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MEMORANDUM THRU Staff Judge Advocate, 82d Airborne Division

15 November 2014

FOR Commanding General, Headquarters, 82nd Airborne Division

SUBJECT: Second-Supplemental RCM 1105/1106, *United States v. Clint A. Lorance*, First Lieutenant, 1st Platoon, C Troop, 4-73 Cavalry, 4th Brigade Combat Team, 82nd Airborne Division, US Army

1. Although the official time has come and gone to submit RCM 1105/1106 matters, we also note that in the interest of justice and due process, two significant and material questions of law rising potentially to the level of constitutional error should rightly be presented to the Staff Judge Advocate and to Brigadier General Clarke. Consideration of these important matters will help inform the determinations of whether or not this court-martial is correct in law and fact, and whether or not clemency can remedy these errors.
2. In re-reviewing the Criminal Investigation Division's ("CID") "Agent's Investigative Reports," CID issued evidence preservation letters to *Yahoo!*, *FaceBook*, and *Army Knowledge Online*. These letters asked the internet service providers to freeze their standard, ordinary course of business destruction of emails and messages pertaining to Clint's accounts. Later, CID used some emails to conduct further investigation.
3. Agent's notes also show a check of the Defense Clearance and Investigation Index and the National Crime Information Center "disclosed derogatory information" pertaining to material witnesses who testified against Clint pursuant to grants of immunity.
3. What the record does not show, however, is that the prosecution gave the emails and the derogatory information to the defense prior to trial. These failures strike at the very heart of American due process and materially prejudiced Clint's ability to prepare his defense and properly cross-examine material witnesses against him.
4. These legal errors are so important that the United States Supreme Court has consistently reversed cases where the prosecution has failed to disclose. For example, in *Brady v. Maryland*, 373 U.S. 83 (1963), the court held that suppression of evidence to an accused violates due process where the evidence is material either to guilt or punishment. In *US v. Bagley*, 473 US 776, 682 (1985), the Supreme Court reversed again where the prosecution failed to disclose; *Kyles v. Whitley*, 514 US 419 (1995) stands largely for the same result. Article 46 UCMJ and Rule for Courts-Martial 701 counsel military lawyers accordingly. And, failure to disclose evidence to the defense subjects Judge Advocates to ethical violations pursuant to AR 27-26, Rules 3.4 and 3.8. It is also important to note that discovery in the military justice system is intended to be more liberal and open than that found in the civilian justice system.
5. We respectfully request that these legal errors be incorporated into Clint's existing clemency matters, that the Staff Judge Advocate recommend corrective action, and that Brigadier General Clarke grant the clemency requested in our 15 August 2014 and 24 October 2014 papers.

Sincerely,

By:

JOHN N. MAHER
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