THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, Appellee	APPELLANT'S REPLY BRIEF
v.	Docket No. ARMY 20130679
First Lieutenant CLINT A. LORANCE, United States Army, Appellant	Tried at Fort Bragg, North Carolina, on 25 April, 22 July, 30 July, 31 July, and 1 August 2013 before a general court-martial appointed by the Commanding General, Headquarters, 82nd Airborne Division, Fort Bragg, North Carolina, Colonel Kristen Brunsen, military judge, presiding.

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

COME NOW the undersigned civilian and military appellate defense counsel pursuant to Rule 22(c) of this court's Rules of Practice and Procedure and files this Reply Brief in response to the government's 30 June 2016, Brief On Behalf of Appellee (Gvt. Br.).

INTRODUCTION

As an Army and as a Nation, we simply cannot have a prosecutor, acting on behalf of the people of the United States, telling panel members that a young Lieutenant only hours into his first combat assignment "murder[ed] Afghan civilians" when in the government's possession, merely a database search away,

existed readily accessible and reliable biometric evidence that the "victims" were actually belligerents engaged in deadly hostility against the United States and its Coalition partners in Afghanistan. (R. 963).

DISCUSSION

I. THIS COURT MUST SET ASIDE THE FINDINGS AND THE SENTENCE DUE TO THE GOVERNMENT'S NON-DISCLOSURE OF *BRADY* EVIDENCE AND FAILURE TO PRODUCE "MATERIAL" EVIDENCE "FAVORABLE TO THE DEFENSE" AFTER A WRITTEN DISCOVERY REQUEST

In his Assignment of Error pursuant to Article 66 U.C.M.J. and his Petition for a New Trial pursuant to Article 73 U.C.M.J., First Lieutenant (1LT) Lorance explained that the victims and other military-aged-males on the Kandahar Provence battlefield 2 July 2012 were linked to improvised explosive device (IED) networks, emplacements, and U.S. paratroopers who had been killed-in-action. (Def. App. Ex. K).

He also explained that this information is stored on searchable U.S. Army biometric servers and databases widely used throughout Afghanistan. The prosecution failed to search for, disclose, or produce this "exculpatory" and "mitigating" evidence as required pursuant to the Fifth Amendment, *Brady v. Maryland*, Rule for Courts-Martial (R.C.M.) 701(a)(6), R.C.M. 701(a)(2)(A), and Army Regulation (AR) 26-27. (Brief in Support of Petition for a New Trial).

First Lieutenant Lorance demonstrated that his military trial defense counsel tendered a written pretrial discovery request to the prosecution seeking information about the "aggressive tendencies" of the "deceased persons" and urged the government to "exercise due diligence in making such a search as to any persons who were in any way involved with the instant case. . ." (Def. App. Ex. M, ¶¶ 2a and 2b).

The written discovery request also sought records of prior "foreign" "investigations," "apprehensions," and/or "titling," which involved "military investigatory agencies" relating to "persons who were in any way involved with the instant case." *Id*.

It is undisputed that the government did not disclose the evidence which appellate defense counsel discovered after trial. R.C.M. 701(a)(6). It is also undisputed that the government did not produce any evidence in response to the defense's written discovery request. R.C.M. 701(a)(2)(A). The government conceded as much in its Brief on Behalf of Appellee: "[t]he government made no search of these databases before trial." (Gvt. Br. at 14).

Because there is no dispute concerning the nondisclosures and non-productions, the legal issue for this Assignment of Error boils down to the effect the nondisclosures and failures to produce had on the proceedings. To this point, the government

essentially argues: a) that the defense did not request the evidence; b) that the evidence was neither "favorable to the defense" nor "material;" and c) that the prosecution had no duty to search for the evidence. *Id*. at 19-24.

The government underappreciates not only the evidentiary value of the biometric evidence and how its use would have influenced each stage of the proceedings to 1LT Lorance's favor, but also the ease with which the evidence can be located given the Army's widespread use of biometric evidence throughout Afghanistan.[1]

In fact, throughout the Brigade's deployment from February 2012 through September 2012, the Brigade Commander, Colonel (COL) Mennes, the Brigade Deputy Commanding Officer, Lieutenant Colonel (LTC) Halstead, the Brigade S-3, and the Brigade S-2 regularly accessed and used biometric data to identify targets and plan and execute missions. (Def. App. Ex. O).

[1] General Petraeus lauds the technology, not only for separating insurgents from the population in which they seek to hide, but also for cracking cells that build and plant roadside bombs, the greatest killer of American troops in Iraq and Afghanistan. Fingerprints and other forensic tidbits can be lifted from a defused bomb or from remnants after a blast, and compared with the biometric files on former detainees and suspected or known militants. "This data is virtually irrefutable and generally is very helpful in identifying who was responsible for a particular device in a particular attack, enabling subsequent targeting," said General Petraeus, who will soon retire as Commander in Afghanistan to become director of central intelligence. "Based on our experience in Iraq, I pushed this hard here in Afghanistan, too, and Afghan authorities have recognized the value and embraced the systems." Thom Shanker, *To Track Militants, U.S. Has a System That Never Forgets a Face*, New York Times, July 13, 2011, *available at* http://www.nytimes.com/2011/07/14/world/asia/14identity.html?_=0

What is more, the lead trial counsel, Captain (CPT) Otto, is a former Infantry Officer, Ranger, with Platoon Leader experience while deployed in combat before he became a Judge Advocate. *Id*. With respect, one would think that he must have known about the reliability and availability of biometric evidence to confirm the identities and terror-affiliations of the "males of apparent Afghan descent," not only because of his tactical combat experience, but also because the S-2 (intelligence) shop was directly across the hall from his office. *Id*.

Even so, the crucial and prejudicial legal error: the record of trial (R.O.T.) is void of any evidence that any responsible official, for the chain-of-command, the Criminal Investigation Division (CID), the prosecution, or the defense for that matter, checked to see if First Platoon killed the enemy as opposed to "innocent civilians" in a combat zone during a combat patrol.

It bears repeating: the government conceded that it did not search the databases prior to trial. (Gvt. Br. at 14). In light of these facts, the concession gives rise to the reasonable inference that the government remained "willfully ignorant" of exculpatory evidence. *United States v. Stellato*, 74 M.J. 473, 486-87 (C.A.A.F. 2015).

The government's nondisclosures and non-productions are prejudicial legal error that must reach the level of "manifest injustice" because of what would have been revealed had the appropriate search been conducted – First Platoon engaged the enemy.

A. The Government Cannot Prove That The Non-Productions Were Harmless Beyond A Reasonable Doubt

Regardless of whether the defense has made a request, the government is required to disclose known evidence that "reasonably tends to" negate or reduce the degree of guilt of the accused or reduce the punishment that the accused may receive if convicted. *See* R.C.M. 701(a)(6); *see also United States v. Williams,* 50 M.J. 436, 440 (noting that R.C.M. 701(a)(6) implements the disclosure requirements of *Brady v. Maryland, 373 U.S. 83 (1963))*. Evidence that could be used at trial to impeach witnesses is subject to discovery under these provisions. *See United States v. Watson,* 31 M.J. 49, 54 (C.M.A. 1990) (citing *Giglio v. United States,* 405 U.S. 150 (1972)).

"We view our superior court's guidance as requiring us to analyze nondisclosure issues under the statutory and executive order standards set forth by R.C.M. 701 and Article 46, UCMJ, which are broader than the *Brady* constitutional standard." *United States v. Trigueros*, 69 M.J. 604 (Army Ct. Crim. App. 2010).

As a result, the government bears the higher burden of proving, as a matter of law, a nondisclosure in response to a specific request is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004); *see also United States v. Hart,* 29 M.J. 407, 410 (C.M.A. 1990) ("[w]here an appellant demonstrates that the Government failed to disclose discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt").

In its Brief, the government states that, "R.C.M. 701(a)(2) does not apply because the defense made no request under that provision." (Gvt. Br. at 19). The government is mistaken. Prior to trial, detailed trial defense counsel tendered the following written discovery requests, in relevant part, to the prosecution:

> IAW RCM 701 and Article 46, UCMJ, please provide the following information:
>
> 2. Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, 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. Prior federal, state, and foreign civilian arrests, investigations, and convictions, as well as any military apprehensions, arrests, and court-martial

> convictions, and any titling of any of these persons. . .including a check. . .with all local criminal military investigatory agencies. . .
>
> 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. . .
>
> The defense specifically asks the government to exercise due diligence in making such a search as to any of these persons who were in any way involved with the instant case and/or any charged and/or uncharged related offenses.

(Def. App. Ex. M, ¶¶ 2a and 2b and Gov't App. Ex. 1).

A fair reading of this written discovery request, which specifically references R.C.M. 701 and Article 46 U.C.M.J., reveals that the defense was concerned about the victims' propensity for violence, surely relevant and discoverable information given that enemy fighters hide within the local population. (R. 225) ("because the forces, obviously, that we were engaging in Afghanistan were called 'maybe a guerilla force' in terms that they could blend straight into the -- the indigenous population").

The written discovery request also shows that the defense was concerned about military investigative records containing criminal histories of any person associated with the case, certainly relevant and necessary to determine if the victims were associated with terror. Yet, no evidence about the victim's

propensity for aggressiveness or records compiled by previous military investigations was forthcoming, which the government now concedes. (Gvt. Br. at 14).

Since trial, however, the defense has brought forth evidence that the victims were extremely violent and engaged in deadly hostility against the United States, Coalition forces, and the civilian population. (Def. App. Exs. C, D, E, F, G, H, I, J, and K). This biometric evidence is contained on dozens of servers in widespread use throughout Afghanistan. *Id*, *see also supra* Note 1.

For example, the three males of apparent Afghan descent who were riding back-to-back on the single red motorcycle moving toward First Platoon, which was patrolling on foot in single file behind a minesweeper, were Mohammad ASLAM, GHAMAI, and Haji KARIMULLAH. (Def. App. Ex. K). These names are contained in the CID Agent's Activity Summaries within the R.O.T.

First Platoon shot and killed Mohammad ASLAM and GHAMAI but Haji KARIMULLAH escaped. (R. Allied Papers, ROI Number 0254-12-CID379-77688, at 4-5) ("Mr. AHAD stated his father, brother, and uncle were traveling on a motorcycle . . . his father . . . ASLAM and his brother . . . GHAMAI were killed by U.S. Forces;" "KARIMULLAH then ran into the village to find help"). Special Agent Rasmussen, CID, wrote that, "KARIMULLAH is an important

interview, as he was uninjured as a rider on the motorcycle while his relatives were killed." *Id.*

Accordingly, the prosecution had available to it the identities of the two deceased riders and the third who fled, that is, the names of the three murder and attempted murder victims. What remained hidden on Army biometric systems only a database search away was the critical evidence of the riders' terrorist associations. Manufacturing, emplacing, and/or detonating IEDs which killed American paratroopers must constitute "aggressive" or violent tendencies and military investigatory records of prior criminal activity, which the defense requested. Therefore, notwithstanding the government's contention to the contrary, the defense's written discovery request was specific enough to activate the government's search and production obligations set forth in R.C.M. 701(a)(2)(A).

Had the prosecution searched for information responsive to the defense written discovery requests (a search no more complex than a case law search using Lexis/Nexis or Westlaw) biometric information about the three riders stood to be located.

As it turns out, one deceased rider, GHAMAI, has a biometric enrollment number of B2JK9-B3R3. GHAMAI is biometrically linked to IED event number 12/1229 which occurred on 12 May 2012, approximately six weeks "prior" to 2 July 2012,

the date of the engagement giving rise to this court-martial. (Def. App. Ex. K).

A second rider who fled unharmed, Haji KARIMULLAH, has a biometric enrollment number of B2JK4-G7D7. KARIMULLAH is biometrically linked to IED event number 12/0156, which occurred approximately six weeks after 2 July 2012, but certainly "before" 1LT Lorance's trial began. *Id*.

Mohammad RAHIM, whom Staff Sergeant (SSG) Herrmann, Specialist (SPC) Haggard, and/or Private First Class (PFC) Carson shot in the arm on 2 July 2012, was detained with homemade explosive residue (HME) on his hands and questioned by CID while he received medical treatment at the Kandahar Airfield Hospital. *Id*. Mohammad RAHIM is linked to an IED event on 15 June 2012, approximately two weeks "prior" to 2 July 2012, the date of the combat action giving rise to this court-martial. *Id*. The Army paid him a "solatia" payment. (R. Agent's Activity Summary).

Production of the biometric evidence would not only serve to paint a clearer picture of the alleged victims themselves, but also position the defense to use the information to demonstrate the widespread network of IED emplacers and bombers in which the males of apparent Afghan descent operated. This evidence, the same type that the Brigade Commander used to plan missions, tends to prove that First Platoon shot the enemy;

information tending to "negate guilt," "reduce the degree of guilt," and/or "reduce punishment." R.C.M. 701(a)(6).[2]

For example, AHAD, who identified the three riders to CID, *supra*, corroborated that his brother-in-law, Mohammad RAHIM, was shot in the arm by U.S. Forces to the north of the village. (R. Allied Papers, ROI Number 0254-12-CID379-77688, at 5 of 9). Specialist Haggard, assigned to the support by fire element of 1st Platoon and positioned on the roof of the western-most structure in the village, described that he:

> saw a male subject in the grape rows holding an ICOM radio then verified through his weapon optics. He stated he observed the male talk on the ICOM radio and point in his direction while looking at a group of other Afghan males in the near distance. SPC Haggard stated he thought the subject was planning or contributing to a plan of attack on his team. He further stated he told the guys around him, 'we are about to get shot at' and took a lower cover position.

Id. at 6 of 9. Specialist Haggard elaborated that he "feared for his life and the lives of his team and stated he believed his split-second decision to engage was compiled on his belief the subject was a threat, his previous training and similar experiences." *Id*.

Specialist Rivera related that they "watched the MAMSs [military aged males] for a while and noticed they were acting

[2] The CID obtained Mohammed RAHIM's medical records and clothing from the Army's Kandahar Airfield Hospital, but there is no indication that the prosecution tendered that information to the defense. (R. CID Agent's Activity Summary).

suspiciously . . . were walking very low in the grape rows . . . raised their heads for a moment then continued walking low. . .” *Id*. at 2 of 5.

At apparently the same time, personnel at the company-level tactical operations center (TOC) were monitoring the ICOM [input, control, output & mechanism] radio traffic via a “Wolfhound” interceptor and overheard via translation that, “the enemy could see the Americans on the roof and that they wanted to do something to them.” (R. 510-11; Ex. 89, Statement of SSG Deamron).

The team leader, SSG Herrmann, gave the order to engage, resulting in the death of two males of apparent Afghan descent and the wounding of Mohammad RAHIM. (R. Allied Papers, ROI Number 0254-12-CID379-77688, CID Special Agent Sterling Brown).

RAHIM, who was operating in the fields to the north of First Platoon’s support by fire element, is associated with KARIMULLAH, the third rider. (Def. App. Ex. K). This fact connects the two engagements (three-rider phase and the support-by-fire phase) and shows the engagements to be related and quite likely the result of coordinated enemy movements. *Id*.

KARIMULLAH, the rider who fled, is biometrically linked to IED event number 12/0156. KARIMULLAH facilitated the same IED event number 12/0156 with AIDULLAH, a prolific IED facilitator within the Zharay district (First Platoon’s area of operations)

with fifteen (15) other IED events associated with him. *Id*. That is, AIDULLAH's biometric evidence is associated with IED event number 12/0156, as is KARIMULLAH's, thereby establishing that they operated together in hostility against the United States.

GHAMAI, a deceased rider, is biometrically linked to IED event number 12/1229. GHAMAI facilitated the same IED event 12/1229 with Gul NAZI, who has a biometric enrollment number of B28JS-LDM7 and was sentenced to twenty (20) years confinement by the Afghan National Security Court at the Justice Center in Parwan (JCIP). *Id*. NAZI's biometric evidence is linked to IED event 12/1229, as is GHAMAI's, establishing that they too operated together in deadly hostility against the United States.

AHAD, who provided information to CID about RAHIM and KARIMULLAH, is linked to four (4) IED events. *Id*. The CID conducted in-person interviews with KARIMULLAH, RAHIM, and AHAD, dangerous enemies, but let them go on their way, free.

In any event, the recitation of these biometric "hits" goes on to reveal a significant IED network involving numerous IED events which caused the deaths of 82nd ABN DIV paratroopers, as depicted more fully in Defense Appellate Exhibit K. The legal point concerning the legality of this court-martial, though, is that the sought-after evidence existed and was easily retrievable, but the government failed to disclose and/or

produce it in response to the defense's written pretrial discovery request.

The government cannot meet the high burden of proving the non-productions were harmless beyond a reasonable doubt. "Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty." Department of the Army (DA) Pamphlet 27-9, "Military Judge's Benchbook," Closing Substantive Instructions on Findings (2016).

The evidentiary value of the unproduced terror-affiliation evidence is so substantial, "material" and "favorable to the defense" such that the government cannot prove the legal errors were harmless beyond a reasonable doubt. The importance, usefulness, and likely impact of the evidence, it stands to reason, can be resolved by asking whether any soldier on trial for murdering men of apparent Afghan descent in a combat zone on a combat patrol would want to know who the victims were, and, if the victims were truly the enemy taking advantage of exposure points in the rules of engagement by "hiding in plain view" and blending in with the local population. The answer: of course he or she would want to know.

Unquestionably a panel of 82nd Airborne officers, combat veterans themselves, would also want to know those answers, as would the military's elected and appointed civilian oversight

officials, as well as the American public at large. When viewed this way, the critical significance of the terror-affiliation evidence as "material" and "favorable to the defense" becomes obvious, even to the person who is neither a soldier nor an attorney.

As discussed more fully in 1LT Lorance's Petition for a New Trial presently pending before this Court, knowledge that the victims were actually belligerents engaged in deadly hostility against U.S. and Coalition Forces would have dramatically changed the entire landscape of the investigation, chain-of-command decisions, defense strategy and tactics, the panel's deliberations, and the ultimate outcome.

Pointedly, for example, had the paratroopers of First Platoon been informed, at any time prior to their testimony more than a year after the fact, that the victims were not civilians but instead linked to IEDs and U.S. casualties, they probably would have testified differently knowing that the enemy who inflicted four (4) casualties on their comrades in arms was killed. That is, any sense of guilt would have been assuaged. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008) (quoting *California v. Trombetta*, 467 U.S. 479 (1984) ("criminal defendants be afforded a meaningful opportunity to present a complete defense.)" The prosecution's non-production deprived

1LT Lorance of this substantial trial right to put on a complete defense.

This is especially so when considered in light of PFC Skelton's assessment that the three-riders constituted a threat to First Platoon under the rules of engagement such that he could fire his weapon to protect himself and others. (R. 585-86) (Q: "And at the time you fired . . . you were protecting friendly forces, both American and ANA [Afghan National Army];" A: "Based on – based on ROE and my quick threat analysis of what could happen, yes").

"Knowing the area that [the red motorcycle with three riders back-to-back at a high rate of speed] was coming from, the first thought I had was it could be a drive-by shooting; it could be a drive-by grenade throw; it could be a vehicle borne IED." (R. 537). The record thus contains evidence of compliance with the rules of engagement such that the killings could be determined justified on that testimony alone.

Private First Class Skelton's trial testimony is in keeping with his Article 32(b) U.C.M.J. testimony, where, under oath, he stated that the road the three riders were on was "a known avenue of approach for the Taliban," that "[i]t was my obligation to save the Soldier this motorcycle was coming towards, because there was a potential threat. At the time it

was seen as a threat."[3] (R. Investigating Officer's Report Pursuant to Article 32 Investigation). He also testified that he was not merely calling out the threat, rather, "[he] was requesting permission to fire based on the information provided to [him]," and that "[he] did not believe 1LT Lorance ever had eyes on the target, and was taking everything from what was told to him." *Id*.

Apparently disregarding the evidence of record demonstrating compliance with the rules of engagement, the government claims that the victims' connections to deadly hostility against the United States are irrelevant, noting that 1LT Lorance did not know of any affiliations when he gave the order. (Gvt. Br. at 31).

The government misses the fundamental point: the record contains evidence in the form of PFC Skelton's testimony that he perceived a threat and was authorized under the rules of engagement to fire. It is undisputed that 1LT Lorance was below the grape berm and could not see the threat, relied on PFC Skelton's threat assessment (especially given that PFC Skelton was the COIST soldier), and that 1LT Lorance never fired his weapon.

[3] Specialist Todd Fitzgerald also testified that the road on which the three riders were heading toward First Platoon was "a known enemy approach." (R. 460).

There is also evidence of record, from at least five (5) witnesses that the fatal rounds were fired from the "support by fire gun truck" "three seconds," "a few seconds," "five seconds," "10 seconds" and "20 – 30 seconds," after PFC Skelton fired the initial volley at the three riders. (R. 384; 497; 501; 655; 658; 675). These witnesses include Sergeant First Class (SFC) Ayres, the Platoon Sergeant, SGT Ruel, the squad leader, SPC Leon, and significantly, PFC Skelton, the former civilian police officer who testified that the fatal shots were fired "a few seconds" after he fired his weapon at the riders. (R. 544).[4]

With the government's production properly made, the facts evolve to PFC Skelton assessing a hostile threat and 1LT Lorance giving an order to engage the actual enemy, surely lawful and justified actions and by no means, murder or attempted murder. What is more, had the prosecution, the chain-of-command (*i.e.*, the S-2, G-2, or J-2), the AR 15-6 investigating officer, the CID, and/or even the defense checked the biometric systems, as was regularly done within the Brigade and throughout Afghanistan, the possibility of a court-martial, let alone murder convictions and confinement for 20 years, fades to the inconceivable.

[4] Specialist Fitzgerald testified at the Article 32(b), U.C.M.J. hearing that it was "10 seconds" before the second shots were fired. (R. Investigating Officer's Report Pursuant to Article 32 Investigation).

All that was required was running the Afghan names contained in the Agent's Activity Summary in the biometric system to uncover the terror affiliations, akin to a Lexis/Nexis or Westlaw search. (Def. App. Ex. K). Coincidentally, the S-2 (intelligence) shop was directly across the hall from the lead trial counsel's office.

> The Brigade Staff Judge Advocate's office was located within Building C-1140 on Fort Bragg. That building is U-shaped, and the reception area is the horizontal bridge of the U. The command hallway is to the left vertical extension and the staff shops are all on the right. [The trial counsel's] office is located directly across a six-foot wide hallway from the Brigade S2 shop. [The trial counsel] could have walked twenty steps from his desk to the desk of the intelligence analysts and asked for an intel dig into these people's identity.

(Def. App. Ex. O).

This Court cannot be convinced that the government has met the higher burden of proving that the nondisclosures were harmless beyond a reasonable doubt, as a matter of law. Had the exculpatory and mitigating evidence been produced about just one of, let alone all persons "in any way related to this case," the entire course of the proceedings corrects to exonerate 1LT Lorance for his inexperienced split-second judgment made in the unforgivingly violent battlespace of the Zharay district on only his second combat patrol as an Infantry Lieutenant, where First

Platoon lost four (4) paratroopers right before he assumed command.

Put differently, the government has not proven that the biometric terror-affiliation evidence connecting the victims with active hostility against the United States was of such little value that the denial thereof to 1LT Lorance was harmless beyond a reasonable doubt. *See generally United States v. Gibbs*, Army No. 20110998 (27 June 2016).[5]

B. There Is "Reasonable Probability" Of A Different Result At Trial Had The Evidence Been Disclosed

Even if this Court were to find that the defense's written discovery request was, like the government errantly alleges, too general to trigger the prosecution's search and production obligations (Gvt. Br. at 28), there is a "reasonable probability" of a different result had the evidence been disclosed as required by the Fifth Amendment, *Brady*, R.C.M. 701(a)(6), and AR 27-26.

Where nondisclosure occurs in cases where the defense either did not make a discovery request or made only a general request for discovery, an appellant will be entitled to relief only by showing that there is a "reasonable probability" of a different result at trial if the evidence had been disclosed.

[5] That the purported victims were belligerents against the United States goes right to the heart of the capital offenses when considered together with the evidence that First Platoon complied with the rules of engagement., *i.e.*, the elements of "wrongful" and/or "without justification."

United States v. Bagley, 473 U.S. 667, 682 (1985). A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

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" is established, an appellate court need not conduct a further harmless error review. *Id.*

It is undisputed that the day before the engagement giving rise to this court-martial, First Platoon received small arms fire from "historical firing positions" while on patrol. (R. 314). It is also undisputed that First Platoon lost four (4) paratroopers on the same field, to include their Platoon Leader, directly before 1LT Lorance assumed command. (R. CID Agent's Activity Summary).

Sergeant First Class Ayres, the Platoon Sergeant, testified that, "[e]very time we went in the village of Sarenzai we had been attacked from the village -- the abandoned village to the north, named Millashengol, approximately 200 meters to the north, and the last patrol on 23 June, while conducting KLE, I had one of my Soldiers seriously wounded." (R. 509). The Platoon Sergeant further explained that, "[e]very time we moved in, in any type of village we pretty much constantly observed enemy

forces monitoring our movement, maneuvering on us, getting into their fighting positions ready to fight, sir." (R. 510). "They kept telling us it's a safe area, but every time we'd go in there we got shot at." (R. 517).

It is also undisputed that PFC Skelton, the COIST (intelligence) soldier, provided a threat analysis to 1LT Lorance prior to the patrol to watch out for vehicle born IEDs. (R. 584). Private First Class Skelton testified that he perceived the threat and was authorized by the rules of engagement to fire his weapon in self-defense and defense of others. (R. 585-86).

At least five (5) witnesses, to include the Platoon Sergeant and Squad Leader, testified that the fatal rounds were fired "seconds" after PFC Skelton fired the initial rounds. (R. 384; 497; 501; 658; 675). Accordingly, there is evidence of record, that the panel was free to adopt, proving compliance with the rules of engagement resulting in a legally justified use of deadly force.

Moments and meters away, SSG Herrmann and his support by fire gun crew reached the roof of the western-most mud structure and observed "suspicious" males in the field to the north of the village who were using ICOM radios and pointing to First Platoon. (R. 510). The "Wolfhound" intercept verified that the military aged males wanted to "do something" to the Americans.

(R. 445; 511). Although SSG Herrmann was not aware of the "Wolfhound" intercept translation, First Platoon engaged anyway, killing two and wounding Mohammad RAHIM in the arm. RAHIM is associated with Haji KARIMULLAH, the rider who fled the earlier engagement unharmed. (R. Def. App. Ex. K).

It bears noting that neither SSG Herrmann, SPC Haggard, or PFC Carson faced court-martial for having killed two and wounded a third moments and meters away, the third being directly linked to Haji KARIMULLAH, the rider who fled the earlier engagement unharmed.

Logically, it stands to reason that if the second engagement led by SSG Herrmann were justified, RAHIM was lawfully shot during the second engagement, and RAHIM is directly linked to KARIMULLAH from the first engagement, they were acting in concert. Thus, there is added evidence of record linking the two engagements to terrorists associated with each other who were demonstrating hostile intent toward First Platoon, which the panel was free to adopt.

At some point, CPT McNair, flying over watch on station, dropped white smoke on a gathering of seven (7) – eight (8) military aged males with motorcycles to the north of the village. (R. 685). Thereafter, First Platoon interdicted a "lone rider" on a motorcycle heading from the location where CPT McNair dropped the smoke. (R. 591-92). The lone rider was

detained with HME on his hands, but otherwise went unidentified. *Id*. The lone rider lied about his travels because he was going in the wrong direction. (R. 593).

At this point, the quantum of evidence surely supports the reasonable conclusion that enemy fighters had been scouting First Platoon and maneuvering for, what understandably appeared at the time, to be an impending and coordinated attack.

Now, introduce the facts which went undisclosed: that the males of apparent Afghan descent were not innocent civilians, but in reality the enemy linked to U.S. casualties. (Def. App. Ex. K). These realities are the equivalent of finding AK-47s, pistols, RPGs, ammunition, grenades, explosives, wires, detonation cords, ICOM radios, battery packs, or related evidence of hostility with the deceased and/or with the red motorcycle.

A fair reading of the record suggests that had the paratroopers of First Platoon discovered items like these on the deceased, there probably would not have been any concern whatsoever about a possible "CIVCAS" [civilian casualty]. Indeed, the AR 15-6 officer's reasoning shows that he quite possibly would have reached altogether different findings and conclusions if weapons or related items were discovered on the deceased. (Def. App. Ex. Q).

It is hard to imagine that any Army Staff Judge Advocate would recommend to a convening authority charges carrying a potential sentence of confinement for life without eligibility for parole where a new Lieutenant gave an order on his second day on the job in reliance upon his veteran Infantryman who perceived a hostile threat on the very field where the unit lost four (4) paratroopers and received small arms fire the day before in the spiritual home of the Taliban, and in the end, the result was killing of the enemy.

Amidst these facts, the non-disclosure of the Afghan males as biometrically linked to IED events must be, and quite rightly is, "sufficient to undermine confidence of the outcome" of 1LT Lorance's trial. *Bagley*, 473 U.S. at 682.

C. The IED Evidence Was On Army Servers

The government contends that it had no duty to search for, disclose, or produce in response to the defense's written discovery request, information or records bearing on the aggressiveness of any and all persons related to this case. (Gvt. Br. at 20 - 23). In essence, the government alleges that because the terror-affiliation evidence was not in the "prosecutor's own files," the government was not obligated to search for it, disclose, and/or produce it. *Id*.

That the terror-affiliation evidence was not within the prosecutor's files is really no moment. The critical fact is

that the information could be readily found on U.S. Army biometric enrollment computer databases which were in prevalent use not only within the Brigade itself, but also throughout Afghanistan. The confidence in the reliability the Army has in biometric evidence was conveyed in a March 2015 federal technology journal, which explained:

> The Army's Program Executive Office for Enterprise Information Systems is in charge of a DOD-wide biometrics database that has been in the works for half a decade. The Automated Biometric Identification System is a central repository for biometrics data from various combatant commands and military services. The system can process as many as 30,000 daily submissions and hold as many as 18 million records, according to PEO EIS.
>
> For example, a soldier on patrol in Afghanistan uses a device known as the Biometrics Automated Toolset to collect biometrics. Its hardware, called the Secure Electronic Enrollment Kit II, automatically captures and formats fingerprints and iris and facial images, and has a keyboard for soldiers to type in biographical information about the subject. The handheld device connects to a central workstation that links up with any of the several dozen servers across Afghanistan for storing biometric data.
>
> The data is then sent to the ABIS database in West Virginia for correlation. The FBI and the departments of State and Homeland Security, among other agencies, use ABIS to identify biometrics matches for criminal cases and people on intelligence watch-lists of suspected terrorists.

Sean Lyngaas, *Can the Pentagon Keep Pace with Biometrics?*, FCW – The Business of Federal Technology, March 11, 2015,

available at https://fcw.com/Articles/2015/03/11/Can-the-Pentagon-keep-pace-on-biometrics.aspx?Page=1; *see also Handbook: The Commander's Guide to Biometrics in Afghanistan*, Center for Army Lessons Learned, No. 11-25, April 2011, Fort Leavenworth, Kansas, *available at* https://info.publicintelligence.net/CALL-AfghanBiometrics.pdf.

"Thirty thousand requests a day" using "several dozen servers across Afghanistan" suggests that the terror affiliation evidence was readily accessible at any time prior to trial. Another respected journal reported in 2010 on improvements to the ABIS biometric enrollment system:

> The Automated Biometric Identification System Version 1.0 (ABIS v1.0) database supports Operations Enduring and Iraqi Freedom by providing a central, authoritative repository for biometric records. It catalogues biometric data taken from detainees, enemy combatants, and other non-U.S. persons of interest. The prototype system was put into operation at the end of 2004, with the current ABIS v1.0 deployed in early 2009. ABIS v1.0 far surpasses the original prototype ABIS in both reaction time and capability. While the original database stored and matched fingerprints only, v1.0 adds capabilities for facial images, palm prints, and iris patterns, as well as fingerprints for adversary and neutral, unknown, or non-aligned population groups.

Jody Kieffer and Kevin Trissell, Army AL & T, *DoD Biometrics: Lifting the Veil of Insurgent Identity*, April – June 2010, at 14 *available at*

http://asc.army.mil/docs/pubs/alt/2010/2_AprMayJun/articles/14_DOD_Biometrics--Lifting_the_Veil_of_Insurgent_Identity_201002.pdf

A check with the ABIS "central authoritative repository" would have, as the defense has brought forth, revealed that First Platoon killed the enemy, certainly facts to which the chain-of-command, the prosecution, the defense and/or the panel should have been privy.

Beyond the Army, the NATO International Security Assistance Force (ISAF) published specific guidance on the use of biometric enrollment to preserve evidence to prosecute terrorists under internal, domestic Afghan law. *See* ISAF EVIDENCE COLLECTION GUIDE: Supporting the prosecution of Insurgency Crimes, July 2010, *available at* https://publicintelligence.net/isaf-guide-to-collecting-evidence-for-prosecution-in-afghan-courts/

An example of how reliable and effective biometric enrollment evidence is when prosecuting IED manufacturers and emplacers at the Justice Center in Parwan can be seen in Defense Appellate Exhibit R, the case against Mohammed Zahid, who was convicted under Afghan law for subversive activities and sentenced to four (4) years confinement. As the Justice Advisor wrote, "[t]he fingerprints of the Accused were PID [positively identified] to latent prints discovered on an IED located in a cache" – "The fingerprint match on an IED supported by the Paladin (Biometric Task Force on Bagram Air Base) PSP

(Prosecution Support Package) was [sic] the reason for the conviction in this case." (Def. App. Ex. R).

Recognizing the trustworthiness of biometric evidence, Brigadier General Mark S. Martins, an Army Judge Advocate, graduate of West Point, Harvard Law School, and a Rhodes scholar, then Commander of the Rule of Law Field Force – Afghanistan, stated that biometrics "can combat fraud and corruption, place law enforcement on a sounder evidentiary footing, and greatly improve security." (*Supra* Note 1).

Accordingly, the government's position that it was somehow mysterious, onerous, or burdensome to search for biometric terror-affiliation evidence is belied by the near ubiquity of the repositories and the ease with which the Afghan names could have been run, *i.e.*, "across the hall."

Some may understandably say that prudence required the prosecution to use the tools available to it to confirm the identities and affiliations of the males of apparent Afghan descent, especially where the Brigade used the tools regularly and the S-2 office was across the hall from the lead trial counsel's office. *Kyles v. Whitley*, 514 U.S. 419, 433-34, 437-40 (1995) (noting that prosecution must disclose evidence requested by a defendant even if it is held by police investigators); *Williams*, 50 M.J. at 442.

The unique nature of Counterinsurgency Operations (COIN) in Afghanistan should compel prosecutors and their supervisors, as well as defense counsel and their supervisors, to look into identities and affiliations of "males of apparent Afghan descent" given how the enemy uses TTP's to blend in with the local population. In other words, in the context of murder courts-martial involving persons of "apparent Afghan descent," the circumstances require counsel for both parties to inquire into identities and affiliations, to the extent reasonably available, to confirm that victims are truly victims so that justice can be done; the standard of care required of the situation.

Biometric evidence is commonplace and familiar to those who have served in Afghanistan. It is so reliable that operational and tactical decisions, which place U.S. lives at stake, are made in reliance upon biometric evidence. Afghan National Security Courts, like the Justice Center in Parwan, use biometric evidence to convict terrorists under internal, domestic Afghan law. A check with biometric assets is straightforward, takes comparatively little time to perform, and is a small investment in exchange for the larger payoff in terms of the degree of confidence to be secured with legal and factual accuracy so that justice can be done.

Notwithstanding, the government avers that the terror-affiliation evidence was "not directly related to the investigation of the matter that is the subject of the prosecution," and that the evidence belonged to "other governmental entit[ies]" and was thus beyond the scope of the trial counsel's responsibilities to due process. (Gvt. Br. at 22).

The government's argument must fail. In reality, the *Brady* evidence could be easily found on dozens of Army servers, likely accessible across the hall from the trial counsel's office in the S-2 shop, and in regular use by the chain-of-command, which smacks of a prosecutor remaining willfully ignorant of exculpatory evidence, which the Court of Appeals for the Armed Forces soundly rejected as contrary to justice. *Stellato*, 74 M.J. at 486-87.[6]

In sum, the Fifth Amendment, *Brady*, R.C.M. 701(a)(6), R.C.M. 701(a)(2)(A), *Roberts*, *Hart*, and AR 27-26 required the prosecution to disclose, "as soon as [was] practicable," the terror-affiliation evidence which reasonably tends to negate 1LT

[6] The notion of the prosecution remaining "willfully ignorant" of exculpatory evidence in the context of *Stellato* is heightened where, like here, rather than perform a biometric search using the Afghan names in the CID Agent's Activity Summaries, the government's representative merely "lined out" the names on the Charge Sheet and inserted the language, "a male of apparent Afghan descent" after the chain-of-command returned the Taskera (Identification Card) without verifying the identity on it. (R. Pros. Ex. 7). The government could have, and should have, run the searches and kept the Taskera for evidentiary purposes.

Lorance's guilt, reduce any degree of guilt, and reduce the punishment.

That the prosecution did not disclose the terror-affiliation evidence on its own initiative is prejudicial legal error on the facts of this case. Likewise, that the prosecution did not produce the terror-affiliation evidence in response to the defense's written pretrial discovery request is also prejudicial legal error on the facts of this case.

To correct this "manifest injustice," this Court should set aside the findings and the sentence.

II. COUNSEL WAS INEFFECTIVE

The government argues that civilian defense counsel's communication, preparation, tactics, and overall performance met the standard of care required to competently defend 1LT Lorance. (Gvt. Br. at 45 - 51).

This court-martial was a fully contested double murder and attempted murder trial in which 1LT Lorance faced a possible sentence of confinement for life without eligibility for parole. (R. 972).

The entirety of the defense case-in-chief is only 35 pages. (R. 754 – 789). Civilian defense counsel estimated that defense case would take about two (2) hours. As it turns out, the defense case took a mere forty-five (45) minutes. *Id.*

The defense case consisted of only three (3) witnesses. Civilian defense counsel elicited no testimony negating elements of the charged offenses or raising a special defense. *Id.* Underscoring civilian defense counsel's lack of preparation: a Lieutenant Colonel called apparently to introduce good military character, actually testified that 1LT Lorance was "average." "He's about center, you know, average." (R. 765). The defense introduced no documentary evidence, digital images, intelligence reports, expert reports, expert testimony, biometric "hits," or storyboards. The defense used no demonstrative evidence, charts, graphs, images, and/or audio-visual or graphical depictions.

As discussed more fully in 1LT Lorance's Assignment of Error and his declaration at Defense Appellate Exhibit O, Attorney Womack arrived late in the evening the night before this fully contested double murder and attempted murder trial in which 1LT Lorance faced "life," from another trial which had ended late in the afternoon in Texas.

Attorney Womack called 1LT Lorance from his rental car as he was driving from the airport to his hotel and spoke for only a few minutes. *Id.* Attorney Womack's conduct on this point alone fell below the standard of care the U.S. Supreme Court set forth in *Powell v. Alabama,* 287 U.S. 45, 58, (1932). To fulfill that Constitutional guarantee under the Sixth Amendment and render effective assistance of counsel, counsel must have adequate time

to prepare for a case. *See Powell*, 287 U.S. at 71 (inadequate case preparation can jeopardize an accused's right to effective assistance of counsel); *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992); Army Rule 1.7(b) (lawyer precluded from representing client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests); *see also* the American Bar Association Criminal Justice Standards for the Defense Function, Standard 4-1.8 (Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters); *accord* State Bar of Texas' Standards for Criminal Defense Attorneys.

It is well-settled that reviewing courts will give counsel considerable deference in tactical decisions made at trial. In order to make tactical decisions, counsel must have conducted witness interviews and evaluation of the evidence. Here,

Attorney Womack conducted no pretrial interviews of the government's witnesses against 1LT Lorance. (Def. App. Ex. O).

Because he conducted no witness interviews, Attorney Womack was ill-positioned to discuss approaches to each witness with 1LT Lorance and obtain 1LT Lorance's knowledge and input as part of an overall defense strategy. In other words, Attorney Womack could not avail himself of 1LT Lorance's knowledge of the witnesses and events because he had not done the work of interviewing each witness.[7]

The contents of Attorney Womack's file are telling in that there is far less information than one would reasonably expect for a double murder and attempted murder trial. (Def. App. Ex. P). Standing alone, Attorney Womack's failure to gather sufficient evidence upon which to make tactical decisions proves that 1LT Lorance was deprived of his Sixth Amendment right to effective assistance of counsel at trial. *See Jennings v. Woodford,* 290 F .3d 1006, 1014 (9th Cir. 2002), ("[a]ttorneys have considerable latitude to make strategic decisions ... once

[7] The government goes to lengths to sully 1LT Lorance stating that he sought to "manufacture combat" because he "hated" the Afghan people. Had Attorney Womack spent time interviewing 1LT Lorance, government witnesses, and 1LT Lorance's family, he would have been better positioned to push-back on the government's claims and portray 1LT Lorance more in keeping with the realities of the situation. For example, reasonable preparation would have enabled Attorney Womack to introduce evidence and forcefully argue that 1LT Lorance is not a renegade murderer gaming the system to literally get away with murder in pursuit of a Combat Infantryman's Badge. Indeed, 1LT Lorance possessed a stellar record throughout his career. But, he was a new Lieutenant. He was new to the combat platoon which was seasoned, had been in combat together for months, and lost 4 paratroopers to enemy bombs and fires. He had to appear "strong," and "capable" and "in-charge." His remarks can be fairly seen as "bravado" and "trash talk" among the veteran paratroopers, who, unlike him, had already "been there and done that." The government seeks to portray a criminal mindset as if 1LT Lorance were on Main Street, U.S.A. rather than in the spiritual home of the Taliban, sworn to eradicate the U.S. as infidels, during the height of the fighting season in one of the most highly kinetic and deadly locations in the combined joint area of operations. Attorney Womack was not prepared to counter the government's sullying approach, which prejudiced 1LT Lorance before the members of the panel.

they have gathered sufficient evidence upon which to base their tactical decisions.").

One can see how Attorney Womack's lack of preparation disserved 1LT Lorance throughout each stage of the trial. For example, the CID Agent Activity Summary contained the names of various males of apparent Afghan descent associated with the events giving rise to this court-martial. (R. Allied Papers). Reasonable due diligence informs that reasonable counsel would have pursued those evidentiary leads to verify identities and confirm/dispel notions of terror-affiliations, especially where it is common knowledge, even to John or Jane Q. Public, that the enemy in Afghanistan blends into the local population.

In a double murder and attempted murder trial where 1LT Lorance's liberty was at stake for life, counsel reasonably should have taken "some" measures to discern civilians from the enemy. Had Attorney Womack pursued these evidentiary leads which were clearly set forth in the CID Agent Activity Summaries, we now know that he would have found evidence linking the males of apparent Afghan descent to IED networks and events. (Def. App. Ex. K).

Attorney Womack's failure to pursue this evidence to its evidentiary ends and use the results to defend 1LT Lorance was unreasonable, especially given how readily accessible and available the Army's biometric servers were to him, and, the

critical significance of what the evidence tends to prove. *United States v. Gibson*, 51 M.J. 198 (C.A.A.F. 1999) (civilian defense counsel found ineffective where he failed to pursue leads contained in the CID report).

Attorney Womack neither interviewed nor called to the stand SSG Herrmann, SPC Haggard, or PFC Carson, each of whom engaged males of apparent Afghan descent on 2 July 2012, killing two and wounding a third, but none of whom was court-martialed. Counsel should have reasonably pursued this evidence to fully defend 1LT Lorance.

The prosecution called the Brigade's Assistant S-2, 1LT Lucas, who was certainly positioned to testify about the Brigade's use of biometric information to plan targets and execute missions. (R. 770). Because Attorney Womack did not interview her, or pursue confirmation of the Afghan names, he was unable to elicit this significant testimony.

Beyond the findings phase, Attorney Womack's lack of preparation and failure to pursue evidentiary leads negatively affected the pre-sentencing case. Surely that the victims were associated with IED networks and events is a matter in mitigation, which if presented, may have reduced the punishment. Attorney Womack failed to do so. *See United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997); *see also United States v. James H. Lee*, Army Docket No. 16-0468/AR (Court of Criminal Appeals erred

when it failed to order a fact-finding hearing pursuant to *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), to determine the facts surrounding Appellant's allegations that his trial defense counsel was ineffective in failing to identify and investigate potential mitigation evidence for the presentencing hearing).

Attorney Womack asked no questions of SPC Wingo, who testified for the government in aggravation that the area of operations was more dangerous after 2 July 2012. (R. 928-29). Attorney Womack asked only one question of Major Ferris, who also testified in aggravation. (R. 931). Attorney Womack did not examine any defense witnesses in mitigation. Attorney Womack asked but two simple questions of 1LT Lorance during an unsworn statement. (R. 956-57). During his sentencing argument before the panel, Attorney Womack stopped and asked the military judge a question: "[t]he military judge may discuss other factors in sentencing. Your Honor, do you do that?" (R. 964). The simplicity of the defense's pre-sentencing case further highlights how Attorney Womack's lack of preparation prejudiced 1LT Lorance during pre-sentencing.

In sum, Attorney Womack's performance is outside the range of permissibly competent assistance. For these reasons, and those discussed more fully in 1LT Lorance's Assignment of Error

and accompanying declaration, this Court should set aside the findings and the sentence.

III. THE GOVERNMENT'S BRIEF CONTAINS SIGNIFICANT MISSTATEMENTS

A. The government represented to this Court that, "appellant told the platoon that anyone found riding a two wheeled motorcycle was to be engaged on sight." (Gvt. Br. at 4). The representation is misleading because 1LT Lorance was found not guilty of this offense.

B. The government represented that PFC Skelton reported to 1LT Lorance that he saw a motorcycle *in the village* with three men on it. (Gvt. Br. at 5). The record is at odds with this statement. Private First Class Skelton testified that he saw three riders on a single red motorcycle traveling at a high rate of speed, approximately 30 – 45 miles per hour, on the road normally used by the Taliban heading directly toward First Platoon's exposed single file route of march. (R. 571; 585-86).

C. The government represented that First Platoon "had taken a detainee." (Gvt. Br. at 9). This is not correct. First Platoon took two (2) detainee(s) that day: 1) Mohammad RAHIM, shot in the arm by the support by fire element led by SSG Herrmann and associated with Haji KARIMULLAH, the third rider who fled; and

2) the "lone-rider" who was detained with HME on his hands and who lied about his travel.[8]

D. The government represented that "[a]ppellant makes no assertion that the evidence shows that the deceased victims were themselves involved in hostile activities, or that the surviving victim was involved in hostile activities before appellant killed his associates and tried to kill him." (Gvt. Br. at 15).

The government is mistaken. Defense Appellate Exhibit K explains visually and via an expert affiant that GHAMAI a deceased rider, has a biometric enrollment number of B2JK9-B3R3. GHAMAI is biometrically linked to IED event number 12/1229 which occurred on 12 May 2012, approximately six weeks "prior" to 2 July 2012, the date of the engagement giving rise to this court-martial. *Id*.

The rider who fled unharmed, Haji KARIMULLAH, has a biometric enrollment number of B2JK4-G7D7. KARIMULLAH is biometrically linked to IED event number 12/0156, which occurred approximately six weeks after 2 July 2012, but certainly "before" 1LT Lorance's trial began. *Id*.

CONCLUSION

In December 2015, six (6) Airmen were on a foot patrol near Bagram, Afghanistan when a lone rider on a motorcycle approached

[8] The dates on page 13 of the Government's Brief indicate 2014 when the correct year is 2015.

their route of march and detonated himself, killing all six. This vehicle-born IED attacker capitalized on a weakness in the rules of engagement because all he did was "ride" toward the patrol, apparently showing neither hostile intent nor hostile actions. The TTP the single rider used is the same TTP that the three riders used.

Former civilian police officer and seasoned paratrooper, PFC Skelton saw what he perceived as a threat and 1LT Lorance reacted based on his COIST soldier's "quick threat analysis" early that July morning some four (4) years ago. Several witnesses testified that the fatal shots were fired within "seconds" of PFC Skelton's volley, and the Army did not run a biometric database search to confirm identities and terror-affiliations.

WHEREFORE, 1LT Lorance respectfully requests that this Court set aside the findings and sentence.

Respectfully submitted,

JOHN N. MAHER
JOHN D. CARR
MAHER LEGAL SERVICES, P.C.
17101 71st Avenue
Tinley Park, Illinois 60477
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

SCOTT MARTIN
CPT, JA