THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	MOTION TO RETURN THIS INCOMPLETE RECORD OF TRIAL TO THE CONVENING AUTHORITY FOR CONSIDERATION OF AND ACTION ON EXCULPATORY AND MITIGATING EVIDENCE ACQUIRED AFTER INITIAL ACTION BUT BEFORE THE RECORD SHOULD HAVE BEEN FORWARDED.
Appellee	
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 counsel pursuant to Rules 23, 23.1, and 30.3 of this Court's Internal Rules of Practice and Procedure and respectfully move this court to remand the incomplete record of trial to the convening authority. We request that the order direct that the convening authority consider and take action on exculpatory and mitigating evidence

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discovered after initial action but before the record should have been forwarded pursuant to Rules for Courts-Martial [hereinafter R.C.M.] 1105(c)(1), 1106 and 1107.

To assist with resolving this motion, the undersigned present a statement of the case, statement of relevant facts, a brief argument in support, and appellant's motion to attach appellate exhibits A-J, to include those submitted to the staff judge advocate but apparently neither presented to nor acted upon by the convening authority.

Statement of the Case

Contrary to his pleas, a general court-martial comprised of officers convicted First Lieutenant (1LT) Clint A. Lorance of one specification of attempted murder of an Afghan military-aged-male, two specifications of unpremeditated murder of Afghan military-aged-males, and five specifications of conduct prejudicial to the good order and discipline of the service in violation of Articles 80, 118, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 880, 918, and 934 (2012) [hereinafter UCMJ]. Consistent with his plea, the panel of officer members found 1LT Lorance not guilty of making a false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907.

On 1 August 2013, the panel sentenced 1LT Lorance to total forfeitures, confinement for 20 years, and a dismissal. Approximately 18 months later, on 31 December 2014, the

convening authority approved the adjudged sentence but wrote on the document entitled "Action on Petition," "with one year clemency granted." (Def. App. Ex. A).

Statement of Facts

On New Year's Eve, 31 December 2014, the convening authority took initial action on this case. As part of that action, the staff judge advocate served defense counsel, for the first time, with his 4-page addendum to the post-trial recommendation addressing matters the defense raised pursuant to R.C.M.s 1105 and 1106. (Def. App. Ex. B). What was not served, but discovered on 19 January 2015 after the record of trial reached this Court, is a 31 December 2014 memorandum from the chief of military justice containing extensive factual statements from outside the record of trial relating to the reasons for lengthy post-trial processing delay. (Def. App. Ex. C).

Also on 31 December 2014, detailed trial defense counsel informed the staff judge advocate in writing that civilian defense counsel was overseas and due to return to work in the United States on 7 January 2015. (Def. App. Ex. D). The staff judge advocate, however, caused the record to be forwarded to this court that very day, 31 December 2014. (Def. App. Ex. E).

On Saturday 10 January 2015, defense counsel presented two submissions through the staff judge advocate addressed to the

convening authority. The first was a one-page request to clarify the approved sentence to confinement together with an attachment which the staff judge advocate noted in his 31 December 2014 addendum as not having been previously received. (Def. App. Ex. F). The second was a request for modification of the initial action based on exculpatory and mitigating evidence discovered after the initial action but before the record should have been forwarded. (Def. App. Ex. G).

On 14 January 2015, defense counsel received additional newly-discovered exculpatory and mitigating evidence. That day, defense counsel submitted a supplemental request for modification of the initial action based on the additional newly-discovered exculpatory and mitigating evidence. (Def. App. Ex. H). Defense counsel received no communications from the staff judge advocate in response to the three January 2015 submissions. Accordingly, on 19 January 2015 defense counsel sought acknowledgment from the staff judge advocate that the three January 2015 submissions were received and inquired as to when they would be presented to the convening authority. (Def. App. Ex. I).

On 23 January 2015, the staff judge advocate wrote a memorandum addressed to the Clerk of this court and copied defense counsel. In it, he wrote that neither the request for clarification nor the two requests for modification of the

initial action based on the newly-discovered evidence was presented to the convening authority because the record had been forwarded on 31 December 2014, the same date on which he served the Addendum. (Def. App. Ex. E).

On 24 January 2015, defense counsel responded, noting legal error in forwarding the case before the defense had an opportunity to evaluate the Addendum and its allied papers to determine what if any commentary to make concerning new matter. (Def. App. Ex. J).

Law and Argument

This court should remand the record of trial to the convening authority for three reasons: i) for a new Action to personally consider each of 1LT Lorance's January 2015 submissions; ii) to ensure that 1LT Lorance's 24 October 2014 submission and its attachments are included in the record of trial; and iii) to correct what appear to be copying errors where hundreds of pages appear to be cut-off and/or upside-down.

R.C.M. 1106 (a) states in part, "[b]efore the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial," the staff judge advocate shall forward a recommendation. R.C.M 1106 also states that the staff judge advocate shall serve counsel for the accused and the accused. Counsel for the accused has 10 days in which to comment on matters contained in the recommendation.

R.C.M 1106(f)(7) permits the staff judge advocate to submit an addendum to the post-trial recommendation in response to comments from the accused or defense counsel. "When new matter is introduced," however, "the accused and counsel for the accused must be served with the new matter and given 10 days from the service of the addendum in which to submit comments."

To ensure compliance with due process, namely, notice and an opportunity to be heard, once counsel for the accused and the accused are served the addendum (which may or may not contain new matter) and given the 10 days to comment required under R.C.M. 1106, the convening authority then considers the staff judge advocate's post-trial recommendation, the Addendum, and all matters which may have been submitted by the accused and counsel for the accused when taking action under R.C.M. 1107.

Beyond R.C.M. 1106, R.C.M. 1107(b)(3)(A)(iii) makes it clear that an accused and his counsel must be afforded these 10 days in which to review the Addendum when it states, "[b]efore taking action, the convening authority shall consider … any matters submitted by the accused … under R.C.M. 1106(f)." And, under a separate provision, R.C.M. 1107(b)(3)(B)(iii), the convening authority may consider "[s]uch other matters as the convening authority may deem appropriate."

In this court-martial, the staff judge advocate did not follow this procedure. Instead, the staff judge advocate caused

the record of trial to be forwarded the very day he served his Addendum and the papers made a part of the Action upon the accused and counsel - 31 December 2014, (Def. App. Ex. E). The effect: he deprived 1LT Lorance of the 10 days in which to assess the Addendum and Action documents for new matter, consult, and prepare written commentary. In other words, the staff judge advocate deprived 1LT Lorance of an important post-trial due process right – the opportunity to respond. Only after that 10-day period had run would the staff judge advocate been positioned to present any defense commentary on new matter to the convening authority. Put differently, not until the time period had run could the record lawfully be forwarded for review.

Consequently, the commanding general remained the only government official with the authority to act in light of the newly-discovered evidence presented in January 2015. The staff judge advocate's declination to present the three January 2015 filings is a prejudicial error, denying 1LT Lorance's substantial post-trial due process rights.

Briefly, the evidence purportedly identifies the men of apparent Afghan descent that 1LT Lorance has been convicted of attempting to murder and murdering and links them to improvised explosive device [hereinafter IED] emplacements, events, and networks. This is the type of evidence which reasonably tends to

negate 1LT Lorance's guilt, reduces his degree of guilt, and reduces any punishment.

Had the prosecution disclosed this information favorable to the defense, there is a substantial probability that there would have been a different result in this case. This is especially so for two reasons. First, the government's case was premised on the notion that the Afghan males were "innocent civilians." The trial counsel argued in his opening statement and closing argument that the Afghan males were innocent civilians. And, at least three times, the prosecutor argued in sentencing that the men were innocent civilians.

Second, defense counsel could have used this information when conducting pretrial interviews of the soldiers the government called against 1LT Lorance. Although those witnesses were ordered to testify and given grants of immunity (which the panel never knew about), their testimony may have been vastly different had they known about the evidence that the alleged victims were indeed not innocent civilians, but linked to terror networks. Even at trial, upon cross-examination, they may have changed their testimony.

The same can be said concerning the convening authority. Had the staff judge advocate brought the matters contained in the January 2015 submission to his attention, there may very well have been a different decision with regard to the findings

and sentence. Or, the convening authority could have used his authority, as the defense requested, under R.C.M 1102 to direct a post-trial UCMJ Article 39(a) hearing before a military judge, at which the newly-discovered evidence could have been evaluated for purposes of a mistrial and/or a new trial. The overall point is that the staff judge advocate's failure to present the matters prejudiced 1LT Lorance's substantial post-trial due process rights.

Since November 2014, undersigned counsel has received the evidence in piecemeal batches. Each time the evidence was received from defense consultants as a result of evidence withheld originally by the government. Undersigned counsel has expeditiously evaluated that evidence, consulted with the accused, and promptly presented the matters to the staff judge advocate for the convening authority's consideration.

Upon review, this court will see that these matters implicate the Fifth Amendment due process clause, the *Brady* doctrine, and the prosecution's discovery obligations under the applicable rules. The evidence bears directly on the legality of the findings and sentence. Significantly, these matters of constitutional significance were tendered to the convening authority within the 10-day period within which the case should have remained before the convening authority.

What is more, the rules explicitly authorize the convening authority to consider "[s]uch other matters as the convening authority may deem appropriate." Here, the convening authority may have deemed newly-discovered evidence bearing on the identities and affiliations of the Afghan military aged males on the field that day, as well as their associations with each other and IED networks, as appropriate in determining whether to apply his vast powers of clemency.

It is widely recognized that "[i]t is at the level of the convening authority that an accused has his best opportunity for relief." *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971). "The essence of post-trial practice is basic fair play - notice and an opportunity to respond." *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 2006). This court should not allow staff judge advocates to prematurely sever jurisdiction at the court-martial stage, especially where the result is, like here, the deprivation of an opportunity to present matters of constitutional significance to the government authority possessing the capability of taking action at the time.

Finally, the chief of justice's 31 December 2014 memorandum, which contains extensive factual statements derived from outside the record of trial, was a made a part of the Action papers. It was not served on the accused nor counsel for the accused. As a result, the staff judge advocate's premature

forwarding of the record deprived 1LT Lorance of the ability to comment on that new matter and have the convening authority consider those comments when taking action. Those comments involve information the former chief of justice at the 82nd Airborne Division shared with the undersigned. The information is apparently at odds with some of the factual assertions contained in the 31 December 2014 memorandum.

WHEREFORE, appellate defense counsel respectfully request that this court set aside the action of the convening authority, and return the record of trial to The Judge Advocate General for consideration of the January 2015 matters and a new action by the same or a different convening authority.

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CERTIFICATE OF SERVICE

UNITED STATES v. Deance

Army Docket No. 20130679

Brief on Behalf of Appellant _____

Motion ✓

Other _____

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on 3 February 15.

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