IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBERT BALES,

Petitioner,

v.

COMMANDANT, United States Disciplinary Barracks, 1301 North Warehouse Road Fort Leavenworth, Kansas 66027,

Respondent.

Case No. 19-3112-JWL

PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

Petitioner, by his attorneys JOSEPH HOLLANDER & CRAFT LLC and MAHER LEGAL SERVICES PC, respectfully requests the Court to award a writ of habeas corpus pursuant to 28 U.S.C. § 2241, reverse and vacate the findings and sentence, and order a new trial, or, in the alternative, order a new sanity (competency) board and a new trial.

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I. THE PARTIES

Petitioner Robert Bales, formerly Staff Sergeant Robert Bales, 2nd Battalion, 3rd Infantry Regiment, I Corps, United States Army (Bales), is incarcerated by Federal officials in the United States Disciplinary Barracks (USDB) on Fort Leavenworth, Kansas with Registration Number 91675. Respondent is the senior Federal officer responsible for the Military Corrections Complex in which Bales is confined. The United States Army Litigation Division, United States Army Legal Services Agency, 9275 Gunston Road, Fort Belvoir, Virginia 22060, and The United States Attorney's Office for the District of Kansas, 444 S.E. Quincy, Suite 290, Topeka, Kansas 66683, represent Respondent.

II. JURISDICTION

The Court possesses subject matter jurisdiction pursuant to 28 U.S.C. § 2241, habeas corpus for servicemembers. The Court is authorized to grant relief as law and justice require pursuant to 28 U.S.C. § 2243, as Bales has completed direct military review (Article I) and seeks collateral civilian review (Article III) of his court-martial convictions and sentence.

On June 25, 2018, the United States Supreme Court denied Bales's Petition for a Writ of Certiorari brought pursuant to 28 U.S.C. § 1259. On February 15, 2018, pursuant to 10 U.S.C. § 867 (2012), the U.S. Court of Appeals for the Armed Forces (CAAF) granted Bales's Petition for a Grant of Review but summarily affirmed the convictions and sentence in the same one-page action. *United States v. Bales*, ARMY 20130743.[1] On September 27, 2017, the U.S. Army Court

[1] The first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember's branch, for example, the Army Court. 10 U.S.C. § 866 (2012). This court consists of uniformed Judge Advocates appointed by The Judge Advocate General. *Id*. Review at the first level is mandatory for sentences involving death, confinement in excess of one year, dismissal of an officer, or a punitive discharge (bad conduct discharge or dishonorable discharge) for an enlisted servicemember where the right to appellate review has not been waived. *Id*. The second level of appeal involves the CAAF, consisting of five civilian judges appointed by the President. 10 U.S.C. § 867. Review at the second level is largely discretionary. *Id*. If the CAAF denies review, the military appellate process is concluded and access to the United States Supreme Court is not available. *Id*. If the CAAF grants review, appeal of its decision can be pursued before the United States Supreme Court. 28 U.S.C. § 1259 (2012).

of Criminal Appeals (Army Court), denied each of Bales's assignments of error brought pursuant to 10 U.S.C. 866 (2012).

III. VENUE

Because Bales is confined by Federal officials in Leavenworth, Kansas, venue is proper in this district pursuant to 28 U.S.C. § 2241.

IV. PROCEDURAL HISTORY

On January 17, April 23, June 5, 7, and 13, and August 19 – 23 2013, a jury sitting as a general court-martial on Joint Base Lewis-McChord, Washington convicted Bales, pursuant to his plea, of attempted premeditated murder (six specifications), violating a general order by drinking, using and possessing steroids, premeditated murder (sixteen specifications), assault, assault by battery, aggravated assault (five specifications), impeding an investigation, and wrongfully burning bodies in violation of Articles 80, 92, 112a, 118, 128, and 134, Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. §§ 880, 892, 912a, 918, 928, 934 (2012).

The jury sentenced Bales to be reduced to the most junior enlisted grade of Private (E-1), to forfeit all pay and allowances, to be confined for life without eligibility of parole, and to be dishonorably discharged from the Army. The military judge credited Bales with 527 days' confinement credit against his sentence to confinement. The convening authority approved the sentence as adjudged.

V. SUMMARY OF BALES'S PETITION

In criminal cases involving the prosecution's failure to disclose exculpatory or mitigating evidence, or produce evidence favorable to the defense in response to pretrial requests, United

States Courts of Appeals either order a new trial or remand the case where the net effect of evidence the prosecution withheld raises a reasonable probability that its disclosure would have produced a different result. *See, e.g., Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013) (prosecution withheld witness psychiatric records); *Thomas v. Westbrooks*, 849 F.3d 659 (6th Cir. 2017) (prosecution suppressed evidence that witness had been paid by the FBI).

The military appellate courts reviewing Bales's convictions and sentence took a different tack, however. Bales presented the Army Court with unchallenged expert medical affidavits by the Nation's premier experts in Mefloquine poisoning that the Army administered the anti-malarial drug mefloquine as part of Bales's multiple combat deployments, and that the drug had long-lasting adverse psychiatric effects on him, including symptoms of psychosis and tendencies to engage in violence. The unchallenged evidence further showed that these psychiatric effects continued to impact Bales during his fourth combat tour, during which he left his post believing he saw lights in the distance and killed 16 Afghans.

Neither the fact that the Army administered the mefloquine to Bales, nor the Army's knowledge of the very real dangers of mefloquine's long-term, medically-substantiated psychotic side-effects, were disclosed to the defense or the court. Moreover, these medical facts bearing on *mens rea* were not evaluated by responsible medical and legal authorities prior to the prosecution's determination to seek the death penalty, suggesting a rush to judgment before a complete and professional investigation.

Indeed, without the benefit of his defense counsel's use of the mefloquine evidence in coordination with medical experts, Bales ultimately pled guilty to stop the Army from killing him. But, given mefloquine poisoning, whether his plea was truly knowing, voluntary, and intelligent was not fully developed. *See, i.e. Ivy v. Caspari*, 173 F.3d 1136 (8th Cir. 1999) (habeas corpus

granted because guilty plea not voluntary, knowing, and intelligent where petitioner was diagnosed by psychiatrist as having mental illness). The pleas Bales entered without knowledge that the Army had administered upon him a psychosis inducing drug that affected the requisite mental state for his crimes cannot be termed knowing, voluntary, or intelligent—particularly not when that information was unavailable to him because it was omitted from his medical records by the administering agency.

The after-acquired evidence of involuntary mefloquine intoxication gives rise to Bales's request that this Court analyze the prosecution's conduct not only in the context of due process disclosure and production obligations, but also as evidence of actual innocence under Article I, Section 9 of the Constitution. The Supreme Court in *Boumediene v. Bush,* 553 U.S. 723 (2008), held that the Suspension Clause found in the habeas grant of judicial review in Article I not only extended habeas protections to noncitizen detainees at Guantanamo Bay, but also provided a separate and distinct basis for traditional habeas review to focus only on whether the detention was legally and factually authorized.

The unchallenged medical evidence reveals a compromised mental state on the night in question, which was of sufficient significance to negate the *mens rea* necessary to support his convictions. Once compelled by mefloquine induced delusions, Bales's ability to know and to form intent was impaired. And, because he was acting involuntarily, he was deprived of the ability to understand that what he was doing was wrong. His convictions, which required proof that Bales acted intentionally and with premeditation, cannot stand in the face of new evidence indicating that his mind was not his own that night—but instead overcome by the psychotic effects of a drug the Army made him take despite knowledge of the danger it posed. It also calls into question

whether Bales's continued incarceration is lawful in the face of a guilty plea entered into while Bales remained under the effects of mefloquine intoxication.

Bales also presented the Army Court with uncontroverted expert evidence that the prosecution brought Afghan sentencing witnesses from the battlefields of Afghanistan into the United States under alias names, alias social security numbers, under the false representations that they were "government employees," using contrived entry and exit visas, and booked them on domestic airliners among the American flying public. The prosecution portrayed them to the jury as "innocent farmers" and "gardeners."

What went undisclosed, however, was that some of these Afghan sentencing witnesses had left their fingerprints and DNA on improvised explosive devices, that is, on bombs on the fields of battle in Afghanistan. These suppressed facts changed their legal status from noncombatants under International Humanitarian Law to that of unlawful belligerents or brigands, potentially targetable under the Law of War, long-recognized legal principles the Army Court declined to factor into its affirmance.

The Army Court seemingly sought to create a false narrative of how biometrics work in Afghanistan by suggesting fingerprint and DNA evidence is something more complicated and mysterious than it really is. Demonstrating how reliable and trustworthy fingerprint and DNA evidence is within the Federal government in the context of accurately identifying those responsible for making IEDs are the Director of the FBI's public comments on October 26, 2018. As he stood with the Attorney General of the United States at a press conference to discuss how the FBI worked with other agencies to arrest the Florida bombmaker who mailed bombs to prominent public figures, Cesar Sayoc, the Director stated, "[w]e can confirm that 13 IEDs were sent to various individuals across the country," and based on investigation, agents:

> Uncovered a latent fingerprint from one of the envelopes containing an IED that had been sent to Congresswoman Maxine Waters. We have confirmed this fingerprint is that of Cesar Sayoc. There is also a possible DNA connection between samples collected from pieces of two different IEDs, mailed in separate envelopes, and a sample previously collected from Sayoc in connection with an earlier arrest in Florida.

FBI Director Christopher Wray's October 26, 2018, Press Release.[2]

The fingerprint and DNA technology used daily in Afghanistan to identify those responsible for making IEDs is the same type and quality that the FBI used in the Cesar Sayoc case, and at times, directly involves the FBI, *e.g. Combined Joint Task Force Palladin*. Far from the Army Court's characterization of an "abyss," the methodology is proven, accepted, and in widespread use.

The Army Court chose to discount Bales's biometric expert's sworn declaration,[3] not only in the face of weighty Army doctrine and US Government investment in biometrics, but also where there was no countervailing sworn declaration that challenged the methodology or conclusions. Stated differently, the Appellee did not challenge or dispute the validity of Bales's evidence, yet, the Army Court chose to disbelieve unchallenged sworn evidence.

Accordingly, Army Court erred when it departed from binding Fifth Amendment (due process) and Sixth Amendment (confrontation and right to present a complete defense) precedents to devalue the significance involuntary mefloquine intoxication would have had on the most significant parts of the trial, to include: (1) appropriate lesser charges; (2) taking the death penalty off the table; (3) different sanity (competency) board findings; (4) different plea negotiation

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[2] FBI National Press Office, *FBI Director Christopher Wray's Remarks Regarding Arrest of Cesar Sayoc in Suspicious Package Investigation, available at*: https://www.fbi.gov/news/pressrel/press-releases/fbi-directorchristopher-wrays-remarks-regarding-arrest-of-cesar-sayoc-in-suspicious-package-investigation

[3] Under Article 66, UCMJ, 10 USC § 866, a military appellate court may properly receive after-acquired evidence on claims that the prosecution violated a defendant's Fifth Amendment rights by granting a "motion to attach."

positions; (5) defense tactical development; (6) plea of not guilty for lack of mental responsibility; (7) affirmative defense of involuntary mefloquine intoxication at trial; and (8) mitigation during sentencing. *See, i.e. Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007) (habeas corpus granted where cumulative effects of multiple errors violated due process).

The Army Court erred again when it discounted the landscape-changing effects disclosure of terrorist bombmaking, by such reliable and trusted evidence as fingerprints and DNA, would have had on the sentence, especially where the prosecution recognized just how "material" the bombmaking evidence was when, rather than disclosing it, the prosecution filed a motion to prevent the defense from using biometrics in the first place.

The Army Court wrongly decided important Fifth and Sixth Amendment questions inconsistently with prevailing Supreme Court precedent by endorsing the prosecution's seeking of the death penalty without evaluating the impact of mefloquine on Bales, trying Bales without disclosing mefloquine and its psychotic effects to Bales before trial for his defense counsel's use and development, and its failure to disclose the fingerprint and/or DNA evidence linking the victim-witnesses to bombs created to kill American troops. The Army Court's decision conflicts with relevant decisions of this Court under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea must be knowing, intelligent, and voluntary); *Tollett v. Henderson*, 411 U.S. 258 (1973) (accused entitled to effective assistance of counsel in order to ensure a knowing and intelligent plea of guilty).

Accordingly, Bales respectfully requests the Court to vacate and set aside the findings of guilty, set aside the sentence, and order a new trial.

VI. STATEMENT OF FACTS

A native Ohioan, Bales is the married father of two school-aged children, a boy and a girl, whose spouse has moved close to Leavenworth, Kansas, so that Bales may continue to be involved in the lives and development of his children.

After September 11, 2001, Bales enlisted in the Army and rose to the rank of Staff Sergeant in the Infantry. By 2011, he had completed three combat tours in Iraq and was starting a fourth in Afghanistan. Beginning after his first deployment to Iraq in 2004, Bales complained of memory impairment and depression, and following subsequent combat deployments, he complained of additional symptoms of insomnia, irritability, anger, decreased ability to concentrate, and memory impairment, which the United States did not attribute to any psychiatric diagnosis.

Despite experiencing these seemingly medically unexplained symptoms, the Army deployed Bales for a fourth combat tour to the Panjwai District of Kandahar Provence, Afghanistan, the birthplace of the Taliban. The village stability platform to which the Army assigned Bales was a fixed position located within and surrounded by the local population, where the enemy blends in. Roads and trails were littered with IEDs; the insurgents changed the locations of these IEDs nightly to confuse American forces and increase the effectiveness of the IEDs. Gunfights with the enemy occurred daily.

On March 11, 2012, in the middle of the night, in Bales's 42nd month of combat service in the midst of his fourth combat deployment, Bales dropped his protective gear (ballistic vest, plates, and helmet), left the village stability platform, and killed 16 persons of, as the United States termed them, "apparent Afghan descent." (R. Charge Sheet).

Worldwide media attention followed. *See, e.g.*, Craig Whitlock and Richard Leiby, *Army Staff Sgt. Robert Bales Charged With Murdering 1[6] Afghans*, Washington Post, March 24, 2012.

Afghan and Coalition nations publicly expressed outrage. Afghan President Hamid Karzai wanted Bales tried and hanged.

The United States Secretary of Defense at the time, Leon Panetta, announced before any criminal investigation was concluded, before any sanity (competency) board results were completed, and before any foreign witnesses were interviewed or vetted for bombmaking terrorist activities, that the United States would seek the death penalty. *See* Reuters Staff*, Who's to Blame When an Injured Soldier Kills Civilians?* Reuters, March 12, 2012. Apparently making good on that public pledge, in January 2013, the United States assigned a team of four prosecutors, referred this 16-count premeditated murder case to trial, and authorized imposition of the death penalty.

A. The Sanity (Competency) Board Unreasonably Failed To Assess Evidence of Mefloquine Psychosis In Addition to Traumatic Brain Injury and Post Traumatic Stress Disorder Bearing on Bales's *Mens Rea* to Commit Multiple Premeditated Murders After Four Combat Tours and Whether His Guilty Plea Was Knowing, Intelligent, and Voluntary Was Not Determined In The Context of Mefloquine.

On January 17, 2012, approximately two months prior to the incident giving rise to this trial, the Assistant Secretary of Defense (Health Affairs) wrote in a memorandum addressed to the Assistant Secretary of the Army (Manpower & Reserve Affairs) that "[s]ome deploying Service members have been provided mefloquine for malaria prophylaxis without appropriate documentation in their medical record," and directed a review of mefloquine prescribing practices be performed in deployed locations. Attachment A, Declaration of Dr. Remington Nevin (Nevin Decl.) ¶ 43, Ex. D.

The results of this review were due in April 2012 and were not widely publicized, but only known by the government, such that only the prosecution had access to this information while the defense did not and was therefore, unable to make a more specific request for it. The United States therefore knew or should have known at the time of the incident that Bales may have been

prescribed mefloquine without documentation in his medical records. However, this memorandum and the results of the United States' review, which presumably included a potentially exculpatory contemporaneous review of mefloquine prescribing practices in Afghanistan, was never provided to Bales by the prosecution.

After arraignment and deferral of pleas to the Charges, the trial judge directed that a sanity board (ordinarily a three-member panel consisting of a psychiatrist, physician, and/or clinical psychologist) convene and report to the court and the parties if Bales were competent to stand trial, participate in his own defense, and whether or not he had a severe mental disease or defect on the night in question. As a matter of law, anything an accused says to the sanity board is privileged and cannot be used against him.

As these preliminary trial phases were unfolding, the U.S. Food and Drug Administration (FDA) was reviewing a report originally received on April 11, 2012. In the report, which was described as "medically confirmed," Roche, the original manufacturer of mefloquine, reported that an unnamed U.S. soldier "was treated with Mefloquine Hydrochloride ... and led to Homicide killing of 17." *Id*. ¶ 44, Ex. E. Initial reports incorrectly cited that Bales had killed 17, rather than 16.

The Army, as a holder of a then-current FDA marketing authorization for mefloquine, was or should have been aware of this "medically confirmed" report that clearly suggested that the United States had issued mefloquine to Bales. This report was never provided to Bales nor to the sanity (competency) board by the United States.

While Bales's trial was underway, on June 25, 2013, the FDA responded to a Freedom of Information Act request (FOIA), and released this adverse event report publicly. *Id*. ¶¶ 18, 44, 45. Ex. E.

Approximately one month later, on July 29, 2013, the FDA issued a Drug Safety Communication, advising the public about "strengthened and updated warnings regarding neurologic and psychiatric side effects associated with the antimalarial drug mefloquine," including requiring the addition of a boxed warning, the most serious kind of warning about these potential problems." *Id*. ¶¶ 14, 18, Ex. E.

In its review of reported adverse events associated with mefloquine, the FDA noted that "some of the psychiatric symptoms persisted for months or years after mefloquine was discontinued," and warned that "[t]he psychiatric side effects can include feeling anxious, mistrustful, depressed, or having hallucinations." *Id*. ¶ 18.

The Army, as a holder of a then-current FDA marketing authorization for mefloquine, knew or should have known of this Drug Safety Communication and the FDA's deliberations preceding its issuance, including deliberations concerning the drug's long-lasting psychiatric side effects. *Id*. ¶ 44. However, neither the Drug Safety Communication nor information related to these deliberations were provided to Bales or to the sanity board by the United States.

Consequently, the sanity (competency) board did not evaluate evidence that the United States had ordered Bales to be exposed to mefloquine or that he may have been laboring under symptoms of psychosis caused by exposure to the drug, even years previously. That is, the defense and the court remained unaware of mefloquine and its medical impact compromising *mens rea* for premeditated murders, and accordingly, whether his pleas to multiple murders were knowing, voluntary, and intelligent.

The sanity board completed its work on May 3, 2013, and reported to the court that Bales was competent to stand trial and possessed no mental disease or defects on the night in question. However, the sanity board was not aware of the June 2012 adverse event report that clearly

suggested that the United States had issued mefloquine to Bales. Nor was the sanity board, having concluded its work, able to consider the significance of the July 2013 FDA Drug Safety Communication in assessing the impact that prior exposure to mefloquine may have had on Bales, including what impact symptoms of psychosis caused by use of the drug even years earlier could have had on Bales's state-of-mind on the night in question. *Id*. ¶¶ 42, 56.

The trial judge, for reasons unexplained on the record, later provided to the four prosecutors 78 statements from Bales derived from the court-ordered sanity board. The prosecutors admitted in open court that they read the 78 statements, but the trial judge refused to recuse the four prosecutors and substitute a "taint-team." *See Kastigar v. United States*, 406 U.S. 441 (1972) (use of "taint-team" recommended to ensure compelled statements from a criminal accused are not used unfairly by the prosecution).

The trial judge did not determine whether or not the prosecution "used" derivative information for "non-evidentiary" purposes, "altered" the prosecution's strategy, and/or the extent of the prejudice to Bales. The defense moved to "fact-check" what the United States may have already known prior to the disclosures, which the trial judge denied. The defense also moved to conduct a *Kastigar* hearing, which would have provided the trial-level procedure to account for the 16 compelled statements, which the trial judge denied.

The defense further moved to recuse the trial judge and the four prosecutors who admitted to reading and reviewing the entirety of the 78 compelled statements from Bales. The trial judge denied that motion as well, disregarding the Constitution.

B. The Prosecution Flew Terrorist Bombmakers Into the United States Under False Names And Alias Social Security Numbers On Delta Airlines Among The American Flying Public And Wrongly Urged the Jury They Were Only Farmers or Gardeners.

The defense propounded written discovery seeking from the prosecution not only Bales's medical records, but also biometric evidence (namely fingerprints and/or DNA left on IED components or evidence of detention by coalition forces for terror activities in Afghanistan) in connection with any and all witness the United States intended to call.

Concerning biometrics, the defense request used common terms to defense biometrics suggesting where the information could be reasonably located. The prosecutors did not provide any biometric information in response to the defense requests, however.[4] This in spite of the fact that at the same time, the prosecutors were actively working with the U.S. Department of State to identify Afghan aggravation witnesses, secure visas, obtain travel documentation, order military personnel to escort the witnesses from Afghanistan to the United States, usher them in and around Joint Base Lewis-McChord, and accompany them on the return trip to Afghanistan after they testified at the sentencing phase of the trial.

The prosecution learned from the U.S. Department of State that biometric evidence existed concerning at least one Afghan witness, Mullah Baraan, and that he may have been a coalition detainee in Afghanistan (suggestive of a biometric "hit"). The prosecution did not disclose this

[4] At base, biometrics is largely fingerprint and/or DNA. Biometric evidence as used in Afghanistan to fight the war involves two main components: enrollment and match or "hit." Enrollment occurs when coalition personnel take fingerprints, an iris scan, a digital image, a saliva swab, and background information and upload the data into an authoritative database. A match or "hit" occurs when an IED explodes or is diffused, and upon a sensitive site exploitation, the forensic tidbits are dusted for prints and evidence of skin (from twisting wires on bombs) is run against enrollment records. A "hit" occurs when there is a match, proving by fingerprint and/or DNA evidence that the person made the bomb. The converse is also true. Fingerprints and DNA from bombs can be uploaded to the database, and later, when a local individual is enrolled, a match or "hit" might occur in that manner.

evidence to the defense. Nor apparently did the prosecution run biometric database searches (fingerprints/DNA) of its own to pursue the evidence to its logical ends.

Instead, the prosecution filed a motion in limine seeking ***to prevent*** the defense from using any biometric evidence associated with Mullah Baraan, *i.e.*, that he had been a coalition detainee, or had been involved in terrorism or bombmaking. This was just one aspect of the shell game the prosecution played regarding the biometric (i.e., DNA and fingerprint) evidence the defense sought. At a hearing on the biometric issue before the trial judge, the defense urged the court to direct that the United States produce the biometric records, but the prosecutor insisted that the U.S. Department of State refused to provide them. (R. at 405).

Prosecutors deemed defense suggestions that these witnesses could be Taliban or terrorists as "innuendo and rumor," or "purely speculative," and "lack[ing] any reasonable indicia of reliability." (R. at 406).

The trial judge determined the matter "resolved" and that he was not going to make a "congressional investigation" about Mullah Baraan or the biometric impeachment evidence. (R. at 409).

At this point, the defense did not have evidence of Bales's exposure to mefloquine or that sentencing witnesses were terrorist bomb-makers. The prosecution, however, still sought the death penalty. In exchange for the United States' removing the death penalty, Bales pled guilty to all charges and specifications.

To bring the Afghan sentencing witnesses to the American courtroom, the United States issued a travel authorization using "pseudo names," "pseudo SSANs," for "Afghan civilian employees," and paid the witnesses cash for travel, meals, and incidentals. The United States booked passage from Afghanistan to Dubai, United Arab Emirates, then Dubai to Atlanta, Georgia.

The final leg of the inbound journey was on August 18, 2013, aboard Delta Airlines Flight 1884 from Atlanta, Georgia, to Seattle, Washington. During the sentencing phase before a jury, Afghan witnesses testified against Bales.

Upon direct examinations, the prosecution elicited answers from the Afghan witnesses, portraying them as "farmers." During sentencing arguments before the jury, the United States contended that the Afghan witnesses flown into the United States under alias social security numbers, false names, in a status as "government employees," and ticketed on domestic American airliners within the United States among the general flying public, were simply "farmers."

C. Dr. Pitman, Professor of Psychiatry at Harvard University, Found Bales Had No Recidivism Risk.

Dr. Robert Pitman, Professor of Psychiatry at Harvard University offered the following medical opinion for Bales:

> The unique constellation of factors enumerated above that led SSG Bales' perpetrating the homicides, *will never occur again.*
>
> Prior to his combat in Iraq and Afghanistan, SSG Bales was not by nature a violent criminal I see little reason why he should be expected to engage in violent criminal activity should he be eventually paroled.

On August 23, 2013, the jury sentenced Bales to confinement for life without the eligibility for parole.

Twenty-three days later, the U.S. Army Special Operations Command, under which Bales had been assigned, ordered commanders and medical personnel to stop using mefloquine. Nevin Decl. ¶ Ex.

Bales has been confined at Leavenworth, Kansas, ever since.

D. The Army Court's Review Was Neither Full Nor Fair Because It Failed To Follow Prevailing Legal Precedents, Discounted Unchallenged Expert Medical (Mefloquine) and Biometrics (Fingerprint and DNA) Evidence, and Adopted Large Portions of the Prosecution's Narrative In the Face Of Undisputed Defense Evidence.

Upon direct appeal, Bales brought two main constitutional issues under the Fifth and Sixth Amendments. First, Bales claimed that his trial violated due process because the prosecution did not disclose, nor did it produce in response to defense request, evidence of involuntary mefloquine intoxication and poisoning bearing on the most significant aspects of the trial, to include (1) the special findings required by law to authorize the death penalty (RCM 1004); (2) the appropriateness of premeditated murder charges; (3) the sanity board's findings; (4) the defense of lack of mental responsibility; (5) the defense of involuntary mefloquine intoxication; (6) the assistance of counsel during plea negotiations; (7) the landscape of plea negotiations; (8) whether his plea was knowing, intelligent, and voluntary; and (9) the value of mefloquine as mitigation evidence on findings and during sentencing.

Second, Bales noted that a prosecutor's due process disclosure and production obligations extend to the sentencing phase in a criminal proceeding. He claimed that his sentencing procedure violated due process because the prosecution failed to disclose that some Afghans it flew into the United States to testify as victim-impact witnesses left their fingerprints on IED components, proving that they were not "farmers" but bombmaking terrorists that probably could have been affirmatively targeted by coalition forces. Bales also claimed the prosecution again violated due process by failing to produce the biometric records in response to a written defense request.

Bales argued that consideration of this material evidence favorable to the defense would have produced a different and more favorable result, noting that once a *Brady* violation is established, courts need not test for harmlessness. *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995).

E. The Army Court Refused To Remand The Case To A Trial Judge For A Fact-Finding Hearing on Mefloquine Poisoning And *Mens Rea* To Commit Multiple Premeditated Murders In The Face Of Clear And Unchallenged Evidence Of Mefloquine Intoxication.

Bales initially moved the Army Court to order appellate discovery into the facts and circumstances surrounding mefloquine. *See, e.g.*, *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002) (ordering Air Force Court of Criminal Appeals to obtain government discovery related to appeal). The United States opposed the motion. The Army Court denied the motion in an order without providing any reasoning or rationale.

Bales asked the Army Court for a new trial or to remand the case to a trial judge to conduct a factfinding hearing to determine if at the time of the killings, he was laboring under symptoms of psychosis caused by his exposure to and involuntary intoxication from mefloquine, such that his *mens rea* for premeditated murder was legally deficient to support a guilty plea or conviction. *See United States v. DuBay*, 17 CMR 147 (CMA 1967) (fact-finding hearing appropriate to determine issues raised collaterally which require findings of fact and conclusions of law). In support, Bales introduced mefloquine intoxication evidence in the form of unchallenged sworn affidavits the Army Court accepted and attached to the appellate record. Specifically, Bales produced evidence from three different individuals, two of whom were medical experts, on the impact mefloquine had on the charged conduct.

1. Gregory Rayho's Declaration About Involuntary Mefloquine Ingestion By Order Of The Army.

The first affiant, Mr. Gregory Rayho, served with Bales during combat operations in Iraq in 2004. Mr. Rayho confirmed that he stood with Bales in weekly formations wherein mefloquine was distributed, and that he and Bales were ordered to take mefloquine in 2004. Mr. Rayho believed that Bales would have been ordered to take mefloquine, and that he believed he it would

have been very unlikely that Bales would have been given a different antimalarial medication, or no antimalarial medication.

2. Remington L. Nevin, M.D., M.P.H., DR. P.H.'s Unchallenged Conclusion That Bales's *Mens Rea* Was Compromised On The Night In Question.

Dr. Nevin is one of the world's most recognized experts in mefloquine and its adverse effects. He possesses specialized medical and public health training and experience as a preventive medicine physician, epidemiologist, and expertise in the adverse effects of antimalarial drugs, particularly mefloquine.

He has published over 40 scientific and medical publications, including eight peer-reviewed manuscripts and 11 letters in scientific and medical journals specifically on the topics of mefloquine or malaria, including an analysis of patterns of use of mefloquine in Afghanistan.

Dr. Nevin has coauthored the first manuscript in the psychiatric literature on the forensic application of claims of mefloquine toxicity, which appears in the Journal of the American Academy of Psychiatry and the Law.

In his unchallenged sworn affidavits to the Army Court, Dr. Nevin described that it was recognized within the medical community that adverse psychiatric effects of mefloquine, including symptoms of psychosis, may occur years after exposure to the drug.

Prior to tendering the first of his affidavits, Dr. Nevin reviewed Bales' available medical records and other evidence including the Rayho affidavit. Dr. Nevin also spoke directly with Bales by telephone. Dr. Nevin concluded that it was likely that Bales was exposed to mefloquine during his deployment to Afghanistan, and that it was very likely that Bales had been previously exposed to mefloquine during his tour to Iraq in 2003-2004.

Dr. Nevin also concluded that it was very likely that Bales experienced adverse psychiatric effects as a direct result of his very likely exposure to mefloquine during this tour, and that this exposure very likely constituted involuntary intoxication.

Prior to tendering the second of his affidavits, Dr. Nevin reviewed the sanity board the trial judge directed. He concluded that it was very likely that the adverse psychiatric effects of mefloquine on Bales had persisted, and that "it is likely that Bales did in fact experience visual hallucinations of flashing lights in the region of Alikozai during his guard shift the evening prior to the incident in question," and, "that Bales's visual hallucinations of flashing lights were accompanied by paranoia and bizarre, persecutory delusions that these constituted a highly dangerous threat, and that these perceptual disturbances compelled Bales to attack [the compounds]."

Dr. Nevin further concluded that "Bales's perceptions were not likely based on reasonable, rational pieces of information, and that his thoughts and behaviors were instead likely influenced by delusional beliefs."

It was also Dr. Nevin's opinion that Bales's "visual hallucinations, paranoia, persecutory delusions, and subsequent unusual behavior were signs and symptoms of psychosis consistent with a likely severe mental disease or defect at the time of the incident in question," and that these "were a direct result of involuntary intoxication resulting either from his very likely exposure to mefloquine in Iraq, or his likely exposure to mefloquine in Afghanistan, or both." The prosecution tendered no evidence to the contrary.

3. Stephen M. Stahl, M.D., Ph.D.'s Unchallenged Finding That Mefloquine Impacted Bales's Mindset on the Night in Question.

Dr. Stahl is a Professor of Psychiatry at the University of California, San Diego, an Honorary Fellow at the University of Cambridge, Editor-in-Chief of CNS Spectrums, Director of

Psychopharmacology and Senior Academic Advisor for the state of California's Department of State Hospitals, board certified in psychiatry, author of over 500 academic papers, editor of 12 textbooks and author of 35 textbooks, including two best sellers in psychiatry: *Stahl's Essential Psychopharmacology*, 4th edition, Cambridge University Press, and *Stahl's Prescriber's Guide*, 5th edition, Cambridge University Press.

In his affidavit, Dr. Stahl wrote that "the potential changes in brain function and behavior that can accompany Mefloquine administration make it feasible that long lasting effects of this drug were contributors to Bales' behavior in Afghanistan."

F. The Army Court Wrongly Devalued Bales's Unchallenged Biometrics Expert's Affidavit That At Least Three Afghan Sentencing Witnesses Left Their Fingerprints or DNA on Improvised Explosive Devices.

Bales moved the Army Court for appellate discovery[5] to compel production of the biometric evidence sought by the defense's written pretrial request, discussed by the lead prosecutor in open court (State Department "hit" on Mullah Barran), and discovered by Bales's appellate defense counsel. The United States opposed the motion. The Army Court denied the request by order without an opinion or rationale.

Bales offered the expert affidavit of an American law enforcement officer, retired from a major metropolitan police department, who had spent the previous 10 years in Afghanistan using biometric evidence (fingerprints and DNA left on IED components) to develop and prosecute criminal cases against IED networks and terror cells. The United States did not challenge the authenticity or accuracy of the affidavit before the Army Court.

His sworn expert affidavit not only confirmed, as the lead prosecutor mentioned in open court, that Mullah Barran was involved with terror activities (IEDs and bombmaking), but also

[5] *See, e.g.*, *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002) (ordering Air Force Court of Criminal Appeals to obtain government discovery related to appeal).

that two other witnesses portrayed as innocent farmers by the United States participated in making bombs--that is, they left their fingerprints and/or DNA on IED components. As the declarant explained using data available on U.S. government databases marked "Unclassified // REL to USA, AFGHAN:"

> Prosecution witness Mullah Baran indeed, as the U.S. Department of State reported to the prosecution, was a "Coalition detainee" at the Detention Facility at Parwan, Afghanistan, or "DFIP." United States' biometric records show that he is a known associate of the Taliban, terror cells, insurgent groups, to include involvement with weapons caches throughout Kandahar Province.
>
> Prosecution witness Hikmatullah was enrolled in the biometric system on July 27, 2012, with number B28JPGYG6. His fingerprints and DNA were matched to two IED events in Panjwai, Afghanistan. The first IED event occurred on September 14, 2011, at GRID coordinate 41RQQ16991283643. The IED event is referenced as 11/369595. The second IED event occurred on February 3, 2013, at GRID coordinate 41RQQ271849. The IED event is referenced as 11/0088.
>
> Prosecution witness Rafiullah was enrolled in the biometric system on March 9, 2013, with number B2JKMH83. An IED event occurred on October 28, 2012, in Panjwai, Afghanistan at GRID coordinate 41RQQ1498082684. The IED event is referenced as 12/3538. Rafiullah left his DNA on the bomb and he was matched on March 13, 2013.

Bales argued that as a matter of reasonable diligence given the ubiquity of biometric use in Afghanistan and the reliability of fingerprint and DNA evidence, this information should have been in the prosecutor's own files in the first place, before any charging decisions were made or the death penalty sought.

In an order that did not contain a rationale or discussion, the Army Court declined to consider this sworn declaration of Bales's biometric expert, even though the United States did not challenge its substance.

G. The Army Court's Decision Departs From Judicial Norms of Objectivity and Fairness By Adopting the Prosecution's Narrative In the Face of Unchallenged Medical and Biometrics Expertise.

On September 27, 2017, the Army Court affirmed the findings and sentence. The Court concluded that the evidence presented relating to mefloquine "does not set forth specific facts but consist[s] instead of speculative [and] conclusory observations," and, that "the appellate filing and the record as a whole 'compellingly demonstrate' the improbability" of Bales's claims.

In arriving at this conclusion, the Army Court did not evaluate mefloquine's impacts in connection with the special circumstances required to authorize the death penalty (*Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty violates Eighth Amendment were accused has psychiatric challenges)), the appropriateness of premeditated murder charges, *mens rea* for premeditated murder, the development of the defenses of involuntary mefloquine intoxication and lack of mental responsibility, a knowing and intelligent plea of guilt, and/or mitigation as to sentencing. The Army Court addressed none of these substantial points bearing on the fairness of the trial and the reliability of the result and/or the sentence.

That the impacts of undisputed medical evidence that *mens rea* was compromised due to a dangerous drug the Army administered are not a part of the Army Court's analysis is fairly seen as a departure from judicial norms of full and fair review, without justification.

Concerning Bales's argument that he should have been entitled to present evidence that the prosecution's witnesses were, in fact, bombmaking terrorists, and that the prosecution had stymied Bales's attorneys at every corner in this regard, the Army Court made only passing reference. In its opinion, the Army Court referenced only a portion of the written defense discovery requests for biometrics, and failed to address the fact that the prosecution failed to provide relevant information

despite the defense team's specific written requests that led the Government to the precise information the defense team sough. Specifically, Bales's requests for biometric information described the precise tools (e.g., the "BATS" and "HIIDES" biometric databases used to collect and store fingerprints and DNA) that would lead the prosecutor to the information sought. And though the Army Court's reasoning would lead the reader to believe that the biometric evidence sought is difficult to locate, the prosecutors needed only to perform the equivalent of a "Google" search as part of bringing a death penalty case.

The Army Court concluded that "we can see no scenario for the use of [fingerprints and DNA on bombs] for impeachment during the sentencing phase of the trial." Surely, the evidence is directly relevant to rebut the prosecution's having elicited answers from the Afghan witnesses that they were simple farmers or gardeners. Even if the witnesses were farmers and gardeners, their prints and DNA were recovered from bombs designed to kill Americans and local-nationals. The Army Court's opinion misses the point that Bales should have been able to demonstrate to the jury that the witnesses testifying against him made bombs for the purpose of killing Americans and our Afghan partners. Had the jury known the prosecution brought the enemy and terrorists not only to the United States on domestic airlines, but also the courtroom, it stands to reason a lesser sentence would have resulted.

The Army Court also concluded that Bales waived his right to assert this argument because he failed to object to the Afghan witnesses' testimony at trial. What the Army Court overlooked, however, was the fundamental point that Bales had no basis to object because the biometric records had not been disclosed or produced as constitutionally required. Bales therefore had no basis on which to object to the prosecution's holding the Afghan witnesses out as farmers and gardeners. The Army Court's opinion itself tacitly illustrates the gravity of the prosecution's misconduct, and

its impact on the defense. If the fingerprint and DNA evidence been properly disclosed per *Brady* and produced in response to the defense request, Bales's team certainly would have used this information on cross-examination, for impeachment, and during argument.

We do not argue here that this evidence would have exonerated Bales; rather, we simply ask this Court to agree with the simple and fair proposition that the jury should have known these facts, that the prosecution prevented that from occurring, and the Army Court missed or avoided the point altogether.

H. The CAAF Denied Any Relief in Light of the Constitutional Errors Presented.

Bales timely filed a Petition for a Grant of Review to the U.S. Court of Appeals for the Armed Forces (CAAF), the appellate court that exercises civilian oversight of the U.S. military service courts of appeal, and trial courts worldwide. On February 15, 2018, CAAF granted Bales's Petition for a Grant of Review, but on the same day, affirmed the findings and sentence without issuing an opinion or rationale.

I. The Supreme Court Declined to Grant Certiorari.

On May 16, 2018, Bales sought Supreme Court review, but his petition was denied on June 25, 2018.

J. As Part Of A Freedom of Information Act Lawsuit, The US Department Of State Required Bales To Secure Privacy Act Releases From Bombmaking Terrorists Before It Would Release Records About Their Alias Social Security Numbers, Alias Names, And False Visas The Prosecution Used To Bring Them Into the United States And To The Courtroom To Testify Against Bales.

On November 28, 2018, Bales filed a FOIA lawsuit in the United States District Court for the District of Columbia seeking the release of records responsive to his requests. *See Bales v. United States Department of State*, (1:18-cv-02779). One of the main intentions behind the lawsuit was to provide this Court with the evidence the Army Court refused to consider in terms of the

terrorist bombmakers. Although the appellate defense, through its own due diligence, uncovered the evidence, the idea was to showcase to the Court that the United States always had the evidence but refused to disclose or produce it in violation of the Constitution.

On April 11, 2019, the United States Department of State informed that no records visa or entry records into the United States for the terrorist bombmakers would be forthcoming, citing the legal requirement that Bales secure privacy releases from those terrorists who entered the country with alias social security numbers, alias names, false professions, and false entry documents, facilitated by the prosecution and the US Department of State. Attachment B.

VII. THIS COURT IS EMPOWERED BY THE CONSTITUTION, FEDERAL STATUTES, AND TENTH CIRCUIT PRECEDENT TO REACH THE MERITS OF BALES'S CONSTITUTIONAL CLAIMS THAT WERE NEITHER FULLY NOR FAIRLY REVIEWED BY ARTICLE I MILITARY COURTS AND GRANT THE WRIT

This Court is authorized to reach and determine the merits of Bales' constitutional claims and award the writ. Federal statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, empower this Court to entertain a military prisoner's habeas claims and to grant relief as law and justice require. In *Burns v. Wilson*, 346 U.S. 137 (1953), the Supreme Court made clear that civilian habeas review of military decisions is altogether proper when constitutional deprivations resulted in unfair proceedings or unreliable results, and consequently unjust confinement. In *Burns*, the Supreme Court observed:

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

Although determinations made in military proceedings are final and binding on all courts, 10 U.S.C. § 876 (2012), the district courts' jurisdiction over a petition for habeas from a military prisoner is not displaced. *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975) (taking note of the binding nature of court-martial decisions on civil courts, but also recognizing the civil courts' jurisdiction to review habeas petitions stemming from court-martial convictions); *Gusik v. Schilder,* 340 U.S. 128, 132 (1950) (describing the "terminal point" of court-martial proceedings where civil habeas corpus review may begin).

Where constitutional protections were not observed at the trial court level or during direct appeal, the Federal habeas court is empowered to address those claims. *Monk v. Zelez*, 901 F.2d 885, 893 (10th Cir. 1990) ("The writ of habeas corpus shall issue immediately."); *Burns*, 346 U.S. at 139 (explaining that Federal civil courts have jurisdiction over habeas petitions alleging the proceedings "denied them basic rights guaranteed by the Constitution"); *Dodson v. Zelez*, 917 F.2d 1250, 1252 (10th Cir. 1990) (federal jurisdiction to review court-martial proceedings requires "[t]he asserted error . . . be of substantial constitutional dimension."); *Dixon v. United States*, 237 F.2d 509, 510 (10th Cir. 1956) ("in military habeas corpus the civil courts have jurisdiction to determine whether the accused was denied any basic right guaranteed to him by the Constitution").

The Tenth Circuit uses a four-part test to determine whether a Federal habeas court should reach the merits of a constitutional challenge to a court-martial conviction or sentence: (1) whether the asserted error is of substantial constitutional dimension; (2) whether the issue is one of law rather than one of disputed fact previously determined by a military tribunal; (3) whether military considerations warrant different treatment of the constitutional claim(s); and (4) whether the military courts gave adequate consideration to the issues involved and applied proper legal

standards. *Mendrano v. Smith,* 797 F. 2d 1538, 1542 n.6 (10th Cir. 1986) ("our cases establish that we have the power to review constitutional issues in military cases where appropriate."); *Monk*, 901 F.2d at 888 (constitutional claim is subject to our further review because it is both "substantial and largely free of factual questions."). In *Monk*, the Tenth Circuit favorably cited *Calley v. Callaway*, 519 F.2d 184, 199-203 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *Id*. "Consideration by the military of such [an issue] will not preclude judicial review for the military must accord to its personnel the protections of basic constitutional rights essential to a fair trial and the guarantee of due process of law." *Calley*, 519 F.2d at 203.

This Court has discretion to determine if Bales's claims were fully and fairly considered by the military, reach the merits, and award the writ. In *Dodson,* 917 F.2d at 1252, the Court noted that a district judge has a "large amount of discretion" when determining whether a military habeas petitioner's claims were fully and fairly considered on direct appeal: "[w]e recognize that these factors still place a large amount of discretion in the hands of the federal courts." Turning to the definition of full and fair consideration, the Tenth Circuit in *Watson* explained that "full and fair" consideration has not been defined precisely, but leaves the Article III trial judge with the discretion to reach the merits and determine if constitutional protections were correctly considered and applied:

> Although there has been inconsistency among the circuits on the proper amount of deference due the military courts and the interpretation and weight to be given the "full and fair consideration" standard of *Burns*, this circuit has consistently granted broad deference to the military in civilian collateral review of court-martial convictions. Although we have applied the "full and fair consideration" standard, we have never attempted to define it precisely. Rather, we have often recited the standard and then considered or refused to consider the merits of a given claim, with minimal discussion of what the military courts actually did.

Watson v. McCotter, 782 F.2d 143, 144 (10th Cir.), *cert. denied*, 476 U S. 1184 (1986) (internal citations omitted).

Consequently, the applicable federal habeas statutes, 28 U.S.C. § 2241 and 28 U.S.C. § 2243, and the Supreme Court and Tenth Circuit precedents in *Burns*, *Watson, Mendrano*, *Monk*, and *Dodson*, *supra*, authorize Article III courts to reach the merits of constitutional habeas challenges arising from Article I courts-martial and issue the writ -- even when the issue was briefed and decided by the military before arriving in Federal court.

Put another way, none of the applicable legal authorities requires the Federal civilian judiciary to follow an Article I court's constitutional determinations lock-step. To the contrary, *Burns*, (on which the Tenth Circuit's decision in *Watson* is based), specifically states that review is narrow, not foreclosed, and Article III review is appropriate where "military review was legally inadequate to resolve the claims which they have urged upon the civil courts." *Burns*, 346 U.S. at 146.

The instant case falls within the permissible scope of review. This is especially so where, like here, the military's "full and fair consideration" is fatally flawed. Military review cannot be "full" where pivotal evidence was not evaluated and material evidence was misstated. Nor can review be "fair" where Supreme Court precedents interpreting the Fifth and Sixth Amendments in a Federal criminal trial were misapplied. As the Tenth Circuit observed in *Lips v. Commandant*, 997 F.2d 808, 811 (10th Cir. 1993), "[o]nly when the military has not given a petitioner's claims full and fair consideration does the scope of review by the federal civil court expand."

Examples where the court correctly determined that the military had not given a petitioner's claims full and fair consideration, and thus reviewed the merits of a military habeas petitioner's claims in the Tenth Circuit include: *Mendrano*, 797 F.2d at 1541-42 ("full review of petitioner's

claim is especially appropriate here" in context of Due Process and Sixth Amendment right to jury trial); *Wallis v. O'Kier*, 491 F.2d 1323, 1325 (10th Cir.), *cert. denied*, 419 U.S. 901, (1974) ("Wallis asserted in his habeas corpus petition that he was being deprived of his liberty in violation of a right guaranteed to him by the United States Constitution. Where such a constitutional right is asserted and where it is claimed that the petitioner for the Great Writ is in custody by reason of such deprivation, the constitutional courts of the United States have the power and are under the duty to make inquiry."); *Kennedy v. Commandant, U.S. Disciplinary*, 377 F.2d 339, 342 (10th Cir. 1967) ("We believe it is the duty of this Court to determine if the military procedure for providing assistance to those brought before a special court-martial is violative of the fundamental rights secured to all by the United States Constitution."); and *Monk*, 901 F.2d at 888 (reviewing reasonable doubt instruction and granting petitioner's request for a writ).

That this Court may determine the merits of Bales's claims is further shown by looking to the purpose of the military justice system and the basis for Article III deference to Article I courts-martial. To be sure, Article III courts ought to defer to the military courts insofar as "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and, thereby, strengthen the national security of the United States." Part I-1, Manual for Courts-Martial, United States (2016 Ed.); *see also Burns*, 346 U.S. at 141 (noting that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty," and that federal courts have "had no role in [military law] development"). The military courts are surely better equipped than the civilian courts in their analysis of the Manual for Courts-Martial or matters impacting good order and discipline.

But this is not the case where the habeas issues involve fundamental constitutional guarantees applicable to all citizens involving capital murder and potential life in prison. Whether a prosecutor and his investigators complied with the Fifth Amendment's Due Process obligations, or a defense counsel fulfilled his duties under the Sixth Amendment's standard for effective assistance of counsel at trial, or whether a military appellate court conducted a meaningful review to ensure constitutional safeguards were observed, has nothing to do with the unique nature of the military as a distinct society -- the basis for civilian judicial deference. The Fifth and Sixth Amendments apply equally in both the military and civilian settings, unaffected by the military's unique position in American society. Indeed, it is incumbent upon the district court to examine whether the constitutional rulings of a military court conform to prevailing Supreme Court standards. *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (9th Cir. 1969).

Accordingly, there is no reason to defer to the military courts where, as here, the habeas claims involve application of the Constitution during trial and appeal. Congress and the Supreme Court have defined Article III review of military convictions to be appropriate in situations where military courts denied a servicemember "basic rights guaranteed by the Constitution." *Burns*, 346 U.S. at 139. Here, each of Bales's five habeas grounds involve constitutional rulings of military courts which do not conform to prevailing Supreme Court standards and were thus neither fully nor fairly reviewed. In this case, the Court may evaluate the merits and award the writ.

VIII. ARTICLE I REVIEW OF BALES'S CONSTITUTIONAL CLAIMS DEPARTED FROM PREVAILING LEGAL PRECEDENT AND IGNORED THE MOST CRITICAL CONSTITUTIONAL ISSUES BALES RAISED

Prosecutors have a continuing interest in preserving the fair and effective administration of criminal trials, and, as such, the duty of prosecutors is "to seek justice within the bounds of the law, not merely to convict." A.B.A. Standards for Criminal Justice: Prosecution and Defense

Function, Standard 3-1.2(c) (4th ed. 2015). Fundamental to fulfilling this responsibility is making timely disclosure of all evidence favorable to the defense, and responding to defense requests for relevant and material evidence in the prosecution's possession.

A. The Army Court Ignored And Misapplied Binding Legal Standards in its Evaluation of the Prosecution's Failure to Disclose Information Favorable to Bales.

As the Supreme Court recognized in *Brady v. Maryland*, the failure to disclose favorable evidence "violates due process... irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see also United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

This affirmative duty is above and beyond the "pure adversary model," *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985), it is also grounded in the recognition of the prosecutor's "special role in the search for truth in criminal trial." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

In *United States v. Agurs*, 427 U.S. 97, 110 (1976), the Supreme Court held that a prosecutor is required to disclose certain favorable evidence "even without a specific request" from the defense. The Court reasoned that "obviously exculpatory" evidence must be disclosed as a matter of "elementary fairness," and that prosecutors must be faithful.

Prosecutors are subject to heightened ethical obligations due in part to their special position. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney [Federal prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty, whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

As representatives of the United States, prosecutors cannot lose sight that their duty is more than to be exclusively adversarial or ardent advocates. *Bagley*, 473 U.S. at 675 n.6. It is not the prosecutor's responsibility to win at all costs but rather to "ensure that a miscarriage of justice does not occur." *Id*. at 675. Basic to this duty and obligation is "disclos[ing] evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*.

The Supreme Court has made it clear that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439; *accord Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). As the Court in *Kyles* acknowledged, "[s]uch disclosure will serve to justify trust in the prosecutor as the representative of the sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." 514 U.S. at 439 (quoting *Berger*, 295 U.S. at 88).

The Justice Manual, until recently known as the United States Attorney's Manual, sets forth Justice Department policy and counsels, in part:

> 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.
>
> * * * * *
>
> 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.
>
> * * * * *
>
> A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an

> element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.

Justice Manual, United States Department of Justice, 9-5.002 Criminal Discovery (internal citations omitted).

Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence must be made in sufficient time to permit the defendant to make effective use of that information at trial. *See*, *e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997).

B. The Army Court Ignored Unchallenged Expert Medical Evidence That Mefloquine Psychosis Compromised Bales *Mens Rea* to Commit Multiple Premeditated Murders And Whether His Guilty Plea Was Truly Knowing, Voluntary, and Intelligent.

The United States had in its possession evidence that mefloquine is known to cause long-lasting adverse effects. These include symptoms of psychosis, even years after use. Prosecutors knew or reasonably should have known that the United States ordered Bales to take mefloquine, even without proper medical documentation of this exposure. Revelation ofthis evidence stood to be a game-changer.

If Bales were laboring under symptoms of psychosis caused by his exposure to and his involuntary intoxication from mefloquine, his mindset for murder is reasonably called into question and should have been evaluated by the sanity board and constitutionally-speaking, the defense counsel.

Had the mefloquine information been disclosed before trial, and had Bales's trial defense team been allowed to use the evidence before and during trial, at least nine significant and different outcomes were possible:

> (1) the death penalty authorization may not have occurred as not supported by the medical evidence.
>
> (2) lesser charges may have been deemed reasonable.

> (3) Bales's plea of guilty may not been accepted by the military judge as knowing and intelligent given the substantial unresolved legal questions about involuntary mefloquine intoxication.
>
> (4) Bales may not have pled guilty to the murder charges because of his diminished capacity to develop specific intent.
>
> (5) Bales may have pled not guilty due lack of mental responsibility, given that mefloquine can cause long-lasting adverse effects including symptoms of psychosis even years after use.
>
> (6) involuntary mefloquine intoxication could have been developed and presented as a trial defense.
>
> (7) plea negotiations would have occurred under conditions more favorable to Bales.
>
> (8) Bales may have pled guilty to a lesser offense with a lesser punishment.
>
> (9) mefloquine could have been offered as a matter in mitigation during sentencing.

See, i.e., Caspari, 173 F.3d at 1136 (habeas corpus granted because guilty plea not voluntary, knowing, and intelligent where petitioner was diagnosed by psychiatrist has having mental illness); *Runnels*, 505 F.3d at 922 (habeas corpus granted where cumulative effects of multiple errors violated due process).

Evidence is material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." *Napue v. Illinois*, 360 U.S. 264, (1959). In at least these nine different ways, the entire landscape of the trial, to include findings and sentencing, would have been materially different and more favorable to Bales. *California v. Trombetta*, 467 U.S. 479 (1984) (constitutional guarantee that criminal defendants be afforded a meaningful opportunity to present a complete defense).

As in *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), where the prosecution's withholding of evidence relating to the petitioner's sanity precluded a meaningful opportunity to prepare and present an insanity defense, the United States' withholding of mefloquine precluded Bales' meaningful development of his trial defenses.

Without the ability to assess and develop the mefloquine evidence, Bales was also effectively denied the right to counsel during plea negotiations. *United States v. Fuller*, 941 F.2d 993 (9th Cir. 1991). Consequently, his plea of guilty cannot be seen as knowing and intelligent. *Boykin*, 395 U.S. at 238.

Absent direction from this Court, military prosecutors and Courts of Appeal will continue to underappreciate the evidentiary significance of involuntary mefloquine intoxication bearing on premeditated murder cases as measured against prevailing Supreme Court standards, especially in death penalty cases, thereby preventing the truth from ever being brought to the light of day. That the Army Court declined to direct a new sanity board to consider mefloquine makes this point clear. *See generally, Burt v. Uchtman*, 422 F.3d 557 (7th Cir. 2005) (trial judge violated due process without *sua sponte* ordering renewed competency hearing upon notice that accused was treated with large doses of medication).

C. The Military Justice System Has Not Kept Pace With Biometrics in Criminal Prosecutions.

Biometrics have been used for years to fight the wars in Afghanistan, Iraq, against non-state actors across the world, and domestically within the United States for safety and law enforcement purposes. "Biometrics in Afghanistan centers on denying the enemy anonymity among the populace." Center for Army Lessons Learned, Commander's Guide to Biometrics in Afghanistan – Observations, Insights, and Lessons (No. 11-25, 2011) (Biometrics Handbook) p. 37.

> Biometrics is a decisive battlefield capability being used with increasing intensity and success across Afghanistan. It effectively identifies insurgents, verifies local and third country's accessing our bases and facilities, and links people to events.
>
> * * * * *
>
> Biometrics allows an almost foolproof means of identification that is noninvasive yet extraordinarily accurate.

Id. at 23.

Soldiers carrying enrollment devices in their kits, called "BAT," for Biometrics Automated Toolset, and/or "HIIDE," for Handheld Interagency Identity Detection Equipment. *Id*. at 50. Upon biometrics enrollment, the person is assigned a biometric enrollment number, their fingerprints and photograph are taken, an iris scan is performed, DNA is secured, personal data is obtained, all uploaded as a template. The biometrics enrollment is transmitted to the authoritative database – Automated Biometrics Identification System (ABIS) or (A-ABIS) Afghanistan Automated Biometrics Identification System, where it is stored for later reference. *Id*. at 47.

When an IED event occurs, be it an explosion or where forces discover and diffuse the bomb, the GRID coordinate is recorded, the event is assigned an "IED event number" and the IED components are exploited for biometrics, *i.e*., DNA from skin left on wires when the terrorist twists the wires or fingerprints left on components. Latent fingerprints recovered from bomb parts are then compared, or "exploited," to templates already within ABIS or A-ABIS stored from previous enrollments. A "match" is often referred to as a "hit."

The reverse is also true. Fingerprint and DNA information from IED components is uploaded, and later, when a local-national physically encounters US or Coalition personnel using biometrics equipment, a match can occur linking the individual to the previously-uploaded DNA

and/or fingerprint information. "Simply stated, collecting fingerprints with biometric collection devices has led to the apprehension of bomb makers and emplacers." *Id*. at 4.

"Biometrics will positively identify an encountered person and unveil terrorist or criminal activities regardless of paper documents, disguises, or aliases." *Id*. "Every staff element has a role in ensuring the proper incorporation of biometrics into mission accomplishment," and, "[a]ll units will have access to both table top and hand-held biometrics collection equipment like [BAT] and [HIIDE]." *Id*. at 21.

> General Petraeus lauded the technology, not only for separating insurgents from the population in which they seek to hide, but also for cracking cells that build and plant roadside bombs, the greatest killer of American troops in Iraq and Afghanistan. Fingerprints and other forensic tidbits can be lifted from a defused bomb or from remnants after a blast and compared with the biometric files on former detainees and suspected or known militants. 'This data is virtually irrefutable and generally is very helpful in identifying who was responsible for a particular device in a particular attack, enabling subsequent targeting. Based on our experience in Iraq, I pushed this hard [for] Afghanistan, too, and Afghan authorities have recognized the value and embraced the systems.

Thom Shanker, To Track Militants, U.S. Has a System That Never Forgets a Face, New York Times, July 13, 2011, *available at* http://www.nytimes.com /2011/07/14/world/asia/14identity.html?=0

Biometric information is available to, and used regularly by, other federal agencies, state, and local departments, to include the US Department of State For example,

> DOD Biometrics protects the nation through identity dominance by enabling responsive, accurate, and secure biometrics, any place and any time, in cooperation with the Department of Homeland Security, Department of Justice, Department of State, and other government agencies and inter partners.

(https://peoiews.army.mil/programs/biometrics).

At base, biometrics relies on tried and true fingerprint and DNA evidence, something with which all courts are familiar and comfortable.

D. The Prosecution and the Trial Judge Turned a Blind Eye to Terrorist Bombmaking Evidence and the Army Court Failed to Apply *Kyles v. Whitley* to the Prosecution's Admitted Coordination with the State Department to Respond to the Defense's Written Pretrial Request for Biometric Records Associated with Afghan Witnesses.

In *Kyles*, 514 U.S. at 437, the Supreme Court held that the prosecution has a duty to search files maintained by other branches of government which are aligned with its interests. Bales briefed this prevailing case to the Army Court, but it went wholly unaddressed. Had the Army Court applied *Kyles*, the Army Court would have recognized the constitutional errors the prosecution and the trial judge made, compelling action favorable to Bales.

The United States flew Afghan witnesses from the Kandahar battlefield into the United States to testify during sentencing. The United States did not, however, disclose that three of them left their fingerprints on bombs, which is constitutional error. *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964) (police suppressed results of fingerprint and ballistics tests). The prosecution did so after having received a written defense request for biometric records relating to each Afghan witness and responding that no such records exist (which is flatly contradicted by the defense's post-trial showing that the records exist in US Army and US Government databases).

The trial judge violated due process by failing to require the prosecution to produce the biometric records pertaining to Mullah Baraan and all other Afghan witnesses the United States intended to call.

Before considering the issue "resolved," the trial judge should have required the prosecution to search for and produce the records and reviewed them *in camera* to determine if they were material and favorable to the defense. *See, i.e., Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (trial judge violated due process by quashing petitioner's request for agency records without first conducting an in-camera inspection to determine whether portions of them were material and

favorable to the defense); *see also United States v. Weintraub*, 871 F.2d 1257 (5th Cir. 1989) (habeas corpus granted where prosecution withheld police reports that were material to sentencing).

This information might have informed Bales' defense strategy and advanced his efforts to undermine witnesses' credibility. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (recognizing the importance of witnesses' credibility in a criminal trial); *see also Barton v. Warden*, 786 F.3d 450 (6th Cir. 2015) (prosecution withheld witness impeachment evidence); *accord Lewis v. Connecticut Comm'r of Correction*, 790 F.3d 1109 (2d Cir. 2015); *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014); *Dow v. Virga*, 729 F.3d 1041 (9th Cir. 2013).

As a matter of reasonable investigation, the prosecutor should have coordinated to ensure that biometric searches were performed when evaluating witness credibility and making plans to bring them into the United States from the Kandahar battlefield. That the records were not apparently in the prosecution's files is one error, but it is entirely another degree of legal error to claim in open court that the U.S. Department of State would not turn over the biometric records. Prosecutors have a duty to search the files of cooperating agencies working on case, and surely the U.S. Department of State was working with the prosecution. *Kyles*, 54 U.S. at 437; *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (prosecution has a duty to search files maintained by other branches of government which are aligned with its interests).

The Supreme Court noted in *Pointer v. Texas*, 380 U.S. 400 (1965) that:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer, 380 U.S. at 405.

Bales was not able to confront the sentencing witnesses with the evidence of their terror bombmaking activities to rebut the prosecution's evidence that they were "farmers" or "gardeners" in contravention of this Court's Fifth and Sixth Amendment caselaw, the remedy for which is a new trial.

Because the Army Court determined not to review the post-conviction fingerprint and DNA impeachment evidence, it was not in a position to determine if the nondisclosures were material or favorable to the defense, which compounded the constitutional trial errors before the Court of Appeals.

But, the prosecution, through its motion *in limine*, at trial revealed just how substantially game-changing the fingerprint and DNA evidence of terror was when it moved the trial judge to stop the defense from mentioning it before the jury. The prosecution's mindful decision not to disclose biometric evidence that the U.S. Department of State reported is problematic on its own. Mere negligence or slight omission is one thing.

What is more troubling, and invites the attention of this Court, is the prosecution's mind-set to actively suppress the evidence for tactical advantage by keeping it not only from the defense but also from the jury, which is surely a departure from the search for truth and justice fundamental to a prosecutor's unique position of public trust. Here, the suppression was an act of ***commission*** rather than omission. That the prosecution tried to quash mention of biometrics proves that the evidence was "material" and "favorable to the defense." It is also reveals why the prosecution declined to pursue biometric evidence in connection with all Afghan witnesses it planned to call, especially after they were on notice of potential biometric links from the U.S. Department of State: if, as has now been revealed, the prosecution found direct evidence of terror and bombmaking,

they stood to lose a tactical advantage as they strove toward imposition of the maximum penalty rather than the truth.

IX. CONCLUSION – ARTICLE I REVIEW WAS NEITHER FULL NOR FAIR, DEPARTED FROM PREVAILING LEGAL STANDARDS, LACKED OBJECTIVE APPELLATE ANALYSIS, SUCH THAT THIS ARTICLE III COURT MAY RIGHTLY DETERMINE THE CONSTITUTIONAL ISSUES RAISED

Bales's guilty plea cannot be fairly seen as knowing, intelligent, and voluntary in the absence of his defense counsel's assessment and development of the mefloquine intoxication evidence and the biometric terrorist impeachment evidence, both of which stood to significantly degrade the prosecution's case, but were withheld in violation of the Constitution.

Lesser charges and penalties to include taking the death penalty off the table were likely appropriate had the United States diligently made the mefloquine and terror evidence a part of this investigation and trial.

The sanity board's conclusions are not reliable because the evidence of involuntary mefloquine intoxication was not considered, nor were mefloquine's psychotic side-effects evaluated against the *mens rea* required for premeditated murder or the affirmative defenses of lack of mental responsibility and involuntary mefloquine intoxication. Accordingly, substantial question remain as to whether Bales's plea of guilty was truly knowing, voluntary, and intelligent.

Had the jury known that the Afghan sentencing witnesses were not simple farmers or gardeners as the prosecution speciously urged, but also terrorist bombmakers, they would have adjudged a lesser sentence.

The United States departed from the Fifth and Sixth Amendments' rights to due process, confrontation, and the right to present a complete defense, which not only deprived Bales of a fair trial and a reliable sentence, but if left as it currently stands, deprives future accused's the right to a fair trial and a reliable sentence.

This case, absent review by this Court, sets conditions for military prosecutors and the Army Court to continue disobeying the Constitution generally and devalue the significance of mefloquine intoxication and the reliability of biometric fingerprint and DNA evidence specifically when bringing multiple homicide prosecutions involving the death penalty.

Because the net effect of the evidence withheld raises the very real probability that its disclosure would have produced a different result, Bales is entitled to a new trial. The Army Court should have granted a new trial or remanded the case to a trial judge with directions to conduct a fact-finding hearing to resolve the significant, novel, and undeveloped issues this case presents: involuntary mefloquine intoxication as a defense to multiple premeditated murders and the United States' obligation to review and produce biometric impeachment evidence available to it in a prosecution involving the death penalty.

The Article I legislative courts, military courts in this case, failed to give adequate consideration to the issues involved, failed to apply proper legal standards to his claims, and neither fully nor fairly considered his constitutional claims such that this Article III Court may reach the merits and decide the issues to ensure constitutional guarantees and justice were properly observed. *Burns*, 346 U.S. at 137.

X. PRAYER FOR RELIEF

WHEREFORE, Petitioner Robert Bales respectfully prays that the Court:

1) Award the writ, reverse, overturn, and vacate his convictions and sentence;

2) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require, 28 U.S.C. § 2243; or alternatively,

3) Pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules), order the Respondents to produce the transcript of trial, the

transcript of all post-conviction hearings (before the Army Court and the CAAF), other relevant records in the case, file its answer, motion, or other response, and afford Petitioner the opportunity to reply to the Respondents' answer;

4) Order discovery on behalf of Petitioner pursuant to Habeas Rule 6;

5) Order expansion of the record pursuant to Habeas Rule 7;

6) Conduct a hearing at which evidence may be offered concerning the factual allegations of the Petition; and

7) Grant such other relief as may be appropriate and to dispose of this matter as law and justice require. 28 U.S.C. § 2243.

Respectfully submitted,

Robert Bales

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VERIFICATION

Pursuant to 28 U.S.C. § 2242, Petitioner Robert Bales' application for a Writ of Habeas Corpus is in writing and signed and verified by his attorneys acting on his behalf.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, I electronically transmitted Petitioner Robert Bales' Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2241, to the Clerk's Office using the CM/ECF System for filing, forwarding to a judge pursuant to the Court's assignment procedure per Habeas Rule 4, and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: United States Attorney for the District of Kansas.

By: /s/ Christopher Joseph
Christopher Joseph