No 17 -

In The Supreme Court of the United States

Robert Bales,

*Petitioner*,

v.

United States,

*Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

# PETITION FOR A WRIT OF CERTIORARI

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
DAVID G. BOLGIANO

MAHER LEGAL SERVICES PC
7 EAST MAIN STREET,
NUMBER 1053
ST. CHARLES, ILLINOIS 60174
johnmaher@maherlegalservices.com
(708) 468-8155

May 16, 2018 *Counsel of Record

## QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred when it held that in a capital case, a prosecutor does not have to disclose exculpatory medical evidence in the government's possession relating to the accused's state-of-mind to commit 16 homicides where the United States ordered the accused to take mefloquine, a drug known by the U.S. Food and Drug Administration and the U.S. Military to cause long-lasting adverse psychiatric effects, including symptoms of psychosis that may occur years after use.

Whether the Court of Appeals erred when it held that in a capital case, a prosecutor does not have to disclose mitigating impeachment evidence in the government's possession that Afghan sentencing witnesses flown into the United States left their fingerprints on bombs and improvised explosive devices, especially where the prosecution held the Afghan witnesses out to the jury as innocent "farmers."

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Robert Bales, appellant below. Respondent is the United States, appellee below. Petitioner is not a corporation.

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## JURISDICTION

The United States Court of Appeals for the Armed Forces (CAAF) decided this case on February 15, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1259(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V
U.S. Const. amend VI

## STATUTORY PROVISIONS INVOLVED

The criminal offense of premeditated murder found at 10 U.S.C. § 918 (2012), has the following elements:

> (1) a death;
>
> (2) that the accused caused the death by an act or omission;
>
> (3) the killing was unlawful; and
>
> (4) at the time of the killing, the accused had a premeditated design to kill.

## SUMMARY OF THE ARGUMENTS

Every United States Court of Appeals has either granted new trials or ordered remands where the net effect of evidence the prosecution withheld in a criminal case raises a reasonable probability that its disclosure would have produced a different result.

*See, e.g., Browning* v. *Trammell,* 717 F.3d 1092 (10th Cir. 2013) (prosecution withheld witness psychiatric records); *Thomas* v. *Westbrooks*, 849 F.3d 659 (6th Cir. 2017) (prosecution suppressed evidence that witness had been paid by the FBI).

That did not occur in the case below. Bales presented the Court of Appeals with unchallenged expert medical affidavits that the United States ordered him to take the anti-malarial drug mefloquine, and, that he was laboring under its long-lasting adverse psychiatric effects, including symptoms of psychosis, when on his fourth Infantry combat tour he left his post and committed 16 homicides. The United States' having ordered Bales to take this drug was not disclosed at trial.

Bales also presented the Court of Appeals with uncontroverted expert evidence that the prosecution brought Afghan sentencing witnesses into the United States under alias names, alias social security numbers, under the false representation that they were "government employees," and booked them on domestic airliners among the American flying public. The prosecution portrayed them as "innocent farmers."

What went undisclosed, however, was that some of the Afghan sentencing witnesses left their fingerprints on improvised explosive devices, that is, on bombs on the fields of battle in Afghanistan. That suppressed fact changed their legal status from noncombatants under International Humanitarian

Law to that of unlawful belligerents or brigands, potentially targetable under the Law of War.

Accordingly, the Court of Appeals erred when it departed from binding Fifth Amendment (due process) and Sixth Amendment (confrontation and right to present a complete defense) precedents to devalue the significance involuntary mefloquine intoxication would have had on the most significant parts of the trial, to include: (1) appropriate lesser charges; (2) taking the death penalty off the table; (3) different sanity board findings; (4) different plea negotiation positions; (5) defense tactical development; (6) plea of not guilty for lack of mental responsibility; (7) affirmative defense of involuntary mefloquine intoxication at trial; and (8) mitigation during sentencing.

The Court of Appeals erred again when it discounted the landscape-changing effects disclosure of terrorist bombmaking, by such reliable and trusted evidence as fingerprints and DNA, would have had on the sentence, especially where the prosecution recognized just how "material" the bombmaking evidence was when, rather than disclosing it, the prosecution filed a motion to prevent the defense from using biometrics in the first place.

The Court of Appeals decided important Fifth and Sixth Amendment questions that have not been, but should be, settled by this Court, namely, the impact of mefloquine and biometrics in a 16-count premeditated murder case where the death penalty was initially authorized. Similarly, the Court of

Appeals decision conflicts with relevant decisions of this Court under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Bales respectfully seeks a new trial or that the Court grant a Writ of Certiorari, vacate the decision of the Court of Appeals, and remand the case.

## STATEMENT OF THE CASE

### I. Proceedings at Trial

By 2011, Bales had previously completed three combat tours in Iraq and Afghanistan as a non-commissioned officer (NCO) in the Infantry. Beginning after his first deployment to Iraq in 2004, Bales complained of memory impairment and depression, and following subsequent combat deployments, he complained of additional symptoms of insomnia, irritability, anger, decreased ability to concentrate, and memory impairment, which the United States did not attribute to any psychiatric diagnosis. Despite his experiencing these seemingly medically unexplained symptoms, the United States deployed Bales for a fourth Infantry combat tour to the Panjwai District of Kandahar Provence, Afghanistan, the birthplace of the Taliban. The village stability platform to which the Army assigned Bales was a fixed position located within and surrounded by the local population. Roads and trails were littered with IEDs. Locations of IEDs changed nightly. Gunfights with the enemy occurred daily.

On March 11, 2012, in his 42nd month of combat service in the midst of his fourth combat deployment, Bales dropped his protective gear (ballistic vest, plates, and helmet), left the village stability platform, and killed 16 persons of, as the United States termed them, "apparent Afghan descent." (R. Charge Sheet).

Worldwide media attention followed. *See, e.g.*, Craig Whitlock and Richard Leiby, *Army Staff Sgt. Robert Bales Charged With Murdering 1[6] Afghans*," Washington Post, March 24, 2012.

Afghan and Coalition nations publicly expressed outrage. Afghan President Hamid Karzai wanted Bales tried and hanged. Then United States Secretary of Defense, Leon Panetta, announced before any criminal investigation was concluded, before any sanity board results were completed, and before any foreign witnesses were interviewed or vetted for bombmaking terrorist activities, that the United States would seek the death penalty. Reuters Staff, *Who's to Blame When an Injured Soldier Kills Civilians*? Reuters, March 12, 2012.

Apparently making good on that public pledge, in January 2013, the United States assigned a team of four prosecutors, referred this 16-count premeditated murder case to trial, and authorized imposition of the death penalty.

### A. Sanity Board and Mefloquine Psychosis

On January 17, 2012, approximately two months prior to the incident, the Assistant Secretary of

Defense (Health Affairs) wrote in a memorandum addressed to the Assistant Secretary of the Army (Manpower & Reserve Affairs) that "[s]ome deploying Service members have been provided mefloquine for malaria prophylaxis without appropriate documentation in their medical record," and directed a review of mefloquine prescribing practices be performed in deployed locations. A-40.

The results of this review were due in April 2012. The United States therefore knew or should have known at the time of the incident that Bales may have been prescribed mefloquine without documentation in his medical records. However, this memorandum and the results of the United States' review, which presumably included a potentially exculpatory contemporaneous review of mefloquine prescribing practices in Afghanistan, was never provided to Bales by the prosecution.

After arraignment and deferral of pleas to the charges, the trial judge directed that a sanity board (ordinarily a three-member panel consisting of a psychiatrist, physician, and/or clinical psychologist) convene and report to the court and the parties if Bales were competent to stand trial, participate in his own defense, and whether or not he had a severe mental disease or defect on the night in question. As a matter of law, anything an accused says to the sanity board is privileged and cannot be used against him.

As these preliminary trial phases were unfolding, the U.S. Food and Drug Administration (FDA) was

reviewing a report originally received on April 11, 2012. In the report, which was described as "medically confirmed," Roche, the original manufacturer of mefloquine, reported that an unnamed U.S. soldier "was treated with Mefloquine Hydrochloride ... and led to Homicide killing of 1[6]." The Army, as a holder of a then-current FDA marketing authorization for mefloquine, was or should have been aware of this "medically confirmed" report that clearly suggested that the United States had issued mefloquine to Bales.

This report was never provided to Bales nor to the sanity board by the United States. Only well over a year later, on June 25, 2013, in responding to a Freedom of Information Act request (FOIA), was this adverse event report publicly released by the FDA.

Approximately one month later, on July 29, 2013, the FDA issued a Drug Safety Communication, advising the public about "strengthened and updated warnings regarding neurologic and psychiatric side effects associated with the antimalarial drug mefloquine," including requiring the addition of a boxed warning, the most serious kind of warning about these potential problems." In its review of reported adverse events associated with mefloquine, the FDA noted that "some of the psychiatric symptoms persisted for months or years after mefloquine was discontinued," and warned that "[t]he psychiatric side effects can include feeling anxious, mistrustful, depressed, or having hallucinations."

The Army, as a holder of a then-current FDA

marketing authorization for mefloquine, knew or should have known of this Drug Safety Communication and the FDA's deliberations preceding its issuance, including deliberations concerning the drug's long-lasting psychiatric side effects. However, neither the Drug Safety Communication nor information related to these deliberations were provided to Bales or to the sanity board by the United States.

Consequently, the sanity board did not evaluate evidence that the United States had ordered Bales to be exposed to mefloquine or that he may have been laboring under symptoms of psychosis caused by exposure to the drug, even years previously. That is, the trial court remained unaware of mefloquine and its medical impact compromising *mens rea* for premeditated murder.

The sanity board completed its work on May 3, 2013, prior to the Roche adverse event report to the FDA or the FDA's subsequent Drug Safety Communication and reported to the court that Bales was competent to stand trial and possessed no mental disease or defects on the night in question.

However, the sanity board was not aware of the June 2012 adverse event report that clearly suggested that the United States had issued mefloquine to Bales. Nor was the sanity board, having concluded its work, able to consider the significance of the July 2013 FDA Drug Safety Communication in assessing the impact that prior exposure to mefloquine may have had on Bales, including what impact symptoms of psychosis

caused by use of the drug even years previously could have had on his state-of-mind on the night in question.

The trial judge, for reasons unexplained on the record, later disclosed to the four prosecutors 78 statements from Bales derived from the court-ordered sanity board. The prosecutors admitted in open court that they read the 78 statements. Rather than conduct a *Kastigar* v. *United States*, 406 U.S. 441 (1972) (use of "taint-team" recommended to ensure compelled statements from a criminal accused are not used unfairly by the prosecution) hearing and recuse the four detailed prosecutors, the trial judge instead failed to account for 16 of the 78 statements.

The trial judge did not determine whether or not the prosecution "used" derivative information for "non-evidentiary" purposes, "altered" the prosecution's strategy, and/or the extent of the prejudice to Bales.

The defense moved to "fact-check" what the United States may have already known prior to the disclosures, which the trial judge denied. The defense moved to conduct a *Kastigar* hearing, which would have provided the trial-level procedure to account for the 16 compelled statements, which the trial judge denied. The defense moved to recuse the trial judge and the four prosecutors who admitted to reading and reviewing the entirety of the long form sanity board report which contained 78 compelled statements from Bales. The trial judge denied that motion as well.

## B. Impeachment of Afghan Sentencing Witnesses

The defense propounded written discovery seeking from the prosecution not only Bales' medical records but also biometric evidence (namely fingerprints and/or DNA left on IED components or evidence of detention by coalition forces for terror activities in Afghanistan) in connection with any and all witness the United States intended to call.[1]

Concerning biometrics, the defense request identified specific databases where the biometric information could be reasonably located. No biometric information was forthcoming from the United States.

At the time, however, prosecutors were working with the U.S. Department of State to identify Afghan aggravation witnesses, secure visas, obtain travel documentation, order military personnel to escort the witnesses from Afghanistan to the United States,

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[1] At base, biometrics is largely fingerprints and/or DNA. Biometric evidence as used in Afghanistan to fight the war involves two main components: enrollment and match or "hit." Enrollment occurs when coalition personnel take fingerprints, an iris scan, a digital image, a saliva swab, and background information and upload the data into an authoritative database. A match or "hit" occurs when an IED explodes or is diffused, and upon a sensitive site exploitation, the forensic tidbits are dusted for prints and evidence of skin (from twisting wires on bombs) is run against enrollment records. A "hit" occurs when there is a match, proving by fingerprint and/or DNA evidence that the person made the bomb. The converse is also true. Fingerprints and DNA from bombs can be uploaded to the database, and later, when a local individual is enrolled, a match or "hit" might occur in that manner.

usher them in and around Joint Base Lewis-McChord, and accompany them on the return trip to Afghanistan after they testified at the sentencing phase of the trial.

The prosecution learned from the U.S. Department of State that biometric evidence existed concerning at least one Afghan witness, Mullah Baraan, and that he may have been a coalition detainee in Afghanistan (suggestive of a biometric "hit.").

The prosecution did not disclose this evidence to the defense. Nor did the prosecution run biometric database searches (fingerprints/DNA) of its own to pursue the evidence to its logical ends. Instead, the prosecution filed a motion *in limine* seeking to prevent the defense from using any biometric evidence associated with Mullah Baraan - that he was a coalition detainee or involved in terrorism or bombmaking.

At a hearing on the biometric issue before the trial judge, the defense urged the court to direct that the United States produce the biometric records, but the prosecutor insisted that the U.S. Department of State refused to provide them. (R. at 405).

Prosecutors deemed defense suggestions that these witnesses could be Taliban or terrorists as "innuendo and rumor," or "purely speculative," and "lack[ing] any reasonable indicia of reliability." (R. at 406).

The trial judge determined the matter "resolved" and that he was not going to make a "congressional

investigation" about Mullah Baraan or the biometric impeachment evidence. (R. at 409).

At this point, the defense did not have evidence of Bales' exposure to mefloquine or that sentencing witnesses were terrorist bomb-makers. The prosecution, however, still sought the death penalty.

In exchange for the United States' removing the death penalty, Bales pled guilty to all charges and specifications.

To bring the Afghan sentencing witness to the American courtroom, the United States issued a travel authorization using "pseudo names," "pseudo SSANs," for "Afghan civilian employees," and paid the witnesses cash for travel, meals, and incidentals. The United States booked passage from Afghanistan to Dubai, United Arab Emirates, then Dubai to Atlanta, Georgia. The final leg of the inbound journey was on August 18, 2013, aboard Delta Airlines Flight 1884 from Atlanta, Georgia to Seattle, Washington.

During the sentencing phase before a jury, Afghan witnesses testified against Bales. Upon direct examinations, the United States elicited answers from the Afghan witnesses, portraying them as "farmers." During sentencing arguments before the jury, the United States contended that the Afghan witnesses flown into the United States under alias social security numbers, false names, in a status as "government employees," and ticketed on domestic American airliners within the United States among the general flying public, were simply "farmers."

On August 23, 2013, the jury sentenced Bales to confinement for life without the eligibility for parole. A lesser sentence was available. Twenty-three days later, the U.S. Army Special Operations Command, under which Bales had been assigned, ordered commanders and medical personnel to stop using mefloquine. Bales has been confined at Leavenworth, Kansas, ever since.

## II. Proceedings Before the United States Army Court of Criminal Appeals (Court of Appeals)

Upon direct appeal, Bales brought two main issues under the Fifth and Sixth Amendments. First, Bales claimed that his trial violated due process because the prosecution did not disclose evidence of involuntary mefloquine intoxication bearing on the most significant aspects of the trial, to include (1) the special findings necessary to authorize the death penalty; (2) the appropriateness of premeditated murder charges; (3) the sanity board's findings; (4) the defense of lack of mental responsibility; (5) the defense of involuntary mefloquine intoxication; (6) the assistance of counsel during plea negotiations; (7) the landscape of plea negotiations; (8) whether his plea was knowing, intelligent, and voluntary; and (9) the value of mefloquine as mitigation evidence on findings and during sentencing.

Second, Bales noted that a prosecutor's disclosure obligations extend to the sentencing phase in a criminal proceeding. He claimed that his sentencing procedure violated due process because the prosecution failed to disclose that some Afghans it

flew into the United States to testify as victim-impact witnesses left their fingerprints on IED components, proving that they were not "farmers" but bombmaking terrorists that probably could have been affirmatively targeted by coalition forces.

Bales argued that consideration of this material evidence favorable to the defense would have produced a different and more favorable result, noting that once a *Brady* violation is established, courts need not test for harmlessness. *Kyles* v. *Whitley*, 514 U.S. 419, 435-36 (1995).

### A. Involuntary Mefloquine Intoxication and *Mens Rea*

Bales initially moved the Court of Appeals to order appellate discovery into the facts and circumstances surrounding mefloquine. The United States opposed the motion. The Court of Appeals denied the motion in an order without providing its reasoning or rationales.

Bales asked the Court of Appeals for a new trial or to return the case to a trial judge to conduct a fact-finding hearing to determine if at the time of the killings, he was laboring under symptoms of psychosis caused by his exposure to and involuntary intoxication from mefloquine, such that his *mens rea* for premeditated murder was legally deficient to support a guilty plea or conviction. *See United States* v. *DuBay*, 17 CMR 147 (CMA 1967) (fact-finding hearing appropriate to determine issues raised collaterally which require findings of fact and conclusions of law). In support, Bales introduced

mefloquine intoxication evidence in the form of sworn affidavits the Court of Appeals accepted.

1. Gregory Rayho

In his affidavit, Mr. Rayho stated that he served with Bales during Infantry combat operations in Iraq in 2004, stood with Bales in weekly formations wherein mefloquine was distributed, and that he and Bales were ordered to take mefloquine. Although Mr. Rayho stated that he did not specifically remember seeing Bales' take this antimalarial medication, he believed that Bales' would have been ordered to take mefloquine, and that he believed he it would have been very unlikely that Bales would have been given a different antimalarial medication, or no antimalarial medication.

2. Remington Nevin, M.D., M.P.H., Dr. PH.

Dr. Nevin is one of the world's most recognized experts in mefloquine and its adverse effects. He possesses specialized medical and public health training and experience as a preventive medicine physician, epidemiologist, and expertise in the adverse effects of antimalarial drugs, particularly mefloquine. He has published over 40 scientific and medical publications, including eight peer-reviewed manuscripts and 11 letters in scientific and medical journals specifically on the topics of mefloquine or malaria, including an analysis of patterns of use of mefloquine in Afghanistan. Dr. Nevin has co-authored the first manuscript in the psychiatric literature on the forensic application of claims of

mefloquine toxicity, which appears in the *Journal of the American Academy of Psychiatry and the Law*.

In his sworn affidavits to the Court of Appeals, Dr. Nevin described that it was recognized within the medical community that adverse psychiatric effects of mefloquine, including symptoms of psychosis, may occur years after exposure to the drug.

Prior to tendering the first of his affidavits, Dr. Nevin reviewed Bales' available medical records and other evidence including the Rayho affidavit. Dr. Nevin also spoke directly with Bales by telephone. Dr. Nevin concluded that it was likely that Bales was exposed to mefloquine during his deployment to Afghanistan, and that it was very likely that Bales had been previously exposed to mefloquine during his tour to Iraq in 2003-2004. Dr. Nevin also concluded that it was very likely that Bales experienced adverse psychiatric effects as a direct result of his very likely exposure to mefloquine during this tour, and that this exposure very likely constituted involuntary intoxication.

Prior to tendering the second of his affidavits, Dr. Nevin reviewed the sanity board the trial judge directed. He concluded that it was very likely that the adverse psychiatric effects of Bales' very likely involuntary intoxication had persisted, and that "it is likely that Bales did in fact experience visual hallucinations of flashing lights in the region of Alikozai during his guard shift the evening prior to the incident in question," and, "that Bales' visual hallucinations of flashing lights were accompanied by

paranoia and bizarre, persecutory delusions that these constituted a highly dangerous threat, and that these perceptual disturbances compelled Bales to attack [the compounds]."

Dr. Nevin further concluded that "Bales' perceptions were not likely based on reasonable, rational pieces of information, and that his thoughts and behaviors were instead likely influenced by delusional beliefs."

It was also Dr. Nevin's opinion that Bales' "visual hallucinations, paranoia, persecutory delusions, and subsequent unusual behavior were signs and symptoms of psychosis consistent with a likely severe mental disease or defect at the time of the incident in question," and that these "were a direct result of involuntary intoxication resulting either from his very likely exposure to mefloquine in Iraq, or his likely exposure to mefloquine in Afghanistan, or both."

3. Stephen M. Stahl, M.D., Ph.D.

Dr. Stahl is a Professor of Psychiatry at the University of California, San Diego, an Honorary Fellow at the University of Cambridge, Editor-in-Chief of CNS Spectrums, Director of Psychopharmacology and Senior Academic Advisor for the state of California's Department of State Hospitals, board certified in psychiatry, author of over 500 academic papers, editor of 12 textbooks and author of 35 textbooks, including two best sellers in psychiatry: *Stahl's Essential Psychopharmacology*, 4th edition, Cambridge University Press, and *Stahl's*

*Prescriber's Guide*, 5th edition, Cambridge University Press.

In his affidavit, Dr. Stahl wrote that "the potential changes in brain function and behavior that can accompany Mefloquine administration make it feasible that long lasting effects of this drug were contributors to Bales' behavior in Afghanistan."

## B. Bombmaking Impeachment Evidence

Bales moved the Court of Appeals for appellate discovery to compel production of the biometric evidence discussed but undisclosed to the trial court. The United States opposed the motion. The Court of Appeals denied the request by an order without an opinion.

Bales offered the expert affidavit of a retired American law enforcement officer who had spent the previous 10 years in Afghanistan using biometric evidence to develop and prosecute criminal cases against IED networks and terror cells. The United States did not challenge the authenticity or accuracy of the affidavit before the Court of Appeals. His sworn affidavit not only confirmed that Mullah Baran was involved with IEDs and bombmaking, but also that two other witnesses portrayed as innocent farmers by the United States participated in making bombs, that is, they left their fingerprints and/or DNA on IED components. As the declarant explained using data available on U.S. government databases marked "Unclassified // REL to USA, AFGHAN:"

Prosecution witness Mullah Baran indeed, as the U.S. Department of State reported to the prosecution, was a "Coalition detainee" at the Detention Facility at Parwan, Afghanistan, or "DFIP." United States' biometric records show that he is a known associate of the Taliban, terror cells, insurgent groups, to include involvement with weapons caches throughout Kandahar Province.

Prosecution witness Hikmatullah was enrolled in the biometric system on July 27, 2012, with number B28JPGYG6. His fingerprints and DNA were matched to two IED events in Panjwai, Afghanistan. The first IED event occurred on September 14, 2011, at GRID coordinate 41RQQ16991283643. The IED event is referenced as 11/369595. The second IED event occurred on February 3, 2013, at GRID coordinate 41RQQ271849. The IED event is referenced as 11/0088.

Prosecution witness Rafiullah was enrolled in the biometric system on March 9, 2013, with number B2JKMH83. An IED event occurred on October 28, 2012, in Panjwai, Afghanistan at GRID coordinate 41RQQ1498082684. The IED event is referenced as 12/3538. Rafiullah left his DNA on the bomb and he was matched on March 13, 2013.

Bales argued that as a matter of reasonable diligence given the ubiquity of biometric use in Afghanistan and the reliability of fingerprint and DNA evidence, this information should have been in the prosecutor's own files in the first place, before any charging decisions were made or the death penalty sought.

In an order that did not contain a rationale or discussion, the Court of Appeals declined to consider this sworn declaration of Bales' biometric expert, even though the United States did not challenge its substance.

### C. The Court of Appeals Declined To Return The Case To A Trial Judge For Fact-finding About Mefloquine and Fingerprint/DNA Impeachment Evidence

On September 27, 2017, the Court of Appeals affirmed the findings and sentence. A-3. The Court concluded that the evidence presented relating to mefloquine "does not set forth specific facts but consist[s] instead of speculative [and] conclusory observations," and, that "the appellate filing and the record as a whole 'compellingly demonstrate' the improbability" of Bales' claims.

In arriving at this conclusion, the Court of Appeals did not evaluate mefloquine's impacts in connection with the special circumstances required to authorize the death penalty, the appropriateness of premeditated murder charges, *mens rea* for premeditated murder, the development of the defenses of involuntary mefloquine intoxication and lack of mental responsibility, a knowing and intelligent plea of guilt, and/or mitigation as to sentencing. The Court of Appeals addressed none of these substantial points bearing on the fairness of the trial and the reliability of the result and/or the sentence.

Concerning bombmaking terrorist testimony, the Court of Appeals produced only a portion of the written defense discovery request in its opinion but omitted the most important part: the specific written request for biometric information using words like "BATS" and "HIIDES," the vernacular used to describe biometric tools used to collect and store fingerprints and DNA, and connoting where the information sought could be reasonably located.

The Court of appeals concluded that "we can see no scenario for the use of [fingerprints and DNA on bombs] for impeachment during the sentencing phase of the trial." A-18. Surely, the evidence is directly relevant to rebut the prosecution's having elicited answers from the Afghan witnesses that they were simple farmers or gardeners. Even if the witnesses were farmers and gardeners, their prints and DNA were recovered from bombs designed to kill Americans and local-nationals.

The Court of Appeals also concluded that Bales waived the biometric issue by failing to object at trial. However, Bales had no basis to object because the biometric records had not been disclosed or produced as constitutionally required. Bales therefore had no basis on which to object to the prosecution's holding the Afghan witnesses out as farmers and gardeners. Had the fingerprint and DNA evidence been properly produced in response to the defense request, an objection was not likely as the Court of Appeals reasoned, rather, cross-examination and impeachment before the jury would have been the probable approach.

Troubling is the fair inference that the Court of Appeals' reasoning seeks to draw a bright line against biometric evidence, that is to say, that prosecutors need not simply perform the equivalent of a "Google" search as part of bringing a death penalty case.

### III. Proceedings before the United States Court of Appeals for the Armed Forces (CAAF)

Bales timely filed a Petition for a Grant of Review to the court which exercises civilian oversight of the military courts of appeal and trial courts worldwide.

On February 15, 2018, the Court granted Bales' Petition for a Grant of Review but on the same day, affirmed the findings and sentence without issuing an opinion or rationale. Appendix A.

## REASONS FOR GRANTING THE PETITION

### I. Absent Review By The Court, Prosecutors And Sanity Boards Are Not Incentivized To Search For and Consider Evidence of Prior Administration of Mefloquine And To Correctly Attribute Its Long-Term Psychotic Effects As Bearing On Premeditated Murder, Especially in Death Penalty Cases

### A. Prosecutors' Duty to Justice, Not Just Winning

Prosecutors have a continuing interest in preserving the fair and effective administration of criminal trials, and, as such, the duty of prosecutors is "to seek justice within the bounds of the law, not merely to convict." A.B.A. Standards for Criminal Justice:

Prosecution and Defense Function, Standard 3-1.2(c) (4th ed. 2015). Fundamental to fulfilling this responsibility is making timely disclosure of all evidence favorable to the defense.

As the Court recognized in *Brady* v. *Maryland,* the failure to disclose favorable evidence "violates due process... irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also United States* v. *Nixon,* 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

This affirmative duty is above and beyond the "pure adversary model," *United States* v. *Bagley,* 473 U.S. 667, 675 n.6 (1985), it is also grounded in the recognition of the prosecutor's "special role in the search for truth in criminal trial." *Banks* v. *Dretke,* 540 U.S. 668, 696 (2004).

In *United States* v. *Agurs,* 427 U.S. 97, 110 (1976), the Court held that a prosecutor is required to disclose certain favorable evidence "even without a specific request" from the defense. The Court reasoned that "obviously exculpatory" evidence must be disclosed as a matter of "elementary fairness," and that prosecutors must be faithful.

Prosecutors are subject to heightened ethical obligations due in part to their special position. *Berger* v. *United States,* 295 U.S. 78, 88 (1935) ("The United States Attorney [federal prosecutor] is the representative not of *an* ordinary party to a

controversy, but of a sovereignty, whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

As representatives of the United States, prosecutors cannot lose sight that their duty is more than to be exclusively adversarial or ardent advocates. *Bagley,* 473 U.S. at 675 n.6. It is not the prosecutor's responsibility to win at all costs but rather to "ensure that a miscarriage of justice does not occur." *Id.* at 675. Basic to this duty and obligation is "disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id.*

The Court has made it clear that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles,* 514 U.S. at 439; *accord Agurs,* 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). As the Court in *Kyles* acknowledged, "[s]uch disclosure will serve to justify trust in the prosecutor as the representative of the sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88).

Also, politics rather than facts often are behind such governmental actions. In this incident, the fact that certain segments of the Government of the Islamic Republic of Afghanistan and the United States' Coalition partners were angered by the alleged killings by US personnel should not have served as a basis for ignoring *Brady* requirements and following the guidelines of *Kastigar*. Prosecutors and

investigators should have the moral courage to ignore or resist such political pressure because:

> It is a politically driven act, not a public interest one – a refutation of the existence of a civil system of law designed and intended to deal with precisely such issues in which harm was done but without criminal elements.[2]

## B. Mefloquine Psychosis Compromises Mens Rea to Commit Premeditated Murder

In this case, the United States had in its possession evidence that mefloquine is known to cause long-lasting adverse effects. These include symptoms of psychosis, even years after use. Prosecutors knew or should have known that the United States ordered Bales to take mefloquine, even without proper medical documentation of this exposure. Revelation of this evidence stood to be a game-changer.

If Bales were laboring under symptoms of psychosis caused by his exposure to and his involuntary intoxication from mefloquine, his mindset for murder is reasonably called into question and should have been evaluated by the sanity board and constitutionally-speaking, the defense counsel.

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[2] Patrick, Urey and Hall, John, *In Defense of Self and Others: Issues, Facts & Fallacies – The Realities of Law Enforcement's Use of Deadly Force*, Second Edition, Carolina Academic Press (2010) at page 277.

Had the mefloquine information been disclosed and used at trial, at least nine significant and different outcomes were possible: (1) the death penalty authorization may not have occurred; (2) lesser charges may have been deemed reasonable; (3) Bales' plea of guilty may not been accepted by the military judge as knowing and intelligent given the substantial unresolved legal questions about involuntary mefloquine intoxication; (4) Bales may not have pled guilty to the murder charges because of his diminished capacity to develop specific intent; (5) Bales may have pled not guilty due lack of mental responsibility, given that mefloquine can cause long-lasting adverse effects including symptoms of psychosis even years after use; (6) involuntary mefloquine intoxication could have been developed and presented as a trial defense; (7) plea negotiations would have occurred under conditions more favorable to Bales; (8) Bales may have pled guilty to a lesser offense with a lesser punishment; and (9) mefloquine could have been offered as a matter in mitigation during sentencing. *See, i.e., Ivy* v. *Caspari*, 173 F.3d 1136 (8th Cir. 1999) (*habeas corpus* granted because guilty plea not voluntary, knowing, and intelligent where petitioner was diagnosed by psychiatrist has having mental illness); *Parle* v. *Runnels*, 505 F.3d 922 (9th Cir. 2007) (*habeas corpus* granted where cumulative effects of multiple errors violated due process).

Evidence is material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." *Napue* v. *Illinois*, 360 U.S. 264, (1959). In at lease these nine different ways, the entire landscape

of the trial, to include findings and sentencing, would have been materially different and more favorable to Bales. *California* v. *Trombetta*, 467 U.S. 479 (1984) (Constitutional guarantee that criminal defendants be afforded a meaningful opportunity to present a complete defense).

As in *Blake* v. *Kemp*, 758 F.2d 523 (11th Cir. 1985), where the prosecution's withholding of evidence relating to the petitioner's sanity precluded a meaningful opportunity to prepare and present an insanity defense, the United States' withholding of mefloquine precluded Bales' meaningful development of his trial defenses.

Without the ability to assess and develop the mefloquine evidence, Bales was also effectively denied the right to counsel during plea negotiations. *United States* v. *Fuller*, 941 F.2d 993 (9th Cir. 1991). Consequently, his plea of guilty cannot be seen as knowing and intelligent. *Boykin*, 395 U.S. at 238.

Absent direction from the Court, prosecutors and Courts of Appeal will continue to underappreciate the evidentiary significance of involuntary mefloquine intoxication bearing on premeditated murder cases, especially in death penalty cases, thereby preventing the truth from ever being brought to the light of day.

That the Court of Appeals below declined to direct a renewed sanity board to include mefloquine makes this point clear. *See generally*, *Burt* v. *Uchtman*, 422 F.3d 557 (7th Cir. 2005) (trial judge violated due process without *sua sponte* ordering renewed

competency hearing upon notice that accused was treated with large doses of medication).

## II. The Law Has Not Kept Pace With Biometric Technology in Criminal Prosecutions

Biometrics have been used for years to fight the wars in Afghanistan, Iraq, against non-state actors across the world, and domestically within the United States for safety and law enforcement purposes.

"Biometrics in Afghanistan centers on denying the enemy anonymity among the populace." Center for Army Lessons Learned, *Commander's Guide to Biometrics in Afghanistan – Observations, Insights, and Lessons* (No. 11-25, 2011) (Biometrics Handbook) p. 37, A-28.

> Biometrics is a decisive battlefield capability being used with increasing intensity and success across Afghanistan. It effectively identifies insurgents, verifies local and third-country's accessing our bases and facilities, and links people to events.

*Id.* at (i).

"Biometrics allows an almost foolproof means of identification that is noninvasive yet extraordinarily accurate." *Id.* at 23, A-31-32.

Soldiers carrying enrollment devices in their kits, called BAT, for Biometrics Automated Toolset, and/or HIIDE, for Handheld Interagency Identity Detection Equipment. *Id.* at 50; A-34-35. Upon biometrics enrollment, the person is assigned a biometric enrollment number, their fingerprints and photograph are taken, an iris scan is performed, DNA is secured, personal data is obtained, all uploaded as a template.

The biometrics enrollment is transmitted to the authoritative database – Automated Biometrics Identification System (ABIS) or (A-ABIS) Afghanistan Automated Biometrics Identification System, where it is stored for later reference. *Id.* at 47; A-33-34.

When an IED event occurs, be it an explosion or where forces discover and diffuse the bomb, the GRID coordinate is recorded, the event is assigned an "IED event number" and the IED components are exploited for biometrics, *i.e.*, DNA from skin left on wires when the terrorist twists the wires or fingerprints left on components. Latent fingerprints recovered from bomb parts are then compared, or "exploited," to templates already within ABIS or A-ABIS stored from previous enrollments. A "match" is often referred to as a "hit."

The reverse is also true. Fingerprint and DNA information from IED components is uploaded, and later, when a local-national physically encounters US or Coalition personnel using biometrics equipment, a match can occur linking the individual to the

previously-uploaded DNA and/or fingerprint information.

"Simply stated, collecting fingerprints with biometric collection devices has led to the apprehension of bomb makers and emplacers." *Id.* at 4.

Biometrics will positively identify an encountered person and unveil terrorist or criminal activities regardless of paper documents, disguises, or aliases." *Id.* "Every staff element has a role in ensuring the proper incorporation of biometrics into mission accomplishment," and, "[a]ll units will have access to both table top and hand-held biometrics collection equipment like [BAT] and [HIIDE]." *Id.* at 21; A-37.

> General Petraeus lauded 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. Based on our experience in Iraq, I pushed this hard [for]

> 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

Biometric information is available to, and used regularly by, other federal agencies, state, and local departments, to include the US Department of State For example,

> DOD Biometrics protects the nation through identity dominance by enabling responsive, accurate, and secure biometrics, any place and any time, in cooperation with the Department of Homeland Security, Department of Justice, Department of State, and other government agencies and inter partners.

(https://peoiews.army.mil/programs/biometrics).

At base, biometrics relies on tried and true fingerprint and DNA evidence, something with which all courts are familiar and comfortable.

### A. Fingerprint and DNA Evidence That Witnesses Were Not Only Farmers, But Also Terrorist Bombmakers

In this case, the United States flew Afghan witnesses from the Kandahar battlefield into the United States

to testify during sentencing. The United States did not, however, disclose that three of them left their fingerprints on bombs, which is constitutional error. *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964) (police suppressed results of fingerprint and ballistics tests). The trial judge violated due process by failing to require the prosecution to produce the biometric records pertaining to Mullah Baraan and all other Afghan witnesses the United States intended to call. Before considering the issue "resolved," the trial judge should have required the prosecution to search for and produce the records and reviewed them *in camera* to determine if they were material and favorable to the defense. *See, i.e., Love* v. *Johnson*, 57 F.3d 1305 (4th Cir. 1995) (trial judge violated due process by quashing petitioner's request for agency records without first conducting an *in-camera* inspection to determine whether portions of them were material and favorable to the defense); *see also United States* v. *Weintraub*, 871 F.2d 1257 (5th Cir. 1989) (*habeas corpus* granted where prosecution withheld police reports that were material to sentencing).

This information might have informed Bales' defense strategy and advanced his efforts to undermine witness' credibility. *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972) (recognizing the importance of witnesses' credibility in a criminal trial); *see also Barton* v. *Warden*, 786 F.3d 450 (6th Cir. 2015) (prosecution withheld witness impeachment evidence); *accord Lewis* v. *Connecticut Comm'r of Correction*, 790 F.3d 1109 (2d Cir. 2015); *Bies* v. *Sheldon*, 775 F.3d 386 (6th Cir. 2014); *Dow* v. *Virga*, 729 F.3d 1041 (9th Cir. 2013).

As a matter of reasonable investigation, the prosecutor should have coordinated to ensure that biometric searches were performed when evaluating witness credibility and making plans to bring them into the United States from the Kandahar battlefield. That the records were not apparently in the prosecution's files is one error, but it is entirely another degree of legal error to claim that the U.S. Department of State would not turn over the biometric records. Prosecutors have a duty to search the files of cooperating agencies working on case, and surely the U.S. Department of State was working with the prosecution. *Kyles*, 54 U.S. at 437; *United States* v. *Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (prosecution has a duty to search files maintained by other branches of government which are aligned with its interests).

This Court noted in *Pointer* v. *Texas,* 380 U.S. 400, 405 (1965) that:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Bales was not able to confront the sentencing witnesses with the evidence of their terror

bombmaking activities to rebut the prosecution's evidence that they were "farmers" or "gardeners" in contravention of this Court's Fifth and Sixth Amendment caselaw, the remedy for which is a new trial.

Because the Court of Appeals determined not to review the post-conviction fingerprint and DNA impeachment evidence, it was not in a position to determine if the nondisclosures were material or favorable to the defense, which compounded the constitutional trial errors before the Court of Appeals. But, the prosecution at trial revealed just how substantially game-changing the fingerprint and DNA evidence of terror was when it moved the trial judge to stop the defense from mentioning it before the jury.

The prosecution's mindful decision not to disclose biometric evidence that the U.S. Department of State reported is problematic on its own. Mere negligence or slight omission is one thing. What is more troubling, and invites the attention of this Court, is the prosecution's mind-set to actively suppress the evidence for tactical advantage by keeping it not only from the defense but also from the jury, which is surely a departure from the search for truth and justice fundamental to a prosecutor's unique position of public trust. Here, the suppression was an act of commission rather than omission.

That the prosecution tried to quash mention of biometrics proves that the evidence was "material" and "favorable to the defense." It is also reveals why

the prosecution declined to pursue biometric evidence in connection with all Afghan witnesses it planned to call, especially after they were on notice of potential biometric links from the U.S. Department of State: if, as has now been revealed, the prosecution found direct evidence of terror and bombmaking, they stood to lose a tactical advantage as they strove toward imposition of the maximum penalty rather than the truth.

In sum, Bales' guilty plea cannot be fairly seen as knowing, intelligent, and voluntary in the absence of his defense counsel's assessment and development of the mefloquine intoxication evidence and the biometric terrorist impeachment evidence, both of which stood to significantly degrade the prosecution's case.

Lesser charges and penalties to include taking the death penalty off the table were likely appropriate had the United States diligently made the mefloquine and terror evidence a part of this investigation and trial.

The sanity board's conclusions are not reliable because the evidence of involuntary mefloquine intoxication was not considered, nor were mefloquine's psychotic side-effects evaluated against the *mens rea* required for premeditated murder or the affirmative defenses of lack of mental responsibility and involuntary mefloquine intoxication.

Had the jury known that the Afghan sentencing witnesses were not simple farmers or gardeners, but

also terrorist bombmakers, they would have adjudged a lesser sentence.

The United States departed from the Fifth and Sixth Amendments' rights to due process, confrontation, and the right to present a complete defense, which not only deprived Bales of a fair trial and a reliable sentence, but if left as the law, stands to deprive future accused's the right to a fair trial and a reliable sentence.

This case, absent review by this Court, sets conditions for prosecutors and Courts of Appeal to devalue the significance of mefloquine intoxication and the reliability of biometric fingerprint and DNA evidence when bringing multiple homicide prosecutions involving the death penalty.

## CONCLUSION

Because the net effect of the evidence withheld raises the very real probability that its disclosure would have produced a different result, Bales is entitled to a new trial. The Court of Appeals should have granted a new trial or returned the case to a trial judge with directions to conduct a fact-finding hearing to resolve the significant, novel, and undeveloped issues this case presents: involuntary mefloquine intoxication as a defense to multiple premeditated murders and the United States' obligation to review and produce biometric impeachment evidence available to it in a prosecution involving the death penalty.

Bales respectfully seeks a new trial or that the Court grant a Writ of Certiorari, vacate the decision of the Court of Appeals, and remand the case to the United States.

Respectfully submitted,

JOHN N. MAHER*
KEVIN J. MIKOLASHEK
DAVID G. BOLGIANO

MAHER LEGAL SERVICES PC
7 EAST MAIN STREET,
NUMBER 1053
ST. CHARLES, ILLINOIS 60174
johnmaher@maherlegalservices.com
(708) 468-8155

May 16, 2018 *Counsel of Record

## APPENDIX A

**United States Court of Appeals**
**for the Armed Forces**
**Washington, D.C.**

United States,
Appellee

**v.**

Robert Bales,
Appellant

USCA Dkt. No. 18-0055/AR
Crim.App. No. 20130743

**O R D E R**

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is, by the Court, this 15th day of February, 2018,

ORDERED:

That said petition is hereby granted; and, That the decision of the United States Army Court of

Criminal Appeals is affirmed.[*]

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (Maher)
Appellate Government Counsel (Fenwick)

[*]It is directed that the court-martial order be corrected to reflect that Appellant pleaded guilty to Charge III, Specification 7, and Charge VI.

## APPENDIX B

**UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Before
TOZZI,[1] SCHASBERGER, and BURTON
Appellate Military Judges

**UNITED STATES, Appellee**

**v.**

**Staff Sergeant ROBERT BALES**
**United States Army, Appellant**

ARMY 20130743

Headquarters, I Corps
Jeffery R. Nance, Military Judge
Colonel William R. Martin, Staff Judge Advocate

For Appellant: Mr. Aaron B. Maduff, Esquire (argued); Major Christopher D. Coleman, JA; Mr. John N. Maher, Esquire; Mr. John D. Carr, Esquire; Mr. Aaron B. Maduff, Esquire (on brief and reply brief).

For Appellee: Captain Austin L. Fenwick, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel

[1]Senior Judge Tozzi took final action while on active duty.

A.G. Courie III, JA; Captain Tara O'Brien Goble, JA; Major Anne C. Hsieh, JA (on brief); Major Michael Korte, JA.

27 September 2017

MEMORANDUM OPINION

***This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.***

BURTON, Judge:

In the early morning hours of 11 March 2012, appellant walked off his military outpost, Village Stability Platform (VSP) Belambay in Kandahar Province, Afghanistan, and entered two Afghan villages nearby where he shot twenty-two Afghan civilians in their homes, murdering sixteen of them and wounding six. Appellant now seeks a sentence rehearing alleging the prosecution failed to disclose evidence related to his case, the court failed to investigate a military judge's disclosure of protected information, and an unreasonable multiplication of charges for sentencing. We disagree and affirm the findings and sentence.

A military judge sitting as a general court-martial, convicted appellant, pursuant to his pleas, of sixteen specifications of premediated murder, six specifications of attempted murder, one specification of violating a lawful general order, one specification of

wrongfully using a Schedule II controlled substance, four specifications of intentional infliction of grievous bodily harm, one specification of assault with a dangerous weapon, one specification of assault consummated by battery,[2] and one specification of wrongfully burning bodies, in violation of Articles 80, 92, 112a, 118, 128 and 134, Uniform Code of Military Justice, 10 U.S.C §§ 880, 912a, 918, 928, 934 (2012) [hereinafter UCMJ]. A panel sentenced appellant to a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances and reduction to the grade of E-1. The convening authority deferred the reduction in rank and the adjudged forfeitures until action. The remainder of the sentence was approved. The automatic forfeitures of all pay and allowance required by Article 58b, UCMJ, were further waived at action for a period of six months with direction that these funds be paid for the benefit of appellant's wife and children. Appellant was credited with 527 days of pretrial confinement credit.

We review this case under Article 66, UCMJ, and conclude one of appellant's assigned errors merits discussion but no relief. Similarly, we considered those matters personally raised by appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982), one of which also warrants discussion but no relief.

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[2]In February 2012, appellant assaulted an Afghan truck driver in front of several junior enlisted soldiers.

## BACKGROUND

Appellant was deployed to Afghanistan and was stationed at VSP Belambay. In the early morning hours of 11 March 2012, appellant left VSP Belambay and travelled to the village of Alikozai. Appellant was armed with his M4 rifle, H&K 9 millimeter pistol, advance combat helmet with night vision device, one full magazine containing thirty 5.56mm rounds for his M4 and one magazine containing fifteen 9mm rounds for his H&K pistol. While in Alikozai, appellant killed four people by shooting them at close range, which included two elderly men, one elderly woman and one child. Appellant also assaulted six people, which included one woman and four children.

When appellant ran low on ammunition, he returned to VSP Belambay to obtain additional ammunition. Appellant left VSP Belambay for a second time, this time armed with his M4 rifle, 9mm H&K pistol, M320 grenade launcher with accompanying ammunition belt, night vision device and ammunition for all of his weapons. Walking south, appellant entered the village of Naja Bien. While in Naja Bien, appellant entered a home where a family was sleeping. Appellant pulled a man from the home to an adjacent courtyard, where he killed the man in front of his family by shooting him at close range. Appellant then entered another home where a different family was sleeping. With the fire selector switch on his M4 set for three-round bursts, he shot ten people in the head at close range, which included three women and six children. Appellant then grabbed

a kerosene-filled lantern from the floor, emptied the contents onto the bodies of the individuals he had just murdered, lit a match and set the bodies on fire. As he was leaving, appellant shot an elderly woman in the chest and head at close range with his 9mm. The woman did not die from being shot so appellant crushed her skull with his boot, stomping with so much force that her face and head were mutilated.

As appellant was returning to VSP Belambay, he was met by three soldiers. The soldiers seized appellant's M4 rifle, M320 grenade launcher, H&K 9mm pistol, numerous magazines and ammunition for those three weapons as well as appellant's helmet, night vision device, and a large piece of blue decorative fabric that appellant had taken from one of the homes and was wearing on his back. Appellant's clothes were soaked in blood.

Appellant was escorted to the Operations Center, were he was guarded by two soldiers until special agents from the Criminal Investigation Command (CID) arrived. While being guarded, appellant made several statements to include: "I thought I was doing the right thing," "I'm sorry that I let you guys down," "My count is twenty," "It's bad, it's really bad," and "We should have hit them harder."

When CID arrived, the special agents seized appellant's computer, clothing, weapons, and ammunition. They also discovered and seized anabolic steroids that appellant had hidden under the boardwalk outside of his room.

## LAW AND DISCUSSION

*A. Alleged Due Process and Discovery Violations*

On appeal, appellant claims he is entitled to a new sentencing hearing because, *inter alia,* the government violated his due process and discovery rights and committed fraud upon the court-martial. Appellant's claims are largely based on his post-trial discovery of "undisclosed evidence" that is not properly before this court. Specifically, appellant moved this court to attach as an appellate exhibit a declaration from a defense consultant, who was retained post-trial, which purportedly "linked" several government witnesses to improvised explosive device (IED) events both before and after the charged offenses. Although offered in the form of a sworn declaration, the information contained in the declaration and accompanying enclosure was of uncertain origin, authenticity, reliability, and classification. Moreover, appellant's assertion that the information in the declaration was known to the government prior to trial was made without supporting evidence. Accordingly, after our initial consideration and subsequent reconsideration, we denied appellant's request to attach the declaration to the appellate record. Therefore, any claim of relief based on this "undisclosed evidence" is unfounded.

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Evidence is

said to be material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley,* 514 U.S. 419, 433-434 (1995) (quoting *United States v. Bagley,* 473 U.S. 667. 682 (1985)). This is an affirmative duty to disclose and requires no triggering action by the defense. *Strickler v. Greene,* 527 U.S. 263, 280 (1999) (citing *United States v. Agurs,* 427 U.S. 97, 107 (1976)). The "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" has long been a recognized duty of trial counsel. *Kyles,* 514 U.S. at 437. In order to have "a true *Brady* violation[, t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler,* 527 U.S. at 281-82. Courts have a responsibility to consider the impact of undisclosed evidence dynamically, in light of the rest of the trial record. *United States v. Pettiford,* 627 F.3d 1223, 1229 (D.C. Cir. 2010) (citing *Agurs,* 427 U.S. at 112). "Once a *Brady* violation is established, courts need not test for harmlessness." *United States v. Behenna,* 71 M.J. 228, 238 (C.A.A.F. 2012) (citing *Kyles,* 514 U.S. at 435-36).

In addition, "Article 46, UCMJ, provides the trial counsel, defense counsel, and the court-martial with 'equal opportunity to obtain witnesses and other evidence in accordance with' the rules prescribed by the President." *United States v. Stellato,* 74 M.J. 4 73,

481 (C.A.A.F. 2015) (quoting Article 46, UCMJ). The procedural rules as prescribed by the President explain the trial counsel's unique obligations in furtherance of this statutory mandate by Congress. In this case, there are two pertinent provisions. First, Rule for Courts-Martial [hereinafter R.C.M.] 701 (a)(6) states: " (t]he trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to [n]egate" or "'[r]educe" the guilt or punishment of the accused. Second, R.C.M. 701 (a)(2)(A) provides the trial counsel shall permit the defense to inspect certain items "which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense .... "

The former provision "is limited to information 'known to the trial counsel[,]'" but does not require materiality or a triggering request by the defense. *United States v. Shorts,* 76 M.J. 523, 530-31 (Army Ct. Crim. App. 2017) (quoting R.C.M. 701(a)(6)). Conversely, the latter provision is not limited to information known to the trial counsel, but requires materiality and an express request to trigger the government's obligation because "[w]ithout the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession." R.C.M. 701 analysis at A21-34. As we have stated before, the distinction between the two provisions is significant, because "whether the trial counsel exercised reasonable diligence in response to the request will depend on the specificity of the request." *Shorts,* 76

M.J. at 530.

Limiting our consideration to the record properly before us and with the above legal framework in mind, we review de novo appellant's remaining claims related to his initial discovery request and the "rumors" concerning a government witness. *See United States v. Roberts,* 59 M.J. 323, 326 (C.A.A.F. 2004) (distinguishing between the deference ordinarily given to discovery ruling by a military judge and the de novo review of purely legal questions like a "military judge's determination of materiality").

*1. Appellant's Initial Discovery Request*

In this case, the scope of appellant's pretrial discovery requests included the following:

> 2. Any books, papers, emails ... computer files ... which are in the possession, custody, or control of military or U.S. and Afghani [sic] authorities, and which are material to the preparation of the defense ....
>
> . . . .
>
> [6.]d. All material, emails, documents, etc[.] ... related to updates regarding the progress of this case provided to any person, organization, Government entity (military or civilian) or any foreign military or civilian person

> or organization. . . . This request is on-going.
>
> . . . .
>
> 24. Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, victims, 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 .... all Afghan or intelligence files or data lists
>
> . . . .
>
> 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, and or any other pertinent trait of character of any witness and/or alleged victim. M.R.E. 404(a)(2) and (a)(3).

The government's response to appellant's discovery request included Bates-stamped and indexed files delivered to the defense in excess of 36,000 pages. Additionally, the government provided broad discovery of classified evidence, which included several hundred pages of documents in indexed form, as well as DVDs

with copies of entire folders from the Special Operations Task Force-Secret share portal, the Coalition Task Force (CTF) Arctic Wolves share portal, and the CTF Arrowhead share portal.

Defense counsel filed a motion to compel discovery in which they acknowledged that they "cannot provide the exact information that it seeks, nor can the Defense tell the Government of the location of such evidence." At a subsequent hearing, defense counsel stated: "Sir, since the original filing of the defense discovery request back in January, of course *most of these things have in fact taken care of themselves."* (emphasis added). Defense counsel raised a few outstanding discovery issues but none of the remaining issues related to biometric data or derogatory information for any of the government's witnesses. Therefore, regarding the discovery of evidence under R.C.M. 701(a)(2), appellant's initial request for information about the character of the victims and government witnesses appears to have been satisfied or abandoned.

*2. Appellant's Request for Character Evidence Related to a Government Witness*

The government filed a motion in limine that sought to limit defense counsel's references to unsubstantiated allegations regarding the victims, to include arguments that one of the government witnesses had ties to the Taliban. Specifically, the government wanted to exclude from evidence the unverified claim that BN's biometric data appeared to

match the biometric data of a former Coalition Forces detainee. In a subsequent motions hearing, defense counsel represented to the military judge that while they intended "to portray the general atmosphere" in which appellant committed the offenses, they did not intend to offer evidence "as to the innocence of the victims as a whole group." Instead, defense counsel's request for character evidence was limited to the rumors pertaining to BN, as articulated in the following discussion:

> ATC1: Yes, Your Honor. There was innuendo and rumor potentially that there had been an investigation related to this one witness. That led to our initial filing of the motion. We have subsequently, pursuant to a request from the defense, we had asked before as well, re-inquired of the Department of State to see if there is any document, any investigation, any paperwork whatsoever to a negative response -- in other words, they responded that they have no such investigation, they have no documentation whatsoever to that effect. We replied on 16 August, last Friday, to the defense to that effect. So there is nothing to provide. Obviously we understand *Brady* and the requirements thereof. We have nothing to give the defense because we have inquired and ----
>
> MJ: And there is none?

ATC1: As far as we know based on our inquires ---

MJ: As long as the [S]tate [D]epartment is telling you the truth?

ATC1: Yes, Your Honor, and we certainly believe that they are.

MJ: So do I.

CDC: Your Honor, I guess then the defense, we'll submit that for a discovery request. I'd still like to know what the rumor was, what the information is, where this came up. We had no idea of this issue at all until they moved to exclude it. So I'd just like to know what is going on at all.

MJ: Okay. Well, get with them and find out. The other side of this though, Defense, is -- I mean, even if the information does exist, and it is, you know, potentially *Brady* material, it seems to me that it relates to the defense's [sic].

CDC: Your Honor, the defense's position would be that that depends what the witness testifies to on the stand. So for instance, if the witness was in fact detained by [C]oalition [F]orces in [sic]

found to be a member of the insurgency and the witness testifies on the stand that he is not and never has been a member of that and goes on about it, then it becomes relevant as something besides the defense.

MJ: Well, is this witness testifying?

ATC1: He is, Your Honor.

MJ: Okay. Is somebody going to ask him that question?

ATC1: We don't intend to, Your Honor.

CDC: I'm not going to ask him, but I have no idea, as the government has pointed out, what he's actually planning to say on the stand.

MJ: Back to that. Okay. Well, you all get together and talk about this ----

CDC: Okay.

MJ: ---- and if we need to talk about it further, we can talk about it further. But it seems to me that, you know, the trial counsel has done their due diligence and they've received the

response from the [S]tate [D]epartment that there is no such investigation. Now, they can tell you where they heard this rumor from, you know, and you all can run that to the ground if you want to and see if there's anything there that needs to be. But I don't think the discovery rules, nor *Brady,* require the government to hold a congressional investigation into the [S]tate [D]epartment' s assertion that there was no such investigation to make sure that, under oath, somebody from the [S]tate [D]epartment says that there was no such investigation. I think they've done, in other words, what they are required under the law to do to determine if there's any investigation into this individual such that there may be *Brady* material to provide to the defense.

CDC: Yes, Your Honor.

MJ: All right. So you all get together and figure out where the rumor came from and if there's anything that grows out of that that I need to hear about and decide on, let me know and I will.

ATC1: Yes, Your Honor.

MJ: Otherwise, I'm going to mark

> this as resolved; not requiring a ruling from me at this point, that's what resolved stands for.

Here, the record of trial demonstrates the government's prior knowledge of the claimed "'undisclosed evidence" was limited to unsubstantiated rumors. The government's efforts to substantiate the rumors left them uncorroborated. Consistent with our holding in *Shorts,* "to comply with *Brady,* a trial counsel must search his or her own file, and the files of related criminal *and administrative investigations.* However, consistent with our superior court's interpretation of the issue, we require a trial counsel only exercise due diligence." 76 M.J. at 532 (citing *United States v. Simmons,* 3 8 M.J. 276 (C.A.A.F. 1993)). We find trial counsel exercised the diligence due under *Brady* and as required under R.C.M. 701 (a). Furthermore, we presume any concerns defense counsel had at the time of trial were resolved or abandoned as no further action was taken on the record pertaining to BN. Appellant has failed to show on appeal that the government's efforts to discover information related to BN or any other witness were either insufficient or disingenuous.

*3. Immateriality of the "Undisclosed Evidence"*

Notwithstanding the apparent satisfaction or abandonment of appellant's evidentiary requests, we specifically note the lack of materiality concerning the allegedly "undisclosed evidence" pertaining to BN (and the other witnesses and victims). Even assuming the

information pertaining to these witnesses was discovered and disclosed to appellant before trial, we see no scenario for the use of such evidence for impeachment during the presentencing phase of trial based on the witnesses' testimony.[3] This is particularly true where, as in this case, appellant has disclaimed any lawful justification for his use of deadly force in the following stipulation of fact:

> Specifically, the Accused did not honestly believe that any of his victims intended to immediately kill him or inflict grievous bodily harm against him, and it was objectively unreasonable to believe that any of his victims from the night of 11 March 2012 posed an immediate threat when he attacked them while they were peacefully in their homes, mostly asleep, all unarmed, and while the Accused was heavily armed with multiple lethal firearms. The Accused agrees that most of his victims were women, children, and old men, not military-age males. *The Accused agrees that he had no intelligence that any of his victims were members of the insurgency or enemy*

[3]At trial, defense counsel conceded the information they believed about BN would not be relevant unless BN was questioned and denied any involvement with IEDs or the Taliban. BN testified about the appearance of his brother after he was murdered and the impact of his brother's death on his family. BN was not questioned by the defense.

*combatants. He did not have any information that the homes where he committed the massacres housed any members of the insurgency or enemy combatants.*

. . . .

The Accused specifically waives the defense of defense of others. The Accused understands that defense of others may be a complete defense to the offenses of Charges I, II, and III in this case, and recognizes that this defense does not apply to him. Specifically, the Accused did not have a reasonable belief that death or grievous bodily harm was about to be inflicted on him or his fellow Soldiers at VSP Belambay. The Accused did not have a reasonable belief that death or grievous bodily harm was about to be inflicted on any person defended and did not actually believe that the force he used was necessary to protect any person. The Accused's victims resting or sleeping in their own homes posed no threat whatsoever to the personnel on VSP Belambay or any other Coalition Forces in Afghanistan at the time of the Accused's murders.

. . . .

> The Accused specifically waives the defense of obedience to orders. The Accused was not acting under any order from any person of authority to commit any of the acts that form the basis for the charges in this case. He did not believe that he was acting pursuant to any lawful order or authority.

(emphasis added). There was no information the government possessed that was not disclosed to appellant. Even assuming, arguendo, there was, the evidence appellant suggests was immaterial. Therefore, we find no basis for granting appellant's requested relief.

*B. Government's Sentencing Argument*

Relying on the same "undisclosed evidence," appellant alleges the government committed fraud upon the defense and the court-martial panel during presentencing argument by referring to the witnesses and victims as "innocent" or "farmers."[4] At trial defense counsel made no objections to the government's use of either reference. However, on appeal, appellant specifically alleges as fraudulent the following argument by the government:

> Most of the people in Alikozai, like the

---

[4]In argument spanning nineteen pages in the trial transcript, the government referred to innocent people approximately six times and made two references to farming.

> people who live at the two homes you see in front of you , are farmers making a living growing crops, typically of grape or wheat, oftentimes on someone else's property.
>
> . . . .
>
> While [appellant] continues his walk home, just a thousand meters away at FOB Zangabad, [appellant's] victims from the village of Alikozai have arrived, having been brought there by the heroic efforts of [F, son of MN] .... [F, son of NM,] brings with him five of those six injured from Alikozai; [including] ... [R, son of S,] shot through both legs, a bullet still lodged in one of them .... As Dr. Hawks and his medics were frantic in saving innocent lives rather than take them, [appellant] continues his leisurely walk home.

In general, "'[d]eviation from a legal rule is error unless the rule has been waived.'" *United States v. Ahern,* 76 M.J. 194, 197 (C.A.A.F. 2017) (quoting *United States v. Girouard,* 70 M.J. 5, 10 (C.A.A.F. 2011)). As our superior court has explained, "[while an appellate court] reviews forfeited issues for plain error, [appellate courts] do not review waived issues because a valid waiver leaves no error to correct on appeal." *Id.* (internal citation omitted). "'Whereas forfeiture is the failure to make a timely assertion of a right, waiver is

the intentional relinquishment or abandonment of a known right.'" *Id.* (quoting *United States v. Gladue,* 67 M.J. 311, 313 (C.A.A.F. 2009)). "'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *Id.* (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). Ultimately, whether an appellant has waived an issue is a question of law we review de novo. *Id.* (citing *United States v. Rosenthal,* 62 M.J. 261, 262 (C.A.A.F. 2005)).

Pursuant to Article 36(a), UCMJ, Congress delegated to the President the authority to prescribe procedural and evidentiary rules for courts-martial. Under the applicable procedural rules, the President has prescribed that the *"[f]ailure to object* to improper argument before the military judge begins to instruct the members on findings *shall constitute waiver* of an objection." R.C.M. 919(c) (emphasis added). Similar to the procedural rule at issue in *Ahern,* "[t]his is not a case where the rule uses the word 'waiver' but actually means 'forfeiture.'" 76 M.J. at 197 (citing as an example R.C.M. 920(f), which equates the failure to object to panel instructions with "waiver of the objection in the absence of plain error"). Therefore, as a matter of law, appellant is not entitled to the three-part review for plain error. Instead, appellant is

entitled to a review of the *validity* of his waiver.[5] *See id.* (contrasting the review applicable to forfeited issues and waived issues).

In this case, appellant failed to object to a single reference of "innocent people" or "farmers" during argument. Accordingly, this issue is waived and there is no legal error to correct on appeal. Moreover, there is no cause for us to exercise our discretionary authority to address this issue notwithstanding appellant's waiver. Even assuming appellant preserved this issue for appellate review, we find neither error in nor prejudice from trial counsel's argument. In its full context, trial counsel's reference to "innocent people" or "farmers", "did not manipulate or misstate the evidence." *Darden v. Wainwright,* 4 77 U.S. 168, 182 (1986). In fact, the innocent people referred to were in their homes asleep when they were attacked by appellant.

*C. Appellant's Alleged Use of Lariam*

At his guilty plea, appellant waived the defense of voluntary intoxication. On appeal, however, appellant personally avers the government failed to

---

[5]Although this court can review issues waived at trial pursuant to its Article 66(c), UCMJ, authority, "[w]aiver at the trial level continues to preclude *an appellant* from raising the issue before either" this court or our superior court. *United States v. Chin,* 75 M.J. 220, 223 (C.A.A.F. 2016) (citing *Gladue,* 67 M.J. at 313-14). Based on the facts in this case, we see no need to engage in a lengthy discussion or grant relief for these waived issues.

provide him with information that he had been prescribed an anti-malaria medication called Lariam, also known by its chemical component name mefloquine hydrochloride. To support this claim, appellant submitted an affidavit from a noncommissioned officer who believed appellant was prescribed Lariam. Appellant also provided an affidavit from Dr. Remington Nevin, a medical expert retained by appellant in 2017, who similarly believed appellant was exposed to Lariam during his deployment to Iraq in 2003-2004. Appellant concedes his medical records are void of any information about him being prescribed Lariam. Instead, appellant's medical records indicate he was prescribed a different anti-malaria medication, doxycycline hyclate, on 4 October 2011 and the prescription was last refilled on 11 April 2012.

Based on these facts, appellant makes a two-fold assumption. First, he surmises that since a full bottle of doxycycline was collected among his personal effects after the charged offenses, he could not have been taking doxycycline. Second, he assumes he must have been taking Lariam as an alternative anti-malarial medication. However, appellate did not submit an affidavit claiming he ingested Lariam, nor did he provide an affidavit from any person that saw him take Lariam.

In response to the government's pretrial motion to compel reciprocal discovery, appellant admitted he was not aware of any medical records suggesting he was prescribed Lariam. In response, the government

filed a subsequent motion to preclude evidence that appellant ingested Lariam. At the hearing on this motion, the military judge stated, "my understanding of that is that the defense doesn't intend to offer any evidence about that drug [Lariam] at all. That was my understanding of the defense's response." The defense responded, "That's correct, Your Honor."

To resolve this issue raised on appeal, appellant requests a fact-finding hearing pursuant to *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). Under the circumstances of this case, however, we see no need to order a *DuBay* hearing. Appellant's factual allegations--even if true--would not result in relief. *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997). Furthermore, the affidavits of the noncommissioned officer and Dr. Nevin "[do] not set forth specific facts but consist instead of speculative [and] conclusory observations .... " *Id.* Moreover, "the appellate filings and the record as a whole 'compellingly demonstrate' the improbability of [appellant's claims]." *Id.* Applying the first, second, and fourth *Ginn* principles to appellant's submission, we reject appellant's claim that he was likely exposed to Lariam. Even assuming appellant was prescribed Lariam, there would still be no evidence he actually took it and was under its influence during the commission of his crimes.

## CONCLUSION

On reconsideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Senior Judge TOZZI and Judge SCHASBERGER concur.

FOR THE COURT:

/s/
JOHN P. TAITT
Acting Clerk of Court

## APPENDIX C

## HANDBOOK

No. 11-25 APR 11

[GRAPHICS OMITTED]

Commander's Guide to Biometrics in Afghanistan

Observations, Insights, and Lessons

U.S. UNCLASSIFIED / FOR OFFICIAL USE ONLY
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EXEMPT FROM MANDATORY DISCLOSURE
under FOIA Exemptions 2 and 5

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## Chapter 5

## Biometrics-Enabled Intelligence

### Introduction

Fusion of disparate information or intelligence related to a person or biometric identity to other people (identities), events, activities, combined with economic, population, and governmental atmospherics provide a higher level of fusion/analysis to attack the insurgent network or "find, fix and finish off enemy leaders."[1] The intent of biometrics-enabled intelligence (BEI) is to identify an individual and link that individual to broader groups through all-source intelligence capabilities, including biometrics, forensics, document exploitation, cell phone exploitation, and media exploitation.

### Biometrics-Enabled Intelligence in Afghanistan

Biometrics in Afghanistan centers on denying the enemy anonymity among the populace. Biometrics are unique and can positively identify an individual. Linking intelligence products, operational information, or other data to a biometric record and placing an individual on the biometrics-enabled watch list (BEWL) is the simplest form of BEI.

In Afghanistan, BEI analysts are being deployed to the brigade combat teams, special operations elements,

regional commands (RCs) (division level), and other coalition forces/elements by request. The duties of the BEI analyst are very broad in spectrum and continue to develop. To be successful, BEI analysts must integrate with the intelligence staff officer and operations staff officer to provide subject-matter expertise on the meaning of biometric and forensic matches when combined with traditional intelligence, contextual, and combat information. The BEI analyst also coordinates for the development of BEI products in support of force protection, operational planning, and intelligence activities. The BEI multiechelon structure allows for development of more complex and comprehensive products.

There are several BEI organizations providing support to the forward deployed BEI analyst: the theater BEI cell at Bagram Air Base; 513th Military Intelligence (MI) Brigade at Fort Gordon, GA; and the Biometrics Intelligence Program (BIP) at the National Ground Intelligence Center (NGIC) at Charlottesville, VA. Requests for development of BEI products are processed 24 hours a day, 7 days a week by imbedded BEI analysts or the theater BEI cell and are elevated to the proper organization based on suspense time, complexity, and available resources.

* * * *

you want the individual kept off other locations. A tracking report should be completed on all watch list hits.

- Targeting is enhanced through the use of biometrics by positive identification of the target. The photo can assist when conducting a cordon and search or other type of search activity. Fingerprints and iris collection for identification or verification on site can help confirm individual target identification. Individuals targeted for operations are usually on the theater BEWL, but their associates may not be. Requesting biometrics on these non-watch listed personnel may be valuable in locating the primary target.

- Mapping the human terrain can contribute markedly to overall area security. Knowing who belongs in a village — who they are, what they do, to whom they are related, and where they live — all helps to separate the locals from the insurgents.

- Whenever possible, commanders and staff members should provide feedback to the biometric collectors when the organization has a successful biometrics

"hit" or succeeds in either taking an insurgent out of the fight or laying the groundwork for someone else to take him out of the fight.

**Operations staff officer**

Biometrics collection and utilization is primarily an operations function. Like any other weapon system, lethal and nonlethal, it must be incorporated into the unit's synchronization matrix and provision made for its full employment. By using biometrics properly, the S-3 separates the insurgent from the populace, rendering him vulnerable to coalition activity (Figure 3-2). As noted in ISAF *Commander's Counterinsurgency Guidance*, our operations are most effective "when the insurgents have become so isolated from the population that they are no longer welcome, have been kicked out of their communities, and are reduced to hiding in remote areas and raiding from there." Biometrics allows an almost foolproof means of identification that is noninvasive yet extraordinarily accurate. Using biometrics collections along with other forensics capabilities will ultimately secure the area for both coalition forces and the local populace.

[GRAPHICS OMITTED]

**Figure 3-2. Example of an insurgent match**

* * * *

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[GRAPHICS OMITTED]

**Figure A-1. Enrollment and collection platforms**

Fingerprint recognition has long been used by law enforcement and provides a good balance related to the seven measures of biometrics. Nearly every human being possesses fingerprints (universality) with the exception of hand-related disabilities. In Afghanistan, however, a lifetime of hard work has all but eradicated some fingerprints on local farmers. They present something of a challenge, but there should be some readable prints on a standard ten-print card. Fingerprints are distinctive and fingerprint details are permanent, although they may temporarily change due to cuts and bruises on the skin or external conditions (e.g., wet fingers). Live-scan fingerprint sensors can quickly capture high-quality images (collectability). The deployed fingerprint-based biometric systems offer good performance, and fingerprint sensors have become quite small and affordable. In some societies, fingerprints have a stigma of criminality associated with them, but that is changing with the increased demand of automatic recognition and authentication in a digitally interconnected society (acceptability). By combining the use of multiple fingers, cryptographic techniques, and "liveness" detection, fingerprint systems are becoming quite difficult to circumvent. Fingerprints used in tactical biometric collections provide a direct

link to battlefield forensics and the latent prints of value collected from pre- and post-blast forensic collections, cache sites, safe houses, and anywhere else a person has been. When seeking bomb makers, emplacers, or other "forensically interesting" individuals, fingerprints are the biometric of choice.

* * * *

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against all templates when the identity of the person is unknown. If a match is (or is not) made, then a decision is made based on why the biometric was submitted. When matching a fingerprint against a watch list, receiving “no match” results means the person hasn’t been identified for further scrutiny. When matching an iris against a base access roster, a positive match means the person will be allowed access.

The two most prevalent biometrics collections systems in use in Afghanistan are the Biometrics Automated Toolset (BAT) and the Handheld Interagency Identity Detection Equipment (HIIDE). These systems are available as theater-provided equipment and can also be requested for use in situational training exercises in preparation for deployment.

The BAT system is made up of a ruggedized laptop computer, BAT software, fingerprint scanner, iris image collection device, and a camera. It is a multimodal system (collects and matches against more

than one biometric) used to collect, match, transmit, and store biometrics and related contextual data. It can be used to identify and track persons of interest and to build digital dossiers on individuals that include interrogation reports, biographic information, and relationships. The database of information and biometrics are shared throughout the theater, and much of the data can be shared with other federal agencies.

The HIIDE is the primary collection tool for biometrics in a tactical environment and is a tactical extension of BAT. It can collect the same three modalities as the BAT system, but due to size and processing power, does not have the same database and connectivity capabilities as the BAT. This is the primary device used for enrollments in Afghanistan based on its portability (2.3 pounds) and the challenges of the rugged environment. The HIIDE is used to enroll and establish the identity of persons of interest in forward deployed sites, on objectives, or any other time coalition forces desire to check a person's claimed identity.

* * * *

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**COA approval**

- Biometrics collection must be incorporated in specified rehearsals.
- Biometrics collection and the use of BEWLs should be included in the high-pay off target list, as appropriate.

**Orders production**

- Biometrics collection and/or exploitation should be included in every OPORD to the extent appropriate for the operation.
- Biometrics must be included in the reconnaissance and surveillance plan as well as the collection management plan.
- Biometrics is a key part of the common operational picture.
- Biometrics may also lead to its own branches and/or sequels.
- Synchronization of all aspects of the operation should incorporate biometrics functions.
- Biometrics must be included in the information network.

- Biometrics must also be considered an operational security measure.

**Staff Elements Responsibilities**

Every staff element has a role in ensuring the proper incorporation of biometrics into mission accomplishment. By the same token, every staff element can utilize the biometrics collections system in some capacity. Planning operations to incorporate biometrics systems takes minor coordination.

**Intelligence staff officer**

Biometrics serves the intelligence staff officer (S-2) several ways in day-to- day operations. Below are recommended tasks that provide the S-2 with a complete picture when conducting IPB or identifying key elements of local networks.

- Biometrics-enabled intelligence (BEI) personnel at theater and above can create products that fuse biometrics information with terrain analysis (in effect, biometrics-enabled IPB). These products can be invaluable in planning operations that can lead to improved biometrics collections. For example, some products will actually become recommended named areas of interest (NAIs) for the collection of biometrics and are likely to result in matches against the theater BEWL or against unknown

latent files. Much of this type of analysis — termed human terrain mapping — is currently produced by the National Ground Intelligence Center (NGIC) in conjunction

* * * *

[Page 3]

## Chapter 1

## Operationalizing Biometrics

[GRAPHICS OMITTED]

**Depiction of watch list 1 high-value target detained as a result of biometrics screening. (Note: Named individual "Ghazni Gul" is fictional and used for training purposes only.)**

Scenarios, as the one described above, occur with increasing regularity. Biometrics collections and forensic exploitation of improvised explosive devices (IEDs), cache sites, safe houses, and vehicles support the counterinsurgency (COIN) effort by giving commanders additional tools to separate the insurgents from the populace. Biometrics is a critical COIN nonlethal weapon system. (Appendix A contains a comprehensive description of biometrics collection.)

All units will have access to both table top and hand-held biometrics collection equipment like the Biometrics Automated Toolset (BAT) and Handheld Interagency Identity Detection Equipment (HIIDE). This equipment helps units conduct biometrics collection for a wide range of missions across the spectrum of operations. Lessons from theater indicate it is vital for commanders to ensure their personnel are adequately trained to effectively operate the equipment. Just as an infantry commander would not rotate duties of manning a machine gun at random, operation of biometric equipment should be a dedicated mission for a designated group of service members. Evidence in theater indicates that dedicated biometric enrollers increase the level of proficiency and enable more thorough

* * * *

## APPENDIX D

**THE ASSISTANT SECRETARY OF DEFENSE**
1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200

[SEAL]
HEALTH AFFAIRS 17 Jan 2012

MEMORANDUM FOR
ASSISTANT SECRETARY OF THE ARMY (M&RA)
ASSISTANT SECRETARY OF THE NAVY (M&RA)
ASSISTANT SECRETARY OF THE AIR FORCE (M&RA)
COMMANDER, JOINT TASK FORCE NATIONAL CAPITAL REGION MEDICAL

SUBJECT: Service Review of Mefloquine Prescribing Practices

Some deploying Service members have been provided mefloquine for malaria prophylaxis without appropriate documentation in their medical records and without proper screening for contraindications. In addition, not all individuals have been provided the required mefloquine medication guide and wallet information card, as required by the Food and Drug Administration. Providing our Service members with the highest quality care is one of the most important

things we do; thus, it is incumbent upon us to ensure our Service members are appropriately screened and informed about the medicines they are taking, and we must accurately record their prescriptions in their medical records.

The Department of Defense Instruction 6490.03, "Deployment Health," dated August 11, 2006, addresses the administration of Force Health Protection prescription products and remains in effect. It requires qualified personnel to dispense all Force Health Protection prescription products under a prescription, and that the prescription be recorded in individual medical records.

Please review your Service's quality assurance procedures for the use of mefloquine, with particular emphasis placed on screening for contraindications, documentation of patient education, and documentation of mefloquine prescriptions in medical records. The contraindications for mefloquine use are discussed in the attached Health Affairs Policy 09-017, "Policy Memorandum on the Use of Mefloquine (Lariam ) in Malaria Prophylaxis." Your review should include mefloquine dispensed at medical treatment facilities, pre-deployment processing locations, and in deployed locations. Your review also should confirm that your health care providers understand the important screening and documentation requirements associated with prescribing mefloquine.

Please provide me with the results of your review within 90 days of this memorandum, including

deficiencies identified, and measures taken to correct them, along with a copy of any updated Service-wide policies addressing these issues. The point of contact for this matter is COL Scott Stanek. COL Stanek may be reached at (703) 575-2669, or Scott.Stanek@tma.osd.mil.

/s/
Jonathan Woodson, M.D.

Attachments:
As stated

Cc:
Surgeon General of the Army
Surgeon General of the Navy
Surgeon General of the Air Force
Medical Officer of the Marine Corps
Joint Staff Surgeon