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MEMORANDUM THRU Staff Judge Advocate, 82d Airborne Division 30 November 2014

FOR Commanding General, Headquarters, 82nd Airborne Division

SUBJECT: Rule for Courts-Martial (RCM) 1102 Motion to the Convening Authority – Newly Discovered Evidence in *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. REQUEST. The Army has in its possession evidence linking Afghan military-aged-males involved in this general court-martial to improvised explosive devices (IED) as well as IED attacks and terror networks in Afghanistan. The government failed to disclose this information to the chain-of-command, counsel for the defense, and the court-martial. These significant failures strike at the very heart of American due process and show that the government violated its discovery and disclosure obligations under Uniform Code of Military Justice (UCMJ) Article 46, RCM 701, Army Regulation (AR) 27-26, and well-settled Supreme Court and military case law. This newly discovered evidence, standing alone or in combination with the many legal errors already raised, shows that this court-martial is not correct in law and fact. Accordingly,

a. We urge the Staff Judge Advocate to recommend corrective action on these errors discussed more fully below, as well as the ten prejudicial legal errors previously identified;

b. We ask that the Convening Authority disapprove the findings, the sentence, and allow 1LT Lorance to resign honorably from the US Army;

c. If the Staff Judge Advocate and/or the Convening Authority would like to discuss these important matters before action, we are available to travel to Fort Bragg with little notice;

d. Should the Staff Judge Advocate and/or the Convening Authority determine that this newly discovered evidence does not invalidate this court-martial entirely, we respectfully request that the defense be notified and provided the opportunity to prepare and file appropriate post-trial matters, including but not limited to a fully-developed RCM 1102 motion with the Convening Authority seeking a post-trial UCMJ Article 39(a) session in front of a military judge, a UCMJ Article 60, RCM 1107 request for rehearing, and/or a request for a new trial. *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993) (new trial appropriate to prevent manifest injustice); and

e. The Convening Authority now has significant information that his predecessor commanders who recommended and ordered this court-martial never had. He also knows important facts that the jury never had before it. Clemency empowers him to substitute his judgment for that of the jury and end this process, now, as the important interests of the unit, the Army, the country, and Clint's family are now firmly aligned. It is in everyone's interest that this court-martial end.

2. BACKGROUND. On the morning of 02 July 2012, three military-aged-males were riding together on a single motorcycle speeding along a dirt road towards 1st Platoon's route of single-file march across that dirt road from their Strong Point to the nearby village of Sarenzai. Private First Class Skelton (PFC) perceived hostile intent/acts from the riders during that morning engagement. He testified under oath to the following:

> **Q. It was your obligation, as you saw it, to say to Soldiers that the motorcycle was possibly threatening because of the potential threat it represented, correct?**

A. We have the right to protect ANA and coalition forces, yes.

Q. And at the time that you fired, you believed that's what you were doing; you were protecting friendly forces, both American and ANA.

A. Based on -- based on ROE and my quick threat analysis of what could happen, yes.

Q. Yes. So this I'll ask you, okay. Based on what you had available to you, you saw this as a threat and you felt an obligation as an American Soldier to protect friendly forces, American and ANA, correct?

A. Yes.

R. 585-586.

3. THE FIRST ENGAGEMENT. A former civilian traffic police officer prior to enlisting in the Army with months of combat experience in the area of operations, PFC Skelton was on top of a berm while his platoon leader of only two days could not see the motorcycle. Clint was below the berm. He relied on PFC Skelton's threat assessment and gave the order to engage the riders. PFC Skelton fired his weapon but missed. PFC Shiloh, manning his turret-M240B on a blocking vehicle received the order to engage from his vehicle commander, Specialist (SPC) Reynoso. PFC Shiloh fired his weapon, killing two. The third rider ran off and was not captured. Clint was convicted of murdering the two and attempting to murder the third, even though their identities and affiliations were not known at that time.

4. THE SECOND ENGAGEMENT. Moments later, approximately 500 meters from the first engagement, the lead element of 1st platoon took an over watch position. Staff Sergeant (SSG) Herrmann and PFC Carson identified military-aged-males scouting 1st Platoon, crouching among the berms, pointing, "acting suspiciously," and communicating on ICOM radios. SSG Herrmann and PFC Carson engaged and killed two. *Wolfhound* communications intercepts subsequently revealed that the military aged-males stated on the ICOM radios that "there are Americans on the roof – we want to do something to them." Nobody was court-martialed for these killings which happened moments after and a few hundred meters away from the first engagement.

5. THE LONE RIDER & MOHAMMAD RAHIM. First Platoon began its withdrawal to return to its Strong Point. But, another military-aged-male riding a motorcycle was interdicted and detained. Upon detention, his hands tested positive for homemade explosive residue (HME). And, Mohammad Rahim was captured near the village with a gun-shot wound to his arm. Upon capture, he too tested positive for HME and was treated medically at Kandahar Airfield.

6. NEWLY DISCOVERED EVIDENCE. Several days ago, counsel for the defense learned that the Army has in its possession evidence linking Afghan military-aged-males involved in this court-martial to IED attacks and terror networks in Afghanistan. The undersigned phoned the OSJA, 82nd Airborne Division that day and was granted time to prepare this matter for the Staff Judge Advocate and the Commanding General. Detailed more fully in *Appendix A* hereto, below are examples of the evidence contained in databases and computer systems in the possession of and accessible to the Army, the CID, and the prosecution:

a. Mohammad RAHIM, likely shot in the arm during the second engagement, is linked to at least one IED event in Kandahar in June 2012, the month before the engagements;

b. Upon information and belief, the third-rider who escaped uninjured from the first engagement is Haji KARIMULLAH. He is linked to at least one IED event in Kandahar in August 2012, the month after the engagements; and

c. A *Taskera*, or Afghan identification card, was recovered from one of the killed riders in the first engagement. A picture of it is in the record of trial. However, the writing is not visible. Nor was it translated into English. It was returned to villagers.

The new evidence implicating the Afghan military-aged-males to attacks on US and other terror targets during the relevant timeframe all but confirms hostile intent and hostile activities. The evidence underscores the validity of the split-second decision to fire at the three riders. This is especially so where it is beyond any doubt that moments and meters later, Afghan military-aged-males associated with the three riders (as shown in *Appendix A*) were scouting 1st platoon for an attack. And, the two Afghan military-aged-males detained shortly after the second engagement each had HME on their hands. This is reasonable doubt. But, the larger point is the prosecution had this evidence available and did not disclose it.

7. ACCESSIBLE BUT NOT DEVELOPED. This new evidence is contained in the United States' government computer databases and systems, including those operated by the National Ground Intelligence Center (NGIC), the Combined Information Data Network Exchange (CIDNE), the Biometric Automated Tool Set (BAT), Intelink, the Detention Facility in Parwan (DFIP), the Justice Center in Parwan (JCIP), the Joint Legal Center (JLC), the Theater Exploitation Databases (TEX), Task Force Paladin, and/or the Afghanistan Captured Material Exploitation/Joint Expeditionary Forensics Lab (ACME). There may well be other classified systems and databases which have not been made known to counsel for the defense. Significantly, the CID seized Mohammad RAHIM's medical evidence (charts, bloody clothing) but did not disclose it to the defense. Nor, upon information and belief, did the CID run the information in the medical reports (*i.e.*, name, date-of-birth, father's name, DNA, fingerprints, biometrics, statements made to medical personnel) in United States government computer databases and systems. Likewise, the identity noted on the *Taskera* seized from one of the military-aged-males PFC Shiloh shot could have been inputted into these databases. From a straightforward search, evidence of his actual identity and affiliations could have been obtained. It was not. These discovery and disclosure failures are prejudicial error depriving Clint of due process and substantial legal rights.

8. FAILURE TO DISCLOSE. Had the new evidence been properly developed and disclosed to decision-makers along the investigative, preferral, and referral processes, it is certain that there would have been a disposition other than General Court-Martial. Indeed, the Army did not court-martial SSG Herrmann or PFC Carson for killing and wounding military-aged-males that morning based on less than perfect information. The newly-discovered information was never presented to the chain-of-command when each commander recommended trial by general court-martial. It was not presented to the UCMJ Article 32 Investigating Officer. It was not presented to the Convening Authority when he referred the case to general court-martial. It was not disclosed to defense counsel. It is all but certain that, coupled with the constitutional vagary of the attempted murder, murder, and UCMJ Article 134 charges and specifications, a motion to dismiss, motion based on defective charges, motions for appropriate relief, motions for findings of not guilty, and/or a mistrial would have been appropriate.[1] Had the case made it through these levels of investigation, command, and meritorious legal challenges, it would have resulted in findings of not guilty. In any event, the failure to search for and disclose deprived Clint of fundamental due process. This was no fair trial.

[1] The Charges and Specifications were preferred on 15 January 2013. Subsequently, on 17 April 2013, the prosecutor made "major changes" to the UCMJ Article 80, 118, and 134 offenses by deleting the names of ostensible victims. These major changes implicate RCM 603. Referral occurred 18 April 2013.

9. ADDITIONAL GOVERNMENT NON-DISLOSURES. *Appendix B* hereto lists 23 additional examples where the prosecution failed to disclose relevant information favorable to and/or helpful to the preparation of the defense. Equally troublesome is that the military judge did not instruct the jury that certain states of mind do establish attempted murder. Although she did instruct that the specific intent to kill must be present, she did not instruct the jury that the intent to inflict great bodily harm or while engaged in an act which is inherently dangerous to others and evinces a wanton disregard for human life are not sufficient for attempted murder. *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982). Clint wrote that his intent was to "protect his paratroopers." His intent is corroborated by the facts that after the engagements, 1st Platoon detained one wounded man and another lone motorcycle rider. Had the complete instruction been given on the state-of-mind required for attempted murder, the jury could have returned a finding of not-guilty on that Charge and its Specification.

10. CLEMENCY IS THE REMEDY. The court-martial did not hear this exonerating evidence when it convicted Clint and sentenced him to 20 years in prison. The defense was not able to use this information to prepare. With this information, the defense would have been altogether different. Clint has been imprisoned for the past year and a half. The government's withholding of this evidence was grounds for a mistrial and is grounds for a new trial. At this point, as Clint sits in prison, the most direct route to justice is clemency to right these wrongs.

11. CLEMENCY SERVES ALL INTERESTS. To date, the defense has identified 10 material legal errors during the processing of this court-martial. At least four were never put before the jury when it decided this case: i) the jury never knew each witness against Clint was initially suspected of murder but then given immunity; ii) the jury never knew that the Squadron twice prevented CID from investigating the identities of the riders in the first engagement; iii) the jury did not know that the military judge failed to give the right instructions on applicable special defenses; iv) the jury never knew that the CID uncovered "derogatory" information about prosecution witnesses which was not disclosed to the defense. We now present the Staff Judge Advocate and the Convening Authority with even more evidence that was not before the jury. Lieutenant Colonel Whitford and Brigadier General Clarke, we implore you to recognize these errors for what they are, and, conclude that no interest is served by continued litigation or processing. The 82nd Airborne Division, the Army, the Nation, and Clint's family can have no confidence that these proceedings were conducted in accordance with American law, values, or sensibility. The process and the results are not reliable. Granting clemency now can bring these proceedings into line with the proud history of the 82nd Airborne Division - America's Guard of Honor.

12. CONCLUSION. Clint has written that he "always believed that those men intended to harm my soldiers and if I had done nothing and some of my men had been wounded or killed, I would have been in a different kind of prison for the rest of my life." For the reasons discussed herein, and the many additional reasons set forth in our 15 August, 24 October, and 15 November papers, we respectfully request that the Convening Authority disapprove the findings and sentence, release Clint from prison, and allow him to resign honorably from the US Army.

Sincerely,

By:

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