

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S)	
	)	SPECIAL COURT-MARTIAL
)	
v.	)	FIRST AMENDMENT TO DEFENSE
	)	MOTION FOR APPROPRIATE RELIEF
JOSE BRITO	)	(Motion to compel the
SERGEANT	)	Government to approve the
U.S. MARINE CORPS	)	defense requested expert
	)	witness, produce documents,
	)	produce lay witnesses and
	)	answer the bill of particulars
	)	request)
)	
	)	27 September 2010

I. Nature of Motion

The motion is made pursuant to RCM 906(b) (7).

The Accused moves this Court to order the Government to produce the defense requested lay witnesses for the merits and sentencing.

The Accused moves this Court to order the Government to produce the defense requested expert witness.

The Accused moves this Court to order the Government to provide the Accused with requested discovery documents not yet produced.

The Accused moves this Court to order the Government to answer the Bill of Particulars that it denied.

II. Facts

- a. The Government previously charged Sgt Brito with raping multiple women. Those shocking claims were thoroughly investigated at an Article 32 hearing, however, and the 32 Officer found that every single one of those Article 120 claims were not credible.
- b. Sgt Brito is now facing trial at a SPCM for false official statement and violating various orders, including a Depot

Order 1100.4B that dealt with the conduct of recruiters, which Sgt Brito was one of them.

- c. There was a 1st and a 2nd Discovery Request by the defense to the Government that were made before the Article 32 hearing.
- d. The 1st discovery request of the defense was dated 23 February 2010 and it was answered by the Government on 31 March 2010.
- e. The 2nd discovery request of the defense was dated 21 April 2010 and it was answered by the Government on 4 May 2010 and then the Government's answer was amended on 6 May 2010.
- f. The 3rd discovery request of the defense was made after referral of charges to a SPCM and it was delivered to the government on 20 August 2010.
- g. The 3rd discovery production request of the defense asked for many items; including these, which have not been produced by the Government, but are known to exist (and that the defense asks this Court to order in this motion):
 - Notes from any command or NCIS investigator concerning this case, specifically Capt Christopher Siekman and or SSgt Underwood.
 - Verbatim Transcripts of ALL witness testimonies from the Article 32 hearing in this case. This is relevant and necessary for impeachment purposes and also for motion purposes.
 - All documents in the Government's possession concerning US Naval Academy appointment and acceptance documents for Perris Weiland. LCpl Perris Weiland's Article 32 testimony indicated that she was accepted to the US Naval Academy, but evidence was also raised that contradicted this claim.
 - The results of US v. Henthorn reviews for derogatory information for any NCIS agent or investigating officer that investigated this case, including Capt Siekman and SSgt Underwood.
 - Facebook and myspace records are requested to be subpoenaed by the trial counsel from the accounts of Alicia Clanton and LCpl Perris Weiland concerning Sgt Jose Brito, SSgt Mark Mattson or this case in anyway.

- Complete psychiatric, psychological and other counseling records concerning LCpl Perris Weiland and Alicia Clanton. At the Article 32 hearing, Weiland said she received such treatment at Camp Johnson, North Carolina and at Okinawa. LCpl Weiland claimed that CDR Weber (a psychiatrist) and Miss Sumako Shiroma (a psychologist) treated her at Camp Lester, Okinawa too. Weiland also claimed that she has been diagnosed with PTSD as well as dissociative disorder. The defense wants all of these records for her and also Alicia Clanton, if they exist.
- Preliminary investigation, command investigation or other records concerning the hazing incident at Camp Johnson described by Perris Weiland at the Article 32 in this case. Weiland claimed that the staff was disciplined for hazing her and other Marines. This information may impeach Weiland and the defense wants it.
- Martial Arts training certificates and records concerning Perris Weiland. At the Article 32, LCpl Weiland alleged that she is a 3rd degree black belt in Tae Kwon Do and that she can disable someone with one kick.
- Contact information (address and phone numbers and emails are requested) for Jorge Nunez, US Navy. Perris Weiland claimed that she was raped by this US Navy sailor months prior to her alleged sexual encounter with Sgt Brito. We also request all law enforcement records concerning the investigation into this alleged rape.
- Full OMPF of SSgt Mark K. Mattson (derogatory portions only)
- Full OMPF of LCpl Perris Weiland (derogatory portions only)

h. Regarding the 3rd Defense Discovery Request, the Government denied the physical production of all but 5 out of 39 requested defense requested witnesses (and that the defense asks this Court to order in this motion).

i. The Defense specifically requests that this Court order these 28 Defense witnesses produced:

Name: MSgt Michael Orman, USMC, ret.

Contact: personal cell number is 949.370.5911 and my email is orman@att.blackberry.net. 12MCD.

Subj: MSgt Orman was the operations chief at RS Orange. He remembers applicant Alicia Clanton who popped for drugs at LA MEPS. He remembers because it was an out of the ordinary drug pop. She was also involved with SSgt Mattson in that he took her to the ball. MSgt called Sgt Brito and spoke to him on the 2nd or 3rd of November and told him that she had tested positive for amphetamines and we need to schedule her for a discharge. That means there would be no further processing. As soon as they pop, they are done. They are ineligible for waiver. Only 12th district can effect the actual discharge. Mission plays a role because an RS cannot take a discharge after the 9th b/c they lock the previous month's database.

Name: Stephen J. Kirkpatrick, Col, USMC

Contact: MCAS Cherry Point, CO. (252) 466-5702.

stephen.kirkpatrick@usmc.mil

Subject: This officer thought highly of Sgt Brito and awarded Brito with an award. This officer served in Okinawa Japan and the Philippines with Brito. Sgt Brito knew the officer in 2003 and 2004. Sgt Brito was under the personal observation of this officer approximately twice a week for about a year. Col Kirkpatrick was the CO of the squadron Brito served under.

Name: Christian Randy Felder, Captain, USMC

Contact: I MEF, CLB 2. christian.felder@afg.usmc.mil

Capt Chris Felder

Charlie Co, CLB-2

Engr Co Cmdr

Delaram II, Afghanistan

NIPR: Christian.Felder2@afg.usmc.mil

SIPR: Christian.Felder@afg.usmc.smil.mil

Centrix: Christian.Felder@afgn.centcom.isaf.cmil.mil

DSN: (318) 358-6018

VOSIP: (308) 357-8033

Subj: Still ranks Sgt Brito as an above average Sgt.

Initiated in 2003 a Navy and Marine Corps Achievement Medal award for Sgt Brito when he was at Okinawa. He wrote how excellent Sgt Brito was both in garrison and on deployment and how Sgt Brito's conduct reflected highly on the entire Marine Corps. Felder was Brito's OIC during a deployment.

Name: CWO2 Kermin Miller,

Contact: CLR3 GSMT co. 3MLG, Camp Foster Bldg. 5655.
(315) 645-4009. kerim.miller@usmc.mil

Subj: Marine Corps Officer at 2/11. He was the motor transport officer of Sgt Brito at 2/11 in 2004. He initiated in 2004 and 2005 two Navy and Marine Corps Achievement Medals for Sgt Brito and also assisted Sgt Brito to become the recipient of the 2005 Sgt Leadership award for the Battalion. He also wrote an accelerated fitness report for Sgt Brito in a combat zone.

Name: Col Michael M. Frassier

Contact: (760) 725-3627. michael.m.frazier@usmc.mil.

Subj: CO of 2/11 when Sgt Brito was there from 2004 to 2006. He awarded Sgt Brito with Sergeant of the year and also awarded two NAMs to Sgt Brito. Sgt Brito was personally observed by this officer on a weekly basis.

Name: Jeromye Rogers, CW02, USMC

Contact: Wounded Warrior Regiment, Quantico, VA.
jeromye.rogers@usmc.mil

Did a fitness report for Sgt Brito in 2006 that gave Sgt Brito many E's on his fitness report. He wrote of how great Brito's leadership and mission accomplishment skills were. He initiated a navy commendation medal for Sgt Brito when he was deployed in a combat tour to Iraq.

Name: SgtMaj Jeffrey Tanner, ret.

Contact: 7608455461. Oceanside, CA

Subj: Former SgtMaj of RS Orange and previously 2/11. He personally observed Sgt Brito at 2/11 and at RS Orange and thought very highly of Sgt Brito in the fleet and in recruiting. He was present for many awards of Sgt Brito and Sgt Brito went to a combat zone with the SgtMaj on his first Iraq deployment.

Name: SgtMaj William P. Toves, USMC

Contact: WILLIAM.TOVES@USMC.MIL, TWENTYNINE PALMS CA
0092278, (760) 830-7307

Subj: Former company first sergeant of Sgt Brito at 2/11. He was present for Sgt Brito's Sgt of the year award, his NAMS and his first combat deployment to Iraq.

Name: MGySgt Rex Lumaboa, USMC

Contact: 1st MLG, CLR 15, REX.LUMABAO@USMC.MIL,
7607252793/2116

Subj: He was the maintenance chief of Sgt Brito at 2/11. MGySgt Lumaboa deployed with Sgt Brito and did a lot of

predeployment training with Sgt Brito. He was also assisted in initiating Sgt Brito's Sgt of the year award at 2/11. MGySgt Lumaboa was also part of the advance party to Iraq with Sgt Brito.

Name: GySgt Ron McCollum
Contact: 7147159518, MCCOLLUMRO@MARINES.USMC.MIL. RS Orange, 12th MCD.
Subj: SNOIC of Sgt Brito at RSS Mission Viejo that supervised Brito and Mattson during recruiting. According to SSgt Mattson's testimony, he also told Mattson that it was OK for him to date Alicia Clanton so long as she was discharged from the DEP. This witness also thinks very highly of Sgt Brito's military character.

Name: Sgt Michael Garciaflores, USMC
Contact: michael.garciaflores@marines.usmc.mil, 949-261-0131. RS Orange, 12 MCD.
Subj: Admin clerk at RS Orange that typed up the awards of Sgt Brito at RS Orange. He observed Sgt Brito on recruiting duty and the awards Sgt Brito received. He also observed Sgt Brito's performance and behavior following charges in this case being referred.

Name: SSgt Dwight Amantine, USMC
Contact: MCB Camp Pendleton, CA. Cell: 8582086620.
Subj: Supply SNCOIC that worked for GySgt Esparzaguzman at RS Orange. He supervised Sgt Brito on a daily basis following his relief. He was also present when Sgt Brito received his awards on recruiting. He also thinks very highly of Sgt Brito.

Name: SSgt Roberto Orozco, USMC
Contact: Los Angeles, CA. UCLA. 216-633-9016.
Subj: He is in the MCEP program at UCLA. He has been Brito's friend since 8th grade. He went into the buddy program with Sgt Brito. He is a crew chief for a C130 by MOS.

Name: SSgt Thomas Tabiz, USMC
Contact: THOMAS.TABISZ@USMC.MIL, 843-228-4175, RTR, Paris Island, SC
Subj: Worked for Sgt Brito at MWSS371 in Okinawa, Japan. He thinks very highly of Sgt Brito and he was a wrecker operator and worked on many projects with Sgt Brito.

Name: Mr. Gordon Stewart

Contact: Sunset Beach, Orange County, CA. 949-533-1191.
Subj: He is in charge of a children's cancer foundation.
Sgt Brito volunteered to help him out. Sgt Brito helped
his foundation out regularly during his off time as a
recruiter and after he got relieved.

Name: Todd Admon
Contact: Capistrano Valley High. 9493646100
Subj: Assistant principal of a high school that Sgt Brito
recruited out. Sgt Brito volunteered to help out the high
school with miscellaneous tasks. He thinks very highly of
Sgt Brito. He was also in charge of the Associated Student
Body.

Name: Lisa Admon, wife of Todd Admon
Contact: Capistrano High school, Mission Viejo, CA.
9493646100
Subj: She is a teacher at Capistrano Valley High School.
She will talk about how Sgt Brito, a recruiter at the time,
helped out the high school regularly and was a good
citizen.

Name: Kathy Linstrom
Contact: 9495868800. Silverado High school, Mission
Viejo, CA.
Subj: Vice Principal for Silverado High school. She knew
Sgt Brito as a recruiter when she was a counselor at
Silverado High School. She observed Sgt Brito helping the
high school out and volunteering for whatever they needed.

Name: Mark Ryan
Contact: 9494668100. Mission Viejo, CA
Subj: Assistant to the Orange County Liaison to the Devil
Pup's Program. He observed that Sgt Brito helped recruit
for the devil pups program for Orange County. He also
helped Mr. Ryan get other recruiters involved in this
program.

Name: MSgt Marus Ortiz
Contact: (949) 261-2802/5869. Recruiter Instructor for RS
Orange, 12 MCD
Subj: He observed Brito as a recruiter and NCOIC. He
mentored Sgt Brito and also observed Sgt Brito's
performance after he got in trouble.

Name: Tracey Sanchez
Contact: 949-874-4153

Subj: Mother of Marine recruited by Sgt Brito (Aaron Shipley). She will say Sgt Brito was very professional and always there to help her son in his quest to become a Marine.

Name: James Byer, Msgt, ret.

Contact: 7608311357

Subj: OSA in RS Orange that supervised Brito after Brito was relieved for cause. He was also present for some awards Brito received as a recruiter. He was the equal opportunity officer for the RS that Sgt Brito went to talk to about being moved back and forth while pending trial.

Name: Kenneth Cameron, 1stSgt, ret.

Contact: 6788730083

Subj: The CO for the YUMA Young Marines that Sgt Brito volunteered for in Yuma, AZ. Brito was his training NCO for the program.

Name: Gene House

Contact: 9284467788

Subj: Mechanic that Brito worked for at first duty station. Brito was working for him when Brito was doing volunteer work after duty. He was present when Brito received a volunteer service medal.

Name: GySgt Danny Bauerle, ret.

Contact: CCBDBAUERLE@YAHOO.COM, (785)256-2247

Subj: NCOIC of Brito at Crash Fire Rescue in Yuma, AZ. He saw Brito get promoted from LCpl to Sgt. He was there for many awards Brito received.

Name: MGySgt Paulo Moniz, ret.

Contact: 9498131521

Subj: He was the recruiter instructor for Rs Orange. He was there for awards and instructed Sgt Brito on how to be a outstanding recruiter. He saw Sgt Brito's progress and was there for many awards that he received. He is currently a JROTC instructor in LA, CA.

Name: MSgt Derrick Alexander (Telephonically if not local at the time of trial) (not previously requested by defense)

Contact: RS San Fransicio, c 6263754858, w 6509964189

Subj: He was the assistant recruiter instructor while Brito was a recruiter at RS Orange. He is very knowledgeable about recruiting orders and SOPs in general. He specifically says that once an applicant tests positive

for methamphetamine, they are disqualified from ever joining the Marines as of the date they pop (28 October 2008 in Clanton's case) and it would be OK for a recruiter to have a personal relationship with such a person because they are ineligible to ever join the US Marines.

Name: Maj M. J. Gervasoni (not previously requested by defense)
Contact: 12th MCD, Operations, MCRD San Diego, CA
Subj: Just to authenticate and explain the MCRSS data for Alicia Clanton.

- j. Regarding the toxicologist-psychiatrist requested by the defense in its 3rd Discovery Request, Dr. Thomas Grieger, CAPT, USN(ret.) was denied.
- k. The Government also denied the Defense's bill of particulars request without any explanation or reason.

III. LAW AND ANALYSIS

In trials by courts-martial, the Accused is afforded equal access to witnesses and evidence as the Government. United States v. Lee, 64 M.J. 213, 214 (C.A.A.F. 2006). This means that despite not having the same subpoena power as the Government, the Government needs to provide access to evidence and witnesses that are material for the preparation of the Accused's defense. However "material" is used liberally and historically courts err on the side of full disclosure to the defense to ensure that persons like the Accused can get a fair trial.

Discovery practice under Article 46 and R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

Providing broad discovery at an early stage reduces pretrial motions practice, surprise, and delay at trial. Roberts, citing Manual for Courts-Martial, United States (2002 ed.), Analysis of Rules for Courts-Martial A21-32. "The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." Roberts at 325, referencing United States v. Stone, 40 M.J. 420, 422

(C.M.A. 1994) (citing United States v. Lloyd, 301 U.S. App. D.C. 186, 992 F.2d 348, 351 (D.C. Cir. 1993)). "The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

"We also have interpreted these rules to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a minimum, with the disclosure and discovery rights available in federal civilian proceedings." United States v. Williams, 50 M.J. 436, 440 (C.A.A.F. 1999).

a. The Government should produce the defense requested lay witnesses because they provide exculpatory evidence and establish good military character.

Under RCM 703(b) each party is entitled to witnesses whose testimony would be relevant and necessary.

The case of United States v. McElhaney, 54 MJ 120 (CAAF 2000) is illustrative of the equal rights of defense to call witnesses. The McElhaney court held that the parties to a court-martial are given equal opportunity to obtain witnesses and are entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

McElhaney went on to hold that a military judge's ruling on a request for a witness is reviewed for abuse of discretion and should be reversed only if, on the whole, denial of the defense witness was improper; judicial denial of a witness request will not be set aside unless there is a definite and firm conviction that the military judge committed a clear error of judgment in the conclusion it reached upon weighing relevant factors.

McElhaney stated in part that some of the factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the witness to those issues; whether the witness is called on the merits or the sentencing portion of the case; and whether the witness's testimony would be cumulative.

United States v. Warner, 62 M.J. 114 (CAAF 2005) held that under Article 46, UCMJ, the defense's opportunity to obtain witnesses is to be equal to the government's.

The defense requested fact and character witnesses (on the merits and at sentencing) in this case in a witness request that also offered expected witness testimony. The Defense believes that this proffered testimony meets the requirements of RCM 703. In a response, the Government responded that it was denying the vast majority of defense requested witnesses because the witnesses were not necessary or cumulative.

For those fact witnesses not yet approved by the Government, and in support of this motion, the Defense will put the witnesses on the stand so that the Military Judge can determine their relevance and also determine that they are necessary. The Defense asks for the Government's assistance to produce for the motion's hearing all denied defense witnesses telephonically or in person so that they can explain their relevance to the military judge should the defense proffer be insufficient.

In the meantime, the proffers of the merits and sentencing lay witnesses (found at Defense Discovery requests 1, 2 and 3) that have not yet been approved by the Government; speak for themselves about the necessity and relevancy of the testimony they would offer for Sgt Brito at trial.

The Defense specifically requests that the Military Judge order the Government to produce the witnesses identified in the facts section above.

Sgt Brito seeks to put on good military character evidence for all stages of his career, since 2000 and until present (both before and after he was preferred and referred charges). That is why the defense requested all of these character witnesses: to show the members that despite the Government's few remaining accusations against Sgt Brito, he is truly a good person and U.S. Marine.

Some of the witnesses denied (SgtMaj Jeffrey Tanner, ret., GySgt Ron McCollum, GySgt Jonathan McFarland, USMC, MGySgt Paulo Moniz, ret.) are former RS Orange Marines and fact witnesses necessary for the members to hear from when they decide whether or not Sgt Brito (a former recruiter of RS Orange) is in fact guilty of violating recruiting SOPs(e.g.

of such offenses like violating Depot Order 1100.4B with respect to how Sgt Brito as a recruiter behaved towards alleged recruit applicants Ms. Clanton and Weiland).

Other denied witnesses are character witnesses (including teachers and other civilians that Sgt Brito associated and worked with as a recruiter) that could also testify to the members that Sgt Brito was a good recruiter and US Marine that did his recruiting job properly.

Essentially, by their denial of Sgt Brito's witnesses, the Government would have Sgt Brito go to trial with almost no character witnesses to say that he is a good Marine. The summary denial of defense witness requests is not fair and this is not equal access as the defense has no input into whom the Government produces as a witness at trial. The current rules allow the Government to summarily deny all defense witnesses while permitting the Government to produce whomever they want without restriction.

This hamstringing by the prosecution to prevent Sgt Brito from defending himself is another example of why the current rules of discovery as found at RCM 701 to 703 violate Sgt Brito's constitutional right to have a fair criminal trial.

The US Supreme Court has written that "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." U.S. v. Scheffer, 523 U.S. 303, 327, 118 S.Ct. 1261, (US 1998).

"The sixth amendment right to compulsory process does not mandate otherwise. This provision ensures that a defendant has subpoena power to summon witnesses so that the jury may hear the defendant's version of the facts." U.S. v. Taylor, 728 F.2d 930 (CA Ill 1984), citing, Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

Therefore, the defense asks this Court to order all of Sgt Brito's denied lay witnesses and for such other relief as is just. Regarding the defense requested expert denied, the defense will comment on that issue in the appropriate subsection below.

b. The Defense Experts should be produced.

"(A)n accused servicemember has a limited right to expert assistance at government expense to prepare his defense." United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

"(T)his Court articulated a three step test for determining whether such government-funded expert assistance was necessary, as follows: There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

The defense asked for Dr. Thomas Grieger (or any comparable psychiatrist-toxicologist), whose CV was provided to the government, to be assigned for consulting purposes to the defense team of Sgt Brito. The defense indicated that it may later designate this witness to testify in this case.

Ms. Perris Weiland (an accuser on the charge sheet who claims Brito raped her) claims that she has received significant psychological counseling and treatment over the years because of her past claims of sexual abuse by a US Navy Seal. At the Article 32 hearing, Weiland said she received such treatment at Camp Johnson, North Carolina and at Okinawa. LCpl Weiland claimed that CDR Weber (a psychiatrist) and Miss Sumako Shiroma (a psychologist) treated her at Camp Lester, Okinawa too. Weiland also claimed that she has been diagnosed with PTSD as well as dissociative disorder.

The defense hypothesis that supports the defense request for an expert is that: LCpl Weiland has these mental disorders which indicates that she may be less able to testify truthfully as compared to another person because of her mental conditions. Defense needs an expert psychiatrist like Dr. Grieger to examine LCpl Weiland and review her medical records to determine if she is capable

of testifying truthfully in this case or accurately recalling the events that occurred with Sgt Brito. For example, if LCpl Weiland has border line personality disorder or some other mental health condition, this is something relevant that the members need to consider when they are listening to LCpl Weiland testify about how Sgt Brito raped her.

Defense needs a psychiatrist to tell us how her mental conditions impact her abilities to perceive and function as compared to an ordinary person. By way of example, LCpl Weiland claimed to Maj Marshall under oath at an Article 32 that she had been accepted to the Naval Academy and had a third degree black belt in Taekwondo. These claims are suspected to be false. LCpl Weiland admitted that she has received mental health treatment and has been diagnosed with some mental health conditions. The extent of this remains unanswered.

An expert is needed to develop this theory and to testify about LCpl Weiland's mental conditions and the impact these conditions have on her ability to perceive reality. When requested for his services in similar cases, Dr. Grieger has indicated "I would start out at 10 hours consultation at \$350 per hour. I would estimate 4 days at \$4500 per day for trial. That includes everything (travel/lodging/rental car, etc) ... \$21,500 Firm Fixed Price." Of course, the defense requests a comparable government employed expert if the Government does not wish to pay for Dr. Grieger.

The defense deserves the ability to impeach LCpl Weiland and granting the defense psychiatrist as well as ordering LCpl Weiland's requested documents produced (e.g. her mental health records, Academy acceptance documents and martial arts history) will enable this. LCpl Weiland's claims against Sgt Brito are so inflammatory (that he raped her) that Sgt Brito deserves the opportunity to impeach this incredible testimony. Dr. Grieger can provide that opportunity.

c. The Defense requested discovery should be produced because the defense needs the material to impeach the Government's witnesses and to prepare for trial.

United States v. Webb, 66 M.J. 89 (CAAF 2008) held that the Due Process Clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to

present a complete defense; that guarantee requires the prosecution to disclose to the defense evidence favorable to an accused where the evidence is material either to guilt or to punishment; favorable evidence includes impeachment evidence that, if disclosed and used effectively, may make the difference between conviction and acquittal.

Webb went on to hold that like other forms of exculpatory evidence, impeachment evidence is material to guilt or punishment only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; under the reasonable probability standard of materiality, the question is not whether the accused would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial; therefore, a reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial; failing to disclose such evidence is a due process violation irrespective of the good faith or bad faith of the prosecution.

Webb further stated that in military practice, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe; subject to certain exceptions and upon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are material to the preparation of the defense; thus, an accused's right to discovery is not limited to evidence that would be known to be admissible at trial; it includes materials that would assist the defense in formulating a defense strategy.

Additionally, United States v. Madigan, 63 M.J. 118 (CAAF 2006) held that RCM 703(f)(1) provides that each party is entitled to the production of evidence which is relevant and necessary. In particular, RCM 703(f)(2) provides that notwithstanding subsection (f)(1), 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 it 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 in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

Here, the defense has multiple times in writing asked for the criminal and adverse administrative records of the Government witnesses. Those records have not been provided, but they exist and those records would likely impeach the Government witnesses at trial.

The Defense requests that the 32 transcripts of the witnesses at the Article 32 be produced because the transcripts can be used to impeach those same witnesses at trial.

The defense also asked for the subpoenaing of facebook and myspace records for key witnesses like Ms. Clanton and LCpl Weiland.

The MCRSS data for Ms. Clanton is needed to pinpoint exactly when Ms. Clanton became ineligible to join the Marines. This is a key component of Sgt Brito's defense that he was informed she was no longer an applicant when the alleged inappropriate relationship with her occurred.

The defense also asked for mental health records and derogatory information concerning LCpl Weiland in order to impeach her claims she made at the Article 32. LCpl Weiland indicates that she has a history of mental health counseling and this is relevant for the defense to explore in cross examination. LCpl Weiland also claims Brito raped her and that she possesses the ability to disable someone with a single kick. She also claims she was accepted to the US Naval Academy. If these claims are false, LCpl Weiland should not be permitted to lie during Article 32's and at trial with impunity. For the Government to claim that they are not investigating her, only Sgt Brito; should not prohibit the defense from pointing out to the members that LCpl Weiland (the trial counsel's chief witness) is a liar (to be verified by these requested documents in discovery).

d. The Defense requested bill of particulars should be answered so that Sgt Brito can prepare for trial.

In its third discovery request, the accused asked for a bill of particulars to clarify the vague charges the accused is facing. Specifically, Sgt Brito is facing specifications for violating a Depot Order by having alleged inappropriate relationships with applicants. The defense inquires to know the full extent of what the Government's allegations are so that the defense can defend against them. The defense also inquires to know how the Article 134 offenses the accused is facing violated good order and discipline. The accused is also charged with violating an MPO, again how did the accused violate that MPO? Why was having contact with Ms. Karen Walker as alleged wrongful?

Case law provides that when the charges are vague or the accused is uncertain on how to defend the charges he is faced with, then a bill of particulars is appropriate.

For example, "If appellant was in any way uncertain as to the nature of the charge, she could have filed a motion for a Bill of Particulars under Rule for Courts-Martial (R.C.M.) 906(b)(6) prior to her pleas." U.S. v. McDaniel, Not Reported in M.J., 2008 WL 4525334 (AFCCA 2008).

"Discussion to R.C.M. 906(b)(6) explains that a bill of particulars serves "to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial." See U.S. v. Harman, 66 M.J. 710, 712 (ACCA 2008) for its application.

See also U.S. v. Rivera, 62 M.J. 564, 566 (CGCCA 2005) which held that a bill of particulars assist a defendant "to avoid or minimize the danger of surprise at time of trial and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague and indefinite for such purposes. United States v. Francisco, 575 F.2d 815, 818 (10th Cir.1978) (citing United States v. Haskins, 345 F.2d at 114); Rule for Court-Martial (R.C.M.) 906(b)(6) Discussion, Manual for Courts-Martial, United States, (2002 ed.). A bill of particulars is not a part of the indictment or of the charge to the jury. Francisco, 575 F.2d at 819. In military practice, the bill of particulars is not a part of the specification. R.C.M. 906(b)(6) Discussion."

That the trial counsel has not attempted to answer the defense's bill of particulars is an abuse of discretion and this Court should make such discovery orders that are just in addition to compelling the Government to answer the defense's bill of particulars.

IV. EVIDENCE AND BURDEN OF PROOF

a. The defense will submit these documents in support of its motion:

Exhibit A - Defense 1st Discovery Request
Exhibit B - Defense 2nd Discovery Request
Exhibit C - Defense 3rd DISCOVERY REQUEST
Exhibit D - Government Response to 1st Def Disc Req
Exhibit E - Government Response to 2nd Def Disc Req
Exhibit F - Government Response to 2nd Def Disc Req
(amended)
Exhibit G - Government Response to 3rd Def Disc Req
Exhibit H - Case Listing Dr. Grieger
Exhibit I - Thomas Grieger Curriculum Vitae

b. If deemed necessary by the military judge, the defense will call all of the denied lay and expert witnesses telephonically to explain their relevance to the military judge. The Defense asks for the Government's assistance in ensuring that all defense requested witnesses denied are available telephonically or produced live at this hearing.

c. Burden of proof: the burden of proof in proving all facts in support of this motion falls upon the moving party, the defense. The burden standard is a preponderance of the evidence to prove the validity of all facts. See R.C.M. 905.

V. RELIEF REQUESTED

Oral argument is requested. The defense requests that this Court order that the Government will:

1. produce the defense requested lay witnesses for the merits and sentencing.
2. produce the defense requested expert witness denied.

3. provide the Accused with requested discovery documents not yet produced.

4. compel the Government to answer the defense's bill of particulars request.

VI. ARGUMENT AND SERVICE

Oral argument is requested. A copy of the foregoing motion was served on the government on 27 September 2010.

/S/

C. P. HUR

CAPTAIN USMC

DETAILED DEFENSE COUNSEL