

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

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES

Appellee

v.

MICHAEL C. BEHENNA  
First Lieutenant  
U.S. Army

Appellant

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REPLY BRIEF ON BEHALF OF APPELLANT

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different allegation. It actually referred to the May 5, 2008 allegation of assault consummated by a battery, not an offer assault that allegedly deprived 1LT Behenna of his right to self-defense on May 16, 2008. JA-212. There was also an instruction on the elements of the lesser included offense of aggravated assault. GB 19. It came eight pages after the inadequate limiting instruction. In the limiting instruction, the military judge did not refer the members to either the instruction dealing with the assault consummated by a battery or the one dealing with the lesser included offense.

Significantly, the military judge instructed the members that the defense of self-defense pertained only to "the charged offense of premeditated murder and the lesser-included offense of unpremeditated murder." JA-213.

The government contends that "the judge provided the panel with all of the necessary instructions" and left the decision on whether an assault occurred to the members. GB 18-19. This contention is followed by the claim that the military judge did not "even imply that if appellant merely pointed a weapon at Mr. Mansur, this fact alone is enough to prove assault..." GB 20. A plain reading of the instruction reveals, "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 members were not

instructed on the elements of an offer assault; therefore, contrary to the government's argument, they did not have the guideposts necessary to make the determination as to whether there was an offer assault. The only instruction they received on this issue was the military judge's instruction presuming an offer assault by merely pointing a loaded weapon at Mansur. The government makes the same error in its pleading before this Court in saying: "There is no question from the evidence that appellant first pointed a loaded weapon at Mr. Mansur. As a matter of law, appellant therefore assaulted Mr. Mansur." GB 27 (emphasis added). However, especially in light of the fact that the government did not advance this theory at trial and did not offer any evidence of unlawfulness at trial, the mere pointing of a weapon at a suspected terrorist in a combat zone was not, by definition or as a matter of law, an assault, such that 1LT Behenna lost his right to self-defense. This Court "cannot affirm a criminal conviction on the basis of a theory of liability not presented to the trier of fact." *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). Likewise, this Court should not approve depriving 1LT Behenna of his defense based on a theory not presented to the trier of fact at trial. The military judge failed to properly instruct the members and failed to correct the error by relying on a novel and factually unsupported theory.

In March of this year, this Court decided a case involving the law of self-defense. *United States v. Stanley*, 71 M.J. 60 (C.A.A.F.

2012).<sup>1</sup> Both opinions quoted *United States v. Moore*, 15 C.M.A. 187, 194 (1964). This Court in *Moore* reversed a murder conviction, relying on the principle that "'One whose acts provoke a situation wherein he has to defend himself, who does so without intending thereby to provoke a difficulty, or who does so without intent to use the provoked assault as a pretext for killing or injury, does not forfeit his right to perfect self-defense.'" *Moore*, 15 C.M.A. at 194 (quoting *Caraway v. State*, 263 S.W. 1063, 1065 (Tex. 1924) (emphasis added)). *Moore* is still the law in the military justice system.

1LT Behenna testified that he did not intend to kill Mansur that day; he only intended to scare him into divulging information about terrorist activity. JA-180. 1LT Behenna was clear as to why he wanted to scare Mansur: "My whole intent through this whole thing was to question Ali and to get the bigger fish, if you will, in Salam Village. That was my whole intent." JA-188 (emphasis added).

"Whether an accused, by resort to a weapon, uses excessive force in repelling an assault upon him is dependent upon all of the circumstances." *United States v. Black*, 12 C.M.A. 571, 575 (1961). Because these rules regarding self-defense were established to deal with use of force in non-combat situations, usually in peace time,

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<sup>1</sup> Citations to this case are to the pages as they appear in the opinion published on this Court's website.

domestic environments, such as in *Stanley*, their application may not apply precisely to the circumstances of combat where an Army officer is seeking an interview with a man the officer reasonably believes is a dangerous insurgent responsible for the deaths of his soldiers.

These cases contradict the government's claim in the case at bar that 1LT Behenna was committing assault as a matter of law. GB 27 (emphasis added).

**B. The Government Introduced NO Evidence of Unlawfulness at Trial.**

The government asserts that "An assault did occur. Appellant had no legal justification or excuse for pointing the weapon at Ali Mansur." GB 18.<sup>2</sup> It was the government's burden to allege and prove unlawfulness, but it did not. In an attempt to fill the void of a total lack of evidence of unlawfulness the government states, "appellant admits that he had no authorization to either take Mr. Mansur to the culvert or to interrogate Mr. Mansur by pointing a loaded weapon at him." GB 20. However, 1LT Behenna testified that he was using scare tactics to get Mansur to answer his questions about the terrorist cell in the area. 1LT Behenna acknowledged that it was not an "authorized standard operating procedure type of technique," and it was a "bad decision." JA-194-95. Violation of a standard operating procedure is not proof of a criminal offense,

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<sup>2</sup> The government claims 1LT Behenna "constantly assaulted Mr. Mansur with a loaded firearm." GB 28.

and certainly does not suffice to meet the government's burden at trial to prove the element of unlawfulness.<sup>3</sup> See *United States v. Johnson*, 54 M.J. 67, 69 (C.A.A.F. 2000) (evidence of bad judgment or a violation of other social or military norms does not support a criminal conviction). The limiting instruction unconstitutionally relieved the government of its burdens of proving an element required in order to apply the limiting instruction, and disproving the affirmative defense of self-defense beyond a reasonable doubt. R.C.M. 916(b).

C. The Limiting Instruction Improperly Required a Finding of Escalation.

The limiting instruction erroneously required a finding of escalation, even if there were no assault, in order to find that self-defense applied, because escalation was "linked" to the other ways 1LT Behenna could act in self-defense. The government acknowledges that escalation was linked in that manner on two separate occasions. GB 19, 23. The conjunctive "and" was not only confusing, it was erroneous.

This Court held in *Stanley* that where evidence of escalation was not introduced, escalation was not in issue, and it was not error to omit an escalation instruction. *Stanley*, at 3. In the case at bar, there was no evidence of escalation by Mansur, neither

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<sup>3</sup> The government's argument that Mansur was not a "combatant" is irrelevant to the requirements of proof and proper instruction on the element of unlawfulness, and has not been raised on appeal by 1LT Behenna.

side requested an instruction on escalation, neither side argued that escalation occurred, and yet the military judge instructed in the limiting instruction that escalation was required for self-defense to apply. It should be noted that the defense in *Stanley* did not object to the lack of an escalation instruction; in the case at bar the defense did object to the limiting instruction, and it was overruled.

**D. The Government Misunderstands the Law Regarding Withdrawal.**

Following the Army Court's faulty reasoning, the government does not look to the relevant time period on the issue of withdrawal. Whether 1LT Behenna "initiated" or "orchestrated"<sup>4</sup> the initial sequence of events in the culvert is irrelevant. The time period that frames this issue is that between the time 1LT Behenna 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. This was when 1LT Behenna felt his life was threatened and it was after this threat that he did not have a reasonable opportunity to withdraw; thus he should not have lost his right to self-defense.

**E. Excessive Force Civil Rights Cases Highlight the Need to Focus on the Relevant Time Period - the Moment Before the Split-second Decision to Use Force Is Made.**

The government quotes *dicta* in *Plakas v. Drinski*, without indicating that it is derived from the theory "that shooting in self-defense is unjustified where the aggressor acted out of

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<sup>4</sup> GB 24-25.

reasonable fear of police brutality." GB 26; *Plakas v. Drinski*, 19 F.3d 1143, 1147 (7th Cir. 1994). In *Plakas*, however, the court stated that this theory was of "no use" in the case and held that the "[officer's] use of deadly force was reasonable given [the deceased's] act of aggression and [the officer's] knowledge of what had gone on before." *Plakas*, 19 F.3d at 1147, 1150. The court stressed the importance of the relevant time period - the instant or two before the officer fired the fatal shot. *Id.* at 1149-50. The deceased's actions in charging the officer with a fire poker and raising it to swing were "sudden and unexpected" and the officer "was in fear of his life" at that time period. *Id.* at 1146. The court refused to consider events prior to the threat to determine whether the officer could have avoided the situation. *Id.* at 1148, 1150.

This is analogous to the case at bar. The government cites Harry's testimony that 1LT Behenna and Mansur were "at a distance of 3 to 4 meters away" from each other immediately prior to the shooting. GB 12.<sup>5</sup> However, the CID investigator who physically measured the culvert testified that the culvert was "maybe 10 feet wide." JA-49. The back of each man was about one foot from the two inside walls of the tunnel. JA-75-76. Their outstretched arms would have been only two or three feet apart, justifying a reasonable

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<sup>5</sup> The government repeats this erroneous fact regarding the distance during argument. GB 25.

fear that when Mansur threw the concrete at 1LT Behenna's head and stood up with an outstretched arm, Mansur was reaching for the pistol and presented an immediate danger of death or grievous bodily injury. Significantly, the fact that Harry's estimate of the distance was so far from reality reflects his inability to accurately see what happened and the lack of reliability of his testimony as an "eyewitness."

In addition, 1LT Behenna testified that "this happened fast." JA-197. This instant is the relevant period for determining whether 1LT Behenna had a reasonable opportunity to withdraw.

The government also cites a case decided before the Supreme Court articulated the objective reasonableness standard<sup>6</sup> that looks to the moment before the split-second decision to use force is made. GB 26 (citing *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985)). The government's reliance on this case is misplaced because it cites to language from the opinion that was analyzed under a substantive due process standard, which has been replaced by an objective reasonableness standard.

Several United States circuit courts of appeals have decided excessive force civil rights cases where the officers assert self-defense based on the current standard articulated in *Graham*. See, Brief on Behalf of Appellant 30-31. These courts have uniformly refused to consider events prior to the threat against the officer

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<sup>6</sup> *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

in determining whether he could have avoided the situation which led to the use of deadly force. Applying these principles to the case at bar, 1LT Behenna acted reasonably in using deadly force based on self-defense.

**F. 1LT Behenna Was Harmed by the Limiting Instruction.**

The government urges that if any error occurred it was harmless because of 1LT Behenna's "guilty mind" after he shot Mansur. GB 27-28. These allegations of 1LT Behenna's actions after he shot Mansur come primarily from the discredited testimony of the government's cooperating witness, SSG Warner, who had traded his testimony for dismissal of a premeditated murder charge and a 17 month sentence, and thus lack merit.

The defense filed a Motion in Limine to prevent the government from introducing evidence or commenting on 1LT Behenna's reliance on Article 31 and the Fifth Amendment prior to trial. This motion was unopposed. The military judge granted the motion. The government's taking one position at trial and then taking the opposite position on appeal is improper, as is its comment on 1LT Behenna's silence.

**G. 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.

The government concedes this court will apply a *de novo* standard of review. It is noted that the government did not address the teaching of *United States v. Kreutzer*, 61 M.J. 293, 298-99 (C.A.A.F. 2005) as it relates to its burden to demonstrate that there was no reasonable possibility that the nondisclosure contributed to the sentence. This is a burden the government cannot meet.

#### B. Dr. Macdonell Presented to the Prosecution Team the Only Logical Scenario by Which He Could Reconcile the Shooting with the Forensic Evidence.

The government concedes that at the Wednesday evening meeting of the prosecution team, Dr. MacDonell's demonstration was "consistent with the defense experts' testimony" and he was "reconcil[ing] the defense experts' testimony with the forensic evidence." GB 32, 46 (emphasis added). Having learned for the first time on Wednesday from Dr. Berg about the "horizontal and essentially parallel" wound trajectories, he performed the demonstration based on "the autopsy findings, the bloodstains, the

final resting position of the body, and the time between shots." JA-302.<sup>7</sup>

This opinion was strengthened on Thursday morning, before 1LT Behenna's testimony, when he examined the 9mm spent bullet recovered from the scene. Based on its shape, he determined that it had tumbled in flight after exiting one of the wounds and struck a vertical surface such as the culvert's concrete wall. JA-302-03.

There is one other factor that is critical to the forensic analysis - the interval between the shots. While the government's brief states 1LT Behenna testified that he "paused for a few seconds" between shots, GB 12, 1LT Behenna's actual testimony is that it was "about a second." JA-196. This is significant because Dr. MacDonell had formed the opinion before he heard this testimony that the second shot was to the head very quickly as Mansur fell after the first shot to the ribs.

It is clear from the uncontroverted evidence from Dr. MacDonell that his opinion as to what transpired was based on the forensic evidence and was favorable to the defense. Therefore, the government should have timely disclosed it.

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<sup>7</sup> The government argues that any "reliance on the affidavit of Dr. MacDonell is misplaced as the military judge found that it was not credible." GB 47. In fact, the military judge only found one statement contained in the affidavit to be not credible. JA-319. The military judge did not question anything else in the affidavit.

**C. The Government Relies on "Facts" Unsupported by the Record.**

1LT Behenna and the government agree that the only evidence presented at the hearing on the Motion for Mistrial was the testimony of Dr. MacDonell and the oral stipulation that defense counsel had brought to government counsel's attention: Dr. MacDonell's statement that he would have been a good defense witness, and government counsel had told defense counsel that no exculpatory evidence existed. GB 34; JA-271. It is uncontroverted that the only evidence submitted in relation to the subsequently filed Motion for New Trial was the affidavit of Dr. MacDonell. The government's position on Issue II lacks merit because the record of trial contains no factual support for its position on the Motion for Mistrial or the Motion for New Trial. It should be noted that none of the three trial counsel ever testified to contradict the testimony of what Dr. MacDonell swore happened at the Wednesday demonstration with SGT McCauley, witnessed by Dr. Berg, the three trial counsel, and others. Nor did any of them ever file an affidavit to controvert Dr. MacDonell's testimony or his affidavit. Dr. Berg never testified or submitted an affidavit to contradict Dr. MacDonell's testimony and affidavit about the demonstration on Wednesday, or that on Thursday Dr. MacDonell was sitting next to Dr. Berg in the courtroom and, after hearing 1LT Behenna's recollection of the shooting, leaned over and told Dr. Berg "that's exactly what I told you yesterday." JA-254, 269. No government

witness testified or submitted an affidavit to contradict Dr. MacDonell's testimony and affidavit that he told the prosecuting group as he was leaving the courthouse on Thursday to return to New York, "That was just exactly what I told you." JA-254.

Yet the government states as fact to this Court that at the Wednesday evening demonstration, "Dr. MacDonell still held the opinion that there were a multitude of possibilities." GB 32. Not only do the government's record citations not support this, citing to the military judge's Findings of Fact as if they are evidence is improper. GB 32 n.164, 40 n.203-04, 42 n.213, 44 n.221. Many of the military judge's Findings of Fact are unsupported by the record and contested by 1LT Behenna, and the government is bootstrapping a factual foundation for the arguments in its brief by citing the military judge rather than evidence in the record. Examples of explanations without supporting testimony include why the government decided not to call Dr. MacDonell as a witness at trial and what was "clear" by the end of the Wednesday meeting. GB 42. There simply was no evidence presented regarding trial counsels' thought processes, observations, or actions (such as when trial counsel read the email from Dr. MacDonell). GB 44-45, 49.

**D. Dr. MacDonell's Opinion Was Not New or Revised.**

The government claims multiple times throughout its brief that Dr. MacDonell's opinion changed, was revised, or suddenly shifted, among other descriptors, in an effort to convince this Court that

Dr. MacDonell held anything other than an opinion that was supported by the forensic evidence and what he had learned was the defense theory of the case. GB 15, 36, 39, 40, 42, 43, 44, 48, 49, 50, 51, 53, 59. Claiming something enough times does not make it a fact. 1LT Behenna does not dispute that Dr. MacDonell stated that anything is possible. However, it cannot be overstated that when he said that, in the same breath Dr. MacDonell consistently provided one explanation that was "the only logical explanation." JA-302. Dr. MacDonell's original opinion is, in fact, his only opinion.

The claim that "It was only after hearing appellant's account of the shooting that Dr. MacDonell changed his opinion and believed appellant was telling the truth" is inaccurate. GB 44. The day before 1LT Behenna testified, Dr. MacDonell had demonstrated to the prosecution team, including its expert assistants, the only logical explanation for the shooting. JA-255-56,301-05. When questioned by the military judge at the hearing on the Motion for Mistrial, Dr. MacDonell made it clear his opinion never changed. He merely did not realize how favorable to the defense it was until he saw 1LT Behenna demonstrate the shooting on Thursday:

Q. [MJ] If you had testified on Wednesday, prior to hearing Lieutenant Behenna's testimony, what would your conclusions have been?

A. Well, I would have the same conclusions, but I would not have been as concerned, I guess is the right word, because I had no idea that he was going to say that.

\* \* \*

Q. As of Wednesday during this meeting--I am trying to understand the--I am trying to understand where your opinion was as of Wednesday as it relates to your analysis of the evidence and opinions you were providing to the government. As of Wednesday, what was your conclusion as to the most likely fact pattern?

A. Well, there would have been exactly what I have just been saying, but I would not have been as sure--well, I don't think sure is the right word. I would not have been as concerned until I heard the defendant testify because I thought he was acting out what I had just done . . . So, the moment I saw what he did, I thought, "Well, maybe this guy is telling the truth after all and maybe he didn't--it didn't happen that way [the government's theory]."

\* \* \*

...[I]t was only triggered by seeing him testify, or hearing him and his explanation. I think he put his arms up showing that Ali was supposedly reaching for his gun and so on, and it kind of concerned me because I thought in the interest of justice I ought to do something.

JA-265-66.

It is clear that when he said "it was only triggered," Dr. MacDonell was referring to his concern that he thought he "ought to do something." *Id.* He sent the email. He did not state that a "revised" or "new" opinion was triggered. In contrast to its prior positions, the government later acknowledges, "After appellant's testimony, Dr. MacDonell's expert opinion had not changed." GB 52 (emphasis added). 1LT Behenna agrees.

**1. The Government Mischaracterizes Dr. MacDonell's Testimony.**

The government mischaracterizes Dr. MacDonell's testimony by stating, "on Saturday, February 28, 2009, Dr. MacDonell also testified that based upon the forensic evidence, appellant fired

down upon the seated victim." GB 40. A careful review of Dr. MacDonell's testimony in conjunction with that statement reveals the following:

- Q. [MJ] No, please, Doctor, I don't want to hear what you have said all along. Tell me exactly what your opinion was of what occurred in the culvert prior to hearing Lieutenant Behenna's testimony.
- A. That the only explanation for the two horizontal shots would be if they were fired in the same trajectory with one being fired higher than the other. And either the shot was fired down at the ribs or the body and that the head dropped down in line with the pistol, or the shot was fired in the head first and then really, really quickly he dropped down to the body before it fell and shot again, which seemed extremely unlikely. So, I felt the horizontal trajectories and the horizontal nature of the trajectories would mean that he was shot first in the ribs and then in the head as he fell down. That was the whole thing that I figured out on the posture and the position of the deceased at the time he was being shot, and it was consistent with the blood on the floor.

JA-267 (emphasis added).

Next, the government states that Dr. MacDonell "disagreed with a defense expert that Mr. Mansur was standing when shot." GB 41. The record does not contain any such statement by Dr. MacDonell.

Finally, the government claims that Dr. MacDonell "believed that Mr. Mansur was 'not standing when the [sic] shot through the head.'" GB 46-47. Dr. MacDonell's actual opinion was:

. . . I said the 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 [what] happened.

JA-255.

**2. The Government Mischaracterizes the Defense Experts' Testimony.**

The government contends that both defense experts admitted "the victim could have been seated when [the] appellant shot him." GB 55. A careful review of the government's citation to the record reveals no such testimony. Contrary to the government's assertion, neither expert ever testified that based on all of the forensic evidence "the victim could have been seated when [the] appellant shot him."

Moreover, when considering all of the evidence, both Dr. Radelat and Mr. Bevel were certain in their conclusions: Dr. Radelat testified that based on the autopsy, 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-110-13. Mr. Bevel testified that based on the blood stains and other forensic evidence, the best explanation for the location of the wounds on Mansur and the pattern of the blood depicted in scene photographs was that Mansur was standing when shot first in the chest, and that his right arm was raised at that moment because it was not in the flight path of the bullet that entered the side of his right rib cage under the arm. JA-119-22. In fact, when the military judge questioned Dr.

Radelat whether the evidence was inconsistent with the government's theory, the reply was, "I guess, Judge, the only thing that I can really say is that it is a contorted scenario, which is not impossible by the rules of physics, but I do think it kind of offends probability and maybe commonsense to some extent." JA-17.

**E. Admissibility is Irrelevant in the Context of Brady<sup>8</sup> Material; However, Dr. MacDonell's Testimony was Admissible.**

1LT Behenna and the government agree that in the military justice system "discovery is not limited to evidence known to be admissible at trial." GB 37. Yet the government argues that Dr. MacDonell's testimony would not have been admissible. GB 52-54. This argument lacks merit and has no bearing on the fact that the information was favorable to the defense and should have been disclosed, regardless of its admissibility.

The government contends that Dr. MacDonell's testimony would have been inadmissible "lie detector" testimony. GB 53-54. This is a complete red herring. First, Dr. MacDonell should have been allowed to testify and conduct the same demonstration for the members that he gave to the prosecution team. Second, he should have been permitted, as an eminently qualified expert, to render his expert opinion that the forensic evidence supported the "only logical explanation" of what happened - that the first shot was to the chest as Mansur was standing with his right arm outstretched

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<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

and the second shot was to his head as he fell. Third, Dr. MacDonell's opinion was not based on his belief that 1LT Behenna was telling the truth, see *supra* 16-18, 1LT Behenna's testimony simply alerted Dr. MacDonell to how favorable to the defense his opinion actually was. Finally, the opinion of an expert witness unquestionably can be and very often is based on the testimony of other witnesses. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 703 (2008) (emphasis added). That is why experts are permitted to sit in the courtroom during testimony of other witnesses, and was the reason that Dr. MacDonell personally observed the courtroom testimony of Dr. Radelat, Mr. Bevel, and 1LT Behenna.

The government's argument that had Dr. MacDonell testified the government counsel would have impeached him is irrelevant. GB 54-55. Even if true, that has no bearing on the requirement to disclose favorable information to the defense. Moreover, contrary to the government's contention that a third defense expert "would not have substantially altered the outcome of the case,"<sup>9</sup> confirmation from the government's expert of the two defense experts and 1LT Behenna himself on the core factual dispute at trial very likely would have made the difference in the jury's

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<sup>9</sup> GB 58.

finding, and its non-disclosure deprived 1LT Behenna of a fair trial. See *United States v. Brickey*, 16 M.J. 258, 265-66 (C.M.A. 1983) ("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").

Finally, even if Dr. MacDonell was not called as a witness, timely disclosure of his opinion would have provided a basis for an objection to government counsel's final argument that no rebuttal was needed by the government "because I think the forensics were clear." JA-232.

Indeed they were - but they supported the defense, not the government.

**F. The Burden of Persuasion Belongs to the Government.**

The government had the burden of persuasion on the issue of whether it failed to disclose favorable information. *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008). The government's decision not to disclose that its own expert witness' opinion was consistent with the defense theory and contrary to the government's theory, if deliberate, was a violation of the Constitutional, statutory, and ethical duties of government counsel. If it was negligent, the harm to 1LT Behenna is exactly the same. The government cannot show that the non-disclosure was harmless beyond a reasonable doubt, and thus the government did not meet its burden.

The government cannot fulfill its duty by shifting the burden of production to the defense: "Trial defense counsel was in a better situation to understand and comprehend Dr. MacDonell's statement after hearing appellant's version of the killing for the first time." GB 48-49. This contention lacks merit. The remark that Dr. MacDonell would have made a "good witness" for the defense did not contain any facts for trial defense counsel to use. It certainly did not advise trial defense counsel that the opinion of the government's expert witness supported the defense theory and impeached the so-called "eyewitnesses." If the three government counsel did not know what Dr. MacDonell meant when they were informed of his comment on Friday morning, after they had seen and heard his demonstration on Wednesday, and had seen and heard 1LT Behenna's testimony on Thursday, how could defense counsel know the meaning of Dr. MacDonell's comment? On Friday morning, the defense counsel was unaware of the Wednesday demonstration. Even *if*, *arguendo*, the government did not appreciate the favorable nature of the Wednesday demonstration, the defense experts' testimony, and 1LT Behenna's testimony, taken together, on Friday morning when the defense counsel asked what Dr. MacDonell meant, the government had the duty to inquire of Dr. MacDonell. The government counsel could not escape that duty by burying their collective heads in the sand.

The burden of production was and remained on the government. *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004). The

government violated its duty, and cannot prove that this was harmless beyond a reasonable doubt.

**G. The Government Fails to Appreciate the Significance of What This Case Would Say About the Military Justice System Should This Court Approve the Government's Conduct Here.**

Almost since the inception of this Court's existence, the military justice system has been a step ahead of the civilian criminal justice system in the United States. The government's brief fails to acknowledge how important this case is in defining in concrete terms the duty of military prosecutors regarding disclosure of favorable information to the accused.

The government fails to address this issue in its brief, although the concern was raised in the Brief on Behalf of the Appellant.

The case at bar provides this Court the opportunity to exercise its supervisory powers to unequivocally enforce the requirements of *Roberts*, *Webb*, *Kreutzer*, and their progeny, by holding that Dr. MacDonell's expert opinion given at the Wednesday demonstration should have been provided to the defense in time to use it at trial; that it was not for government counsel to decide whether Dr. MacDonell's expert opinion was material to the defense or admissible; and that if there was a doubt by the trial prosecutors or their supervisors, they should have sought before-the-fact guidance from the military judge.

Given the failure to disclose in the case at bar, this conviction should not stand.

**H. Conclusion.**

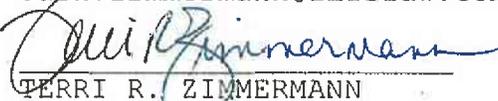
This Honorable Court should reverse the decision of the Army Court and set aside the findings and the sentence, because this error infected the entire trial.

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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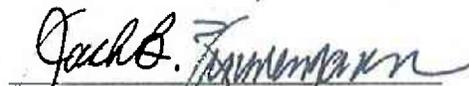
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