

MEMORANDUM THRU Staff Judge Advocate, 82nd Airborne Division

10 January 2015

FOR Commanding General, Headquarters, 82nd Airborne Division

SUBJECT: Rule for Courts-Martial (RCM) 1107 Request for Modification of Initial Action in *United States v. Lorange*

1. BACKGROUND. Major General (MG) Clarke took initial action on this case 31 December 2014. RCM 1106 provides the defense 10 days from the date of service of the action to present commentary on any “new matter” the Staff Judge Advocate (SJA) may raise in his Addendum. Accordingly, the record of trial should not be forwarded for review until that timeframe has elapsed. RCM 1107 empowers the convening authority to “recall and modify any action at any time prior to forwarding the record for review.”

2. REQUEST. We respectfully request that the SJA recommend and that MG Clarke recall and modify the initial action. This request is based upon evidence discovered after trial, after MG Clarke’s action, but before the record has been forwarded. The evidence is detailed in Appendices A, B, and C. At all times relevant, the information in Appendices A & B has been in the government’s possession and retrievable by a relatively straightforward database search.

3. THE BASES FOR THIS REQUEST. 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 Lorange 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 Lorange 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. *U.S. v. Bagley*, 473 U.S. 667 (1985).

a. CONSTITUTIONAL LEGAL ERROR. Generally, where a federal government prosecution fails to disclose exculpatory information it violates the 5th Amendment Due Process Clause of the United States Constitution. This type of legal error is so significant that an entire body of law has developed around it called “the *Brady* doctrine” after a widely known Supreme Court holding, *Brady v. Maryland*, 373 U.S. 83 (1963). The United States Supreme Court has long held that the remedy for a *Brady* violation – the failure to disclose exculpatory information - is a new trial. *Strickler v. Green*, 527 U.S. 263 (1999). And, the *Brady* process is not just for pre-trial. The prosecution has an ongoing constitutional obligation to turn over all *Brady* material whenever they find it. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Here, the information the defense has acquired after-the-fact casts serious doubt on the correctness of the convictions and the sentence, but it was never disclosed.

b. PROSECUTION’S KNOWLEDGE. Sharing *Brady* material is so fundamental to a fair trial that the courts have held that the prosecution does not have to have actual knowledge of the evidence to commit a *Brady* violation. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Mahoney*, 58 M.J. 346 (CAAF 2003). What is more, the government has an affirmative duty to learn of any favorable evidence known to the other people and agencies acting on behalf of the government. *Kyles v. Whitley*, 514 U.S. 419 (1995). A reasonable prosecutor would have coordinated with the CID and/or intelligence officers to conduct relatively straightforward database searches to identify purported victims and witnesses and their affiliations.

c. RULE FOR COURT-MARTIAL & REGULATORY ERRORS. RCM 701(a)(6) requires, even in the absence of a defense counsel request, that the prosecution disclose, as soon as practicable, “evidence which reasonably tends to negate guilt; reduce the degree of guilt; or reduce the punishment.” AR 27-26 goes further and states that prosecutors “will” disclose this type of evidence. Here, that the purported victims are associated with terror reasonably tends to negate 1LT Lorance’s guilt, reduce the degree of any guilt, and reduces any punishment. The prosecution has the opportunity to correct these critical legal errors by acknowledging them for what they are and recommending corrective action.

d. BURDENS OF PRODUCTION AND PROOF. Because these legal errors are of constitutional importance, we do not get as far as assessing whether or not 1LT Lorance’s conduct was right or wrong. The court-martial should not have begun without this important information having been disclosed. The government took over one year to bring this case to court-martial. Additionally, it is not the defense’s burden to produce the evidence now presented. Nor is it the defense’s obligation to prove conclusively the evidence now presented. These burdens always remain with the government. What is central to this issue is that armed with this knowledge, the command may have decided differently and/or the jury would have decided differently. Now that the government has actual knowledge of this *Brady* material, it is well-positioned to honor its obligations to do justice and follow the Constitution’s requirements by disapproving the findings and the sentence as the result of an incomplete investigation and flawed trial.

4. SUMMARY OF THE BRADY MATERIAL.

a. APPENDIX A. The Criminal Investigation Division (CID) interviewed Abdul AHAD on the date of the shootings. He identified the three men on the motorcycle as his uncle, Haji KARAMULLAH (attempted murder), his brother GHAMAI (murder), and his father Mohammad ASLAM (murder). He also stated that his cousin Jam MOHAMMAD was killed and his brother-on-law, Mohammad RAHIM was shot in the arm in the second engagement (1st Platoon shot them after observing ICOM radio use – consistent with scouting). When the CID interviewed Haji KARAMULLAH, he stated that he knew Abdul AHAD. Page 3 of Appendix A graphically depicts these relationships in a link-chart.¹

b. ABDUL AHAD. What the CID did not discover, or what to date remains undisclosed to the defense, is that Abdul AHAD was incarcerated at the Detention Center in Parwan, released in 2009, and is linked to four separate IED events spanning 2010 – 2013.

c. HAJI KARAMULLAH. 1LT Lorance stands convicted of attempting to murder this man as the third rider from the motorcycle. What the government has not disclosed is that he is linked to a common IED event with AIDULLAH which occurred in August 2012 in the Zharay district of Kandahar. AIDULLAH is linked to 14 other IED events in the area of operations. Page 7 of Appendix A graphically depicts KARAMULLAH’s association to AIDULLAH and 6 other IED emplacers.

d. GHAMAI ABDUL HAQ. Clint stands convicted of murdering this man, one of the motorcycle riders. What the government has not disclosed is that he is linked to a common IED event with Gul NAZI. Gul NAZI is linked to 13 other IED events in the Zharay district of Kandahar. Gul NAZI was convicted at the Justice Center in Parwan by Afghan prosecutors and Judges. He received a 20 year sentence to confinement. Not only is he linked with GHAMAI for the common IED event, he is also associated with at least 6 other co-conspirators as depicted on page 4 of Appendix A.

¹ The graphical depictions are not intended to be sensational whatsoever. The graphical depictions used here are those known to be used in the investigation and prosecution of Afghan males linked to terror and violence against coalition forces in Afghan national security courts. Further, it is quite possible that additional information remains available on classified databases which the government still has access to. The government can and should use this defense after-acquired information and run its own searches and fulfill its *Brady* disclosure obligations which remain outstanding.