IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	) FINAL BRIEF ON BEHALF OF) APPELLEE
v.	)
	) Crim. App. Dkt. No. 20090234
First Lieutenant (0-2) **MICHAEL C. BEHENNA,** U.S. Army, Appellant	) USCA Dkt. No. 12-0030/AR

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

Granted Issues 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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is found in Article 67(a)(3), UCMJ, which allows review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."[2]

Statement of the Case

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of unpremeditated murder and assault in violation of Articles 118 and 128, Uniform Code of Military Justice (UCMJ).[3] The panel found appellant not guilty, in accordance with his pleas, of false official

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[1] *United States v. Behenna*, 70 M.J. 521 (Army Ct. Crim. App. 2011); 10 U.S.C. § 866(b).
[2] 10 U.S.C. §867(a)(3).
[3] JA 241-242. The panel found appellant not guilty of premeditated murder but guilty of the lesser included offense of unpremeditated murder.

statement in violation of Article 107, UCMJ.[4] The court-martial sentenced appellant to forfeiture of all pay and allowances, confinement for twenty-five years and a dismissal. The convening authority approved only so much of the sentence that included total forfeiture of all pay and allowances, twenty years confinement, and dismissal.[5] The convening authority credited appellant with fifty days of confinement against the sentence to confinement and, with the exception of dismissal, ordered it executed.[6]

The Army Court affirmed the findings and sentence on February 22, 2011.[7] Appellant filed a petition for review with this Court on September 19, 2011. Pursuant to Rule 21(c)(2)(i), the Government filed an opposition to the petition without formal briefing. This Court granted review on January 13, 2011. Appellant filed his brief under Rule 25 on February 28, 2011.

Statement of Facts

In September, 2007, appellant deployed to Forward Operating Base (FOB) Summerall, Bayji, Iraq as the platoon leader for 5th platoon, Delta Company, 1-327th Infantry Regiment, 101st Airborne Division, Fort Campbell, Kentucky.[8] The platoon was

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[4] JA 241.
[5] Action.
[6] *Id.*
[7] JA 4.
[8] JA 162.

assigned to conduct operations in Albu Toma, a town south of Bayji.[9] The three primary missions of appellant's platoon were to provide security for Checkpoint 104 just outside of FOB Summerall, respond as a battalion quick reaction force when necessary, and conduct counterinsurgency missions in Albu Toma.[10] Counterinsurgency missions not only included operations with the Iraqi Security Forces, the Iraqi Army and the Iraqi police, but also required the platoon to gain the trust of the local leadership in Albu Toma.[11]

On April 21, 2008, two Soldiers from appellant's platoon were killed and several other individuals wounded by an improvised explosive device (IED) while on convoy during a patrol mission in Salaam Village.[12] Following the loss of his Soldiers, appellant wanted to question an individual named Mr. Ali Mansur because his name was linked to a terrorist cell operating in Salaam Village.[13] In particular, appellant believed Mr. Mansur had information about who had implanted the IED that killed the two Soldiers from appellant's platoon.[14] Mr. Mansur was detained and sent to Combat Operating Base (COB) Speicher

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[9] JA 163.
[10] JA 163.
[11] JA 163.
[12] JA 169-172.
[13] JA 173.
[14] JA 178; *See generally* JA 163-171 and 172-177.

for interrogation and then sent back to FOB Summerall for release.[15]

On May 15, 2008, appellant requested that Mr. Mansur be questioned again prior to his release from detention.[16] SGT Lee, a human intelligence collector, confirmed that Mr. Mansur was being returned to FOB Summerall for release because " . . . the interrogations at Speicher weren't able to get answers or break the detainee."[17] SGT Lee also testified that it was "pretty unusual" to screen a detainee who was about to be released, but that the rescreening was conducted specifically at appellant's request.[18] SGT Lee questioned Mr. Mansur about a list of names provided to him by appellant and attempted to elicit information from Mr. Mansur about insurgents who were active in the local area.[19] SGT Lee testified that appellant requested to observe the rescreening because he believed that appellant was "pretty upset" that Mr. Mansur was getting released from detention.[20] Appellant did not participate in the questioning.[21] SGT Lee confirmed that Mr. Mansur was cooperative and corroborated "pretty much all of the names" that appellant provided as the

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[15] JA 174.
[16] JA 40-41.
[17] JA 44.
[18] JA 42.
[19] JA 45.
[20] JA 42.
[21] JA 42-43.

basis for the rescreening.[22] At the conclusion of the rescreening, SGT Lee advised appellant that he believed Mr. Mansur was being deceptive.[23]

On May 16, 2008, upon an order of release issued from higher headquarters, appellant was to return Mr. Mansur back to Albu Toma.[24] Appellant, without authorization, intended to question Mr. Mansur himself, believing interrogators failed to ask Mr. Mansur about cell leaders operating out of Salaam Village who may have played a role in the April 21 IED attack on his Soldiers.[25] That same afternoon, appellant picked up two detainees from the detainee cell (D-Cell) on FOB Summerall, including Mr. Mansur, for release in Mezra and Albu Toma.[26] Appellant drove both detainees back to his platoon area.[27] Appellant then spoke to Mr. Mansur outside with the help of an interpreter, Mr. Tarik Abdallah Silah (known as "Harry"), and told Mr. Mansur the following:

> I'm going to talk to you later on today. There is three pieces of information that I want from you: one, who was involved in the IED attack on the 21st of April; second, the leaders out in Salaam Village in the cell, I want to know that; and then the third thing was his trips to Syria and why he was going to

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[22] JA 42-43.
[23] JA 47.
[24] JA 46, 178.
[25] JA 178, 185, 188-190.
[26] JA 179-181.
[27] JA 179.

> Syria. If I don't get that information today, you will die today.[28]

Appellant had no training as an interrogator, and testified that there was no standard operating procedure (SOP) for any platoon leader to use this technique.[29] Even though appellant knew that he was not authorized to issue threats of death to a detainee, appellant states he did this in order to scare Mr. Mansur into providing information.[30]

Appellant released the first detainee in Mezra, and appellant's convoy continued to Albu Toma.[31] Instead of releasing Mr. Mansur as ordered by higher headquarters, appellant subsequently met with Sheik Hamad, the local village leader, for approximately an hour's time.[32] After this meeting, the convoy headed back towards FOB Summerall by taking a western desert route, then continued north and stopped at a culvert appellant chose because it was in a remote place, secure, and near a Concerned Local Citizens (CLC) checkpoint.[33] The area was approximately five minutes away from FOB Summerall by vehicle.[34]

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[28] JA 54, 180.
[29] JA 181.
[30] JA 1181, 203. On 5 May 2009, appellant had previously assaulted Mr. Mansur by hitting him with his Kevlar helmet over 30 times in the back when questioning Mr. Mansur at his home about his involvement with local terrorist groups. JA 51-52.
[31] JA 53, 55-56, 181.
[32] JA 181-182.
[33] JA 182-185.
[34] JA 48.

The convoy had stopped in an area of open desert that contained railroad tracks on top of two berms, with two culverts situated underneath.[35] The railroad tracks ran north to south and parallel to the two berms.[36] Two concrete culverts were situated underneath the railroad tracks and across from each other on the east berm and west berm, approximately 50 to 75 meters apart and a 30 second walk from the first culvert to the second culvert.[37] Each culvert was made of concrete, with a floor and ceiling, with dimensions of 30 feet in length, 10 feet in height, and 8-9 feet in width.[38] When approaching from the west, it was not possible to see the second culvert from the road because the western berm blocked its visibility.[39] No houses were in the immediate area.[40]

At appellant's command, the four-vehicle convoy stopped in a modified herringbone pattern headed north on the west side of the railroad tracks.[41] Appellant exited his vehicle, met up with Harry the interpreter and removed Mr. Mansur from the back of an MRAP vehicle commanded by SSG Warner, an NCO in the platoon.[42] Mr. Mansur was blindfolded and had his hands zip tied in front

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[35] JA 48.
[36] JA 49.
[37] JA 50.
[38] JA 49.
[39] JA 49-50.
[40] JA 56, 101.
[41] JA 77-80.
[42] JA 77, 184-185.

of him.[43] After telling three Soldiers who had also dismounted to get back into their vehicles, appellant then asked SSG Warner if he had a thermite grenade.[44] SSG Warner did not have a grenade in his vest as he normally would, but went to the third truck in the convoy and obtained a thermite grenade from a Soldier.[45] SSG Warner placed the grenade in his pouch and ran to catch up with appellant, Harry and Mr. Mansur, all of whom had already begun walking towards the culvert.[46]

When the group reached the first culvert, SSG Warner believed that they were going to use some scare tactics to question Mr. Mansur, and then release him.[47] SSG Warner had concerns about security because it was just the three of them in the culvert, but when appellant told SSG Warner "kind of snappishly" to "come on" with him, SSG Warner continued to follow appellant and Mr. Mansur to the second culvert.[48] Appellant did not want any of his other Soldiers to be involved in the interrogation because he knew what he was doing was

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[43] JA 78.
[44] JA 78.
[45] JA 79.
[46] JA 79.
[47] JA 79.
[48] JA 79-80.

wrong.[49] Appellant knew he had no authorization to bring Mr. Mansur to the culvert for questioning.[50]

Once in the second culvert, appellant and SSG Warner began stripping the clothes off of Mr. Mansur in an attempt to humiliate him.[51] Appellant cut off Mr. Mansur's shirt with a knife as SSG Warner cut off Mr. Mansur's pants.[52] Mr. Mansur never resisted appellant or SSG Warner as they cut off his clothes.[53] Appellant knew that he had no authorization to strip Mr. Mansur naked, that it was humiliating in the Arab culture for a man to be naked in front of another man, and that this was not an approved interrogation technique.[54] Both appellant and SSG Warner then tried to cut off the zip tie from Mr. Mansur's wrists with a knife, but Harry intervened, took the knife and removed the zip ties when he saw Mr. Mansur had a small cut on his hand from appellant and SSG Warner's efforts.[55] When Mr. Mansur was asked to sit down, he did so on a pile of rocks approximately 1-2 feet in height.[56] Mr. Mansur was now completely naked except for a pair of sandals on his feet, sitting on the pile of rocks, in a remote culvert in the desert,

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[49] JA 208.
[50] JA 203.
[51] JA 189-190.
[52] JA 189.
[53] JA 58.
[54] JA 190.
[55] JA 190.
[56] JA 58, 81.

surrounded by appellant, SSG Warner and Harry.[57] Both appellant and SSG Warner were fully armed with body armor, Kevlar helmets, M-4 rifles, a Glock pistol, multiple grenades, and 300 rounds of rifle ammunition.[58]

Once Mr. Mansur was stripped of his clothing, SSG Warner left the culvert to conduct a security check of the immediate area[59] and appellant pulled a loaded Glock pistol from his waist and pointed it at Mr. Mansur to scare him.[60] When appellant pointed his weapon at Mr. Mansur, Harry stepped back because he was afraid appellant might fire a shot, or a bullet would hit the concrete, ricochet and hit him.[61] Appellant continued to ask Mr. Mansur the same questions - "What do you know? What groups do you know? Who are the names of the people of the cells, groups? Talk to me today because if you don't talk, I will kill you."[62] Appellant also told Mr. Mansur, "[t]his is your last chance to tell the information or you will die."[63] Appellant knew that pointing his loaded weapon at Mr. Mansur and

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[57] JA 82, 83-84.
[58] JA 98-100, 205.
[59] JA 84-85.
[60] JA 59, 64, 72, 194.
[61] JA 59.
[62] JA 59.
[63] JA 195.

threatening to kill him were not authorized interrogation tactics.[64]

At first, Mr. Mansur denied knowing anything, but when Harry interpreted the conversation for the second time, and told Mr. Mansur, "You'd better talk. I mean, why do you put yourself in this situation. He is going to kill you," Mr. Mansur replied, "I will talk."[65] As Harry started to interpret Mr. Mansur's response, appellant shot him with his Glock.[66]

Harry, who was situated approximately 10 meters outside of the culvert, could see both appellant and Mr. Mansur, although not clearly.[67] Harry testified that appellant and Mr. Mansur were approximately 3 to 4 meters apart inside the culvert during questioning.[68] Harry could see both appellant and Mr. Mansur at the same time during the questioning, but testified they were not directly in front of him, but at an angle.[69] Harry further testified that when appellant fired the first shot, Mr. Mansur was still sitting and had made no sudden movements.[70] Contrary to Harry's testimony, appellant testified that he turned his head to listen to Harry's translation and said he heard a sound

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[64] JA 180-181, 194-195.
[65] JA 60.
[66] JA 59, 73-74, 196.
[67] JA 60, 67, 71.
[68] JA 72.
[69] JA 71.
[70] JA 60.

of concrete hitting concrete over his left shoulder.[71] Appellant testified that he then saw Mr. Mansur getting up with his hands out toward appellant's weapon.[72] Appellant, who had on full battle gear while in the culvert, to include IBA, a Kevlar helmet, an M-4 rifle and a Glock pistol, testified that Mr. Mansur, who was naked and unarmed, at a distance of 3 to 4 meters away, was a threat to appellant at this point.[73] In response, appellant stepped to the left, shot Mr. Mansur once, paused for a few seconds, then shot Mr. Mansur a second time.[74]

After the first shot, Mr. Mansur moved to the back and slowly to the right, falling and then laying on his side.[75] Appellant fired the second shot at Mr. Mansur as he was falling.[76]

SSG Warner heard the first pistol shot as he was relieving himself in the bushes outside and to the right of the culvert.[77] He immediately turned, brought his weapon to the high ready and moved north at a rapid pace towards the culvert.[78] Before reaching the culvert, SSG Warner turned on his tactical light and with his night vision goggles, could see appellant standing

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[71] JA 196.
[72] JA 196.
[73] JA 205-206.
[74] JA 87-91, 196.
[75] JA 60.
[76] JA 60.
[77] JA 87.
[78] JA 87.

with a pistol in his hand aimed at the Mr. Mansur inside the culvert.[79] Mr. Mansur was in a semi-sitting position on the north side of the culvert where SSG Warner had left him, and it looked as though Mr. Mansur was falling towards him as SSG Warner moved forward towards the culvert.[80] Prior to reaching the culvert, SSG Warner saw a muzzle flash and heard the second shot fired within three seconds after the first shot.[81]

As SSG Warner was nearing the opening of the culvert, he could see Mr. Mansur's naked body lying on its side, with an injury to his upper right torso area with a wound that was profusely pumping blood.[82] Appellant met SSG Warner as he came out of the culvert and stopped him.[83] SSG Warner testified that appellant instructed SSG Warner to "[t]hrow it."[84] When SSG Warner responded with "[t]hrow what?" appellant said to him, "[d]on't be stupid."[85] SSG Warner pulled the thermite grenade from his belt, moved toward Mr. Mansur, removed the safety pin and threw the grenade at Mr. Mansur's body.[86] SSG Warner knew that thermite grenades were normally used to destroy equipment

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[79] JA 89.
[80] JA 89-90.
[81] JA 91.
[82] JA 92.
[83] JA 93.
[84] JA 93.
[85] JA 93.
[86] JA 61, 93.

and had never received any training that it was permissible to use a thermite grenade on a human body.[87]

Subsequent to appellant shooting Mr. Mansur twice and SSG Warner throwing the thermite grenade at Mr. Mansur's body, appellant and SSG Warner both had articles of Mr. Mansur's clothing when they left the culvert.[88] On the way back to the convoy, appellant gave SSG Warner the clothes he had and told him to "Take care of them."[89] Upon arriving back to the convoy, appellant, SSG Warner and Harry entered their vehicles and headed back to the FOB.[90]

After returning to FOB Summerall, appellant asked SSG Warner to go for a walk with him and repeatedly asked if SSG Warner "was cool" with what happened and discussed with him legal rights versus moral rights.[91] Harry also testified that when he asked appellant "Why did you kill Ali Mansur?" appellant replied, "Mr. Mansur planted explosives twice on a specific road and the explosive that went off in Salaam Village, and he had a hand in this too. He was part of this operation."[92] There was no testimony from any witnesses at trial, to include appellant, that appellant told anyone before trial that appellant shot Mr.

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[87] JA 108.
[88] JA 93.
[89] JA 94
[90] JA 61.
[91] JA 94-96.
[92] JA 63.

Mansur because Mr. Mansur threw a piece of concrete at him, rushed him and tried to grab his weapon.

Summary of Argument

The military judge properly instructed the panel. Under the facts of this case, the Military Judge properly tailored his instructions and provided appropriate legal guidelines for the panel. Even if this Court finds an error in the instructions, such error is harmless as the panel was properly instructed that they could find appellant assaulted Mr. Mansur and appellant never had reason or justification for this assault and never regained his right to self-defense.

Turning to the second granted issue, Dr. MacDonell's opinion was not discoverable. In the event it is discoverable, it was timely disclosed. Dr. MacDonell changed his opinion of the forensic evidence based on a credibility determination. If there was any error in disclosing this "new" opinion there was no prejudice to appellant. Just as the defense experts were cross-examined, Dr. MacDonell would have been cross-examined, concerning how the forensic evidence does not lend itself to one interpretation. The military judge did not abuse his discretion in his findings of fact or conclusions of law.

Argument

Granted Issue 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

Standard of Review and Law

This Court reviews the adequacy of the self-defense instruction de novo.[93] "In assessing whether the court properly exercised [its] discretion," this Court "must examine the instructions as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence."[94] While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding which instructions to give[95] and has considerable discretion to tailor instructions to the evidence and law.[96]

Argument

The military judge properly instructed the panel. Under the facts of this case, the Military Judge properly tailored his instructions and provided appropriate legal guidelines for the panel. Even if there was an instructional error, the error is

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[93] *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007).
[94] *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 2006); see also *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011).
[95] *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993).
[96] *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002).

harmless. Defense's theory was appellant did not assault Mr. Mansur by pointing a weapon at him. Nevertheless, in reviewing the facts of this case, this Court will find appellant did assault Mr. Mansur and nothing triggered appellant's right to self-defense.

1. The instructions did not presume an assault.

Appellant argues the Military judge did not define assault by offer.[97] Appellant argues that this "failure to instruct is especially egregious, considering the government presented no evidence that such use of the weapon in a combat zone on this occasion was unlawful."[98]

The Military judge used his considerable discretion in tailoring instructions and provided appropriate legal guidelines to assist the panel in its deliberations. These instructions adequately covered the issue of assault.

The Military Judge's instructions included:

"An assault is an attempt or offer with unlawful force or violence to do bodily harm to another."[99]

"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 legal justification or excuse assaults another person is not entitled to self-defense unless the person being assaulted escalates the level of force beyond what that which was originally used...If you are convinced beyond a

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[97] AB at 22.
[98] AB at 22.
[99] JA 212.

reasonable doubt that the accused without provocation or 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 a right to self defense, and then you must determine if the accused actually did act in self-defense."[100]

An assault did occur. Appellant had no legal justification or excuse for pointing the weapon at Ali Mansur. As the Army Court properly stated, "[t]he military judge's tailored instructions correctly set forth the applicable established principle: 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."[101] Further, the military judge clearly instructed the burden of proof was on the government.[102]

The military judge did not "decide whether the act of pointing the weapon under the circumstances constituted the offense of assault."[103] Instead, the judge provided the panel with all of the necessary instructions, leaving the panel to decide if the evidence proved that appellant either assaulted

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[100] JA 215-216. Emphasis added.
[101] *Behenna*, 70 M.J. at 531-532.
[102] *Behenna*, 70 M.J. at 531-532.
[103] AB at 21.

Mr. Mansur and later regained his right to self-defense, or that appellant did not assault Mr. Mansur and acted in self-defense.[104] The military judge properly instructed the panel that there "may" be evidence of an assault, and that if the panel was "convinced beyond a reasonable doubt" that appellant assaulted Mr. Mansur "without provocation or other legal justification or excuse," then the panel could find that appellant lost his right to self-defense.[105] Additionally, the military judge instructed the panel on the elements of both assault and aggravated assault.[106]

The military judge concluded by instructing the panel on the ways in which appellant could regain his right to self-defense, including if the panel found that Mr. Mansur provoked appellant, or that appellant had some other legal justification or excuse for his use of force, and that the panel was not convinced beyond a reasonable doubt that Mr. Mansur did not escalate the force.[107] Under these particular circumstances, the military judge instructed the panel they then "must" conclude appellant retained his right to self-defense and then "must" decide if appellant acted in self-defense.[108] Contrary to

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[104] JA 215-216.
[105] JA 215-216.
[106] JA 217-218.
[107] JA 215.
[108] JA 215.

appellant's assertions, nowhere in the instructions does the military judge even imply that if appellant merely pointed a weapon at Mr. Mansur, this fact alone is enough to prove assault beyond a reasonable doubt and would thereby extinguish appellant's right to self-defense.[109]

The military judge's instructions should also be placed within the context of the facts in evidence. The evidence shows that pointing a loaded Glock pistol at Mr. Mansur was unlawful.[110] In particular, 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.[111]

Appellant argued for the instruction that Mr. Mansur was a combatant. The first time in the court proceedings the word "combatant" was used is when trial defense counsel mentioned it arguing for an instruction.[112] The military judge is within his discretion in tailoring instructions to the evidence and law, including whether to deny an instruction on whether Mr. Mansur was a combatant. There is no evidence or case in front of this court that would allow a finding that a civilian, who had been

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[109] JA 215.
[110] JA 181, 188-195, 204-205.
[111] JA 181, 188, 193-195.
[112] During the sentencing phase, the terms combatant and non-combatant were used, but this occurred after the discussion on the instructions for findings.

ordered released, was being detained, naked, in a culvert at gunpoint and without authorization, is a combatant.[113]

Appellant testified that he continued to detain Mr. Mansur without authority, even after appellant drove and stopped in Albu Toma where he was ordered to release him.[114] Appellant took matters into his own hands and not only brought Mr. Mansur to a remote culvert, but stripped him naked, sat him down, and verbally threatened to kill him while pointing a loaded weapon at Mr. Mansur's head - even though Mr. Mansur was unarmed.[115] The panel had all of these facts in evidence to consider when deliberating. These facts, coupled with the military judge's instructions, gave the panel the proper framework to determine whether appellant acted in an unlawful manner by committing assault and thereby gave up his right to claim self-defense

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[113] A legal definition of combatant available to this Court is in *Ex parte Quirin*: "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Ex parte Quirin*, 317 U.S. 1 (1942) Trial defense counsel did not argue that *Quirin* applied or did not apply to combatants, either lawful or unlawful, in Iraq. "Unlawful combatants...are not entitled to 'combatant immunity'... [u]nlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals..." *United States v. Lindh*, 212 F.Supp.2d 514, 554 (E.D. VA 2002) *citing Ex parte Quirin*, 317 U.S. at 30-31).

[114] JA 53, 55-56, 181, 204.

[115] JA 189-195, 205.

unless the evidence showed that Mr. Mansur escalated the level of force beyond the initial level of force used by appellant.[116]

2. The limiting instruction was not hopelessly confusing and unintelligible.

Appellant argues that the military judge's instructions were "confusing" and therefore erroneous when he used the term "and," which implied escalation of force was needed for appellant to act in self-defense.[117]

As there was evidence that appellant pointed a loaded Glock pistol at Mr. Mansur,[118] the military judge instructed the panel, "In deciding the issue of self-defense, you must give careful consideration to the violence, if any, involved in the incident."[119] The military judge continued his instruction as follows:

> 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. 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

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[116] JA 181, 188-195, 204-205, 215-216.
[117] JA 215.
[118] JA 58-59, 64, 72, 194-195.
[119] JA 215.

> 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.[120]

The first portion of the instruction informs the panel that if they found appellant was "assaulting Mr. Mansur", the appellant could not regain his right to self-defense unless Mr. Mansur "escalates the level of force beyond that which was originally used."[121]

The military judge went on to properly instruct the panel that if they found that Mr. Mansur escalated the force beyond the initial force used by appellant, the panel "must" definitively conclude that appellant retained his right to self-defense and then "must" decide if he did act in self-defense.[122]

Finally, the military judge concluded by instructing the panel on the ways in which appellant could regain his right to self-defense, including if the panel found that Mr. Mansur provoked appellant, or that appellant had some other legal justification or excuse for his use of force, and that the panel was not convinced beyond a reasonable doubt that Mr. Mansur did

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[120] JA 215-216.
[121] JA 215.
[122] JA 215-216.

not escalate the force.[123] Under these particular circumstances, the military judge instructed the panel they then "must" conclude appellant retained his right to self-defense and then "must" decide if appellant acted in self-defense.[124]

3. The Army Court did not err when analyzing the law of self-defense-withdraw

Appellant argues that the military judge failed to instruct on appellant's ability to regain or retain self-defense if he was unable to physically withdraw from the conflict.[125]

Appellant wants this Court to believe that he was unable to physically withdraw from the culvert because Mr. Mansur supposedly threw a piece of concrete at him, stood up and reached for his weapon - and that this all "happened fast."[126] Contrary to appellant's assertions, the facts in evidence show that appellant not only had control of all of the events that occurred in the culvert, but also had ample opportunity to physically "withdraw in good faith"[127] from the conflict he initiated.[128]

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[123] JA 215.
[124] JA 215-216.
[125] AB at 28.
[126] AB at 29.
[127] *Lewis*, 65 M.J. at 89.
[128] JA 185-205.

The Army Court found that "[a]ppellant had every opportunity to withdraw from the confrontation and there was no evidence he either attempted or was unable to do so. As such, the military judge was not required to instruct on inability to withdraw as it was not 'in issue,' and we find no error in his failure to do so."[129]

Withdraw should not be contemplated in an isolated instant as appellant argues. Here, the facts in evidence show that appellant himself orchestrated an unauthorized interrogation of Mr. Mansur by personally bringing him into a remote culvert for questioning.[130] Once in the culvert, appellant stripped Mr. Mansur naked and then pointed his loaded Glock pistol at Mr. Mansur, from a distance of three to four meters, protected with full battle gear, while telling Mr. Mansur repeatedly to give him names of cell leaders in Salaam Village or that he would be killed.[131] The area was secure enough that SSG Warner could leave to go relieve himself.[132]

Additionally, appellant cites to multiple cases that discuss 42 USC § 1983 in arguing its view of when appellant had to withdraw in order to regain self-defense. Appellant's

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[129] *Behenna*, 70 M.J. at 532-533.
[130] JA 188, 203-204.
[131] JA 188-195, 204-205.
[132] JA 87.

reliance upon 42 USC § 1983 (a civil statute) is misplaced. Civil cases interpreting that statute contradict appellant's arguments.

In *Plakas v. Drinski*, cited by appellant, the Seventh Circuit Court stated: "The proposition that an officer who beats John Doe may not use self-defense to justify killing Doe, who later attacks him, rests on the idea that because the officer's wrongful acts caused the attack, he cannot take advantage of his fear of retaliation to defend against liability."[133] *Plakas* cites *Gilmere v. City of Atlanta, GA* which stated "any fear on the officer's part was the fear of retaliation against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power."[134]

Here, the facts in evidence show that appellant himself orchestrated an unauthorized interrogation of Mr. Mansur by personally bringing him into a remote culvert for questioning.[135] Once in the culvert, appellant stripped Mr. Mansur naked and then pointed his loaded Glock pistol at Mr. Mansur, from a distance of three to four meters, protected with full battle

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[133] *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994).
[134] *Gilmere v. City of Atlanta, Ga.*, 774 F.2d 1495, 1501 (11th Cir. 1985).
[135] JA 188, 203-204.

gear, while telling Mr. Mansur repeatedly to give him names of cell leaders in Salaam Village or that he would be killed.[136] Based on the facts of appellant's case, any omission in the instructions to physically withdraw from the conflict was harmless.

4. Assuming *arguendo* any error occurred, appellant was not harmed.

Appellant argues that the government cannot prove beyond a reasonable doubt that the instructional error did not contribute to the verdict.[137]

Appellant was able to have his self-defense theory in front of the panel.[138] The panel had the guideposts for an informed deliberation. 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. Appellant never regained that right to self-defense that he lost by assaulting Mr. Mansur with a loaded weapon.

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[136] JA 188-195, 203-204.
[137] AB at 32 and see *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006).
[138] Compare with see *United States v. Dearing*, 63 M.J. 478 (C.A.A.F. 2006): In *Dearing*, the military judge did not address the concept of escalation of the conflict and the instruction the military judge did give severely limited the panel's ability to consider appellant's self-defense theory. *Dearing* 63 MJ at 484.

Appellant is not prejudiced from the self-defense instruction as appellant constantly assaulted Mr. Mansur with a loaded firearm before the killing and showed a "guilty mind" after killing Mr. Mansur. Appellant orchestrated this unauthorized interrogation of Mr. Mansur by personally bringing him into a remote culvert for questioning.[139] When the vehicles stopped, appellant asked SSG Warner if he had a thermite grenade.[140] Once in the culvert, appellant stripped Mr. Mansur naked and then pointed his loaded Glock pistol at Mr. Mansur, protected with full battle gear, while telling Mr. Mansur repeatedly to give him names of cell leaders in Salaam Village or that he would be killed.[141] Appellant continued to ask Mr. Mansur the same questions - "What do you know? What groups do you know? Who are the names of the people of the cells, groups? Talk to me today because if you don't talk, I will kill you."[142] Appellant also told Mr. Mansur, "[t]his is your last chance to tell the information or you will

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[139] JA 188, 203-204.
[140] JA 78.
[141] JA 188-195, 204-205.
[142] JA 59.

die."[143] Appellant knew he was no authorized to do these actions.[144]

After the shooting, the actions of appellant showed a guilty mind not a person who acted in self-defense. After killing Mr. Mansur, appellant instructed SSG Warner to "[t]hrow it" and "[d]on't be stupid," meaning that appellant wanted SSG Warner to throw the thermite grenade on Mr. Mansur's dead body.[145] After the killing and throwing a thernmite grenade on Mr. Mansur's dead body the guilty mind of appellant continued when, on the way back to the convoy, appellant gave SSG Warner the clothes he had and told him to "Take care of them."[146]

Appellant's guilty mind continued once he returned to FOB Summerall, when appellant asked SSG Warner to go for a walk with him and repeatedly asked if SSG Warner "was cool" with what happened and discussed with him legal rights versus moral rights.[147] Harry also testified that when he asked appellant "Why did you kill Ali Mansur?" appellant replied, "Mr. Mansur planted explosives twice on a specific road and the explosive that went off in Salaam Village, and

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[143] JA 195.
[144] JA 180-181, 194-195.
[145] JA 93.
[146] JA 94.
[147] JA 94-96.

he had a hand in this too. He was part of this operation."[148]

There is no prejudice when the actions of appellant produced an offer assault with a weapon that culminated in the death of Mr. Mansur and subsequent actions of appellant after killing do not indicate any probability of a successful self-defense.

Granted Issue II.

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

Additional Facts

On Wednesday, February 25, 2009, the Government rested its case without presenting any expert testimony from its expert assistants, to include Dr. Herbert MacDonell, a blood spatter expert.[149] The defense presented testimony from two of its experts during its case, Dr. Paul Radelat and Mr. Tom Bevel, experts in forensic pathology and scene reconstruction.[150] Although both Dr. Radelat and Mr. Bevel testified that appellant shot the victim, Mr. Mansur, in the chest while standing, Dr. Radelat also testified that if he knew the specific positions of

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[148] JA 63.
[149] JA 311.
[150] JA 109, 118, 311.

Mr. Mansur's head and torso when he was shot, then he might change his opinion as to whether or not Mr. Mansur was standing when he was shot.[151] Dr. Radelat also conceded that it was not impossible for Mr. Mansur to be sitting and falling over as he was shot when comparing this to the trajectory of the bullets through Mr. Mansur's body and head.[152] Mr. Bevel testified that when Mr. Mansur was shot, he could have been anywhere from three-and-a-half to four feet, hunched over the ground to a standing position.[153] Based on this premise, Mr. Bevel further testified that based on the bloodstain evidence, the deceased could have been in a seated position on a rock when he was shot.[154]

During cross-examination of the defense experts, both experts testified there were multiple explanations for the shooting, given the limited evidence at the crime scene.[155] For example, the experts admitted that the arm position of the naked corpse could have been caused by the fall or rigor mortis;[156] the grenade could have destroyed evidence;[157] Mr. Mansur's arm could

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[151] JA 116, 311
[152] JA 117.
[153] JA 147-148.
[154] JA 147-148.
[155] JA 311.
[156] JA 115.
[157] JA 136-137.

have been in any position other than the path of the bullet;[158] and the victim could have been seated when appellant shot him.[159]

At the conclusion of the defense experts' testimony, the prosecution[160] met to assess the strength of a potential rebuttal case and discuss various hypothetical shooting scenarios.[161] During the meeting, Dr. MacDonell hypothesized and demonstrated an unlikely scenario, consistent with the defense experts' testimony, in which appellant first shot Mr. Mansur in the ribs and then shot him in the head while he was falling to the ground.[162] Dr. MacDonell believed this was the only logical scenario where he could reconcile the defense experts' testimony with the forensic evidence.[163] At the end of the proceedings on Wednesday, February 25 2009, Dr. MacDonell still held the opinion that there were a multitude of possibilities.[164]

The next day, Thursday, February 26, 2009, appellant testified that he twice shot Mr. Mansur out of fear that Mr. Mansur was reaching for appellant's weapon.[165] While listening

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[158] JA 138.
[159] JA 153-154.
[160] Three trial counsel, paralegals, Dr. MacDonell, and Dr. Eric Berg, the Government's forensic pathologist, and COL Ricky Malone, the Government's forensic psychiatrist, were present at the meeting. JA 256-257, 312.
[161] JA 248, 312.
[162] JA 312.
[163] JA 255-257.
[164] JA 255, 260, 312.
[165] JA 196-197.

to appellant's testimony in the courtroom gallery, Dr. MacDonell tapped Dr. Berg on the shoulder and told him "That's exactly what I told you guys yesterday."[166] During a recess prior to the Government's cross-examination of appellant, as Dr. MacDonell was leaving the courthouse to catch his flight home, he mentioned to the lead defense counsel that he would have made a good defense witness.[167] When defense counsel inquired as to what his testimony might be, Dr. MacDonell stated that he could not divulge any information, since he had been retained by the Government as an expert assistant.[168]

The next morning, Friday, February 28, 2009, after the defense had rested, defense counsel informed Government counsel about his conversation with Dr. MacDonell and reminded counsel of the obligation to turn over exculpatory evidence.[169] Not realizing why Dr. MacDonell had told defense counsel he would have made a "great witness" for them, the prosecution responded that they had turned over all exculpatory evidence.[170] After returning home to New York, Dr. MacDonell sent an email to Government counsel at 1607 hours, expressing his concern that his ideas from Wednesday's meeting may not have been shared with

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[166] JA 257, 313.
[167] JA 253-254, 313.
[168] JA 253-254, 313.
[169] JA 244, 271-272, 313.
[170] JA 244, 271-272, 313.

defense. Trial counsel read the email at approximately 2300 hours and forwarded it to defense counsel seven minutes later.[171]

On Saturday, February 28, 2009, defense counsel orally moved for a mistrial under Rule for Courts-Martial (R.C.M.) 915 because of the Government's failure to disclose exculpatory evidence.[172] The motion was based upon defense not receiving access to Dr. MacDonell's comments from the Wednesday, February 25, 2009 meeting.[173] The Government responded that Dr. MacDonell was brainstorming with the prosecution team and his original opinion that the victim was shot while seated never changed.[174] Dr. MacDonell was the only witness called by either side during litigation of the motion and the only evidence submitted was an oral stipulation between the parties regarding the Friday morning conversation between Government and defense counsel.[175] The military judge ordered both sides to submit written briefs on defense's oral mistrial motion by Monday, March 2, 2009 and then proceeded with the sentencing phase of the court-martial.[176]

The military judge heard argument from the parties on Monday, March 2, 2009, but then deferred ruling on the motion

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[171] JA 247, 308-309.
[172] JA 243.
[173] JA 245-246.
[174] JA 249-250.
[175] JA 251-252, 271-272.
[176] JA 273-275.

for mistrial.[177] The military judge ruled that the Government's knowledge of Dr. MacDonell's opinion as of Wednesday evening did not rise to the level of *Brady* material, and was not discoverable as a matter of due process or under the Rules for Courts-Martial.[178] The parties were ordered to provide additional briefing on the impact of Dr. MacDonell's notice to defense on Thursday, February 26, 2009, and whether such notice would satisfy any obligation by the Government to provide notice of favorable evidence to the defense.[179] Also, the military judge asked the parties to brief the impact of defense counsel's inquiry of trial counsel on the morning of Friday, February 27, 2009, as to whether Dr. MacDonell possessed exculpatory information.[180]

At an Article 39(a) hearing held on Friday, March 20, 2009, the military judge denied the motion for mistrial.[181] The military judge found that there was no reasonable probability, but for the error, of a more favorable result in the findings or sentence, and that such an error was harmless beyond a reasonable doubt.[182]

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[177] JA 278.
[178] JA 277-278.
[179] JA 277-278.
[180] JA 277-278.
[181] JA 281-282.
[182] JA 314.

The military judge reasoned that "Dr. MacDonell's opinion of the value of the forensic evidence never changed" and "did not lend itself to detailed interpretation."[183] Dr. MacDonell's original conclusion was that the "forensic evidence was not inconsistent with the testimony of 'Harry' and SSG Warner" and that the "'revised conclusion' was not based on a reassessment of the forensic evidence," but rather "[Dr. MacDonell's] personal opinion of the credibility of 1LT Behenna's testimony."[184] The military judge found this to be "an impermissible comment by one witness on the credibility of other witnesses in the guise of an 'expert opinion.'"[185] Further, the military judge determined that because of the "overwhelming evidence" presented at trial that appellant was assaulting Mr. Mansur prior to the shooting, " . . . the Court is convinced beyond a reasonable doubt that any evidence as to self-defense did not have, nor would any additional evidence as to self-defense would have, made a difference in the Court's determinations."[186]

Standard of Review and Law

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[183] JA 314.
[184] JA 314.
[185] JA 314.
[186] JA 315.

Article 46, UCMJ, establishes the right of an accused to obtain favorable evidence.[187] R.C.M. 701 incorporates this statute and details the liberal discovery practice permitted at courts-martial.[188] Discovery practice in the military "promote[s] full discovery . . . eliminates 'gamesmanship' from the discovery process" and is "quite liberal . . . ."[189] As such, the rules "focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice."[190] Therefore, discovery is not limited to evidence known to be admissible at trial.[191]

"If the Government fails to disclose discoverable evidence, the error is tested on appeal for prejudice, which is assessed 'in light of the evidence in the entire record.'"[192] In this context, an appellate court reviews "the materiality of the erroneously withheld evidence in terms of the impact that information would have had on the results of the trial proceedings."[193] A Court's determination of materiality is "not

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[187] 10 U.S.C. § 846 (2008).
[188] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2008) [hereinafter MCM].
[189] MCM, *supra* note 146, Analysis of Rules for Courts-Martial (R.C.M.) A21-32.
[190] *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).
[191] *Id.* (citing *United States v. Stone*, 40 M.J. 420, 422 (C.M.A. 1994)).
[192] *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004) (internal citations omitted).
[193] *Roberts*, 59 M.J. at 326.

whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[194]

In *United States v. Roberts,* this Court held that if the defense made only a general request for discovery, or no request at all, the appellant will not be entitled to relief unless he can show a "reasonable probability" that the evidence's disclosure at trial would have led to a different result.[195] If, however, the Government failed to disclose discoverable evidence in response to a specific request, or as a result of prosecutorial misconduct, the appellant would be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt.[196]

Under *Roberts*, appellate review of discovery issues requires a two-step analysis.[197] First, the Court must determine whether the information at issue was subject to disclosure or discovery; and second, if there was nondisclosure, then the Court tests the effect of that nondisclosure on appellant's

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[194] *United States v. Romano*, 46 M.J. 269, 272 (C.A.A.F. 1997).
[195] *Roberts*, 59 M.J. at 326-27. *See also United States v Cano*, 61 M.J. 74, 75 (C.A.A.F. 2005) (internal citations omitted); *United States v Hart*, 29 M.J. 407, 410 (C.M.A. 1990).
[196] *Roberts,* 59 M.J. at 327. *See also Hart,* 29 M.J. at 410.
[197] *Roberts*, 59 M.J. at 325.

trial.[198] Under the standards set forth in *Roberts*, this Court may resolve a discovery issue, without determining whether there has been a discovery violation, if the court concludes that the alleged error would not have been prejudicial.[199]

"An appellate court reviews a military judge's decision on a request for discovery for abuse of discretion. A military judge abuses his discretion when his findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law."[200]

Argument

Dr. MacDonell's opinion, if it was subject to discovery, was timely disclosed. Dr. MacDonell changed his opinion of the forensic evidence based on his own credibility determination. There was no prejudice to appellant if there was a discovery violation. Dr. MacDonell would have been impeached concerning his prior opinion and in the same fashion the defense experts were cross-examined. Consequently, the military judge did not abuse his discretion in his findings of fact or conclusions of law.

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[198] *Id.* at 325.
[199] *See Santos*, 59 M.J. at 321.
[200] *Id.* at 326 (citing *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999)).

1. Dr MacDonell's statement was not subject to discovery.

The Army Court did not determine "whether the claimed opinion is required to be disclosed pursuant to *Brady* and R.C.M. 701."[201] The military judge likewise "assum[ed] without deciding whether the Government counsel were obligated to disclose Dr. MacDonell's "new" opinion pursuant to Brady and/or R.C.M. 701..."[202] As no court has ruled on this issue, this Court would review this issue *de novo*.

Dr. MacDonell's statement was not subject to discovery because he had not changed his opinion on the forensic evidence at the conclusion of the defense experts' testimony on Wednesday, February 28, 2009.[203] Dr. MacDonell opined that the crime scene did not lend itself to detailed interpretation and disagreed with the defense experts' opinion that the victim was standing when he was shot.[204] At a post-trial Article 39(a) session on Saturday, February 28, 2009, Dr. MacDonell also testified that based upon the forensic evidence, appellant fired down upon the seated victim.[205] He "couldn't see how [Mr. Mansur] would reach up in the air or if [Mr. Mansur] is sitting down it would be more logical if [he] were lower than the

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[201] JA 12.
[202] JA 314.
[203] JA 260-261, 312.
[204] JA 260-261, 312.
[205] JA 267.

shooter."[206] Additionally, he "couldn't rule out the fact that the eyewitness was correct and [the victim] was sitting down and shot in the head first, then he must have been shot in the abdomen later or when he was on the ground."[207]

Therefore, if Dr. MacDonell had been called to testify on Wednesday after listening to the defense experts, he "would have had the same conclusions" he had maintained throughout the case up to that point.[208] In particular, Dr. MacDonell's opinion was that while the degradation of the crime scene left multiple possibilities as supported by eyewitness testimony, he disagreed with a defense expert that Mr. Mansur was standing when shot.[209]

Following the defense experts' testimony, trial counsel, paralegals, and three experts met and discussed various hypothetical scenarios and alternate interpretations of the forensic evidence, in preparation for a potential rebuttal to the evidence presented by defense.[210] It was during this session that Dr. MacDonell again explained that "there are always other possibilities," which is why he suggested another "very unlikely" alternative explanation, where the victim was

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[206] JA 259.
[207] JA 268.
[208] JA 265.
[209] JA 259, 312.
[210] JA 248, 256-257, 312.

"standing first, shot in the ribs first."[211] By the end of the meeting, it was clear that no single fact pattern could prevail and a multitude of possibilities remained, of which Dr. MacDonell's hypothetical was only one. As Dr. MacDonell said in almost every discussion he had with the prosecution, "anything is possible."[212] Given their expert's lack of a definitive opinion, the Government decided not to call him as a witness and rested their case on Wednesday.[213]

During defense's direct examination of appellant on Thursday, February 26, 2009, Dr. MacDonell did not believe much of appellant's testimony.[214] But when appellant gave his explanation of the circumstances surrounding the killing, he thought to himself that "maybe this guy is telling the truth after all" and perhaps the shooting occurred in the manner appellant described, instead of the way Dr. MacDonell had

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[211] JA 263, 270-271, 312. Appellant relies upon an unpublished Navy-Marine Corps Court of Criminal Appeals case, *United States v. Mott*, No. 200900115, 2009 WL 4048019 (N.M. Ct. Crim. App. 24 Nov. 2009). Appellant's reliance is misplaced. In *Mott*, the testimony sought, and ultimately found discoverable, was an expert medical opinion that appellant suffered from a severe mental disease, rendering appellant unable to understand the wrongfulness of his actions, and thereby providing him with a complete defense. In appellant's case, the "opinion" sought was a hypothetical, and as conceded by Dr. MacDonell, a very unlikely explanation of how the two defense forensic experts could have reached their opinion on the sequence and positioning of bullet wounds. JA 253, 255-256, 260.

[212] JA 262.

[213] JA 249, 312.

[214] JA 256-266.

previously opined.[215] In fact, Dr. MacDonell admitted that his sudden shift in thinking was "only triggered by seeing [appellant] testify, or hearing him and his explanation."[216]

In his essential findings of fact and conclusions of law, the military judge did not decide whether Government counsel was obligated on either Thursday, February 26, 2009 or Friday, February 27, 2009,[217] to disclose Dr. MacDonell's revised "opinion," pursuant to *Brady* or R.C.M. 701, because any perceived error was harmless beyond a reasonable doubt.[218] In his findings of fact, the military judge properly found that after hearing the testimony of Dr. Radelat and Mr. Bevel, Dr. MacDonell's opinion was that the Government's theory of the case was not contradicted by the forensic evidence.[219] Further, the military judge also properly found that Dr. MacDonell's demonstration at the prosecution meeting on Wednesday, February 25, 2009, during which a possible scenario demonstration had Mr. Mansur being shot first in the chest, was Dr. MacDonell's attempt to reconcile the forensic evidence with the testimony of

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[215] JA 256-266.
[216] JA 266.
[217] On March 2, 2009, the military judge found that Dr. MacDonell's opinion did not rise to the level of *Brady* material and was not discoverable. JA 277.
[218] JA 314.
[219] JA 312.

Dr. Radelat and Mr. Bevel.[220] It was only after hearing appellant's account of the shooting that Dr. MacDonell changed his opinion and believed appellant was telling the truth.[221]

Based upon this, the military judge correctly concluded as a matter of law that Dr. MacDonell's original opinion on the forensic evidence never changed, and his "revised" conclusion would be impermissible testimony because it was based upon his assessment of appellant's credibility.[222] The military judge also concluded as a matter of law that there was "overwhelming evidence in this case to support a finding that [appellant], immediately prior to the shooting, was assaulting Mr. Mansur with a loaded firearm while threatening to kill him if he did not provide the information [appellant] was seeking" and that " . . . this was clearly not one of those situations that would justify or excuse pointing a loaded weapon at someone in a combat environment."[223]

2. The Army Court findings as to timing of the disclosure are proper.

If this court assumes that Dr. MacDonell's "new opinion" had to be disclosed, there is no error as the new opinion was

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[220] JA 312.
[221] JA 266, 313.
[222] JA 314.
[223] JA 314.

properly disclosed as soon as trial counsel was made aware of the new opinion.

The Army Court found that Dr. MacDonell's opinion was disclosed via the email he sent the trial counsels.[224] The Army Court discussed three possible events which may have triggered an earlier duty to disclose: 1) The Wednesday evening meeting as set forth in the military judge's factual findings; 2) the late Thursday afternoon encounter between Dr. MacDonell and defense counsel; and 3) the Friday morning encounter between trial and defense counsel.

Appellant's argument follows the same three points in time that the Army Court relied upon.[225]

A. Wednesday Demonstration.

The Army Court did not err finding that there was no duty to disclose at this point in time. The Army Court agreed with the military judge that the Wednesday night demonstration with Dr. MacDonell was a theory and not discoverable as it was "merely Dr. MacDonell's attempt to reconcile the forensic evidence with the testimony of Dr. Radelat and Mr. Bevel. Dr. MacDonell's original opinion, based on the forensic evidence and all other evidence known to him at the time, remained unchanged as of Wednesday."

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[224] *Behenna*, 70 M.J. at 528.
[225] AB at 33-37.

Appellant is arguing that a finding of fact from the Army Court, adopted from the military judge's ruling, is unsupported by the record:

"Dr. MacDonell theorized and demonstrated that an unlikely but possible scenario, that was not inconsistent with the forsenic evidence and the only logical explanation consistent with the testimony of Dr. Radelat and Mr. Bevel, was 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."[226]

This finding of fact is not clearly erroneous. The forensic evidence did not lend itself to one interpretation. Dr. MacDonell hypothesized and demonstrated what even he described as an unlikely scenario, consistent with the defense experts' testimony, in which appellant first shot Mr. Mansur in the ribs and then shot him in the head while he was falling to the ground.[227] Dr. MacDonell believed this was the only logical scenario where he could reconcile the defense experts' testimony with the forensic evidence.[228] At the end of the proceedings on Wednesday, February 25, 2009, Dr. MacDonell still held the opinion that there were a multitude of possibilities, but

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[226] AB at 34, *see also* JA-8.
[227] JA 312.
[228] JA 255-257.

believed that Mr. Mansur was "not standing when the [sic] shot through the head."[229]

Appellant's reliance on the affidavit of Dr. MacDonell is misplaced as the military judge found that it was not credible, and this finding of fact is not clearly erroneous.[230] Since Dr. MacDonell's opinion did not change, there was no duty to disclose that fact to the trial defense counsel.

B. The Thursday comment between Dr. MacDonell and trial defense counsel.

On Thursday, February 26, 2009, appellant testified that he twice shot Mr. Mansur, out of fear that Mr. Mansur was reaching for appellant's weapon.[231] While listening to appellant's testimony in the courtroom gallery, Dr. MacDonell tapped Dr. Berg on the shoulder and told him "That's exactly what I told you guys yesterday."[232] During a recess prior to the Government's cross-examination of appellant, as Dr. MacDonell was leaving the courthouse to catch his flight home, he mentioned to the lead defense counsel that he would have made a good defense witness.[233] When defense counsel inquired as to what his testimony might be, Dr. MacDonell stated that he could

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[229] JA 255, 260, 262, 312.
[230] AB at 34 and JA 302.
[231] JA 196-197.
[232] JA 257, 313.
[233] JA 253-254, 269, 313.

not divulge any information, since he had been retained by the Government as an expert assistant.[234] Dr. MacDonell testified he never informed government counsel that his opinion changed.[235]

Appellant argues that Dr. MacDonell did not state what information he had that would be favorable to the defense and conveyed no essential facts.[236] Appellant takes issue with the Army Court also considering the time of the disclosure (after appellant testified) and that trial defense counsel had the essential facts and numerous avenues of eliciting further information.[237]

It is clear that trial counsel had no direct knowledge that Dr. MacDonell changed his opinion based on the credibility determination he made of the appellant while appellant testified or Dr. MacDonell's statement to trial defense counsel.[238] Trial Counsel could not reasonably infer that only after hearing appellant's testimony on Thursday, February 26, 2009, Dr. MacDonell would have offered the highly unlikely scenario championed by appellant as the one instead of his previously stated multiple interpretations of the crime scene.[239] Trial defense counsel was in a better situation to understand and

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[234] JA 253-254, 269, 313.
[235] JA 257-258, 268-269.
[236] AB at 35.
[237] AB at 35 see also JA-8.
[238] JA 313.
[239] JA 312.

comprehend Dr. MacDonell's statement after hearing appellant's version of the killing for the first time.

C. The Friday morning meeting with Trial Counsel and Trial Defense Counsel.

On Friday, February 28, 2009, after the defense rested, defense counsel informed trial counsel about his conversation with Dr. MacDonell and reminded counsel of the obligation to turn over exculpatory evidence.[240] Not realizing why Dr. MacDonell had told defense counsel he would have made a "great witness" for them, the prosecution responded that they had turned over all exculpatory evidence.[241] The trial counsels at this point had no new information and had not been informed of Dr. MacDonell's "new" opinion.

After returning home to New York, Dr. MacDonell sent an email to Government counsel at 1607 hours, expressing his concern that his ideas from Wednesday's meeting may not have been shared with defense. Trial counsel read the email at approximately 2300 hours and forwarded it to defense counsel seven minutes later at 2307 hours.[242]

Any delay or error in the government failing to produce the "new" opinion of Dr. MacDonell on Friday morning is harmless

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[240] JA 244, 271-282, 313.
[241] JA 244, 271-282, 313.
[242] JA 247, 308-309.

beyond a reasonable doubt. Trial counsel, within minutes of reading Dr. MacDonell's email that evening, forwarded the email to trial defense counsel. As the military judge found, any error that occurred between Friday morning and Friday evening was harmless beyond a reasonable doubt as the military judge would not have Dr. MacDonell's "revised opinion" in front of the panel.[243]

3. The Army Court's findings of fact and conclusions of law were supported by the evidence.

Appellant argues that a portion of the military judge's findings of fact are clearly erroneous as those facts are not supported by any evidence. Appellant points to the following findings of fact as evidence of the clearly erroneous findings of the military judge and Army Court:

> 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.[244]

> "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"[245]

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[243] JA 314.
[244] AB at 38, JA-9.
[245] AB at 38; JA-10.

These findings of fact are not clearly erroneous nor are they unsupported by the evidence. The military judge's reasoning that the trial counsel did not call Dr. MacDonell on rebuttal is certainly reasonable because, as the military judge found that Dr. MacDonell's opinion had not changed and that there were a variety of ways the killing could have occurred based on the forensic evidence. This is supported by the testimony of Dr. MacDonell.

It is certainly is reasonable and not clearly erroneous for the military judge and the Army court to find that trial counsel did not learn of the revised opinion until trial defense counsel notified them of Dr. MacDonell's statement. Even at that point though, trial counsel did not know the precise nature of that "new opinion" until they received the email from Dr. MacDonell. The military judges analysis of this issue is not incorrect or erroneous.

All of the military judge's findings of fact are fair and reasonable when the evidence and inferences from the evidence are taken into account.

4. The Army Court's test of harmlessness was correct.

The United States Supreme Court in *Kyles* stated "*Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question

is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[246]

Appellant argues the Army Court stated relief is not the correct state of the law. The Army Court based its denial of relief on a reasonable probability that there would have been a different result had the evidence been disclosed not on a reasonable possibility that the nondisclosure contributed to the findings and sentence.[247]

Under either analysis of "reasonable possibility" or "reasonable probability" the outcome is no different. Appellant is properly convicted of this crime under either standard. After appellant's testimony, Dr. MacDonell's expert opinion had not changed. Even if Dr. MacDonell's opinion had changed, the military judge ruled that it was impermissible.

5. Dr. MacDonell's testimony that Appellate Counsel seeks to introduce would not have been admissible

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[246] *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) *citing United States v. Bagley*, 473 U.S. 667, 682, (1985).
[247] AB at 44-45, JA-11.

Dr. MacDonell's revised opinion is not admissible because it amounts to an "impermissible comment by one witness on the credibility of other witnesses in the guise of an 'expert opinion.'"[248] Dr. MacDonell's original opinion was that there were too many potential scenarios for him to come to a conclusion to a reasonable degree of medical certainty how the victim was shot. Once he watched appellant testify, he believed that appellant was telling the truth and therefore his opinion was that appellant's version of events was true. This is impermissible "lie detector" testimony.

In *United States v. Brooks*,[249] this Court "has been resolute in rejecting the admissibility of so-called human lie detector testimony, which [the Court] [has] described as: 'an opinion as to whether the person was truthful in making a specific statement regarding a fact at issue in the case.'"[250] Dr. MacDonell's understanding of the forensic evidence as a blood

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[248] JA 313-314. (The military judge ruled that Dr. MacDonell's testimony would not be cumulative, presumably because it would impermissibly bolster appellant's testimony. Assuming *arguendo* defense sought to augment their experts' testimony with Dr. MacDonell's opinion under another theory, it would be barred under M.JAE. 403). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[249] 64 M.J. 325 (C.A.A.F. 2007).

[250] *Brooks*, 64 M.J. at 328 (quoting *United States v. Kasper*, 58 M.J. 314, 315 (C.A.A.F. 2003)); *See also United States v. Petersen*, 24 M.J. 283, 284 (C.M.A. 1987) ("We are skeptical about whether any witness could be qualified to opine as to the credibility of another.").

splatter expert never changed; the sole catalyst behind his revised opinion was appellant's testimony.[251] Dr. MacDonell's human lie detector testimony would "encroach[] into the exclusive province of the court members to determine the credibility of witnesses."[252]

As the Army Court and military judge found:

> "The overwhelming evidence in this case supports a finding that [appellant] immediately prior to the shooting, was assaulting [A.M.] with a loaded firearm while threatening to kill him if he did not provide the information [appellant] was seeking. [Appellant] testified that he had no legal justification or legal excuse to interrogate [A.M.] at all and that he did [not] have any legal justification or legal excuse to conduct an interrogation in the manner that he did. Although there are many situations in a combat environment that would justify or excuse the pointing of a loaded firearm at someone, this was clearly not one of those situations. In applying the law to the facts of this case, the members could come to no reasonable conclusion other than [appellant] did not have a right to self-defense. Accordingly, the [c]ourt is convinced beyond a reasonable doubt that any evidence as to self-defense did not have, nor would any additional evidence as to self-defense have, made a difference in the [c]ourt's determination.[253]

6. Dr. MacDonell's opinion would not have affected findings or sentence.

Had Dr. MacDonell testified that the appellant's version was correct based on the forensic evidence, he would have been

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[251] JA 265-266, 314.
[252] *Kasper*, 58 M.J. at 315; *See also United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F. 2000).
[253] *Behenna*, 70 M.J. at 530.

heavily impeached. Just as the defense experts were cross-examined on the evidence, the same would have been true for Dr. MacDonell. During cross-examination of the defense experts, both experts testified there were multiple explanations for the shooting, given the limited evidence at the crime scene.[254] For example, the experts admitted that the arm position of the naked corpse could have been caused by the fall or rigor mortis;[255] the grenade could have destroyed evidence;[256] Mr. Mansur's arm could have been in any position other than the path of the bullet;[257] and the victim could have been seated when appellant shot him.[258]

7. Defense Counsel could not have objected to improper closing argument based on Dr. MacDonell's "new opinion".

In so far as appellant's argument may be construed to raise a separate legal issue of the trial counsel posing an inappropriate theory to the panel, the law of the case doctrine should preclude it.[259]

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[254] JA 311.
[255] JA 115.
[256] JA 116-117, 141.
[257] JA 138.
[258] JA 136-137. Additionally, Dr. MacDonell would have had to say as of the day before appellant testified, it was unlikely that victim was standing when shot. He then would not be able to testify that his opinion changed as previously discussed.
[259] The Government is not using the law of the case as a shield from the alleged improper argument error, the government finds the alleged inappropriate argument error to be is completely and

Trial counsel properly argued the evidence, including the eyewitness testimony, presented at trial and made reasonable inferences based upon this evidence to the panel. Harry testified that when appellant fired the first shot, Mr. Mansur was still sitting and had made no sudden movements.[260] Trial counsel's closing argument was proper.

8. Condoning the government's conduct would not negatively reflect on the actual and apparent fairness of the military justice system.

Appellant received a fair trial "resulting in a verdict worthy of confidence."[261] Two government eyewitnesses, Harry and SSG Warner, testified that appellant brought Mr. Mansur to a remote culvert to interrogate him, pointed a loaded weapon at Mr. Mansur, and subsequently fired two shots at Mr. Mansur while he was seated on a pile of rocks.[262] Appellant testified that he brought Mr. Mansur without authorization to a remote culvert to interrogate him, stripped him naked, pointed a weapon at him, and then shot Mr. Mansur after he stood up, threw a piece of concrete at appellant's head and reached for appellant's weapon.[263]

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utterly without merit. *See generally United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011).

[260] JA 60.

[261] *Id.*

[262] *See generally* JA 51-108.

[263] JA 178, 180-181, 185, 188-197.

After the shooting, the actions of appellant showed a guilty mind not a person who acted in self-defense. After killing Mr. Mansur, appellant instructed SSG Warner to "[t]hrow it" and "[d]on't be stupid," meaning that appellant wanted SSG Warner to throw the thermite grenade on Mr. Mansur's dead body.[264] After the killing and throwing a thernmite grenade on the Mr. Mansur's dead body, the guilty mind of appellant continued when, on the way back to the convoy, appellant gave SSG Warner the clothes he had and told him to "Take care of them."[265]

Appellant's guilty mind continued once he returned to FOB Summerall, when appellant asked SSG Warner to go for a walk with him and repeatedly asked if SSG Warner "was cool" with what happened and discussed with him legal rights versus moral rights.[266]

Appellant's own words showed the guilty mind and not someone who used self-defense when Harry testified that when he asked appellant "Why did you kill Ali Mansur?" appellant replied, "Mr. Mansur planted explosives twice on a specific road and the explosive that went off in Salaam

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[264] JA 93.
[265] JA 94
[266] JA 94-96.

Village, and he had a hand in this too. He was part of this operation."[267]

Additionally, while both Dr. Radelat and Mr. Bevel opined that the victim was first shot in the chest in a standing position,[268] they both conceded during cross-examination that other explanations were possible, to include the victim being shot in a seated position.[269] Neither expert provided any conclusive opinion or discussed any evidence demonstrating appellant acted in self-defense when he killed Mr. Mansur.[270]

For all of these reasons, the testimony of a third forensic expert called by the defense would not have substantially altered the outcome of the case, and its absence did not compromise the fairness of the trial. The military judge properly ruled that, due to the "overwhelming evidence in this case," the members could come to no other reasonable conclusion other than appellant having no right to self-defense and that "any additional evidence on self-defense. . . would not have made a difference in the Court's determinations."[271]

Conclusion

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[267] JA 63.
[268] JA 110, 112, 119, 122.
[269] JA 116, 147-148, 155.
[270] JA 110, 112-117, 119-153.
[271] JA 315.

The military judge properly instructed on self-defense. Any error in the self-defense instructions is harmless beyond a reasonable doubt. Furthermore, Dr. MacDonell's "new opinion" was not discoverable. Even if it was, it was timely disclosed by the government. Any error in disclosure is harmless beyond a reasonable doubt. The opinion would not have changed, or possibly changed, the outcome of the trial. Under the facts of this case, to include the lack of definitive expert opinion in regards to the crime scene, the continuous assault of appellant on Mr. Mansur, and the actions of appellant after the killing, any error is harmless beyond a reasonable doubt.

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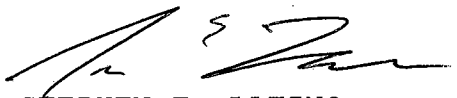

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing brief on behalf of appellee was electronically filed with the Court to efiling@armfor.uscourts.gov on March 29, 2012 and contemporaneously served electronically on civilian defense counsel, Jack B. Zimmerman at jack.zimmermann@zlzslaw.com, Terri R. Zimmermann at terri.zimmermann@zlzslaw.com and Defense Appellate Division, CPT E. Patrick Gilman at edward.p.gilman.mil@mail.mil.

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