

NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

UNITED STATES)
)
)
V.) DEFENSE MOTION TO
) COMPEL PRODUCTION OF
) WITNESSES
)
MARINA D. LOPEZ)
Staff Sergeant (E-6))
U.S. Marine Corps) 11 May 2011

1. **Nature of Motion.** The Defense submits this motion and requests the Court to compel the Government to produce 39 witnesses requested by Defense Counsel on 30 March 2011.

2. **Summary of Facts.**

- a. On 30 March 2011 the Defense submitted a witness request ("Request") to Trial Counsel.
- b. In the Request, the Defense made, in relevant part, a request for the following witnesses:

"e. Each of the candidates from First Platoon, Charlie Co., Fall 2010 are all percipient witnesses as to each and every specification on the charge sheet. Those who did not graduate or did not accept commissions and are, therefore, out of area, are listed on enclosure (1) and their personal appearance is requested. Their contact information has been requested by the undersigned via a request for copies of the candidate record books. However, copies of the candidate record books have not been produced to the undersigned. Such records (and the contact information) are in the government's control and are therefore not provided herein."

- c. The government's response ("Response") to defense witness request was received on or about 31 March 2011.
- d. In the Response, the government denied production of all those witnesses identified in paragraph 2.b. above claiming that the request failed to comply with the requirements of RCM 703.

e. Of those witnesses requested above and denied by the government, all were identified either by name or as a group of individuals (in a platoon) in the government's Bill of Particulars dated 1 April 2011 in response to Defense's request for such document.

3. Discussion.

There are several rules and statutes that control the production of witnesses before a court-martial. Both Article 46, UCMJ, and the Rules for Court-Martial implementing the statute set forth how witnesses will be produced for the court-martial. "The prosecution and defense...shall have **equal opportunity** to obtain witnesses and evidence, including the benefit of compulsory process." R.C.M. 703(a); Article 46, UCMJ (emphasis added). Upon timely submission by the defense of a request for witnesses, the Manual requires the trial counsel to arrange for the presence of requested witnesses unless the trial counsel contends that witnesses' presence is not required under R.C.M. 703. R.C.M. 703(c)(2)(D). Upon such a contention, the defense may submit the matter to the military judge for decision. *Id.* While there is no specific provision in the Constitution that provides for the defense to have a right to obtain evidence, a right of compulsory process has been read into the Sixth Amendment right to present a defense and confront witnesses. See Washington v. Texas, 388 U.S. 14 (1967).

In determining the materiality of witnesses, military courts consider seven factors. U.S. v. Allen, 31 M.J. 572, 610-611 (C.M.R. 1990) (*quoting U.S. v. Tangpuz*, 5 M.J. 426, 429 (C.M.A. 1978)). The factors considered in determining materiality are:

(1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by non

amenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service.

Allen, 31 M.J. 611. Other considerations such as cost, distance or inconvenience will not deem their testimony irrelevant.

It is the Defense's position that the Accused in a criminal trial has the absolute right under the Sixth Amendment to the Constitution to "confront the witnesses" against him. This means more than just having the opposing witness available for cross-examination; it also means having the right to present witnesses who will contradict, refute, or impeach the complaining witnesses.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (U.S. 1967).

4. **Evidence.** The defense intends to introduce the following evidence in support of this motion:

Attachment A – Defense Witness Request

Attachment B – Government Response

Attachment C – Government's Response to Defense Request for Bill of Particulars

5. **Relief Requested.** The Defense asks that all 39 witnesses requested be approved and that the Government be compelled to produce each witness.

6. **Oral Argument.** In the event that trial counsel opposes the instant motion, the defense desires oral argument.
7. **Burden of Production.** The Defense bears the burden of production as the moving party.
8. **Burden of Persuasion.** The Defense bears the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion.
9. **Burden of Proof.** The Defense has the burden of proof, by a preponderance of the evidence, on any factual issue the resolution of which is necessary to decide this motion.



Bret A. White
Captain, USMC
Detailed Defense Counsel
Date: 11 May 2011



UNITED STATES MARINE CORPS
OFFICE OF THE STAFF JUDGE ADVOCATE
3250 CATLIN AVENUE
MARINE CORPS BASE
QUANTICO, VIRGINIA 22134-5001

IN REPLY REFER TO
5800
DEF/baw
30 Mar 11

From: Captain Bret A. White, Defense Counsel
To: Captain Pete C. Combe II, Trial Counsel

Subj: REQUEST FOR PERSONAL APPEARANCE OF WITNESSES ICO UNITED STATES VERSUS
STAFF SERGEANT MARINA D. LOPEZ, USMC

Ref: (a) R.C.M. 703

Encl: (1) Excerpt (pages 19-21) from the COMMAND INVESTIGATION INTO POSSIBLE
VIOLATIONS OF THE OCS STANDARD OPERATING PROCEDURES (SOP) AND
HAZING ALLEGATIONS INVOLVING COMPANY C STAFF

1. Pursuant to reference (a), it is respectfully requested that the following witnesses be produced at the special court-martial in the above-named case:

a. **Sgt Maj Antonio N. Vizcarrondo, Jr.:** This witness is relevant and necessary because he was the Sgt Maj, RTR, MCRD Parris Island while SSgt Lopez served under him from December 2007 to May 2009. This witness can testify as to SSgt Lopez's good military character and character for truthfulness during this time period. He observed her in the execution of her duties on a daily basis. His contact information is as follows: 760-763-3586, 760-208-7089, antonio.vizcarrondo@usmc.mil, currently stationed at Camp Pendleton, California.

b. **LtCol Karla M. Jessup:** This witness is relevant and necessary because she was SSgt Lopez's Battalion C.O. for 4th Bn, RTR, MCRD Parris Island during the 2006-2008 timeframe. This witness can testify as to SSgt Lopez's good military character and character for truthfulness during this time period. She observed her in the execution of her duties on a daily basis. Her contact information is as follows: 808-257-6978, karla.jessup@usmc.mil, currently stationed at MCB Kaneohe Bay, Hawaii.

c. **Sgt Maj Jean Paul Courville:** This witness is relevant and necessary because he was SSgt Lopez's instructor at the Senior Drill Instructor Course in June of 2008 and has known SSgt Lopez from summer 2006 to the present day. This witness can testify as to SSgt Lopez's good military character and character for truthfulness during this time period. He observed her in the execution of her duties on a daily basis. His contact information is as follows: 858-577-6878, jeanpaul.courville@usmc.mil, currently stationed at VFMA 323, MCAS Miramar, California.

d. **1st Sgt William Carter:** This witness is relevant and necessary because he was the Delta Co. First Sergeant during the Summer and Winter of 2009 for Officer Candidates School while SSgt Lopez was a sergeant instructor. This witness can testify as to SSgt Lopez's good military character and character for truthfulness during this time period. He observed her in the execution of her duties on a daily basis. His contact information is as follows: 760-763-2940, william.c.carter@usmc.mil, currently stationed at 1st Recon Bn, MCB Camp Pendleton, California.

Attachment A

Subj: REQUEST FOR PERSONAL APPEARANCE OF WITNESSES ICO UNITED STATES VERSUS
STAFF SERGEANT MARINA D. LOPEZ, USMC

e. Each of the candidates from First Platoon, Charlie Co., Fall 2010 are all percipient witnesses as to each and every specification on the charge sheet. Those who did not graduate or did not accept commissions and are, therefore, out of area, are listed on enclosure (1) and their personal appearance is requested. Their contact information has been requested by the undersigned via a request for copies of the candidate record books. However, copies of the candidate record books have not been produced to the undersigned. Such records (and the contact information) are in the government's control and are therefore not provided herein.

2. SSgt Lopez reserves the right to call any of the witnesses called by the prosecution or further update and modify this request.

3. Defense specifically requests that the Government provide a written response to this request as soon as possible.

A handwritten signature in black ink, appearing to read "Bret A. White". The signature is stylized with a large initial "B" and a long horizontal stroke extending to the right.

BRET A. WHITE

Subj: COMMAND INVESTIGATION INTO POSSIBLE VIOLATIONS OF THE OCS
STANDARD OPERATING PROCEDURES (SOP) AND HAZING ALLEGATIONS
INVOLVING COMPANY C STAFF

~~59. At 0730 on 6 October 2010, the H&S troop handlers turned over
responsibility of the First Platoon, Company C to the platoon staff and
training day one commenced. [encl (151)]~~

~~60. Fifty six (56) Officer Candidates commenced training on 6 October
10 in First Platoon, Company C and are listed as follows: [encls
(5), (151)]~~

- a. Iris J. Antunezbarahona
- ~~b. Evita M. Ayala~~
- ~~c. Melissa A. Blake~~
- d. Michele A. Boeche
- ~~e. Kate M. Brannon~~
- f. Laura D. Brenstuhl
- g. Christen A. Brown
- ~~h. Kelsey C. Burnham~~
- i. Michelle L. Cabral
- j. Nicole C. Delpriore
- k. Traci J. Deshazor
- l. Rebecca L. Finley
- m. Jennifer L. Friese
- ~~n. Emily A. Gabriel~~
- ~~o. Jasmin P. Garcia~~
- p. Raeanna L. Grizzle
- q. Rebecca L. Hanif
- r. Eileen K. Harper
- s. Caitlin C. Havron
- t. Amber M. Helms

Subj: COMMAND INVESTIGATION INTO POSSIBLE VIOLATIONS OF THE OCS
STANDARD OPERATING PROCEDURES (SOP) AND HAZING ALLEGATIONS
INVOLVING COMPANY C STAFF

u. Monica C. Hernandez
~~v. Kristen A. Hetske~~
w. Jennifer L. Howard
~~x. Corey M. Hughey~~
y. Mary T. Jentz
~~z. Jayme L. Karlstrom~~
aa. Keshia A. Levan
~~bb. Kelli E. Lacosta~~
~~cc. Christina Lopez~~
~~dd. Laura R. Lundin~~
ee. Kimberly D. Martinez
~~ff. Stephanie L. Mills~~
gg. Vanessa S. Nicholas
~~hh. Kathleen J. Chava~~
ii. Kristen N. Parnell
jj. Whitney N. Partridge
~~kk. Laura A. Pether~~
ll. Amanda C. Pfabe
mm. Danielle J. Ray
nn. Joanna M. Reynolds
oo. Danielle A. Richards
~~pp. Phoebe D. Riner~~
qq. Katelyn P. Roberts
rr. Carolyn R. Schintzius

Enclosure (1)

Subj: COMMAND INVESTIGATION INTO POSSIBLE VIOLATIONS OF THE OCS
STANDARD OPERATING PROCEDURES (SOP) AND HAZING ALLEGATIONS
INVOLVING COMPANY C STAFF

ss. Rebecca M. Swann

~~tt. April C. Tatten~~

uu. Britany T. Thompson

~~vv. Lindsay M. Thorstenson~~

ww. Leah L. Turner

xx. Emily L. Tweto

yy. Hannah D. Walden

.zz. Kelly A. Wills

aaa. Gabriela M. Wilson

bbb. Rachel L. Wooden

ccc. Angela M. Wozniak

ddd. Shanna B. Yelisetty

~~61. On 6 October 2010, GySgt Cannady was present for approximately four hours of transition training before she left training and did not return due to medical issues. [encls (145), (151)]~~

~~62. GySgt Cannady was not replaced by another Sergeant Instructor. [encl (145)]~~

~~63. On 21 October 2010, Company C candidates received a class on hazing that covered the definition of hazing, examples of hazing, and the Marine Corps Policy on Hazing. [encls (151), (156)]~~

~~64. After that class at 1020 on 21 October 2010, Captain Kraics conducted a platoon values-based discussion with First Platoon reemphasizing the key points regarding hazing. [encls (151), (157)]~~

~~Allegations involving actions conducted during the execution of Close Order Drill (COD)~~

~~65. During the majority of scheduled Close Order Drill (hereinafter "COD") periods, GySgt Kelton and SSgt Lopez instructed First Platoon to conduct incentive Physical Training (hereinafter "PT") oftentimes in some manner of running and would include instructions such as, "Go touch the bleachers" and "Run the four corners." [encls (6), (8), (10), (11), (15), (16), (20), (25), (37), (38), (42), (49), (52), (65), (68), (78), (79)]~~



UNITED STATES MARINE CORPS
OFFICE OF THE STAFF JUDGE ADVOCATE
3250 CATLIN AVENUE
MARINE CORPS BASE
QUANTICO, VIRGINIA 22134

IN REPLY REFER TO
5800
B0521
31 Mar 11

From: Captain P. C. Combe II, USMC, Trial Counsel
To: Capt B. A. White, USMC, Defense Counsel

Subj: REQUEST FOR PERSONAL APPEARANCE OF WITNESSES IN THE
CASE OF UNITED STATES VERSUS STAFF SERGEANT MARINA D.
LOPEZ, USMC

1. This responds to your request for personal appearance of witnesses dated 30 March 2011 (herein referred to as Request).
2. Sergeant Major Anthony N. Vizcarrondo, Jr.: The government will agree to produce this witness for personal appearance at trial in the above captioned case.
3. Lieutenant Colonel Karla M. Jessup: The government will agree to produce this witness for personal appearance at trial in the above captioned case.
4. Sergeant Major Jean Paul Courville: The government will not produce this witness for personal appearance at trial in the above captioned case. This witness is currently deployed aboard the USS Ronald Reagan and is not reasonably available. Furthermore, your request for this witness fails to comply with the requirements for a witness request pursuant to R.C.M. 703.
5. First Sergeant William Carter: The government will agree to produce this witness for personal appearance at trial in the above captioned case.
6. OCS, Charlie Company, 1st Platoon Officer Candidates: The government will not produce these witnesses for personal appearance at trial in the above captioned case as your request fails to comply with the requirements for a witness request pursuant to R.C.M. 703.

P. C. COMBE II

Subj: REQUEST PERSONAL APPEARANCE OF WITNESSES IN THE
CASE OF UNITED STATES VERSUS LANCE CORPORAL JARED M.
COKER, USMC

I hereby certify that I served a copy of this document upon
Captain B. A. White, USMC, Detailed Defense Counsel, on the 31
day of March 2011.

A handwritten signature in black ink, appearing to read "P. C. COMBE II". The signature is stylized and written in a cursive-like font.

P. C. COMBE II



UNITED STATES MARINE CORPS
OFFICE OF THE STAFF JUDGE ADVOCATE
3250 CATLIN AVENUE
MARINE CORPS BASE
QUANTICO, VIRGINIA 22134

IN REPLY REFER TO:
5800
B0521
1 Apr 11

From: Captain P. C. Combe II, USMC, Trial Counsel
To: Capt B. A. White, USMC, Defense Counsel

Subj: REQUEST FOR BILL OF PARTICULARS IN THE CASE OF
UNITED STATES V. STAFF SERGEANT MARINA D. LOPEZ,
USMC

1. This responds to your request for a bill of particulars dated 29 March 2011.

2. In response to your requests with regard to Charge I and the sole specification thereunder:

a. Capt Kraics provided the enumerated commands/orders to the accused both orally, and in writing. For the specific method of communication for each command, and any memorialization thereof, please see enclosures 97-89, and 140 of the government's initial discovery provided on 17 February 2011.

b. The government is not aware of any commands or orders given by Capt Kraics which are not listed in the specification, nor does the government intend to present evidence as to a violation of any order not listed in the specification. Therefore, this request is denied as irrelevant.

b. All violations of the enumerated commands or orders were provided to the defense with the government's initial disclosure of evidence on 17 February 2011; specifically, enclosures 29, 45 and 88-89 therein. However, this is not an exhaustive list of the methods by which the accused violated the commands of Capt Kraics.

3. In response to your requests with regard to Charge II, Specification 1:

Attachment C

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

a. The area through which the accused ran Charlie Company, 1st Platoon includes, but is not limited to, the area surrounding Bobo Hall on Brown Field. Maps, photographs, and amplifying information can be found at enclosures 158-161 of the government's initial discovery.

b. The individuals who were injured include, but are not limited to, OCAN Phoebe Riner and OCAN Brittany Thompson. Further amplifying information and medical documentation can be found at enclosures 165-169, 171 of the government's initial disclosure.

4. In response to your requests with regard to Charge II, Specification 2:

a. The government's theory with regard to the accused pushing, grabbing, or shoving candidates outside of the authorized occasions is that this was a pattern of behavior with regard to the platoon as a whole. Specific instances of which can be found in the candidates' statements at enclosures 2-80 of the government's initial disclosure.

b. With regard to pulling the bandage off of a candidate, this incident refers to Candidate Hughey; amplifying information can be found at enclosures 37 and 75 of the government's initial discovery. Contact information for all candidates has previously been provided.

5. In response to your requests with regard to Charge II, Specification 3:

a. The government's theory with regard to this charge is that the name calling by the accused was a pattern of behavior with regard to the platoon as a whole.

b. The following names referred to the listed specific candidates:

i. Candidate Walden: "Billy"

ii. Candidate Lopez: "Zepol"

iii. Candidates who were not within height/weight standards: Variations on "Ms. Cheesburger"

6. In response to your requests with regard to Charge II, Specification 4:

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

a. The government's theory with regard to this charge is that the use of profanity by the accused was a pattern of behavior with regard to the platoon as a whole.

7. In response to your requests with regard to Charge II, Specification 5:

a. Candidates Brown and Partridge were photographed by the accused. Enclosures 44, 76.

b. Any photographs of candidates were taken using the accused's personal equipment, and no such equipment or photographs are in the possession or control of the government.

8. In response to your requests with regard to Charge II, Specification 6:

a. all essays actually collected by the platoon sergeant and platoon commander are contained in the candidate record books. However, only those essays actually collected by the platoon sergeant and platoon commander are contained within those CRBs. There is no formal, written log of all essays actually assigned as it was the responsibility of the accused to maintain any such log. all candidate record books are available for defense inspection and copying at the Coordinator of Student Activities office aboard Officer Candidate School with advance notice. The point of contact for any request to inspect and copy such records is either: Capt Jonathan M. Secor, 784-2912 or Capt Sarah Carle, 784-2351.

9. In response to your requests with regard to Charge II, Specification 7:

a. Barracks building 5001, northwest ladder well, first platoon was housed on the third deck.

10. In response to your requests with regard to Charge II, Specification 8:

a. "Foot locker drills" refers primarily to the 2 November incident involving carrying foot lockers up and down the ladder wells. However, this generally refers to any unnecessary moving or lifting of foot lockers without training value.

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

11. In response to your requests with regard to Charge II, Specification 9:

a. "Incentive PT" is any physical training conducted outside of authorized physical training conducted by a Physical Training Instructor, or the ten (10) push-ups authorized as punishment when a candidate drops a rifle on the deck.

b. This includes, but is not limited to, the accused instructing candidates or the platoon to:

- i. Run the "four corners of the parade deck" during drill;
- ii. Run around Bobo Hall before and after meals;
- iii. Do more than ten (10) push-ups for dropping a rifle.

12. In response to your requests with regard to Charge II, Specification 10:

a. The following candidates were denied medical care for the specified injuries or ailments:

- i. Corey Hughey, for a laceration to her hand;
- ii. Evita Ayala, for pink eye;
- iii. Brittany Thompson for a knee injury;
- iv. Candidate Wilson for a leg injury.

b. Contact information for all candidates identified was provided along with the government's initial discovery.

13. In response to your requests with regard to Charge II, Specification 11:

a. The accused woke candidates by repeatedly holding gear inspections after lights out. The accused would order candidates to mark their gear, then inspect candidate gear. The accused would then order candidates to remedy any discrepancies by the time of the next gear inspection, which would still be before lights. The accused held gear

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

inspections approximately every two hours from lights out until lights the next morning.

14. In response to your requests with regard to Charge II, Specification 12:

a. The accused, along with GySgt Kelton, caused candidates to be disrespectful to one another by verbally berating candidates and requesting that candidates do the same. The accused and GySgt Kelton would speak negatively about a candidates performance or appearance in front of the platoon, then request that the platoon provide insight or additional commentary on whichever candidate was the object of the tirade.

15. In response to your requests with regard to Charge II, Specification 13:

a. The accused would remove rifles from candidates hands during drill, and throw them to the deck in violation of the OCS SOP.

b. Amplifying information can be found at enclosures 8, 10, 12, 16, 21, 22, 24, 47, 51, 52, 66, 69, 89 and 162.

c. A list of candidates can be found at enclosure 162, though this is not an exhaustive list of the candidates whose rifles were thrown to the deck.

d. There is no evidentiary value to be gained from performing a finger print analysis on any candidate rifles as they are OCS property and have been cleaned and reissued since the charged events.

16. In response to your requests with regard to Charge II, Specification 14:

a. This specification refers to the pattern of conduct with respect to the platoon as a whole undertaken by the accused and GySgt Kelton.

17. In response to your requests with regard to Charge III:

a. See response to Charge II, specification 1.

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

b. Candidate Riner vomited on the parade deck.
Enclosure 87.

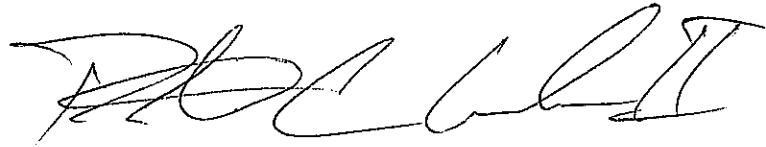
c. The accused and GySgt Kelton did not allow candidates enough time to hygiene in that candidates were only given enough time to rinse themselves in the shower, but not provided enough time to use soap or other hygiene related products. Additionally, this was exacerbated by the accused's refusal to allow candidates to use hygiene products such as soap, shampoo, toothpaste, tooth brushes, etc. Evidence relating to the increased likelihood of pneumonia and cellulitis can be found at enclosure 175.

18. In response to your requests with regard to Charge IV:

a. This specification refers generally to a pattern of conduct with regard to the platoon as a whole. Specific information can be found at enclosures 2-80.

19. Unless otherwise noted, information and specifics not provided are denied. Furthermore, unless specifically noted, all charged conduct related to a pattern of conduct with regard to the platoon as a whole. Exact dates, times, and locations are in many cases unknown due to the fact that witnesses are predominantly OCS officer candidates and the nature of OCS precludes a precise recollection of the dates, times, and locations of any such incidents.

20. With regard to defense requests for photographs, notes, emails, or any other documentation or depiction of any place, event, or action, to the extent that any exist and are in the control of the government, and relevant to this case, they have been provided to the defense. The specific grounds/site are available to the defense for inspection with appropriate notice to the unit/OCS.

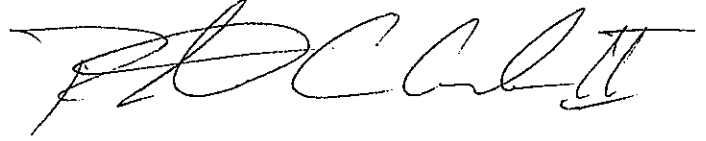


P. C. COMBE II

Subj: REQUEST FOR DISCOVERY IN THE CASE OF UNITED STATES
V. STAFF SERGEANT MARINA D. LOPEZ, USMC

I hereby certify that I served a copy of this document upon
Captain B. A. White, Detailed Defense Counsel, on the 4
day of ~~March~~ 2011.

April



P. C. COMBE II