

Hon. Pete Geren  
Secretary of the United States Army  
1400 Defense Pentagon  
Washington DC 20301-1400

Dear Secretary Geren:

We write to seek your help in preventing a miscarriage of justice. We believe a new trial is required in the case of *United States v. Michael C. Behenna* in order to comply with fundamental due process.

1LT Michael Behenna, a platoon leader in the 101<sup>st</sup> Airborne Division, was charged with premeditated murder and other military crimes relating to the detention and death of an Iraqi national. Critical evidence that supports 1LT Behenna's testimony that he shot the individual in self defense was not presented at the military trial. 1LT Behenna was acquitted of premeditated murder but was found guilty of unpremeditated murder and is in custody awaiting final sentencing.

The following are undisputed facts important to understanding our position that a new trial is warranted:

- The government's theory of the case is that 1LT Behenna shot Ali Mansur "execution style" with a first shot to the head and a second shot to the torso. 1LT Behenna's defense is that he shot Mansur in self-defense as Mansur approached Behenna with his arms raised.
- The government hired prominent forensics expert Dr. Herbert MacDonell to advise them during the case and to potentially call as a witness.
- As the case unfolded, and before the government rested its case-in-chief, Dr. MacDonell advised the prosecutors that it was possible that Mansur was standing with his arms raised and was first shot through the torso and secondly shot in the head as he fell. Dr. MacDonell demonstrated this scenario to the prosecutors using prosecution team personnel.
- After 1LT Behenna testified, Dr. MacDonell again advised another government expert that the forensics of the entry wounds supported Behenna's testimony. The government did not disclose to the defense the fact that their own expert had concluded that Behenna's version was not

just possible but was the “only logical” explanation consistent with the forensic evidence, despite formal requests from Behenna’s counsel before and during the trial for *Brady* material – evidence potentially favorable to the accused as to guilt or sentencing.

- The case then proceeded to closing argument without the benefit of Dr. MacDonell’s testimony. In fact, the government argued in closing that Behenna’s version of events was so implausible that the government did not need to call a rebuttal witness when, in fact, Dr. MacDonell was retained in part for the contingency of being such a rebuttal witness. Only after Dr. MacDonell pressed the issue with the prosecutors by sending them an email did the prosecutors disclose his opinion that:

“[T]he only logical explanation for this shooting . . . [is] that Ali Mansur had to have been shot in his chest when he was standing. . . . [I]t fits the facts and I can not think of a more logical explanation. [W]hen I heard Lt. Michael Behenna testify . . . I could not believe how close it was to the scenario I had described to you on Wednesday.”

- This email with its critical content was produced to Behenna’s defense team *after* the court members (what civilians call the “jury”) had already returned a guilty verdict. Therefore, the court members never learned of Dr. MacDonell’s exculpatory conclusions for their deliberations on guilt or sentencing.
- The government opposed 1LT Behenna’s new trial, stating in its brief:

“Dr. MacDonell’s opinion that 1LT Behenna’s account was the only logical explanation of the shooting, albeit extremely unlikely or an amazing coincidence, would not have produced a substantially more favorable result for the Accused.”

- The trial judge reached a similar conclusion. Without specifically finding there was not a *Brady* violation with respect to the failure to disclose Dr. MacDonell’s conclusions after 1LT Behenna testified, the trial judge ruled, in essence, that “there is no reasonable probability” admission of Dr. MacDonell’s expert opinion would have led to a more favorable result for 1LT Behenna.

With all due respect to the trial judge, we believe it is rank speculation to pretend that even an experienced jurist can know how the court members would react to this startling fact – that the government’s own expert, renowned in the field of forensics, concluded the defense’s theory of the case was “the only logical explanation for this shooting ...”

In addition, such a finding ignores how the introduction of such evidence would have limited the government's closing argument and bolstered the defenses. To pretend one can know whether the introduction of Dr. MacDonell's expert opinion would not have changed the outcome flies in the face of the concept of reasonable doubt, a pillar of the American society that 1LT Behenna volunteered to protect.

Fortunately, the military justice system allows for an immediate and fair remedy. Pursuant to Rule 1107(c) of the Rules for Courts-Martial, the convening authority set aside any finding of guilt and order for a new trial.

To be clear, we are not seeking a statement of 1LT Behenna's innocence on any charge. We are not asking for a dismissal of charges with prejudice like the relief recently afforded former United States Senator Ted Stevens. Although many of us do believe a *Brady* violation occurred, we are not seeking a finding of misconduct by the prosecutors.

Instead, we simply ask that a new trial be held in which all relevant evidence, including Dr. MacDonell's testimony, is presented to the fact finders in accordance with due process. Unfortunately, we do not believe such a trial occurred in 1LT Behenna's case.

The undersigned are a combination of current or former prosecutors, JAG or other military officers, public defenders, elected officials, law professors, and private sector civil and criminal litigators. We are Democrats, Republicans, and Independents. We all have a stake in seeing due process work in any tribunal, but especially in a proceeding dealing with the loss of life in a combat zone during a war being fought in the very name of the American system of government.

Sincerely,

[See attachment for list of signatories]

Cc: Dr. Robert Gates, U.S. Secretary of Defense  
U.S. Senator Jim Inhofe  
U.S. Senator Tom Coburn  
U.S. Representative Dan Boren  
U.S. Representative Tom Cole  
U.S. Representative Mary Fallin  
U.S. Representative Frank Lucas  
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