Crim. App. No. 20090234
USCA Dkt. No. 12-0030/AR

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ARMED FORCES

UNITED STATES

Appellee

v.

MICHAEL C. BEHENNA
First Lieutenant
U.S. Army

Appellant

BRIEF ON BEHALF OF APPELLANT

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	)	OF APPELLANT
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	)	
MICHAEL C. BEHENNA,	)	
First Lieutenant (O-2),	)	
United States Army,	)	
	)	
Appellant	)	

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

COMES NOW First Lieutenant (1LT) Michael Behenna, and submits this Brief on Behalf of the Appellant. Good cause exists to show that errors occurred which were materially prejudicial to 1LT Behenna's substantial rights.

ISSUES ASSIGNED

I

WHETHER THE MILITARY JUDGE'S ERRONEOUS INSTRUCTION LIMITING THE RIGHT TO SELF-DEFENSE DEPRIVED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

II

WHETHER THE GOVERNMENT'S FAILURE TO DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE DEPRIVED THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ), and affirmed the findings and sentence. 1LT Behenna invokes this Court's statutory jurisdiction under Article 67, UCMJ.

STATEMENT OF THE CASE

A general court-martial with members tried 1LT Behenna at Fort Campbell, Kentucky, on December 8, 2008, January 22, February 23-28, and March 2 and 20, 2009. He was charged with violations of Articles 107 (False Official Statement), 118 (Premeditated Murder), and 128 (Assault), UCMJ. The members acquitted 1LT Behenna of the false official statement and premeditated murder allegations, but found him guilty of unpremeditated murder and assault consummated by a battery, alleged to have occurred on different days. He was sentenced to total forfeitures, confinement for twenty-five years, and a dismissal. The convening authority reduced confinement to twenty years.

The Army Court affirmed the findings and the sentence on July 21, 2011. *United States v. Behenna*, 70 M.J. 521 (A. Ct. Crim. App. 2011), JA—1. This Court granted review on January 13, 2012, and on February 1, 2012, granted a motion for enlargement. This Brief is timely filed.

GENERAL STATEMENT OF FACTS

A. Case Overview.

1LT Behenna was a platoon leader serving in Iraq. JA-162. On April 21, 2008, two of his soldiers were killed and several were severely wounded by an Improvised Explosive Device (IED). JA-169-71. 1LT Behenna discovered that a suspected insurgent, Ali Mansur (Mansur), was involved in this attack, as well as planning and participating in others on coalition forces. JA-169, 200-02. A Draft Intelligence Information Report that 1LT Behenna read stated: "ADIL ARAK IS THE LEADER [sic] THE AL-QA'IDA IN IRAQ IED CELL. ADIL MAKES AND EMPLACES IEDS. . . . ALI MANSUR TRANSPORTS EXPLOSIVES AND INFORM [sic] ADIL ABOUT THE CF [COALITION FORCES] PRESENCE IN THE AREA." DE H for identification, JA-283-84.[1]

1LT Behenna and his soldiers took Mansur into custody on May 5, 2008, and interrogated him regarding his background and a weapon found in his home. 1LT Behenna was accused of striking Mansur on the back with his helmet during this encounter.

On May 16, 2008, Mansur was released, and 1LT Behenna was ordered to take Mansur to his home. JA-173-78. 1LT Behenna decided to further interrogate Mansur because he felt that the intelligence personnel had not adequately questioned Mansur about his knowledge of terrorist activities. JA-178, 180. After leaving the Forward

[1] This demonstrative exhibit was published to the members during 1LT Behenna's direct testimony. JA-173.

Operating Base, 1LT Behenna diverted his unit from the road into the desert, where he, his squad leader (Staff Sergeant Warner), and their interpreter (Harry), walked to a tunnel in a culvert. JA–187-88. There 1LT Behenna and SSG Warner cut off Mansur's clothes in an attempt to humiliate him and induce him to answer questions. JA–189-90. During the questioning, SSG Warner left the tunnel to urinate. JA–85-87. Harry was standing outside the tunnel translating. JA–70, 193. Just prior to the shooting, 1LT Behenna had his Glock pistol pointed at Mansur with his finger outside the trigger well, which means that the safety was engaged. JA–207. 1LT Behenna heard "a sound of a piece of concrete hitting concrete over my left shoulder. . . .[then saw] Ali is getting up with his hands out toward my weapon. I stepped to the left and fired two shots." JA–196.

B. Pretrial.

Seven months before trial, the Defense requested in writing that the government promptly produce all exculpatory evidence prior to trial. Discovery Request, JA–285. During trial, the Court reminded the Government of its continuing duty to disclose exculpatory evidence. JA–38-39.

Prior to trial, the government gave notice that it had retained Dr. Herbert MacDonell[2] as an expert scene reconstruction consultant and that he was a potential witness.

C. **The Government Case.**

During opening statement, the government claimed 1LT Behenna shot and killed Mansur while Mansur was sitting on a rock. JA–36. The government stated the first shot was to Mansur's head, describing an execution-style killing. JA–35.

Harry testified that 1LT Behenna was questioning Mansur as Mansur was sitting on a rock or piece of concrete in the culvert. JA–58, 60. He could see 1LT Behenna and Mansur talking, "but not clearly." JA–60. He could not see Mansur's hands or arms. JA–68. It was dark. JA–62.

Mansur refused to provide information. JA–65-66. When Harry turned toward 1LT Behenna to translate, he was surprised to hear a shot, because he did not know or see what happened immediately before the shot. JA–68-69. He was at least ten meters outside the tunnel and at an angle from 1LT Behenna and Mansur, who were both inside the tunnel, each about a foot from the walls. JA–70-71, 75-76. Their outstretched arms would have been two or three feet apart.

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[2] Dr. MacDonell is "the preeminent practitioner in the field [of blood-flight analysis]." *United States v. Mustafa*, 22 M.J. 165, 166 (C.M.A. 1986); *see United States v. St. Jean*, 45 M.J. 435, 445 (C.A.A.F. 1996).

SSG Warner confirmed that it was dark enough to use his night vision equipment. JA–101-02. He was to the side of and facing away from the culvert while urinating. He was in full gear, including IBA, helmet, M-4, grenades, and 300 rounds, which was very heavy. JA–100. He testified at trial that he was 35 meters from the culvert when he heard a shot, and could not see into the tunnel. JA–85-87, 104-05. One week prior to this testimony, he swore during his guilty plea[3] that he was 50 meters away. JA–104-05, 106-07. He claimed he interrupted urinating and ran that distance through sand and rocks "in one second" to where he could see a pistol pointing at Mansur within the three seconds between shots. JA–88-91, 104-05. The following exchange took place on cross-examination of SSG Warner:

> Q. [Y]ou didn't see the Lieutenant pull the trigger or who pulled the trigger on the first shot?
>
> A. No, sir, I did not.
>
> Q. And you didn't see who pulled the trigger on the second shot?
>
> A. No, sir, I did not.
>
> Q. And you don't know why either shot was fired?
>
> A. No, sir, I do not.
>
> Q. You didn't see any activity that occurred or whatever that was before the first shot?
>
> A. No, sir.

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[3] He also was charged with premeditated murder of Mansur.

Q. Or whatever activity occurred before the second shot, you didn't see it?

A. No, sir, I did not.

Q. And you don't know why the trigger was pulled on either occasion?

A. Sir, I can't speculate; no, sir.

JA–104.

His pretrial agreement included a grant of testimonial immunity. JA–97. The premeditated murder charge against him was dismissed, and he received 17 months confinement.

The government called no expert witnesses, and did not present any rebuttal evidence.

D. <u>The Defense Case.</u>

On Wednesday, February 25, 2009, Dr. Radelat (a forensic pathologist) testified that based on the autopsy findings of horizontal wound trajectories and no bullet trajectory in Mansur's right arm, Mansur was shot first in the right side of the chest while standing, with his right arm not in the bullet track, and then in the side of his head as he instantly fell to the ground. JA–110, 112-13. Mr. Bevel (a scene reconstruction expert) testified that based on the blood stains and other forensic evidence, the best explanation for the location of the wounds and the pattern of the blood depicted in scene photographs was that Mansur was rising or standing when shot first in the chest, and his right arm was raised because it was not in the flight path of the bullet that

entered the side of his right rib cage underneath the arm. JA-119-22. On cross-examination, the government implied that there were other explanations of the shooting scenario based on the forensic evidence. JA-114-15, 136-38. However, no forensic expert contradicted these experts, nor was any evidence introduced to contradict the significance of the horizontal wound trajectories or the absence of a wound in the right arm.

After trial the day the defense experts testified, the three government counsel and their experts, Dr. MacDonell, Dr. Malone (a psychiatrist), and Dr. Berg (a pathologist), met in an effort to determine possible shooting scenarios supported by the forensic evidence. JA-255-56. 1LT Behenna had not yet testified. Dr. MacDonell informed them:

> [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.

JA-255. Dr. MacDonell used a government paralegal to demonstrate:

> I asked if he could stand in front of me and I put a finger in his ribs and said "Bang, now drop." And he went down to his knees and as he went by the finger I said, "Bang." I said, "Now, that seems to me to be the only logical thing."

JA-256 (emphasis added). This was the only demonstration he performed to explain the uncontroverted forensic evidence. JA-264.

The following day, Dr. Stewart (a psychiatrist) testified that 1LT Behenna was suffering from Acute Stress Disorder at the time of the shooting. JA–161. This is the condition known as Post-Traumatic Stress Disorder if it persists after 30 days from the traumatic event. JA–161. Common symptoms are an exaggerated startle response reaction and hypervigilance. This evidence was not disputed. The defense made it clear that mental responsibility was not being raised. JA–37.

1LT Behenna testified that he believed Mansur was involved with terrorist acts, including attacks using IEDs. JA–163-69, 200-02. 1LT Behenna felt that Mansur had not been sufficiently questioned regarding his knowledge of insurgent cell operations occurring in 1LT Behenna's area of operations:

> My intent on May 16th was to question Ali myself. I knew he had information about the April 21st attack. I knew he knew who the cell leaders were in Salaam Village and operating in Salaam Village. Those questions weren't asked during any of the interrogations that were done.

JA–178.

Therefore, 1LT Behenna made efforts to further question Mansur on the day he was ordered to return Mansur to his home. 1LT Behenna testified, "My whole intent through this whole thing was to question Ali and to get the bigger fish, if you will, in Salaam Village. That was my whole intent." JA–188. 1LT Behenna testified that he shot Mansur because he feared that Mansur was trying to take the weapon from him and kill him:

A. As I had my head turned toward the left, I hear a sound of a piece of concrete hitting concrete over my left shoulder. Immediately I turned toward my--to my right. You know, my weapons like this [demonstrating.] Ali is getting up with his hands out toward my weapon. I stepped to the left and fired two shots.

* * *

Q. And why did you fire at all?

A. Because when Ali was standing up, reaching toward my weapon, this happened fast. As I turned Ali was reaching up toward my weapon, getting up, I stepped to the left and fired two shots.

Q. Why?

A. I was scared Ali was going to take my weapon and use it on me, but this happened fast.

JA-196-97.[4]

Dr. MacDonell was in the courtroom the day after his demonstration during 1LT Behenna's description of why he shot Mansur. It was the first time he learned of 1LT Behenna's explanation of the shooting. Affidavit of Dr. MacDonell, Attachment to Motion for New Trial (Affidavit), AE XCIII, JA-303. When he heard it, he tapped the shoulder of Dr. Berg, the government's pathologist who was sitting next to him in the courtroom, and said, "that's exactly what I told you yesterday." JA-254.

E. Dr. MacDonell's Departure.

After direct examination but before cross-examination of 1LT Behenna, the court-martial took a short recess. JA-198. During that

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[4] This fear was reasonable - even SSG Warner testified that when he heard the first shot, he feared that Mansur had "got a hold of the weapon." JA-103.

recess, Dr. MacDonell had a discussion with government counsel and offered to stay another day if they needed his testimony. Government counsel told him that would not be necessary and that he could leave to catch his flight home. Dr. MacDonell, while preparing to leave, reminded the government counsel:

> [A]lthough the scenario I had presented to them the day before was unlikely, it still was the only theory I could develop that was consistent with the physical evidence. It was also exactly the way Lt. Behenna had described the events. Their reaction was noticeably cold.

Affidavit, JA–303 (emphasis added). After this discussion, Dr. MacDonell, as he left the courthouse, said to the civilian defense counsel, "I would have made a great witness for you." Affidavit, JA–253-54. When the defense inquired what his testimony might be, Dr. MacDonell stated that he could not divulge any information to the defense, as he had been retained by the government. Affidavit, JA–303; JA–254. As the cross-examination of 1LT Behenna was about to begin, defense counsel asked Dr. MacDonell to remain, but he refused. Affidavit, JA–303. He left to fly to New York.

F. The Court-Martial Continued.

After the recess, the government cross-examined 1LT Behenna. JA–199. Then the defense rested. JA–209. There was no rebuttal.

The military judge advised he would give a limiting instruction regarding self-defense, to which defense counsel objected. JA–210-211.

The next morning, Friday, before court began, defense counsel informed government counsel of his conversation with Dr. MacDonell on his way out of the courtroom the day before, and reminded them that they had an obligation to turn over that information if it was potentially exculpatory. Government counsel responded that "there was no exculpatory evidence" to provide. JA–271.[5] The court-martial proceeded with instructions and final argument.

G. Instruction Limiting Self-Defense.

Over defense objection, the military judge gave the following oral limiting instruction:

> Now there exists evidence in this case that the accused may have been assaulting Ali Mansur immediately prior to the shooting by pointing a loaded weapon at him. A person who without provocation or other legal justification or excuse assaults another person is not entitled to self-defense unless the person being assaulted escalates the level of force beyond that which was originally used. The burden of proof on this issue is on the prosecution. If you are convinced beyond a reasonable doubt that the accused, without provocation or other legal justification or excuse, assaulted Ali Mansur then you have found that the accused gave up the right to self-defense. However, if you have a reasonable doubt that the accused assaulted Ali Mansur, was provoked by Ali Mansur, or had some other legal justification or excuse, and you are not convinced beyond a reasonable doubt that Ali Mansur did not escalate the level of force, then you must conclude that the accused had the right to self-defense, and then you must determine if the accused actually did act in self-defense.

JA–215-16 (emphasis added). In response to a member's question, the military judge repeated this oral instruction. JA–239-40.

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[5] The government stipulated to this. JA–271.

H. Final Argument.

Government counsel argued that Mansur was shot execution-style while sitting on a rock, with the first shot to the head and the second to the chest. JA–219-23, 231. The defense argued that 1LT Behenna shot Mansur in self-defense after Mansur rose and reached for 1LT Behenna's weapon. JA–224. The first shot was to the chest and the second was to the head as Mansur fell. JA–225. At the time, defense counsel did not know that this argument mirrored Dr. MacDonell's opinion as the only logical explanation of the shooting consistent with the physical evidence. JA–226-28.

During rebuttal argument, the government ridiculed the defense theory that Mansur was shot in self-defense. Counsel argued, "That is incredible. That makes no sense whatsoever. It's unreasonable to expect that to be true." JA–229. Counsel continued, "That makes no sense. That story is incredible." JA–230. Arguing that the forensic evidence was "clear," she attacked 1LT Behenna's testimony, describing it as "an impossible situation." JA–231. As for the unrebutted forensic evidence, she stated:

> Now, we didn't offer rebuttal on the forensic testimony because I think the forensics were clear. There is a whole range of possibilities of what could have happened. It's almost impossible to conclude either that he was sitting or standing. The experts made it clear. It could mean a whole bunch of things. That's why we didn't bother to rebut it, because we have eyewitness testimony and even more than that, we have a story that is reasonable versus a story that is incredibly self-interested and unreasonable.

JA–232 (emphasis added).

Referring to 1LT Behenna, she concluded, "His story is incredible, and I ask you to look at all the evidence in deciding whether or not you actually have a reasonable doubt." JA–233-34.

The members returned findings of guilty to unpremeditated murder (May 16) and assault (May 5) late on Friday. JA–241-42.

I. Post-Findings.

On the same day as findings, Dr. MacDonell sent the government an email from New York stating that 1LT Behenna's testimony was consistent with the forensic evidence and that had Dr. MacDonell testified, it "would not have been helpful to the prosecution case." Email, JA–309-10. He continued: "I feel that it is quite important as possible exculpatory evidence so I hope that, in the interest of justice, you informed Mr. Zimmerman (sic) of my findings. It certainly appears like *Brady*[6] material to me." Email, JA–310. At 11:07 p.m., government counsel forwarded the email to defense counsel adding, "I am not sure that I believe that Mr. MacDonnell's [sic] new opinion is exculpatory, but I wanted to send it to you in an abundance of caution." *Id.*, JA–309. The email was sent to an incorrect address, but government co-counsel recognized the mistake and forwarded the email to civilian defense counsel at 12:27 a.m. *Id.*

Saturday morning, defense counsel received the email, and prior to the beginning of the sentencing proceedings, orally moved

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

for a mistrial for failure to disclose exculpatory evidence. JA–243. The military judge stated he would hear evidence, and not conduct the hearing based on proffers. JA–251. During the evidentiary hearing, Dr. MacDonell testified telephonically that he had, in fact, told the prosecution team, including the prosecutors present in the courtroom during the trial and at that hearing, that 1LT Behenna's account of the shooting was the most logical explanation based on the forensic evidence. JA–254-55. He said that he informed them of that opinion during the demonstration Wednesday night prior to 1LT Behenna's testimony, and then again Thursday after 1LT Behenna's direct examination. *Id.*

Dr. MacDonell was the only witness called by either side at the hearing on the Motion for Mistrial. The only other evidence produced was an oral stipulation that defense counsel had brought to government counsel's attention that Dr. MacDonell stated that he would have been a good defense witness and government counsel had told defense counsel that "no exculpatory evidence" existed. JA–271.

The military judge ordered both sides to submit briefs and then proceeded with sentencing. JA–273-74, 276.

On March 20, 2009, the military judge denied the Motion for Mistrial and stated that a new trial was not appropriate. AE XCI, JA–315; JA–281-82.

After Dr. MacDonell learned of this ruling, on April 21, 2009, defense counsel received an affidavit from Dr. MacDonell, which stated,

> When I testified that I told Dr. Berg, "That is exactly what I told you guys yesterday," and did not remember telling my reaction to any other person, I meant right there at that moment in the courtroom. There was no one else but Dr. Berg sitting nearby who had witnessed my demonstration the day before. The prosecutors were at counsel table then.
>
> However, at the next recess, when I went to get my hat, coat, and briefcase, I specifically told the three prosecutors in their office in room 13 the same thing I told Dr. Berg. As I testified on February 28, 2009, [during his telephonic testimony at the evidentiary hearing on the motion for mistrial] "And as I was leaving I told the prosecuting group, I said, "'That was exactly what I told you. . . .'"
>
> * * *
>
> I know that this affidavit and my telephone testimony differ from what the court heard from the prosecution. I take my oath seriously, and this is the truth. I told the prosecutors on Thursday that what Lt. Behenna had just described is exactly what I had demonstrated to them before I knew what Lt. Behenna would say. I told them this before I made my remark to Mr. Zimmermann on my way out of the courthouse. I am quite willing to take a polygraph if anyone thinks it is necessary.

Affidavit, JA-304-05 . Based on this affidavit, the defense filed a Motion for New Trial on April 21, 2009. AE XCIII, JA-316. The government did not file <u>any</u> controverting affidavit from the three government counsel, or from anyone else. This motion was denied. AE XCV, JA-319.

SUMMARY OF THE ARGUMENT

ISSUE I

THE MILITARY JUDGE'S ERRONEOUS INSTRUCTION LIMITING THE RIGHT TO SELF-DEFENSE DEPRIVED 1LT BEHENNA OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The military judge's erroneous and confusing instruction usurped the function of the members, instructed a verdict of guilty, and deprived 1LT Behenna of a fair trial.

The fact that 1LT Behenna pointed his weapon at Mansur prior to the shooting was undisputed. The military judge orally instructed the members that if they found that 1LT Behenna committed an assault by pointing his pistol at Mansur, he lost his right to self-defense. However, the government never advanced the theory that the pointing constituted an offer assault or presented any evidence that the pointing was unlawful, and the military judge did not instruct the members as to the elements of an offer assault or in any way instruct them that whether the pointing was lawful or unlawful was their determination to make. Thus, the members were given no guideposts to apply to the crucial issue of whether 1LT Behenna forfeited his right to self-defense. Instead, the instruction presumed an offer assault and therefore, directed a verdict of guilty.

Furthermore, the instruction was hopelessly confusing and convoluted because it used double-negatives, and required the members to find both escalation and one other factor in order for

1LT Behenna to retain or regain the right to self-defense. However, since the defense did not produce any evidence of escalation, did not request an instruction on escalation, and never argued that Mansur had escalated the conflict, the instruction amounted to an instructed verdict of guilty because it stripped 1LT Behenna of his right to act in self-defense due to the lack of escalation.

This unintelligible limiting instruction stripped 1LT Behenna of his defense and thus his Fifth Amendment constitutional right to a fair trial.

ISSUE II

THE GOVERNMENT'S FAILURE TO DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE DEPRIVED 1LT BEHENNA OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The government's theory was that 1LT Behenna executed Mansur while he was sitting on a rock in the culvert, as revenge for a fatal IED attack on 1LT Behenna's platoon. The defense theory was that Mansur was being questioned through an interpreter, when Mansur threw a piece of concrete at 1LT Behenna to distract him, and was rising and reaching for 1LT Behenna's pistol when he was shot first in the right rib cage and then in the right side of his head as he fell. The legal defense was self-defense.

The government failed to disclose to the defense until the morning after the guilty findings that the government's retained scene reconstruction expert had told the prosecution team that based on the forensic evidence, "the most logical explanation" of

what happened was that Mansur was shot first in the chest with his right arm outstretched, and then in the head as he fell. In fact, prior to 1LT Behenna's testimony, the expert had demonstrated to the three government counsel and the other government experts this most logical explanation of the forensic evidence. During 1LT Behenna's testimony the next day, the expert commented to another government expert "that's exactly what I told you yesterday." He repeated this information to the government counsel before they excused him to leave the courthouse and return to New York that day without testifying. The next morning, when lead defense counsel directly asked government counsel if the expert had any exculpatory evidence, they replied there was none. The government had at least three opportunities prior to final argument on findings to disclose the favorable information to the defense: 1) after the demonstration, 2) after the testimony of 1LT Behenna when the expert spoke to the government counsel on the way out of the courthouse, and 3) when the defense counsel asked government counsel before final argument the next day if the expert had any exculpatory information.

Because the expert did not testify, would not reveal the substance of his opinion to the defense, and refused to remain to testify the next day, defense counsel was unable to present this favorable information to the members. He also was unable to object during final argument to government counsel's improper and repeated

characterization of 1LT Behenna's testimony as "impossible," "incredible," "unreasonable," and "self-serving," claiming "the forensic evidence was clear."

This non-disclosure of favorable information resulted in the deprivation of 1LT Behenna's Fifth Amendment constitutional rights to a fair trial and to due process of law because it was not timely disclosed, it was clearly favorable to the defense, and it was material because it supported the defense theory and impeached the government's theory and witnesses.

The government cannot meet its burden of proving that this non-disclosure was harmless beyond a reasonable doubt because the information would likely have affected the findings. That is, applying that standard of proof, this Honorable Court surely will have its confidence in the outcome of the trial undermined. However, *arguendo*, even if a conviction would have resulted, surely the withheld information would have affected the sentence because the members would have adjudged a lower sentence for an accused who shot a man reaching for his pistol than for an accused who executed a man sitting on a rock.

The proper test is to ask whether 1LT Behenna received a fair trial - and due to the government's conduct, he did not.

ARGUMENT

ISSUE I

THE MILITARY JUDGE'S ERRONEOUS INSTRUCTION LIMITING THE RIGHT TO SELF-DEFENSE DEPRIVED 1LT BEHENNA OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A. Standard of Review.

This Court reviews the adequacy of the self-defense instruction *de novo*. *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). If the Court finds error, the government must show that the error was harmless beyond a reasonable doubt. *Id.* "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *Id.*

B. The Oral Instruction Presumed an Offer Assault Despite the Lack of a Government Theory, Offer Evidence, and an Instruction on the Elements of an Offer Assault.

The instruction defined assault as merely pointing a loaded weapon at Mansur: "Now there exists evidence in this case that the accused may have been assaulting Ali Mansur immediately prior to the shooting by pointing a loaded weapon at him." JA-215 (emphasis added). The military judge failed to instruct the members on the elements of an offer assault so that they, rather than he, could decide whether the act of pointing the weapon under the

circumstances constituted the offense of assault.[7] To prove an "offer assault," the Government had to prove, among other elements, the element of unlawfulness: "An 'offer' type assault is an unlawful demonstration of violence." Manual for Courts-Martial, United States, pt. IV, ¶ 54c (1)(b)(ii) [hereinafter MCM] (emphasis added). The Military Judge's Benchbook prescribes that the military judge instruct the members that "An 'assault' is an offer with unlawful force or violence to do bodily harm to another." D.A. Pam 27-9 Inst. 3-54-1, note 2 or Inst. 3-54-8, note 6 (emphasis added).

Despite this controlling authority, the military judge never instructed the members that they had to make a determination as to whether the pointing was lawful or unlawful.

This failure to instruct is especially egregious, considering that the government presented no evidence that such use of the weapon in a combat zone on this occasion was unlawful.[8] The military judge did not acknowledge that circumstances in a combat

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[7] The Army Court stated, "The law does not, under these facts, allow for self-defense if the members found beyond a reasonable doubt appellant's actions to be an assault." *Behenna*, JA-18. However, that court did not address the argument raised below that the military judge failed to instruct the members as to the elements of an offer assault so that they could do just that.

[8] The Army Court adopted the military judge's erroneous finding that, "1LT Behenna testified that he had no legal justification or legal excuse to interrogate [Mansur] at all and that he did [not] have any legal justification or legal excuse to conduct an interrogation in the manner that he did." *Behenna*, JA-15. However, 1LT Behenna merely stated it was a "bad decision" and not an interrogation technique authorized by standard operating procedures. JA-194-95. Bad judgment and violation of standard operating procedures do not equate to a violation of criminal law. *See United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000).

zone or a designated hostile fire area when the rules of engagement apply are completely different from those in a domestic setting, such as a typical barracks fight or barroom confrontation. The effect of the failure to instruct on the elements of an offer assault, tailored to the situation in the case at bar, is that the military judge stripped 1LT Behenna of his right to self-defense and relieved the government of its burden to disprove self-defense beyond a reasonable doubt.

The military judge went beyond an accurate, fair, impartial recitation of the facts with regard to self-defense. The fact that 1LT Behenna pointed his weapon at Mansur was not disputed; but the military judge applied that fact in a way that injected a theory of legal liability upon 1LT Behenna that even the government counsel had not proposed[9] or proved - that a U.S. Army infantry officer pointing a weapon at a suspected terrorist in a combat zone, without more, was unlawful and therefore an assault.

Obviously, the mere pointing of a weapon under these circumstances was not, by definition or as a matter of law, an "assault," such that 1LT Behenna was stripped of his right to self-defense. Otherwise, there would not have been a basis for the military judge to instruct the members regarding self-defense in

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[9] Government counsel's opening statement and final arguments are completely devoid of any allegation or legal conclusion that 1LT Behenna committed an offer assault on the day of the shooting.

the first instance. This situation highlights the inadequacy of the limiting instruction - the military judge instructed the members that the defense might apply, and then instructed them that in this case, it did not apply because 1LT Behenna assaulted Mansur by pointing a weapon at him. The military judge failed to give the members the appropriate guidance - the elements of the offense that would negate self-defense - and failed to require the government to produce some evidence on each of those elements, including unlawfulness.

It is emphasized that the separate conviction for assault consummated by a battery, which allegedly occurred on May 5, is different from the offer assault under discussion here (for which no instruction was given), which allegedly happened on May 16 immediately prior to the shooting. Under the instruction given, there was no defense to the murder charge - and only one possible verdict - guilty. The military judge usurped the function of the members by directing a guilty verdict, and deprived 1LT Behenna of a fair trial.[10]

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[10] To further illuminate the military judge's erroneous understanding of the law on this issue and exacerbate the harm 1LT Behenna suffered, note that it was solely on this basis - the forfeiture of the right to self-defense due to an "assault" - that the military judge denied the motions for mistrial and new trial. AE XCI, JA-315; AE XCV, JA-319. The Army Court relied on that conclusion to find no harm on the *Brady* issue, *infra*. *Behenna*, JA-15-16.

C. **The Limiting Instruction was Hopelessly Confusing and Unintelligible.**

The instruction attempted to inform the members that 1LT Behenna could exercise his right to self-defense if the government had not proven beyond a reasonable doubt that:

1) 1LT Behenna assaulted Mansur;

2) Mansur did not provoke 1LT Behenna; or

3) 1LT Behenna did not have some other legal justification or excuse.[11]

JA–215.

Although incomplete (*see infra*, regarding the lack of instruction on regaining the right, such as via the inability to withdraw), an additional fatal error in this paragraph is that after the military judge listed the three circumstances above, he linked them to the issue of escalation by stating that if they found the government had not proven one of those first three factors, "and" they found escalation, only then was 1LT Behenna entitled to act in self-defense. JA–215. Therefore, regardless of whether the members believed that 1LT Behenna assaulted Mansur,[12]

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[11] Raised and ignored below is the argument that this instruction is internally inconsistent - if there were any legal justification or excuse, there could not have been an assault. If there were an assault, there could not have been any legal justification or excuse. The instruction is confusing.

[12] For purposes of this argument, counsel will assume that "provocation" and "other legal justification or excuse" are not at issue, since the military judge and the Army Court found that the reason 1LT Behenna forfeited his right to self-defense was that he assaulted Mansur by pointing his weapon at Mansur.

they had to find that Mansur escalated the conflict before they could, under the instruction, find that 1LT Behenna had the right to self-defense.

In other words, the law provides that 1LT Behenna had the right to self-defense unless he assaulted Mansur; however, he could regain that right - even if there were an assault - if the members found escalation by Mansur. The military judge instructed the members, however, that even if they found no assault, they still had to find escalation to consider self-defense. This is erroneous. The instruction should have used the word "or" instead of "and," to make escalation the fourth potential scenario that would have afforded 1LT Behenna the right to self-defense.

The harm from this becomes clear when one considers that 1LT Behenna never argued that Mansur actually escalated the level of force. Because escalation was not part of the defense theory, and the defense did not present evidence or argument that escalation existed, the military judge's instruction that required the members to find escalation in order to consider self-defense obviously prejudiced 1LT Behenna.

Finally, the fact that the military judge required the members to find escalation by Mansur in order to entitle 1LT Behenna to the right to self-defense further confirms the military judge's presumption that an assault took place - otherwise, escalation would not be an issue (or at least escalation would not be a

required finding the members had to make to find self-defense). It is emphasized that the government never proposed or proved that the pointing of the weapon was unlawful under the facts of the instant case. The instruction setting forth the various scenarios described above further reinforced to the members the military judge's erroneous determination that 1LT Behenna must have committed an assault.

The bottom line is that frankly, even trained lawyers who repeatedly and carefully read and study this instruction cannot understand it. It contains double negatives, and is internally inconsistent. Yet this unintelligible instruction stripped 1LT Behenna of his defense. Non-lawyer members, who never had a chance to read it, but only heard it read to them, could not be expected to do anything other than conclude if a pistol was pointed, there was no defense.

The members themselves provided a telling indication of the confusion this instruction caused - of the three questions the members asked about the instructions prior to closing for deliberations, one requested a written copy of the instructions (which was denied) and another sought clarification of this instruction: "Explain how an assault with a weapon nullifies a self-defense argument." AE LXXV, JA-320; JA-235-37.

D. The Army Court Erred in Analyzing the Law of Self-Defense - Withdrawal.

The Army Court completely and without explanation adopted the military judge's findings and conclusions on the self-defense instruction issue. *Behenna*, JA-19. The military judge and the Army Court found that because 1LT Behenna chose to question Mansur in the culvert and pointed a weapon at a naked, unarmed man, he was criminally responsible for any and all consequences of what transpired subsequently, regardless of what Mansur did or how 1LT Behenna reacted during the encounter.

In addition to the other reasons discussed above, this instruction is erroneous because it failed to inform the members that even if 1LT Behenna lost his right to self-defense, he could regain it if he did not have the opportunity to withdraw. *Lewis*, 65 M.J. at 89. The Army Court found, "In this case the defense did not request an instruction on ability to withdraw and 'some evidence' upon which the members could reasonably rely to support such an instruction was not presented." *Behenna*, JA-18. This analysis is erroneous.

First, the military judge had a *sua sponte* duty to properly instruct the members regardless of whether the defense requested an instruction on withdrawal. The Army Court's opinion to the contrary ignores precedent established by this Court: "A military judge is required to instruct the members on special (affirmative) defenses 'in issue.' A matter is considered 'in issue' when 'some evidence,

without regard to its source or credibility, has been admitted upon which members might rely if they choose.'" *Lewis*, 65 M.J. at 87 (citing R.C.M. 920(e)).

Second, the record does contain evidence to support the defensive theory. 1LT Behenna testified,

> As I had my head turned toward the left, I hear a sound of a piece of concrete hitting concrete over my left shoulder. Immediately I turned toward my--to my right. You know, my weapons [sic] like this [demonstrating.] Ali is getting up with his hands out toward my weapon. I stepped to the left and fired two shots. . . . I was scared Ali was going to take my weapon and use it on me, but this happened fast.

JA–196-97.

The Army Court's finding that 1LT Behenna "was the aggressor and had every opportunity to withdraw from the situation of his own creation" is clearly erroneous. *Behenna*, JA–19. 1LT Behenna's testimony clearly supports an argument that he had no opportunity to withdraw at the relevant time - between the time he heard the concrete hit the wall behind him and the time he shot out of fear that Mansur was trying to take his weapon and shoot him. The Army Court focused on the wrong time frame - it found that because 1LT Behenna had brought Mansur to the culvert in the first place, he could not claim an inability to withdraw from the situation of his own making. *Id.*, JA–19. The Army Court did not address 1LT Behenna's testimony that because it "happened fast" there was no reasonable opportunity to withdraw. In other words, to lose his right to self-defense 1LT Behenna must have had the opportunity to

withdraw after he felt that his life was threatened, not prior to the threat.[13]

In excessive force civil rights cases against police officers under 42 U.S.C. § 1983, where focusing on the correct timing issue is similar to that in the case at bar, the Supreme Court has held that the actions of the officer are to be reviewed under a reasonableness standard that looks to the moment before the split-second decision to use force is made, and "must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)(emphasis added). Instructive on this issue is persuasive authority from the various United States circuit courts of appeals deciding these § 1983 cases where the law enforcement officers asserted self-defense.

Uniformly, these courts have refused to consider events prior to the threat against the officer to determine whether he could have avoided the situation which led to the use of deadly force. *See, e.g., Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995)("evidence that [the officers] created the need to use [deadly] force by their actions prior to the moment of seizure is

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[13] The Army Court claimed that the opportunity to withdraw existed because other soldiers were nearby and could have defended 1LT Behenna had he shouted for help, and that he could have run off into the desert. *Behenna*, JA-19. Because one may defend a third party only if that party has a right to defend himself, if his soldiers were legally entitled to defend 1LT Behenna, he was entitled to defend himself. R.C.M. 916(e)(5). The Army Court ignored this principle.

irrelevant"); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995)(refused to consider whether officer caused the suspect to behave in a threatening manner); *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)(refused to consider events prior to threat to determine whether officer could have avoided situation which led to use of deadly force, stating "[officer's] use of deadly force was reasonable given [deceased's] act of aggression and [officer's] knowledge of what had gone on before"); *Fraire v. City of Arlington*, 957 F.2d 1268, 1274-75 (5th Cir. 1992)("regardless of what had transpired up until the shooting itself, [the deceased's] movements gave the officer reason to believe, at that moment, that there was a threat of physical harm"); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (failure to follow standard procedures not relevant to whether officer acted reasonably in using deadly force; factfinder must focus on the very moment the "split-second judgment" is made).

These principles apply when judging whether the defense of self-defense could be stripped from 1LT Behenna, an Army officer in a combat zone facing a threat from an individual 1LT Behenna had a good-faith belief was an enemy insurgent reaching for his weapon to use it to kill him.

E. 1LT Behenna was Harmed.

This Court has found that an "erroneous and incomplete" self-defense instruction is reversible error, because "without a correct

self-defense instruction, the members did not have guideposts for an 'informed deliberation.'" *United States v. Dearing*, 63 M.J. 478, 484-85 (C.A.A.F. 2006). The instruction given in the instant case likewise was erroneous and incomplete, constituting constitutional error, because 1LT Behenna did not receive the fair trial to which he was entitled under the Fifth Amendment. The government cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Dearing*, 63 M.J. at 484.

F. Conclusion.

This Honorable Court should reverse the decision of the Army Court, and set aside the findings of unpremeditated murder and the sentence.

ISSUE II

THE GOVERNMENT'S FAILURE TO DISCLOSE FAVORABLE INFORMATION TO THE DEFENSE DEPRIVED 1LT BEHENNA OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A. Standard of Review.

This Court conducts a *de novo* review involving a two-step analysis of this issue: first, whether the information was subject to disclosure, and second, if there was non-disclosure, the Court tests the effect of that non-disclosure on the trial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Because a specific request for the information was made at least twice, 1LT Behenna is entitled to relief unless the government can show that non-disclosure was harmless beyond a reasonable doubt. *Id.* at 327; *see*

also United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008) ("where the defense requested any undisclosed impeachment evidence, this Court requires the government to show that nondisclosure is harmless beyond a reasonable doubt"); *United States v. Kreutzer*, 61 M.J. 293, 298-99 (C.A.A.F. 2005) (errors "of constitutional magnitude must be tested for prejudice under the standard of harmless beyond a reasonable doubt"). The military judge's ruling as to whether information was subject to disclosure is given no deference due to the *de novo* standard of review of questions of law. *Roberts*, 59 M.J. at 327. Similarly, appellate review assessing the impact of improper disclosure is not deferential. *Id.*

B. The Army Court's Faulty Error Analysis - Timing of Disclosure.

The Army Court found no error because it found the government disclosed the favorable information. *Behenna*, JA–15-16. However, disclosure only occurred after the conviction. When the government failed to make the required disclosure earlier, 1LT Behenna was deprived of due process and the fair trial to which he was entitled under the Fifth Amendment.

1. Wednesday evening demonstration

The government had a duty to disclose Dr. MacDonell's expert opinion after the Wednesday evening demonstration. A government expert telling the members of the prosecution team that "the only logical explanation" of the forensic evidence is consistent with the defense theory (of which they were aware from the expert

testimony earlier that day) and contrary to the government's theory, certainly is information that could be favorable to the defense. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

The Army Court adopted the military judge's clearly erroneous finding of fact that,

> Dr. MacDonell theorized and demonstrated that an unlikely but possible scenario, that was not inconsistent with the forensic evidence and the only logical explanation consistent with the testimony of Dr. Radelat and Mr. Bevel, was that if the first shot was to the chest, the second shot to the head could have occurred as [Mansur] dropped in front of the muzzle of 1LT Behenna's weapon.

Behenna, JA-8. (emphasis added). This finding is not supported by the record. As a *bona fide* forensic expert, Dr. MacDonell was entitled under M.R.E. 702 and 704 to render his expert opinion, which is precisely what he did. *Brady*, Article 46, UCMJ, and R.C.M. 701(a)(2)(B), all require that "favorable" opinion evidence be timely disclosed to the defense.

Dr. MacDonell testified that immediately after the demonstration, "I remarked that this was consistent with the wound trajectories and the bloodstain patterns on the floor, and the testimony of Dr. Radelat and Mr. Bevel, and that while highly unlikely, it was the only logical explanation consistent with the physical evidence." Affidavit, JA-302 (emphasis added); *see also* JA-254-57.

The distinction is significant - Dr. MacDonell did not merely reconcile the forensic evidence with the defense expert testimony,

he told the prosecution team that based on the forensic evidence, that is, the wound trajectories and the bloodstain patterns on the floor, the "first shot to the chest as he was standing, second shot to the head as he fell" conclusion was the only logical explanation of what happened during the incident. Clearly this was information favorable to the defense as it was uncontradicted by any government expert, impeached the so-called "eyewitnesses," and corroborated the defense witnesses. It should have been disclosed to the defense at the conclusion of the Wednesday demonstration.

2. Dr. MacDonell's statement to defense counsel

The Army Court found:

> in light of Dr. MacDonell's area of expertise, his statement [to civilian defense counsel on his way out of the courthouse that he would have made a good defense witness but refused to explain] provided "sufficient notice that he possessed favorable, if not exculpatory, information under both *Brady* and R.C.M. 701." . . . defense counsel had the essential facts and numerous avenues of eliciting further information from Dr. MacDonell.

Behenna, JA-13.

This analysis fails because a vague statement that a designated government witness would be "a good defense witness"[14] is far from a disclosure about what information the witness possesses that could be favorable to the defense. Dr. MacDonell conveyed no "essential facts." This would be a different case on

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[14] For all defense counsel knew at the time, Dr. MacDonell's comment was facetious.

appeal if Dr. MacDonell had told defense counsel that he had performed a demonstration that impeached the government witnesses. Defense counsel had no idea that such a demonstration had been given to the prosecutors. The lower court's opinion erroneously placed a burden upon defense counsel that the law squarely places on the prosecution. This Court has embraced the Supreme Court's mandate that, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf. . . ." *United States v. Mahoney*, 58 M.J. 346, 348 (C.A.A.F. 2003)(citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). Because Dr. MacDonell, Dr. Berg, and Dr. Malone were agents of the prosecution, government counsel had a duty to learn of the favorable information they possessed. Civilian defense counsel could not have ordered a civilian witness to stay on a military installation, and he certainly had insufficient information to request production under R.C.M. 703(c)(2)(B)(i). The Army Court failed to identify the "avenues" available.[15]

3. Defense counsel's inquiry to government counsel

The Army Court found that after defense counsel informed government counsel of the conversation with Dr. MacDonell and

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[15] The Army Court also failed to acknowledge that defense counsel did attempt to utilize "avenues of eliciting further information from Dr. MacDonell": (1) he asked Dr. MacDonell to stay rather than return home to New York. Dr. MacDonell refused. Affidavit, JA-303. ("He asked me not to leave but I did."); and (2) he directly asked government counsel in the courtroom if Dr. MacDonell had favorable information and was told none existed. JA-271.

government counsel assured defense counsel that there was nothing to disclose,

> Both parties were now on notice that Dr. MacDonell had asserted he possessed defense favorable or exculpatory information within his area of expertise. At this juncture, either party could have taken action to stop or delay the proceedings while more information was obtained. Neither party chose to do so, at that time or anytime throughout the day.

Behenna, JA–13.

The government took the position (in argument, with no supporting evidence) that it did not learn of Dr. MacDonell's opinion until it received his email Friday night after the guilty verdicts. However, the Army Court found that both parties were on notice when defense counsel inquired of government counsel before final argument whether Dr. MacDonell had any favorable information, and was told there was none. Because government counsel indeed were then on notice, it was their duty to inquire of their own witness what favorable information existed. *Mahoney*, 58 M.J. at 348; *Leka v. Portuondo*, 257 F.3d 89, 102 (2d Cir. 2001) ("In the first place, it is the prosecutor's burden to make full disclosure of exculpatory material, not the defendant's") (emphasis added). Defense counsel, on the other hand, properly relied upon the explicit representation by the prosecutors that Dr. MacDonell had no exculpatory information, stated in the courtroom on Friday morning. *See Strickler*, 527 U.S. at 283 (defense counsel may rely on prosecutor's assertion regarding compliance with *Brady*).

Government counsel's response effectively and wrongfully represented to the defense "that the evidence does not exist, and [caused the defense] to make . . . trial decisions on [that] basis." *United States v. Bagley*, 473 U.S. 667, 683 (1985).

C. The Army Court's Faulty Error Analysis - Unsupported Findings of Fact and Conclusions of Law.

1. Findings of Fact

The Army Court improperly relied upon the military judge's clearly erroneous findings of fact that are wholly unsupported by any evidence in the record. For example:

> - "Government counsel, based on Dr. MacDonell's opinion that the available forensic evidence did not lend itself to a very detailed interpretation, decided that they would not call Dr. MacDonell in rebuttal." *Behenna*, JA–9.
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> - "trial counsel did not learn of Dr. MacDonell's revised opinion until they were notified by civilian defense counsel the morning of Friday, 27 February 2009." *Id.*, JA–10.

The military judge specifically told the lawyers that he would take evidence on the Motion for Mistrial and would not rule on the basis of proffers. JA–251. The only witness who provided testimony was Dr. MacDonell; none of the government counsel testified to contradict his testimony or offered any evidence as to their thought processes. Dr. MacDonell did not testify to either of the statements above; in fact, his testimony, clarified in his affidavit, was that he told government counsel before he left the courthouse on Thursday that 1LT Behenna's testimony was consistent with the demonstration he had given the day before:

> After Lt. Behenna described the shooting, I turned to Dr. Berg and told him, "That is exactly what I told you guys yesterday."[16] There was a recess about 5:00 pm and Lt. Behenna was still on the witness stand. I was told by Captain Poirier that I would not be needed, and a flight was arranged for me for that evening. I told Captains Poirier and Roberts that I could stay another day if necessary. They told me my testimony would not be needed and I could leave to get my flight.
>
> When I went back to room 13 to get my hat, coat, and briefcase the captains on the prosecution team were already in that room. As I gathered my things I reminded them that although the scenario I had presented to them the day before was unlikely, it still was the only theory I could develop that was consistent with the physical evidence. It was also exactly the way Lt. Behenna had described the events. Their reaction was noticeably cold. I went back into the courtroom and went over to Jack Zimmermann. As I was putting on my coat I remarked that I was sorry I was leaving because I would have made a good witness for him. He asked why, and I told him I was a government expert, and could not discuss it with him until after the trial. He asked me not to leave but I did.

Affidavit, JA–303. Although the government had the opportunity to do so both at the hearing on the Motion for Mistrial and in response to the Motion for New Trial based on Dr. MacDonell's affidavit, no one ever testified or offered any <u>evidence</u> to contradict Dr. MacDonell. The government also elected not to offer <u>evidence</u>, such as affidavits from any of the government trial lawyers or anyone else, before the Army Court. Thus, there is no evidence in the record before this Court to support those findings.

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[16] Presumably, had this government pathologist disagreed with Dr. MacDonell's forensic analysis, the government would have called him as a rebuttal witness.

2. Conclusions of Law

The Army Court relied upon inapposite precedent in holding: "based on Dr. MacDonell's direct statement to the defense, the government provided timely notice to the defense of favorable information and there was no violation of either Article 46, UCMJ; R.C.M. 701; or *Brady*." *Behenna*, JA-13 (citing *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000)). The nondisclosed fact at issue in *Carter* was that Carter had received medical treatment prior to his trial. That court found that the State had not suppressed the information because Carter himself was aware of the essential facts on this issue, and therefore, there was no *Brady* violation. *Id.* at 603. The facts and holding of that case are completely unrelated to the facts and issues in the instant case.

Two cases decided after *Carter* are on point and indicate that relief in the instant case is warranted. *Leka*, 257 F.3d at 102; *DiSimone v. Phillips*, 518 F.3d 124 (2d Cir. 2008)). In both *Leka* and *DiSimone*, the prosecution suppressed the substance of a witness' favorable testimony, requiring relief.

The government only disclosed the essential facts of Dr. MacDonell's favorable information after the findings of guilty were returned. In *Leka*, a murder case where the defense did not know of the observations of a witness who was not called to testify, the

prosecution claimed the defense should have sought out the witness in the middle of trial. The Second Circuit stated,

> a responsible lawyer in the midst of the pressures and paranoias of trial may well deploy scarce trial resources doing other things. At that point, without substantive disclosure by the prosecutor, the supposed failure by the defense to petition for leave to seek out [the witness] cannot fairly be seen as a default, or a neglect, or even as an election.

Leka, 257 F.3d at 103 (emphasis added). Finding that the late, incomplete disclosure left only unsatisfactory options such as to "waste scarce trial resources on a possible dry hole, or to call a witness cold, which would be suicidal," relief was granted for a *Brady* violation. *Id.* at 103, 107.

Additionally, two state murder cases where *Brady* violations resulted in new trials are illustrative. The Tennessee Court of Criminal Appeals reversed a case where the defense was self-defense. *State v. Bennett*, No. 03C01-9304-CR-00115, 1994 WL 53645 (Tenn. Crim. App. Feb. 24, 1994) (unpub.), JA–321. The prosecution theory was that the deceased was unarmed, and thus there was no need for the defendant to shoot him. *Id.*, JA–329. After the evidence had closed, the defense saw a photograph on the prosecutor's table indicating that the deceased had two knives in his pocket when he was killed. *Id.*, JA–327. The Tennessee court stated this was evidence favorable to the defendant, and could have been used to more strenuously emphasize the threat the deceased posed, or at the very least, as a valuable impeachment tool. *Id.*,

JA–328. In the case at bar, Dr. MacDonell's expert opinion of the most logical explanation of the forensic evidence was material for exactly the same reasons: to show that at the time of the shooting Mansur was perceived as a threat to 1LT Behenna, and to impeach the alleged "eyewitnesses," Harry and SSG Warner.

After the photograph was discovered, the prosecutor in *Bennett* argued to the jury that the deceased was unarmed and the self-defense theory was invalid. *Id.* JA–329. In reversing, the court wrote: "Thus, the state knowingly advanced an inappropriate theory to the jury in an attempt to capitalize on an error of its own making. Were we to allow this situation to go unremedied, we would neglect our obligation to grant relief when errors result in prejudice to the judicial process." *Id.*

In the case at bar, the government did exactly the same thing. Knowing what Dr. MacDonell had advised, and having heard 1LT Behenna's testimony (which was "just exactly what I [Dr. MacDonell] had told you yesterday"), government counsel argued to the members that 1LT Behenna's self-defense theory was incredible and unreasonable, and that Mansur was shot in the head while sitting on a rock. The government counsel specifically addressed the forensic evidence in a manner that was completely contrary to Dr. MacDonell's exculpatory expert opinion. Just as in the *Bennett* case, government counsel advanced an inappropriate theory to the

jury to capitalize on an error of its own making. This prejudiced the judicial process.

The second murder case *is Ex Parte Mowbray*, 943 S.W.2d 461, 466 (Tex. Crim. App. 1996). The Texas Court of Criminal Appeals overturned a murder conviction and life sentence based on a *Brady* due process violation, finding that the prosecutor did not timely disclose a report that was favorable to the defendant from a state's bloodstain analysis expert who did not testify. Coincidentally, the state's bloodstain analysis expert in *Mowbray* was Dr. Herbert MacDonell - the very same expert involved in the instant case. Even more coincidentally, the defense in *Mowbray* called an expert to testify during its case in chief - the very same Tom Bevel who testified on 1LT Behenna's behalf.

Considering the existing case law finding reversible error when the defense found out about favorable evidence during trial (*Bennett*), and even before trial (*Mowbray*), it is clear that reversible error occurred in the case at bar. The defense did not discover the favorable evidence until after the members had returned their guilty findings.

Finally, federal circuit courts of appeals continue to reverse convictions when the government withholds information that should have been disclosed to the defense. *LaCaze v. Warden*, 645 F.3d 728, 736-39 (5th Cir. 2011) (finding prejudice where evidence impeaching key witness withheld: "A *Brady* violation is more likely to occur

when the impeaching evidence would seriously undermine the testimony of a key witness on an essential issue or there is no strong corroboration"); *United States v. Price*, 566 F.3d 900, 910 (9th Cir. 2009) (once a defendant produces some evidence to support inference that government possessed or knew about favorable material and failed to disclose it, "the burden shifts to the government to demonstrate that the prosecutor satisfied his duty to disclose all favorable evidence known to him or that he could have learned from 'others acting on the government's behalf'") (quoting *Kyles*, 514 U.S. at 437); *United States v. Triumph Capital Group*, 544 F.3d 149, 162 (2d Cir. 2008) (new trial where suppressed evidence included facts "entirely at odds with the government's theory of the case").

Also, the Attorney General of the United States recently moved to set aside a guilty verdict and dismiss the indictment against former Senator Ted Stevens after a new set of prosecutors determined that the original prosecutors had failed to make required disclosures. *See* Government's Motion to Dismiss *Stevens* case, JA–332; and the district court's reaction, Sullivan letter, JA–335.

D. The Army Court's Faulty Harm Analysis.

1. The Army Court applied the wrong tests

The Army Court stated relief is appropriate if there is a reasonable probability that there would have been a different

result had the evidence been disclosed. *Behenna*, JA–11. The proper test is whether the government demonstrated there was no reasonable possibility that the nondisclosure contributed to the findings of guilty. *Kreutzer*, 61 M.J. at 300. As this Court noted, these tests "are substantially different." *Id.*

The opinion below also states, "Even if there was error in its disclosure, we find such error would not have resulted in a different outcome at trial had the evidence been disclosed earlier." *Behenna*, JA–15-16 (emphasis added). The Supreme Court and this Court have made it clear, "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." *Webb*, 66 M.J. at 92 (emphasis added) (quoting *Kyles*, 514 U.S. at 434).

2. The government cannot prove harmlessness beyond a reasonable doubt.

The Army Court found that if there was error at all, it was in the timing of the disclosure. *Behenna*, JA–15-16. The court found any such error was harmless beyond a reasonable doubt on these grounds:

- Even had the disclosure been timely, the military judge properly would not have allowed Dr. MacDonell to testify. *Id.*
- 1LT Behenna lost his right to self-defense based on his assault of Mansur, so the information was irrelevant and would not have affected the findings. *Id.*, JA–16-17.

- In a footnote, the court found no effect on the sentence. *Id.*, JA–15.

All of these conclusions are erroneous.

a. Dr. MacDonell's opinion would have been admissible

The Army Court erroneously found that the military judge would have properly excluded Dr. MacDonell's testimony under M.R.E. 403. *Behenna*, JA–14. Certainly this evidence was relevant, and its probative value was not substantially outweighed by any of the Rule 403 factors militating against admissibility.

An accused has a due process right to present witnesses who support a defense. *United States v. Brewer*, 61 M.J. 425, 429-30 (C.A.A.F. 2005) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). This right includes the right to have expert assistance in that effort, even at government expense. *See United States v. Lee*, 64 M.J. 213, 218 (C.A.A.F. 2006) (citing Article 46, UCMJ). This Court has followed Supreme Court precedent and held:

> The Due Process Clause of the Fifth Amendment guarantees that "criminal defendants be afforded a meaningful opportunity to present a complete defense." That guarantee requires the prosecution to disclose to the defense "evidence favorable to an accused. . . where the evidence is material either to guilt or to punishment."

Webb, 66 M.J. at 92.

In addition, Article 46, UCMJ, establishes an accused's right to access favorable evidence that would assist in preparing a

defense. *Roberts*, 59 M.J. at 325. This Court has confirmed that Rule 701 of the Rules for Courts-Martial implements this right, and has described the application of these authorities as the "liberal discovery practice in courts-martial." *Id.*

b. Dr. MacDonell's opinion would have affected the findings

A crucial factual issue in the case was whether Mansur was sitting or standing when shot. A determination that he was standing supports the theory of self-defense and contradicts the government's execution theory.

1) The opinion was material

Dr. MacDonell's expert opinion that Mansur was standing when the first shot struck him in the ribs and then the second shot struck him in the head as he fell is material because it cast substantial doubt on the government's theory of 1LT Behenna's guilt. It scientifically corroborated 1LT Behenna's testimony, wholly supported the defense experts' testimony, and impeached the inference from the two alleged "eyewitnesses" that because Mansur was sitting when the interrogation began, he was sitting when he was shot.[17] Significantly, the military judge found that Dr. MacDonell's testimony would not be cumulative. JA-279-80.

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[17] In *Leka*, the murder conviction was vacated because, among other things, the undisclosed "testimony casts doubt on the testimony of both eyewitnesses presented by the prosecution at trial." *Leka*, 257 F.3d at 99.

The Supreme Court spoke in January 2012 to the materiality issue in a case involving the failure to disclose impeachment evidence of an eyewitness. Reversing a murder conviction, based on *Brady*, the Supreme Court reaffirmed the test clarified in *Kyles* that a defendant does not need to show that he "'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 132 S.Ct. 627, 630 (2012)(quoting *Kyles*, 514 U.S. at 434).

In the case at bar, the alleged "eyewitness" SSG Warner was 50 meters (guilty plea) or 35 meters (trial testimony) from the culvert when he heard the first shot, and did not see what happened in the culvert before either the first or the second shot. His claim that he stopped urinating, and carrying a rifle, IBA, helmet, grenades, and 300 rounds of ammunition, ran that distance in <u>one second</u> is ludicrous. When contrasted with Dr. MacDonell's testimony, surely SSG Warner's testimony cannot provide confidence in the outcome beyond a reasonable doubt. The only other alleged "eyewitness" was Harry, who testified he was outside the culvert, it was dark, and he could not see Mansur's arms or hands. Dr. MacDonell's testimony clearly was material because, when it is contrasted with Harry's testimony, Harry's testimony was not strong enough to sustain confidence in the outcome beyond a reasonable doubt.

The fact the defense experts had testified contrary to the alleged "eyewitnesses" does not ease the government's burden. "The fact that court-martial members believe a witness despite circumstances A and B, which tend to impair his credibility, does not mean they will continue to believe him if impeaching circumstance C is added." *United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983). Thus, even if the members believed the alleged "eyewitnesses" despite the testimony of the pathologist ["A"] and the scene reconstruction expert["B"], that does not mean they would have continued to believe the alleged "eyewitnesses" if Dr. MacDonell's testimony ["C"] were added to the case. This is especially so since Dr. MacDonell was the government's own witness.[18] Presumably the members would give more credit to the testimony of the defense experts after corroboration by the government's expert. *See Leka*, 257 F.3d at 106-07. This is more important in the instant case, considering that the military judge, *sua sponte*, gave a limiting instruction over objection on the weight to be given to expert testimony immediately after Dr. Radelat and Mr. Bevel testified for the defense. JA-156-60. No other experts had testified in the case.

The Navy-Marine Corps Court of Criminal Appeals squarely addressed this issue and found in the appellant's favor: "We have

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[18] The government obviously had confidence in Dr. MacDonell's abilities, or else government counsel would not have requested that the Convening Authority authorize his employment as a government expert.

no doubt that knowledge of the existence of a Government medical expert whose professional opinion wholly supported the opinion of the defense expert is a fact both favorable to the appellant and material to an assessment of his guilt and/or punishment." *United States v. Mott*, No. 200900115, 2009 WL 4048019 (N.M. Ct. Crim. App. Nov. 24, 2009) (unpub.), JA–343 (emphasis added). The government argued that the error was harmless because their expert "would accomplish nothing beyond duplicating the testimony already offered" by the defense expert. *Id.* That court stated, "While we will not speculate on what [government expert] might have provided the defense, the burden is solidly on the Government to prove beyond a reasonable doubt that [government expert]'s testimony would not have aided the defense case. They have failed to meet this burden." *Id.* Similarly, the government failed in the instant case to show that Dr. MacDonell's testimony would not have aided the defense case, and that the failure to timely disclose Dr. MacDonell's expert opinion was harmless beyond a reasonable doubt.

This Court recently discussed the effect on members of an additional factor affecting the credibility of a witness, and its admissibility. *United States v. Ellerbrock*, 70 M.J. 314 (C.A.A.F. 2011). Finding that the military judge abused her discretion in excluding evidence that the complaining witness had previously engaged in an extramarital affair when the sole issue in the case was consent to sexual activity, this Court held that, "It is a fair

inference that a second consensual sexual event outside a marriage would be more damaging to a marriage than would a single event, assuming the evidence in the record supported that inference." *Id.* at 12.[19] Therefore, the evidence was constitutionally required. *Id.* at 17. Finally, this Court found that the error was not harmless beyond a reasonable doubt and set aside the findings and the sentence. *Id.* at 18. The rationale of these holdings also applies to the instant case, especially regarding the importance of the evidence, the weaknesses in the government's case, and the fact that, "a reasonable jury might have received a significantly different impression of the witness's credibility" had the members received this evidence. *Id.*

The Army Court wholly and erroneously[20] adopted the military judge's position that 1LT Behenna lost his right to self-defense, and concluded that Dr. MacDonell's opinion, therefore, would not have affected the findings. *Behenna*, JA–15-16. This analysis fails, because it should have been the properly instructed members, not the military judge, who decided whether 1LT Behenna had the right to self-defense after hearing the evidence - including Dr. MacDonell's opinion.

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[19] Page citations to *Ellerbrock* are to the opinion as it appears on this Court's website.

[20] *See* Issue I, *supra*.

2) Defense counsel could have used the favorable information to object to the improper argument

The duty to disclose is focused on access to evidence to aid in the preparation of the defense, and not on evidence known to be admissible at trial. *Roberts*, 59 M.J. at 326. The possible use of such evidence in trial is not the determinative factor. *Id.* This Court held that the military judge erred as a matter of law in denying discovery, in part by improperly limiting the scope of discovery by focusing on the admissibility of impeachment evidence to be used in the defense case, rather than on its value to the preparation of the case. *Id.* The military judge in the case at bar erred for the same reason. AE XCI (para. 4a), JA-314.

However, if *arguendo*, Dr. MacDonell would not have been permitted to testify, his opinion remained material to the defense, would have affected the findings, and should have been timely disclosed.

The Army Court failed to acknowledge[21] that the defense could have benefitted from Dr. MacDonell's opinion, for example, to object to government counsel's improper argument that the forensics supported the theory that Mansur was executed while sitting when, in fact, counsel knew the forensics showed the exact opposite.

A "prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's

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[21] This appellate issue was raised and ignored below.

judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985). Improper government argument, capitalizing on the defendant's ignorance of favorable evidence, may elevate the evidence to materiality. For example, the First Circuit reversed where the government's arguments suggested that a source of contraband did not exist after the defendant claimed it did. "[T]he prosecutor's persistent theme in closing argument suggesting the nonexistence of this information - and even the opposite of what the government knew - did fatally taint the trial." *United States v. Udechukwu*, 11 F.3d 1101, 1105-06 (1st Cir. 1993) ("Here we find a kind of double-acting prosecutorial error: a failure to communicate salient information, which, under [*Brady* and *Giglio v. United States*, 405 U.S. 150 (1972)] should be disclosed to the defense, and a deliberate insinuation that the truth is to the contrary."). *See also United States v. Gil*, 297 F.3d 93, 103-04, 108 (2d Cir. 2002) (new trial ordered where prosecutor attacked the defendant's credibility for testifying about facts which were supported by evidence the government improperly withheld).

1LT Behenna asserts that the failure to reveal Dr. MacDonell's opinion in time to present it to the members or to provide a basis for objection to government counsel's final argument, denied him a fair trial. In a similar situation, the Fourth Circuit found a *Brady* violation and a new trial mandated where the government "stressed" and "insisted" in argument that its crucial witness was

truthful when it knew that withheld evidence would have significantly undermined her credibility, making it "impossible to say that [the defendant] received a fair trial." *Monroe v. Angelone*, 323 F.3d 286, 314-17 (4th Cir. 2003).

The Ninth Circuit spoke clearly to this situation in *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009). The issue at trial was criminal intent when Reyes signed off on financial statements prepared by others. Knowing that higher-level witnesses had given exculpatory statements not presented in evidence, the prosecutor argued that they "did not know anything." "Our theory is that those people didn't know anything." *Id.* at 1077. The court found that, "Defense counsel made no knowingly false statements. The prosecutor did." *Id.* Because "The prosecutor asserted as fact a proposition that he knew was contradicted by evidence not presented to the jury," the court found harmful error. *Id.* at 1076. The court reversed because, "The record demonstrates that the prosecution argued to the jury material facts that the prosecution knew were false, or at the very least had strong reason to doubt." *Id.*

Likewise, government counsel's arguments in the instant case went to the heart of the case - whether 1LT Behenna perceived an imminent threat from Mansur and acted in self-defense. The government argued at the hearing on a motion for mistrial that they did not know for sure what their expert witness would say, and that is why they sent him home without testifying and did not inform the

defense of his demonstration or opinion. First, possessing the information they did, they had an obligation to seek and clarify his opinion. Second, there was no evidence whatsoever introduced at the hearing on the motion for mistrial - by testimony or affidavit - to support that argument.

In the instant case, after hearing the sworn testimony of Dr. Radelat, Mr. Bevel, and 1LT Behenna, combined with the undisclosed opinion rendered by its own forensic scene reconstruction expert, clearly government counsel knew her arguments were false, or without question had very strong reason to doubt that they were true. Given the evidence, how could she give the imprimatur of the United States Government to the statements that 1LT Behenna's description of the shooting was "incredible," "makes no sense whatsoever," "unreasonable," and "impossible"?

It must be emphasized that no objection was lodged on the basis that counsel was arguing facts she knew to be contradicted by evidence not presented because no defense counsel knew of Dr. MacDonell's evidence until after the verdict on findings.

> Deliberate false statements by those privileged to represent the United States harm the trial process and the integrity of our prosecutorial system. We do not lightly tolerate a prosecutor asserting as a fact to the jury something known to be untrue or, at the very least, that the prosecution had very strong reason to doubt.

Reyes, 577 F.3d at 1078.

Significantly, failing to disclose favorable evidence is a due process violation "irrespective of the good faith or bad faith of

the prosecution." *Brady*, 373 U.S. at 87. Whether deliberate or because of lack of training and experience, government counsel in the instant case was disingenuous when she asserted counsel did not "bother to rebut" the defense forensic evidence "because we have eyewitness testimony" (neither alleged "eyewitness" saw what happened before the first shot), "and even more than that, we have a story that is reasonable versus a story that is incredibly self-interested and unreasonable." JA–232 (emphasis added). She stated this as fact to the members on Friday, all the while knowing that 1LT Behenna's testimony on Thursday matched exactly the demonstration by Dr. MacDonell on Wednesday of the "only logical explanation" of the forensic evidence.

If there could be doubt that reversal is required, the final plea to the members by counsel should dissolve that doubt: "[h]is story is incredible, and I ask you to look at all of the evidence in deciding whether or not you actually have a reasonable doubt." JA–233-34 (emphasis added). Counsel for 1LT Behenna ask this Honorable Court to consider that the government did not present all of the evidence, nor did it inform the defense of the undisclosed evidence so it could present that evidence to the members so they could look at all of the evidence.

c. Dr. MacDonell's opinion would have affected the sentence

In a footnote, the Army Court rejected the argument that had the members heard evidence from the government's own expert that

Mansur was standing when shot rather than being executed while sitting, they might have adjudged a more lenient sentence even if they found guilt (*e.g.* because of the erroneous instruction limiting self-defense). *Behenna*, JA–15. This is true even though Dr. MacDonell's testimony was substantially similar to that of 1LT Behenna's two forensic experts. *See Brickey*, 16 M.J. at 265-66; *Mott*, JA–339. It is reasonable to infer that members would sentence more harshly an accused who "executed" a sitting man than an accused who shot someone getting up, trying to take his weapon to use it on him. JA–196-97.

E. Condoning the Government's Conduct Would Negatively Reflect on the Actual and Apparent Fairness of the Military Justice System.

Military courts have a long history of being concerned not only with servicemembers actually receiving fair trials, but also in ensuring that the public is aware that a citizen can receive a fair trial by court-martial; in other words, that trials in the military justice system are fair, and appear to be fair. *See United States v. Bragg*, 66 M.J. 325, 326 (C.A.A.F. 2008); *United States v. Leonard*, 63 M.J. 398, 402 (C.A.A.F. 2006); *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987). The failure to disclose Dr. McDonnell's opinion and the resulting conviction in this case send the opposite message to servicemembers and the public.

The adversarial process did not function properly in this case, and it provides a vehicle for this Court to establish clear

rules that implement *Brady v. Maryland*, *Kyles v. Whitley*, and *United States v. Webb*. It also will permit this Court to exercise its supervisory power to refine expectations for prosecutors in the military justice system to heed the admonition of this Honorable Court and the United States Supreme Court that the interest of the government in criminal cases "is not that it shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)(quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Only then can the American public repose confidence in the military attorneys who are entrusted with the power of the sovereign and are privileged to represent the United States in courts-martial.

F. Conclusion.

This Honorable Court should reverse the decision of the Army Court and set aside the findings and the sentence, because this error infected the entire trial.

CONCLUSION

This Honorable Court should reverse the decision of the Army Court and set aside the findings and the sentence, or in the alternative, without waiving the foregoing, reverse the decision of the Army Court and set aside the finding of unpremeditated murder and the sentence.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Behenna*, Crim.App.Dkt.No. 20090234, USCA Dkt. No. 12-0030/AR, was electronically filed with both the Court and Government Appellate Division on February 28, 2012.

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