No 18 -

In The Supreme Court of the United States

Robert Bales,

Petitioner,

v.

United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred when it held that in a capital case, the Fifth Amendment does not require a prosecutor to search for and/or disclose to the defense medical evidence relevant both to the accused's *mens rea* to commit 16 premeditated murders and the affirmative defense of involuntary intoxication through compelled ingestion of mefloquine, known by the U.S. Food and Drug Administration and the U.S military to cause long-lasting psychotic mind-altering side effects.

Whether the Court of Appeals erred when it held that in a capital case, the Fifth Amendment does not require a prosecutor to search for and/or disclose to the defense impeachment evidence in the government's possession that Afghan sentencing witnesses flown into the United States left their fingerprints on bombs and improvised explosive devices, especially where the witnesses urged the death penalty and the prosecution held them out to the jury as "innocent farmers."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Robert Bales, appellant below. Respondent is the United States, appellee below. Petitioner is not a corporation.

JURISDICTION

The United States Court of Appeals for the Armed Forces (CAAF) decided this case on February 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1259(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V
U.S. Const. amend VI

STATUTORY PROVISIONS INVOLVED

The criminal offense of premeditated murder found at 10 U.S.C. § 918 (2012), has the following elements:

(1) a death;

(2) that the accused caused the death by an act or omission;

(3) the killing was unlawful; and

(4) at the time of the killing, the accused had a premeditated design to kill.

SUMMARY OF THE ARGUMENTS

Every United States Court of Appeals has either reversed convictions, set aside sentences, granted new trials, or ordered remands where the net effect of evidence the prosecution withheld raises a reasonable probability that its disclosure would have

produced a different result. *See, i.e., Kyles* v. *Whitley*, 514 U.S. 419 (1995).

That did not occur below. Petitioner presented the Court of Appeals with unchallenged expert medical affidavits that the United States prescribed mefloquine to Bales and that he was laboring under the long-term psychotic effects of the anti-malarial drug, now banned by the U.S. Food and Drug Administration and the U.S. military, when on his fourth Infantry combat tour he left his post and committed 16 homicides. The evidence was not disclosed at trial.

Petitioner also presented the Court of Appeals with uncontroverted expert evidence that the prosecution brought five Afghan sentencing witnesses into the United States under alias names, alias social security numbers, under the false representation that they were "government employees," and booked them on domestic airliners among the American flying public. The prosecution portrayed them as "innocent farmers." The Afghan witnesses urged the jury to impose the death penalty. What went undisclosed, however, was that they left their fingerprints on improvised explosive devices, that is, on bombs.

Accordingly, the Court of Appeals erred when it departed from binding Fifth Amendment (due process) and Sixth Amendment (right to present a complete defense) precedent to devalue the significance involuntary mefloquine intoxication had

on the state-of-mind required to prove 16 premeditated murders.

The Court of Appeals erred again when it discounted the landscape-changing effects disclosure of terrorist bombmaking by such reliable evidence as fingerprints and DNA, would have had on the entire course of the trial to include the findings and the sentence, especially where the prosecution filed a motion *in limine* to prevent the defense from using biometrics in the first place.

The Court of Appeals decided important Fifth and Sixth Amendment questions that have not been, but should be, settled by this Court, namely, mefloquine and biometrics in a 16-count premeditated murder case initially authorized to impose the death penalty. Similarly, the Court of Appeals 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).

Petitioner respectfully seeks an order that the United States return the case to a trial judge to conduct fact-finding into the issues surrounding involuntary mefloquine poisoning and biometric fingerprint and DNA evidence proving witnesses were not "innocent farmers" but terrorist bombmakers.

STATEMENT OF THE CASE

I. Proceedings at Trial

By 2011, Bales had previously completed three combat tours in Iraq and Afghanistan as a non-commissioned officer (NCO) in the Infantry. He sustained traumatic brain injury (TBI) as a result of improvised explosive device (IED) explosions that toppled vehicles in which he was riding. His medical records also reflect post-traumatic stress disorder (PTSD). Still, the Army deployed Bales for a fourth Infantry combat tour to the Panjwai District of Kandahar Provence, Afghanistan. The village stability platform to which the Army assigned Bales was a fixed position located within and surrounded by the local population. Roads and trails littered with IEDs. Locations of IEDs changed nightly. Gunfights with the enemy occurred daily.

On March 11, 2012, in his 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, i.e.*, Craig Whitlock and Richard Leiby, *Army Staff Sgt. Robert Bales Charged With Murdering 17 Afghans*," Washington Post, March 24, 2012.

Understandably, Afghan and Coalition nations publicly expressed outrage. In response, then United States Secretary of Defense, Leon Panetta, announced before any criminal investigation was completed, before any sanity board results were in,

and before any foreign- witnesses were interviewed or vetted for bombmaking activities, that the United States would seek the death penalty. Reuters Staff, *Who's to Blame When an Injured Soldier Kills Civilians*? Reuters, March 12, 2012, ("Secretary of Defense Leon Panetta said the death penalty was a possibility — before Bales had even been charged.").

Apparently making good on that public pledge, in January 2013, the United States assigned a team of four prosecutors and referred this 16-count premeditated murder case to trial and authorized imposition of the death penalty.

A. Sanity Board and Mefloquine Psychosis

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 manufacturer of an anti-malarial prescription drug mefloquine filed an adverse event report with a European regulator. In the report, Roche Pharma stated that Bales "was treated with Mefloquine Hydrochloride ... and led to Homicide killing of 1[6]."

Also, in 2013, the United States Food and Drug Administration (FDA) issued a Black-Box warning about mefloquine – a warning of the highest order because mefloquine was now known to cause long-lasting psychotic damage, to include suicidal and homicidal ideations, especially among those already laboring under TBI and/or PTSD.

The sanity board 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 that Bales had ingested mefloquine. Nor did the sanity board assess the impact mefloquine may have had on Bales' TBI, PTSD, or what impact long-term psychotic effects could have had on his state-of-mind on the night in question.

The trial judge, for reasons unexplained on the record, disclosed to the four prosecutors 78 statements from Bales derived from the government-compelled and court-ordered sanity board. The prosecutors admitted in open court that they read the 78 statements. Rather than conduct a *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), hearing and recuse the four detailed prosecutors, the trial judge instead failed to account for 16 of the 78 statements.

The trial judge did not determine whether or not the prosecution "used" derivative information for "non-evidentiary" purposes, "altered" the prosecution's strategy, and 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 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 moved to recuse the trial judge and the four prosecutors who admitted to reading and reviewing the entirety of the long form sanity board report which contained 78 compelled statements from Bales. The trial judge denied that motion as well.

The sanity board in the case below did not evaluate evidence that the Army ordered Bales to take mefloquine or whether he may have been laboring under the long-lasting psychotic behavior and altered mental states associated with mefloquine use. That is, the trial court remained unaware of mefloquine and its medical impact compromising *mens rea* for premeditated murder.

B. Impeachment of Afghan Sentencing Witnesses

The defense propounded a written discovery request seeking from the prosecution not only Bales' 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.[1]

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[1] Essentially, biometric evidence as used in Afghanistan to fight the war involves two main components: enrollment

Concerning biometrics, the defense request identified specific databases where the biometric information could be reasonably located. No biometric information was forthcoming from the United States.

At the time, however, prosecutors were working with the US 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 US Department of State that biometric evidence existed concerning at least one Afghan witness, Mullah Barran, and that

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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 sight 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, when a local-individual is enrolled, a match or "hit" might occur in that manner.

he may have been a coalition detainee in Afghanistan (suggestive of a biometric "hit.").

The prosecution did not disclose this evidence to the defense. Nor 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 Barran - that he was a coalition detainee or involved in terrorism or bombmaking.

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 US 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 Barran or the biometric impeachment evidence. (R. at 409).

At this point, the defense did not have evidence of Bales' mefloquine ingestion or that sentencing witnesses were terrorist bomb-makers. The prosecution, however, compelled statements from

Bales' sanity board and the United States still sought the death penalty.

In exchange for the United States' removing the death penalty, Bales pled guilty to all charges and specifications.

During the sentencing phase before a jury, Afghan witnesses testified against Bales and the death penalty, even though by that point, the court was no longer authorized to impose it.

Upon direct examinations, the United States elicited answers from the Afghan witnesses, portraying them as "innocent 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 "innocent farmers."

On August 23, 2013, the jury sentenced Bales to confinement for life without the eligibility for parole. A lesser sentence was available. Twenty-three days later, the Army ordered commanders and medical personnel to stop using mefloquine. Bales has been confined at Leavenworth, Kansas, ever since.

II. Proceedings Before the United States Army Court of Criminal Appeals (Court of Appeals)

Upon direct appeal, Bales brought two main issues under the Fifth Amendment and this Court's teachings pursuant to *Brady*, 373 U.S. at 83.

First, Bales claimed that his trial violated due process because the prosecution did not disclose evidence of involuntary mefloquine intoxication bearing on his *mens rea* to commit premeditated murder.

Second, Bales noted that a prosecutor's disclosure 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 five Afghans it flew into the United States to testify as victim-impact witnesses left their fingerprints on IED components, proving that they were not "innocent farmers" but bombmaking terrorists that probably could have been affirmatively targeted by coalition forces.

Consideration of this material evidence favorable to Bales would have produced a different and more favorable result, he argued, for at least the following reasons seven reasons: (1) the death penalty may not have been authorized in the first place; (2) the sanity board's findings would have been different (3) lesser charges may have resulted given evidence of compromised *mens rea* for premeditated murder; (4) his plea may have changed to not guilty by reason of lack of mental responsibility; (5) the defense of involuntary intoxication could have been developed

and presented; (6) his position to negotiate a plea agreement would have been more favorable; and/or (7) the sentencing jury would have reached a lesser sentence viewing mefloquine and terrorist bombmakers as substantial mitigation evidence.

In sum, Bales argued that the suppressed evidence – mefloquine degrading his *mens rea* for premeditated murder and belligerent bombmakers rather than innocent farmers imploring harsh punishment on sentencing - denied him a fair trial.

A. Involuntary Mefloquine Intoxication and *Mens Rea*

Bales initially moved the Court of Appeals to order appellate discovery into the facts and circumstances surrounding mefloquine. The United States opposed the motion. The Court of Appeals denied the motion in an order without providing its reasoning or rationales.

Bales asked the Court of Appeals to return the case to a trial judge to conduct a fact-finding hearing to determine if at the time of the killings, he was involuntarily intoxicated by mefloquine's long-lasting psychotic effects, exacerbated by his TBI and PTSD, 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 sworn affidavits the Court of Appeals accepted.

1. Remington Nevin, M.D., M.P.H., and Dr. Ph.

Dr. Nevin is one of the world's most recognized experts in mefloquine and its side effects. He possesses specialized medical and public health training and experience as a preventive medicine physician, epidemiologist, and expert in the adverse effects of antimalarial drugs, particularly the drug mefloquine. He 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 co-authored 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 sworn affidavit to the Court of Appeals, Dr. Nevin described the effects of mefloquine poisoning as permanent. "It causes injury to the brain which is always there and under certain conditions, the brain is subject to seizures which cause hallucinations and delusions which can take place years or even decades after the initial poisoning." Dr. Nevin submitted a slide presentation explaining the growing peer-reviewed literature that links mefloquine to suicidal and homicidal ideations, and a transcript of his testimony on the subject before the U.S. Senate Committee on Appropriations.

Prior to tendering his affidavit, Dr. Nevin reviewed Bales' available medical records and the sanity board the trial judge directed. He concluded 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' 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' 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' "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."

2. Stephen M. Stahl, M.D., Ph.D.

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 he reviewed a mandated manufacturer's report to the FDA from Roche Pharma about the anti-malarial prescription, mefloquine, and in his expert medical opinion, he reasoned: "[w]e now know that Roche has issued a "black box" label warning. 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."

3. Gregory Rayho

In his affidavit, Mr. Rayho served with Bales during Infantry combat operations in Iraq in 2004, stood next to him in weekly formations wherein medications were distributed, and was required to swallow a pill like everyone else and the label on the bottle read "mefloquine."

Bales noted that both Dr. Nevin and Dr. Stahl evaluated the evidence of record and swore that in their expert opinions, Bales was probably suffering from the hallucinogenic effects of the mefloquine administered to him in 2004 and 2012.

Bales claimed that Dr. Nevin and Dr. Stahl validated not only Rayho's testimony of mefloquine ingestion, but also the serious actions taken by Roche Pharma, and the United States government through both the military and the FDA in response to Bales' action which led to the trial below.

4. Robert Pitman, M.D. Professor of Psychiatry, Harvard University

After having examined Bales, Dr. Pitman prepared a written report, which Bales presented to the Court of Appeals. In relevant part, Dr. Pitman concluded in his expert medical opinion, that:

> The unique constellation of factors [combat, TBI, PTSD] that led to Bales perpetrating the homicides will never occur again. Prior to his combat in Iraq and Afghanistan, [he] 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.

Bales asked the Court of Appeals, at oral argument, to not necessarily accept the medical evidence offered by affidavit as conclusive, rather, to return the case to a trial judge where the experts and other witnesses could testify to develop the record in the search for truth.

B. Bombmaking Impeachment Evidence

Bales moved the Court of Appeals for appellate discovery to compel production of the biometric evidence discussed but undisclosed to the trial court. The United States opposed the motion. The Court of Appeals denied the request by an order without an opinion.

Bales offered the expert affidavit of a retired American law enforcement officer who had spent the previous 10 years in Afghanistan using biometric evidence 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 Court of Appeals. His sworn affidavit not only confirmed that Mullah Baran was involved with IEDs and bombmaking, but also that five 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:"

The first prosecution witness, Mullah Baran, was enrolled in the biometric system on May 22, 2009, with number B28JMS3P2. An IED event occurred on January 7, 2010, in Helmand Province. The component parts of the IED were processed for DNA/fingerprints, and on January 8, 2010, matched Mullah Baran's enrollment profile.

The second 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 number five, 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.

Prosecution witness 13, Dost Mohammad, was enrolled in the biometric system on August 19, 2012, with number B2JK4VVSS. His fingerprints were recovered from bombs at two IED events in Kandahar, Afghanistan. The first IED event occurred on July 5, 2011, at GRID coordinate 41RQR54364112597. The first IED event is referenced as 11/267290. The second IED event occurred on July 11, 2011, at GRID coordinate 41RQR5369612783. The second IED event is referenced as 11/283190. Dost Mohammad was enrolled on August 19, 2012, and matched the same day to these two IED events.

Prosecution witness 16, Naimatullah, was enrolled in the biometric system on March 29, 2011, with number B28JQ5GGR. His fingerprints were recovered from bomb parts at two IEDs occurring in the Zharay and Panjwai Districts. The first IED event occurred on July 19, 2011, at GRID coordinate 41RQQ2704189390. The first IED event is referenced as 11/239150. The second IED event occurred on November 10, 2012, at GRID coordinate 41RQQ3382389351. The second IED event is referenced as 12/12111-01. Naimatullah was matched to the first IED event on July 19, 2011, and to the second event on November 12, 2012.

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. He also argued that disclosure of the bombmaking criminal histories of the Afghan witnesses would have produced a different result, namely a lesser sentence.

The Court of Appeals declined to consider this sworn declaration of Bales' biometric expert, even though the United States did not challenge its substance, by an order without issuing its reasoning or rationales.

C. The Court of Appeals Declined To Return The Case To A Trial Judge For Fact-finding About Mefloquine and Fingerprint/DNA Impeachment Evidence

On September 27, 2017, the Court of Appeals affirmed the findings and sentence. Appendix B. The Court [insert mefloquine]

The Court of Appeals further reasoned that Bales failed to object to the statements that the witnesses were innocent farmers at trial - something Bales had no basis to do given that the biometric records had not been disclosed or produced at that time and that he therefore had no evidence that the statements were untrue.

III. Proceedings before the United States Court of Appeals for the Armed Forces (CAAF)

Bales timely filed a Petition for a Grant of Review to the court which exercises civilian oversight of the military courts of appeal and trial courts worldwide.

On February 15, 2018, the Court granted Bales' Petition for a Grant of Review but on the same day, affirmed the findings and sentence without issuing an opinion or rationale. Appendix A.

REASONS FOR GRANTING THE PETITION

I. Absent review by the Court, Prosecutors and Sanity Boards Are Not Incentivized to Search and Review Medical Evidence of Mefloquine and its Long-Term Psychotic Side-Effects Bearing on Premeditated Murder

A. Prosecutors Have A Duty To Seek Justice and the Truth

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.

As the 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 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 befaithful.

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 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).

In this case, the United States had in its possession evidence that it prescribed mefloquine to Bales, that mefloquine can cause behavioral issues including suicidal and homicidal ideations, and that the effects can be exacerbated in individuals already afflicted by PTSD or TBI with long-term psychosis.

However, the prosecution did not disclose that the United States ordered Bales to take mefloquine, or that these side effects were known. If Bales were laboring under the lasting psychiatric suicidal and homicidal ideations associated with mefloquine usage, his mindset for murder is called into question.

Had the mefloquine information been disclosed and fully evaluated at trial, seven significant and different outcomes were possible (1) the death penalty authorization may not have occurred; (2) due to the recognition of potentially adverse interactions resulting from use of mefloquine, the clarity of intent is substantively in question, such that lesser charges may have been reasonable; (3) Bales may not have pled guilty to the murder charges had his diminished capacity to clearly develop specific intent due to mefloquine been brought into trial; (4) Bales' 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; (5) Bales may have pled not guilty due lack of mental responsibility, given mefloquine's exacerbation of violent ideations for

those afflicted with TBI and PTSD; (6) involuntary mefloquine intoxication could have been developed and presented as a defense; and (7) Bales may have pled guilty to a lesser offense with a lesser punishment. *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 has having mental illness); *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007) (*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 lease these seven 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 evidence from the sanity board and the defense precluded meaningful development of Bale's plea agreement position and trial defenses based on lack of mental responsibility and involuntary mefloquine intoxication.

Without the ability to assess and develop the mefloquine evidence, Bales was 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 the Court, prosecutors and Courts of Appeal will continue to underappreciate the evidentiary significance of involuntary mefloquine intoxication bearing on premeditated murder cases, thereby preventing the truth from ever being brought to daylight and depriving accused's the right to a fair trial and a reliable sentence.

That the Court of Appeals declined to direct a renewed sanity board to include 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).

II. The Law Has Not Kept Pace With Biometric Technology in Criminal Prosecutions

Biometrics have been used for years to fight the wars in Afghanistan, Iraq, and against non-state actors across the world.

"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, A-28.

> 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.

Id. at (i).

"Biometrics allows an almost foolproof means of identification that is noninvasive yet extraordinarily accurate." *Id*. at 23, A-31-32. 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; A-34-35. 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; A-33-34.

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; A-37.

> 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 agencies, 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).

In this case, 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 five 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 trial judge violated due process by failing to require the prosecution to produce the biometric records pertaining to Mullah Burran 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). Had the jury been informed of these facts, Bales could have received a lesser sentence.

This information might have informed Bales' defense strategy and advanced his efforts to undermine witness' 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 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. *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.)

This Court noted in *Pointer* v. *Texas,* 380 U.S. 400, 405 (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.

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 "innocent farmers" in contravention of this Court's Fifth and Sixth Amendment caselaw, the remedy for which is a new trial.

Because the Court of Appeals 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. But, the prosecution 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.

CONCLUSION

Because the net effect of the evidence withheld in this case raises a reasonable probability that its disclosure would have produced a different result, Bales is entitled to a new trial. The Court of Appeals should have returned the case to a trial judge with directions to conduct a fact-finding hearing to resolve the significant and novel issues this case presents: involuntary mefloquine intoxication as a defense to premeditated murder and the United States' obligation to review and produce biometric impeachment evidence available to it in a criminal prosecution.

The Court should grant the petition for a writ of certiorari, order a new trial, or alternatively, direct the United States to return the case to a trial judge to conduct a fact-finding hearing to develop the record in connection with mefloquine and biometrics.

Respectfully submitted,

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