THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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

v. Docket No. ARMY 20130679

First Lieutenant
CLINT A. LORANCE,
United States Army,
Appellant.

BRIEF IN SUPPORT OF PETITION FOR A NEW TRIAL

TO THE JUDGE ADVOCATE GENERAL OF THE ARMY

COMES NOW PETITIONER First Lieutenant (ILT) Clint A. Lorance by and through the undersigned counsel and pursuant to Rule for Court-Martial (R.C.M.) 1210, respectfully submits this Brief in Support of his Petition for a New Trial filed concomitantly herewith.

INTRODUCTION

The identities and affiliations of the three military-aged-males at whom 1LT Lorance ordered fire during a combat patrol in Kandahar, Afghanistan in July 2012 are *Brady* material the prosecution was required to disclose. However, the prosecution failed to disclose the exculpatory and mitigating evidence to the chain-of-command, the convening authority, the defense, the military judge, and the members of the panel in violation of the Due Process Clause of the Fifth Amendment, the Supreme Court's holding in *Brady v. Maryland*, and R.C.M. 701.

Discovered after trial, First Lieutenant Lorance presented this information to the Commanding General of the 82nd Airborne Division, who denied Clint's requests to either disapprove the findings and the sentence, order a post-trial Article 39(a) U.C.M.J. hearing, or direct a new trial. The Commanding General's senior military attorney determined that there was "no legal error."

SUMMARY OF THE BASIS FOR A NEW TRIAL

The members of the panel (jury) had before them evidence that PFC Skelton, a former civilian police officer and veteran infantryman with months of combat on this very field, saw the three military-aged males. He was on top of a grape berm and saw the trio riding back-to-back on a single motorcycle at a high rate of speed toward his exposed platoon-mates; exposed because they were crossing a dirt road in single file behind a minesweeper. Private First Class Skelton testified to the members that he perceived the riders as a hostile threat and was authorized to engage under the applicable Rules of Engagement. (R. 585-586).

What the members did not have before them, however, is the evidence the prosecution withheld: that the three military-aged males were associated with one another, terror networks, IED emplacements, IED explosions, and linked to U.S. casualties from those IEDs.

If considered by the members, PFC Skelton's hostile intent/hostile act evidence combined with the enemy identity and affiliation evidence which resulted in U.S. casualties would "probably have produced a substantially more favorable result" for 1LT Lorance. *See* R.C.M. 1210 (standard for a new trial).[1] Although this exculpatory and mitigating information is on U.S. Government unclassified databases, the prosecution failed to turn it over.

As demonstrated more fully below, neither the process of this trial (investigation, preferral of charges, referral of charges, trial, post-trial) nor the results (findings and sentence) can be trusted as reliable.

To prevent this "manifest injustice," the Court should grant 1LT Lorance a new trial. *United States v. Williams*, 37 M.J. 352, 35 (C.M.A. 1993) (new trial appropriate to prevent manifest injustice).

[1] As discussed more fully below, in addition to PFC Skelton's assessment that the three unidentified males triggered his right to self-defense under the Rules of Engagement, there were assessments by others that day showing that 1st Platoon was subjected to hostile intent and hostile acts by the enemy. For example, moments and meters away from the engagement with the three riders on a single motorcycle, SSG Herrmann and PFC Carson shot and killed two enemy fighters and wounded a third in the arm. These enemy fighters had been tactically maneuvering 1st Platoon and used ICOM radios to communicate words to the effect of "we must do something to the Americans."

STATEMENT OF FACTS

A. The Prosecution's Theory of Attempted Murder & Murder

The prosecution repeatedly urged the members to conclude that 1LT Lorance ordered fire on three "innocent civilians," that is, the three military aged-males who were riding together on a single motorcycle at a high rate of speed toward 1st platoon. (R. 141; 144; 318; 323; 853; 855; 964; 964; 965).

During the prosecution's opening statement, the trial counsel proclaimed to the members that "[t]he next thing that happens is the murder. Lieutenant Lorance orders the murder of two men and tries to murder a third." (R. 141).

The prosecutor continued describing - "one of the three men is what they call the village elder." (R. 144).

During the prosecution's case-in-chief, the prosecutor elicited testimony as follows:

> Q. Did you recognize any of them?
>
> A. I recognized the older gentlemen as the village elder -- who we called the village elder because he was always the one that would come out and talk to us the prior -- the times that we'd been there.

(R. 318)

> Q. Okay, what happened after the second shots?
>
> A. After the village elder -- or we knew as the village elder was shot, his older son took off running back into Sarenzai -- into the house that they lived in.

(R. 323).

In closing arguments during the findings portion of the court-martial, the prosecution argued as follows: . . . "he ordered the murder of those two men." (R. 853). He continued, ". . . . they were two men with families. . ." (R. 855).

As part of its pre-sentencing argument, the prosecution claimed:

> ". . . and murder Afghan civilians."
>
> ". . . "shoot two civilians."
>
> ". . . "those civilians were victims. . ."
>
> ". . . "he ordered those Soldiers to shoot those two civilians."
>
> ". . . gone out and killed civilians. . ."

(R. 963 – 965).

B. Discovery of Evidence Withheld by the Prosecution

During post-trial processing, 1LT Lorance dismissed his civilian trial defense counsel and retained first undersigned counsel.

The authenticated record of trial does not establish murder attempted murder, or unpremeditated murder of unknown victims. Instead, it leaves open the questions whether or not it is lawful to sustain convictions not only in the absence of bodies, but also in the absence of identities.

This is especially troubling because the identities and affiliations of males "of apparent Afghan descent," if known to the prosecution and the chain-of-command, would likely have affected the legal advice provided to the chain-of-command and the ultimate recommendations and decision to refer this case to general-court martial.

Upon further review and consideration, the undersigned defense team determined that the U.S. Army and possibly thus the prosecution possessed the names and affiliations of the three males of apparent Afghan-descent, further reasoning that the failure to timely disclose that information to the defense would constitute separate violations of the U.S. Constitution, the *Brady v. Maryland* doctrine and its progeny, and R.C.M. 701.

Consequently, while the convening authority considered 1LT Lorance's post-trial R.C.M. 1105 and 1106 matters, the defense sought to determine what information the prosecution possessed but failed to disclose, and also sought the identities and affiliations of each male of apparent Afghan-descent mentioned in the authenticated record of trial and allied papers.

In late November 2014, as 1LT Lorance had already spent over 15 months in confinement, the defense learned that the Army indeed possessed evidence linking the Afghan military-aged-males involved in this court-martial to IED attacks, terror networks, and U.S. casualties in Afghanistan.

C. Presentation To The Convening Authority

On 30 November 2014, 1LT Lorance brought the following to the convening authority's attention:

Below are brief examples of the evidence contained in databases and computer systems in the possession of and accessible to the Army, the CID, and the prosecution:

> a. Mohammad RAHIM, likely shot in the arm during the second engagement, is linked to at least one IED event in Kandahar in June 2012, the month before the engagements;
>
> b. Upon information and belief, the third-rider who escaped uninjured from the first engagement is Haji KARIMULLAH. He is linked to at least one IED event in Kandahar in August 2012, the month after the engagements; and
>
> c. A *Taskera*, or Afghan identification card (ID card), was recovered from one of the killed riders in the first engagement. A picture of the ID card is in the record of trial. However, the writing is not visible. Nor was it translated into English. It was returned to villagers."

(Def. App. Ex. C).

Because the military-aged males were not the innocent civilians the prosecution portrayed them to be, 1LT Lorance asked the convening authority to disapprove the findings and the sentence or alternatively, to authorize him to supplement his post-trial submissions to include "a fully-developed R.C.M. 1102 motion to the Convening Authority seeking a post-trial U.C.M.J. Article 39(a) session before a military judge, a U.C.M.J.

Article 60, R.C.M. 1107 request for rehearing, and/or a request for a new trial. *United States v. Williams,* 37 M.J. 352, 356 (C.M.A. 1993) (new trial to prevent manifest injustice)." *Id.*, ¶ 1(d).

First Lieutenant Lorance explained that the evidence withheld by the prosecution is "contained in the United States' government computer databases and systems, including those operated by the National Ground Intelligence Center (NGIC), the Combined Information Data Network Exchange (CIDNE), the Biometric Automated Tool Set (BAT), Intelink, the Detention Facility in Parwan (DFIP), the Justice Center in Parwan (JCIP), the Joint Legal Center (JLC), the Theater Exploitation Databases (TEX), Task Force Paladin, and/or the Afghanistan Captured Material Exploitation/Joint Expeditionary Forensics Lab (ACME). There may well be other classified systems and databases which have not been made known to counsel for the defense." *Id.*, ¶ 7.

While his 30 November 2014 request was pending convening authority review, additional evidence which supported 1LT Lorance's pending request surfaced. On 22 December 2014, 1LT Lorance brought additional details of the identities and affiliations of the military-aged-males to the convening authority's attention as part of a supplemental clemency request. In it, 1LT Lorance stated,

> [O]f the seven military-aged-males the

> Criminal Investigation Division (CID) placed on the field that day, at least five are associated with terror. None of this information was disclosed previously to decision-makers when deciding to send this case to trial. Nor was it disclosed to defense counsel, the military judge, or the members of the jury. Because the Commanding General has this superior information that others previously did not, he may use his judgment to rightly grant clemency because neither the process of this trial, nor the results it produced, can be trusted as reliable.

(Def. App. Ex. D, ¶ 1).

Also in his 22 December 2014 Supplemental Clemency Request, 1LT Lorance explained the significance of the newly-discovered evidence and how it would have produced a more favorable result for him:

> This information shows that RAHIM, KARIMULLAH, and AHAD were associated with each other and with terror networks spanning dozens of emplacements in the same district and province during the same timeframe in which 1st platoon operated. RAHIM and KARIMULLAH were on the field that day. They knew each other. Abdul AHAD told CID that RAHIM was with the ICOM scouts while KARIMULLAH was the third rider on a single motorcycle. It shows that the two other riders were on the motorcycle with a member of an IED cell. It shows that of the seven Afghan military-aged males on the field that day, five are tied to HME, IEDs, and terror networks.

(*Id.*, ¶ 7).

On 31 December 2014, and notwithstanding these compelling facts, the senior attorney for the 82nd Airborne Division advised

the convening authority that there was "no legal error" in the case. The convening authority took initial action, denied 1LT Lorance's R.C.M. 1105/1106 requests, but did grant one-year clemency.

On 10 January 2015, 1LT Lorance requested, pursuant to R.C.M. 1107, that the convening authority rescind the initial action and modify it based on still additional evidence.

> The prosecution is duty-bound to disclose to the defense exculpatory evidence. Exculpatory evidence is that which is favorable to the defense and material to either guilt or punishment. The evidence offered here by the defense identifies the Afghan military-aged males on the field that day to include the three motorcycle riders 1LT Lorance was convicted of murdering and attempting to murder. It associates each with improvised explosive device (IED) events and terror networks in Kandahar province during the relevant timeframe. To date, the prosecution has not disclosed these identities. Nor has the prosecution disclosed their affiliations with bombings and terror networks. That 1LT Lorance did not get a fair trial is made clear where the prosecution argued in closing that there is "no suggestion" that the alleged victims were Taliban. (R. 855). As it turns out, there is a good bit suggesting that they were/are associated with terror. Because the prosecution failed to turn over the evidence but instead urged the jury that the evidence did not exist at all, this is legal error. The legal error is so momentous that the law requires a new trial.

(Def. App. Ex. E, ¶ 3).

Also in his 10 January 2015 request for modification, 1LT Lorance explained how the newly-discovered information would have produced a more favorable result for him:

> The officers of the 82nd Airborne Division, be they the chain-of-command or the members of the panel, would have thought differently about this case if they knew about this information. There may have been an altogether different approach and disposition. Likewise, there is a reasonable probability that had these disclosures been made, the findings and/or any sentence would have been different. It is for these reasons that the Supreme Court's holdings require a new trial to correct *Brady* violations.

(*Id.*, ¶ 5).

This request too, however, was denied.[2]

As detailed more fully below and as part of the attached audio/video presentation of sworn expert testimony, the findings and the sentence are unjust and accordingly, 1LT Lorance respectfully petitions for a new trial. R.C.M. 1210(c)(4) and (c)(7)(8)(9).

[2] On 4 February 2015, 1LT Lorance filed with this Court a motion seeking return of the record of trial to the convening authority for consideration of and action on exculpatory and mitigating evidence. This Court denied the request.

DISCUSSION

I. MANIFEST INJUSTICE WILL OCCUR IN THE ABSENCE OF A NEW TRIAL

A. NEW TRIAL STANDARDS

Granting a new trial is necessary to prevent "manifest injustice." *United States v. Johnson*, 61 M.J. 195, 199 (C.A.A.F. 2005)(citations omitted). The Courts "have held that when evidence is discovered which is directly relevant to a material issue in the case, denial of a motion for a rehearing based upon that newly-discovered evidence is an abuse of discretion." *United States v. Niles*, 45 M.J. 455, 459 (C.A.A.F. 1996). A new trial on the basis of newly-discovered evidence is appropriate when:

> (1) the evidence was discovered after the trial;
>
> (2) the evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
>
> (3) the newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).[3]

Each of these criteria is satisfied in this case.

[3] Article 73, U.C.M.J., 10 USC § 873, states that a new trial may be granted if a petition is filed by the accused within 2 years of approval of the sentence by the convening authority.

B. THIS PETITION IS TIMELY FILED

The trial ended on 1 August 2013. The newly-discovered evidence began to arise in November 2014 during the clemency stage of this court-martial. The convening authority took action on 31 December 2014. Thus, the evidence was discovered after the trial, this petition is timely filed within the 2-year period pursuant to R.C.M. 1210(a), and the first criteria is satisfied.

C. THE EVIDENCE WAS NOT DISCOVERABLE AT TRIAL

1. The Prosecution's Obligation to do Justice First

Prosecutors have a continuing interest in preserving the fair and effective administration of criminal trials, and, as such, the duty of prosecutors is "to seek justice within the bounds of the law, not merely to convict." A.B.A. Standards for Criminal Justice: Prosecution and Defense Function, Standard 3-1.2(c) (4th ed. 2015). Fundamental to fulfilling this responsibility is making timely disclosure of all evidence favorable to the defense. As the Supreme Court recognized in *Brady v. Maryland*, the failure to disclose favorable evidence "violates due process … irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963); *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

This affirmative duty is above and beyond the "pure adversary model," *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985), it is also grounded in the recognition of the prosecutor's "'special role … in the search for truth in criminal trial,'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Accordingly, in *United States v. Agurs*, 427 U.S. 97, 110 (1976), the Supreme Court held that a prosecutor is required to disclose certain favorable evidence "even without a specific request" from the defense. The Supreme Court reasoned that "obviously exculpatory" evidence must be disclosed as a matter of "elementary fairness," and that prosecutors must be faithful to their duty that "'justice shall be done.'" *Id.* at 107, 110, 111. Indeed, the United States Supreme Court has recognized the "special role played by the American prosecutor" in the search for truth. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

2. Prosecutors Are Not Just Advocates

Prosecutors are subject to heightened ethical obligations due in part to their special position. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney [federal prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty. . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

As representatives of the United States and the Army, prosecutors cannot lose sight that their duty is more than to be exclusively adversarial or ardent advocates. U*nited States v. Bagley*, 473 U.S. 667, 675 n.6 (1985). It is not the Army prosecutor's responsibility to win at all costs but rather to "ensure that a miscarriage of justice does not occur." *Id*. at 675. Basic to this duty and obligation is "disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*.

The Supreme Court makes it clear that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *accord Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). As the *Kyles* Court acknowledged, "[s]uch disclosure will serve to justify trust in the prosecutor as the 'representative … of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88).

3. <u>The Army Prosecutor's Broad Obligation to Disclose</u>

"Discovery in the military justice system, which is broader than in federal civilian criminal proceedings, is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial

motions practice, and reduce the potential for surprise and delay at trial." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004).

In addition to the obligations set forth by the United States Supreme Court interpreting the Due Process Clause of the Fifth Amendment, R.C.M. 701(a)(6) states that the prosecutor shall disclose evidence which reasonable tends to: (a) negate guilt; (b) reduce the degree of guilt; or (c) reduce the punishment. This provision of the *Manual for Courts-Martial* mandates disclosure without request and removes the need for the defense to rely solely on the prosecutor's constitutional duty to disclose favorable evidence. R.C.M. 701(a)(6) "implements the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963)." *Williams*, 50 M.J. at 440.

Under *Brady*, "the Government violates an accused's 'right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.'" *United States v. Behenna*, 71 M.J. 228, 237-38 (C.A.A.F. 2012) (quoting *Smith v. Cain*, 132 S. Ct. 627, 630, (2012)).

Army Regulation 27-26 goes further and requires the prosecutor to disclose all evidence that tends to negate guilt, mitigate the offense, or mitigate the sentence. *See United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002).

4. The Prosecution Withheld Crucial Defense Evidence

Based on the foregoing, the prosecution here was duty-bound to search for and produce, even in the absence of a defense discovery request, evidence favorable to the defense and material to either guilt and or punishment.

Available on government databases were the identities and terror affiliations of the three military-aged males. It stands to reason that a prudent prosecutor, when pursuing the evidence in a murder case, would seek the identity of purported victims, especially where the major crimes occurred in a combat environment. This is especially so where a fundamental question of whether the shooting was lawful or not turns largely if not squarely on their identity as innocent civilians or enemy fighters.

The prosecution surely considered the question of the victims' identities, as shown by comparing the original charge sheet with the "lined-out" amended specifications deleting the victim's names. Doubt as to their identities would seem to be properly resolved in favor of 1LT Lorance based on the prosecution's obligations to the truth-seeking process and principles of fairness; or such doubts at least should have led to further investigation. Put differently, the instant the prosecution obliterated the names of the three male riders, a

grievous injustice against 1LT Lorance took place, an injustice this Court can and should redress.

That the evidence was not available to the defense at trial is demonstrated by the prosecution's failure to disclose it. The burden to identify the purported victims and their affiliations always was and remains with the prosecution pursuant to *Brady*, Supreme Court precedent, and R.C.M. 701. Whatever measure of due diligence trial defense counsel discharged cannot relieve the prosecution from its duty to disclose *Brady* material. In other words, that 1LT Lorance, after expending many man hours and substantial funds, eventually and fortuitously discovered this exculpatory information does not relieve the prosecution of its obligation to release such information in the first place. To conclude otherwise is tantamount to saying that a "'prosecutor may hide, defendant must seek,'" which the Supreme Court in *Banks v. Dretke* made clear "is not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 696 (2004).

Accordingly, the evidence was not available at trial despite petitioner's due diligence because the prosecution withheld it. The second criteria for a new trial is thus satisfied.

D. A SUBSTANTILY MORE FAVORABLE RESULT FOR 1LT LORANCE

Pertaining to the third requirement, "[w]hen presented with a petition for new trial, the reviewing court must make a credibility determination, insofar as it must determine whether the 'newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.'" *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998).

The court in *Brooks* explained, the task before this court is neither to "determine whether the proffered evidence is true" nor to "determine the historical facts." *Brooks*, 49 M.J. at 69. Rather, this court should determine whether "the evidence is sufficiently believable to make a more favorable result probable." *Id.*

1. Disposition Other Than Court-Martial

If the prosecution would have disclosed this evidence, the entire landscape of this case would have dramatically changed and every aspect of the trial would have been altered to 1LT Lorance's favor: preferral of charges, Article 32, U.C.M.J. investigation, referral of charges, motions, defense preparations, defense request for an expert, defense pretrial interviews of the prosecution's witnesses, opening statements, direct examinations, cross-examinations, the defense case-in-

chief, expert testimony, special defenses, jury instructions, and closing statements.

Concerning preferral and referral of the charges, the newly-discovered information was never presented to the chain-of-command when each commander recommended trial by general court-martial. Had the evidence been properly developed and disclosed to decision-makers during the investigative, preferral, and referral stages, it is probable that there would have been a disposition other than a General Court-Martial, at least for the three most serious offenses of attempted murder and unpremeditated murder. Indeed, the Army did not court-martial SSG Herrmann or PFC Carson for killing and wounding military-aged-males that morning moments and meters away. (R. 510).

The newly-discovered evidence was not presented to the Article 32, U.C.M.J. Investigating Officer before he made his recommendations as to disposition. Nor was it presented to or considered by the Convening Authority when he referred the case to general court-martial. At each of these points in the court-martial process, a fully informed chain-of-command would have decided differently - the idea being that 1LT Lorance ordered fire on military-aged-males associated with terror networks and U.S. casualties. In other words, 1st platoon killed and wounded the "right" military-aged males.

2. A More Robust and Compelling Defense Strategy

The new evidence was not disclosed to defense counsel. This information might have informed 1LT Lorance's defense strategy and advanced his efforts to undermine witness' credibility. *Giglio v. United States*, 405 U.S. 150, 154-155 (1972) (recognizing importance of witness credibility). The Due Process Clause of the Fifth Amendment guarantees that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008)(quoting *California v. Trombetta*, 467 U.S. 479 (1984)).

Without identity and affiliation evidence of the military--aged-males, 1LT Lorance is denied this right. Had the evidence been disclosed, the defense could have used it when conducting pretrial interviews of the prosecution's main witnesses. If the paratroopers of 1st platoon knew that the military-aged-males were actually IED makers and insurgent fighters linked to U.S. casualties, their testimony offered to convict 1LT Lorance, would probably have been different on direct-examination and on cross-examination as to all the issues in this court-martial.

3. Use of a Defense Expert

Of particular significance, the defense could have secured an expert in conducting biometric and other investigations into positively identifying IED makers and IED terror cell networks in Afghanistan, tendered him as an expert in such

investigations, and offered his expert opinion testimony to the members.[4]

For example, the attached audio and visual presentation is the product of one such investigator with seven years of experience on the ground in Afghanistan investigating and prosecuting the Taliban and IED makers and co-conspirators at places such as the Justice Center in Parwan. (Def. App. Ex. A). This exhibit is approximately 30 minutes of graphical depictions narrated by a defense expert whose credentials are attached, explained in narration within the exhibit, and would have been offered pursuant to M.R.E. 702, 703, and 704 at 1LT Lorance's trial. (Def. App. Exs. A and B). This is the type of compelling evidence that 1LT Lorance could have provided to the members which would have changed the landscape of the trial altogether. It is deserving of consideration at a new trial.[5]

***** Please View and Listen to CD *****

[4] M.R.E. 702 states that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods to the facts of the case."

[5] First Lieutenant Lorance respectfully requests that the reader play Exhibit D at this point, which is offered pursuant to R.C.M. 1210(c)(7)([a] full statement of the newly discovered evidence – which is relied on for the remedy sought).

4. The Weight of the Evidence Changes and Defenses Arise

In evaluating the credibility of this newly-discovered evidence, disclosure of the identities and affiliations probably would have altered key prosecution witness testimony and led to different cross-examinations and/or questions from the members.

Also, it probably would have tipped the evidence in 1LT Lorance's favor on at least the following critical issues: (i) whether or not the first engagement with the three riders was lawful (critical element of the attempted murder and murder offenses which the prosecution must prove beyond a reasonable doubt); (ii) whether the engagement was legally justified (justification a special defense pursuant to R.C.M. 916(e)); (iii) whether the engagement was resultant from self-defense and/or "defense of another" (special defenses pursuant to R.C.M. 916 (e)(1)(A) and (B) and 916(e)(5)); or (iv) whether the engagement was resultant from "ignorance or mistake of fact (special defense pursuant to R.C.M. 916(j)). Each of these "special" or "affirmative" defenses denies criminal responsibility.

5. Reasonable Doubt and Acquittals

The members had before them evidence that PFC Skelton perceived hostile intent and hostile acts when he called out the threat and fired his weapon. A former civilian police officer

with months of combat experience on the very same field, he testified as follows:

> Q. It was your obligation, as you saw it, to say to Soldiers that the motorcycle was possibly threatening because of the potential threat it represented, correct?
>
> A. We have the right to protect ANA and coalition forces, yes.
>
> Q. *And at the time that you fired, you believed that's what you were doing; you were protecting friendly forces, both American and ANA.*
>
> *A. Based on -- based on ROE and my quick threat analysis of what could happen, yes.*
>
> Q. Yes. So this I'll ask you, okay. Based on what you had available to you, you saw this as a threat and you felt an obligation as an American Soldier to protect friendly forces, American and ANA, correct?
>
> A. Yes.

(R. 585-586)(Emphasis added).

The members were entitled to determine this testimony as hostile intent and/or hostile acts and thus compliant with the applicable Rules of Engagement. It is undisputed that 1LT Lorance never fired his weapon and did not actually see the threat as he was below a large grape berm while PFC Skelton fired from above. Now, combine the hostile intent/action evidence with identity and affiliation evidence that the males were part of IED networks and U.S. casualties, and the new

weight of the evidence adjusts in favor of reasonable doubt and acquittal.

When the identity and affiliation evidence is placed among other defense-oriented evidence, the shift toward reasonable doubt becomes precipitous. For example, Captain McNair, the pilot who provided air reconnaissance on station that morning, testified that a group of "suspicious" military-aged males were huddling on foot and on motorcycles meters from "the ground element" and that she dropped smoke to identify their position. (R. 684; 690; 692).

Captain Swanson, the squadron commander said, "without a doubt there was an existential enemy threat in the area."

Staff Sergeant Herrmann and PFC Carson, who reached the western edge of the village, perceived hostile intent and acts when the individuals on foot tactically bobbed and weaved while operating ICOM radios (R. 510). So much so that they shot, killed, and wounded them, but were not referred to court-martial. And, Mohammad RAHIM and another unknown male were detained with HME on their hands. The ICOM transmissions were translated and confirmed hostile intent.

The significance: by adding the identify and affiliation evidence to the other evidence, the members would have connected the dots that the military-aged males were not innocent

civilians but were in the midst of committing hostile acts toward U.S. forces.

With the availability of evidence that the military-aged males are known to be associated with terrorist networks and U.S. casualties, the defense could have used the information to convince the members of what truly happened on the field that day: U.S. combat forces engaged a hostile enemy force to defend U.S. lives.

Like the evidence in *Brooks, supra*, this evidence is sufficiently believable to make a more favorable result probable. 49 M.J. at 69.

In *United States v. Singleton*, 41 M.J. 200, 206-07 (1994), this Court concluded that, where the newly-discovered evidence directly contradicted key elements of a crime alleged, due process favors a more complete trial. Likewise, the newly-discovered evidence here contradicts key elements of the attempted murder and murder convictions.

6. The Withheld Evidence Tainted the Entire Trial

Following the reasoning of the *Singleton* court, *supra*, due process favors a more complete trial of all the issues because neither the process nor the result can be trusted as reliable. This is especially so where the key prosecution witnesses were combat veterans, bonded by combat and shared suffering, who lost friends on the same field.

Had they known that the military-aged males were truly the enemy, their testimony would probably have been different as to ***all*** the issues and all the specifications. After all, they would have realized that 1LT Lorance's order to engage that morning may have saved their lives and limbs, and, provided a measure of justice by targeting the enemy linked to U.S. casualties.

In a larger sense, when the prosecution deleted the names of the three riders from the Charge Sheet in this court-martial, and then defined the men as innocent civilians when in fact the new evidence ties them to numerous deadly attacks against U.S. personnel, a manifest injustice occurred. This Court can prevent the continuation of this injustice.

For these reasons, this evidence would probably produce a substantially more favorable result for 1LT Lorance. Accordingly, the third criteria is satisfied and the requested relief should be granted. (R.C.M. 1210(f)(2)).

Finally, because this single issue is so pervasively pivotal, meritorious, and dispositive, this Court should consider and decide this Petition directly and separately from any subsequent assignments of error 1LT Lorance may file. Indeed, should the Court grant the requested relief, the necessity to file assignments of error will be mooted.

CONCLUSION

WHEREFORE, Clint A. Lorance, First Lieutenant, U.S. Army, respectfully requests that this Court grant him a new trial.

Respectfully submitted,

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