IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee, v. ROBERT BALES Staff Sergeant (E-6) U.S. Army Appellant.	)	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW USCA Dkt. No. 18-0055/AR Crim.App. Dkt. No. 20130743

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I. WHETHER THE ARMY COURT ERRED WHEN IT FAILED TO ORDER A *DUBAY* HEARING AS TO MEFLOQUINE BECAUSE IT FOUND THE FIRST, SECOND, AND FOURTH *GINN* FACTORS MET.

II. WHETHER THE ARMY COURT ERRED IN FINDING THAT THE GOVERNMENT HAD MET ITS *BRADY* OBLIGATIONS IN SPITE OF ITS FAILURE TO CONDUCT SEARCHES OF ITS BIOMETRIC DATABASES AS REQUESTED BY THE DEFENSE.

III. WHETHER THE ARMY COURT ERRED BY FAILING TO RETURN THE CASE BECAUSE OF A VIOLATION OF APPELLANT'S RIGHTS UNDER *KASTIGAR*.

Statement of Statutory Jurisdiction

The U.S. Army Court of Criminal Appeals (the Army Court) had jurisdiction pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ] , 10 U.S.C. § 866. This Court, therefore, has jurisdiction pursuant to Article 67, UCMJ. 10 U.S.C. § 867.

Statement of the Case

On January 17, April 23, June 5, 7, and 13, and August 19 – 23 2013, an enlisted panel sitting as a general court-martial convicted Staff Sergeant (SSG) Robert Bales, pursuant to his plea, of attempted premeditated murder (six specifications), violating a general order by drinking, using and possessing steroids, premeditated murder (sixteen specifications), assault, assault by battery, aggravated assault (five specifications), impeding an investigation, and wrongfully burning bodies in violation of Articles 80, 92, 112a, 118, 128, and 134, UCMJ, 10 U.S.C. §§ 880, 892, 912a, 918, 928, 934 (2012).

The panel 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 dishonorably discharged. The military judge credited SSG Bales with 527 days' confinement credit against his sentence to confinement. The convening authority approved the sentence as adjudged and credited appellant with 527 days' confinement credit.

On September 27, 2017, the Army Court affirmed the findings and sentence. (App'x A). On November 22, 2017, appellant filed a Petition for Grant of Review and sought leave to file a Supplement separately. On November 27, 2017, this Court granted an extension of time to December 12, 2017. On December 5, 2017, appellant requested an enlargement of time within which to file his Supplement, which this Court, on December 6, 2017, granted until December 27, 2017.[1]

Reasons for Granting Review

This case is one of the most important in recent military history not only because of its scale and notoriety, but because it is *the* case that demonstrated the hazards of the anti-malarial drug mefloquine, sold as Lariam. Indeed, twenty-three days after SSG Bales was sentenced to life without parole, U.S. Army Special Operations Command (USASOC) ordered commanders and medical personnel to cease using mefloquine. (Def. App. Ex. C).[2] But the facts about mefloquine referenced by the affidavits attached on appeal – and the meaning of other facts in the case in light of this new information – were never considered below, and no factual determinations relating to these issues were made. The Army Court lacked the findings necessary for it to determine that its ruling was correct in fact (and

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant requests this Court consider the matters raised in App'x B.
[2] Staff Sergeant Bales was under USASOC command while serving in Afghanistan in 2011-2012.

law) under Article 66 because it failed to order a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), based on a misapplication of the factors in enumerated in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).

The first issue presented addresses the Army Court's mistaken application of *Ginn* factors by simply discounting three competent affidavits that showed a strong likelihood that SSG Bales took mefloquine (instead of doxycycline), instead of ordering a *DuBay* hearing. The Army Court dismissed these affidavits (one from an occurrence witness who was with SSG Bales when he was forced to take mefloquine in 2004) and concluded, "There is no evidence that he actually took [mefloquine]." (App'x A at 13).

The Army Court insisted that no relief was available even if the affidavits were true – even if SSG Bales was being affected by Mefloquine – (the first *Ginn* factor); that the affidavits were speculative and conclusory (the second *Ginn factor*); and that they were inconsistent with the record as a whole which compellingly demonstrated their improbability (the fourth *Ginn* factor).

This is a case where the material in the affidavits at issue shows that appellant was suffering from the hallucinogenic effects of the anti-malarial drug at the time of the acts in question, that is, substantial questions about the legal correctness of his *mens rea* for murder. The Army Court's findings are therefore

inconsistent with *Ginn* and with the affidavits themselves. This Court's precedents inform that a *DuBay* hearing was appropriate to address this conflicting affidavits.

The second issue presented addresses the Government's failure to disclose and/or produce in response to defense discovery requests impeachment evidence in the form of biometric records which prove that witnesses against appellant at his sentencing hearing were enemy belligerents and not innocent farmers as described by the Government at trial. This failure was in clear and prejudicial violation of appellant's Due Process Rights and implicates Rules 21(b)(5)(A) and (B). They also involve a misapprehension of U.S. Supreme Court law and the law of this Court on the balance of harms as espoused in such cases as *Brady v. Maryland*, 363 U.S. 83 (1963), and its progeny. The prejudice: had the panel known the Afghan witnesses flown into the United States made improvised explosive devices (IEDs), they may have voted for the lesser sentence of confinement for life with parole instead of confinement for life without parole.

Moreover, the Army Court denied appellant's motion to attach the biometric records of bomb making activity, calling the material, which was explained in the "Carney" affidavit, to be of "uncertain origin, authenticity, reliability and classification," something it could also have resolved with a *DuBay* hearing. In so doing, the Army Court used an unarticulated and apparent *ad hoc* standard in excluding the "Carney" affidavit and attached material thereby improperly

curtailing its plenary jurisdiction under Article 66. The Army Court's decision conflicts with *Brady* and later holdings of this Court. It is also inconsistent with *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004) ("discovery is not limited to matters within the scope of trial counsel's personal knowledge"). *See also United States v. Mahoney,* 58 M.J. 346, 348 (C.A.A.F.2003), and *Strickler v. Greene,* 527 U.S. 263, 281 (1999). Without that material in the record, the Army Court determined that it was not reasonably within the prosecution's control, and that the prosecution was diligent in providing information.

The Army Court also found no error because appellant failed to object to the Government calling the witnesses at trial "innocent farmers" – a circular conclusion given that appellant was unaware of the inaccuracy of that argument at the time because the Government failed to disclose or produce the evidence. The Army Court entered upon a significant discussion of the doctrine of waiver, but precedents of this Court indicate that failure to object is merely forfeiture when the lack of objection is that the defense was denied access to the evidence that would have support those very arguments. The Army Court's misreading of *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), cannot be reconciled with the longstanding rule clearly reiterated in *United States v. Pabelona*, 76 M.J. 9 (C.A.A.F. 2017): "Because defense counsel failed to object to the arguments at the time of trial, *we review for plain error.*" 76 M.J. at 11 (emphasis added).

The third issue presented concerns the Army Court's declination to follow the Supreme Court's binding precedent in *Kastigar v. United States,* 406 U.S. 441 (1972), resulting in material prejudice to appellant's substantial rights. The military judge provided trial counsel seventy-eight statements appellant was compelled to make before the Rule for Courts-Martial (RCM) 706 Sanity Board and, to this day, appellant has not been provided a straight answer as to which statements were provided while the trial counsel each admitted in open court that they had read all of the statements errantly disclosed to them. And yet trial counsel was not disqualified and no hearing on the issue took place.

For these reasons, and as discussed more fully below, appellant has demonstrated good cause and respectfully requests that this Court grant review of these issues, which materially prejudiced his substantial rights. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Statement of Facts

Appellant, in spite of suffering from traumatic brain injury (TBI) and post-traumatic stress disorder (PTSD), successfully completed three previous combat tours as an Infantry Sergeant in Iraq. On his fourth deployment as an Infantry non-commissioned officer, he walked off post in the early morning hours without his protective gear and killed sixteen people in an episode so graphic it is unparalleled

in modern U.S. military history.[3] There is no reasonable explanation for this conduct except that new evidence makes it likely that appellant was suffering from hallucinations and delusions as a result of involuntary mefloquine intoxication.

In the hotly kinetic Panjawei district of Kandahar province, appellant used a variety of substances including: sleeping pills and alcohol to help with rest, steroids to enhance his performance, and caffeine drinks to maintain alertness, – all to cope with the intense and deadly combat conditions inherent in this area and in being surrounded by the enemy on a "village stability platform."

In addition, appellant was untreated for diagnosed TBI and/or PTSD.[4] Appellant waived any defense of voluntary intoxication based upon these substances. But he did not know that he was under the influence of mefloquine that his commanding officers required he take. Indeed, neither the convening authority, military judge, nor sentencing members were aware that infantry were being administered mefloquine. And importantly, neither did the RCM 706 Sanity

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[3] The government has included and argued the extraordinarily graphic and shocking story contained in the 30 plus page plea stipulation in numerous places in the record below. Appellant does not contest that the stipulation reads as it does, but sees no need to set it forth again in this petition. Suffice it to say that it is graphic and shocking.

[4] The effects of mefloquine are often confused with PTSD and TBI. It is likely in this case the symptoms attributed to appellant's mental illness are the result of mefloquine poisoning as well. (Def. App. Ex. C).

Board. Instead, all involved believed that doxycycline was being used as an anti-malarial instead.

Unfortunately, as the Government conceded at oral arguments before the Army Court, the military failed to keep proper records of what drugs it was administering: "Records are not always kept the way they should be. And it is true. There is no record he was prescribed doxycycline either." (MP3 File from Bales Oral Arg., August 8, 2017, Panel 2, Part 2 at 14.45, on file with ACCA). Hence, the capital charges referred against appellant, and appellant's pleas, conviction and sentence rest at least in part on the fact that the Government failed to keep proper records.

A. Re Evidence of Mefloquine Intoxication

Evidence that appellant was under the influence of mefloquine became available during the course of his appeal and was provided to the Army Court. Sergeant Gregory Rayho provided a sworn affidavit that in 2004 while serving with SSG Bales and standing in formation with him, was required to swallow a pill like everyone else and the label on his bottle read "mefloquine."[5]

[5] The effects of mefloquine poisoning are permanent. It causes injury to the brain which is always there and under certain conditions, the brain is subject to seizures which cause hallucinations and delusions which can take place years or even decades after the initial poisoning. *See* Def. App. Ex. C.

On March 29, 2012, Roche Pharmaceuticals (the manufacturer of Larium) filed an adverse event report to a European regulator specifically referring to SSG Bales stating that appellant "was treated with Mefloquine Hydrochloride (Larium)…and led to Homicide killing 17." (Def. App. Ex. B). Twenty-three days after SSG Bales was sentenced to life without parole, U.S. Army Special Operations Command (USASOC) (under whose command appellant had been operating) ordered commanders and medical personnel to cease using mefloquine. (Def. App. Ex. C). And in 2013 and during appellant's court martial the FDA issued a Black Box warning on its drug Lariam (mefloquine) – a warning of the highest order, because it is known to cause long-lasting psychotic damage, to include suicidal and homicidal ideations, especially among those already laboring under TBI and/or PTSD.

That Sergeant Rayho swears that appellant was issued mefloquine, and that Roche and USASOC obviously believed Bales was affected by mefloquine are only the beginning. appellant has provided detailed affidavits from two experts on Mefloquine, Dr. Stephen Stahl and Dr. Reamington Nevin, evaluating numerous facts in the record which demonstrate a strong likelihood that appellant was suffering from the hallucinogenic and delusional effects of the drug in 2004 and in 2012, and validate the testimony of Sergeant Rayho, and the serious actions taken by Roche, the FDA, and USASOC in response to appellant's conduct that led to

the charges in this case. In spite of this, the Army Court found that the fourth *Ginn* factor was triggered – the evidence compellingly demonstrated that appellant was not under the influence of Mefloquine – and thereby denied a *Dubay* hearing.

Appellant now asserts that if the Army administered of mefloquine to him as the evidence indicates, then it affected his *mens rea* at the time of the events, the sanity board's conclusions would have been different, the command's disposition would have been different, appellant's plea may have been not guilty by reason of lack of mental responsibility, and/or, the members would have adjudged a lesser sentence. The Army Court thus reached a conclusion through a contorted ad hoc exercise of its Article 66 jurisdiction and directly at odds with this Court's holding and rationale in *Ginn*.

B. Re Biometric Impeachment Evidence

During pretrial discovery on January 14, 2013, the defense tendered an initial written discovery request to the prosecution and in relevant part, requested production of:

> ***BATS/HIIDES information on all witnesses*** and known villagers in the area, historical kinetic strike data in a two mile radius for a period of six months before and after the incident, the then current-No Strike List, all information on shaping operations, non-lethal targeting operations, KLE profiles of village elders, all information on CERP and any other United States-funded projects in the area for a period of six months before and after the charged offenses, profiles of suspects individuals on any Joint Targeting List (JPEL, JPSIL, JEL) in the area, a list of

> mission records for any other civilian or military conventional, nonconventional, and/or covert unit, contractor, and NGO conducting operations in the area for a period of six months before and after the incident.

(R. at Def. App. Ex. VIII, ¶ 6e, p. 16) (emphasis added).

The plain language of the defense discovery request sought biometric information concerning government witnesses, and specifically identified databases, by name, where that information could be reasonably obtained. But no BATS/HIIDES or any other biometric search was performed and the Government provided no information that nine of the witnesses against SSG Bales were connected to IED events, more specifically, that their fingerprints and/or DNA (skin) were forensically located on IED components such as wires or pressure plates.

Also in March 2013, the I Corps Staff Judge Advocate was involved in arranging the military personnel who were ordered to fly from the United States into Afghanistan, and escort the Afghan witnesses to the United States. This process required the U.S. State Department to act on behalf of the prosecution, in this case, to secure visas, among other coordinating efforts.

At some point before July 22, 2013, the prosecution learned from the State Department, acting on the Army's behalf in the case, of information favorable to the defense, namely, that one Afghan witness for the government, Mullah Baran, was biometrically enrolled and may have been a "coalition force detainee." (One

would assume that the State Department, in working with the Army to grant visas for the Afghan witnesses would have conducted a biometric search in order to report the "hit."[6])

On July 22, 2013, the prosecution filed a motion *in limine* to bar the defense from making any mention of Mullah Baran's having been biometrically enrolled and/or "potentially" having been "a coalition detainee." (R. at Gov't App. Ex. XX). The defense responded in writing and noted the logical link between Mullah Baran and the enemy, but because the biometric searches had not been done, it did not have this impeachment evidence and so could not object to the *in limine* motion. During a pre-trial Article 39(a) hearing on the issue, the military judge ultimately determined the issue "resolved," reasoning that the prosecution had performed the necessary due diligence, even though the biometric "hit" concerning Mullah Barran was not disclosed or produced, and that he was not going to make a "congressional investigation" about this witness. (R. at 409).

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[6] Biometric information is available to, and used regularly by, other federal agencies, to include the State Department. For example, "DOD Biometrics protects the nation through identity dominance by enabling responsive, accurate, and secure biometrics, any place and any time, in cooperation with the Department of Homeland Security, Department of Justice, Department of State, and other government agencies and international partners." (https://peoiews.army.mil/programs/biometrics).

The witnesses testified at trial against SSG Bales and the prosecution elicited answers portraying them as innocent farmers. Indeed, the Government argued to the Panel that they were innocent farmers. They were not.

During the course of the appeal, SSG Bales' appellate counsel was able to find an expert in biometrics use in Afghanistan to do the biometric searches that the Government did not do in response to the requests and obtained biometric hits on these witnesses connecting them to IED events. The Army Court not only denied the motion to attach this material, but noted that Bales failed to object to the statements that the witnesses were innocent farmers at trial – something Bales would have no basis to do given that the biometric records had not been disclosed or produced at that time and that he therefore had no evidence that the statements were untrue.

The Army and/or State Department also appears to have used alias social security numbers, alias names, and false statements that witnesses were US government employees to bring nine people of apparent Afghan descent from Kandahar, Afghanistan to the United States to testify during the pre-sentencing phase of this court-martial. Yet no one informed the defense that six of these persons were connected to improvised explosive devices (IED).

C. Re Requirement for a *Kastigar* Hearing

As part of this case, like any others where serious crimes are alleged, the court ordered an RCM 706 sanity board review. During that review, appellant was compelled to provide information on the promise that it would not be used against him per his rights secured by the Fifth Amendment. Unfortunately, the military judge inadvertently disclosed seventy-eight supposedly protected statements from the appellant to the prosecution team. The prosecutors admitted in open court that they read the seventy-eight statements, but the military judge failed to conduct a *Kastigar* hearing and failed to recuse the four detailed prosecutors. Moreover, the military judge also failed to account for sixteen of the seventy-eight statements, and to this day appellant does not even know which they are. In a further effort to determine the damage, the defense filed a motion to "fact-check" what the government may have already known prior to the disclosures. That motion was denied.

As a result, the military judge had an incomplete standard by which to measure whether or not the prosecution "used" derivative information for "non-evidentiary" purposes, "altered" the prosecution's strategy, and the extent of the prejudice to SSG Bales. As a matter of law, it did.

I.

WHETHER THE ARMY COURT ERRED WHEN IT FAILED TO ORDER A *DUBAY* HEARING AS TO MEFLOQUINE BECAUSE IT FOUND THE FIRST, SECOND AND FOURTH *GINN* FACTORS MET.

Appellant opened his oral argument before the Army Court with the following words:

> Unfortunately we do not have a complete record that would allow you to affirm a sentence in this case or change one that is correct in fact and law under Article 66(c). There are at least two reasons why you need to send this back for a *DuBay* hearing to complete that record. We have affidavits that now establish that it is ***very likely*** that Sergeant Bales had been exposed to mefloquine in 2004 and ***likely*** that he had been exposed in 2012. We also have affidavits that show that it is likely that if he was exposed that this significantly compromised his *mens rea*...

(MP3 File from Bales Oral Arg., August 8, 2017, Panel 2, Part 12 at 3:03 – 3:51 on file with ACCA, emphasis in original). The Army Court began with the premise that appellant waived that argument at trial. Judge Tozzi stated his recollection that "Defense counsel basically said we're not interested in bringing that up." (MP3 File from Bales Oral Arg., Aug. 8, 2017, Panel 2, Part 12 at 4:46-50, on file with ACCA). That was simply not the case. A review of the motions showed that the Government did not have proper medical records and that therefore it did not turn those records over to the defense. As a result, SSG Bales could not present them in defense of guilt or in mitigation. But from appellant's perspective, this appeal has been about completing the factual record.

The Army Court had before it four things that should have triggered a *DuBay* hearing to complete that record:

1) An affidavit from Sergeant Gregory Rayho which provided that while in formations with SSG Bales in Mosul, Iraq in 2004, his chain of command ordered him and the appellant to take mefloquine. (Def. App. Ex. D).
2) An Affidavit from Dr. Stephen Stahl analyzing the importance of the Roche Adverse Event Report which states that SSG Bales had taken mefloquine while in Afghanistan in 2012, and appellate discovery is necessary to determine the proper history of appellant's history of anti-malarial medications. (Def. App. Ex. B).
3) An Affidavit from Dr. Reamington Nevin which explained not only how mefloquine was being used by the army, but also its effects on soldiers and how the description of the events presented by this case are consistent with mefloquine intoxication; and
4) The fact that the Army did not keep proper medical records and there is no record that appellant was taking doxycycline (the alternative) prior to his return to the United States after the events in question.

Instead of granting that hearing, the Army Court determined that the first, third, and fourth *Ginn* factors were met such that the sixth, a *DuBay* hearing, was

not triggered. Although this is not a merits brief, it will quickly summarize why that was error.

The Army Court found that taking the material in the affidavits as true would not result in relief, the first *Ginn* factor. Appellant respectfully suggests that at a *DuBay* hearing, this information has a substantial possibility of resulting in a finding that appellant's acts were the result of mefloquine intoxication and that his mental state was compromised. Appellant will argue on the merits that relief would be appropriate in one or more of the following forms: 1) Mitigation of sentence; 2) Reconsideration by the RCM 706 Board of its findings; 3) Reconsideration by SSG Bales of his plea; 4) Reconsideration by SSG Bales of his choice of defense tactics; and even the possibility of 5) Reconsideration by the convening authority as to whether to refer capital charges. There are endless permutations of where this could lead, but it could very well lead to a different result.

The Army Court found that the affidavits themselves were speculative and conclusory, the second *Ginn* factor. Appellant respectfully believes that this too is inaccurate. The affidavits at issue include more than twenty-five pages and more than 11,000 words demonstrating that SSG Bales likely suffered from a Mefloquine-induced hallucinations while in Iraq in 2004, (Def. App. Ex. C), and was likely hallucinating again while in Afghanistan in 2012, (Def. App. Ex. L).

They include statements by SGT Rayho alone from which a reasonable trier of fact could conclude that appellant had taken mefloquine. The expert affidavits provide context for the facts which are proper expert testimony and from which a reasonable trier of fact could conclude that appellant was suffering from the effects of mefloquine poisoning at the time of his crimes.

Finally, the Army Court concluded that the record as a whole compellingly demonstrates that appellant was not taking mefloquine and that he was not suffering from its effects. Appellant respectfully submits that this simply cannot be. Given the admission that the Government failed to keep medical records, that there are no records of his being on doxycycline, the mefloquine alternative, and given the factual stipulations in this case (which go beyond appellant's conduct), appellant believes that at a proper *DuBay* hearing, the opposite conclusion will be reached by a trier of fact.

Moreover, given the information now available, appellant believes it likely that more information can be gathered in preparation for a *DuBay* hearing. While efforts were made to review appellant's medical history, given that even the Government conceded that "records are not always kept the way they should be," and that is has no records that appellant was prescribed doxycycline either, that system has an obligation to explore what documents and other information might

be available to establish or eliminate the likelihood that mefloquine was being dispensed and that appellant was taking it.[7]

As to the mefloquine then, this Court needs to provide guidance as to the proper weighing of evidence when applying *Ginn* factors, the application of expert testimony as discussed by the U.S. Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and the *Brady* responsibilities of the Government when faced with the fact that it already knows that its records are not properly kept. Any criminal defendant's due process rights are compromised when part of his conviction rests on the absence of records when such absence is the Government's fault in the first instance and this Court's guidance is needed to address that concern as well.

II.

WHETHER THE ARMY COURT ERRED IN FINDING THAT THE GOVERNMENT HAD MET ITS *BRADY* OBLIGATIONS IN SPITE OF ITS FAILURE TO CONDUCT SEARECHES OF ITS BIOMETRIC DATABASES AS REQUESTED BY THE DEFENSE.

There is no dispute that appellant made a specific request for searches of the biometric databases any connection between the witnesses against him and improvised explosive devices. There is also no dispute that the Government failed

[7] Moreover, the Army also failed to complete the normal post-deployment medical assessment for Petitioner upon his return to the United States.

to conduct those searches. Indeed, trial counsel never claimed to do so. Instead they asserted that they asked the State Department and were told that there was no such information. Appellant disagrees with that conclusion, but without the material from the databases, had nothing more to argue.

Unfortunately, it was not until after appeal was taken in this case that the biometric records came to light showing that six witnesses were bomb makers. An affidavit was provided by Mr. William Carney, but the Army Court denied appellant's motion to attach them to the record. Mr. Carney's affidavit explained his background, training, and years of experience using biometrics during law enforcement and military operations to identify bomb makers from local-national civilians. He also explained how the searches were done and what the results meant. But the Army Court denied appellant's motion to attach the results of those searches on the basis that they were "of uncertain origin, authenticity, reliability, and classification." The Army Court also found that there was no evidence that this material was in the Government's hands. (App'x A at 3).

As to the former, it was the affidavit itself that provided evidence of the authenticity of the material. However, if the Army Court were concerned about authenticity and origin, it could have ordered a *DuBay* hearing to make further determinations. Absent that hearing, it was incumbent upon the Army Court to accept that they were authentic.

The Army Court's conclusion that there was no evidence that the Government had this information is puzzling. The biometric records always were and remain within the possession, custody, and control of the Army. Regardless of whether the defense has made a request, the government is required to disclose known evidence that is favorable to the defense, and that reasonably tends reduce the punishment that the accused may receive. *See* R.C.M. 701(a)(6) and *Brady*. This burden does not require an appellant to demonstrate that he would have received a different verdict. *United States v. Hawkins*, 73 M.J. 605 (Army Ct. Crim. App. 2014) (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). Once a "reasonable probability" has been established, an appellate court need not conduct a further harmless error review. *Id.*; *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004).

Where a discovery request is made as is the case here, the burden falls upon the government to prove that its failure to produce is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). *See also United States v. Hart*, 29 M.J. 407 (C.M.A. 1990), and *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004). Appellant has already provided some specific uses for this material in the preceding paragraphs, but would suggest on the merits that meeting a beyond a reasonable doubt standard for harmless error would be an impossible hurdle for the government.

III.

WHETHER THE ARMY COURT ERRED ITS FAILURE TO RETURN THE CASE BECAUSE OF A VIOLATION OF APPELLANT'S RIGHTS UNDER *KASTIGAR.*

There is no dispute that seventy-eight statements made by appellant at his RCM 706 board were inadvertently released by the military judge to the prosecution team. The prosecution team was not recused, and the military judge held a *Kastigar* hearing.

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). Here, not only did the military judge fail to conduct a hearing, but the government still has not identified all seventy-eight statements. Since no hearing was conducted, under *Aiken*, the Army Court should have vacated the sentencing hearing on the basis of automatic unrebutted prejudice to appellant.

Conclusion

WHEREFORE appellant requests this Court grant review of his case.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Bales*, Army Crim. App. Dkt. No. 20130743, USCA Dkt. No. 18-0055/AR, was electronically filed with the Court and Government Appellate Division on December 22, 2017.

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI,[1] SCHASBERGER, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant ROBERT BALES
United States Army, Appellant

ARMY 20130743

Headquarters, I Corps
Jeffery R. Nance, Military Judge
Colonel William R. Martin, Staff Judge Advocate

For Appellant: Mr. Aaron B. Maduff, Esquire (argued); Major Christopher D. Coleman, JA; Mr. John N. Maher, Esquire; Mr. John D. Carr, Esquire; Mr. Aaron B. Maduff, Esquire (on brief and reply brief).

For Appellee: Captain Austin L. Fenwick, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Captain Tara O'Brien Goble, JA; Major Anne C. Hsieh, JA (on brief); Major Michael Korte, JA.

27 September 2017

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

BURTON, Judge:

In the early morning hours of 11 March 2012, appellant walked off his military outpost, Village Stability Platform (VSP) Belambay in Kandahar Province, Afghanistan, and entered two Afghan villages nearby where he shot twenty-two Afghan civilians in their homes, murdering sixteen of them and wounding six. Appellant now seeks a sentence rehearing alleging the prosecution failed to disclose evidence related to his case, the court failed to investigate a military judge's disclosure of protected information, and an unreasonable multiplication of charges for sentencing. We disagree and affirm the findings and sentence.

A military judge sitting as a general court-martial, convicted appellant, pursuant to his pleas, of sixteen specifications of premediated murder, six

[1] Senior Judge Tozzi took final action while on active duty.

specifications of attempted murder, one specification of violating a lawful general order, one specification of wrongfully using a Schedule II controlled substance, four specifications of intentional infliction of grievous bodily harm, one specification of assault with a dangerous weapon, one specification of assault consummated by battery,[2] and one specification of wrongfully burning bodies, in violation of Articles 80, 92, 112a, 118, 128 and 134, Uniform Code of Military Justice, 10 U.S.C §§ 880, 912a, 918, 928, 934 (2012) [hereinafter UCMJ]. A panel sentenced appellant to a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances and reduction to the grade of E-1. The convening authority deferred the reduction in rank and the adjudged forfeitures until action. The remainder of the sentence was approved. The automatic forfeitures of all pay and allowance required by Article 58b, UCMJ, were further waived at action for a period of six months with direction that these funds be paid for the benefit of appellant's wife and children. Appellant was credited with 527 days of pretrial confinement credit.

We review this case under Article 66, UCMJ, and conclude one of appellant's assigned errors merits discussion but no relief. Similarly, we considered those matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), one of which also warrants discussion but no relief.

BACKGROUND

Appellant was deployed to Afghanistan and was stationed at VSP Belambay. In the early morning hours of 11 March 2012, appellant left VSP Belambay and travelled to the village of Alikozai. Appellant was armed with his M4 rifle, H&K 9 millimeter pistol, advance combat helmet with night vision device, one full magazine containing thirty 5.56mm rounds for his M4 and one magazine containing fifteen 9mm rounds for his H&K pistol. While in Alikozai, appellant killed four people by shooting them at close range, which included two elderly men, one elderly woman and one child. Appellant also assaulted six people, which included one woman and four children.

When appellant ran low on ammunition, he returned to VSP Belambay to obtain additional ammunition. Appellant left VSP Belambay for a second time, this time armed with his M4 rifle, 9mm H&K pistol, M320 grenade launcher with accompanying ammunition belt, night vision device and ammunition for all of his weapons. Walking south, appellant entered the village of Naja Bien. While in Naja Bien, appellant entered a home where a family was sleeping. Appellant pulled a man from the home to an adjacent courtyard, where he killed the man in front of his family by shooting him at close range. Appellant then entered another home where a different family was sleeping. With the fire selector switch on his M4 set for three-

[2] In February 2012, appellant assaulted an Afghan truck driver in front of several junior enlisted soldiers.

round bursts, he shot ten people in the head at close range, which included three women and six children. Appellant then grabbed a kerosene-filled lantern from the floor, emptied the contents onto the bodies of the individuals he had just murdered, lit a match and set the bodies on fire. As he was leaving, appellant shot an elderly woman in the chest and head at close range with his 9mm. The woman did not die from being shot so appellant crushed her skull with his boot, stomping with so much force that her face and head were mutilated.

As appellant was returning to VSP Belambay, he was met by three soldiers. The soldiers seized appellant's M4 rifle, M320 grenade launcher, H&K 9mm pistol, numerous magazines and ammunition for those three weapons as well as appellant's helmet, night vision device, and a large piece of blue decorative fabric that appellant had taken from one of the homes and was wearing on his back. Appellant's clothes were soaked in blood.

Appellant was escorted to the Operations Center, were he was guarded by two soldiers until special agents from the Criminal Investigation Command (CID) arrived. While being guarded, appellant made several statements to include: "I thought I was doing the right thing," "I'm sorry that I let you guys down," "My count is twenty," "It's bad, it's really bad," and "We should have hit them harder."

When CID arrived, the special agents seized appellant's computer, clothing, weapons, and ammunition. They also discovered and seized anabolic steroids that appellant had hidden under the boardwalk outside of his room.

LAW AND DISCUSSION

A. Alleged Due Process and Discovery Violations

On appeal, appellant claims he is entitled to a new sentencing hearing because, *inter alia*, the government violated his due process and discovery rights and committed fraud upon the court-martial. Appellant's claims are largely based on his post-trial discovery of "undisclosed evidence" that is not properly before this court. Specifically, appellant moved this court to attach as an appellate exhibit a declaration from a defense consultant, who was retained post-trial, which purportedly "linked" several government witnesses to improvised explosive device (IED) events both before and after the charged offenses. Although offered in the form of a sworn declaration, the information contained in the declaration and accompanying enclosure was of uncertain origin, authenticity, reliability, and classification. Moreover, appellant's assertion that the information in the declaration was known to the government prior to trial was made without supporting evidence. Accordingly, after our initial consideration and subsequent reconsideration, we denied appellant's request to attach the declaration to the appellate record. Therefore, any claim of relief based on this "undisclosed evidence" is unfounded.

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is said to be material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). This is an affirmative duty to disclose and requires no triggering action by the defense. *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). The "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" has long been a recognized duty of trial counsel. *Kyles*, 514 U.S. at 437. In order to have "a true *Brady* violation[, t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler,* 527 U.S. at 281-82. Courts have a responsibility to consider the impact of undisclosed evidence dynamically, in light of the rest of the trial record. *United States v. Pettiford*, 627 F.3d 1223, 1229 (D.C. Cir. 2010) (citing *Agurs*, 427 U.S. at 112). "Once a *Brady* violation is established, courts need not test for harmlessness." *United States v. Behenna*, 71 M.J. 228, 238 (C.A.A.F. 2012) (citing *Kyles*, 514 U.S. at 435-36).

In addition, "Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with 'equal opportunity to obtain witnesses and other evidence in accordance with' the rules prescribed by the President." *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) (quoting Article 46, UCMJ). The procedural rules as prescribed by the President explain the trial counsel's unique obligations in furtherance of this statutory mandate by Congress. In this case, there are two pertinent provisions. First, Rule for Courts-Martial [hereinafter R.C.M.] 701(a)(6) states: "[t]he trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to [n]egate" or "[r]educe" the guilt or punishment of the accused. Second, R.C.M. 701(a)(2)(A) provides the trial counsel shall permit the defense to inspect certain items "which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense . . . ."

The former provision "is limited to information 'known to the trial counsel[,]'" but does not require materiality or a triggering request by the defense. *United States v. Shorts*, 76 M.J. 523, 530-31 (Army Ct. Crim. App. 2017) (quoting R.C.M. 701(a)(6)). Conversely, the latter provision is not limited to information known to the trial counsel, but requires materiality and an express request to trigger the government's obligation because "[w]ithout the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession." R.C.M. 701 analysis at A21-34. As we have stated before, the distinction between the two provisions is significant, because

"whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *Shorts*, 76 M.J. at 530.

Limiting our consideration to the record properly before us and with the above legal framework in mind, we review de novo appellant's remaining claims related to his initial discovery request and the "rumors" concerning a government witness. *See United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (distinguishing between the deference ordinarily given to discovery ruling by a military judge and the de novo review of purely legal questions like a "military judge's determination of materiality").

1. Appellant's Initial Discovery Request

In this case, the scope of appellant's pretrial discovery requests included the following:

> 2. Any books, papers, emails . . . computer files . . . which are in the possession, custody, or control of military or U.S. and Afghani [sic] authorities, and which are material to the preparation of the defense . . . .
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> . . . .
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> [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 on-going.
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> . . . .
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> 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).

The government's response to appellant's discovery request included Bates-stamped and indexed files delivered to the defense in excess of 36,000 pages. Additionally, the government provided broad discovery of classified evidence, which included several hundred pages of documents in indexed form, as well as DVDs with copies of entire folders from the Special Operations Task Force-Secret share portal, the Coalition Task Force (CTF) Arctic Wolves share portal, and the CTF Arrowhead share portal.

Defense counsel filed a motion to compel discovery in which they acknowledged that they "cannot provide the exact information that it seeks, nor can the Defense tell the Government of the location of such evidence." At a subsequent hearing, defense counsel stated: "Sir, since the original filing of the defense discovery request back in January, of course *most of these things have in fact taken care of themselves*." (emphasis added). Defense counsel raised a few outstanding discovery issues but none of the remaining issues related to biometric data or derogatory information for any of the government's witnesses. Therefore, regarding the discovery of evidence under R.C.M. 701(a)(2), appellant's initial request for information about the character of the victims and government witnesses appears to have been satisfied or abandoned.

2. Appellant's Request for Character Evidence Related to a Government Witness

The government filed a motion in limine that sought to limit defense counsel's references to unsubstantiated allegations regarding the victims, to include arguments that one of the government witnesses had ties to the Taliban. Specifically, the government wanted to exclude from evidence the unverified claim that BN's biometric data appeared to match the biometric data of a former Coalition Forces detainee. In a subsequent motions hearing, defense counsel represented to the military judge that while they intended "to portray the general atmosphere" in which appellant committed the offenses, they did not intend to offer evidence "as to the innocence of the victims as a whole group." Instead, defense counsel's request for character evidence was limited to the rumors pertaining to BN, as articulated in the following discussion:

> ATC1: Yes, Your Honor. There was innuendo and rumor potentially that there had been an investigation related to this one witness. That led to our initial filing of the motion. We have subsequently, pursuant to a request from 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. We replied on 16 August, last Friday, to the defense to that effect. So there is nothing to

provide. Obviously we understand *Brady* and the requirements thereof. We have nothing to give the defense because we have inquired and ----

MJ: And there is none?

ATC1: As far as we know based on our inquires ----

MJ: As long as the [S]tate [D]epartment is telling you the truth?

ATC1: Yes, Your Honor, and we certainly believe that they are.

MJ: So do I.

CDC: Your Honor, I guess then the defense, we'll submit that for a discovery request. I'd still 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.

MJ: Okay. Well, get with them and find out. The other side of this though, Defense, is -- I mean, even if the information does exist, and it is, you know, potentially *Brady* material, it seems to me that it relates to the defense's [sic].

CDC: Your Honor, the defense's position would be that that depends what the witness testifies to on the stand. So for instance, if the witness was in fact detained by [C]oalition [F]orces in [sic] found to be a member of the insurgency and the witness testifies on the stand that he is not and never has been a member of that and goes on about it, then it becomes relevant as something besides the defense.

MJ: Well, is this witness testifying?

ATC1: He is, Your Honor.

MJ: Okay. Is somebody going to ask him that question?

ATC1: We don't intend to, Your Honor.

CDC: I'm not going to ask him, but I have no idea, as the government has pointed out, what he's actually planning to say on the stand.

MJ: Back to that. Okay. Well, you all get together and talk about this ----

CDC: Okay.

MJ: ---- and if we need to talk about it further, we can talk about it further. But it seems to me that, you know, the trial counsel has done their due diligence and they've received the response from the [S]tate [D]epartment that there is no such investigation. Now, they can tell you where they heard this rumor from, you know, and you all can run that to the ground if you want to and see if there's anything there that needs to be. But I don't think the discovery rules, nor *Brady*, require the government to hold a congressional investigation into the [S]tate [D]epartment's assertion that there was no such investigation to make sure that, under oath, somebody from the [S]tate [D]epartment says that 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.

CDC: Yes, Your Honor.

MJ: All right. So you all get together and figure out where the rumor came from and if there's anything that grows out of that that I need to hear about and decide on, let me know and I will.

ATC1: Yes, Your Honor.

MJ: Otherwise, I'm going to mark this as resolved; not requiring a ruling from me at this point, that's what resolved stands for.

Here, the record of trial demonstrates the government's prior knowledge of the claimed "undisclosed evidence" was limited to unsubstantiated rumors. The government's efforts to substantiate the rumors left them uncorroborated. Consistent with our holding in *Shorts*, "to comply with *Brady*, a trial counsel must search his or her own file, and the files of related criminal *and administrative*

investigations. However, consistent with our superior court's interpretation of the issue, we require a trial counsel only exercise due diligence." 76 M.J. at 532 (citing *United States v. Simmons*, 38 M.J. 276 (C.A.A.F. 1993)). We find trial counsel exercised the diligence due under *Brady* and as required under R.C.M. 701(a). Furthermore, we presume any concerns defense counsel had at the time of trial were resolved or abandoned as no further action was taken on the record pertaining to BN. Appellant has failed to show on appeal that the government's efforts to discover information related to BN or any other witness were either insufficient or disingenuous.

3. Immateriality of the "Undisclosed Evidence"

Notwithstanding the apparent satisfaction or abandonment of appellant's evidentiary requests, we specifically note the lack of materiality concerning the allegedly "undisclosed evidence" pertaining to BN (and the other witnesses and victims). Even assuming the information pertaining to these witnesses was discovered and disclosed to appellant before trial, we see no scenario for the use of such evidence for impeachment during the presentencing phase of trial based on the witnesses' testimony.[3] This is particularly true where, as in this case, appellant has disclaimed any lawful justification for his use of deadly force in the following stipulation of fact:

> Specifically, the Accused did not honestly believe that any of his victims intended to immediately kill him or inflict grievous bodily harm against him, and it was objectively unreasonable to believe that any of his victims from the night of 11 March 2012 posed an immediate threat when he attacked them while they were peacefully in their homes, mostly asleep, all unarmed, and while the Accused was heavily armed with multiple lethal firearms. The Accused agrees that most of his victims were women, children, and old men, not military-age males. *The Accused agrees that he had no intelligence that any of his victims were members of the insurgency or enemy combatants. He did not have any information that the homes where he committed the massacres housed any members of the insurgency or enemy combatants.*

[3] At trial, defense counsel conceded the information they believed about BN would not be relevant unless BN was questioned and denied any involvement with IEDs or the Taliban. BN testified about the appearance of his brother after he was murdered and the impact of his brother's death on his family. BN was not questioned by the defense.

. . . .

> The Accused specifically waives the defense of defense of others. The Accused understands that defense of others may be a complete defense to the offenses of Charges I, II, and III in this case, and recognizes that this defense does not apply to him. Specifically, the Accused did not have a reasonable belief that death or grievous bodily harm was about to be inflicted on him or his fellow Soldiers at VSP Belambay. The Accused did not have a reasonable belief that death or grievous bodily harm was about to be inflicted on any person defended, and did not actually believe that the force he used was necessary to protect any person. The Accused's victims, resting or sleeping in their own homes, posed no threat whatsoever to the personnel on VSP Belambay or any other Coalition Forces in Afghanistan at the time of the Accused's murders.
>
> . . . .
>
> The Accused specifically waives the defense of obedience to orders. The Accused was not acting under any order from any person of authority to commit any of the acts that form the basis for the charges in this case. He did not believe that he was acting pursuant to any lawful order or authority.

(emphasis added). There was no information the government possessed that was not disclosed to appellant. Even assuming, arguendo, there was, the evidence appellant suggests was immaterial. Therefore, we find no basis for granting appellant's requested relief.

B. Government's Sentencing Argument

Relying on the same "undisclosed evidence," appellant alleges the government committed fraud upon the defense and the court-martial panel during presentencing argument by referring to the witnesses and victims as "innocent" or "farmers."[4] At trial, defense counsel made no objections to the government's use of either reference. However, on appeal, appellant specifically alleges as fraudulent the following argument by the government:

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[4] In argument spanning nineteen pages in the trial transcript, the government referred to innocent people approximately six times and made two references to farming.

> 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, oftentimes on someone else's property.
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> . . . .
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> While [appellant] continues his walk home, just a thousand meters away at FOB Zangabad, [appellant's] victims from the village of Alikozai have arrived, having been brought there by the heroic efforts of [F, son of MN] . . . . [F, son of NM,] brings with him five of those six injured from Alikozai; [including] . . . [R, son of S,] shot through both legs, a bullet still lodged in one of them . . . . As Dr. Hawks and his medics were frantic in saving innocent lives rather than take them, [appellant] continues his leisurely walk home.

In general, "'[d]eviation from a legal rule is error unless the rule has been waived.'" *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011)). As our superior court has explained, "[while an appellate court] reviews forfeited issues for plain error, [appellate courts] do not review waived issues because a valid waiver leaves no error to correct on appeal." *Id.* (internal citation omitted). "'Whereas forfeiture is the failure to make a timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). "'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Ultimately, whether an appellant has waived an issue is a question of law we review de novo. *Id.* (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)).

Pursuant to Article 36(a), UCMJ, Congress delegated to the President the authority to prescribe procedural and evidentiary rules for courts-martial. Under the applicable procedural rules, the President has prescribed that the "*[f]ailure to object* to improper argument before the military judge begins to instruct the members on findings *shall constitute waiver* of an objection." R.C.M. 919(c) (emphasis added). Similar to the procedural rule at issue in *Ahern*, "[t]his is not a case where the rule uses the word 'waiver' but actually means 'forfeiture.'" 76 M.J. at 197 (citing as an example R.C.M. 920(f), which equates the failure to object to panel instructions with "waiver of the objection in the absence of plain error"). Therefore, as a matter of law, appellant is not entitled to the three-part review for plain error. Instead,

appellant is entitled to a review of the *validity* of his waiver.[5] *See id.* (contrasting the review applicable to forfeited issues and waived issues).

In this case, appellant failed to object to a single reference of "innocent people" or "farmers" during argument. Accordingly, this issue is waived and there is no legal error to correct on appeal. Moreover, there is no cause for us to exercise our discretionary authority to address this issue notwithstanding appellant's waiver. Even assuming appellant preserved this issue for appellate review, we find neither error in nor prejudice from trial counsel's argument. In its full context, trial counsel's reference to "innocent people" or "farmers", "did not manipulate or misstate the evidence." *Darden v. Wainwright*, 477 U.S. 168, 182 (1986). In fact, the innocent people referred to were in their homes asleep when they were attacked by appellant.

C. Appellant's Alleged Use of Lariam

At his guilty plea, appellant waived the defense of voluntary intoxication. On appeal, however, appellant personally avers the government failed to provide him with information that he had been prescribed an anti-malaria medication called Lariam, also known by its chemical component name mefloquine hydrochloride. To support this claim, appellant submitted an affidavit from a noncommissioned officer who believed appellant was prescribed Lariam. Appellant also provided an affidavit from Dr. Remington Nevin, a medical expert retained by appellant in 2017, who similarly believed appellant was exposed to Lariam during his deployment to Iraq in 2003-2004. Appellant concedes his medical records are void of any information about him being prescribed Lariam. Instead, appellant's medical records indicate he was prescribed a different anti-malaria medication, doxycycline hyclate, on 4 October 2011 and the prescription was last refilled on 11 April 2012.

Based on these facts, appellant makes a two-fold assumption. First, he surmises that since a full bottle of doxycycline was collected among his personal effects after the charged offenses, he could not have been taking doxycycline. Second, he assumes he must have been taking Lariam as an alternative anti-malarial medication. However, appellate did not submit an affidavit claiming he ingested Lariam, nor did he provide an affidavit from any person that saw him take Lariam.

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[5] Although this court can review issues waived at trial pursuant to its Article 66(c), UCMJ, authority, "[w]aiver at the trial level continues to preclude *an appellant* from raising the issue before either" this court or our superior court. *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (citing *Gladue*, 67 M.J. at 313-14). Based on the facts in this case, we see no need to engage in a lengthy discussion or grant relief for these waived issues.

In response to the government's pretrial motion to compel reciprocal discovery, appellant admitted he was not aware of any medical records suggesting he was prescribed Lariam. In response, the government filed a subsequent motion to preclude evidence that appellant ingested Lariam. At the hearing on this motion, the military judge stated, "my understanding of that is that the defense doesn't intend to offer any evidence about that drug [Lariam] at all. That was my understanding of the defense's response." The defense responded, "That's correct, Your Honor."

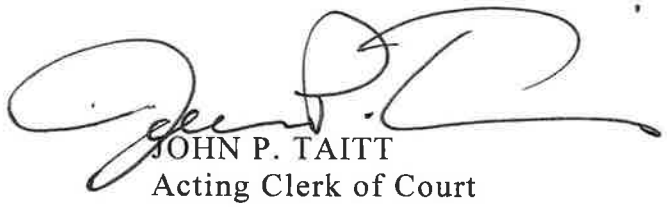
To resolve this issue raised on appeal, appellant requests a fact-finding hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). Under the circumstances of this case, however, we see no need to order a *DuBay* hearing. Appellant's factual allegations—even if true—would not result in relief. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Furthermore, the affidavits of the noncommissioned officer and Dr. Nevin "[do] not set forth specific facts but consist instead of speculative [and] conclusory observations . . . ." *Id.* Moreover, "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of [appellant's claims]." *Id.* Applying the first, second, and fourth *Ginn* principles to appellant's submission, we reject appellant's claim that he was likely exposed to Lariam. Even assuming appellant was prescribed Lariam, there would still be no evidence he actually took it and was under its influence during the commission of his crimes.

CONCLUSION

On reconsideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge TOZZI and Judge SCHASBERGER concur.

FOR THE COURT:



JOHN P. TAITT
Acting Clerk of Court

APPENDIX B

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, Staff Sergeant Robert Bales, through appellate defense counsel, personally requests this court consider the following:

1. The staff judge advocate erred by not addressing appellant's mental responsibility and intoxication, as raised by appellant defense counsel, in the post-trial recommendation to the convening authority. The promulgating order does not correctly reflect appellant's pleas as he pleaded guilty to all assaults.

2. 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. 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.

3. In light of how the murder specifications concerning burning were charged, Article 134 preemption precludes prosecution for burning of the bodies under Article 134. Similarly, the Article 134 offense of burning bodies is preempted by Article 126.

4. *United States v. Robert Bales* appears to be the first of its kind in that it involved the referral of capital charges against an American solider for killing

enemy combatants[1] in a combat zone and in that the only eyewitnesses used by the government were either enemy combatants or members of their families. It is a remarkable event that effectively places the American military on the side of enemy combatants against American soldiers. As a matter of principal, capital charges should not be referred against U.S. personnel for killing enemy combatants.

The preamble to the Constitution of the United States sets forth what this Country is trying to provide for "ourselves and our Posterity." It includes not only a purpose of "establish[ing] Justice", but also to "provide for the common defence." (Const. Preamble) In its zeal to establish justice — not just for ourselves, but for our enemies — the military appears to have forgotten its own mandate: to "provide for the common defence." Robert Bales is a U.S. citizen and

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[1] We recognize that the term "enemy combatant" is often used to describe someone who is, at the relevant moment in time, attacking one or more U.S. soldiers, citizens, or allies. The term is used here to describe a person whose goal is to kill Americans whether by planting improvised explosive devices or by other means, even if that person is not actively assaulting an American at the particular moment in time. Indeed, for purposes of this appeal, the defense does not argue that Bales was under attack at the time of the events in question as he is not challenging his plea bargain at this time. (Bales reserves the right to make that argument later if he deems it appropriate.) However, we know that several of Bales' victims were connected with IED events and we know that there are hundreds of IED events in the area from which DNA was not recovered which could also attach to these same people. Thus, even if they were not shooting at him at the moment, they were combatants in that his death was their goal and moreover, that one or more of their IEDs could have taken his life at any time.

he is part of the "common defence." Put more simply, we owe it to him to defend his life as we would any other citizen.

That concept is so obvious that it has always gone without saying. It has long been a moral backbone of U.S. military servicemen and women that we do not leave a soldier on the field of battle: "The Warrior Ethos". With regard to isolated personnel,[2] that principal is embodied in Army Reg. 525-28, Personnel Recovery [hereinafter AR 528-28] (5 Mar. 2010), which addresses "The Army Personnel Recovery Program". The policy statement found in the introduction reads as follows:

> It is the Army's Policy that all Soldiers and Department of the Army (DA) civilians shall abide by the Warriors Ethos. The Army PR Program is specifically supported by the Ethos statement that **"I Will Never Leave a Fallen Comrade."** The Warrior Ethos combined with the COC provides Soldiers and DA civilians with the moral compass to guide their actions as an IP, and to survive and return with honor.

AR 525-28, 3-1(a) (emphasis in original).

The trading of Taliban prisoners of war for Sergeant Bowe Bergdahl demonstrates just how critical the Warrior Ethos is to the military. Sergeant Bergdahl may have deserted his post; he may have abandoned his duties. But the military's response from President Obama and Secretary of Defense Chuck Hagel

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[2] By "isolated personnel" we mean personnel who are "have become isolated, missing, detained, or captured." (AR 525-28, 3-1(d)).

on down and regardless of whether Bergdahl abandoned his duties has been simple: *America does not leave its soldiers behind.*[3]

War is dangerous and scary, and yet ours is a volunteer Army. One thing upon which American service-members can depend is that their own service will not leave them behind. It will do everything it can to safeguard their lives and to protect them from the enemy.

The case of SSG Bales is remarkable. True, the American government did not leave him behind. We did not leave him in the hands of the enemy to be killed at their leisure. But in referring capital charges against him, we tried to accomplish the same end.

The only difference between leaving Bales on the battlefield for them to kill in Afghanistan and referring a charges this court-martial with a capital instructions is that America serves as the hand of the enemy in killing him. That was satisfactory to the enemy. Meeting the enemy's goals should not be our own.

No matter what their crimes may be, absent an attack on Americans, America betrays its servicemen and women when it refers capital charges against them for killing the enemy, even when the enemy is not actively engaged in killing

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[3] Originally stated by Colin Daileda in The Military History of "Leave No Man Behind", June 14, 2014, (emphasis added) found at http://mashable.com/2014/06/14/bowe-bergdahl-are-american-military-soldiers-ever-left-behind/#nYaI4LhGtOqp

Americans at that moment. This is not to say that the government cannot or should not punish persons in the armed services for violations of laws, including disobeying orders. Indeed, SGT Bowe Bergdahl faced charges when he returned to the United States. But there was no referral of a capital charge.

The United States should, consistent with the principles set forth in the preamble to the United States Constitution to provide for the "*common* defence", adopt a policy against referring capital charges against American servicemen for any crime not taken against an American. This Court should vacate the charges against SSG Bales in their entirety and remand the case for the convening authority to refer such charges as it deems appropriate, not to include a capital charge.

5. My record of trial is not complete and is not verbatim as required by the UCMJ.

The issues of whether a record of trial is complete and a transcript is verbatim are questions of law an appellate court reviews de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). The lack of a verbatim transcript and an incomplete record are two separate and distinct errors. *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

Article 42(b), UCMJ states that "[e]ach witness before a court-martial shall be examined on oath." Rule for Courts-Martial 807(b)(1)(B) tracks verbatim the

language used in Article 42(b): "[e]ach witness before a court-martial shall be examined on oath."

This Rule contemplates that the oath administered should appeal to the conscious of the witness who will testify subject to perjury. Rule for Courts-Martial 807(b)(1)(A) states in relevant part that, "[a]ny procedure which appeals to the conscious of the person to whom the oath is administered and which binds that person to speak the truth....is sufficient."

Article 54(c)(1), UCMJ requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. R.C.M. 1103(b)(2)(D)(v). The "missing" appellate exhibit page(s) solely raise the issue of whether the record is complete.

The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *Davenport*, 73 M.J. at 377. Omissions may be quantitatively insubstantial when in light of the entire record the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (quoting *United States v. Nelson*, 3 C.M.A. 482, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Where a record is missing an exhibit, this court evaluates whether the omission is substantial. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id.* Whether an omission is insubstantial is a "case-by-case," fact based inquiry." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material. *United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014). Failure to produce a complete record "does not necessarily require reversal. Rather, an incomplete or non-verbatim record . . . raises a presumption of prejudice which the Government may rebut." *Abrams*, 50 M.J. at 363.

If the omission is substantial, thereby raising a presumption of prejudice, the government may rebut the presumption by reconstructing the missing material. *See United States v. Garries*, 19 M.J. 845, 852 (A.F.C.M.R. 1985).

6. In this court-martial, the people of Afghan descent who testified were administered the oath for witnesses contained in the UCMJ. However, that oath is ineffective under Afghan law and under Muslim religious tradition, as explained by Afghan legal experts and cultural experts.

Consequently, the testimony is unsworn by operation of R.C.M. 807(b)(1)(A) because it does not appeal to the conscious of the person to whom the oath is administered and does not bind that person to speak the truth. Accordingly, the testimony of each person of Afghan descent was improperly adduced, thereby rendering the record of trial incomplete and non-verbatim pursuant to Articles 42(b) and 54(c). What is more, the government cannot rebut the presumption of prejudice.

7. There is significant evidence of traumatic brain injury and post-traumatic stress disorder, the result of Appellant's three previous combat deployments as an Infantry Sergeant in Iraq. On his fourth deployment in a hotly kinetic area of Kandahar province, there is evidence that Appellant used sleeping pills and alcohol to help with rest, steroids to enhance his performance, caffeine drinks to maintain alertness, and was untreated for TBI and/or PTSD. And, one witness who testified had what appeared to be a Taliban tattoo on his hand. Yet, there was no defense cross-examination on these points, demonstrating that the terms of the plea agreement deprived Appellant of his Due Process rights to put on a full case in mitigation.

8. The military judge erred in not recusing himself, applying only R.C.M. 902(a). Because he had erroneously released my compelled statements, he was both a potential "witness" and had an "interest" that could be "substantially

affected by the outcome of the proceeding." R.C.M. 902(b). He was required to recuse himself under R.C.M. 902(b), and he even trying to get my counsel to waive the issue.

For these reasons, Staff Sergeant Robert Bales respectfully requests this honorable court grant meaningful relief and set aside the sentence and order a sentence rehearing.[4]

9. The Army Court of Criminal Appeals panel that heard appellant's case was improperly constituted.

This Court should grant appellant's petition because his case presents a similar appointment clause issue to that currently pending before Supreme Court in *Dalmazzi v. United States*. The Supreme Court has recently granted review on the appointments clause issue and is scheduled for oral argument on January 16, 2018. See *Dalmazzi v. United States*, Dkt. No. 16-961. A grant of review by this Court is statutorily required for the Supreme Court to later exercise jurisdiction over this case in the event it finds for the petitioners in *Dalmazzi*.

[4] My appellate defense counsel also inspected the Record of Trial at the US Army Court of Criminal Appeals. In portions the military judge ordered sealed, there are missing documents such that SSG Bales is unable to review them and/or determine if they are relevant and necessary to resolving any Assignment of Error. The missing portions of the record should be produced and tendered to appellate defense counsel as part of this UCMJ Article 67 review.