IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee, *- versus -* **MICHAEL C. BEHENNA,** First Lieutenant (0-2), U.S. Army *Appellant.*	USCA Dkt. No. 12-0030/AR Army CCA Dkt. No. 20090234 Date: 18 October 2011

AMICUS CURIAE BRIEF OF

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

In Support of Appellant

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U N I T E D S T A T E S, *Appellee*, **- versus -** **MICHAEL C. BEHENNA,** First Lieutenant (0-2), U.S. Army *Appellant*.	USCA Dkt. No. 12-0030/AR Army CCA No. 20090234

BRIEF OF AMICUS CURIAE
National Association of Criminal Defense Lawyers

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TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

_____

ISSUE

WHETHER THE GOVERNMENT VIOLATED THE DUE PROCESS RIGHTS OF APPELLANT WHEN IT FAILED TO TIMELY DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE ON THE CRUCIAL FACTUAL ISSUES LITIGATED AT TRIAL?

STATEMENT OF THE CASE

Amicus accept the Appellant's Statement.

STATEMENT OF FACTS

Amicus accept the Appellant's facts - the following are

relevant to *Amicus'* arguments.

1LT Behenna was court-martialed for *inter alia* the premeditated murder of a suspected Iraqi terrorist, Ali Mansur [Mansur]. The Government prosecuted 1LT Behenna on the theory that while he was interrogating Mansur, who was alleged to have been sitting on a rock [R.394], Behenna executed Mansur by shooting him twice with his pistol, the first shot to the head. 1LT Behenna testified that as he was questioning Mansur, Mansur attempted to distract him and the next thing that Behenna saw was Mansur lunging at Behenna's arm that was holding the pistol. 1LT Behenna instinctively fired a two-shot burst – both shots hit Mansur; one in the rib cage under his right arm and the other in his head.

The key issues were, was Mansur sitting or standing when he was shot, and the shot sequencing, *viz.,* did the first shot go to the rib cage or to Mansur's head. The government retained Dr. Herbert MacDonell as an expert in scene reconstruction and blood-spatter analysis.[1] Dr. MacDonell did not testify.

The Defense called a forensic pathologist and a scene reconstructionist, who both testified that based upon the autopsy findings and physical evidence at the incident scene, that Mansur had been standing when the first shot (with his right arm not in the bullet track) hit him in the rib cage, and the second shot hit him in the head. R.959-62; 980-83. Of particular relevance was the

[1] MacDonell has been described as the "preeminent practitioner" in his field. *United States v. Mustafa,* 22 M.J. 165, 166 (CMA 1986).

fact that the two wounds were “horizontal” and “parallel” to each other.[2]

The court-martial recessed for the day after the defense experts’ testimony, and the three Government counsel and their experts, including Dr. MacDonell, met privately to discuss the defense case. R.1463 *et seq.* During that meeting, according to Dr. MacDonell [and unrebutted by the Government], “While talking with Dr. Berg about the bullet wounds Ali Mansur received, Dr. Berg gave me information I previously did not have. Dr. Berg told me that the wound trajectories for both the chest wound and the head wound were horizontal and essentially parallel.”[3] Dr. MacDonell also testified that during that prosecutorial meeting:

> [T]he only thing that I can come up with consistent with all of the facts as I know them would be that he probably was shot in the side with his arm up--in the chest or side, and then as he dropped straight down the bullet went through his head because he passed in front of the muzzle at the exact moment, though extremely unlikely that that’s [sic] happened. R.1463.

Dr. MacDonell then performed a demonstration using a prosecution paralegal showing how, in his expert opinion,[4] the shooting took place. That expert opinion was exactly the same as the Defense experts’ opinions, *viz.,* that Mansur was not sitting [contrary to

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[2] Appellant’s Supplement herein, Appendix “B,” at 2 and 4. That refuted the Government’s theory that Mansur was sitting on the rock when shot. If that were factually correct, the trajectory of the two wounds, since 1LT Behenna was standing, would have been in a downward angle, and not parallel.

[3] *Id.* at 2.

[4] *Cf.* MRE 702 and 704.

the prosecution's claims], but was standing and was shot first in the chest and then as he dropped, the second shot went parallel into his head. That "favorable" opinion was not disclosed to the Defense *prior to* the guilty verdicts.

Knowing that Dr. MacDonell had opined that the Government's theory that Mansur was executed while sitting on a rock, with the first shot to the head, was *inconsistent* with the physical evidence; and that *no* direct government evidence or testimony rebutted the Defense experts and 1LT Behenna's testimony, lead Trial Counsel nevertheless proceeded to argue before the members that Mansur was executed while sitting on the rock, with the first shot to his head, and the second to his chest. R. 1328-46, 1410.

The Defense – not knowing of Dr. MacDonell's opinions or his demonstration to the prosecutors that was consistent with both the facts and theory of the Defense, argued as 1LT Behenna testified, that he shot Mansur as he was leaping to grab his pistol, as corroborated by the Defense forensic experts.

During rebuttal, Trial Counsel belittled Behenna's testimony as "an impossible situation" [R.1410] and "incredible" [R.1412-13]. The Appellant was convicted later that day. R.1437-39.

SUMMARY OF ARGUMENT

Dr. MacDonell's expert opinion as to both the deceased's position (standing) and the sequencing of the two shots, was *Brady*[5] material, as it (a) contradicted the prosecution's theory of the case; and (b) corroborated the Defense experts' opinions as well as the testimony of the Appellant.

Trial Counsel had both a legal and ethical obligation[6] to *timely* disclose Dr. MacDonell's opinion to the Defense. Under the circumstances of this case, that required them to notify the Defense *prior* to the Defense resting and the case submitted to the members for Findings.

Dr. MacDonell's opinion was "material" for *Brady* purposes. Under the circumstances, *i.e.,* the Government's Constitutional (*Brady*); statutory (Article 46, UCMJ); and ethical (AR 27-26) duties to disclose MacDonell's expert opinion, which was by any definition "favorable" to the Appellant, coupled with the affirmative misrepresentation by the Government to Mr. Zimmermann upon his specific inquiry, that Dr. MacDonell did not have any "exculpatory information" the day after releasing him to depart

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[5] *Brady v. Maryland,* 373 U.S. 83 (1963).

[6] *See* Army Regulation [AR] 27-26, *Rules of Professional Conduct for Lawyers* (1992), Rule 3.8, *Special Responsibilities of a Trial Counsel,"*

> A trial counsel shall:
> * * * * *
> *(d)* make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense . . . .

Fort Campbell, perpetuated a fraud upon the court-martial.[7]

Finally, the failure to disclose Dr. MacDonell's expert opinion denied Appellant a fair trial in another fundamental way. It allowed the Trial Counsel to make an improper closing argument – had the Defense been privy to MacDonell's expert opinions, they could have objected to those arguments.

ARGUMENT

I.
THE GOVERNMENT VIOLATED THE DUE PROCESS RIGHTS OF APPELLANT WHEN IT FAILED TO TIMELY DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE ON THE CRUCIAL FACTUAL ISSUES LITIGATED AT TRIAL.

A. Dr. MacDonell's Expert Opinion was *Brady* Material.

"*Brady*" material was defined by the Supreme Court as "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment. . . ." 373 U.S. at 87. Dr. MacDonell's expert opinion was favorable to the Appellant because it supported his position both as to the position of the deceased (standing with arm out) and the shot sequences (chest then head). It was also favorable to the Defense because it refuted the Government's theory, *i.e.,* the deceased was sitting on a rock and rebutted their shot sequence (head then chest).

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[7] *Compare* Article 73, UCMJ. *See generally* J. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence,* 22 Okla. City U. L. Rev. 833 (1997).

As refined in *Kyles v. Whitley,* 514 U.S. 419, 434 (1995):

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Considering Dr. MacDonell's professional status, the fact that he - a Government retained expert - opined consistent with the professional opinions of the Defense experts as well as the testimony of the Appellant, the failure to give the fact-finder the benefit of his opinions and qualifications, makes the verdict inherently suspect. Or, as *Kyles* further observed:

> Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, ***the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.*** [emphasis added]

514 U.S. at 439.

Amicus Curiae respectfully submit that under the circumstances a reasonable person cannot have any confidence in this verdict. *See United States v. Gil,* 297 F.3d 93, 101 (2nd Cir. 2002) ["Evidence is favorable ... if it either tends to show that the accused is not guilty or it impeaches a government witness."] *See also United States v. Rivas,* 377 F.3d 195, 199-200 (2nd Cir. 2004).

B. A *Brady* Violation is a Due Process Violation.

> We now hold that the suppression by the prosecution of evidence favorable to an

> accused upon request ***violates due process*** where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [emphasis added]

373 U.S. at 87. *See also Giles v. Maryland,* 386 U.S. 66, at 68 (1967). Or, as the Court subsequently observed:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.

United States v. Bagley, 473 U.S. 667, 675 (1985).

In *United States v. Triumph Capital Group, Inc.,* 544 F.3d 149 (2nd Cir. 2008), the Court addressed a similar *Brady* violation, holding first: "The government has a duty to disclose all material evidence favorable to a criminal defendant." *Id.* at 161. That Court went on to observe:

> When the government violates this [*Brady*] duty and obtains a conviction, ***it deprives the defendant of his or her liberty without due process of law.*** [emphasis added] *Id.*

The court in *Benn v. Lambert,* 283 F.3d 1040 (9th Cir. 2002), a capital *habeas corpus* appeal, encountered a similar scenario - the prosecution's failure to timely disclose an *exculpatory* expert's report. In *Benn,* one of the aggravating factors was an alleged arson-insurance fraud claim. Like this case, the expert's *preliminary* report was disclosed to the Defense which was quite misleading. A subsequent report - not disclosed to the Defense - concluded that there was no evidence of arson, but rather the fire

was accidental due to an electrical defect in a furnace. The Court affirmed *habeas* relief based upon numerous *Brady* violations, including the failure to tender the exculpatory expert report. Judge Trott authored a poignant concurring opinion about the *Brady* issue where he observed:

> Prosecutors routinely take an oath of office when they become stewards of the executive power of government. That oath uniformly includes a promise at all times to support and defend the Constitution of the United States. Fortunately, the great majority of all prosecutors appreciate the solemnity of this oath. However, if a prosecutor fails to abide by this undertaking, it is the duty of the judiciary emphatically to say so. Otherwise, that oath becomes a meaningless ritual without substance.

283 F.3d at 1063-64. The failure to timely disclose Dr. MacDonell's opinion and demonstration, violated both the letter and spirit of *Brady* and its progeny. *See* P. Giannelli & K. McMunigal, *Prosecutors, Ethics and Expert Witnesses,* 76 Fordham L. Rev. 1493, 1514 (2007).

C. Dr. MacDonell's Opinion Was Material for *Brady* Purposes.

Of particular relevance here was counsel's specific request to the Government the morning after Dr. MacDonell left Fort Campbell, *viz.,* asking if Dr. MacDonell had any exculpatory evidence. The Court in *Bagley* addressed that scenario:

> ***And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial***

> ***decisions on the basis of this assumption.*** ... The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken ***had the defense not been misled by the prosecutor's incomplete response***. [emphasis added]

473 U.S. at 682-83. *Accord, United States v. Rivas, supra*. Both courts below erroneously concluded that Defense Counsel should have been "psychic" and somehow known the specifics of Dr. MacDonell's undisclosed expert opinions.

Dr. MacDonell's suppressed opinions need to be put into the perspective of his expertise. *See, e.g., Ex parte Mowbray,* 943 S.W.2d 461, 463, n.1 (Texas Cr. App. 1996), *cert. denied* 521 U.S. 1120 (1997). *See also State v. Hall,* 297 N.W.2d 80, 85 (Iowa 1980) ["Professor MacDonell's considerable experience and his status as the leading expert in the field...."]. Having someone with Dr. MacDonell's professional stature and qualifications *agree* with the Defense theory of the case and Appellant's testimony, while contradicting the Government's theory of events, could not help but be material in the constitutional, *Brady* sense - and the Government had to recognize that, hence the decision to release him to return to New York and not timely disclose his exculpatory and favorable expert opinions.

ACCA erroneously shifted the burden to the defense. MacDonell's cryptic comment to Defense Counsel as he was leaving

the courthouse to return to New York, that he "would have made a great witness for you," [R.1461-62] which the Court below concluded was in some manner sufficient to transmit his expert opinions to the Defense, cannot rise to the level of actual "notice" of those opinions. Under the circumstances, any doubt should be resolved in the Appellant's favor.

Finally, if there is any question about the materiality and necessity of disclosure here, RCM 701(a)(2)(B) resolves this issue - Dr. MacDonell's *opinions* were "material to the ***preparation of the defense***. . . ." *United States v. Adens,* 56 M.J. 724, 733 (Army CCA 2002)[emphasis added].

D. MacDonell's *Favorable* Evidence Was Not Timely Disclosed.

> [W]e need not decide whether the prosecution appreciated the significance of Garcia's testimony from the beginning, or came to appreciate its significance later at the *Wade* hearing, or even later, in the midst of trial. ***It is clear enough, without deciding these questions, that the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use.*** [emphasis added]

Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001) [*habeas corpus* granted].[8] RCM 701(a)(6) provides:

> *Evidence favorable to the defense.* The trial counsel ***shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel*** which reasonably tends to:

[8] For a scholarly analysis of *Leka* in the military context, *see* MAJ C. Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?* May 2002, *Army Lawyer* 18, *et seq.*

> (A) Negate the guilt of the accused of an offense charged;
>
> (B) Reduce the degree of guilt of the accused of an offense charged; or
>
> (C) Reduce the punishment. [emphasis added]

There was no dispute below that the Defense had made a timely Discovery Request which made it clear that the Defense was aggressively seeking all "favorable" evidence from the Government. *See also MCM* (2008), App. 21, Analysis of RCM 701(a)(6), at A21-33. *See generally* Maj LeEllen Coacher, *Discovery in Courts-Martial*, 39 A.F. L. Rev. 103, at 106 (1996) ["This rule also has substantial ethical and constitutional implications." (footnotes omitted)].

At a minimum, *Amicus* submits that the Government should have alerted the Defense to Dr. MacDonell's "favorable" evidence on the evening of 25 February 2009, (after his demonstration) and certainly should have given such notice *prior* to the verdicts. Rather than disclose, the Government counsel appear to have fallen into the mistake identified in *Kyles, supra, i.e.,* to allow a prosecutor's "private deliberations" versus the fact-finder to ascertain "the truth about criminal accusations." 514 U.S. at 440. The "private deliberations" of Trial Counsel created the issues now pending before this Court.

Amicus would note the ABA Standards for Criminal Justice, *The Prosecution Function,* (3rd ed.), and in particular, Prosecution Standard 3-3.11, *Disclosure of Evidence by the Prosecutor,* likewise

imposes a similar duty on the Government:

> (a) A prosecutor should not intentionally fail to make ***timely disclosure*** to the defense, ***at the earliest feasible opportunity***, of the existence of all evidence ***or information*** which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused. [emphasis added].[9]

F. The Failure to Disclose Dr. MacDonell's Expert Opinions Perpetuated a Fraud Upon the Court-Martial.

Amicus Curiae submit that the Court should address this question. Under the circumstances, the guilty verdicts here are suspect based upon Dr. MacDonell's suppressed opinions that were not disclosed until after the verdicts had been announced. The Discussion to RCM 1210(f)(3), *Fraud on court-martial*, is relevant here:

> Examples of fraud on a court-martial which may warrant granting a new trial are: ... ***willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial would probably have resulted in a finding of not guilty*** . . . . . [emphasis added]

Compare Article 69(b), UCMJ ["fraud on the court"]; and Article 73, UCMJ ["fraud on the court"]. *See also United States v. Brooks,* 49 M.J. 64, 70 (CAAF 1998).

Amicus Curiae do not suggest that purported *Brady* violations are *per se* frauds upon the court-martial - only that they may be and it is a factor applicable to the Appellant's pending case

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[9] *See also* ABA Formal Ethics Opn. 09-454, *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense* (2009). Appendix "A" herein.

before this Court. Rather, we urge the Court to again consider Judge Trott's well-reasoned concurring opinion in *Benn:*

> The law and the truth-seeking mission of our criminal justice system, which promise and demand a fair trial whatever the charge, are utterly undermined by such prosecutorial duplicity. ... By unlawfully withholding patently damaging and damning impeachment evidence, the prosecutor knowingly and willfully prevented Benn from confronting a key witness against him. Such reprehensible conduct shames our judicial system.

283 F.3d at 1063. Whether or not Dr. MacDonell's opinions in this case were willfully or negligently withheld from the Defense is not the issue. The ultimate issue is simply, is the verdict of *this* court-martial, under *these circumstances*, worthy of confidence? No one in our military justice system should face the specter of a murder conviction and a lengthy sentence of imprisonment under the cloud now hanging over this case.

II.
REASONS WHY REVIEW IS WARRANTED.

A. This Is Not An Isolated Case.

A sampling of cases from the last ten years demonstrates that the dictates of *Brady,* Article 46, UCMJ, and RCM 701 are ignored (or misunderstood) by military prosecutors, their supervisors, and sometimes, military judges in the context of evidence "favorable" to an accused. The conduct of the Trial Counsel here speaks louder than her words. Once she *heard* Dr. MacDonell's final expert opinions; *saw* his demonstration corroborating those opinions; and

then *heard* Appellant's testimony which was totally consistent with MacDonell's opinions and demonstration, the prosecution literally sent him "packing" – out of the courthouse, out of Fort Campbell and out of the State – all before the verdicts and before disclosing Dr. MacDonell's favorable opinions.

A brief overview of some of the so-called *Brady* cases demonstrates that this case is not an isolated incident, and thus the need for this Court to issue a "bright line" decision addressing the problem.

- *United States v. Dobson,* 2010 WL 3528822 (ACCA)[unpub],[10] *rev. denied* 69 M.J. 458 (CAAF 2010): That Court noted, "This is not the first case in recent months where this court has been faced with the nondisclosure of discovery materials."[11] There the Government deliberately did not disclose that the lead CID agent was under criminal investigation and court-martial charges against him were withheld until after Dobson's trial. While denying relief, the Court held: "Hiding the ball and 'gamesmanship' have no place in our open system of discovery."[12]

- *United States v. Trigueros,* 69 M.J. 604 (ACCA), *rev. denied* 69 M.J. 269 (CAAF 2010): Here the government failed to disclose a rape victim's mental health records prior to verdict. ACCA noted - correctly – that under the unique military discovery provisions, that nondisclosure may *not* violate *Brady*, but could (and in that case, did) violate Article 46, UCMJ, and RCM 701.[13]

- *United States v. Webb,* 66 M.J. 89 (CAAF 2008): Trial Counsel deliberately chose not to disclose Article 15, UCMJ, punishment of a key government witness prior to trial. It was disclosed a week after the trial concluded. In affirming the grant of a New Trial motion,

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[10] Appendix "B" hereto.

[11] *Id.* at *3, n.2 [citation omitted].

[12] *Id.* at *7 [citation omitted].

[13] 69 M.J. at 610.

this Court noted: "an accused's right to discovery is not limited to evidence that would be known to be admissible at trial. ***It includes materials that would assist the defense in formulating a defense strategy.***" [emphasis added][14]

- *United States v. Steward,* 62 M.J. 668 (AFCCA 2006): Trial Counsel made a conscious decision not to disclose certain medical records in an alleged "date rape" case. Although disclosed mid-trial, the defense argued "too little; too late" and sought a mistrial which was denied. On appeal the Court held that the "medical records were clearly material to the preparation of the defense," and reversed.[15] The Court went on to note that the withheld materials "contained evidence that could undermine every part of the government's case."[16]

- *United States v. Jackson,* 59 M.J. 330 (CAAF 2004): This was a urinalysis case where the laboratory failed to disclose a "false positive" quality control result to *either* the Trial or Defense Counsel. Quoting RCM 701(a)(2)(B)'s requirement to allow discovery of any "results ... of scientific tests,"[17] this Court held that the nondisclosure violated RCM 701, and reversed.

- *United States v. Santos,* 57 M.J. 317 (CAAF 2004): CID records were not disclosed prior to the conclusion of the court-martial. This Court, while denying relief, held:

> The review of discovery violations involves case-specific considerations. In another case, undisclosed [discovery] that cast doubt on the credibility of a witness might have greater value.[18]

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[14] 66 M.J. at 92 [citations omitted]. Here, a reasonable defense strategy *after* the Government's cross-examination of the defense forensic experts and the Appellant, would have been to "rebut" that by Dr. MacDonell's demonstration before the members.

[15] 62 M.J. at 671 [citations omitted].

[16] *Id.* Here, Dr. MacDonell's opinions would have undermined the government's theory that Mansur was sitting and that the first shot was to his head.

[17] 59 M.J. at 334.

[18] 57 M.J. at 322. This *is* such a case. Dr. MacDonell's demonstration would have cast significant doubt on the credibility of the government's key "fact" witnesses, SSG Warner (who testified under a grant of immunity) and (continued...)

- *United States v. Mahoney,* 58 M.J. 346 (CAAF 2003): This Court reversed a conviction for a discovery violation. At issue was a government opinion *critical* of the prosecution's forensic expert. Here, it is clear that Trial Counsel was "critical" of Dr. MacDonell's opinions and demonstration. This Court concluded that the Government's failure to provide that discovery rose to the level of a "constitutional due process violation under *Brady.*"[19]

- *United States v. Adens,* 56 M.J. 724 (ACCA 2002): The government failed to disclose relevant physical evidence until mid-trial.[20] Notably that Court - the same CCA as herein - held that while the nondisclosure did not rise to the level of a *Brady* violation, it did violate Article 46, UCMJ, and specifically cited RCM 701(a)(2)(B).[21] *Adens* conflicts with the decision below in the context of requiring discovery "material to the preparation of the defense."[22]

B. Remedial Efforts Have Been Ineffective.

Review is further warranted because, notwithstanding appellate "hand slapping" and academic commentary noted above, the Army itself has for many years sought to educate military prosecutors and their superiors of the parameters of the military's broad discovery entitlements. Yet, as this case demonstrates, convictions rather than justice, seem to be the prosecutorial goals. A cursory search by *Amicus* of past editions of the *Army Lawyer*, shows numerous examples of attempts to "fix" the on-going, nondisclosure issues. We note the following:

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[18] (...continued) "Harry."

[19] 58 M.J. at 350.

[20] 56 M.J. at 725.

[21] *Id.* at 732-33.

[22] RCM 701(a)(2)(A) and (B).

- CPT W. Kilgallin, *Prosecutorial Power, Abuse, and Misconduct,* April 1987, *Army Lawyer* 19, at 21-21.

- MAJ L. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice,* October 1994, *Army Lawyer* 15, at 19-21.

- Faculty, Army TJAG School, *The Art of Trial Advocacy,* February 1999, *Army Lawyer* 1, at 2-5.

- MAJ E. O'Brien, *New Developments in Discovery: Two Steps Forward, One Step Back,* April 2000, *Army Lawyer* 38.

- MAJ C. Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?* May 2002, *Army Lawyer* 18.

- MAJ M. Kohn, *Discovery and Sentencing - 2008 Update,* March 2009, *Army Lawyer* 35.

- LTC E. Carpenter, *Simplifying Discovery and Production: Using Easy Frameworks to Evaluate the 2009 Term of Cases,* January 2011, *Army Lawyer* 31.

Clearly, the Army JAG Corps has made efforts to put its prosecutors, their superiors, and military judges on notice of the correct constitutional, statutory, and ethical discovery standards concerning "favorable" evidence. But, as this case again demonstrates, Trial Counsel either failed to grasp the significance of nondisclosure herein, or deliberately ignored their obligations.

C. This Case Provides An Appropriate Vehicle To Provide Judicial Guidance on Mandated Disclosure of *Favorable* Evidence.

This case demonstrates that Trial Counsel simply did not recognize what was *favorable* evidence under any standard and further did not appreciate the concomitant duty to either disclose such evidence or seek judicial guidance. *Brady/Kyles* and their progeny set the constitutional standard. And as the *Adens* Court

noted:

> A soldier has the right to a fair trial conducted in accordance with his statutory rights under the Uniform Code of Military Justice.[23]

Amicus respectfully suggests that 1LT Behenna did not receive a fair trial because Dr. MacDonell's "favorable" information was not *timely* disclosed. This Court respectfully should grant review not only to address the nondisclosure issues presented, but also to use this case as a vehicle to clearly establish that it will no longer tolerate lackadaisical attitudes towards constitutional, statutory, and ethical discovery requirements.

CONCLUSION

Review should be granted for good cause shown. [4,473]

Dated: 18 October, 2011

Respectfully submitted:

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[23] 56 M.J. at 734.

CERTIFICATE OF E-FILING AND SERVICE

I, *DONALD G. REHKOPF, JR., Esq.,* hereby certify that this document was electronically filed with the Court at: efiling@armfor.uscourts.gov. and served on counsel for the Appellant and Appellee via email, this 18th day of October 2011, to wit:

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CERTIFICATIONS

1. This Pleading complies with the type-volume limitations of Rules 21(b), 24(d) and 26(d) [4,500 words] because it contains **4,473** words, as counted by WordPerfect, Version X4's "Word Count" function;

2. This Pleading complies with the typeface and type style requirements of Rule 37 because it was typed in WordPerfect Version X4's ***Courier New***, monospaced typeface, using 12-point font.

DATED: 18 October 2011

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APPENDIX “A”

APPENDIX “B”

U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee
v.
Sergeant Kimberly E. DOBSON United States Army, Appellant.
ARMY 20000098.

9 Aug. 2010.

Headquarters, Fort Carson, Patrick J. Parrish, Military Judge (trial), Michael Hargis, Military Judge (rehearing), Colonel Joseph L. Graves, Jr., Staff Judge Advocate (trial), Colonel Stephanie D. Willson, Staff Judge Advocate (post-trial), Lieutenant Colonel Mark Sydenham, Acting Staff Judge Advocate (rehearing).

For Appellant: Lieutenant Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Grace M. Gallagher, JA; Captain Pamela Perillo, JA (on brief). For Appellee: Colonel Norman F.J. Allen III, JA; Lieutenant Colonel Francis C. Kiley, JA; Major Philip M. Staten, JA; Captain Patrick G. Broderick, JA (on brief).

Before TOZZI, HAM,[FN1] and SIMS Appellate Military Judges.

FN1. Judge HAM took final action in this case prior to her permanent change of duty station.

MEMORANDUM OPINION ON FURTHER REVIEW

HAM, Judge:

***1** In a retrial of a premeditated murder case, we must decide whether the government's failure to disclose impeachment information about the lead United States Army Criminal Investigation Command (CID) agent was harmless beyond a reasonable doubt. We strongly condemn the government's tactics in this case and remind practitioners that gamesmanship can play no part in the discovery process in the military justice system. We hold, however, that under the specific facts of this case, the government's error was harmless beyond a reasonable doubt. We affirm the findings and sentence.

Procedural History

At her first trial (Dobson I), a general court-martial composed of officer and enlisted members convicted appellant, contrary to her plea, of premeditated murder, in violation of Article 118, Uniform Code of Military Justice, 10 U.S.C. § 918 [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge, confinement for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority credited appellant with 341 days of confinement against the sentence to confinement. On 20 August 2004, this court affirmed the findings and sentence approved by the convening authority. *United States v. Dobson*, ARMY 20000098 (Army Ct.Crim.App. 20 August 2004) (unpub.).

On 20 March 2006, the United States Court of Appeals for the Armed Forces (C.A.A.F.) reversed our decision, concluding that the military judge erred in excluding the testimony of two witnesses concerning prior threats made by the victim against appellant on two separate occasions. *United States v. Dobson*, 63 M.J. 1, 22 (C.A .A.F.2006). The C.A.A.F. returned the record of trial to The Judge Advocate General for remand to this Court to either "(1) affirm a conviction of the offense of unpremeditated murder and either reassess the sentence or order a sentence rehearing; or (2) authorize a rehearing on the charge of premeditated murder." *Id.* at 23. On 14 June 2006, this court authorized a rehearing by the same convening authority on the charge of premeditated murder. *United States v. Dobson*, ARMY 20000098 (Army Ct.Crim.App. 14 June 2006) (unpub.).

At the rehearing (Dobson II), a court-martial composed of officer and enlisted members convicted appellant, contrary to her plea, of premeditated murder, in violation of Article 118, UCMJ. The panel sentenced appellant to a dishonorable discharge, confinement for life without the possibility of parole, forfeiture of all pay and allowances, and a reduction to Private E1. The convening authority approved only so much of the sentence to confinement as provided for confinement for life with the possibility of parole and otherwise approved the adjudged sentence. The convening authority also credited appellant with 2,953 days of confinement credit.

This case is again before the court for review pursuant to Article 66, UCMJ. We have considered the record of trial, appellant's assignments of error, the matters personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C .M.A.1982), and the government's response. As noted above, we find one of

appellant's assignments of error merits discussion but no relief.

***2** Appellant claims the military judge erred in not granting the defense motion for mistrial where the government failed to disclose an investigation and later charges of fraud against the lead CID agent. We disagree.

FACTS

Appellant was twice tried for the brutal murder of her husband. During Dobson I, CID Special Agent Chief Warrant Officer Two (SA) JR testified that he was the lead CID agent in the case, but the focus of his investigative work was searching for the murder weapon, attempting to locate a possible person of interest named "Debra," and tracking down the origin of anonymous letters purporting to be from an eyewitness to the killing. At some point after appellant's first court-martial, but before her rehearing, the government initiated a criminal investigation against SA JR. During Dobson II, SA JR testified again about his involvement as the lead CID investigator on the case and his specific duties. He explained the Colorado Springs Police Department was the initial responding agency and processed the crime scene. When he was called to be part of the investigation the next day, he signed for the evidence the Colorado Springs officers had collected, conducted an unsuccessful search for the murder weapon, a search for the person of interest, and a search for the origin of the anonymous letters. Special Agent JR also testified as a defense witness in appellant's second trial, laying the foundation for a dental bite comparison report submitted by the defense establishing the origin of a bite mark found on appellant.

Discovery Request and Government Nondisclosure

On 19 October 2006, defense counsel submitted a discovery request. As part of the request, the defense asked for, "Any known evidence tending to diminish credibility of any witness including ... evidence of other character, conduct, or bias bearing on witness credibility under [Military Rule of Evidence] 608." Defense also requested "[d]isclosure of all investigations of any type or description, pending, initiated, ongoing or recently completed which pertain to alleged misconduct of any type or description committed by a government witness[.]"

In its 19 October 2006 written response to the defense request, the government stated, "Special Agent [JR] is currently being investigated for misconduct. The investigation is being conducted by the CID higher headquarters and the [g]overnment is not aware of the nature of the misconduct." As a follow up to the request, on 12 February 2007, the government responded, "[SA JR]'s misconduct relates to larceny of money while he was deployed to Iraq. If you want any further information on the investigation, [MAJ S, the chief of justice for the Fort Carson Office of the Staff Judge Advocate] can assist." That same day, defense counsel met with MAJ S, who informed defense counsel that SA JR's misconduct related to an alleged larceny of money from an evidence room in Iraq. MAJ S was unsure whether the amount alleged to have been stolen was $50,000 or $500,000 and was further unsure what charges the government planned to prefer against SA JR.

***3** Neither MAJ S nor any other government agent ever disclosed to the defense that SA JR was also under investigation for fraud.

On 13 March 2007, one week after appellant's court-martial concluded, the government preferred numerous charges against SA JR, including dereliction of duty, larceny, fraud, and fraternization. On 30 May 2007, the defense filed a motion for a mistrial.

Post–Trial Article 39(a), UCMJ and Military Judge's Findings

The military judge held a post-trial Article 39(a), UCMJ session to litigate the defense mistrial motion.[FN2] The military judge heard testimony from MAJ S; CPT W, the CID trial counsel who prosecuted SA JR; CPT R, the trial counsel who drafted the charge sheet for the case against SA JR; and CPT S, a Trial Defense Service counsel at Fort Carson. As a result of the Article 39(a), UCMJ session, the military judge made a number of findings of fact, which we adopt.

> FN2. We commend the military judge for holding a post-trial Article 39(a), UCMJ session and establishing at the trial level a record of the events surrounding the government nondisclosure. This is not the first case in recent months where this court has been faced with the nondisclosure of discovery materials. *See United States v. Trigueros,* ––– M.J. ––––– (Army Ct.Crim.App. 29 March 2010). In each case, the military judge took prompt action ensuring a full record for our review. We encourage all military trial judges and convening authorities to do the same.

The military judge's findings included the following: The Criminal Investigation Command's Standards of Conduct Office (SOCO) conducted an investigation into

SA JR's conduct, first contacted MAJ S in late September 2006, and provided her a copy of the investigation on 17 October 2006. The CID investigation report "include[d] allegations against [SA JR] of both larceny and fraud...." Major S never informed CPT B, the trial counsel in this case, that she had the CID investigation, though she did tell him prior to 19 October 2006 that SA JR was under investigation "so that information could be provided to the defense."

The military judge specifically found,

> MAJ S testified that the Criminal Law Division, Office of the Staff Judge Advocate, Fort Carson, Colorado, did not provide a copy of the CID investigation to the Defense team, even after the 19 October 2006 discovery request, because at that point a decision to call [SA JR] as a witness had not been made. She also testified that the Criminal Law Division, Office of the Staff Judge Advocate, Fort Carson, Colorado, did not provide a copy of the investigation to the [d]efense team, even after the 19 October 2006 discovery request, because [trial defense counsel] did not ask for a copy of the investigation, even though he knew that [SA JR] was under investigation.
>
> ... [T]he Criminal Law Division, Office of the Staff Judge Advocate, Fort Carson, Colorado, did not provide a copy of the CID investigation to the [d]efense team, even after the 19 October 2006 discovery request because the [c]hief of [m]ilitary [j]ustice did not believe they were required to do so absent a specific request for that CID investigation, which [defense counsel] never made, but which [the chief of justice] tried to prompt from him.... The [c]ourt finds the first explanation above for not providing the CID investigation to the defense team to be implausible. If this were the reason, then [trial counsel] would not have told the defense team that [SA JR] was even under investigation on 19 October 2006, as [the chief of justice] testified the decision to call him as a witness in Dobson II had not been made at that time.

***4** The military judge further found defense counsel knew SA JR was under investigation for larceny prior to Dobson II, "but did not know that he was under investigation for travel or [Basic Allowance for Housing] fraud until after the conclusion of Dobson II...." [FN3] Finally, the military judge found although government counsel "testified to the contrary," the government made a "tactical decision not to prefer charges against [SA JR] prior to Dobson II ... because of the potential impact preferral would have on [SA JR] as a witness in Dobson II."

FN3. Unlike fraud, larceny is not a *crimen falsi* offense. However, in some circumstances, it is an appropriate matter for impeachment under Mil. R. Evid. 608(b) as pertaining to character for truthfulness or untruthfulness. "[T]he key to the impeachment question is not the fact of the arrest itself but, instead, whether the underlying facts of the arrest relate to truthfulness or untruthfulness." *United States v. Robertson*, 39 M.J. 211, 215 (C.M.A.1994). "Acts of perjury, subornation of perjury, false statement, or criminal fraud, embezzlement or false pretenses are, for example, generally regarded as conduct reflecting adversely on an accused's honesty and integrity." *United States v. Weaver*, 1 M.J. 111, 118 n. 6 (C.M.A.1975). *See also* *United States v. Frazier*, 14 M.J. 773, 778 n. 9 (A.C.M.R.1982) (In determining admissibility of prior convictions involving "dishonesty or false statement" under Mil. R. Evid. 609(a), "[n]o conviction should be automatically disregarded because it does not qualify on its face as admissible.... Support for admission may be found in the underlying circumstances involved in the offense...."). *But see* *United States v. Jefferson*, 23 M.J. 517, 519 (A.F.C.M.R.1986) (holding that shoplifting is not an offense bearing on truthfulness and is not proper cross-examination under Mil. R. Evid. 608(b); *United States v. Valente*, 17 M.J. 1087, 1089 n. 4 (A.F.C.M.R.1984) (finding error where appellant was cross-examined on "a number of unconnected larcenies.") Larceny under Article 121, UCMJ, contains three methods of committing the offense: wrongful taking, obtaining, and withholding. If the offense of larceny is committed by wrongful obtaining, it must be done by false pretences. Thus, certain larceny by false pretences would be an offense that bears on witness' character for truthfulness or untruthfulness and may be inquired into on cross-examination. The record in this case does not reveal the underlying facts of SA JR's larceny, thus we cannot determine whether the offense relates to truthfulness under Mil. R. Evid. 608(b) and would have been appropriate cross-examination material.

LAW AND ANALYSIS

A. Denial of the Mistrial

Rule for Courts–Martial [hereinafter R.C.M.] 915(a) vests a military judge with the discretion to declare a mistrial when "manifestly necessary in the interest of

justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915. However, mistrials are to be used only "under urgent circumstances and for plain and obvious reasons." *Trigueros*, slip op. at 7 (internal citations omitted).

An appellate court "will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F .2009). A military judge abuses his discretion when his "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Webb*, 66 M.J. 89, 93 (C.A.A.F.2008). As detailed below, we conclude the military judge did not abuse his discretion in denying the mistrial.

B. Required Disclosure of Evidence

The military judge properly concluded the government "had an obligation to provide that CID report of investigation to the [d]efense, even absent a discovery request of any kind." and thus violated its disclosure duties under the United States Constitution and the UCMJ. *See* UCMJ art. 46; *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Roberts*, 59 M.J. 323 (C.A.A.F.2004); R.C.M. 701. However, we also agree with the military judge's conclusion that the discovery violation was harmless beyond a reasonable doubt and thus a mistrial was not warranted.

We review *de novo* the military judge's conclusions of law. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F.1995).

The Due Process Clause of the Fifth Amendment requires the prosecution to disclose evidence that is material and favorable to the defense. *Brady*, 373 U.S. at 87. This is so whether there is a general request or no request at all. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Under due process discovery and disclosure requirements, the Supreme Court has found no " 'distinction between impeachment evidence and exculpatory evidence.' " *United States v. Eshalomi*, 23 M.J. 12, 23 (C.M.A.1986) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "[W]hen an appellant has demonstrated error with respect to a *Brady* nondisclosure, the appellant is entitled to relief only if there is a reasonable probability that there would have been a different result at trial had the evidence been disclosed." *Trigueros*, slip op. at 8 (citing *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F.2004)).

***5** However, disclosures in the military are also governed by R.C.M. 701, "which sets forth specific requirements with respect to 'evidence favorable to the defense' ..." *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F.1999) (emphasis omitted). Under R.C.M. 701, the government bears a higher burden to prove a nondisclosure in response to a specific request is harmless beyond a reasonable doubt. *Webb*, 66 M.J. at 92; *Roberts*, 59 M.J. at 327. We agree with the military judge's determination that, although the discovery request did not name SA JR specifically, it did contain a specific request for any impeachment evidence and the CID investigation, which " 'gave the [government] notice of exactly what the defense desired.' " *Eshalomi*, 23 M.J. at 22 (quoting *Agurs*, 427 U.S. at 106). Thus, the government bears the burden to show that failure to disclose the CID investigation was harmless beyond a reasonable doubt.

We find three reasons for our determination the government's nondisclosure was harmless beyond a reasonable doubt. First, we agree with the military judge's conclusion that SA JR "played a minor role" in the government's case against appellant. Although he was the lead CID agent in the case, his role consisted primarily of signing for and taking custody of evidence that the Colorado Springs Police Department had already collected and investigation of other tangential aspects of the case. He did not collect forensic evidence the government used in the case against appellant and he did not conduct the approximate eight-hour interrogation of appellant. In this case, the Colorado Springs Police Department was the initial responding agency and gathered the vast majority of the physical and forensic evidence, identified eyewitnesses, and conducted the lengthy interrogation of appellant.

Second, SA JR's testimony at appellant's first trial was consistent with his testimony at the second. The military judge found, and we concur, that if defense had challenged SA JR's testimony by inquiring into the misconduct, it would have "opened the door to the [g]overnment's admission of [SA JR]'s prior testimony ...." thus "bolstering" his testimony with a prior consistent statement. Instead, the defense team made a "reasonable tactical decision to forgo inquiry into misconduct that took place after the incidents about which the witness was to testify" at appellant's court-martial. The defense team chose instead to inquire into "specific perceived failings in the CID investigation of" appellant's conduct. Further, portions of SA JR's [FN*] testimony were corroborated; for example, his testimony regarding the anonymous letters.

FN* Corrected

Third, the evidence against appellant in this case was extensive and overwhelming.[FN4] It consisted of multiple eyewitnesses and detailed forensic evidence incriminating appellant. In fact, one witness, who identified appellant in court, described how he saw appellant stab the victim with a buck knife "more [times] than [he] could count ... [o]ver and over and over.... [O]ver a hundred times, at least." The witness testified appellant stabbed the victim in the head and shoulders, but

> FN4. *See Roberts*, 59 M.J. at 327 (Despite finding the military judge erred by failing to order disclosure of derogatory information against the lead special agent, the C.A.A.F. found the error harmless beyond a reasonable doubt based on the "overwhelming" circumstantial evidence of appellant's guilt.)

***6** mostly stabbing at his head area.... At certain points in time, she would take the knife in her left hand and take her right hand and hammer on the butt of the knife ... trying to drive it into his skull, prying it back and forth, jamming on the knife. He would flinch and move, and then she would aim somewhere else, stab some more, hammer on the knife, trying to drive it into his skull.

He watched as she took his head ... and began a sawing, like 'you're cutting roast beef' motion from the back of his head.... And then as she got more over towards the top, it was a flat motion, sawing like you're cutting turkey.... [S]he continued to slice as much as she could around his neck.

The witness then described appellant's demeanor during the stabbing: "[V]ery predatory, calm, methodical, determined, very, very much the aggressor—didn't ever appear to be doing anything than focusing on what [she] was going to do. It didn't seem like she was afraid at all." Appellant was apprehended shortly after the crime.

Though the defense presented evidence of a lack of specific intent and supported that evidence with expert testimony, that evidence was contradicted by government expert testimony to the contrary.

Ultimately, we agree with the military judge's conclusion: "Given the volume of proof of the accused's guilt, the controverted nature of the defense lack of specific intent, and the potential for further ... damage to the [d]efense case had the [d]efense team probed [SA JR]'s misconduct, failure of the [g]overnment to provide the CID investigation ..., while a discovery violation, is harmless beyond a reasonable doubt." As such, a mistrial is not "manifestly necessary in the interest of justice." *See* R.C.M. 915(a).

While we find the government's nondisclosure harmless beyond a reasonable doubt under the specific facts of this case, we recognize that under other factual circumstances, such an error by the government could merit reversal. Evidence possibly impeaching the lead investigator in a brutal murder case could, in many circumstances, be critical evidence for the defense and its nondisclosure would not be harmless beyond a reasonable doubt. The Supreme Court has said:

> a specific request for nondisclosed evidence bolsters the defense case, because "an incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.... And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption."

***7** *Eshalomi*, 23 M.J. at 23 (quoting *Bagley*, 473 U.S. at 682–83). However, *in this case*, because of SA JR's limited role in appellant's investigation, the overwhelming evidence against her, and SA JR's prior consistent testimony, we conclude the government's nondisclosure was harmless beyond a reasonable doubt.

Despite the military judge's finding that the government made a "tactical decision" as to when to prefer charges against SA JR, the military judge "cho [se] to believe and [found]" the government's actions in this case were not intentionally designed to "conceal" the CID investigation from the Dobson defense team. Instead, the military judge found the government's actions in "holding the CID investigation unless there was a specific request for it, ... keeping the trial counsel in Dobson II in the dark as to [the existence of the CID investigation], and not preferring charges against [SA JR] until after Dobson II" were "borne from the [g]overnment's significant misunderstanding of discovery rules and obligations."

While we defer to the military judge's evaluation of the witnesses' credibility and his finding that the

government's violation of discovery rules was not deliberate, but rather ignorant, neither is tolerable. Hiding the ball and "gamesmanship" have no place in our open system of discovery. *See* *United States v. Adens*, 56 M.J. 724, 731 (C.A.A.F.2002) (broad discovery at an early stage reduces pretrial motions, surprise, and trial delays ... leads to better informed judgments about the merits of the cases and encourages broad early decisions concerning withdrawal of the case, motions, pleas, and composition of the court-martial—in short its practice "is essential to the administration of justice ..."); *United States v. Dancy*, 38 M.J. 1, 5 n. 3 (C.M.A.1993) (explaining the "unfortunate consequences of a trial counsel's disregard for the discovery rights of an accused"); *United States v. Lawrence*, 19 M.J. 609, 614 (A.C.M.R.1984).

Despite our holding in this case, we reiterate that all counsel must be competent. Ignorance or misunderstanding of basic, longstanding, and in this case, fundamental, constitutionally-based discovery and disclosure rules by counsel undermines the adversarial process and is inexcusable in the military justice system.

CONCLUSION

The approved findings are sentence are correct in law and fact and the approved sentence is not inappropriately severe, especially in light of the brutal nature of appellant's offenses, her record of service, and all other matters in the record of trial.

Accordingly, the findings and sentence are AFFIRMED.

Chief Judge TOZZI and Judge SIMS concur.

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