

**IN THE
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
FIRST JUDICIAL DISTRICT
FORT CAMPBELL, KENTUCKY**

UNITED STATES,
Plaintiff,

DATE: 16 March 2009

- versus -

MILITARY JUDGE: Colonel T. Dixon

MICHAEL C. BEHENNA,
First Lieutenant, U.S. Army
Company D, 1-327th Infantry Regiment
1st BCT, 101st Airborne Division
(Air Assault)
Fort Campbell, KY 42223,
Accused.

MOTION TO ENTER APPEARANCE AS *AMICUS CURIAE*
On Behalf of

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

and

**To File The Attached Memorandum of Law
In Support of the Accused's Pending Mistrial Motion**

I. RELIEF SOUGHT.

A. The NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS [NACDL], by and through its undersigned counsel, hereby respectfully Moves this Court-Martial for permission to enter a limited appearance as an *Amicus Curiae* herein; and

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

B. Further Moves this Court-Martial for permission to file the attached *Memorandum of Law* on the Accused's pending Motion for a Mistrial pursuant to RCM 915.¹

II. INTEREST OF *AMICUS CURIAE*.

The *National Association of Criminal Defense Lawyers* ["NACDL"] is a non-profit corporation with a subscribed membership of approximately 10,000 national members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 28,000 plus, state, local and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of criminal justice and preserving, protecting and defending the adversary system and the U.S. Constitution.

The interest of *Amicus Curiae* in this case arises due to the fundamental nature of the core constitutional issues presented. The basic right to Due Process of Law under the Fifth Amendment

¹The undersigned counsel for *Amicus Curiae* is a former Air Force Judge Advocate, was previously sworn under Article 42, UCMJ, and certified under Article 27(b), UCMJ. Counsel is admitted and in good standing before the Bars of the Supreme Court of the United States, the U.S. Court of Appeals for the Armed Forces and the State of New York. He is also the Co-Chair of the NACDL's *Military Law Committee* and has not acted in any manner inconsistent with his role as counsel for *Amicus Curiae* herein. In the interests of disclosure, Mr. Zimmermann is the other Co-Chair of NACDL's *Military Law Committee*. However, no counsel for a party authored this Pleading in whole or in part. No person, entity or organization other than the *Amici Curiae* made a monetary contribution to the preparation and submission of this Pleading or to counsel.

forms the basis for imposing the duty to disclose *Brady* material upon the Government.² Concomitant to that duty of disclosure is the question, as presented herein, *viz.*, in the absence of such disclosure, can this Court be assured that the Accused received a fair trial and that the resulting verdict is worthy of confidence. The nature of the *Brady* material involved herein is not *de minimis* - it both impeached the Government's factual premise on how the shooting occurred, while corroborating the Accused's self-defense claim. Thus, the integrity of the fact-finding process and verdict are directly affected. *Amicus* also has an interest in ensuring that prosecutors, civilian or military, comply with their Constitutional and ethical obligations and that clients of NACDL members are not deprived of their *Brady* rights. As such NACDL respectfully requests *Amicus Curiae* status herein.

DATED: 16 March 2009

Respectfully submitted,

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²*Brady v. Maryland*, 373 U.S. 83 (1963).

PROOF OF SERVICE

The undersigned hereby certifies that he caused the foregoing pleading to be served upon the Military Judge, Trial Counsel, and Civilian Defense Counsel via electronic mail, this 16th day of March, 2009, as follows

1. Military Judge (COL Theodore Dixon): ted.dixon@us.army.mil
2. Trial Counsel (CPT Meghan Poirier): meghan.poirier@us.army.mil
3. Civilian Defense Counsel (Mr. Zimmermann): jbzlaw@swbell.net

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**IN THE
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
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FORT CAMPBELL, KENTUCKY**

UNITED STATES,

- versus -

DATE: 16 MARCH 2009

**MICHAEL C. BEHENNA,
First Lieutenant, U.S. Army,
*Accused.***

MILITARY JUDGE: COL T. DIXON

MEMORANDUM OF LAW

**I
STATEMENT OF THE CASE**

The Accused was tried by a general court-martial with members at Fort Campbell, KY, for *inter alia* premeditated murder and related offenses for killing an Iraqi detainee, Mr. Ali Mansur. After a contested trial, he was convicted *inter alia* of *unpremeditated* murder, and thereafter sentenced to a Dismissal, 25 years of confinement and total forfeitures. Prior to sentencing, the Defense made a mistrial motion pursuant to RCM 915, and the Court in an Article 39(a), UCMJ, session (with the members absent) conducted a hearing on such on 28 February 2009. The Military Judge reserved decision on the Defense Motion and requested supplemental briefing by the parties. The Court-Martial did not adjourn but rather is in recess pending resolution of the Accused's mistrial motion and the issues raised therein.

II STATEMENT OF FACTS³

Amicus Curiae rely upon the following facts as we know them, but defer to the Court's pending Findings of Fact.

1. The Government's "theory" was that the Accused, while deployed to Iraq in May of 2008, shot Mr. Mansur twice, first in the head and second, in the chest, while interrogating Mansur, who was sitting on a large rock at the time.
2. On or about 28 August 2008, the Defense submitted a Discovery Request that included specific requests for:
 - a. "Any results . . . of scientific tests . . . or experiments . . . which are material to the preparation of the defense" [¶ 3];
 - b. "If any expert's testimony will be different from that contained in any laboratory report *or the substance of the testimony is not contained in any laboratory or expert's report*, a written description of the substance of the expert's proposed testimony, the expert's opinion, and the underlying basis for that opinion." [¶ 41, emphasis added];⁴
 - c. "All *favorable, exculpatory*, extenuating, or mitigating evidence known or, with reasonable diligence should be known, to the government which reasonably:
* * * * *
 - b. tends to negate the guilt of the accused of any offense charged;
 - c. reduces the guilt of the accused of an offense charged;" [¶ 44, emphasis added];
 - d. "All evidence *in rebuttal* that is exculpatory in nature, impeachment in nature, or material to sentencing, punishment and/or clemency." [¶ 47, emphasis added];
 - e. "This request will also serve to place the government on notice that the

³Taken in substance from the Accused's 2 March 2009, Trial Brief in Support of Mistrial Motion, a telephone conversation with Mr. Zimmermann, and the Government's 2 March 2009, Motion Response.

⁴In this regard, counsel for *Amicus Curiae* has reviewed Dr. MacDonell's 2 February 2009, Report herein, and respectfully suggests that ¶ 41, *supra* of the Defense Discovery Request is thus specifically applicable.

defense is requesting any additional evidence that comes into the possession of the government from the time of this discovery request until the court-martial is concluded” [¶ 68]; and

- f. “This discovery request is continuing . . . to the extent required by due process, fundamental fairness, and the integrity of the criminal justice system ***Immediate notification to the defense is requested as to all items the government is . . . unwilling to promptly produce.***” [¶ 72; emphasis added].
3. The Government gave timely notice that they had retained Dr. Herbert MacDonell as a crime scene reconstructionist and blood spatter expert, to include his C.V. and a copy of his 2 February 2009, written Report.
4. On 25 February 2009, defense experts Dr. Paul Radelat [forensic pathology] and Mr. Tom Bevel [crime scene analysis and blood spatter analysis] testified on behalf of the Accused, which contradicted the Government’s theory.
5. After testimony for the day ended on 25 February, Dr. MacDonell met with the prosecution team and informed them that in his opinion that Mr. Mansur was *standing* when he was shot - the first shot hitting him in the chest and the second in his head as he collapsed from the effects of the first shot. Dr. MacDonell further demonstrated for the prosecution team his scenario using a SGT MacCauley as the “victim.”
6. Dr. MacDonell’s opinion was consistent with the Defense Experts and contrary to the Government’s theory advanced in their case-in-chief.
7. Dr. MacDonell’s opinion (to include his experiment with SGT MacCauley) was not conveyed to the Defense on either 25 or 26 February 2009.
8. On 26 February 2009, the Accused testified in his own behalf. This testimony included the fact that the deceased was both standing and appeared to be reaching out towards the Accused who fired in self-defense, hitting Mr. Mansur first in the chest, and second in the head. That testimony was consistent with both Defense Experts noted above and the undisclosed opinion of Dr. MacDonell.
9. Dr. MacDonell was present in the courtroom for the Accused’s direct testimony. After hearing the Accused’s testimony, Dr. MacDonell told another Government consultant (Dr. Berg) “That’s exactly what I told you yesterday” or words to that effect.
10. During a subsequent recess that day, the 26th, but before the Accused had finished

testifying, as Dr. MacDonell was leaving the courtroom, he remarked to lead Civilian Counsel, Mr. Zimmermann, that, “I would have made a great witness for you,” or words to that effect. Dr. MacDonell would not elaborate when questioned further by Mr. Zimmermann, citing that he had been retained by the Government.

11. The next morning, the 27th, just prior to the start of proceedings, Mr. Zimmermann advised the Government of his conversation with Dr. MacDonell and again, specifically inquired whether or not Dr. MacDonell had any *Brady* information.
12. Government counsel specifically advised Mr. Zimmermann that Dr. MacDonell had *no* exculpatory information.
13. During closing arguments on the merits on 27 February 2009, Government counsel argued that Mr. Mansur had been shot while *sitting*, implying that it was a premeditated, execution-style killing.
14. The Defense - unaware of Dr. MacDonell’s expert opinion both rejecting the Government’s theory and corroborating the defense and Accused’s testimony - argued that Mr. Mansur was both *standing* and had his arms outstretched at the time that he was shot.
15. The members acquitted the Accused of *premeditated* murder, but convicted him of unpremeditated murder.
16. After returning to his home in Corning, New York, Dr. MacDonell on 27 February 2009, consulted with a lawyer and State Supreme Court Judge⁵ about his concerns involving the non-disclosure of his *Brady* material to the Defense, and late in the afternoon of that date, emailed Trial Counsel about his concerns.
17. Trial counsel later forwarded that email to Mr. Zimmermann, who first saw it on Saturday morning, 28 February 2009, and then proceeded to make an oral mistrial motion.
18. The Court conducted a hearing on that motion and Dr. MacDonell testified under oath via telephone. No other witnesses testified and the Court reserved a Decision on the motion. The Court then proceeded to sentencing over Defense objection.
19. Army Regulation, 27-26, *Rules of Professional Conduct for Lawyers* (1992), contains Rule 3.8, *Special Responsibilities of a Trial Counsel*. That Rule states in relevant

⁵In New York, the trial court of general jurisdiction is the Supreme Court, while our highest Court is denominated the New York Court of Appeals.

part:

A trial counsel shall:

* * * * *

(d) make timely disclosure to the defense of all evidence or information known to the lawyer that tends to negate the guilt of the accused or mitigates the offense⁶

III SUMMARY OF ARGUMENTS

Amicus Curiae respectfully submit the following.

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

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

Dr. MacDonell’s opinion was “material” for *Brady* purposes. The Government in essence, made an admission by conduct,⁷ when after hearing Dr. MacDonell’s opinion (unfavorable to the Government’s theory of the case), they “released” him to return to his home in Corning, New York, without disclosing his expected *favorable* testimony for the Accused.

There can be no knowing, intelligent and voluntary “waiver” of the Accused’s right to *Brady* material because the Accused (and his counsel) cannot waive what they are unaware of, *viz.*, Dr.

⁶*Amicus* takes no position as to whether or not the failure to timely disclose Dr. MacDonell’s expert opinion rises to the level of Dereliction of Duty under Article 92, UCMJ or constituted Obstruction of Justice under Article 134, UCMJ. In the context of the Accused’s mistrial motion however, the Court may have to address these issues

⁷*See, e.g., United States v. Trimper*, 28 M.J. 460, 467, n. 6 (CMA 1989).

MacDonell's favorable opinion.

Under the circumstances, *i.e.*, the Government's Constitutional (*Brady*) and ethical (AR 27-26) duties to disclose Dr. MacDonell's expert opinion, which was by any definition "favorable" to the Accused, coupled with the affirmative misrepresentation by the Government to Mr. Zimmermann upon his specific inquiry, that Dr. MacDonell did not have any "exculpatory information" the day after releasing him to depart Fort Campbell, may have perpetuated a fraud upon the court-martial.⁸

IV ARGUMENT

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

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

Or, as the Court refined this principle in *Kyles v. Whitley*, 514 U.S. 419, 434 (1995):

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

⁸Compare Article 73, UCMJ. See generally, J. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 Okla. City U. L. Rev. 833 (1997).

Considering Dr. MacDonell’s professional status,⁹ the fact that he - a Government retained expert - opined consistent with the professional opinions of the Defense experts as well as the testimony of the Accused, the failure to give the fact-finder (here, the Members) the benefit of his opinions and qualifications, makes the verdict inherently suspect. Or, as the *Kyles* Court further observed, a *Brady* violation is demonstrated “by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” 514 U.S. at 435. And the Court warned:

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

514 U.S. at 439.

Brady evidence need not be “exculpatory” evidence - indeed, the majority opinion in *Brady* specifically held that to qualify, evidence need only be “favorable” to the Accused. Dr. MacDonell’s testimony was clearly “favorable” to this Accused, and *Amicus Curiae* respectfully submits that under the circumstances a reasonable person cannot have any confidence in the verdict herein. Or as the Court in *United States v. Gil*, 297 F.3d 93, 101 (2nd Cir. 2002) held, “Evidence is favorable to the accused if it either tends to show that the accused is not guilty or it impeaches a government witness.” *See also, United States v. Rivas*, 377 F.3d 195, 199-200 (2nd Cir. 2004).

⁹ “[T]he preeminent practitioner in the field, Professor Herbert L. MacDonell.” *United States v. Mustafa*, 22 M.J. 165, 166 (CMA 1986).

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

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request *violates due process* where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. [emphasis added]

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

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

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

The Court’s attention is invited to *Ferrara v. United States*, 384 F.Supp.2d 384 (D.Mass. 2005), *aff’d* 456 F.3d 278 (1st Cir. 2006), as both opinions amount to a treatise on *Brady* violations. In granting post-conviction relief, the District Court found a specific denial of Due Process based upon the improper withholding of *Brady* material:

. . . but for the improper suppression of evidence by the government, there is a reasonable probability that the outcome of the proceeding would have been different. That reasonable probability is demonstrated when the suppression of exculpatory evidence undermines confidence in the outcome.

384 F.Supp.2d at 423. In affirming the decision of the District Court, the First Circuit noted (as herein) that the prosecutors had affirmatively misled the Defense as to the existence of key “favorable” information that exculpated Ferrara. 456 F.3d at 284. That Court concluded:

The sad fact is that the government promised the petitioner that it would carry out fully its obligation to produce exculpatory evidence but instead manipulated a key witness, deliberately chose not to

reveal to the petitioner the stunning evidence concerning Jordan's recantation, yet represented falsely to the petitioner that it had kept its promise. This was impermissible conduct.

456 F.3d at 297. The Court affirmed the District Court's decision.

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

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

The Ninth Circuit in *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), a *habeas corpus* appeal in a capital case, encountered a similar scenario - the prosecution's failure to timely disclose an *exculpatory* expert's report. In *Benn*, one of the aggravating factors was an alleged arson - insurance fraud claim. Like the matter herein, the experts *preliminary* report was disclosed to the Defense which was quite misleading. A subsequent report - not disclosed to the Defense - concluded that there was no evidence of arson, but rather the fire was accidental due to an electrical defect in a furnace. The Court affirmed the granting of *habeas* relief based upon numerous *Brady* violations, to include the failure to tender the exculpatory expert report. Judge Trott authored a poignant Concurring opinion in the context of *Brady* where he observed:

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

283 F.3d at 1063-64. With due respect, *Amicus Curiae* submits that under the circumstances of this case, that it is the “duty” of this Court to now say that the failure to timely disclose Dr. MacDonell’s opinion herein, violated both the letter and spirit of *Brady* and its progeny. For a comprehensive Due Process analysis, see P. Giannelli & K. McMunigal, *Prosecutors, Ethics and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1514 (2007).

C. Dr. MacDonell’s Opinion Was “Material” for *Brady* Purposes Herein.

Bagley, supra, addresses the “materiality” prong of the *Brady* equation herein. There the Court held first:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.

473 U.S. 682. Again, of particular relevance herein, is Mr. Zimmermann’s specific request to the Government the morning after Dr. MacDonell left Fort Campbell, *viz.*, asking if Dr. MacDonell had any exculpatory evidence. The Court in *Bagley* went on to address that scenario.

And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken ***had the defense not been misled by the prosecutor's incomplete response.*** [emphasis added]

473 U.S. at 682-83. *Accord*, *United States v. Rivas*, 377 F.3d 195, 199 (2nd Cir. 2004). Or as the Court observed in *United States v. Agurs*, 427 U.S. 97, 112 (1976):

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that ***if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.*** [emphasis added; internal footnote omitted]

Dr. MacDonell’s expert opinion needs to be put into the perspective of his expertise on this subject. In a similar case where the prosecution initially failed to completely submit Dr. MacDonell’s exculpatory conclusions, the Court characterized him as follows:

The State's expert, Dusty Hesskew, studied under MacDonell and testified elsewhere that MacDonell “basically invented” blood spatter analysis. Indeed, during Bevel's [¹⁰] cross-examination, the State sought agreement that MacDonell “is THE expert or THE granddaddy of blood spatter.”

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

¹⁰Upon information and belief, the same Tom Bevel who testified in the case *sub judice*.

favor.

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

D. Dr. MacDonell's *Brady* Evidence Was Not Timely Disclosed.

We can assume that the prosecutor knew the content of Garcia's exculpatory testimony. But we need not decide whether the non-disclosure was a deliberate tactical concealment, or resulted from the mismanagement of information, or from sloppy thinking about the evidentiary significance of the material. And we need not decide whether the prosecution appreciated the significance of Garcia's testimony from the beginning, or came to appreciate its significance later at the *Wade* hearing, or even later, in the midst of trial. ***It is clear enough, without deciding these questions, that the prosecution failed to make sufficient disclosure in sufficient time to afford the defense an opportunity for use.*** [emphasis added]

Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001) [*habeas corpus* granted].¹¹ While that may be the "federal" standard, RCM 701(a)(6), provides the controlling *military* Rule, to wit:

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

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

The Accused's 28 August **2008** Discovery Request, discussed above, made it quite clear that the

¹¹For a scholarly analysis of *Leka* in the military context, see, MAJ Christina E. Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?* Army Lawyer, May 2002, at 18 *et seq.*

Defense was aggressively seeking “favorable” *Brady* evidence from the Government. *See also, MCM(2008), App. 21, Analysis of RCM 701(a)(6), at A21-33. See generally, Maj LeEllen Coacher, Discovery in Courts-Martial, 39 A.F. L. Rev. 103, at 106 (1996) [“This rule also has substantial ethical and constitutional implications.” (internal footnotes omitted)].*

At a minimum, *Amicus* submits that the Government should have alerted the Defense to Dr. MacDonell’s “favorable” evidence on the evening of 25 February 2009, and certainly should have given such notice prior to court commencing on the 26th, at a time *prior* to the verdicts herein. Rather than disclose, the Government counsel appear to have fallen into the mistake identified in *Kyles, supra, i.e.*, “And it will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.” 514 U.S. at 440. The “private deliberations” created the issues now pending before this Court.

In this regard, *Amicus* would note the ABA Standards for Criminal Justice, *The Prosecution Function*, (3rd ed.), and in particular, Prosecution Standard 3-3.11, *Disclosure of Evidence by the Prosecutor*, likewise imposes a similar duty on the Government:

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

E. The Accused Did Not “Waive” His Due Process Right to Receive *Brady* Material.

Amicus invites the Court’s attention to the unreported decision in *State v. Bennett*, 1994 WL 53645 (Tenn. Crim. App. 1994),¹² which comes close to the factual scenario herein. *Bennett* was

¹²A copy of that Decision is appended hereto.

tried for second-degree murder - the Court reversed due to a *Brady* violation. Bennett's defense, as herein, was self-defense. After the close of proof, Bennett's defense counsel saw a photograph on the prosecution table that had not been disclosed to the Defense. The picture showed the contents of the deceased's pockets, which included two (2) knives. The Defense objected as their theory was that the deceased was not only the aggressor, but had a reputation as being violent. The Court found as follows: "The prosecution's failure to disclose the photograph and the existence of the knives, whether it was inadvertent or intentional, was a denial of appellant's due process rights under *Brady*." *Id.*, at * 6.

The Court went on to observe:

The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses. [emphasis added].

Id., at * 7.

The Government contended on appeal that Bennett had somehow "waived" his *Brady* claims by (unlike herein) failing to make a mistrial motion at the time. The Court rejected the "waiver" argument and its rationale is respectfully, applicable herein:

Once the suppressed photograph was discovered, the trial judge gave defense counsel a limited time to decide whether to re-open the proof. He declined to do so. ***We are unwilling to find waiver of a constitutional violation under circumstances*** in which defense counsel, given a limited amount of time, chose not to scurry up witnesses and attempt to establish admissibility of state-suppressed exculpatory evidence. ***The state created the error. Appellant should not have been required, on short notice, to present appropriate***

witnesses to cure it. [emphasis added] *Id.*

Waiver, as urged by the Government herein, requires more than just a claim. The standard for Constitutional rights emanates from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” And, when Constitutional rights are at issue, “every reasonable presumption should be indulged against . . . waiver.” *Hodges v. Easton*, 106 U.S. 408, 412 (1882). *See generally, New York v. Hill*, 528 U.S. 110, 114 (2000) [discussion of waiver of constitutional rights]. The Accused and his counsel herein simply could not waive what the government had failed to disclose.

F. Was There A “Fraud Upon the Court-Martial?”

In the context of the Accused’s pending mistrial motion, *Amicus Curiae* respectfully, albeit reluctantly, submit that the Court must address this question. First of all, under the circumstances, the guilty verdicts herein are suspect based upon Dr. MacDonell’s suppressed opinion that was not disclosed until after the verdicts had been announced. The Discussion to RCM 1210(f)(3), *Fraud on court-martial*, is relevant herein:

Examples of fraud on a court-martial which may warrant granting a new trial are: confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense; ***willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial would probably have resulted in a finding of not guilty*** [emphasis added]

Compare Article 69(b), UCMJ [“fraud on the court”]; and Article 73, UCMJ [“fraud on the court”].

See also, United States v. Brooks, 49 M.J. 64, 70 (CAAF 1998).

This is hardly a novel concept in federal prosecutions - indeed, the DoJ’s *United States*

Attorneys' Manual, devotes considerable space to this in Chapter 9-5.001.¹³ While obviously not binding on military Trial Counsel, *Amicus* suggests that it is persuasive guidance in the federal context. Subparagraph B(1), in particular advises:

Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality ***and err on the side of disclosing exculpatory and impeaching evidence.*** *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, ***this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.*** [emphasis added]

Subparagraph B(2), goes on to state:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

And, Subparagraph C(1), provides as follows:

A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

Had the guidance of the *U.S. Attorneys' Manual* been followed in this case, *e.g.*, erring on the side of caution, this post-trial litigation is unlikely to have arisen.

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

¹³Available on-line at: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ [last accessed 9 MAR 09].

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

The law and the truth-seeking mission of our criminal justice system, which promise and demand a fair trial whatever the charge, are utterly undermined by such prosecutorial duplicity. Although our Constitution guarantees to a person whose liberty has been placed in jeopardy by the State the right to confront witnesses in order to test their credibility, that right was willfully impaired in this case. By unlawfully withholding patently damaging and damning impeachment evidence, the prosecutor knowingly and willfully prevented Benn from confronting a key witness against him. Such reprehensible conduct shames our judicial system.

283 F.3d at 1063. Whether or not this Court ultimately finds that Dr. MacDonell's opinions in this case were willfully or negligently withheld from the Defense is not the issue. The ultimate issue is simply, is the verdict of *this* court-martial, under *these circumstances* worthy of confidence? No one in our justice system, military or civilian, should face the specter of a murder conviction and a 25 year sentence of imprisonment under the cloud now hanging over this case.

CONCLUSION

As *Amicus*, we recognize that trials are rarely perfect endeavors. But to be constitutionally valid, a trial must be fair. In view of the detailed and specific Defense Discovery requests filed some six (6) months prior to trial; in view of the specific request by Mr. Zimmermann to the Trial Counsel the morning after Dr. MacDonell's departure from Fort Campbell and the Accused's trial; and in view of the terribly misleading response, well-intentioned or malevolent by the Government, it respectfully *cannot* be said that this Accused has, under the circumstances herein, received his Constitutional due - a fair trial. Justice in general and Due Process in particular compel relief herein in the form of granting the pending Defense Mistrial Motion.

DATE: 16 March 2009

Respectfully submitted,

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