

THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S ,

APPELLANT'S MOTIONS FOR
RECONSIDERATION - DEFENSE
APPELLATE EXHIBITS "Q" and "S"

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

COMES NOW the undersigned appellate defense counsel, under
Rules 15.5, 19, and 23 of this Court's Rules of Practice and
Procedure, and respectfully request that Panel 3 reconsider its
denials of First Lieutenant (1LT) Lorance's motions to attach
Defense Appellate Exhibits "Q" and "S."

Panel 3

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DISCUSSION

I. This Court Should Attach Defense Appellate Exhibits "Q" and "S" Because They Are Relevant and Necessary to 1LT Lorance's Fifth and Sixth Amendment Assignments of Error

On 24 August 2016, this Panel denied 1LT Lorance's motions to attach i) a redacted copy of the Army Regulation (AR) 15-6 report used in this court-martial and relevant to 1LT Lorance's Fifth Amendment and *Brady v. Maryland* assignment of error and his Sixth Amendment and *Strickland v. Washington* assignment of error; and ii) a letter to lead civilian counsel, Attorney Guy Womack, which relates to 1LT Lorance's Sixth Amendment ineffective assistance of counsel assignment of error.

This evidence is from outside the record of trial, but is nevertheless relevant, necessary, probative, and thus appropriate for this Panel to consider pursuant to Article 66, Uniform Code of Military Justice (U.C.M.J.) and Rule for Courts-Martial (R.C.M.) 1203. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990) (describing this Court's authority as "awesome, plenary, *de novo* power of review"). Without this evidence, this Panel will not have the benefit of factual assertions bearing directly on the legal and factual issues 1LT Lorance raises for appellate review.

A. Defense Appellate Exhibit "Q."

First Lieutenant Lorance asserted in his motion to attach that the 15-6 is relevant and necessary because it tends to

prove the unfairly prejudicial legal errors he raises under the Fifth and Sixth Amendments:

Defense Appellate Exhibit Q is the redacted Army Regulation (AR) 15-6 Findings and Recommendations made as part of the pretrial investigation into the facts and circumstances surrounding 1LT Lorance's conduct on 2 July 2012 in the Zharay District of Afghanistan. First Lieutenant Lorance cites this report in his Assignments of Error as bearing on the question of whether or not findings and sentence are correct in law and fact.

(Motion to Attach Def. App. Exs. "O - R").

Specifically, 1LT Lorance bases his Fifth Amendment assignment of error largely on matters from outside the record of trial, to include biometric enrollment information linking the males of apparent Afghan descent to improvised explosive device (IED) events, detonations, and U.S. casualties.

This Panel admitted that evidence for purposes of both 1LT Lorance's Petition for a New Trial under Article 73, U.C.M.J. and R.C.M. 1210, as well as for purposes of his assignments of error raised pursuant to Article 66, U.C.M.J. and R.C.M. 1203.

The AR 15-6 investigation is of significant evidentiary value on appeal, equally necessary and probative as the biometric evidence already admitted. A fair reading of the AR 15-6 investigating officer's findings shows that had evidence of hostility been found with the two deceased riders and/or the red motorcycle, *i.e.*, AK 47s, pistols, ammunition, wires, ICOM

radios, detonation chord, and/or bomb-making components, he may have concluded that 1LT Lorance's actions did not rise to attempted murder and murder, initial determinations which stood to substantially alter the entire landscape of this court-martial. First Platoon paratroopers relate in their sworn statements that had contraband or evidence of hostility been found, they too would have concluded that 1LT Lorance's conduct was lawful as opposed to criminal. That is, there would have been little if any concern within First Platoon about civilian casualties as opposed to lawful engagements.

Aside from whatever evidentiary value the court wishes to give the 15-6 Report, the AR 15-6 investigation is also relevant and necessary for this Panel's evaluation of 1LT Lorance's claim of ineffective assistance of counsel. The investigation provides information useful that reasonable counsel in Attorney Womack's position would have found helpful in preparing for the Article 32(b), U.C.M.J. investigation, as well as the actual court-martial. Put differently, the report contains many evidentiary leads which, because the report is not contained within Attorney Womack's files, indicates he did not review and use it to prepare and defend 1LT Lorance.

Without the report, this Panel is unable to fully evaluate whether or not Attorney Womack's level of preparation fell below the standard of care, whether Attorney Womack's tactical

decisions are entitled to deference, and the extent to which lead counsel's failures to prepare unfairly prejudiced 1LT Lorange at trial.

The AR 15-6 investigation is also altogether appropriate for this Panel to consider in the context of a Fifth Amendment, *Brady v. Maryland*, R.C.M. 701(a)(6), R.C.M. 701(a)(2)(A), and AR 27-26 assignment of error. It is equally appropriate upon appellate review of a Sixth Amendment *Strickland v. Washington* assignment of error. The 15-6 is helpful not only to ensure that this court-martial is "correct in law and fact," but also to ensure that this court has "fully and fairly" considered the necessary and relevant evidence surrounding appellant's claims, which by their very nature, require review of matters outside the record of trial. See, i.e., *William M. Lips v. Commandant, United States Disciplinary Barracks*, 997 F.2d 808 (10th Cir. 2003) (suggesting legal error where military appellate courts do not fully and fairly consider allegations of unfairly prejudicial legal error).¹ This is especially so where, following the analysis and decision by the Court of Appeals for the Armed Forces in *United States v. Stellato*, 74 M.J. 473, 486-87

¹ See also *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990) (federal district court review of military conviction available if (1) the asserted error is of substantial constitutional dimension; (2) the issue is one of law rather than of disputed fact already determined by the military tribunal; (3) there are no military considerations that warrant different treatment of constitutional claims; and (4) the military courts failed to give adequate consideration to the issues involved or failed to apply proper legal standards).

(C.A.A.F. 2015), the prosecution's conduct here suggests "willful ignorance" of exculpatory evidence at various points in the case, to include early on with the Criminal Investigation Division's gathering and sharing of evidence with the AR 15-6 investigating officer and U.S. Army trial counsel who made recommendations to the chain-of-command and ultimately prosecuted the trial. ("I [15-6 investigating officer] remained on site with CID as they took over the formal investigation and collected evidence for this report in coordination with CID agents on the ground." 15-6 Findings and Recommendations ¶ 1).

Declination to attach the AR 15-6 hinders this court in conducting a full review of collateral issues by resort to relevant matters outside the record. For these reasons, the AR 15-6 investigation, ordinarily included in a record of trial, should be attached because the information it contains bears on the legal questions 1LT Lorance raises. Otherwise, this Panel is ill-positioned to fully examine the significant factual and legal questions raised by the prosecution's and Attorney Womack's conduct at critical stages of this court-martial.

B. Defense Appellate Exhibit "S."

In his motion to attach what has been marked as Defense Appellate Exhibit "S," 1LT Lorance explained:

Defense Appellate Exhibit "S" is a letter from the undersigned to Attorney Womack who was retained as civilian defense counsel to

represent First Lieutenant (1LT) Lorance at court-martial. The letter is dated 24 December 2015 and the contents of the of letter "speak for itself." The letter is relevant and necessary to aid in this Court's evaluation of 1LT Lorance's Sixth Amendment Assignment of Error alleging ineffective assistance of counsel.

(Motion to Attach Def. App. Ex. "S"). The content of the letter demonstrates its relevance and probative value in the context of a Sixth Amendment, *Strickland v. Washington* assignment of error:

Thank you for bringing to my attention via email that earlier this morning, December 24, 2015, you gave a media interview to the Fox News Network during which you spoke about First Lieutenant Clint A. Lorance, U.S. Army, and his case as it relates to U.S. personnel killed by a motorcycle attack on a foot patrol near Bagram, Afghanistan this week.

With respect Sir, would you please be so kind to state by what authority, and by whose permission, you spoke about First Lieutenant Lorance's legal case to the media, especially where you know he is represented by other legal counsel of record.

Should you be contacted by the media, or any third-parties in the future concerning First Lieutenant Lorance, would you please indicate that you no longer represent First Lieutenant Lorance, and, refer those inquiries to the undersigned.

The favor of your reply is respectfully requested.

(Def. App. Ex. "S").

The letter is relevant because it reflects Attorney Womack's respect for the canons of ethics, at least the ethic precluding communicating about a former client that is represented by other attorneys in an ongoing criminal appeal. See, *i.e.*, American Bar Association Model Rule of Professional Conduct 1.9 ("A lawyer who has formerly represented a client in a matter. . .shall not thereafter: (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.").

The letter suggests that Attorney Womack is perhaps not fully versed in his responsibilities as the circumstances require. Accordingly, the letter is properly before this Panel as it relates to 1LT Lorance's claim of ineffective assistance of counsel.

CONCLUSION

WHEREFORE, appellate defense counsel respectfully requests that this Panel attach Def. App. Exs. "Q" and "S."

PANEL NO. 3

APPELLANT'S MOTION FOR RECONSIDERATION



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

Concerning Def. App. Ex. "Q":

Granted: _____

Denied: _____

Date: _____

Concerning Def. App. Ex. "S":

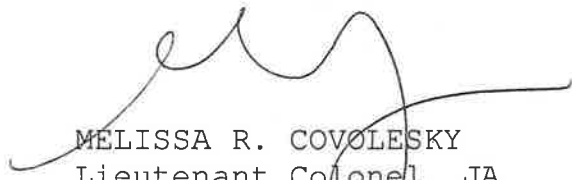
Granted: _____

Denied: _____

Date: _____



SCOTT MARTIN
CPT, JA
Appellate Defense Counsel



MELISSA R. COVOLESKY
Lieutenant Colonel, JA
Deputy Chief, Defense
Appellate Division

CERTIFICATE OF SERVICE

UNITED STATES v. *Lorance*

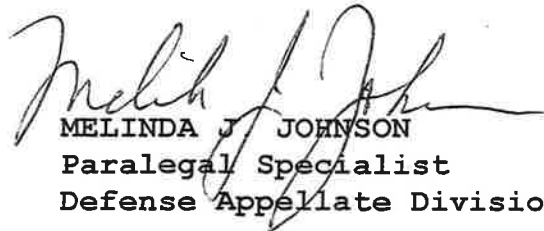
Army No. *20150679*

Brief on Behalf of Appellant _____

Motion *X*

Other _____

I certify that a copy of the foregoing was delivered
to the Court and Government Appellate Division on September 23,
2016.


MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division