

U N I T E D S T A T E S

v.

Accused

REQUESTS FOR PRODUCTION &
DISCOVERY

(date)

1. Purpose of Request.

This is a continuing request for production of evidence, information, and other materials made in accordance with or consistent with Article 46, UCMJ, R.C.M. 405(f)(10), 701, 703; Mil. R. Evid. 304(d)(1), 705, and *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1999); and *Brady v. Maryland*, 373 U.S. 83 (1963). Note, the disclosure of Brady material is a self-executing duty of the prosecution. The duty to disclose favorable evidence exists even without a request by the accused. See *United States v. Agurs*, 427 U.S. 97, 107 (1976).

Discovery is not limited to matters within the scope of trial counsel's personal knowledge. "The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the Government's behalf." *United States v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003)(quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). "Trial counsel must exercise due diligence in discovering [favorable evidence] not only in his possession but also in the possession . . . of other 'military authorities' and make them available for inspection." *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993). "The parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request." *Williams*, 50 M.J. at 441. *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004).

"The prudent prosecutor will resolve doubtful questions in favor of disclosure." . . . Such disclosure will serve to justify the trust in the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a

criminal prosecution is not that it shall win a case, but that justice shall be done." Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976); Berger v. United States, 295 U.S. 78, 88 (1935)).

This request includes any and all information which may be or become of benefit to the accused in preparing or presenting his defense at trial and the opportunity to inspect all real evidence that the government intends to offer at trial on the merits; in the event charges are heard at an Article 32, UCMJ hearing, and/or referred to court-martial. Discovery practice is not focused solely upon evidence admissible at trial. See United States v. Stone, 40 M.J. 420, 423 (C.M.A. 1994)(materiality standard normally "is not a heavy burden," evidence is material as long as there is a strong indication that it will "play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.)(citations omitted); United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

In the event charges are referred to trial this Production Request becomes the first defense discovery request under R.C.M. 701.

2. Definitions. For the purposes of this request the following definitions apply:

a. "Government" means the United States and its agencies, to include the Department of the Army or any other military Department, the Federal Bureau of Investigations, or any other government police or law enforcement agency, and each of its officials, agents, employees, attorneys, investigators, representatives, and anyone else acting or purporting to act on its behalf to include civilian investigative agencies working for, with, or in cooperation with the United States. [NOTE: and for the purposes of this case specifically includes the city of Chesterfield, Virginia, and the Commonwealth of Virginia, and any of their law enforcement agents and entities.]

b. "Within government control" includes that which is within the subpoena or deposition power of an Appointing Authority, Convening Authority, Military Judge, or trial counsel pursuant to the Uniform Code of Military justice and applicable Rules for Courts-Martial, as well as applicable federal statutes.

c. "Person" includes a natural person, a government employee, a government entity, and every other form and kind of

public or private entity. Reference herein to any "person" includes representatives, agents and employees of each person.

d. "Document" means any kind of written, typewritten, printed or recorded material whatsoever, including but without limitation, notes and memoranda (handwritten or otherwise, personal or official), letters, reports, telegrams, publications, opinions of experts, laboratory reports, charts, chain of custody documents, physical evidence contracts, computer discs, electronic mail, tapes or printouts, audio or video recordings, transcriptions of recordings, and public records, whether or not in the agency's possession or under the agency's control, relating to or pertaining in any way to the subject matter to which the discovery requests refer, and includes, without limitation, originals, all file copies, all non-identical copies, and all drafts, working papers, routing slips and similar materials prepared in connection with the documents, whether used or not.

e. "Writing" includes any email, chat, social network posting (e.g. Facebook or MySpace), and similar communication methods.

f. AStatement@ means any replication of a person's words whether transcribed by the person, a third party, or the agency attorney.

g. To Aidentify@ a "document" means to give the date, title, author(s), addressee(s) and a content summary of each document; AIdentify@ with respect to "persons" means to give each person's full name, national origin, age, gender, title, position, agency division, and grade.

3. Declination to Produce or Disclose.

a. If any information responsive to this request is not produced because of a claim of privilege, identify each item that would fall within the request and/or information affected, the basis of the privilege, and the current location of each document or information (i.e. a *Vaughn* Index, see *Vaughn v. Rosen*, 157 U.S. App. D.C. 340; 484 F.2d 820 (DC Cir. 1973)). Such material should be submitted, with notice to the defense, to the investigating officer or military judge for *in camera* review. See e.g. *United States v. Cadet*, 727 F.2d 1453 (9th Cir. 1984).

b. If any information responsive to this request is not produced because it is unavailable: state with particularity the following.

- (1) Item sought.
- (2) Date requested from person or agency believed to be in possession.
- (3) Full name, address, telephone number, of each person contacted in order to obtain production.
- (4) Reason the item is unavailable.
- (5) Steps taken to locate and obtain the information.

4. Specific Requests.

The government is requested to preserve, and produce as appropriate, the following physical evidence for subsequent examination by defense expert consultants, the military judge, and the members.

- a. All reports, documents and writings, statements, information, and evidence, obtained or gathered by each civilian police agency, social services or similar agency, and courts, relating to the allegations or prior investigation into similar allegations.
- b. A copy of all police, social service, child welfare agency interviews, investigations, or complaints involving the mother and whether or not she physically abused her daughter Dylan Hunt.
- c. All documents and writings regarding the allegations.
- d. A copy of all juvenile records of any alleged victim.
- e. A copy of all school records of any alleged victim.
- f. A copy of all social services or child protective services or other records for any alleged victim.
- g. All handwriting, fingerprint, or other exemplars used to compare suspect evidence with known samples from the accused.
- h. All hand written, voice recorded, or other "notes" or record of witness interviews. This includes agent case notes, interrogation logs.
- i. Any evidence of an exculpatory nature or which tends to negate the alleged guilt of the accused. R.C.M. 701(a)(6)(A); DR 7-1038.

- j. Any evidence which would lessen the punishment of the accused should he be found guilty of any offenses. R.C.M. 701(a)(6).
- k. Any evidence which would tend to mitigate the degree of seriousness or level of intent of the alleged offense. R.C.M. 701(a)(6)(B).
- l. A complete copy of any and all investigations or laboratory reports. Also any internal agency documents and data made in connection with this investigation, the command, or any other law enforcement agency, including copies of all attachments, which relate to forensic examinations. R.C.M. 701(a)(1)(c).
- m. Copy of any message traffic, documents, and writings, from the command to any higher headquarters in connection with the accused or others allegedly involved with the accused or similar crimes, including but not limited to any situation reports or similar message traffic.
- n. A copy of any media releases, official or unofficial by military or civilian agencies. This discovery is necessary so that the defense may properly conduct voir dire, seek appropriate protective orders, and may examine the necessity of raising a motion for a change of venue. *See U.S. v. Chambers*, 49 C.M.R. 220 (A.F.C.M.R. 1974).
- o. Any known evidence tending to diminish credibility of witnesses, both Government and Defense, including, but not limited to, prior convictions under Mil. R. Evid. 609 and evidence of other character traits, conduct, or bias under Mil. R. Evid. 608. *United States v. Agurs*, 427 U.S. 97 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Jenkins*, 18 M.J. 583 (A.C.M.R. 1984); *United States v. Green*, 37 M.J. 88 (C.M.A. 1993); *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975). The government is specifically requested to make a local and national records check for arrests, prosecutions, and convictions in any state, local, or federal court. Further, any adverse action in connection with a security clearance application, review, or decision, should be disclosed. This includes also a review of any law enforcement accreditation files.

- p. Records of pending or completed adverse administrative actions against any prosecution witness, including but not limited to: discharge action prior to expiration of a term of service for any reason, relief for cause actions, letters of reprimand or admonition, and negative counselings related to a negligence or disciplinary matter. *United States v. Green*, 37 M.J. 88 (C.M.A. 1993).
- q. Records or disclosure of any ongoing or completed investigations into allegations of misconduct by a government witness. *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994).
- r. Any and all adverse or negative information contained in the personnel files of any federal or state law enforcement agent who may have worked on this case in any manner. The defense does not agree that *United States v. Henthorn* sets the appropriate standard of production on this issue.
- s. Any psychiatric, psychological, or other mental health related reports or statements concerning any government witness, including but not limited to Julie Farris and the children. References (b), (q), *U.S. v. Brakefield*, 43 C.M.R. 828 (A.C.M.R. 1971), and *U.S. v. Mougeneil*, 6 M.J. 589 (A.F.C.M.R. 1978).
- t. A copy of all Family Advocacy Program documents and statements at FSC x regarding x or any of the children.
- u. A copy of all documentation held by the x Department of Child Protective Services or similar agency, regarding allegations of child abuse.
- v. All medical and non-medical records relating to any alleged spousal abuse, by either party.
- w. Access to pertinent background information of the prospective court members when this becomes available, to include the specific questions listed at R.C.M. 912(a)(1) for each potential court member. R.C.M. 912(a)(2). In addition, we request a copy of all documents relied upon by the convening authority in selecting court members. R.C.M. 912(a)(1). *United States v. Roland*, 50 M.J. 66, 69 (C.A.A.F. 1999); and see *U.S. v. Credit*, 2 M.J. 631 (A.F. C.M.R. 1976); *rev'd and remanded*, 4 M.J. 118 (C.M.A. 1977); *aff'd*, 6

M.J. 719 (A.F.C.M.R. 1978), *aff'd*, 8 M.J. 190 (C.M.A. 1980).

- x. Mental health/counseling records of each government witness. *United States v. Cano*, 61 M.J. 74 (C.A.A.F. 2005).
- y. Inspection and copies of all personal and business notes, memoranda and records, including all internal agency documents and data, kept by all agents, investigators, or witnesses, not formally made part of the reports referred to above. In addition to other uses, said papers are to be used prior to cross-examinations of said persons, as provided by the Jencks Act.

i. NOTE: We further request that all such notes and those made in the future be preserved and not destroyed and that the appropriate parties be directed to preserve the same - regardless of alleged regulations on the timed destruction of documents. Any handwritten, computer-generated, typed, or recorded statements by any witness for the government, to include summaries of conversations with representatives from the government which were not attached as allied papers. This includes investigator's notes, any Interview and Interrogation Log, and any statements which have been recorded by the trial counsel in his/her discussion with the witnesses. If any information is alleged to be classified, it is requested that an immediate declassification review be undertaken. R.C.M. 914; R.C.M. 405(f) (creates independent and inter-connected substantial rights, including the right to production of evidence in the control military authorities, set out in R.C.M. 405(f)(10) (hereinafter "the Rule"). One of the production issues at an Article 32, UCMJ, hearing, is the NCIS file, and notes.

ii. NOTE: *United States v. Jackson*, 33 C.M.R. 884, 890 (A.F.B.R. 1963), stands for the proposition that NCIS agent notes should be produced in advance of an Article 32, UCMJ, hearing.)

iii. If an informant, confidential witness, or cooperating witness has been used in any way in

investigating or prosecuting allegations against the accused, provide copies of the following:

- (1) All written offers, inducements, or suggestions that the witness would or may received money or other inducements for cooperation.
- (2) A summary of all offers, inducements, or suggestions that the witness would or may received money or other inducements for cooperation.
- (3) A copy of all receipts or other documents showing money disbursements to that witness.
- (4) A copy (or summary of oral agreement) of any agreement to cooperate.
- (5) A copy of any notes, diary, or similar record which shows investigator contacts, observations, or supervision, of the witness during the course of the investigation.

5. Forensic Examinations:¹ The government is requested to provide:

The text of any reports or statements or conclusions of experts made in connection with this case, including, but not limited to, the results of corporeal, physical, scientific, forensic and mental health examinations or tests including polygraph or comparisons. Fed. R. Crim. Pro. 16(a)(1)(d); Article 46, UCMJ; R.C.M. 701(a)(2)(b); *U.S. v. Mougene1*, 6 M.J. 589 (A.F. C.M.R. 1978).

A summary of any expected testimony of any expert the prosecution intends to call as a witness. R.C.M. 703(e), Mil. R. Evid. 1102; Fed. R. Evi. 16(a)(1)(E); Article 46, UCMJ, 10 U. S. Code §846; Article 36, UCMJ, 10 U. S. Code §836.

¹ The defense notes that were this case to occur in the Commonwealth of Virginia, much of the requested production and discovery here is publically available. See Va. Dept. Forensic Science at <http://www.dfs.virginia.gov>. Many other state and federal organizations information is available to the general public.

A complete copy of any forensic laboratory case file to include results of tests; bench-notes, photographs, quality assurance examinations, proficiency reviews, and notes of such.

A complete copy of any forensic testing laboratory or testor protocols used or required to be used in conducting any forensic examination.

A copy of any internal or external reviews or audits on any forensic laboratory or examiner into quality assurance issues.

A complete copy of each text, article, or research paper relied upon by any expert forensic witness. Alternatively, a citation to such item may be substituted if properly cited and there is a statement of the place where such item may be examined or is reasonably available to members of the public at no cost.

As to each mental health, counseling, or other expert - A complete copy of each text, article, or research paper relied upon by any expert forensic witness. Alternatively, a citation to such item may be substituted if properly cited and there is a statement of the place where such item may be examined or is reasonably available to members of the public at no cost. See Mil. R. Evid. 705.

Disclosure of all investigations of any type or description, pending initiation, ongoing or completed since 1 January 2001 which pertain to alleged misconduct of any type or description committed by any military or civilian personnel who conducted tests upon, had custody of, or otherwise handled or possessed evidence in this case. R.C.M. 701(a)(6)(A); *United States v. Stone*, 40 M.J. 420 (C.M.A. 1994).

Prior civilian and court-martial conviction(s) and all arrests, apprehension of, or charging of all military and civilian personnel who conducted tests upon, had custody of, or otherwise handled or possessed the samples of the accused or alleged victim. The Defense specifically requests a check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations be made. R.C.M. 701(a)(6)(A); *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986).

All evidence in control of or known to the United States concerning the mental status of all military and civilian personnel who conducted tests upon, had custody of, or otherwise handled or possessed the samples of the accused or alleged victim. Material sought specifically includes medical records

reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. R.C.M. 701(a)(6)(A); *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R. 1971), *United States v. Brickey*, 8 M.J. 757 (A.C.M.R. 1980) aff'd 16 M.J. 258 (C.M.A. 1983), *United States v. Eschalomi*, 23 M.J. 12 (C.M.A. 1985).

All evidence of character or conduct or bias bearing on the credibility of all military and civilian personnel who conducted tests upon, had custody of, or otherwise handled or possessed the urine samples of the accused in the control of or known to the United States. R.C.M. 701(a)(6)(A); *Giglio v. United States*, 405 U.S. 15, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

NOTE: As noted above, the defense specifically requests that all evidence be preserved. Further, should the government intend testing any suspected evidence the defense requests the following:

a. That a sample be retained sufficient for independent testing;

b. That the defense, or defense expert, be permitted to observe all aspects of the handling, testing, and reporting of any testing of evidence.

6. As to all Witnesses.

Copies of any maps, diagrams, or drawings relevant to this case.

Any matter which the prosecution seeks to have judicially noticed. Mil. R. Evid. 201; *U.S. v. McShane*, 28 M.J. 1036 (A.F.C.M.R. 1989).

Any writing used by a witness to prepare for trial. Mil. R. Evid. 612.

All police reports and reports of investigation concerning the subject charges, including copies of all notes, memoranda, writings, and drafts of reports of all police/security officers, Customs personnel, FBI personnel, Navy personnel, NCIS special agents, or investigators who participated in any phase of the investigation of the subject charges. This request is not limited to formatted or typed reports, but also includes any and all Arough® or handwritten notes, memoranda and documents in the hands of government employees. *U.S. v. Brickey*, 16 M.J. 258 (C.M.A. 1983) and *U.S. v. Webster*, 1 M.J. 216 (C.M.A. 1975) *U.S.*

v. Jones, 20 M.J. 919 (N.M.C.M.R. 1985); *United States v. Briggs*, 48 M.J. 143 (1998).

If any relevant witness in this case has been subject to a polygraph or other "truth detecting" examination, I request to be provided with the results of this testing, together with all relevant charts, graphs, questions and other documents. This request includes, but is not limited to, any psychiatric or psychological testing designed to assess the "credibility" of the alleged victim's statement. See *U.S. v. Gipson*, 24 M.J. 246 (C.M.A. 1987); *U.S. v. Mougene*, 6 M.J. 589 (A.F.C.M.R. 1978).

The names, home and business addresses and phone numbers of all witnesses the prosecution intends to call in rebuttal. *United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. Appl. 2002)(discussing *United States v. Trimper*, 26 M.J. 534 (A.F.C.M.R. 1988), aff'd, 28 M.J. 460 (C.M.A. 1989), as being unduly restrictive and not to be followed in Army courts-martials), see also, Gilligan & Wims, *Civilian Justice v. Military Justice*, *Journal of the Association of Trial Lawyers of America*, 2, 36 (Summ. 1990) ("R.C.M. 701(a)(3)) requires disclosure of the names of witnesses to be called in rebuttal").

Any hearsay evidence the government intends to introduce as an exception to Mil. R. Evid. 802. See Mil. R. Evid. 803 & Mil. R. Evid. 804. The defense further requests to be notified of the specific provision under which the government will seek admission of the hearsay evidence. See generally, R.C.M. 701.

Any evidence the Government intends to introduce concerning any specification which was not charged due to lack of evidence concerning these specifications, or lack of seriousness to charge at a Court-Martial. The term "any evidence" includes, but is not limited to, statements, whether oral or written, real or documentary evidence, etc.

Any evidence the Government intends to introduce concerning any uncharged financial misconduct, no matter how minor or tangentially related to the charged offense, which has not been charged for whatever reason. *U.S. v. McIntosh*, 27 M.J. 204 (C.M.A. 1988).

Any evidence the Government intends to introduce concerning any uncharged misconduct of any nature, no matter how minor or tangentially related to the charged offense, which have not been charged for whatever reason. See generally, E. Imwinkelried, *Uncharged Misconduct Evidence* (1984).

The Defense requests further that the Government articulate the permissible purpose(s) under Mil. R. Evid. 404(b) (specific theory, i.e. Motive, Intent, Plan etc) which justify consideration of this evidence and how the evidence is more probative than prejudicial under the balancing test of Mil. R. Evid. 403, which permits admission into evidence.