review of the ICRC documents and determined that they would not be made available to the civilian defense counsel, even for purposes of review.

"You are advised that no adverse inference or finding should be drawn from the fact that the civilian defense counsel was not provided access to these documents since the only persons who could have authorized him to review these documents were the Secretary and Deputy Secretary of Defense. As I instructed you earlier, neither of these senior DoD officials took any apparent action to formally decide the issue when it was presented for their consideration."

A hearing and oral argument on the Request for Instruction is requested.

JOHN P. GALLIGAN
Civilian Defense Counsel

Certificate of Service

I certify that I served or caused to be served a true copy of the above on the Trial Counsel on August 5, 2005, by email. Original copies will be placed in the US Mail on August 6, 2005.

JOHN P. GALLIGAN
Civilian Defense Counsel

DEPARTMENT OF THE ARMY
OFFICE OF THE DEPUTY CHIEF OF STAFF FOR INTELLIGENCE
WASHINGTON DC 20310-1001

REPLY TO ATTENTION OF

DAMI-CD (380-67a)

21 March 2005

MEMORANDUM FOR THE COMMANDER, US ARMY HEADQUARTERS DPTMS, U.S. ARMY AIR DEFENSE ARTILLERY CENTER AND FORT BLISS, (ATZC-DPT-SC MS JOAN SAND), FORT BLISS, TX 79916

SUBJECT: PFC Willie V. Brand

1. Reference: Memorandum, US Army Judge Advocate General, DAJA-IO, 10 Mar 05, Subject: Request for Access for Civilian Attorney (Encl 1)

2. In accordance with the provisions of paragraph 3-404f, AR 380-67, COL (R) Mr. John P. Galligan, civilian defense counsel for PFC Willie V. Brand, is eligible for access to information classified up to and including the SECRET level. This temporary access eligibility authorization is limited to information determined necessary by the US Army Trial Defense Service (TDS) authorities for representation of PFC Brand during legal proceedings related to charges resulting from his service with Abu Ghraib. Third agency rules must be adhered to for the release of any information for which Army is not the sole proponent and/or classification authority.

3. In accordance with AR 380-5, prior to granting access to classified information, DPTMS U.S. Army Air Defense Artillery Center and Fort Bliss security specialists must provide COL (R) Galligan an initial security briefing and have him execute a Classified Information Nondisclosure Agreement (SF 312). A copy of this memorandum will be filed with the SF 312 until such time as the access authorization is rescinded. At that time, COL (R) Galligan must be given a termination security briefing (DA Fm 2962) and the termination section of the SF 312 completed. The briefings will stress the constraints on release of classified information and requisite protection measures, to include prohibition on release of classified information to other members of his firm.

4. This authorization is valid through the duration of the legal proceedings against PFC Brand and pertains solely to information related to those proceedings.

FOR OFFICIAL USE ONLY

APPELLATE EXHIBIT LXIX

DAMI-CD
SUBJECT: PFC Willie V. Brand

5. Point of contact is Mrs. Julia Swan, (703) 695-2629, or email Julia.Swan@hqda.army.mil .

Encl

THOMAS A. GANDY
Director, Counter Intelligence, Humint Intelligence,
Disclosure & Security Directorate

CF w/o encl:
Cdr, CCF, ATTN: IACF-AD
US Army Judge Advocate General (DAJA-IO), ATTN: LTC Vlahopoulos

FOR OFFICIAL USE ONLY

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES v. PFC Willie V. Brand 377th Military Police Company Cincinnati, OH 45237	Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion to Compel Production of Witnesses August 8, 2005

1. The defense has moved, pursuant to Rule for Courts-Martial 703, for the production of certain witnesses. I have considered the defense witness request and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with one specification of assault with a means likely to produce death or grievous bodily harm; three specifications of assault consummated by a battery; four specifications of maltreatment; one specification alleging a false official statement; and one specification of maiming. A specification alleging manslaughter relating to the detainee Dilawar was dismissed by the convening authority upon referral. All of the charges relate to the detainees known as Habibullah and Dilawar, who were held at the Bagram Airfield collection point in Afghanistan.

b. The charges were preferred on 4 January 2005; an Article 32 investigation was conducted 21-23 March 2005; the charges were referred to a general court-martial by the convening authority on 19 April 2005; and the accused was arraigned on the charges on 5 May 2005. The Court issued a pretrial order the same day (Appellate Exhibit III).

c. On 7 June 2005, the defense orally moved for a continuance from the originally scheduled trial dates the week of 18 July until 15 August. The suspense date for defense requests for out of town witnesses was then set for 21 July, and defense requests for local witnesses was set for 8 July (Appellate Exhibit XXIX).

d. On 21 June the Court denied a defense request for a new or re-opened Article 32 investigation (Appellate Exhibit XXVI). The bases for the

APPELLATE EXHIBIT LXX I

defense motion related to the production of more than twenty defense witnesses for the Article 32 investigation. In upholding the Article 32 investigating officer's determinations, the Court concluded that the Article 32 investigating officer's determinations were not arbitrary and capricious, or an abuse of discretion. The Court further concluded that the proffered testimony of the defense-requested witnesses was either irrelevant or cumulative to the testimony of other witnesses.

e. On 15 July the defense gave notice of several motions, to include a motion to compel the production of unspecified witnesses, "based upon the past practice and anticipated refusal of the government to virtually all defense requests for evidence and witnesses necessary to ensure a fair trial" (Appellate Exhibit L).

f. On 22 July 2005, the defense submitted its out of town witness request (Appellate Exhibit XLIX). The Court hereby adopts the defense proffers as reflected on Appellate Exhibit XLIX for the following witnesses: Mr. Thomas A. Gandy; COL (RET) David L. Hayden; MAJ Jeff A. Bovarnick; COL Kathleen M. Ingwersen; Mr. Ahmadzai; and Mr. Baryalai.

g. At an Article 39(a) session conducted on 28 July 2005, the Government stated on the record that it would produce four of nine merits witnesses, as well as both pre-sentencing witnesses (the parties having agreed on producing Mr. Schwartz in lieu of SPC Patterson).

h. At the 28 July Article 39(a) session, Civilian Defense Counsel (CDC) made the following additional proffers in relation to its requested witnesses:

1. Mr. Gandy. The CDC had spoken with Mr. Gandy, who would relate the procedures at the Bagram Control Point (BCP), which included hooding, sleep deprivation, and chaining, all of which were in violation of Army policies then in effect. The gist of Mr. Gandy's testimony would be that in effect, the detainees were subjected to "government-sponsored maltreatment." The CDC also asserted that Mr. Gandy was familiar with "the Bagram cases."

2. COL Hayden. Would be called to advise the panel members the issues are not as clear as the Government says, and he would opine that the "compliance blows" were a lawful use of force.

3. MAJ Bovarnick. He met directly with the International

Committee of the Red Cross (ICRC) representatives. Specific complaints about detainee abuse were brought to his attention.

4. COL (Dr.) Ingwerson. A forensic pathologist, She would testify that the thawing of the detainee Habibullah's body may have had an effect on the appearance of tissue depicted in the autopsy photographs the Government intends to introduce. She would also testify about "irregularities" in the autopsy report. Defense counsel had not spoken to COL Ingwerson, and was relying on statements in making its proffer.

5. Mr. Ahmadzai. A contract interpreter who would testify as to the treatment of detainees and the absence of any complaints. Mr. Ahmadzai was apparently not present to observe the compliance strikes or the ability of the detainees to walk after the alleged offenses.

6. Mr. Baryalai. Another contract interpreter. The CDC made the same proffer for Mr. Baryalai as for Mr. Ahmadzai.

i. The Court asked the defense to make an election as between COL Hayden and MAJ Bovarnick and as between Mr. Ahmadzai and Mr. Baryalai as potential witnesses. On 29 July 2005, the defense informed the Court that while it would prefer to have all four witnesses available for trial, if forced to elect, they would prefer MAJ Bovarnick and Mr. Baryalai (Appellate Exhibit LIII).

j. The Government offered to stipulate in lieu of COL Ingwerson's appearance that the accused's actions did not cause the detainee Habibullah's death.

k. On 1 August 2005, the Government inquired whether or not the Court would be ordering the production of Mr. Baryalai as a defense witness for trial. The Government was concerned that it would need sufficient lead time to obtain immunity for Mr. Baryalai (who had informed the parties through counsel that he would not testify without immunity), as well as make arrangements for his travel from Afghanistan.

l. On 5 August, the Government sent an e-mail to the defense that related that Mr. Baryalai, as a civilian employee of SOSi, LTD, was not subject to the Government's subpoena authority, and he had advised the Government through is attorneys that he would travel to Fort Bliss for the accused's trial only by commercial air. The Government proffered that it would not be able to obtain a seat on a commercial flight out of

Afghanistan for Mr. Baryalai on the only commercial carrier operating out of Afghanistan until 21 August. Trial counsel further proffered that although he had coordinated Mr. Baryalai's immunity and made arrangements for military air travel, it appeared that since no commercial flight was available, Mr. Baryalai is unavailable. Trial counsel also proffered that he had coordinated with Mr. Ahmadzai's civilian attorney, who indicated that Mr. Ahmadzai was prepared to travel to Fort Bliss in time for trial. In response to the Government's e-mail, the CDC replied that as Mr. Baryalai essentially worked at the behest of the United States Government, his employers could ensure that he appeared for trial by traveling on military air transport. See Appellate Exhibit LXVII.

Law and Analysis.

3. The defense asserts that all of the above witnesses are relevant and necessary for trial. The Government asserts that Mr. Gandy's testimony is not relevant or necessary, as his knowledge is limited to military intelligence-related activities, and the accused did not act at the behest of the military intelligence personnel. The Government further asserts that Mr. Gandy's testimony would create a "mini-trial not related to the accused's charges." The Government next asserts that the testimony of COL Hayden and MAJ Bovarnick would result in a national policy debate if allowed. As to COL Ingwerson, the Government asserted that her testimony would be cumulative to the testimony of LTC (Dr.) Rouse, another forensic pathologist who will be called by the Government. Finally, the Government asserts that the testimony of Mr. Ahmadzai and Mr. Baryalai is not relevant, as neither individual was present to personally observe any of the alleged conduct which formed the basis for the charged offenses.

4. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of a case in some positive way on a matter in issue. A witness whose testimony is necessary and material must be produced or the proceedings abated, unless the testimony would be merely cumulative to the testimony of other defense witnesses. The proponent bears the burden of establishing relevance and necessity by a preponderance of the evidence. Witness production factors the Court considered included: (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness is desired on the merits or sentencing portion of the trial; (3) whether the witness' testimony would be merely cumulative; and (4) the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories or pervious testimony.

5. The Court concludes that the defense has demonstrated the relevance and necessity for the testimony of MAJ Bovarnick and either Mr. Ahmadzai or Mr. Baryalai. The Court further concludes: that the proffered testimony of Mr. Gandy is not material or relevant; the testimony of COL Hayden would be cumulative to the testimony of MAJ Bovarnick; and the testimony of Dr. Ingwerson would be cumulative to the testimony of Dr. Rouse and Dr. Carter. The Court further concludes that the defense has failed to demonstrate that the testimony of Mr. Gandy, COL Hayden, or COL Ingwerson would be relevant and necessary, or that it would not be cumulative. Finally, the Court concludes that as Mr. Baryalai is not subject to subpoena or warrant of attachment, the Government will produce Mr. Ahmadzai for trial as a defense witness.

Ruling.

6. With the exception of MAJ Bovarnick and Mr. Ahmadzai, the defense motion to compel the production of witnesses is DENIED.

MARK P. SPOSATO
LTC, JA
Military Judge

UNITED STATES

v.

BRAND, Willie V.,
PFC, U.S. Army
HHB,
US ADA Center and Fort Bliss,
Fort Bliss, Texas

DEFENSE DISCOVERY REQUEST

24AA2 05
~~9 August 2005~~

****

1. The accused, through counsel, and under Article 46, UCMJ, R.C.M. 701, M.R.E., Rule 3.8 of the Army Rules of Professional Conduct for Lawyers, and the Fifth Amendment to the U.S. Constitution, requests that the United States produce and permit the defense to inspect, copy, or photograph each of the following things which are known, or should through the exercise of due diligence be known, to the United States or its agents. Request the Prosecution notify the Defense in writing which specific items of requested information or evidence will not be provided and the reason for denial of discovery. Hereinafter, the term *Government* includes Federal, state and local governments, to the extent that such agencies are participating or have participated in the investigation of this case. The specific items requested below are examples, not limitations, of the items requested under a cited provision.

a. Under R.C.M. 701(a)(1), any papers which accompanied the charges when submitted for recommendations or referred, the convening orders, any sworn or signed statement relating to an offense charged which is in the possession of the Government.

Similar documents are requested in any companion cases which have or are pending referral to trial, e.g. United States v. Cammack and United States v. Boland.

b. Under R.C.M. 701(a)(2)(A), any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody or control of the Government, 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. *See, U.S. v. Simmons*, 38 MJ 376 (CMA 1993).

Defense requests that all currently classified documents referenced in the Final CID Report of Investigation be declassified for use during any trial proceedings.

Defense requests disclosure of any and all documentation associated with the capture, background, and conduct of the PUCs 412 and 421.

APPELLATE EXHIBIT LXXII

Defense requests release of any administrative or pretrial investigation of Captain Wood, currently stationed at Fort Huachuca, AZ.

c. Under R.C.M. 701(a)(2)(B), any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the Government, the existence of which is known to the trial counsel and which is material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecutions case in chief at trial. *See, U.S. v. Simmons*, 38 MJ 376 (CMA 1993).

d. Under R.C.M. 701(a)(3), the names and addresses of the witnesses the trial counsel intends to call either in the prosecution case in chief or to rebut a defense of alibi, innocent ingestion, or lack of mental responsibility.

e. Under R.C.M. 701(a)(4), any records of prior convictions or court-martial convictions of the accused that may be offered on the merits, for impeachment, or in the presentencing phase of trial.

f. Under R.C.M. 701(a)(5), any and all information, including the names and addresses of the witnesses and records of nonjudicial punishment relating to the accused, the Government intends to offer during the presentencing proceedings under R.C.M. 1001(b).

g. Under R.C.M. 701(a)(6), any evidence, known or which through the exercise of reasonable diligence should be known to the trial counsel, which may negate the guilt of the accused, reduce the degree of guilt of the accused, or reduce the punishment. This includes, but is not limited to, any prior convictions or arrests of the Government witnesses, military investigatory organizations, or on file at the Criminal Records Center; previous records of nonjudicial punishment of the Government witnesses; any information concerning an abnormal mental status of any witness; any evidence of other character, conduct, or bias bearing on witness credibility under M.R.E. 608 and 609; any books, papers, documents, photographs, or mental examinations and of scientific tests or experiments, or copies thereof which may potentially exculpate, diminish the guilt, or mitigate the possible sentence of the accused.

h. Under R.C.M. 914, any previous statement, written or oral, made by a witness the prosecution intends to call on the merits or in the presentencing phase, and the anticipated subject matter of that witness's testimony.

i. Under M.R.E. 301(c)(2), disclosure of any immunity or leniency pertaining to witnesses or to potential witnesses. This includes any anticipated or completed pretrial agreements that may or may not contain an offer of cooperation, and any written or oral statements from those witnesses used to support the pretrial agreement.

j. Under M.R.E. 304(d)(1), all statements, oral and written, by the accused that are relevant to the case and within the control of the Armed Forces; and notice as to which statements are intended to be introduced as evidence against the accused.

k. Under M.R.E. 311(d)(1), disclosure of all evidence seized from the person or property of the accused or believed to be owned by the accused, that the prosecution intends to offer into evidence against the accused in trial; all physical evidence that will be offered against the accused.

l. Under M.R.E. 321(c)(1), disclosure of all evidence of prior identification of the accused at a line-up or other identification process that the prosecution intends to enter against the accused at trial.

m. Under M.R.E. 404(b), reasonable notice in advance of trial of the general nature of any evidence of other crimes, wrongs, or acts that the prosecution intends to introduce for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake of fact or accident.

n. Under M.R.E. 612, any writing or document used by a witness to prepare for trial.

o. The names of all Government investigators who have participated or are presently participating in the investigation of the instant case.

p. The contents of all CID accreditation files for all CID investigators who have participated or are presently participating in the investigation of the instant case.

q. All personal or business notes, memoranda, and writings prepared by law enforcement investigators in this case which are not furnished under any other provisions of this request.

r. Disclosure of personnel records and panel member questionnaires of all prospective court members, under R.C.M. 912(a)(1). In the event that questionnaires have not been prepared or otherwise do not exist, this constitutes a request for such under R.C.M. 912 (a)(1).

s. Disclosure of all advice, written or oral, provided to the convening authority concerning the selection of the court-martial panel in the present case, under R.C.M. 912(a)(2).

t. Any information or evidence known to the Government, or which may become known to the Government through the exercise of due diligence, which is exculpatory in nature or otherwise favorable to the accused for the merits or on sentencing. See Brady v. Maryland, 73 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976). This includes any relevant impeachment evidence as well. United States v. Bagley, 87 L.Ed.2d 481 (1985). This includes exculpatory evidence contained in law enforcement files. United States v. Kinzer, 39 M.J. 559 (A.C.M.R. 1994).

u. Copies of any administrative or other non-criminal investigations related, directly or indirectly, to this case; for example, AR 15-6 investigations, reports of survey,

line of duty investigations, commander's inquiries, collateral, Article 139, EO, or IG investigations, and any other like or similar investigation(s).

v. Any derogatory information, including criminal history or prior disciplinary record, for any witnesses the Government intends to call either on the merits or on sentencing. This includes the conditions of separation and characterization of service for any witnesses with prior military experience.

w. Any charge sheet, result of trial, transcript of a trial, as well as all appellate, prosecution, and defense exhibits to including but not limited to the pre-trial agreement and offer, and the Stipulation of Fact in any co-related cases.

x. The local unit files (or SMIF) for all witnesses the Government intends to call on the merits or on sentencing.

y. Copies of the audiotaped testimony at any Article 32(b) investigations of the charges in this case, pursuant to the Jenks Act, 18 U.S.C. 3500.

2. Any determination of materiality in these matters is viewed by the Defense as within the province of the Defense and the Court; any question of materiality, therefore, should be
brought to the attention of the Defense and decided by the Court.

3. This request is made on the grounds that the Defense cannot effectively prepare for trial without the production and inspection of the items requested.

4. Under R.C.M. 701(d), this is a continuing request for the items described above. Should the Prosecution oppose this request or any part therein, the Defense requests immediate notice thereof and the reasons for opposition.

I certify that a copy of this request was served on the trial counsel on April 24, 2005.

JOHN P. GALLIGAN
Civilian Defense Counsel

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES	
v.	Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion to Dismiss Due to Destruction of Evidence
PFC Willie V. Brand 377th Military Police Company Cincinnati, OH 45237	
	August 10, 2005

1. The defense has given notice of a motion to dismiss all charges and specifications based upon the apparent destruction of certain evidence. The defense has not filed a brief or made argument in relation to this matter. I have considered the Government response to the defense's oral request to the Court for the evidence in question, as well as documents appended thereto.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with one specification of assault with a means likely to produce death or grievous bodily harm; three specifications of assault consummated by a battery; four specifications of maltreatment; one specification alleging a false official statement; and one specification of maiming. A specification alleging manslaughter relating to the detainee Dilawar was dismissed by the convening authority upon referral. All of the charges relate to the detainees known as Habibullah and Dilawar, who were held at the Bagram Airfield collection point in Afghanistan.

b. On 24 May 2005 (Appellate Exhibit XXI) and 15 July 2005 (Appellate Exhibit L), the defense gave notice of several motions, to include what was styled "Motion to Dismiss all Charges and Specifications based upon the apparent destruction of Bagram logbooks wherein the treatment of various terrorist detainees was frequently annotated." To date (10 August 2005) the defense has not filed a brief with the Court in conformance with the notice of such motion.

c. On 24 April 2005, the defense filed its first request for discovery (Appellate Exhibit LXXII). That document makes no mention of, nor does it request copies of any Bagram log books. At least one subsequent defense

APPELLATE EXHIBIT LXXIII

discovery request was filed by the defense, as reflected by the Government response (See Appellate Exhibit XIV), apparently also does include a request for the Bagram log books. The defense also filed a motion to compel discovery in the nature of paper copies of two CID reports of investigation (Appellate Exhibit XX), which again made no reference to the Bagram log books.

d. At a 28 July 2005 Article 39(a) session, the Civilian Defense Counsel stated on the record that the defense was requesting the log books in question. Special Agent Birt, one of the principal CID agents in charge of investigating detainee deaths at Bagram Airbase, testified in relation to a defense motion to suppress statements of the accused (See Appellate Exhibit LIV). SA Birt testified that investigators located the computer at the Bagram Airbase which was likely used to create the log entries in question. However, a search of the computer's files failed to disclose any log entries relating to the tenure of the 377th Military Police Company. SA Birt further testified that a forensic search of the computer's hard drive was not conducted.

e. On 1 August 2005, the defense submitted to the Court a proposed "jury instruction" relating to "spoliation of evidence" (Appellate Exhibit LVII). The defense submission and proposed instruction follow:

> Currently pending before the Court is a Defense motion to dismiss the Charges and Specifications as a consequence of the Government's failure to produce the "logbooks" used at the Bagram detention facility to record significant events associated with suspected terrorist detainees. In the event the Court does not grant the aforementioned motion, the Defense respectfully asks that the following spoliation instruction be provided to the panel before they close to deliberate on findings:
>
> Members of the Court – During the course of the trial, you have heard or been presented with evidence that logbooks were maintained in the Bagram detention facility to maintain various entries associated with the suspected terrorist detainees. Although the Defense properly requested to be provided with a copy of these logbooks, they are no longer available.
>
> The logbooks were in the exclusive possession of the United States Army at the time CID was actively investigating the underlying offenses in this case. The government has asserted that the logbooks were either lost or destroyed. From this, you may infer, although you are not compelled to

> do so, that the logbooks would be damaging to the prosecution's case. You may give this inference such force and effect as you think it should have under all of the facts and circumstances. You are permitted to make this inference even though there is no evidence at [sic] the US Army acted intentionally or negligently or in bad faith. You should not make this inference if you find that there is a fair, frank, and satisfactory explanation of what happened to the logbooks that were earlier in the possession of US Army law enforcement personnel.

f. In a document styled "Government Response to Discovery Request for BCP Logbooks" (Appellate Exhibit XLVI), the Government endeavored to "inform the court of the status of the Bagram Collection Point logbooks requested by the Defense." The Government proffered that the log books could not be located, but that persons familiar with the contents of the log books rendered sworn statements to the effect that the log books "would not contain the information seeks or is entitled to." The Government also proffered "The Government is in possession of two pages of computer printouts purporting to be local incident reports, dated 2 and 3 December 2002 relating to Habibullah. The Defense has been provided access to those two pages. To the Government's knowledge, no other log book records have been found.

g. The Government's submission was supplemented with the following sworn statements: CPT Beiring, dated 22 January 2004 (Enclosure 1 to Appellate Exhibit XLVI); the accused, dated 21 December 2002 (Enclosure 3); the accused, dated 24 January 2004 (Enclosure 5); the accused, dated 3 February 2004 (Enclosure 7); SPC Callaway, dated 30 January 2004 (Enclosure 9); SFC Davis, dated 5 February 2004 (Enclosure 10); and former SGT Curtis, dated 4 February 2004 (Enclosure 12).

h. Green cloth pass on books were used in the BCP to record important events relating to the detainees (Enclosure 1). One of these military notebooks was kept in the general population area and others were kept in the upstairs and downstairs isolation areas (Enclosure 10). SFC Jeff Davis would take the logbooks and compile them in a computer in the front office of the BCP and also generate a report (Enclosure 12).

i. The 293rd MP Co. relieved the 377th MP Co. in Bagram (Enclosure 1). The notebooks were placed by the 377th MP Co., in a field safe in the TOC area of the BCP, and the 293rd took over the log books. The Soldiers of the 377th MP Co. did not keep any copies of the log books when they left Afghanistan, and SFC Davis did not keep copies of the computerized version of the log books, either. CPT Beiring states that the 293rd began cleaning out and destroying records during its RIP with the 377th MP Co..

The computer containing SFC Davis's log book entries were also wiped out by the relieving MP company. SFC Davis became aware of this because the Commander of that company called to see if the 377th had a back up disk (see Enclosures 1 and 10 of Appellate Exhibit XLVI).

j. It is likely that the logbooks did not contain evidence that the detainees were struck by other MPs. In his sworn statement, SFC Davis related that "[t]he log books were not always accurate, because the MPs were not documenting all the interactions with the detainees"(Enclosure 10).

k. SPC Jeremy Callaway admitted to striking a detainee in an isolation cell. He stated that he had no memory of logging the strike and thought he did not (Enclosure 9).

l. The sworn statement of SGT Thomas Curtis (Enclosure 12), who observed PFC Brand strike Dilawar, related the following in regard to the log books:

Q: What were you told to write in the log books?
A: Bathroom breaks, when they ate, when they saw medical, when they were interviewed, what MI directed about the detainees treatment (hooding, standing up for sleep dep)

. . .

Q: Were comments made in the logbook about strikes made?
A: Nope, cause you rarely had to strike someone. If they struck at you, you'd note he was combative.

. . .

Q: Were compliance blows recorded in the logbook?
A: I doubt it and I never remember reading it in the book. I know the blows happened and I don't remember reading it.

m. In his 21 December 2002 sworn statement (Enclosure 3), the accused answered a series of questions as follows:

Q: Do you pass on to the next shift how many times and where you struck a detainee?
A: No, usually all we pass on is what they are eating, what kind of problems they gave us, if they need to see a doctor, or any other requests the detainees have. . .
Q: Is it recorded anywhere?
A: It wasn't then, but it is now.

n. In his 24 January 2004 sworn statement (Enclosure 5), the accused answered pertinent questions as follows:

Q: Did any of these blows get logged or recorded?
A: No, prior to the deaths, we only logged when they got medicine, if they refused to eat or refused to drink.

o. In his 3 February 2004 sworn statement (Enclosure 7), the accused admitted that he did not log the 30 strikes he gave to the detainee known as Dilawar.

Law and Analysis.

3. Without benefit of a defense pleading or argument, aside from the matters related in the defense's proposed jury instruction, the Court will not presume to know what the defense position is with regard to the log books in question. The Government asserts that the log books do not contain evidence "that possesses a material or exculpatory value," and can obtain comparable evidence by calling witnesses with personal knowledge of the matters that may have been related in the logs.

4. Rule for Courts-Martial 703(f)(2) provides in pertinent part with respect to evidence that has been lost or destroyed:

> [A] party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief . . .

5. The Government has a duty to use good faith and due diligence to preserve and protect evidence and make it available to the defense. However, where evidence is not apparently exculpatory, the burden is on the accused to show that the evidence possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed. Further, it must be shown that the defense is unable to obtain comparable evidence by other reasonably available means. Further, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *See Arizona v. Youngblood*, 488 U.S. 51, at 57 (1988).

6. The Court concludes that there was no bad faith on the part of the Government associated with the destruction of the evidence in question. The log books were likely destroyed in the due course of the rotation of

units in and out of Afghanistan before any possible evidentiary value was known. The Court also concludes that there is no evidence that any information contained in the log books was exculpatory or of the nature represented by the defense, and there is other evidence available in the form of witnesses with personal knowledge of the matters related in the log books. Therefore, the loss of the of the log books does not violate the accused's rights to due process and confrontation, nor does it impair the accused's ability to receive a fair trial.

Ruling.

7. The defense motion to dismiss is DENIED. The Court will address the proposed defense jury instruction in an Article 39(a) session.

MARK P. SPOSATO
LTC, JA
Military Judge

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES	
v.	Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion in Limine to Exclude Autopsy Photographs
PFC Willie V. Brand 377th Military Police Company Cincinnati, OH 45237	
	August 10, 2005

1. The defense has moved *in limine* to preclude the introduction of autopsy photographs by the Government. I have considered the briefs submitted by the parties, documents appended thereto, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with one specification of assault with a means likely to produce death or grievous bodily harm; three specifications of assault consummated by a battery; four specifications of maltreatment; one specification alleging a false official statement; and one specification of maiming. A specification alleging manslaughter relating to the detainee Dilawar was dismissed by the convening authority upon referral. All of the charges relate to the detainees known as Habibullah and Dilawar, who were held at the Bagram Airfield collection point in Afghanistan.

b. On 21 July 2005, the defense filed a motion *in limine* requesting that the Government "specifically identify and secure a pretrial ruling as to admissibility for the specific photos it intends to offer into evidence at trial" (Appellate Exhibit XLII).

c. In three sworn statements obtained after Article 31 rights advice (Enclosures 1- 6 of Appellate Exhibit XI) the accused admits driving his knee into the detainee Habibullah's thigh on one occasion. The accused's statements also reflect that the accused drove his knee into the thighs of the detainee known as Dilawar a total of thirty-seven to forty times on three separate occasions. On each of these occasions, the detainees were in an isolation cell with their hands chained to the ceiling of the cell. One the two occasions when the accused admits to striking Dilawar "once or

APPELLATE EXHIBIT LXXIV

twice," he or a SGT Thomas was on duty as the isolation guard. According to the accused, on the third occasion the accused struck Habibullah, as well as the occasion when he admits striking Dilawar thirty times, there were no witnesses present. The accused could not clearly remember the occasions when he struck Dilawar because "[t]hey were not the only PUCs [he] delivered blows to. [He] did it to a lot of other PUCs, who did not die . . . Dilawar died, but [he] probably kneed 20 or so PUCs total and [he] can't differentiate between the rest of the PUCs and the ones who died."

d. The Government has charged the accused with striking Habibullah between on or about 30 November and 3 December 2002, and striking Dilawar between on or about 5 and 10 December 2002. The accused is also charged with maiming Dilawar during the same period. The Government proffers that in order to corroborate the accused's confessions, the Government intends to offer 6 autopsy photographs depicting bruising and tissue damage to the upper legs and thighs of Dilawar (Enclosures 1a-f to Appellate Exhibit XLI) and two photographs depicting bruising to the legs of Habibullah (Enclosures 2a and 2b to Appellate Exhibit XLI).

e. The Court earlier denied a related defense motion *in limine* in which the defense requested that the Government not be allowed to elicit any testimony relating to the deaths of the detainees known as Dilawar and Habibullah (Appellate Exhibit XXXVI).

f. Exhibits 1a-c depict what appears to be areas of bruising on the upper thighs of a dark-skinned body identified by the Government as Dilawar, with a ruler held against the bruises for scale. Exhibits 1d-f are dissected views of the upper thighs of what appears to be the same individual. The photographs appear to depict damage to the muscle tissues, and there is a profusion of what appears to be clotted blood in the field of view.

g. Exhibits 2a and 2b appear to depict areas of bruising the back of the knee area on a different, light-skinned individual identified by the Government as Habibullah, with a ruler held against the body for scale.

Law and Analysis.

3. The defense asserts that if introduced at trial, the proffered photographs "would be extremely prejudicial and serve to inflame the passions of the jury." The Government asserts that the photographs are relevant evidence in that they show the existence of marks consistent with the charged offenses, and thus corroborate the accused's confessions. The Government also asserts that the probative value of the photographs outweighs any prejudicial impact.

4. MRE 402 provides that generally, only relevant evidence is admissible. MRE 401 provides that evidence is relevant if it has a tendency to make more or less probable a fact that is of consequence to the determination of the action. MRE 403 provides that although logically relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, or by considerations of undue delay. The Court concludes that the photographs depicting the bruising of the detainees known as Habibullah and Dilawar, as well as the dissected views depicting apparent massive tissue damage to Dilawar's legs are clinical in nature, limited in number, and highly relevant corroboration of the accused's confession and presumably will also corroborate the testimony of the pathologist relating to the nature of the injuries as well as the manner of their infliction. The Court further concludes that the probative value of such evidence greatly outweighs any danger of unfair prejudice, confusion of the issues, or misleading of the fact finder.

Ruling.

5. The defense motion in limine is DENIED. The photographs which appear as enclosures 1a-f and 2a and 2b are admissible as prosecution exhibits, subject to proper authentication by the Government.

MARK P. SPOSATO
LTC, JA
Military Judge

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES v. PFC Willie V. Brand 377th Military Police Company Cincinnati, OH 45237	Essential Findings of Fact, Conclusions of Law, Ruling and Order - Defense Motion to Compel Disclosure of Documents Under MRE 506 August 5, 2005

1. The defense has moved, pursuant to Military Rule of Evidence (MRE) 506(i)(4)(C), to compel the release of certain documents after the Government claim of privilege. I have considered the briefs submitted by the parties, and the document in question.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with one specification of assault with a means likely to produce death or grievous bodily harm; three specifications of assault consummated by a battery; four specifications of maltreatment; one specification alleging a false official statement; and one specification of maiming. A specification alleging manslaughter relating to the detainee Dilawar was dismissed by the convening authority upon referral. All of the charges relate to the detainees known as Habibullah and Dilawar, who were held at the Bagram Airfield collection point in Afghanistan.

b. The charges were preferred on 4 January 2005; an Article 32 investigation was conducted 21-23 March 2005; the charges were referred to a general court-martial by the convening authority on 19 April 2005; and the accused was arraigned on the charges on 5 May 2005. The Court issued a pretrial order the same day (Appellate Exhibit III).

c. In conjunction with e-mailing the pretrial order to the parties, the Court asked the parties "if there are any MRE 505 issues, or any issue relating to obtaining a security clearance for Mr. Galligan [Civilian Defense Counsel, hereinafter "CDC"] (Appellate Exhibit LXII). In a 12 May 2005 response, trial counsel informed the Court: "Sir – I apologize for getting back so late on the MRE 505 matter. Mr. Galligan has a security clearance.

APPELLATE EXHIBIT LXVI

The only material he has not viewed is ICRC material which will be addressed in response to a motion he filed. The government expects to introduce material that is presently classified, but is working on declassification. At this point, the Government anticipates a need for a/some closed session(s)." A defense motion to compel disclosure of the ICRC documents was not actually filed by the defense until 1 August 2005, as noted below.

d. On 11 May the defense submitted a second supplemental discovery request, which the Government replied to on the same day (Appellate Exhibit XLI). That response references a "SECDEF Memo" dated July 2004 which prohibits the Government from disclosing ICRC communications to any non-DoD personnel without approval of the SECDEF or a Deputy SECDEF.

e. On 24 May 2005, the defense gave notice, *inter alia*, of a "Motion to Dismiss; or alternatively, to Abate, Pending Approval of civilian defense counsel's access to classified evidence provided by the International Committee of the Red Cross (ICRC) and/or other sources"(Appellate Exhibit XXI).

f. On 28 June 2005, the Government filed a notice styled "Government Invocation of Military Rule of Evidence 506 and Request for *In Camera* Review of Privileged Materials (Appellate Exhibit XLVII). The so-called invocation proffers "To insure the confidentiality of communications between the ICRC and the United States, the Secretary of Defense has ordered that '[d]issemination of ICRC communications outside of DoD is not authorized without the approval of the Secretary or Deputy Secretary of Defense.' Secretary of Defense Memorandum on 'Handling of Reports from International Committee of the Red Cross,' dated 14 July 2004, attached." The Government asserted that disclosure of the ICRC reports would be detrimental to the public interest. The Government also asserted that ICRC materials were not relevant to the guilt or innocence or to punishment of the accused.

g. In its MRE 506 notice, the trial counsel invoked the privilege against disclosure of the ICRC communications pursuant to MRE 506(c), and moved for the Court's *in camera* inspection of the documents to determine whether disclosure is required under the standard set forth in MRE 506(i)(4)(C).

h. At an Article 39(a) session conducted on 28 July 2005, the Court ordered the defense to file a motion to compel release of the specific information the defense required, pursuant to MRE 506(i)(4)(C).

i. On 1 August the defense filed a notice that the accused would plead not guilty plea to all charges and specifications, and elected trial with a panel composed of one-third enlisted panel. The defense also gave notice of the affirmative offenses of obedience to orders and justification (Appellate Exhibit LXIII).

j. On 1 August 2005, the defense also filed a motion to compel disclosure of the ICRC communications under MRE 506 (Appellate Exhibit LX). In addition to the general need for disclosure of the documents to the CDC for adequate trial preparation, the defense articulated the following specific bases for disclosure: the documents contain exculpatory and mitigating evidence; the accused's right to civilian counsel will be compromised unless the CDC has full access to the documents; the documents would support the defense theories of justification or obedience to orders; the documents make reference to the treatment of detainees at the time of the charged misconduct, and may relate to the nature of their injuries; and the documents also make reference to misconduct by others that would be appropriate extenuation and mitigation evidence.

k. The Government submitted a handwritten response to the defense motion to compel release of the ICRC documents (Appellate Exhibit LXIV).

l. The Court conducted an *in camera* review of the ICRC documents on 5 August 2005.

m. To date, the ICRC documents have not been declassified by the Secretary of Defense, and the Government proffers that it is unlikely that such documents will be declassified in the near future.

Law and Analysis.

3. The defense asserts that it requires the disclosure of all of the ICRC documents to the CDC in order to adequately prepare for trial as well as the specific reasons detailed in paragraph 2(j) above. The Government asserts: nothing in the ICRC documents directly relates to the charged offenses; none of the information contained in the ICRC documents relates to causation of the charged offenses, and the reports are therefore irrelevant; the ICRC documents do not contain any information germane to either of the affirmative defenses of which the defense has given notice (justification or obedience to orders); and the CDC has already been provided an unclassified version of one of the statements contained within the ICRC documents.

4. Rule for Courts-Martial (RCM) 701 regulates discovery in courts-martial. RCM 701(f) provides: "Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. RCM 710(g)(2) further provides: "Upon a sufficient showing the military judge may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." This provision also authorizes a military judge to examine evidence *in* camera, issue protective orders if necessary, and order evidence "sealed and attached to the record . . . as an appellate exhibit." In order to secure the MRE 506 *in camera* proceeding, the Government must make a showing that disclosure of the information requested by the defense could be expected to cause identifiable damage to the public interest. If the Government makes such a showing, the military judge conducts the *in camera* proceeding. The standard to be employed on the issue of disclosure is a demonstration, by the defense, that the evidence "is relevant to the guilt or innocence or the punishment of the accused *and* is otherwise admissible in the court-martial proceeding." MRE 506(i)(4)(C). This standard is more restrictive than the "material for preparation of a defense" liberal release standard of RCM 701.

5. The Court concludes: (1) the Government has made a valid assertion of privilege in relation to the ICRC documents under MRE 506; (2) the Government has shown that disclosure of the ICRC documents could reasonably be expected to cause some damage to the public interest (the protection of the confidentiality of communications between the ICRC and the United States); (3) the defense has failed to demonstrate a specific need for the information, or that the information would be admissible at a court-martial. The Court further finds that the materials contained within the ICRC communications, which are comprised of several ICRC reports, five sworn statements, and various memoranda for record dated from early June 2002 through late January 2003, are not relevant, and involve matters totally unconnected to the charged offenses in the instant case. Finally, the Court concludes that the materials contained within the ICRC documents do not contradict any information already disclosed to the defense or provide any impeachment evidence that is not already available to the defense, nor any evidence reasonably relevant to extenuation or mitigation matters.

Ruling.

6. The defense motion to compel disclosure of the ICRC documents is DENIED.

Order.

7. It is hereby ordered that the briefs of the parties (Appellate Exhibits LX and LXIV), as well as the ICRC materials the Court reviewed *in camera* (Appellate Exhibit LXV) shall be sealed and attached to the record. Appellate Exhibit LXV may only be unsealed by a general court-martial convening authority with jurisdiction over the accused or an appellate court.

MARK P. SPOSATO
LTC, JA
Military Judge

IN A SPECIAL COURT-MARTIAL OF THE UNITED STATES
US ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT

UNITED STATES v. BRAND, Willie V.. PFC, U.S. Army, HHB, USAADACENFB, Fort Bliss, Texas	)	GOVERNMENT RESPONSE TO DISCOVERY REQUEST FOR BCP LOGBOOKS 28 June 2005

COMES NOW the Government and informs the court of the status of Bagram Collection Point logbooks requested by the Defense. The logbooks cannot be found. Despite that fact, persons familiar with the log books have given sworn statements that they would not contain the information Defense seeks or is entitled to. They are irrelevant and are therefore not required to be produced.

1. The government is in possession of two pages of computer printouts purporting to be local incident reports, dated 2 and 3 December 2002 relating to Habibullah. The Defense has been provided access to those two pages. To the Government's knowledge, no other log book records have been found.

2. Green cloth pass on books were used in the BCP to record important events relating to the detainees. (Sworn statement of he 377th Commander, CPT Christopher Beiring, 22 Jan 04, p. 9) One of these military notebooks was kept in the general population area and others were kept in the upstairs and downstairs isolation areas. (Sworn statement of SFC Jeffrey Davis, 5 Feb 04, p. 5) SFC Jeff Davis would take the logbooks and compile them in a computer in the front office of the BCP and make a report. (Sworn statement of SGT Thomas Curtis, 4 Feb 2004, p.4)

3. The 293rd MP Co. relieved the 377th MP Co. in Bagram. (Beiring, 22 Jan 04, p. 9) The notebooks were placed, by the 377th MP Co., in a field safe in the TOC area of the BCP. (Davis, 5 Feb 04, p. 5) The 293rd took over the logbooks. (Davis, 5 Feb 04, p. 5) (Beiring, 22 Jan 04, p. 9) The Soldiers of the 377th MP Co. did not keep any copies of the log books when they left Afghanistan. (Beiring, 22 Jan 04, p. 10). SFC Davis did not keep copies of the computerized version of the log books, either. (Davis, 5 Feb 04, p. 3) CPT Beiring said that the 293rd began cleaning out and destroying records during its RIP with the 377th MP Co. (Beiring, 22 Jan 04, p. 9) The computer containing SFC Davis's log book entries were also wiped out by the relieving MP company. SFC Davis became aware of this because the Commander of that company called to see if the 377th had a back up disk. (Davis, 5 Feb 04, p. 3)

4. Even if the logbooks presently existed, they would not have contained evidence that the detainees were struck by other MPs. From the sworn statements collected by CID agents in this case, and from PFC Brand's own admission, it is clear that knee strikes were not recorded in the logbooks.

APPELLATE EXHIBIT XLVI

a. SFC Davis stated that "[t]he log books were not always accurate, because the MPs were not documenting all the interactions with the detainees." (Davis, 5 Feb 04, p. 5).

b. SPC Jeremy Callaway admitted to striking a detainee in an isolation cell. He stated that he had no memory of logging the strike and thought he did not. (Callaway, 30 Jan 04, p. 2)

c. SGT Thomas Curtis, who observed PFC Brand strike Dilawar, made a sworn statement on 4 February 2004 in pertinent part, as follows:

(p. 2) . . .

Q: What were you told to write in the log books?
A: Bathroom breaks, when they ate, when they saw medical, when they were interviewed, what MI directed about the detainees treatment (hooding, standing up for sleep dep)

. . .

Q: Were comments made in the logbook about strikes made?
A: Nope, cause you rarely had to strike someone. If they struck at you, you'd note he was combative.

(p. 4) . . .

Q: Were compliance blows recorded in the logbook?
A: I doubt it and I never remember reading it in the book. I know the blows happened and I don't remember reading it.

d. In a 21 December 2002 sworn statement (p. 2), PFC Brand answered this series of questions :

Q: Do you pass on to the next shift how many times and where you struck a detainee?
A: No, usually all we pass on is what they are eating, what kind of problems they gave us, if they need to see a doctor, or any other requests the detainees have. . .
Q: Is it recorded anywhere?
A: It wasn't then, but it is now.

e. In a 24 January 2004 sworn statement (p. 11), PFC Brand answered the following question:

Q: Did any of these blows get logged or recorded?
A: No, prior to the deaths, we only logged when they got medicine, if they refused to eat or refused to drink.

f. In a 3 February 2004 (p. 2) sworn statement, PFC Brand admitted that he did not log the 30 strikes he gave to Dilawar.

The statements provided above make clear that the log books do not contain evidence that possesses a material or exculpatory value. Even if they did contain such evidence, it was apparent before the logbooks were destroyed by the 293rd MP Company. Further, no evidence contained in the log books is of central importance to an issue that is essential to a fair trial. Even if such central evidence were present, the defense is able to obtain comparable evidence by calling witnesses to testify to the strikes they believe were recorded in the log book.

The government does not have an absolute and undifferentiated duty to preserve all material that might be of conceivable evidentiary significance in a given case. Unless the defendant can show bad faith on the part of the government, the failure to preserve potentially useful evidence does not deny due process of law. Poor judgment, negligence, and even ineptitude do not equal bad faith. The 293rd MP Co. had no reason to believe the logbooks contained any useful evidence for this or any prosecution, and it had no reason to want to impair the rights of any persons accused in these cases.

The Defense is not entitled to relief either in abatement, suppression, or the giving of a lost evidence instruction.

CID agents have made extensive efforts to try and locate the logbooks and SFC Davis's computer. In the event the Court requires proof of the extent of the Government's efforts to obtain the logbooks, an evidentiary hearing would have to be held. The records of those efforts are presently contained only in Agent Investigative Reports.

/s/ Original Signed

DAVID R. TRAINOR
1LT, JA
Trial Counsel

This is to certify that I have served the *Government's Response to Discovery Request for BCP Logbooks* on Mr. John Galligan via email to galligan5646 @sbcglobal.net, this 28th day of June, 2005.

/s/ Original Signed

DAVID R. TRAINOR
1LT, JA
Trial Counsel

UNITED STATES)
)
v.)
)
PFC Willie V. BRAND)
)
HHB, USAADACENFB)
Fort Bliss, Texas 79916)
)

SENTENCING WORKSHEET

NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.

~~Private First Class Willie V. Brand, this court-martial sentences you:~~

NO PUNISHMENT

1. ~~To no punishment.~~ NRC

REPRIMAND

2. ~~To be reprimanded.~~ NRC

REDUCTION

3. ~~To be reduced to the grade of E-1.~~

FORFEITURES

4. ~~To forfeit $_____ pay per month for _____ months.~~ NRC

5. ~~To forfeit all pay and allowances.~~ NRC

RESTRAINT AND HARD LABOR

6. ~~To be restricted for _____ (days) (months) to the limits of:~~ NRC

_____

_____

7. ~~To perform hard labor without confinement for _____ (days) (months).~~ NRC

8. ~~To be confined for _____ (days) (months) (years).~~ NRC

PUNITIVE DISCHARGE

9. ~~To be discharged from the service with a Bad Conduct Discharge.~~ NRC

10. ~~To be dishonorably discharged from the service.~~ NRC

Victor P. Corello, LTC, USA
(Signature of President)

EXHIBIT CXLIX

Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offenses of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation, you must bear in mind that the accused is to be sentenced only for the offenses of which he has been found guilty.

The offenses charged in specification 1 of Charge I and the specification of the Additional Charge are one offense for sentencing purposes. Therefore, in determining an appropriate sentence in this case, you must consider them as one offense.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority. A single sentence shall be adjudged for all offenses of which the accused has been found guilty.

The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of E-1,

b. Forfeiture of all pay and allowances,

c. Confinement for 11 years, and,

d. A dishonorable discharge.

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

HIBIT CL

This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

This court may adjudge reduction to the lowest or any intermediate enlisted grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-2.

I also advise you that any sentence of an enlisted soldier in a pay grade above E-1 which includes either of the following two punishments will automatically reduce that soldier to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge (meaning in this case, a bad conduct discharge or a dishonorable discharge; or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1. However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. Restriction to limits will not exempt an accused from any assigned military duty.

This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

As I have already indicated, this court may sentence the accused to confinement for 11 years. A sentence to confinement should be adjudged in either full days or full months or full years; fractions such as one-half or one-third should not be employed. So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.

This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused and his family of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-3 with over 8 years of service, the total basic pay being $ 1,640.00 per month.

This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

Any sentence which includes either (1) confinement for more than six months or (2) any confinement *and* a punitive discharge will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay and/or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

You are advised that the stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.

This court may adjudge either a dishonorable discharge or a bad conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad conduct discharge that would terminate the accused's current term of service.) A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct.

Finally, if you wish, this court may sentence the accused to no punishment.

In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after your findings. (Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.

You should consider evidence admitted as to the nature of the offenses of which the accused stands convicted, plus:

1. The accused's age 27 years old.

2. The accused's good military character.

3. The accused's reputation in the service for good conduct and efficiency.

4. The combat record of the accused – deployments to Kosovo and Afghanistan, as well as a deployment to Guatemala.

5. The family difficulties experienced by the accused.

6. The financial difficulties experienced by the accused.

7. The duration of the accused's pretrial restriction – he's been restricted to the confines of Fort Bliss since 24 January 2005.

8. The accused's GT score of 103.

9. The accused's education which includes a high school diploma.

10. That the accused is a graduate of the following service schools: Military Police and Corrections AIT.

11. That the accused is entitled to wear the medals and awards as reflected in PE 17.

12. Lack of previous convictions or Art. 15 punishment.

13. Character evidence—testimony of Mr. Schwartz, SSG Raymer, CH. Mattingly, Mrs. Robertson, and Mrs. Brand.

14. Accused's testimony.

15. And the testimony of SSG Plummer.

Further you should consider:

The nature and extent of injuries suffered by the victim.

The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

The accused's unsworn statement included the accused's personal thoughts and feelings about certain matters. An unsworn statement is a proper means to bring information to your attention, and you must give it appropriate consideration. Your deliberations should focus on an appropriate sentence for the accused for the offenses of which the accused stands convicted.

During argument, trial counsel and defense counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of counsel and their

recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known.

Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you arrive at the required concurrence, which is two-thirds or 5 members. A sentence which includes confinement in excess of ten years requires the concurrence of three-fourths or 6 members.

The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will then give you specific instructions on the procedure for reconsideration.

Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good

order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.