

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

¹Senior 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***This opinion is issued as an unpublished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 premeditated 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.

²In 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, where 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 inquiries ---

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*, 38 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*

³At 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

⁴In 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*, 477 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

⁵Although 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, appellee 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

* * * *

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

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[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

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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