IN THE FIFTH JUDICIAL CIRCUIT
Fort Benning, Georgia 31905

UNITED STATES	)	
	)	
	)	
v.	)	
	)	Supplemental Brief
	)	
WILLIAM L. CALLEY, JR.	)	
FIRST LIEUTENANT	)	
UNITED STATES ARMY	)	

Comes now accused through counsel and files a supplemental brief to the motion for interim discovery dated 18 February 1970:

I

By reply brief government implies that defense first must exhaust administrative remedies before resorting to a motion for discovery. Your Honor's attention respectfully is invited to Army Regulation 345-20, Army Regulation 345-60 and the related regulations therein cited. These regulations do not require use of administrative procedures as a condition precedent to an accused's resort to a motion for appropriate relief for discovery. Neither does the Manual for Courts-Martial establish such an obnoxious evidentiary rule.

In a prior administrative request for discovery, defense was advised, "BY ORDER OF THE SECRETARY OF THE ARMY," in an indorsement from The Adjutant General, Department of the Army, that:

> "2. The provisions of the Manual for Courts-Martial, United States, 1969 (Revised Edition), contemplate that motions for appropriate relief which are based upon claims for discovery by the defense shall be acted upon by the convening authority concerned or the military judge as appropriate...." (2d Emphasis Added.)

This indorsement (see Incl 1) clearly indicates that Department of the Army considers action on disclosure requests in pending court-martial cases to be a judicial rather than an administrative responsibility. Thus, trial counsel's tacit assertion that defense must exhaust administrative remedies before petitioning the Court-Martial for appropriate relief is without merit.

II

Relevant officer efficiency reports are admissible in evidence even on the merits of a case (U.S. v Barnhill, 13 USCMA 647, 33 CMR 179). In requesting certain designated

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officer efficiency reports for three specified officers, defense has not engaged in a "fishing expedition." Your Honor was provided the names of Colonel Marlowe; LTC Vincent and Captain Hill who testified for the Government on the issue of command control and influence. Colonel Marlowe rated LTC Vincent and indorsed the efficiency report of Captain Hill. Colonel Marlowe was rated by BG Berry -- see testimony of the Chief of Staff, this command. Captain Hill testified that Colonel Marlowe uttered certain remarks in the presence of LTC Vincent; however, LTC Vincent denied being present at such a meeting. LTC Vincent would have been aware of his pending officer efficiency report rating during the stated time period as Colonel Marlowe had applied for retirement. Captain Hill would have received an officer efficiency report rating upon his permanent change of station to Vietnam. In these circumstances, it is submitted that the request for discovery of stated efficiency reports is reasonable and necessary to the defense. Note: Only those local reports rendered on these three officers during the time when this case was being processed are requested. The remarks section of these reports may produce impeachment information or independent evidence substantiating defense's command control allegation.

Your Honor is well aware that defense counsel rarely can determine the content of secreted or filed government documents, especially under our adversary legal system. This fact should be taken in account when determining reasonableness of defense discovery requests. Defense asks not for blanket authority to inspect all officer efficiency reports of the three designated officers. Permission is sought only to obtain those officer efficiency reports which reasonably could provide a source for defense evidence.

III

Trial counsel's argument concerning release of Operation Order 1-68, 11th Brigade Regulation 525-1 and DA Message SACLL is without merit. Defense has identified these documents with sufficient particularity to warrant discovery. Defense does not possess a copy of any of these documents. Defense informally discussed release of documents with the Americal Division Inspector General's action officer and with the Americal Division's Staff Judge Advocate. Military Defense Counsel was then led to believe that the 'piecemeal' furnishing of authenticated records and reports would produce a burden on the Division's administrative resources. Accordingly, Military Defense Counsel, in good faith, stated he would wait until return to CONUS to request documents through the Court. The above offer of proof should be verified upon dispatch of a message to the Americal Division's Inspector General. Trial Counsel asserts that he has no personal knowledge of the contents of these documents. Defense is willing to give trial counsel any continuance he needs to obtain this information.

To reduce further administrative burden on a combat division, defense recently has provided a detailed listing of numerous requested documents with trial counsel. Your Honor will be requested to order discovery only over contested documents or over those uncontested documents which trial counsel cannot obtain within a reasonable time period.

IV

Trial counsel correctly states that he has agreed to provide defense with two copies of requested photographs. Production request of photographs was made informally in late December 1969 or early January 1970. As yet these photographs have not been produced. These photographs are needed to insure that defense has "equal opportunity" to prepare its case. The CID, it is firmly believed, used the requested photographs in witness interviews. Defense can produce statements, furnished in the Bill of Particulars, by trial counsel, where reference was made to numbered photographs. Without the referenced photographs witness responses in some instances are meaningless. Request for photographs was made to this court in an attempt to assist trial counsel by providing him with a sound legal basis for requiring a Department of the Army investigative agency to provide immediately the requested photographs. Defense's witness interview cannot proceed satisfactorily without availability of all photographs used during CID witness interview. Trial counsel suggests accused use unauthenticated photographs contained in commercial publications. If Your Honor desires we will use such photographs; however, you are advised that photographs currently are in the possession of the trial counsel and the CID which are not contained in cited publications. Accordingly, such a substitution seems constitutionally unfair.

V

Your attention next is invited to defense's request for in camera inspection of the files of Colonel Dalton O. Carpenter, Junior, and Colonel George W. Everett. Defense requested all exculpatory matter within the meaning of Brady v Maryland, 373 U.S. 83, because such a request clearly included matters relating to sentencing as well as matters relevant to case merits and motions at bar currently under advisement.

Trial counsel cites a series of Federal cases to establish that Brady provides either for very limited pretrial discovery or no pretrial discovery apart from Rule 16, Federal Rules of Criminal Procedure, Title 18 United States Code (hereafter called Rule 16). It appears trial counsel believes defense is asserting Brady as basic authority for pretrial discovery in a court-martial proceeding. Defense cited Brady to insure that Your Honor was not mislead as to the scope of the discovery request. However, defense's ultimate authority for making such a discovery motion was Paragraph 115c, Manual for Courts-Martial, United States, 1969 (Revised Edition), which states in pertinent part:

> "If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge ...will upon reasonable request... take necessary action to effect their production for use in evidence and, within any applicabl limitations (see 151b(1) and (3)), to make them available to the defense to examine or to use, as appropriate under the circumstances. See also 44h." (Emphasis Added.)

Your Honor's attention is invited to the fact that trial counsel's authorities are directed to interpreting Brady in

light of the subsequently enacted Rule 16. None of trial counsel's cases purport to interpret the scope of Paragraph 115c, MCM. In United States v Franchia, 13 USCMA 315, 32 CMR 315 (1962) the Court stated:

> "Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian criminal prosecution." (Emphasis Added.) (Id at 320.)

This philosophy of broader discovery clearly was adopted by the President of the United States when he promulgated current Paragraph 115c, MCM. In fact, the drafter's of the Manual opined:

> "This subparagraph (115c) has been broadened in order to make it clear that the defense is entitled to the equal opportunity to prepare his case which is implicit in Article 46." (Emphasis Added.) (Draft Analysis of Contents, Manual for Courts-Martial, United States, 1968.)

The military test for discovery simply is relevancy to the subject matter and reasonableness. (Draft Analysis of Contents, supra.) As stated in United States v Franchia, supra at 320:

> "At the trial itself, the accused's right to subpoena witnesses and the motion for appropriate relief give him practically unlimited means for the production of evidence favorable to him. But the availability of the machinery for extensive discovery and production of evidence does not entitle the accused to use the machinery for improper purposes. If discovery of documentary evidence is sought, it must appear that the documents are relevant to the subject matter of the inquiry and that the request is reasonable. Relevance and reasonableness of request necessarily depend upon the facts of each case, especially in considering the impact of the trial court's ruling upon the rights of the accused." (Emphasis Added.)

It is submitted that defense's request both are relevant to the subject matter and reasonable in the attendant circumstances. Both Colonel Carpenter and Colonel Everett have been described by the United States Government as contact points for policy or other liaison information regarding My Lai 4. This fact can be established by (1) the rank of the officers concerned; (2) the duty assignment of each officer; (3) the degree of official interest in the My Lai incident; and, (4) the Americal Division's files to include reference to DA Message SACLL (fully cited in motion filed 18 February 1970). It can be inferred from the above circumstantial evidence that each officer has possession of documents relevant to the subject matter under inquiry -- would Department of the Army appoint contact officers unless they are to be contacted. Further, it is normal and customary to keep notes and memoranda of important conversation relating to one's military assignment -- in this case that of a My Lai contact officer. Thus, defense's request can be proven relevant by available

direct and circumstantial evidence. The reasonableness of this request (like relevancy) depends upon the attendant facts, especially considering the impact of Your Honor's ruling upon the rights of Lieutenant Calley. It is respectfully submitted that a criminal trial is a "quest for truth" (Gregory v United States, 369F2d 185, 188 (DC Cir 1966) and this is a keystone fact to be judicially considered. To insure truth is obtained and that evil such as witness intimidation, perjury subornation and justice obstruction is prevented, civilian criminal courts have strictly limited an accused's right of discovery (See e.g., United States v Malensky, 19 F.R.D. 426). Conversely, as military courts-martial generally need not fear these external threats, they have adopted the broader theory of "equal opportunity" to obtain evidence and achieve case preparation. It is very essential to defense case preparation - especially where command control issues have been raised - to inspect those government files reasonably known to contain relevant My Lai information. (For example, the mere fact that contact officers have been appointed by the United States Government constitutes relevant, circumstantial evidence of some weight that command influence exists at appellate review and executive clemency levels.) Further, Your Honor is asked to consider the following additional facts in determining reasonableness:

a. Chief counsel is a former member of the United States Court of Military Appeals. His access to sensitive information would not embarass the United States.

b. Associate civilian counsel is a retired Navy Reserve officer. His access to sensitive information would not embarass the United States.

c. Military defense counsel is a career officer whose possession of sensitive information, especially considering his former duty assignment in Vietnam, would not embarass the United States.

d. If necessary, information initially may be released solely to Chief Counsel, Mr. George Latimer.

e. The accused has been charged with committing premeditated murder.

f. The case has been referred capital -- if convicted and if accused erroneously is denied exculpatory matter it could cost him his life. (An example of "...the impact of the trial court's ruling upon the rights of the accused.")

g. Defense has made all requests as specific as adversary discovery procedures permit. (Note: Prior requests in appellate record to include the three page "Request For Production Of Records" filed with trial counsel -- the accuracy and specificity in listing these relevant documents constitutes circumstantial evidence of the accuracy of this current defense request.); and,

h. If Your Honor orders record production, either for in camera inspection or for defense use or examination, agencies of the Department of the Army will assist in obtaining such writings

(See paragraph 4, Incl 1). This is important as it shows feasibility of records inspection as well as written recognition by Department of the Army of your authority to order in camera inspections. (Weigh this factor against the possible prejudicial effect of nondisclosure on an accused's rights in a capital case.)

i. Defense has specified those files it desires examined.

j. Rule 16 b exempts from discovery "other internal documents made by government agents in connection with the investigation or prosecution of the case." Paragraph 115, MCM, contains no similar exemptions.

Considering the above factors, it is submitted that defense's request is reasonable within the meaning of Paragraph 115c, MCM, and United States v Franchia, supra.

Defense desires that it have access to the above requested documents under the provisions of Paragraph 115c, MCM. However, defense, in the alternative, would request Your Honor's in camera inspection of said files or documents. Trial counsel asserts in his brief that in camera inspection normally is not mandatory regarding general requests under Brady v Maryland as interpreted in light of Rule 16. Without conceding such fact, defense contends that in camera inspection often is the just method of conducting a "quest for truth" (See Taglionetti v United States, 394 U.S. 316, 22 L Ed 302 (electronics surveillance records); Matthews v United States, 407 F 2d 1371 (1969) (Jencks Act Case); Canaday v United States 354 F 2d 849 USCA 8th Cir 1966) (Jencks Act Case).) In fact, in certain instances it may constitute reversible error to refuse to conduct in camera inspection (United States v Keig, 320 F 2d 634 (USCA 7th Cir 1963). Consider that Paragraph 115c, MCM, states, "...the military judge will, upon a reasonable request... take necessary action to effect (document or other evidentiary materials) production...." (Emphasis Added.) This procedural requirement impose an express duty on the military judge when faced with a reasonable discovery request. In this respect, Paragraph 115c, MCM, is related closer to the affirmative duty for in camera inspections imposed by the Jencks Statute than to Rule 16. Thus, those cases cited by defense regarding Jencks Statute in camera inspections should be afforded greater persuasive value than trial counsel cited cases construing Brady as directly related to Rule 16.

Your Honor's attention is invited to the fact that even under the more restrictive rules of civilian criminal discovery, disclosure cannot be limited solely to materials demonstrated in advance to be admissible as evidence in court. As stated in United States v Gleason, 265 F Supp 880 at 886:

> "It is enough to hold that the Government may not resist disclosure on its own view - or even on the view of the motion judge before trial - that it will succeed on debatable evidence theories in blocking admission of the information demanded."

Your Honor will note that Paragraph 115c, MCM, does not require a defense showing of admissibility as a condition precedent to discovery.

It has been said that error can result not only from evidence suppression but by suppression of the means by which the defendant can get evidence (See Gregory v United States, supra at 189.) It is submitted that denial of this discovery request will be tantamount to suppression of the only means available to defense for records inspection necessary to secure equal case preparation opportunity. It is most certain that defense does not have access to the files of Colonel Carpenter and Colonel Everett (See Incl 1 -- Note: Department of the Army would not even provide response information concerning Lieutenant Calley's recommended Vietnam awards from Official Military Personnel Files).

Trial Counsel stressed throughout his brief that he would provide defense with such exculpatory matter as is known to trial counsel. As authority, trial counsel cited several cases where the court accepted the United States Attorney's assertion that all exculpatory matter contained in Attorney General and Federal Bureau of Investigation files would be provided defense counsel. These cases should not be controlling in court-martial discovery proceedings because: (1) A United States Attorney represents the entire United States Government before the Court. Trial Counsel merely represents the Government at the Convening Authority level. Trial Counsel cannot bind higher headquarters, let alone outside departmental agencies, by his good faith promises of exculpatory matter production. The cases cited by trial counsel imply that the United States Attorney was aware of all relevant documents possessed by the government. Trial counsel in a case of this magnitude cannot make a similar assertion; and (2) Paragraph 115, MCM, provides for a broader based right of discovery than does the Jencks Act and Rule 16.

Your Honor's attention further is directed to the fact that nondisclosure of exculpatory evidence may not be neutralized merely because a prosecuting attorney is shown not to have knowledge of its existence (Barbee v Warden, Maryland Penitentiary, 331 F 2d 842, 846 (USCA 4th Cir 1964) (In this case police but not the US Attorney was aware of exculpatory laboratory reports).) If such a judicial result can occur in stricter civilian criminal proceedings, it can occur in the military where a duty is placed on the military judge by Paragraph 115c, MCM, to act on reasonable and relevant discovery requests. For the reasons above asserted, Your Honor should not rely on trial counsel's assurance to comply with Brady v Maryland. At no point does trial counsel assert he will tender to defense information which is of contested admissibility. Further, trial counsel does not assert that he is aware of all My Lai matter or that he intends to become aware of all existing My Lai matter. For example, trial counsel admits that he is unaware of the contents of OPORD 1-68 (C) and 11th Brigade Regulation 525-1. If Your Honor accepts as sufficient trial counsel's assertion, in such circumstances, you place defense counsel, wherever situated, at the mercy of other trial counsel who at some future date intentionally or negligently may view only prosecution oriented files thereby denying defense any means to obtain existing exculpatory evidence. Accordingly, defense requests that its motion be granted to insure that the

fair trail and equal case preparation opportunities granted by the Manual and military or other due process standards are not violated to the detriment of the accused.

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