IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee v.	BRIEF ON BEHALF OF APPELLANT Docket No. ARMY 20130743
Staff Sergeant (E-6) **Robert Bales**, United States Army, Appellant	Tried at Fort Lewis, Washington, on 17 January 2013, 23 April 2013, 5 June 2013, and 7, 13, 19 and 20-23 August 2013, before a general court-martial appointed by Commander, Headquarters, I Corps, Colonel Jeffery Nance, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
ARMY COURT OF CRIMINAL APPEALS

Assignments of Error

I.

STAFF SERGEANT BALES IS ENTITLED TO A NEW SENTENCING HEARING BECAUSE OF THE GOVERNMENT'S *BRADY* VIOLATION, THE GOVERNMENT'S FRAUD ON THE COURT-MARTIAL AND THE MILITARY JUDGE'S EXCLUSION OF MULLAH BARAAN'S TIES TO IED EVENTS.

II.

THE MILITARY JUDGE ERRED BY FAILING TO HOLD A *KASTIGAR* HEARING TO DETERMINE THE EXTENT THE MILITARY JUDGE'S MISTAKEN DISCLOSURE OF FIFTH AMENDMENT PROTECTED INFORMATION AFFECTED THE SENTENCING HEARING.

III.

THIS COURT SHOULD DISMISS THE UNREASONABLY MULTIPLIED CHARGES.

Statement of the Case[1]

On 5 June 2013, a military judge found Staff Sergeant (SSG) Robert Bales guilty, pursuant to his pleas, of sixteen specifications of premeditated murder, six specifications of attempted murder, four specifications of intentional infliction of grievous bodily harm, one specification of assault with a dangerous weapon, one specification of assault consummated by battery, one specification of wrongfully burning bodies, one specification of wrongfully using a Schedule III controlled substance, one specification of wrongfully possessing a Schedule III controlled substance, and one specification of violating a lawful general order in violation of Articles 118, 80, 128, 134, 112a, and 92, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 918, 880, 928, 934, 912a and 892.

On 23 August 2013, a panel with enlisted representation sentenced SSG Bales to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for life without eligibility of parole, and to be

[1] Staff Sergeant Robert Bales requests this court consider the issues in the Appendix which are personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (1982).

dishonorably discharged. The convening authority deferred automatic and adjudged forfeitures and the reduction in rank. The convening authority approved the sentence as adjudged, waiving automatic forfeitures of all pay and allowances for six months.

Introduction

Staff Sergeant Robert Bales enlisted into the United States Army after September 11th and subsequently spent forty-two months in combat as an Infantryman. (Post-Trial Matters).

As a result of these experiences, SSG Bales suffers from traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD). (Post-Trial Matters). On his fourth deployment to a hotly kinetic area of Kandahar Province, Afghanistan, SSG Bales used legal and illegal substances including, over-the-counter sleeping pills and alcohol to self-treat his mental illness, illegal steroids to enhance his physical conditioning, caffeine drinks to maintain alertness, while suffering variously from anxiety, depression and sleep deprivation. (Post-Trial Matters). During sentencing at his court-martial, the government produced an Afghan witness, who was tattooed with a Taliban symbol on his hand, to testify against SSG Bales. (Def. App. Ex. A).

Dr. Robert Pitman, Professor of Psychiatry at Harvard University offered the following medical opinion for SSG Bales:

> The unique constellation of factors enumerated above that led SSG Bales' perpetrating the homicides, *will never occur again*. Prior to his combat in Iraq and Afghanistan, SSG Bales was not by nature a violent criminal. I see little reason why he should be expected to engage in violent criminal activity should he be eventually paroled.

Post Trial Matters, Tab 4 (emphasis added).

This extenuation and mitigation evidence was not presented to the panel. (R. 812-1023).

During the sentencing hearing, the government called several persons of apparent Afghan descent to provide victim-impact evidence. The government represented that these witnesses were "farmers" and that they were "innocent." In fact, several of these witnesses were linked to improvised explosive device (IED) emplacements, IED detonations, violence against United States forces, Coalition forces, and the civilian population (hereinafter belligerents).

After an IED explodes or upon discovery of an undetonated IED, the government takes DNA from component parts and logs it into one or more searchable database systems. The government also regularly takes DNA from

persons of apparent Afghan descent, and compares them to events and persons in the database systems.[2] The goal: if there is a match between the person and other evidence within the searchable database systems, a "hit" occurs which demonstrates that the individual in question is probably tied to an IED event.

As discussed below, the defense in this case not only asked that searches be run on the information systems for activity involving the prosecution witnesses against SSG Bales, but the government actually ran the searches. The problem, though, is that the government failed to disclose, either to the court or the defense, that several of these witnesses were flagged in the database systems — that hits occurred — connecting them to IED events before SSG Bales' trial. What is more, the military judge denied a defense motion to compel production of this biometric and related evidence, made after the prosecution informed the trial court that the Department of State, working in conjunction

[2] The government maintains several database systems including: 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).

with the prosecution, suggested that one witness had been biometrically enrolled.

The information withheld — these nondisclosures — was "material" and "favorable to the defense" because it was relevant and necessary for the court-martial panel's proper evaluation of the witnesses' testimony, for direct use in considering appropriate sentences, and, critically, for purposes of cross-examination.

The government's failure to disclose and/or produce the withheld evidence constitutes a clear violation of SSG Bales' due process rights under the Fifth Amendment as espoused by *Brady v. Maryland,* 373 U.S. 83 (1963) as well as Article 46, UCMJ, and the Rules of Court-Martial (R.C.M.) 701. These nondisclosures cannot be harmless beyond a reasonable doubt, and, if the members knew the true affiliations of the prosecution witnesses, the adjudged sentence would have been more favorable to SSG Bales.

I.

STAFF SERGEANT BALES IS ENTITLED TO A NEW SENTENCING HEARING, BECAUSE OF THE GOVERNMENT'S *BRADY* VIOLATION, THE GOVERNMENT'S FRAUD ON THE COURT-MARTIAL AND THE MILITARY JUDGE'S EXCLUSION OF MULLAH BARAAN'S TIES TO IED EVENTS.

Facts

1. The Defense Discovery Requests

On 14 January 2013, SSG Bales' civilian defense team sought to determine what information the prosecution possessed in a "Defense Request for Discovery" Motion filed with the court. In that motion the defense made the following requests, set forth here in relevant part:

> 2. Any books, papers, emails ... computer files ... which are in the possession, custody, or control of military or U.S. and Afghani authorities, and which are material to the preparation of the defense ....
>
> 6.d. All material, emails, documents, etc ... related to updates regarding the progress of this case provided to any person, organization, Government entity (military or civilian) or any foreign military or civilian person or organization ... This request is ongoing.
>
> 24. Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, victims and persons deceased ("these persons") who were in any way involved with the instant case and/or any charged or uncharged related offenses, including but not limited to:
>
> a. ... all Afghan or intelligence files or *data lists* ...
>
> b. Any information of any prior and/or subsequent propensity on the part of any witness and/or alleged victim to be an aggressor, to incite aggressive behavior, and or any other pertinent trait of character of any witness and/or alleged victim. M.R.E. 404(a)(2) and (a)(3).

D. App. VIII, encl. 1[3] (emphasis added.)

Subsequently, the defense team filed a motion to compel discovery on 27 March 2013, which the military judge wrongly denied. (D. App. VIII).

Proper responses to these requests would have disclosed the affiliations and criminal histories of several of the witnesses of apparent Afghan descent. Proper responses were not, however, forthcoming.

Instead, apparently misapprehending the importance of the defense discovery requests in terms of due process and a fair sentencing hearing, the government stated in open court that one defense discovery request as "wast[ing] government resources[.]" (D. App. VIII, encl. 2). As it turns out, the government apparently ran the database searches, and even announced to the military judge and the defense in open court, that the search revealed only one person, Mullah Baraan, as a biometric enrollment "hit."

2. The Undisclosed Evidence

In 2015 and 2016, undersigned appellate defense counsel and their investigative team discovered the following new evidence:

[3] *See also* Defense Supplemental Request For Specific Discovery Of Classified Evidence, 7 March 2013. (D. App. XXXII at 4-5).

1. Mullah Baraan (Prosecution witness 1). New evidence discovered after Bales' court-martial demonstrates that Baraan is tied to an IED event that occurred 7 January 2010 in Helmand Province. His biometric identification number is B28JMS3P2 and he shares the same cell phone as Hikmatullah (Prosecution witness 2).

2. Hikmatullah (Prosecution witness 2). New evidence discovered after Bales' court-martial demonstrates that Hikmatullah is linked to two IED events in Panjawai, Afghanistan, occurring in 2011 and 2012 respectively. His biometric identification number is B28JPGYG6.[4]

3. Rafiullah (Prosecution witness 5). New evidence discovered after Bales' court-martial demonstrates that Rafiullah is linked to and IED event occurring on 28 October 2012 in Panjawai, Afghanistan. His biometric identification number is B2JKMH83. The US Government matched Rafiullah to this event on 13 March 2013. Bales pled guilty to attempting to murder Rafiullah in August, 2013.

4. Haji Baqi (Brother of prosecution witness 8). New evidence discovered after Bales' court-martial demonstrates that Baqi is tied to an IED event that occurred on 14 October 2010 in Panjawai, Afghanistan. His biometric identification number is B28JMV6XE.

5. Haji Mohammad Wazir (Prosecution witness 12). Evidence discovered after Bales' court-martial from a documentary film demonstrates that Wazir had

[4] Hikmatullah shares a cell phone with a Mullah Baraan. In addition, Qudratullah (older brother to prosecution witness 11, Sediqullah) is responsible for two IEDs occurring in the Panjawai District in 2012. His biometric identification number is B2JK6635M. The government performed a background check of Qudratullah on 9 January 2013. (Def. App. Ex. A). Akhtar (victim 15) is also connected to IED activity or events as well. He is Haji Mohammad Wazir's brother (Prosecution witness 12). (Def. App. Ex. A).

Taliban tattoos on his hand. Wazir is believed to be the leader of this insurgent cell.

6. Dost Mohammad (Prosecution witness 13). New evidence discovered after Bales' court-martial demonstrates that Mohammad is tied to two, 2011 IED events occurring in Kandahar, Afghanistan. His biometric identification number is B2JK4VVSS.

7. Naimatullah (Prosecution witness 16). New evidence discovered after Bales' court-martial demonstrates that Naimatullah is responsible for two IEDs occurring in the Zhary and Panjawai Districts of Afghanistan in 2011 and 2012, respectively. His biometric identification number is B28JQ5GGR.

(Def. App. Ex. A).

Although this evidence is newly-discovered by the defense, it was not new to the government. Staff Sergeant Bales' sentencing hearing began on 19 August 2013. Four of these witnesses — Naimatullah, Hikmatullah, Dost Mohammad, and Rafuillah — had been matched to IED incidents before the sentencing hearing began.[5]

Moreover, these IED discoveries and explosions occurred in one of the most violent parts of the Afghan theater. At least 175 IED incidents occurred near the villages of Alikozai and Naja Bien between 2009-2014 (the

[5] Not only did the government have this information available to it, but when it flew these Afghan local nationals into the United States for this hearing, basic security measures would have the government check the aforementioned IED databases again, as shown by the prosecution's having stated that the Department of State informed that there was at least one biometric "hit."

two "villages" that SSG Bales assaulted, both of which were only a few hundred meters from his Village Stability Platform.) (Def. App. Ex. A).

Witnesses and reports introduced during the sentencing hearing explained that the AO was a place of almost daily combat. (R. at 743, 750). Two potential prosecution witnesses apparently died between the 11 March 2012 events and SSG Bales' arraignment on 17 January 2013, (the government never disclosed the details of these witnesses' deaths to SSG Bales' defense team either.) A fair inference is that that most or all of the remaining witnesses were also belligerents, or at the least sympathizers.

3. The Government's Sentencing Argument

On 23 August 2013, the government argued to the panel members as follows:

> While Sergeant Bales continues his walk home, just a thousand meters away at FOB Zangabad, Sergeant Bales' victims from the village of Alikozai have arrived, having been brought there by the heroic efforts of Faziullah. ... Faziullah brings with him five of those six injured from Alikozai [including] ... Rafiullah shot through both legs, a bullet still lodged in one of them. ... Dr. Hawks and his medics were frantic in saving ***innocent*** lives.

R. at 961-62 (emphasis added).

Rafiullah was not innocent, and the government must have known so, after all, it had linked his biometric enrollment number to an IED event in 2012.[6]

But that was just the government's sentencing argument. Throughout the court-martial, the government misrepresented (even if unintentionally) the character of these Afghan witnesses. On several occasions prosecutors deemed suggestions that these witnesses could be Taliban or terrorists as "innuendo and rumor," or "purely speculative and lack[ing] any reasonable indicia of reliability," (R. at 406; G. App. XX). *See also* "No evidence exists to indicate any of SSG Bales victims were members of the Taliban, or any other insurgent group[.]" (G. App. XX at 4).

Additionally, during SSG Bales' sentencing, trial counsel argued that these witnesses were "farmers," ("Most of the people in Alikozai, like the people who live at the two homes you see in front of you, are farmers, making a living growing crops, typically of grape or wheat, often

[6] Indeed, new evidence discovered after SSG Bales court-martial may also link Mohammad Dawud (Victim 5) to terrorist activity in SSG Bales AO. A "Mohammad Daoud" is responsible for an IED event occurring in the Maiwand District of Kandahar Province in 2009. His biometric identification number is B28JMRGKN. Bales defense expert, William Carney, conducted a database search using the name "Daoud" instead of "Dawud," *See* Def. App. Ex. X.

times on someone else's property." (R. at 957). What the prosecution did not disclose/produce, was the rest of the activities in which the witnesses engaged – mitigating evidence which should have been disclosed or at the very least, produced in response to Defense counsel's discovery and subsequent motion to compel.

A. The government failed to disclose and/or produce evidence to the defense prior to trial that multiple prosecution witnesses were terrorists connected to IED incidents or networks, in violation of *Kyles*, *Brady*, and R.C.M. 701.

"The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Additionally, Rule 3.8 of Army Reg. 27-26, Rules of Professional Conduct for Lawyers, [hereinafter AR 27-26](1 May 1992), required the prosecution to timely disclose favorable evidence to the defense, particularly in light of specific requests for that information. *See also* R.C.M. 701.

Here, SSG Bales' court-martial began in January of 2013, with his sentence adjudged in August of 2013. Nowhere in the record during that time frame — or for that matter through the present date — did the government inform anyone that several of its witnesses are IED emplacers or connected to terror networks, despite the fact that the

"prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989).

The prosecution's failure to turn over this evidence was not timely and a violation of *Kyles*, R.C.M. 701, and Rule 3.8 of AR 27-26. The prosecutors failed to make a reasonably diligent effort to comply with discovery, as this evidence, however, was, and is, easily discoverable in United States' government computer databases and systems. *See* footnote 2 *supra*. There may well be other classified systems and databases which have not been made known to counsel for the defense. (Def. App. Ex. A). In short, they failed to comply with Rule 3.4(d), their *Kyles*' obligations, and R.C.M. 701.

Brady v. Maryland, 373 U.S. 83 (1963) is referenced with such frequency that a denial of discovery is just called "a *Brady* violation." The relevant language of that case reads as follows: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The

Court further emphasized that the quality of the government's intentions are not relevant insofar as it describes the resultant proceeding as being one "that does not comport with standards of justice, even though ... [the prosecutor's] action is not 'the result of guile.'" *Id.* at 88 (quoting the underlying opinion, *Brady v. State*, 226 Md. 422, 427 (Md. 1961)).

The Supreme Court noted in *Pointer v. Texas*, 380 U.S. 400, 405 (1965) that:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

See also Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination.") *Brady* stands for the proposition that failure by the prosecution to provide exculpatory evidence upon request by a defendant is a violation of due process. *See also United States v. Behenna*, 71 M.J. 228, 237-38 (C.A.A.F. 2012). One reason for this proposition, among others, is for use in cross-examination whose purpose is to challenge the

credibility and reliability of witnesses' statements. *See Giglio v. United States,* 405 U.S. 150, 153-4 (1922) (applying *Brady* to challenges to a witness' credibility.) The government's "failure to assist the defense by disclosing information that might have been helpful in conducting cross-examination" is a Constitutional error. *See United States v. Bagley*, 473 U.S. 667, 677 (1985). But as the Court of Military Appeals noted in *U.S. v. Eshalomi*, 23 M.J. 12 (1986), military accused enjoy an even more generous right to discovery. *Id.* at 24.[7]

The government withheld evidence that Afghans SSG Bales pled guilty to murdering or harming (e.g. Victim #5 [Mohammad Dawud], #15 [Akhtar Mohammad], and #3 [Rafiullah]), as well as a witnesses (Haji Wazir, witness #12)[8] who testified in the sentencing hearing, were

[7] The Uniform Code of Military Justice and the Manual for Courts-Martial make specific effort to implement this Constitutional mandate: the former, at 10 U.S.C. § 846 (Art. 46 of the UCMJ) and the latter at Rule 701(a)(2)(a). Rule 701 (a) (6) specifically requires the government to disclose evidence favorable to the defense which reasonably tends to (A) negate guilt; (B) reduce the degree of guilt; or (C) reduce the punishment. AR 27-26 injects similar professional obligations on the trial counsel and his or her disclosure obligations as well. *See* AR 27-26, Rule 3.8, Special Responsibilities of Trial Counsel, which requires disclosure by the government of exculpatory as well as incriminating evidence.

[8] Although there is no "hit" in any of the databases on an IED emplacement with Wazir's DNA, he has a Taliban tattoo,

belligerents. The government was at the least equipped with "innuendo and rumor" that at least one witness, Mullah Baraan, had been connected to IED events and refused to provide further information (*See* Part D, *infra).* That information should have been made available to the Defense for cross-examination at the least.

B. The government committed a fraud on the defense and on the court-martial panel by arguing that the witnesses and victims were all innocents, when, in fact, they were not.

The *Brady* violations are only the beginning of the errors in this case. The government compounded that problem when it argued to the court-martial panel that Bales' victims (specifically including Rafiullah) were innocent farmers.[9] This must be manifest injustice.

Brady is itself an expansion on cases such *Mooney v. Holohan*, 294 U.S. 103 (1935) and *Pyle v. Kansas,* 317 U.S. 213 (1942) which hold that the prosecution violates due process when it deceives the court and jury. In *Pyle*, a habeas petition, the State of Kansas simply ignored assertions that the prosecution used perjured testimony.

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and he is connected to the others who do have "hits" for IED emplacements.

[9] It is the defense's view that the government as an entity commits fraud on the court-martial panel when trial counsel argues something that the government as an entity knows to be false, even though trial counsel may have made no intentional misrepresentation.

The Supreme Court, citing *Mooney*, found that if true, these allegations constituted a denial of due process. *Mooney*, which came first, noted that due process

> cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

Id. at 112.

That is precisely what happened in this case. Knowingly or not, the government offered misleading arguments at SSG Bales' sentencing hearing by calling victims innocents when in fact some were not (e.g. Rafiullah), and by analogizing the situation in Panjuwai, Afghanistan to a bucolic American farmstead: It was "not a whole lot different than any 3 year-old girl living in any rural farming community anywhere in America[.]" (R. at 958).

C. SSG Bales is entitled to a new sentencing hearing, because the government cannot prove that the aforementioned errors were harmless error beyond a reasonable doubt.

Staff Sergeant Bales pled guilty to sixteen (16) counts of murder, among other things. That plea left open the question of whether he would receive a sentence of life with parole, or life without parole. In a tainted process,

he received the latter. Confidence in the fairness of the process is critical. "[A] prosecutor's duty is not to win the case, but to ensure that justice is done." *U.S. v. Williams*, 47 M.J. 621, 625 (A.C.C.A. 1997) quoted with approval by *U.S. v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The system cannot be fair if the government suppresses exculpatory evidence, or worse, presents misleading evidence to the court-martial members. Public confidence in the criminal justice system is of paramount concern. There can be no confidence in a system of justice which denies an accused the full measure of due process afforded by the law.

Where a *Brady* violation has been found, the next question is what effect did the violation have on the trial or hearing at issue. Staff Sergeant Bales need not show that he would have been acquitted but for the violation. *Smith v. Cain*, 565 U.S. 73 (2012) (slip op. at 2-3). Rather, the question is whether the new evidence is sufficient to undermine confidence in the verdict. *Wearry*, 577 U.S. ___ (2016) (slip op. at 7) (citing *Smith*). Indeed, the U.S. Supreme Court specifically noted that "Given this legal standard, [an accused] can prevail even if ... the undisclosed information may not have affected the jury's verdict." *Id.* at n.6.

In *Chapman v. California,* 386 U.S. 18, 24 (1967), the Supreme Court clearly and unambiguously held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Nonetheless, the Supreme Court appears to have reversed course in the markedly divided decision of *United States v. Bagley*, 473 U.S. 667, 677 (1985).[10]

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[10] To understand *Bagley*, one must first consider, in *United States v. Agurs*, 427 U.S. 97 (1976), wherein the Court synthesized *Brady, Mooney,* and other cases to identify three situations. The first is where "the undisclosed evidence demonstrates that the prosecution's case include[ed] perjured testimony." *Id.* at 103. In these cases, the conviction or sentence "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* The second situation is that which occurred in *Brady*, where the prosecution failed to provide information in response to a specific discovery request. There, the test is whether the evidence was material. *Id.* at 104-105. The third situation is that found in *Agurs* itself, and that is where there was a general request for discovery, which the Court found to be practically no different from no request at all. There the test is whether the evidence is "highly probative of innocence." *Id.* at 110.

Expanding upon *Agurs*, the Court in *Bagley*, considered the question as it relates not just to exculpatory evidence, but to impeachment evidence, and specifically found that that they should be treated the same. *Id.* In *Bagley*, the government had failed to respond to a specific discovery request which potentially deprived the Defendant of an opportunity to fully cross-examine witnesses against him. The Court was remarkably divided in the case. Justice Blackmun opined for himself (with Justice O'Connor concurring) that in that circumstance, the underlying conviction must be vacated if "there is a reasonable probability ... that the result of the trial would have

However, in spite of the confusion of *Bagley,* the Court of Appeals for the Armed Forces later suggested that a more liberal construction is appropriate in the armed

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been different." *Id* at 684. Justice Blackmun applied a higher standard where the government uses perjured testimony. In that case, the sentence must be vacated unless the prosecution can show that the failure to disclose was "harmless beyond a reasonable doubt". *Id.* at 679-680. This was not a matter of prosecutorial misconduct, but rather because it represented "a corruption of the truth seeking function of the trial process." *Id.* (citing *Agurs)*.

Justice White, joined by Justices Burger and Rehnquist, declined to join Justice Blackmun in making distinctions between perjured testimony, discovery requested specifically, or discovery requested more generally. Rather, he simply agreed with the "reasonable probability" standard espoused by Justice Blackmun, and would apply it in all circumstances.

Divisions appear in the dissents as well. Justice Brennan, joined by Justice Marshall took the opposite view of Justice White's concurrence, finding that in all cases where there is a Constitutional deprivation, the conviction/sentence must be vacated "unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial." *Id.* at 704. Justice Stevens meanwhile took the view that where the government failed to disclose favorable (to the defendant) evidence in response to a defendant's request, then the conviction must be set aside if the evidence was material without further elaboration. *Bagley* is thus a murky opinion on the matter at best.

However, even under *Bagley,* a majority of the Justices (Blackmun, O'Connor, Stevens, Brennan, and Marshall) would have found that where the prosecution uses perjured testimony, the standard for harmless error is that it must be harmless beyond a reasonable doubt. In addition to the government's discovery failures, appellant also argues that the government suborned perjury and argued facts to the panel which were untrue. Hence, the beyond a reasonable doubt standard should apply anyway.

forces. "In view of the statutory and Manual provisions for discovery, it might be argued that, when defense-requested information is withheld by the prosecution, we should impose a heavier burden on the Government to sustain a conviction than is constitutionally required by *Bagley*." *Eshalomi*, 23 M.J. at 24. Although *Eshalomi* never specifically reached the question because the Court ultimately concluded that reversal was necessary in that case even under the less stringent "reasonable probability" test, the implication was that the *Chapman* formulation — burden being on the prosecution to show that error was harmless beyond a reasonable doubt — is the appropriate one for the military. The Court of Military Appeals finally took that implication to a clear holding in *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990), where it stated, "where prosecutorial misconduct is present *or where the Government fails to disclose information pursuant to a specific request*, the evidence will be considered 'material unless a failure to disclose' can be demonstrated to 'be harmless beyond a reasonable doubt.'" *Id.* at 410 (citations omitted, emphasis added). *See also United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004); *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005).

The evidence withheld by the government in SSG Bales' sentencing hearing, surely matters in mitigation, has the tendency to reduce the appropriate level of punishment. The due process violations at issue should, at the least, entitle him to a new sentencing hearing, a hearing at which he can use this information in an effort to persuade the court-martial panel that a lesser sentence is appropriate.

For these reasons, the prosecution's failure to voluntarily disclose the evidence that the people of apparent Afghan descent who testified against SSG Bales were linked to IED networks and harbored hostility toward the United States cannot be "harmless beyond a reasonable doubt," and surely, had the panel known the true identities and affiliations of the witnesses as enemies of the United States, the sentence probably would have been different. *Roberts*, 59 M.J. at 323; *Hart*, 29 M.J. 407.

Accordingly, this court should disapprove the sentence and direct a new-sentencing hearing. *See United States v. Gibbs*, Army No. 20110998 (27 June 2016) (this court ordered a limited *DuBay* hearing to permit the trial court to obtain and evaluate potentially exculpatory and/or mitigating evidence); *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967); *United States v. Sztuka*, 43 M.J. 261 (C.A.A.F. 1995) (service-court ordered a fact-finding hearing to receive

evidence and enter findings of fact regarding government discovery failures).

Prior to this hearing, this court should direct the government to comply with SSG Bales' request for appellate discovery, filed contemporaneously herewith, which seeks relevant and necessary evidence for a fully developed factual assessment of the lengths to which the prosecution withheld and/or suppressed evidence favorable to SSG Bales. Indeed, the Defense is unaware of precedent by which the United States brought persons linked to terror into the United States to testify against an American Soldier.

D. The military judge abused his discretion by granting the government's motion *in limine* to exclude reference to Mullah Baraan's ties to IED events.

In July of 2013, roughly one month prior to SSG Bales' sentencing hearing, the government sought to exclude evidence Mullah Baraan (prosecution witness #1) had ties to IED events. This motion *in limine* by the government was not prompted by any suggestion from the Defense that it would use such evidence — indeed, the Defense was not in possession of it due to the government's failure to disclose and/or produce it. Rather, the government sought to preempt the use of information which we now know would have shown, at a minimum, that Mullah Baraan, a key

prosecution witness, was biometrically connected to at least one IED event.

The government stated on the record, "[t]here was innuendo and rumor potentially that there had been an investigation related to this one witness." (R. at 406). Moreover, the government affirmatively represented that the Department of State was in possession of this evidence: "The fact that, *after review of whatever intelligence the Department of State was able to gather*, he was issued a visa constitutes a clear implication that he was not involved in insurgent activities." (G. App. XX) (emphasis added). Clearly then, the Department of State, working in conjunction with the prosecution in this court-martial, possessed information which was material and favorable to the defense, as well as having the tendency to reduce punishment. The trial counsel stated as much in open-court.

Apparently realizing the defense was not aware of this evidence, the government proceeded to reverse itself at the hearing on 19 August 2013. "We have subsequently, pursuant to a request of the defense, we had asked before as well, re-inquired of the Department of State to see if there is any document, any investigation, any paperwork whatsoever to a negative response—in other words, they responded that

they have no such investigation, they have no documentation whatsoever to that effect," (R. at 406).

The defense was understandably non-plussed by the government's reversal and sought to understand what caused the government's initial motion:

> I'd like to know what the rumor was, what the information is, where this came up. We had no idea of this issue at all until they moved to exclude it. So I'd just like to know what is going on at all.

R. at 407.

The military judge responded as follows:

> But it seems to me that, you know, the trial counsel has done their due diligence and they've received the response from the State Department that there was no such investigation. Now, they can tell you where they heard this rumor from, you know, and you can run that to the ground if you want to and see if there's anything there needs to be. *But I don't think the discovery rules, nor Brady, require the government to hold a congressional investigation into the state department's assertion that there was no such investigation to make sure that, under oath, somebody from the state department says there was no such investigation.* I think they've done, in other words, what they are required under the law to do to determine if there's any investigation into this individual such that there may be Brady material to provide to the defense.
> ....
> *Otherwise, I'm going to mark this as resolved.*

R. at 408-9 (emphasis added).

The government's spontaneous motion and suggestion that there was evidence regarding Mullah Baraan accompanied by its apparently equally spontaneous reversal should have

alerted the military judge that mitigating evidence was within the government's possession. Faced with this information, the military judge should have granted the Defense' motion to compel production rather than "mark it resolved."

Due process requires more than the prosecutor merely asking a cooperating agency if there were any biometrically linked information. When the Department of State indicated there was a probable biometric "hit," the prosecution is now "on-notice" of potentially mitigating evidence triggering its constitutional and statutory duties to pursue the information to its evidentiary end. The prosecution did not.

Moreover, the military judge also had a responsibility, on these facts, to ensure that appropriate prosecutorial disclosures were made. And, to the extent they were not, the military judge, when confronted with a report that the government had a potential link to terror associated with one of its main witnesses against SSG Bales, had to compel the prosecution to search for and produce information responsive to the Defense request and/or certify to the court that no such information existed. The Fifth Amendment, *Brady, Kyles*, R.C.M. 701, and AR 27-26 all require it.

What was the "rumor and innuendo" that caused the government to file the motion to exclude in the first instance? Given that Mullah Baraan as well as other prosecution witnesses and one victim were tied to IED networks or were IED emplacers, (Def. App. Ex. A), it is apparent that there was more than rumors involved and not only trial counsel, but the military judge too, had an obligation to the military justice system, to the Constitution, to SSG Bales, and to the truth to "drill down" to the truth to ensure a fair sentencing hearing.

Pursuant to R.C.M. 701(g)(3), the military judge had numerous options at that point. He could have directly ordered the discovery from the Department of State, R.C.M. 701(g)(3)(A), clearly a federal entity working together with the prosecution in this trial.

He could have taken the lesser step of holding a hearing to determine the source of the rumor and innuendo or used his creativity to resolve the situation in another manner, i.e., enter findings of fact and conclusions of law. R.C.M. 701(g)(3)(D). He could have prohibited Mullah Baraan's testimony at trial. R.C.M. 701(g)(3)(C). He did none of these things. Instead, he simply granted the *in limine* motion without further ado.

We recognize that this error is subject to an abuse of discretion review and an abuse of discretion will only be found where the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (2008); *see also United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015). However, now that we know Mullah Baraan's ties went for beyond innuendo, and the military judge's ruling was a clear abuse of discretion leading to a clearly erroneous ruling, especially where the military judge did not hear evidence, making findings of fact, nor draw conclusions of law. As such, the sentence should be set aside and the case remanded for a new sentencing hearing.[11]

[11] The withholding of such evidence with regard to Mullah Baraan is particularly conspicuous given that whatever the government did know caused it to file a motion *in limine* in the first instance. However, the same error is manifest with regard to the other individuals connected to IED events as defense filed a motion to compel discovery on 27 March 2013. (D. App. VIII).

II.

THE MILITARY JUDGE ERRED BY FAILING TO HOLD A *KASTIGAR* HEARING TO DETERMINE THE EXTENT THE MILITARY JUDGE'S MISTAKEN DISCLOSURE OF FIFTH AMENDMENT PROTECTED INFORMATION AFFECTED THE SENTENCING HEARING.

Facts

On 11 March 2012, the event comprising the charges against appellant occurred. (Charge Sheet; Pros. Ex. 1). On 23 March 2012, charges were preferred. The Special Court-Martial Convening Authority ordered a R.C.M. 706 mental examination of appellant (sanity board) on 26 March 2012. (D. App. XLIII (sealed)). On 28 March 2012, the same convening authority suspended the board order after appellant invoked his right not to answer any questions. (D. App. XLIII, encl. 2 (sealed)).

Following a government motion to order a Rule for Court-Martial 706 mental examination of appellant, (D. App. XLIII, encl. 3 (sealed)), the defense expressed concern about potential prejudice appellant could suffer from the government receiving premature access to the sanity board short form report. (D. App. XLIII, encl. 4 (sealed)).

On 5 February 2013, following an Article 39(a) session on the issue, the court ordered a sanity board, released exclusively to the military judge and defense counsel. (D.

App. XLIII, encl. 5 and 6 (sealed)). The sanity board was convened and a 3 May 2013 report addressed appellant's mental capacity. (D. App. XLIII (sealed)).

The defense counsel repeatedly expressed their objection to having to disclose to the government information based on their client's statements compelled against his will. (R. at 42-50; R. at 115-19).

Appellant was found guilty, pursuant to his pre-trial agreement, on 5 June 2013. His pre-sentencing hearing was set for a later date after the providence inquiry. On 1 July 2013, the defense gave notice of its intent to present mental health testimony as matters in mitigation, and provided the government with a redacted sanity board report. (D. App. XLIII (sealed)). The redactions sought to protect statements SSG Bales was compelled to make.

Trial counsel emailed the military judge on 10 July 2013, and requested that the military judge review the defense redactions. (D. App. XLIII, encl. 7 (sealed)). In a 16 July 2013 follow-up request, the trial counsel requested an independent in camera review of the sanity board long form report. (D. App. XLIII, encl. 7 (sealed)).

On 18 July 2013, the military judge emailed all parties and disclosed the entire contents of the sanity board long form report, that is, the un-redacted, un-

protected version. (D. App. XLIII, encl. 7 (sealed)). The defense had no opportunity to object to now-unredacted material before it was disclosed to the four (4) government trial counsel detailed to this court-martial. (D. App. XLIII (sealed)).

The defense emailed the military judge with concerns about the now-unredacted material. (D. App. XLIII, encl. 7 (sealed)). The military judge asked the trial counsel not to read the now-unredacted material, but it was too late. The government had already read and reviewed the now-unredacted material. (D. App. XLIII, encl. 7 (sealed)).

The military judge emailed all parties on 19 July 2013, admitting a failure to "double check" what he had released. (D. App. XLIII, encl. 8 (sealed)). He wrote, "Attached are the properly redacted pages 16, 17 and 39 ... As you can see, I only intended to further release a very limited amount of the report. I am sorry for my mistake." (D. App. XLIII, encl. 8 (sealed)).

The defense filed motions requesting recusal of the military judge and replacement of the trial counsel. (D. App. XLIII and XXXIII (sealed)).

The military judge ruled that R.C.M. 902(a) did not require his recusal, (App. Ex. XXV (sealed)), and then held Article 39(a) sessions on 7 and 13 August 2013 with a

"taint-team" temporarily replacing the four (4) government trial counsel originally detailed. (R. at 296 and 310 (sealed)). The defense argued in the alternative: that *Kastigar*[12] was not the correct framework because M.R.E. 302 required the trial team to be disqualified, (R. at 300 (sealed)), or, if *Kastigar* applied, then a *Kastigar* hearing was required. (R. at 300 (sealed)). The trial counsel stated that *Kastigar* applied, and the trial counsel agreed that a *Kastigar* hearing was necessary. (R. at 303 (sealed)).

On 15 August 2013, the military judge ruled that the four (4) original trial counsel who read and reviewed the un-redacted sanity board long form report contained compelled statements from SSG Bales would not be disqualified. (App. Ex. XXVII (sealed)).

The military judge found that 62 of the 78 statements in the improperly disclosed information were already contained in the stipulation of fact, provided at the plea, or previously known to the defense. (App. Ex. XXVII (sealed)).

However, the military judge did not account for the balance of the compelled statements, namely, sixteen (16)

[12] *Kastigar v. United States*, 406 U.S. 441 (1972).

unauthorized statements which the four (4) trial counsel admitted to reading and reviewing. (App. Ex. XXVII (sealed)).

The military judge said the issue was *Kastigar*-like, but he did not order a *Kastigar* hearing. (App. Ex. XXVII (sealed)). Instead, the government was not permitted to admit R.C.M. 1001(b)(3) or (5) evidence in their sentencing case-in-chief. (App. Ex. XXVII (sealed)). Additionally, before any rebuttal witness was called or any "did you know" question was asked of a defense witness, the government was required to request an Article 39(a) session and have the military judge rule on the propriety of the witness or question. (App. Ex. XXVII (sealed)).

Despite requesting the military judge give them an opportunity to "fact-check" government assertions, the military judge ruled without giving the defense and opportunity to rebut the government's version of how much of the improperly disclosed information was previously known. (D. App. LVIII (sealed)).

After the military judge denied their request to disqualify the government's trial team, the defense requested a *Kastigar* hearing, in light of the judge's ruling that the protections of *Kastigar* applied. (D. App. LVIII (sealed)). However, the military judge denied the

defense request for a *Kastigar* hearing to rebut the government's assertions. (R. at 451).

After the sentencing case, the military judge stated on the record:

> I took careful note and it was the court's observation that none of the -- none of the evidence put on by the government in their case-in-chief, nor any of the questions they asked on cross-examination raised any of the issues or were related in any way to the information contained in the three pages in question that were the subject of that motion for disqualification. In light of that, the court did not conduct any *Kastigar* analysis beyond the determination that none of the information, none of the cross-examination questions, none of the evidence presented by the government in any way touched on any of the information in those three pages.

R. at 951.

The military judge then asked the defense counsel if he thought any *Kastigar*-like inquiry was required. (R. at 952). The defense counsel responded, "No, Your Honor, I do not; but I'd like to say that without affecting our previous motion that was denied by the court for the *Kastigar* hearing." (R. at 952). After being asked multiple times by the military judge, the defense counsel stated, "The defense's position was that we should have had [a *Kastigar* hearing] prior to the presentencing proceedings. Given the court's ruling on that issue, no, we don't believe a *Kastigar* hearing is necessary now." (R. at 953).

Law

The Fifth Amendment states that "[no] person . . . shall be compelled in any criminal case to be a witness against himself." "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-582 (1961) (opinion announcing the judgment)).

In *Kastigar,* the Supreme Court held when a Fifth Amendment-invoking witness is compelled to testify, the protection to insure prosecutors do not improperly benefit from the compelled statements is a hearing in which the prosecutors must prove their case is not based on the compelled evidence. In *Kastigar*, the Court created a procedure—the *Kastigar* hearing—where prosecutors must prove the government's case is not based on tainted compelled statements. *Kastigar*, 406 U.S. at 460. "This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent

of the compelled testimony." *Id*. The burden of persuasion at a *Kastigar* hearing means appellant's relief is presumed unless the government proves the absence of taint and the independent derivation of its evidence. *Aiken v. United States*, 956 A.2d 33 (D.C. 2008). A court conducting and reviewing a *Kastigar* hearing may not infer findings favorable to the government. *Aiken*, 956 A.2d at 49; *see also United States v. Rinaldi,* 808 F.2d 1579, 1583 (D.C. Cir. 1987).

Military Rule of Evidence [hereinafter M.R.E.] 302 seeks to maintain the integrity of the sanity review process by protecting an accused when a sanity review board is ordered under R.C.M. 706. *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005). The rule was drafted with the purpose of giving the defense control over whether an accused's sanity board statements are released to the prosecutors and presented at the court-martial. *Clark*, 62 M.J. at 200.

Similarly, the Military Rules of Evidence and Rules for Court-Martial include protections designed to protect and accused from having compelled statements used against him. *See* M.R.E. 302 and R.C.M. 706(c)(5); *see also Clark*, 62 M.J. at 199. The privilege in M.R.E. 302 "may be asserted by an accused only under the procedure set forth

in Mil. R. Evid. 304 for an objection or a motion to suppress." M.R.E. 302(e).

In this court-martial, it is undisputed the military judge disclosed protected information to the four (4) trial counsel. It is equally undisputed that the four (4) trial counsel read and reviewed the erroneously-disclosed, compelled statements. The issue devolves then, to whether or not the prosecution has met its burden to show that none of the impermissibly obtained information tainted the balance of the pre-sentencing case.

The government, however, cannot meet this burden, because the military judge did not account for sixteen (16) of the compelled statements the military judge released to the prosecution. Because those statements remain unaccounted-for in the military judge's findings of fact and conclusions of law, there is no measure against which this Court may properly assess whether or not the government used derivative evidence in violation of the Fifth Amendment, *Kastigar*, and M.R.E. 302.

The absence of these sixteen (16) compelled statements takes on an even greater significance, where, like here, the military judge denied not only the defense request to "fact-check," but also the defense request for a *Kastigar* hearing before the pre-sentencing case. Either or both of

these measures is designed to prevent the very situation which now presents: fact-checking and/or a *Kastigar* hearing would have provided a trial-level mechanism by which the Defense, the military judge, and the government could account for, and test for taint, the sixteen (16) compelled statements.

In *United States v. Youngman*, 48 M.J. 123, 127 (C.A.A.F. 1997), the Court reiterated the long-standing principle that in the *Kastigar* context, prosecutorial "use" includes "non-evidentiary" use. *See also United States v. Olivero*, 39 M.J. 246, 249 (C.M.A. 1994), citing *United States v. Kimble*, 33 M.J. 284 (C.M.A. 1991). Other federal appellate courts have construed *Kastigar* to hold that the government may not "alter its investigative strategy" based on immunized [compelled] testimony. *See United States v. Harris*, 973 F.2d 333, 336 (4th Cir. 1992).

Here, that the military judge failed to account for sixteen (16) compelled statements is "clearly erroneous." The error is compounded because not only was the military judge ill-positioned to test for impermissible use of compelled statements by the prosecution, he had no standard against which to measure whether or not the trial counsel "used" the compelled statements for non-evidentiary purposes. He was equally ill-positioned to test the

prosecution's case to determine whether or not the prosecution "altered" its strategy based on the unaccounted-for compelled statements.

Indeed, the military judge's findings of fact are silent on: (a) identifying the sixteen (16) statements; (b) whether or not the government "used" the statements for non-evidentiary purposes; and (c) whether or not the government "altered" its strategy. Accordingly, the military judge's findings of fact and decision to allow the prosecution to proceed as it did are clearly erroneous. *See Samples v. Vest*, 38 M.J. 482, 487 (C.M.A. 1994).

The military judge's clearly erroneous findings, based largely on the absence of ostensibly required findings of fact, evolves into a larger prejudicial error when the military judge declined to follow *Kastigar* and the military line of cases arising under *Kastigar*, and: (a) recuse himself; (b) recuse the tainted four (4) trial counsel who admitted to reading and reviewing the sanity board long form report; (c) grant the defense motion to "fact-check;" (d) grant the defense motion to conduct a *Kastigar* hearing; and (e) instead, opted to try and "save" these constitutional and statutory errors by way of an incomplete accounting of the compelled statements which left an

inadequate gauge by which to assess the government's "use," "strategy," and resulting "prejudice" to SSG Bales.

Finally, at the conclusion of the evidence portion of the pre-sentencing phase, the military judge, in what can be fairly described as impatiently, asked what appears to be a question designed to elicit the Defense to concede the *Kastigar* issue.

> MJ: So shall we sit here until you decide whether one is necessary or when you believe one will be necessary? It's a simple yes-or-no question because there won't be any more evidence put on in this case.
>
> CDC: I understand that, Your Honor. The defense's position – I didn't want to reiterate what the court's already ruled on, the defense's position was that we should have had one prior to the presentencing proceedings. Given the court's ruling on that issue, no, we don't believe a Kastigar hearing is necessary now.

R. at 953.

The military judge should have conducted the hearing "before" the prosecution put on its case, not after the panel heard the prosecution's evidence.

For these and those reasons discussed more fully above, this Court should set aside the sentence and order a sentencing rehearing.

III.

THIS COURT SHOULD DISMISS THE UNREASONABLY MULTIPLIED CHARGES.

It was an unreasonable multiplication of charges for appellant to be found guilty of and sentenced for both attempted murder and assault/intentional infliction of grievous bodily harm for the same acts. Additionally, it was an unreasonable multiplication of charges for appellant to be found guilty of and sentenced for both murder by burning and for simply burning the same bodies. The lesser offenses should be dismissed.

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) discussion. Thus, even where two charges are not technically multiplicious, "the prohibition against unreasonable multiplication of charges has long provided courts-martial and reviewing authorities with a traditional legal standard—reasonableness—to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

In *Quiroz*, the Court of Appeals for the Armed Forces adopted a five-part test for determining when charges have been unreasonably multiplied:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?;
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?; and
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338. These five factors are not intended to be all-inclusive, but are meant to serve as a guide on this issue. *Id.; see also United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012) (noting that one or more factors may be sufficiently compelling, without more, to warrant relief).

Here, the second, third and fifth factor favor dismissing the lesser offenses. The appellant has been found guilty of attempting to murder and of inflicting grievous bodily harm on the same individuals for the same conduct. Similarly, as the offenses are charged, the convictions for body burning and murder by burning arise from one act. The piling on of charges by charging the same

act multiple ways exaggerates appellant's criminality. Here, the greater offenses are the most serious offenses one can be accused of, and, in this case, these charges resulted in a capital referral. Therefore, it was an unreasonable multiplication of charges to find appellant guilty of and sentence him for attempted murder and assault/intentional infliction of grievous bodily harm for the same offenses. Similarly, it was an unreasonable multiplication of charges to find appellant guilty of and sentence him for murder and burning the same individuals. The lesser offenses should be dismissed.

Conclusion

Staff Sergeant Bales requests the court grant the requested relief.

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