

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20200715

Private First Class (E-3)
JEROME J. FORREST,
United States Army,

Appellant

Tried at Fort Campbell, Kentucky, on
8 May 2019, 6 August 2019, 29
August 2019, 25 October 2019, 2
December 2019, 19 February 2020, 7
December 2020, 9-11 December 2020,
and 14-16 December 2020 before a
general court-martial convened by the
Commander, Headquarters, Fort
Campbell, Colonel Matthew A.
Calarco and Colonel Jacqueline
Tubbs, military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

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Panel 4

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TO THE HONORABLE, THE JUDGES OF THE
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Assignments of Error¹

**I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE IN
INVESTIGATING AND PREPARING FOR TRIAL?**

**II. WHETHER THE MILITARY JUDGE ERRED BY DENYING
THE DEFENSE’S MOTION TO COMPEL A MITIGATION
EXPERT?**

**III. WHETHER THE MILITARY JUDGE ERRED BY
ADMITTING PROSECUTION EXHIBIT 32 OVER DEFENSE
OBJECTION?**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this court consider the information provided in the Appendix.

IV. WHETHER THE SENTENCE WAS INAPPROPRIATELY SEVERE?

V. WHETHER THE MILITARY JUDGE PROPERLY ADVISED APPELLANT OF HIS FORUM RIGHTS?

Statement of the Case

On 16 December 2020, a military judge sitting as a general court-martial convicted appellant, Private First Class (PFC) Jerome J. Forrest, contrary to his plea, of one specification of unpremeditated murder in violation of Article 118, UCMJ, 10. U.S.C. § 918 (2018).² (R. at 1206; Charge Sheet). Later that same day, the military judge sentenced appellant to a dishonorable discharge and confinement for life. (R. at 1273).

On 3 February 2021, the convening authority approved the findings and adjudged sentence. (Convening Authority Action). That same day, the military judge entered Judgment. (Judgment of the Court). This court docketed appellant's case on 19 April 2021. (Referral and Designation of Counsel).

² The military judge found appellant guilty, except the words "his and hands and" Of the excepted words, Not Guilty. Of the Charge, Guilty. The final specification to which appellant was found guilty reads:

In that Private First Class Jerome J. Forrest, U.S. Army, did, at or near Fort Campbell, Kentucky, on or about 17 December 2018, murder Mrs. [REDACTED], by means of striking her on the face and head with blunt objects.

Statement of Facts

On 9 December 2018, appellant was seriously injured when he sustained a significant head injury during a car accident. (App. Ex. III). This head injury resulted in appellant's loss of consciousness, hospitalization, and intubation. (App. Ex. III). Once hospitalized, medical providers administered level 1 trauma treatment, which is the highest level of treatment available. (Def. App. Ex. A, p.3). According to medical records, his Glasgow Coma Scale³ score was 7, indicating a severe head injury. At the time, hospital staff noted appellant could not be interviewed due to his altered mental status. (Def. App. Ex. A, p.3). Medical personnel conducted a Computerized Tomography (CT) scan of appellant's head, which did not reveal any acute intracranial changes. (App. Ex. III). No additional brain scans or tests were conducted on appellant in the hospital or in preparation for trial. Medical personnel released him from the hospital with a prescription for Percocet for his fractured nose. (App. Ex. III).

One week later, on 17 December 2018, appellant's wife, Mrs. ■■■, was found dead in the kitchen of their family's on-post home at Fort Campbell, Kentucky.

³ The Glasgow Coma Scale is a clinical scale physicians use to measure a person's level of consciousness after a brain injury, based on such things as motor response, verbal response, and eye opening response. The scale ranges from 3 (complete unresponsiveness) to 15 (fully responsive). A score of 8 or less is considered a severe head injury. Centers for Disease Control and Prevention, Mass trauma Resource Information Paper, *Glasgow Coma Scale*, <https://www.cdc.gov/masstrauma/resources/gcs.pdf>.

(R. at 547). Police arrived at the scene and found appellant sitting in a vehicle in the garage. (R. at 537-38). Appellant had what appeared to be blood on his clothing. (R. at 559). Almost exactly two years later, in December 2020, appellant was tried and found guilty of unpremeditated murder. (R. at 1206).

Additional facts will be included, as relevant, in the assignments of error below.

I. WHETHER DEFENSE COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND PREPARING FOR TRIAL?

Facts Relevant to Assignment of Error

The government charged appellant with murdering his wife. (Charge Sheet). If convicted, he faced a maximum sentence of confinement for life without the possibility of parole. *Manual for Courts-Martial, United States* (2016 ed.), pt. IV ¶ 56.d.(2). During the merits portion of the trial, the government presented extensive evidence of appellant's guilt, including the testimony of the victim's children who were present at the house when the murder allegedly took place (R. at 316, 391); admissions made by appellant to a medical provider and the presence of a prison guard (R. at 1017-19, 1028); DNA evidence showing appellant was found covered in his wife's blood (R. at 718); expert witness testimony about blood spatter and the volume of blood found at the scene (R. at 923); and other wide-ranging physical evidence presented by numerous members of law enforcement. The government's merits case lasted five days, involved the testimony of over twenty-

five witnesses, and thirty-seven admitted prosecution exhibits. (R. at 245, 1031; Index). Appellant was convicted of unpremeditated murder. (R. at 1206).

A. The Presentencing Case

After a week of the government making their case against appellant, the defense's pre-sentencing case stood in stark juxtaposition. The military judge reopened the court to announce findings at 1306 hours on 16 December 2020. (R. at 1206). The entire presentencing case, both government and defense, was complete by 1509 that same day, barely more than two hours later. (R. at 1272). The transcript of the defense pre-sentencing case begins on page 1229 and ends twenty-seven pages later, on page 1257. In total, the defense called four witnesses: appellant's mother, father, sister, and brother. (R. at 1229-1257). The most in-depth witness testimony, that of appellant's sister, covers fewer than eight pages of transcript. (R. at 1248-1255).

B. Defense Preparation

In preparation for appellant's pre-sentencing case, the defense counsel never spoke to appellant's family about the hearing, prepared them to testify, or personally interviewed them about appellant's background, until the trial had already begun. (Def App. Ex. C, D, E). They never traveled to appellant's childhood home or inquired as to his upbringing. They never interviewed friends, teachers, coaches, or neighbors. When the defense counsel did finally meet with

appellant's family for the first time, in the middle of his murder trial, they spent no more than a few minutes asking about his childhood and schooling. (Def. App. Ex. C).

The defense counsel never asked appellant's family for names of other friends or relatives that may have mitigating or extenuating evidence to provide. (Def. App. Ex. D). With respect to appellant's sister, who testified the longest, defense counsel never spoke to her about her testimony until the day before she testified, and even then, for no more than fifteen minutes. (Def. App. Ex. C). Both appellant's parents felt unprepared for trial and had additional evidence they would have liked to present if they had the time to prepare, or if they knew how to present it to the judge. (Def. App. Ex. D, E). They both felt that the court did not get a full picture of appellant's true character before rendering its sentence. (Def. App. Ex. D, E).

C. Missing Evidence

The defense did not call a single military sentencing witness, even though a number of them were willing and able to testify as to appellant's character and rehabilitative potential. Sergeant (SGT) [REDACTED] served in the same platoon as appellant and remembers serving on charge of quarters (CQ) at the time the alleged crime took place. (Def. App. Ex. H). Despite learning about what happened, SGT [REDACTED] still had positive things to say about appellant as a soldier

and a person, including his dedication to being an infantryman, his high performance at physical training, and demonstrations of moral courage. (Def. App. Ex. H). Appellant's childhood friend, Staff Sergeant [REDACTED] would have also testified on appellant's behalf. (Def. App. Ex. F). Staff [REDACTED], who is serving overseas, at the time of filing, could not believe what happened because it was so out of character for appellant. (Def. App. Ex. F). He remembers appellant's interest in the Army, always asking questions about furthering his career, and having a passion for self-improvement. (Def. App. Ex. F). Another one of appellant's close childhood friends was Technical Sergeant (TSgt) [REDACTED], an Air Force Non-Commissioned Officer. (Def. App. Ex I). In both his personal and professional opinion, TSgt [REDACTED] believed appellant had a good character and would have testified to his high rehabilitative potential. (Def. App. Ex. I). The defense did not contact any of these servicemembers in preparation for trial. (Def. App. Ex. F, H, I).

In addition to those already mentioned, there were other close friends and family members from appellant's life that would have testified on his behalf. [REDACTED], appellant's close childhood friend, would have testified to appellant's struggles with bullies in school, how the bullies would regularly attack appellant, but appellant was always able to keep calm and was difficult to provoke, despite ample justification. (Def. App. Ex. G).

██████████, another close family friend, would have testified to appellant's moral character and willingness to support his sister when she got pregnant, despite the rest of her family's anger at the unwanted pregnancy. (Def. App. Ex. K). Appellant's defense counsel never contacted any of these witnesses – close friends and family of appellant, all of whom could have helped the sentencing authority get a full picture of who appellant was, beyond his crime. (Def. App. Ex. G, J, K).

In addition to not researching and contacting the critical witnesses in mitigation, defense counsel also failed to properly prepare the witnesses that did testify. Appellant's family members would have liked to have shared more with the court than the perfunctory testimony they gave. (Def. App. Ex. C, D, E). Unfortunately, appellant's counsel failed to work with them until the middle of trial, and by then it was too late and they were too busy to take the time or effort necessary to prepare the family to testify. As a result, the family was uncertain what they were supposed to say and they did not know how to give their important testimony to the sentencing authority. (Def. App. Ex. C, D, E).

D. Expert Request

On 24 July 2019, the Convening Authority denied appellant's request to appoint Dr. ██████ to the defense team as an expert consultant in the field of Forensic Psychology and Neuropsychology. (App. Ex. X). Appellant filed a motion to

compel Dr. [REDACTED] appointment. (App. Ex. III). Appellant requested Dr. [REDACTED] for two reasons:

(1) As a neuropsychologist to examine the accused and determine if he suffered from a traumatic brain, concussion, or other injury the week prior to the death of his wife that might have affected his cognition, judgment, or impulse control. Additionally, she would help the defense team understand whether the condition of appellant's brain could provide extenuating or mitigating evidence.

(2) As a forensic psychologist to assist the defense in presenting a robust mitigation case based on the historical psychological background of appellant. She would do this by helping the defense team obtain and review information from appellant's past, help them conduct mitigation interview's regarding appellant's upbringing and other factual circumstances, and lend her training and expertise in helping them compile a mitigation case to argue to the trier-of-fact.

(App. Ex. III).

At an Article 39(a) hearing conducted on 29 August 2019, the parties argued the motion to compel Dr. [REDACTED] appointment. (R. at 107). Regarding the first stated reason for Dr. [REDACTED] appointment, the military judge asked the parties whether appellant had been specifically evaluated for a traumatic brain injury (TBI), and whether anything would prevent that evaluation from taking place. (R. at 107). Defense counsel stated no additional TBI testing had been done, but it was their understanding additional testing, beyond the CT scan performed immediately after the accident, was necessary to determine the extent of appellant's head injury, and

that Dr. [REDACTED] appointment would help them understand what additional testing could and should be done. (R. at 107-108, 112). The military judge deferred her ruling, indicating that, prior to her granting the defense’s requested expert, appellant needed to be “evaluated to determine whether he does have TBI.” (R. at 120). On 17 September 2019, the trial counsel emailed the defense counsel and asked if appellant requested TBI screening, and, inexplicably, the defense counsel, apparently surrendering the issue, told the government appellant did not need the screening. (App. Ex. XV). On 25 October 2019, the military judge denied the defense’s motion, citing, among other reasons, that “the government offered to do additional TBI screening of the accused and defense declined additional TBI testing.” (R. at 185).

Standard of Review

Allegations of ineffective assistance of counsel are reviewed *de novo*. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012); *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

Law

The Sixth Amendment guarantees an accused the right to the “effective assistance of counsel.” *United States v. Cronin*, 466 U.S. 648, 653-656 (1984).

A. Ineffective Assistance Generally.

To prevail on a claim of ineffective assistance of counsel, the appellant must show both deficient performance and prejudice. *Strickland*, 466 U.S. at 687.

Applying this standard “begin[s] with the presumption of competence announced in [*Cronic*].” *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011). Then:

This Court applies a three-part test to determine whether the presumption of competence has been overcome:

1. Are the allegations true, and, if so, is there any reasonable explanation for counsel’s actions?

2. If the allegations are true, did counsel’s performance fall measurably below expected standards?

3. Is there a reasonable probability that, absent the errors, there would have been a different outcome?

Gooch, 69 M.J. at 362 (citing *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

Appellant need not “make an ‘outcome-determinative’ showing that ‘counsel’s deficient conduct more likely than not altered the outcome in the case.’”

United States v. Howard, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 693). A reasonable probability of a different outcome means something less than proof of a different outcome by a preponderance. Put differently, “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a

preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U.S. at 694.

Strategic, tactical, or other deliberate decisions of counsel must be objectively reasonable, based on counsel’s perspective at the time of the conduct in question. *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) (citing *Strickland*, 466 U.S. at 688; *United States v. Marshall*, 45 M.J. 268, 270 (C.A.A.F. 1996)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (quoting *Strickland*, 466 U.S. at 686).

B. Ineffective Assistance in Investigation.

One of the ways in which a defense counsel’s performance may be deficient is when they fail to investigate the case adequately. *United States v. Scott*, 1987 CMA LEXIS 2557, *19 (C.M.A. 1987)(“A defense counsel has the duty . . . to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . In many cases, pretrial investigation is the most critical stage of a lawyer’s preparation.”) (internal citations omitted). In preparing a defense, “counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *see also United States v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002).

Failure to investigate a case includes the failure to obtain necessary expert assistance. *See United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). A counsel’s failure to conduct sufficient investigation may violate the appellant’s Sixth Amendment rights. *United States v. Scott*, 24 M.J. 186, 192-93 (C.M.A. 1987) (failure to investigate alibi defense and prepare for trial was ineffective); *Holsomback v. White*, 133 F.3d 1382, 1387-89 (11th Cir. 1998) (holding that failure to conduct adequate investigation into medical evidence of sexual abuse was ineffective).

Unlike cases involving tactical decisions made in the heat of the moment during the course of a trial, courts apply closer scrutiny when claims of ineffective assistance are based on a counsel’s failure to investigate during the weeks and months leading up to trial. *United States v. Clark*, 55 M.J. 555, 560 (Army Ct. Crim. App. 2001). “[I]nvestigation is an essential component of the adversary [sic] process,’ . . . that testing process generally will not function properly unless defense counsel has done some investigation.” *Scott*, 24 M.J. 188 (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)).

1. Pre-sentencing Preparation.

The American Bar Association (ABA) Standards of Criminal Justice specify the duties of defense counsel during sentencing. Defense counsel should:

take particular care to make certain that the record of the sentencing proceedings will accurately reflect *all relevant mitigating circumstances* relating either to the offense or to the *characteristics of the defendant* which were not disclosed during the guilt phase of the case.

United States v. Weathersby, 48 M.J. 668, 671 (Army Ct. Crim. App. 1998)

(quoting American Bar Association Standards for Criminal Justice, 18-6.3(f)(ii)(2d ed. 1980))(emphasis added).⁴

Multiple military appellate court cases have addressed situations where counsel failed to adequately investigate in preparation for sentencing. In *United States v. Boone*, 42 M.J. 308 (C.A.A.F. 1995), a sexual assault case where the appellant did not face a life sentence, the defense's sentencing case consisted solely of the appellant's unsworn statement submitted through counsel. In remanding the case, the C.A.A.F. stated, "We find no explanation and can discern no tactical reason from the record for the meager defense presentation," and specifically noted the appellant's honorable service in Saudi Arabia, lack of disciplinary actions in his personnel record, and the fact that no one from his chain

⁴ The ABA Standards are applicable to military trial and defense counsel to the extent they do not conflict with the Manual for Courts-Martial or the UCMJ. *Weathersby*, 48 M.J. at 672.

of command or fellow soldiers testified to personal qualities or soldierly performance. *Id.* at 314. On remand, this court held, “appellant has sufficiently met his burden of showing ineffective assistance of counsel and prejudice so that he is entitled to remedial action by this court.” *United States v. Boone*, 44 M.J. 742, 743 (Army Ct. Crim. App. 1996), *rev’d on other grounds*, 49 M.J. 187 (C.A.A.F. 1998).

The record in *Boone* identified three potential sentencing witnesses in addition to the appellant’s uncle. *Id.* at 744. This court found that although the three potential sentencing witnesses would not have described the appellant as an outstanding soldier, they would have added *some value* for rehabilitation. *Id.* at 746. Furthermore, this court found that appellant’s uncle, who was “ready, willing, and able to testify on appellant’s behalf” would have testified about knowing him from birth and described his “family background, upbringing, attitude toward the Army, and . . . normally peaceful nature.” *Id.* This court ultimately determined that there was “a reasonable probability that the sentence would have been different but for counsel’s performance, and that probability is sufficient for us to question the reliability of and to undermine our confidence in the sentencing proceeding.” *Id.*

This court also found ineffective assistance because of defense counsel’s failure to investigate in *United States v. Saintaude*, 56 M.J. 888 (Army Ct. Crim.

App. 2002), another case where the appellant was not facing life in prison. The defense sentencing case in *Saintaude* consisted of a stipulation of expected testimony from the appellant's mother, a short unsworn statement, and the appellant's Personnel Qualification Record. *Id.* at 896-97. After his trial, during clemency, the appellant's newly hired civilian defense counsel (CDC) submitted thirteen letters from individuals describing the appellant prior to and following his military career. Additionally, the CDC discovered that appellant's wife was present and willing to testify but was never called by his original defense counsel. *Id.* at 897.

This court found, under the circumstances of that case, "appellant's defense team erred during the sentencing phase by their failure to investigate appellant's background for potential mitigation evidence and, thereafter, by their failure to present available mitigation evidence." *Id.* Once again, this court set aside the sentence.

The law in this area is not dependent on the degree of appellant's participation in his own case. In *United States v. Scott*, the Court of Appeals for the Armed Forces assessed ineffective assistance in the context of counsel's failure to "seek witness[es]" who could provide mitigation testimony. 81 M.J. 79, 86 (C.A.A.F. 2021). Given the possibility of a severe sentence stemming from "extremely aggravating facts," the CAAF held that it was "not a close call;"

counsel were ineffective for failing to seek witnesses that could provide mitigation. *Id.* at 85-86. (“Accordingly, trial defense counsel did not seek witnesses who could testify about Appellant's combat record and his multiple instances of bravery. Trial defense counsel also did not seek non-local witnesses who could testify about other impressive aspects of Appellant's long military career.”). Given the circumstances, the CAAF could “see no reasonable tactical reason that trial defense counsel might have had for not seeking additional information,” and found counsels’ performance deficient. *Id.* at 86. The holding in *Scott* means that counsel have an independent obligation to seek out mitigation witnesses and extenuating evidence regardless of whether appellant gives them a list, or those individuals are otherwise included in the trial record. This can be seen in several other military cases. *See e.g. United States v. Allen*, 8 C.M.A. 504, 512, 25 C.M.R. 8, 12 (1957) (noting that appellant’s wife was an available, unused mitigation witness); *Boone*, 42 M.J. at 308 (“Appellant has furnished affidavits indicating that his mother and his uncle, an Air Force career officer, were willing to attest to his family background and good character.”); *Saintaude*, 56 M.J. 888 (appellant’s counsel furnished thirteen letters from individuals who would have testified on appellant’s behalf but were never contacted by trial defense counsel).

Even when the client wholly unhelpful or unwilling to help counsel develop the case, the Supreme Court has recognized that counsel maintains an independent

obligation to investigate. *Porter v. McCollum*, 558 U.S. 30, 40 (2009). In *Porter*, the Supreme Court held while “Porter may have been fatalistic or uncooperative, [] that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation.” *Id.* (emphasis in original).

2. Expert Assistance.

A counsel’s failure to use expert assistance is similarly treated as a failure to investigate. *United States v. Wean*, 45 M.J. 461, 463-64 (C.A.A.F. 1997); *United States v. Clark*, 55 M.J. 555, 560-61 (Army Ct. Crim. App. 2001). Additionally, even when counsel does investigate a case, a failure to present expert testimony itself can constitute ineffective assistance. *See United States v. Clark*, 49 M.J. 98 (C.A.A.F. 1998) (failure to call accident-reconstruction expert was ineffective); *United States v. Grigoruk*, 52 M.J. 312 (C.A.A.F. 2000) (failure to call a child psychologist met the threshold for a *prima facie* showing of ineffective representation).

C. Ineffective Assistance in motions practice.

Finally, a defense counsel’s failure to file certain motions can satisfy *Strickland*’s deficient performance prong. *See United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018); *see also United States v. Horner*, ARMY 20190249, 2020 CCA LEXIS 421, *16, n.6 (Army Ct. Crim. App. 2020) (mem. op.). “When a claim of ineffective assistance of counsel is premised on counsel’s failure to

make a motion an appellant must show that there is a reasonable probability that such a motion would have been meritorious.” *Harpole*, 77 M.J. at 236 (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). When submitting motions compelling expert witnesses, “[d]efense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case.” *United States v. Kelly*, 39 M.J. 235, 238 (C.A.A.F. 1994); *see also United States v. Leyba*, 2018 CCA LEXIS 394, at *7 (Army Ct. Crim. App. 2018) ([summ. disp.](#)) (assessing counsel’s failure to present sufficient evidence to compel an expert witness as ineffective assistance).

Argument

The CAAF has twice famously stated that “death is different.” *Loving v United States*, 62 M.J. 235, 236 (C.A.A.F. 2005)(quoting *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002)); *United States v. Akbar*, 74 M.J. 364, 425 (C.A.A.F. 2015)(J. Baker, dissenting). In specifically addressing ineffective assistance of counsel, J. Baker in his dissent in *Akbar* reasoned that counsel’s performance is, and should be, held to a higher standard in capital cases because of the extreme and final nature of the sentence.

The same rationale does, and should, extend to a murder case where an accused faces the potential of life in prison. Appellant was not court-martialed for a simple military offense such as disrespect or desertion, nor was he prosecuted for

“low-level” crimes such as wrongful use or simple assault. On the contrary, he was charged with and tried for the murder of his wife, with the possibility that he would spend the rest of his life behind bars. With appellant’s life on the line, his counsel had an obligation to fully investigate every aspect of his alleged crime in search of a defense, every aspect of his life in search of evidence in mitigation, and to prepare the best possible sentencing case. Their *pro forma* or cursory effort in this case can be described as little more than “going through the motions” of advocacy, and appellant and his family suffered the worst possible outcome as a result.

A. Defense Counsel were ineffective by failing to adequately prepare appellant’s pre-sentencing case.

Based on the extensive evidence gathered by the government during its two-year investigation, there was a high likelihood appellant would be convicted. He was found near the scene of the crime with the victim’s blood on his clothes. It should have been plain and obvious to even a novice attorney that there was a likelihood appellant would face a term of confinement for life without the possibility of parole unless the defense presented a sufficiently persuasive sentencing case. Given the stakes, the evidence ultimately presented was wholly inadequate.

The defense had the ability to present military sentencing witnesses who would have provided insight into appellant as a soldier. (Def. App. Ex. F, H, I).

Such evidence of his character, motivation, professionalism, and dedication to duty would have been strong evidence of his rehabilitative potential. Yet the defense presented no evidence of appellant's service. They failed to offer military records, information about appellant's service, or members of his unit to offer that insight. (Def. App. Ex. H). The defense omitted from trial evidence that appellant "was a solid Infantryman and was always out in front leading the way when it came to physical fitness," "he showed moral courage and always motivated others to the very end," "he sought out those with experience and didn't hesitate an opportunity to learn more about his job and everyone else's." (Def. App. Ex. H).

The court did not hear any stories about appellant's acts of military dedication or perseverance. Other than the fact appellant sat in court wearing a uniform, there was almost no indication that he worked hard in service to his country. In *Boone*, this court recognized that even soldiers unwilling to portray an accused as "an outstanding soldier," still would have provided *some* value for rehabilitation and their absence from the trial satisfied the second *Strickland* prong. 44 M.J. at 746. The military witnesses in the immediate case would have gone beyond what was missing in *Boone*, and may have shown the fact finder how appellant was dedicated to becoming a better soldier.

Just as in *Boone*, the defense also ignored available evidence to demonstrate that appellant's crime was out of character. 44 M.J. at 746 (discussing how the

potential sentencing witnesses would address “the appellant’s normally peaceful nature.”). Staff Sergeant [REDACTED] and [REDACTED] would have testified to how out of character the crime was, and how shocked they were to hear what had occurred. (Def. App. Ex. F, G). Other witnesses would have discussed appellant’s genuine, morally courageous nature, which would have also conflicted with the government’s portrayal of appellant as someone who lacked compassion. (Def. App. Ex. H, J, K; R. at 1261).

There is always more to a man than his worst moment. Appellant is a human being with hopes, fears, passions, experiences, and indisputably *good* qualities. He was a soldier who volunteered to serve his country in a time of war, he was a friend, colleague, son, and brother. The defense’s pre-sentencing case, less than two hours long after a week-long murder trial, did nothing to humanize appellant, to demonstrate to the military judge that he had some redeeming value, or that he amounted to more than just his worst moment. It could have, and under *Strickland* and its progeny, it should have.

As demonstrated by the defense appellate exhibits filed contemporaneously with this brief, there was a plethora of evidence of mitigation and extenuation, as well as rehabilitative potential, easily within the defense’s grasp. Not only did they not present it – they never even looked for it, despite knowing their client would

likely be convicted. “[I]nvestigation is an essential component of the adversary process,” without which a trial “will not function properly.” *Scott*, 24 M.J. at 188.

The crime for which appellant stood convicted was undeniably heinous but, if all that mattered was the crime, there would be no need for a pre-sentencing case. Even the worst offenders, convicted of the worst imaginable crimes, have a right to present a case in extenuation and mitigation, and to demonstrate that they have the potential to be rehabilitated. Appellant deserved legal representation that would have placed his crime in context and provided the fact finder with evidence of who he was as a person. He did not receive it. As a result, this court should set aside the sentence and authorize a rehearing⁵ so that defense counsel can gather the evidence already uncovered, and investigate further to present the appropriate pre-sentencing evidence a case like this required.

B. Defense Counsel were ineffective when they failed to take sufficient steps to investigate appellant’s head injury and provide a sufficient factual basis to request or compel an expert witness in the area of Neuropsychology.

Just one week before the death of Mrs. ■■■, appellant was in a terrible car accident where he violently struck his head. (App. Ex. III). The crash caused

⁵ In the alternative, if this court is not convinced by the exhibits attached hereto, it should order a fact-finding hearing in accordance with *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

appellant to suffer some form of traumatic brain injury (TBI)⁶, evidenced by his lack of consciousness, hospitalization, elevated Glasgow Coma Score, altered mental state, and a fractured bone in his face. (App. Ex. III). There is a strong possibility these injuries may have contributed to appellant's mental state at the time of Mrs. [REDACTED] death. (Def. App. Ex. A). While the defense requested expert assistance on this issue, and later filed motion to compel that assistance, the record demonstrates a clear lack of sufficient investigation.

Defense's failure to adequately investigate this issue, and present evidence supporting its motion, was clearly deficient in light of easily-accessible information. Had defense performed the necessary diligence, there would have no doubt been "a reasonable probability [the] motion would have been meritorious." *McConnell*, 55 M.J. at 482. The defense's subsequent use of that expert assistance, and presentation of the medical evidence, would have reasonably led to a different outcome. *See Strickland*, 466 U.S. at 694.

This case is strikingly similar to *United States v. Witt*, where the Air Force Court found that this type of evidence is absolutely critical to a mitigation case. 72 M.J. 727, 760 (A.F. Ct. Crim. App. 2013). Four and a half months prior to murdering his wife and two others, Senior Airman (SrA) Witt was in a motorcycle

⁶ The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (5th edition, 2013) (DSM-5) section on Neurocognitive Disorders, states that loss of consciousness is evidence of a TBI.

accident. *Id.* at 759. The accident rendered SrA Witt unconscious and led to behavior changes, including an unprecedented turn to physical violence and aggression. *Id.* Despite knowing of this condition, defense counsel did not consult with a neuropsychologist and did not request additional testing. *Id.* Instead, they “chose to forego investigation into the possibility of traumatic brain injury,” despite “the possibility of a correlation between a closed head injury and criminal acts.” *Id.*

As in this case, the only testing performed on SrA Witt was a CT scan, which the court noted, “could not exclude a traumatic brain injury because an immediate CT is mostly sensitive to acute bleeding rather than the longer term consequences of a traumatic brain injury.” *Id.* at 760; *see also* Def. App. Ex. A. The court explained that evidence of SrA Witt’s accident would have been of paramount importance, especially in light of the uncharacteristic behavior leading up to the homicides. *Id.* The court specifically noted, “traumatic brain injury can affect impulse control, normal cognitive functions, emotional self-regulation, and behavior.” *Id.* It ultimately held the defense team’s failure to follow-up on this evidence constituted ineffective assistance, a failure that was “amplified by the lack of any other mitigation or extenuation evidence that may have shed light on why [the] aberrant behavior transpired.” *Id.*

In both cases, the defense failed to present sufficient evidence in mitigation and in both cases they follow up on an obvious defense lead. The key difference is that SrA Witt's accident occurred several months before his crime, but appellant's TBI was only *one week* before his. It defies logic, or even the lowest possible standard of criminal defense work, to not pursue this obvious avenue of defense and mitigation.

In addition to *Witt*, other courts have repeatedly found evidence of mental problems, including traumatic brain injury, to be powerful mitigation. “[E]vidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to . . . emotional or mental problems, may be less culpable than defendants who have no such excuse.” *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Cannon v. Gibson*, 259 F.3d 1253, 1277—78 (10th Cir. 2001) (finding omitted mitigation information of “serious brain damage” and lack of impulse control would have displaced mitigation information portraying the petitioner as a “kind, compliant, and responsible individual whose involvement in the murder was an aberration”).

At trial, to include pre-sentencing, evidence of appellant's car accident just one week prior to his crime was not presented. Defense counsel presented *some*, albeit woefully inadequate, evidence which attempted to humanize appellant, but the record was devoid of any evidence of why he committed a seemingly senseless crime. In this case, explanatory evidence was critical to avoiding a significant sentence. *See Allen v. Woodford*, 395 F.3d 979, 1006 (9th Cir. 2005) (noting that "explanatory" mitigating evidence often bears more weight than "humanizing" evidence).

1. Had the defense conducted sufficient pre-trial investigation, there was "a reasonable probability" the motion to compel an expert neuropsychologist would have been meritorious.

In requesting an expert consultant, or seeking to compel production of an expert witness, the defense must show the witness is relevant and necessary. Rules for Courts-Martial [R.C.M.] 703(d)(2)(A)(i). The standard for production of an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii). "To be entitled to expert assistance, an accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Hennis*, 79 M.J. 370, 382-83 (C.A.A.F. 2020) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). "In order to satisfy the first prong of this test, the defense

must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop.” *Id.* at 383.

Under the facts of this case, with the car accident one week prior to the crime and the government’s strong evidence from the day of the crime, the strongest viable defense strategy was the issue of whether appellant lacked mental responsibility to commit the alleged crime. “It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.” R.C.M. 916(k)(1).

Even if a disease or defect is insufficient to satisfy the affirmative defense, evidence “may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense. Discussion. R.C.M. 916(k)(2). When raised by the defense in a murder case, the issue of “partial mental responsibility” requires the government to prove, beyond a reasonable doubt, an accused’s mental defect, disease, impairment, condition, deficiency, character, or behavior disorder did not render him mentally incapable of forming the specific intent to kill. Military Judges’ Benchbook: Legal Services, Dep’t of the Army, Pamphlet 27-9 [Benchbook] at para. 6-5.

Appellant was in a serious accident, but the extent of the connection between his head trauma from the accident and the alleged murder of his wife just one week later was never fully explored. (R. at 184; App. Exs. III and IV). In denying defense's requested expert, the military judge erroneously found there was no evidence before the court that appellant suffered from a TBI. (R. at 187). Contrary to the military judge's ruling, the evidence was presented; the problem was that no one realized it. According to the DSM-5, one of the primary diagnostic criteria of TBI is a loss of consciousness. (Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders at 624-26 (5th ed. 2013)). Medical personnel also noted that appellant had an "altered mental status," and tests indicated he had a Glasgow Coma Scale Score of 7 out of 15.

Neuro/CNS: altered mental status, localizes painful stimuli																				
Glasgow Coma Score:																				
<table border="1"> <thead> <tr> <th colspan="2">Glasgow Coma Score: Response</th><th>Value</th></tr> </thead> <tbody> <tr> <td>Patient intubated?</td><td>no</td><td></td></tr> <tr> <td>Glasgow eyes:</td><td>eyes open to pain</td><td>2</td></tr> <tr> <td>Glasgow speech:</td><td>no verbal response</td><td>1</td></tr> <tr> <td>Glasgow motor:</td><td>withdrawal from pain</td><td>4</td></tr> <tr> <td>Total</td><td></td><td>7</td></tr> </tbody> </table>			Glasgow Coma Score: Response		Value	Patient intubated?	no		Glasgow eyes:	eyes open to pain	2	Glasgow speech:	no verbal response	1	Glasgow motor:	withdrawal from pain	4	Total		7
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(App. Ex. III at 62-65). (Def. App. Ex. A). This means that he had a "severe head injury" and would be considered by some practitioners to be comatose. Centers for Disease Control and Prevention, Mass trauma Resource Information Paper, *Glasgow Coma Scale*, <https://www.cdc.gov/masstrauma/resources/gcs.pdf>. That evidence alone was enough to show that appellant suffered from *some* kind of

brain injury. All the defense needed to do was present this information to the military judge.

Instead, the defense's failure to even do a modicum of research to present sufficient evidence ultimately resulted in the military judge's denial of their requested expert. The military judge may have been wrong, but she erred based on the omissions and failures of the defense team. Ironically, even the government inadvertently nudged the defense toward a winning argument. Had the defense critically read the medical article the government provided in support of its response to the defense's motion to compel, they would have been able to persuasively argue to the military judge concerning potential options for additional testing and the limitations of a CT Scan. (App. Ex. VIII). Amongst other things, the article stated, "CT findings may lag behind actual intracranial damage, so that examinations performed within 3 h[ours] of trauma may underestimate injury." (App. Ex. VIII at page 3); *see also Witt*, 72 M.J. at 760. The article also discussed the potential superiority of magnetic resonance imaging (MRI) tests under certain circumstances, stating, "[s]tudies have shown that CT missed approximately 10-20% of abnormalities seen on MRI." (App. Ex. VIII at page 3). The accused never received an MRI or any other brain testing after his accident.

2. The Defense failed to investigate the issue or present the military judge with available facts and research which constitutes deficient performance.

At the motions hearing, the defense did not ask Dr. [REDACTED] to testify, they failed to present any evidence that appellant was suffering from a recognizable mental defect, and they failed to present any symptoms appellant displayed following his accident. They presented no evidence that Dr. [REDACTED] would provide the requested assistance. The only evidence presented to the military judge was Dr. [REDACTED] Curriculum Vitae (CV) and excerpts of appellant's medical records from the car accident. (App. Ex. III, p.3). On the issue of neuropsychology, the defense's motion was bare with respect to the facts, law, and analysis. (App. Ex. III).

First, the defense never addressed why the failure to compel Dr. [REDACTED] would "result in a fundamentally unfair trial." *Lloyd*, 69 M.J. at 99. Even the analysis the defense included did little to satisfy their burden. With respect to why the expert assistance was needed, the defense merely argued:

First, the Defense requires a neuropsychiatrist⁷ to examine the accused and determine if he suffered from a traumatic brain, concussion, or other injury the week prior to the death of his wife that might have affected his cognition, judgment, or impulse control and explain it to the Defense team. The condition of PFC Forrest's brain at the time of the alleged murder could prove to be extenuating, mitigating, or disprove the intent element of the charged offense.

⁷ The military judge had to clarify on the record that defense was actually requesting a neuropsychologist and not a neuropsychiatrist. (R. at 107).

(App. Ex. III, p. 3). In so arguing, the defense's request appeared to the military judge as a baseless "fishing expedition," rather than a bona fide request for expert assistance to understand and present the very complex and technical impacts of a *known* TBI. Shockingly, the defense did not identify for the military judge that appellant did, in fact, suffer from a TBI at the time, as evidenced by his loss of consciousness. They did not articulate *why* that evidence would have been relevant to mitigation, extenuation, or disproving intent. They did not explain what Dr. ■■■ was actually going to do, or how she was qualified to assist. They did not explain what her conclusions would have been. With respect to the second factor, what the expert would accomplish, there is no mention of the car accident or injury, or anything Dr. ■■■ would accomplish related to it. (App. Ex. III, p.4). Lastly, the defense's case for why they could not gather the evidence themselves was merely a declaration that the area was too complex. (App. Ex. III, p.5).

The motions hearing on the issue did nothing to resolve these deficiencies. (R. at 107-121). The defense had nothing new to offer. They never corrected the military judge's obvious misunderstanding of the facts. At one point, the military judge seemed inclined to allow the defense to explore the issue as long as they could first establish appellant had a TBI. (R. at 120). The defense should have taken this obvious opportunity to establish conclusively that he had undeniably suffered a TBI. Had defense done minimal preparatory research, they could have

done so. Instead, they surrendered and completely abandoned this entire line of defense.

3. The Defense failed to follow-up the investigation and conduct additional testing relevant to appellant's head injury.

The defense's deficiencies are further demonstrated by the fact that, after the motions hearing, the trial counsel offered appellant additional TBI screening. (App Ex. XV). The military judge indicated during the motions hearing she was open to granting defense's motion for a neuropsychologist expert, however, she stated "the first starting point would be to get him evaluated to determine whether he does have a TBI." (R. at 120). Notwithstanding the fact there was already evidence appellant had suffered a TBI before the military judge, the defense did absolutely nothing to attempt to meet the "first starting point" the military judge indicated.

When offered the opportunity by the government for additional TBI testing, the defense inexplicably declined. (App. Ex. XV; R. at 187). Instead of recognizing the golden opportunity to accept the government's offer and satisfy the judge's condition which likely would have led to her granting their requested expert, the defense counsel declined any additional testing. (App Ex. XV). This declination was then used by the military judge to form the basis of her denial of defense's requested expert. (R. at 187).

This cannot be explained as a tactical or strategic decision. Even when foregoing investigation on the advice of an expert consultant, courts have held that a failure to investigate this precise issue constituted ineffective assistance. *Witt*, 72 M.J. at 760. Defense counsel should have pursued the lead and then decided whether the evidence was fruitful. There was nothing to be lost by pursuing additional tests, conducting additional investigation, and giving the military judge the evidence needed to decide the motion in appellant's favor. The judge's own words at the motions hearing and her ruling establish that, had the defense not been deficient, there was "a reasonable probability" the motion to compel would have been granted.

4. Prejudice

Had the defense adequately investigated and presented sufficient evidence, which was readily available, there is a reasonable probability that the military judge would have found their motion meritorious and granted them an expert in neuropsychology. A neuropsychologist would have understood and identified the significant possible issues raised by appellant's brain trauma so close in time to the alleged crime. (Def. App. Ex. A, p.3). They would have been able to conduct additional tests in order to determine the significance and level of trauma as well as the impact it had on appellant's executive functioning and impulse control. (Def.

App. Ex. A, p.3). They would have been able to challenge significant issues in the R.C.M. 706 board results. (Def. App. Ex. A, B).

This evidence would very likely have provided the defense with sufficient information to raise the defense of severe mental disease or defect, or at the very least, to present evidence of partial mental responsibility. (Def. App. Ex. A, B). This would have then required the government to prove, beyond a reasonable doubt, appellant's mental defect, disease, impairment, condition, deficiency, character, or behavior disorder did not render him mentally incapable of forming the specific intent to kill. Military Judges' Benchbook: Legal Services, Dep't of the Army, Pamphlet 27-9 [Benchbook] at para. 6-5.

Furthermore, during the pre-sentencing phase, a neuropsychologist would have been able to discuss, as mitigating factors, the effects of TBI on appellant's executive functioning, impulse control, hyper-vigilance, and paranoia. (Def. App. Ex. A, p.3); *see also Witt*, 72 M.J. at 760 ("Essentially, this mitigating evidence could have provided the explanation evidence otherwise lacking in the appellant's presentation."). Defense's deficient performance directly prejudiced appellant by preventing inquiry into any of these viable and probable options for presenting defenses and mitigation evidence. Instead, with no alternative explanation, the sentencing authority was left with the conclusion that appellant simply murdered his wife in cold blood for no apparent reason.

C. The cumulative effect of ineffective assistance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Mazza*, 67 M.J. at 474.

While each instance of defense counsel’s ineffective assistance constitutes its own degree of prejudice, this court should also consider them in the aggregate. *See Akbar*, 74 M.J. at 392 (citing *United States v. Loving*, 41 M.J. 213, 252 (C.A.A.F. 1994), *United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014)). As the C.A.A.F. held, it is “appropriate to consider whether defense counsel’s conduct of the trial as a whole might have been defective within the meaning of *Strickland*, even though individual oversights or mistakes standing alone might not satisfy *Strickland*.” *Loving*, 41 M.J. at 252. The claims presented above represent those errors which, on their own, may satisfy the second prong of *Strickland*, however, even if the individual deficiencies are insufficient, defense counsel’s conduct, examined in its totality, surely does. This was a serious case, with appellant’s life literally on the line. It warranted much more care, effort, and dedication than appellant received.

“[I]t should not require an attorney of extreme competence or vast experience to realize that when representing a [a soldier] who is facing life in prison... some extra effort may be necessary to prepare a credible case in extenuation and mitigation.” *United States v. Dorsey*, 30 M.J. 1156, 1160-61 (A.C.M.R. 1990). The defense team wholly failed to investigate or present

evidence in mitigation or evidence of rehabilitative potential. They failed to present a sufficient legal and factual basis to compel crucial expert assistance. Without Dr. ■■■, or another qualified neuropsychologist, none of appellant's best merits arguments were ever investigated or presented at trial. Even if the evidence provided was insufficient to establish a partial mental responsibility defense, it would have been critical evidence for mitigation. Further mitigation could have been provided through the battery of testing and other contributions of an expert consultant in mitigation strategies, which the defense also failed to justify, despite the strong likelihood such assistance was necessary to appellant's case. Finally, despite the defense's recognition that a strong mitigation case was "crucial," they barely presented one and failed to obtain readily available witness testimony. (App. Ex. III, p. 4). When reviewing the defense's conduct in the totality, there is far more than a "reasonable probability of a different outcome." *Strickland*, 466 U.S. at 694. With even marginally effective counsel, appellant would not have been sentenced to die in prison.

II. WHETHER THE MILITARY JUDGE ERRED BY DENYING THE DEFENSE'S MOTION TO COMPEL A MITIGATION EXPERT?

Facts Relevant to Assignment of Error

As discussed above, one of the bases for defense's motion to compel Dr. ■■■ was for assistance as a mitigation expert to help with compiling a "robust

mitigation case.” (App. Ex. III). At the motions hearing, the defense counsel argued for Dr. [REDACTED] appointment, but faced an unusual line of questioning from the military judge that indicated her fundamental misunderstanding of the law. (R. at 115).

MJ: Okay. And then finally, you are asking for Dr. [REDACTED] to act as a mitigation expert. Is that an accurate characterization?

ADC: That is correct, Your Honor.

MJ: Do you have any authority that you can cite? I mean, this case is not referred capital, correct?

ADC: Correct, Your Honor.

MJ: Do you have any authority that talks about *allowing* mitigation experts in non-capital cases?

ADC: Not off-hand, Your Honor, and I apologize that I am not prepared for that. If I may be able to do some research and get it to the Court within the next 24 to 48 hours depending on the Court’s timeline?

MJ: Yes, yes.

ADC: Okay.

MJ: That’s fine.

(R. at 115-116) (emphasis added). Once again, defense counsel failed to accept the judge’s invitation, and they never provided any additional authority or argument to the military judge. (R. at 189).

On 25 October 2019, the military judge denied appellant's motion to compel the appointment of Dr. [REDACTED] (R. at 189-190). In her ruling, the military judge used the fact that the defense did not establish why a mitigation expert *in a non-capital case* is required as justification for her denial of defense's motion. (R. at 189).

Standard of Review

A military judge's ruling regarding the appointment of a government-funded expert is reviewed for an abuse of discretion. *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010). When a ruling involves a mixed question of fact and law, the fact-finding is tested under a clearly erroneous standard, and the conclusions of law are reviewed de novo. *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). A military judge abuses his discretion when his decision is "influenced by an erroneous view of the law." *United States v. Kelly*, 72 M.J. 237, 242 (C.A.A.F. 2013) (quoting *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008)).

Law

In requesting a defense expert witness, or seeking to compel production of a defense expert witness, defense must show the witness is relevant and necessary. R.C.M. 703(d)(2)(A)(i); The standard for production of an expert consultant is "whether the assistance of the expert is necessary for an adequate defense." R.C.M. 703(d)(2)(A)(ii);

“To be entitled to expert assistance, an accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial.” *United States v. Hennis*, 79 M.J. 370, 382-83 (C.A.A.F. 2020) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). “In order to satisfy the first prong of this test, the defense must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop.” *Id.* at 383.

When it comes to mitigation specialists, there is no requirement that an accused be facing the death penalty to qualify for such assistance. When a request for expert assistance of a mitigation specialist is erroneously denied, “that ruling implicates the right to present a defense, compulsory process, and due process conferred by the Constitution, the right to obtain witnesses and evidence conferred by Article 46, UCMJ, and the right to the assistance of necessary experts conferred by R.C.M. 703(d).” *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). When a constitutional error is established, the burden shifts to the benefiting party to demonstrate the error was harmless beyond a reasonable doubt. *Id.* at 300.

Argument

The military judge denied appellant's request for a mitigation specialist because she mistakenly believed such assistance was only available to capital accused. Notwithstanding defense counsel's ineffective representation in failing to provide a sufficient factual or legal basis to compel a mitigation specialist, the military judge abused her discretion when she erroneously denied appellant's request for Dr. [REDACTED] appointment due to her decision being influenced by a mistaken view of the law. This resulted in a fundamentally unfair trial for appellant.

The evidence in the government's possession leading up to trial was significant, leading to the probability appellant would be convicted and need to present a strong and comprehensive pre-sentencing case. Despite how poorly this defense team prepared for trial, even they recognized the need for expert assistance to put together a "robust mitigation case." (App. Ex. III). Accordingly, one of the bases they gave for Dr. [REDACTED] appointment was for her to serve as a mitigation expert consultant.

Although not referred as a capital case, appellant was charged with intentionally murdering his wife and faced the possibility of spending the rest of his life in confinement without the possibility of parole. In other words, he was facing a potential punishment of "death by confinement." The military judge

should have, at the very least, taken this into consideration when she considered the defense's request for an expert who would assist them with a mitigation case. Instead, the military judge proceeded, under the mistaken belief, that she was not even allowed to order a mitigation expert in a non-capital case. (R. at 115) ("MJ: Do you have any authority that talks about allowing mitigation experts in non-capital cases?").

The military judge is presumed to know and follow the law. *See United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). That said, such a presumption has logical limits, and this judge's obvious – and stated – misunderstanding of the law exceeds those limits. The military judge's statements in both her questioning of defense counsel and her ruling that "the defense has failed to establish why *in a non-capital case* an expert in mitigation is necessary or required," demonstrates that her decision was clearly "influenced by an erroneous view of the law." *Kelly*, 72 M.J. at 242. She approached defense's request with an erroneous predisposition that she was not permitted to grant their requested expert and she never moved away from that position. Accordingly, even if defense counsel presented sufficient justification in their brief, this court should find that the military judge abused her discretion in denying the defense's mitigation expert resulting in a fundamentally unfair trial for appellant.

Appellant faced significant prejudice by not having a mitigation expert appointed to the defense team. Had the defense been able to obtain the service of an expert witness, it would have been able to offer additional evidence of psychological issues and diagnoses that may have provided additional mitigation including evidence of childhood abuse. (Def. App. Ex. B, p.2). There would have also been an opportunity for appellant to take a violence risk assessment which would have likely provided the court with additional insight into his rehabilitative potential. (Def. App. Ex. B, p.2). Expert testimony would have also allowed the defense to offer evidence of extenuation by exploring the impact the head injuries he received in a car accident just days before the alleged crime. (Def. App. Ex. A, p.3).

In addition to the lack of any mitigation or extenuation evidence, appellant was also unable to present any evidence during the merits portion of the trial of a possible defense to the intent element of the charged offense. *See Kreutzer* at 301. (mental health evidence potentially gathered by a mitigation specialist could be relevant to the contested elements of offenses, i.e. premeditation, specific intent, knowledge, or willfulness).

Regardless of the defense theory or strategy during the trial, the military judge should have recognized the evidence against appellant leading up to trial was substantial and there was a strong likelihood the pre-sentencing case would be of

paramount importance. The military judge should have considered that appellant was facing possible death by confinement, and should have afforded appellant the resources necessary in order for him to present a complete mitigation case. Instead, she wouldn't even consider granting a mitigation specialist. Due to the military judge's error, appellant was wrongly deprived of the expert assistance of a mitigation specialist to aid in the preparation of his case.

III. WHETHER THE MILITARY JUDGE ERRED BY ADMITTING PROSECUTION EXHIBIT 32 OVER DEFENSE OBJECTION?

Facts Relevant to Assignment of Error

At the beginning of trial, before any witnesses were called, the government moved to admit Prosecution Exhibit 32 into evidence. (R. at 258). Prosecution Exhibit 32 is a collection of Evidence and Property Custody Documents and other papers related to the chain of custody for nearly all the physical evidence collected in the case. (Pros. Ex. 32). The defense counsel objected to the admission of the exhibit on the basis of foundation and hearsay. (R. at 258). The assistant trial counsel responded that the evidence was admissible as a self-authenticating document admissible pursuant to Mil. R. Evid. 902(11). (R. at 258-59).

The first page of Prosecution Exhibit 32 is a document titled "Certificate of Authenticity of Evidence Property Custody Documents (EPCDs) in the case of United States v. Forrest," signed by Mr. [REDACTED]. (Pros. Ex. 32). The government

explained that Mr. ■ would be called as a witness, and based on the military judge's authority pursuant to R.C.M. 801, she could admit the document and later grant the defense the opportunity to renew the objection, after Mr. ■ testified. (R. at 260-61). Mr. ■ never testified at trial.

The military judge asked the defense if they received notice. (R. at 260). The defense confirmed receiving notice but that they had objected at that time. (R. at 260). An email exchange, attached to the record as an appellate exhibit, confirmed that the government first provided notice, required by Mil. R. Evid. 902(11), to the defense on 2 December 2020. (App. Ex. XLV). The following day, the defense replied to the government, indicating that they intended to object pursuant to Mil. R. Evid. rules 803(6) and 902(11). (App. Ex. XLV). The government never responded.

Ultimately, the military judge admitted the document. (R. at 261). The military judge told the defense they could renew the objection once Mr. ■ testified. (R. at 261). The military judge also found that the defense failed to file a motion prior to trial. (R. at 261). Defense counsel responded they "strategically waited till [sic] this point." (R. at 261).

Much of the prosecution's case rested on the admissibility of Prosecution Exhibit 32, which facilitated the testimony of five different government witnesses. (R. at 625-30, 662, 683, 708, 794). The document was first used during the

testimony of Special Agent (SA) [REDACTED]. (R. at 625). Throughout the testimony, the trial counsel asked SA [REDACTED] to look at several pages of the document and asked if it “memorialized” different actions SA [REDACTED] took. (R. at 630-636). Law enforcement officials used the document to prepare maps indicating where physical evidence was found, labeling them with the property numbers found on Prosecution Exhibit 32. (Pros Ex. 24, 25, 26). Rather than testifying about the accuracy of certain times and dates, witnesses would simply state the document was accurate:

Q (trial counsel): Agent [REDACTED] does this EPCD memorialize that swab, the Buccal swab you took from PFC Forrest?

A: (SA [REDACTED]): Yes, sir, it does, it has the date and time collected, as well as from the person it was collected and by whom it was collected.

(R. at 684).

As demonstrated below, throughout trial, the government asked witnesses whether the descriptions contained within Prosecution Exhibit 32 were accurate, often without asking them to testify about what they did, or how evidence was collected or preserved.

R. at 630	“Is the swab that you took from the countertop and the physical soap dispenser on that EPCD [Pros Ex. 32]?”
R. at 635	“Have you label[led] those accordingly with their EPCD and Item number?”
R. at 636	“Does this document memorialize the swab you took of the china cabinet?”
R. at 640	“Does this document memorialize the cardboard piece you took from the china cabinet?”

R. at 684	“[D]oes this EPCD memorialize that swab, the Buccal swab you took from PFC Forrest?”
R. at 687	“Are those swabs you took of PFC Forrest memorialized on this EPCD?”
R. at 689	“Are those clothing items you collected from PFC Forrest memorialized on this EPCD here?”
R. at 709	“Item Number 1 on this Evidence Property Custody Document on page 27 of Prosecution Exhibit 32, where did you swab that item from in the house?”
R. at 795	“[I]s that evidence property custody document that memorializes this particular phone that you’re talking about?”

During trial, the defense sought to undermine the integrity of the law enforcement investigation. (R. at 1176). Defense counsel pointed out that the agents collecting DNA were inexperienced, that the crime scene was tainted by the arrival of dozens of individuals, that critical evidence wasn’t collected until eighteen months after the alleged crime, and that an unknown individual’s DNA was found at the scene. (R. at 1175-79).

Standard of Review

When a military judge admits evidence during sentencing over defense objection, this court reviews the judge’s decision for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (citing *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009)); *United States v. Ponce*, 75 M.J. 630, 634 (Army Ct. Crim. App. 2016). If the military judge abused her discretion, this court must then determine whether the admission of the evidence “substantially

influenced the adjudged sentence.” *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Law

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. Mil. R. Evid. 801(c). Hearsay is generally not admissible in courts-martial. Mil. R. Evid. 802. Nonetheless, there are several exceptions and exemptions from the general prohibition. *See* Mil. R. Evid. 801(d), 803, 804, 807. To rely upon a hearsay exception or exemption, the offering party bears the burden of satisfying the specific rule’s foundational requirements. *See United States v. Yeager*, 27 M.J. 199, 202 (C.M.A. 1988) (“Once proffered evidence meets the foundational requirements for any of these exceptions [to the hearsay rule], it is admissible.”).

In order to be admissible at trial, evidence must also be authenticated. “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Mil. R. Evid. 901(a). Certain documents may be “self-authenticating,” thereby requiring no extrinsic evidence of authenticity in order to be admitted. Mil. R. Evid. 902. Nonetheless, these self-authenticating documents require certain foundations be established. *See* Mil. R. Evid. 902(1-11).

Ultimately, “[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” Art. 59(a), UCMJ. “For non-constitutional evidentiary errors, the test for prejudice ‘is whether the error had a substantial influence on the findings.’” *United States v. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (quoting *United States v. Fetrow*, 76 M.J. 181, 187 (C.A.A.F. 2017)). In determining the prejudice from an erroneous admission of evidence, the Court must weigh “(1) the strength of the Government’s case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question.” *United States v. Norman*, 74 M.J. 144, 150 (C.A.A.F. 2015).

Argument

Prosecution Exhibit 32 is nothing more than pages of unauthenticated, prejudicial, inadmissible hearsay. The government failed to meet the foundational requirement for any of the exceptions to the hearsay rule, nor did they satisfy the authentication requirements of Mil. R. Evid. 902. They never even called the witness they proffered. As such, the military judge’s decision to admit the exhibit was an abuse of discretion.

A. Prosecution Exhibit 32 was not authenticated.

Since the government did not call a witness to lay a foundation for the document's authenticity, the document would need to be "self-authenticating" under Mil. R. Evid. 902 to be properly admissible.⁸ Through the provisions in paragraph 11, a party can admit a record "that meets the requirements of Mil. R. Evid. 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court." Mil. R. Evid. 901(11). The government argued Prosecution Exhibit 32 was admissible pursuant to this rule. (R. at 258).

While the document contains language that seems to satisfy the requirements of Mil. R. Evid. 803(6), the compliance is not "shown by a certification" which complies with a federal statute or Supreme Court rule. Mil. R. Evid. 902(11). The statute most commonly relied upon, 28 U.S.C. § 1746, provides that any certification must be "subscribed," "dated," and follow substantially the following form: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." Prosecution Exhibit 32 does not comply with this statute or any other.

B. Prosecution Exhibit 32 is inadmissible hearsay.

⁸ In order to satisfy Mil. R. Evid. 803(6), the document would have needed to satisfy Mil. R. Evid. 902(11) specifically.

The government argued the evidence satisfied the hearsay exception for “records of a regularly conducted activity.” Military Rule of Evidence 803(6) excepts records from the definition of hearsay when: (A) made at or near the time by someone with knowledge; (B) kept in the course of regularly conducted activity of a uniformed service or business; and are (C) made as a regular practice of that service or business. These three conditions must be “shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Mil. R. Evid. 902(11), or with a statute permitting certification in a criminal proceeding in a court of the United States.” Mil. R. Evid. 803(6)(D).

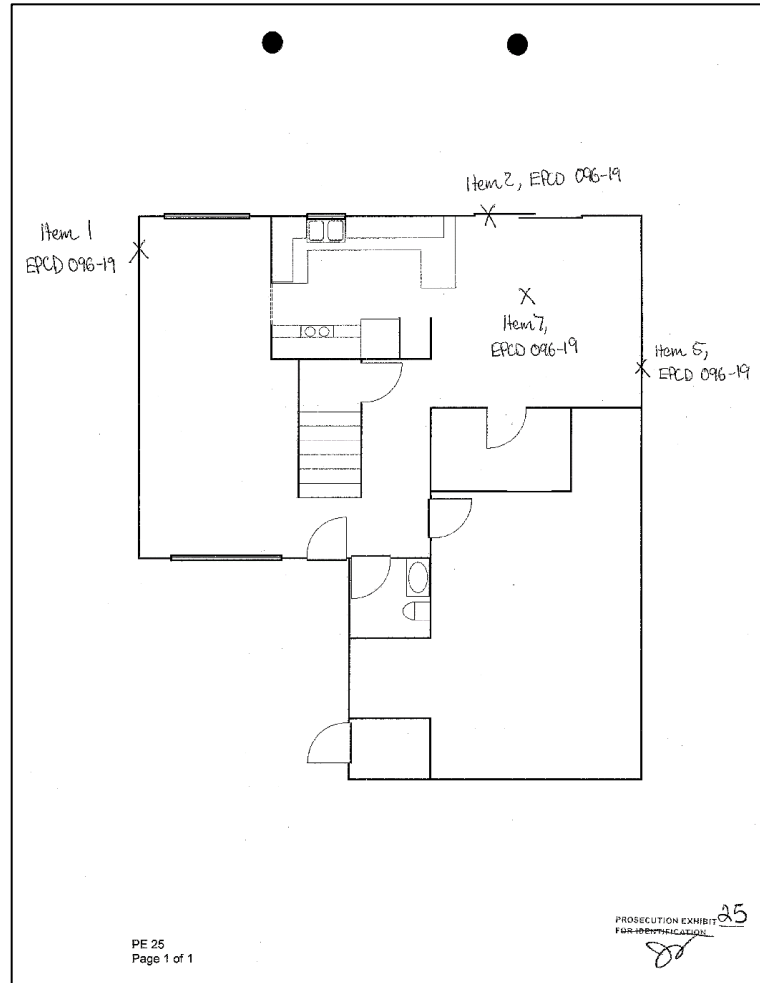
As explained above, the exhibit does not satisfy Mil. R. Evid. 902(11), nor is there any record of compliance with another statute permitting certification. The custodian, Mr. ■■■, never testified at trial. As a result, the document does not satisfy Mil. R. Evid. 803(6)(D) nor any other exception to the hearsay rule and should have also been ruled inadmissible as hearsay.

C. The Admission of Prosecution Exhibit 32 Prejudiced Appellant.

Prosecution Exhibit 32 contains records for the chain of custody for every piece of physical evidence collected during the investigation and presented at trial. (Pros. Ex. 32). This includes all samples of DNA and clothing collected from appellant and the victim, the alleged murder weapon, and physical evidence collected from the crime scene. (Pros Ex. 32). Had the military judge properly

excluded the document, there would have been a dramatic lack of evidence indicating proper efforts had been taken to ensure the integrity of the chain of custody. The chain of custody was of central importance in the trial as the defense's theory was that the scene was not properly secured and evidence had been tampered with. (R. at 1175-80).

In assessing the strength of the government's case, it is imperative for this court to consider what the government could have presented without Prosecution Exhibit 32. Aside from the evidentiary value of the document itself, the manner it was used and relied upon means the government's case would have been extensively weakened had it been excluded. The government relied heavily on the exhibit as the lynchpin referencing all the other evidence. When asking law enforcement witnesses where certain evidence was found at the scene, the government relied on Prosecution Exhibit 32. (R. at 708-09). Maps created by law enforcement agents during their testimony show the location physical evidence was found by directly referencing Prosecution Exhibit 32. (Pros. Ex. 24, 25, 26).



(Pros Ex 25). Without Prosecution Exhibit 32, these maps and much of the agent's testimony about evidence collection would be meaningless.

Finally, the documents themselves contain a high degree of detail that was not otherwise introduced at trial.

Furniture Fracture, brown in color, wood type construction, approximately 8 3/4" long x 1" wide x 3/4" thick. One end of the fracture contains a wooden dowel protruding from the edge. The opposite end of the fracture has a broken, jagged edge with wood splintering and contains an unknown red substance throughout its entirety. Fracture was super glue fumed and wrapped in the original packaging. Fracture was placed in a clean brown paper bag, sealed with paper packaging tape, and MFID with 0312/18 Dec 18/RMM. (Northwest corner of Dining Room E/E) (**POSSIBLE BIOHAZARD**)

(Pros Ex. 32, p. 11).

One of the defense's strategies was to undermine the integrity of evidence presented at trial. As a result, this evidence was material. It was also high quality because it contained extensive evidence of the integrity of the chain of custody. *Norman*, 74 M.J. at 150. The erroneous admission of Prosecution Exhibit 32 "had a substantial influence on the findings," and the finding of the court should, therefore, be set aside. *Kohlbeek*, 78 M.J. at 334.

IV. WHETHER THE SENTENCE WAS INAPPROPRIATELY SEVERE?

Standard of Review

Under Article 66, UCMJ, the service courts review sentence appropriateness de novo. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). In "exercising this statutory mandate, a service court has discretion to approve only that part of a sentence that it finds 'should be approved,' even if the sentence is 'correct' as a matter of law." *Id.* (quoting *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010)). Sentence appropriateness is reviewed de novo. *United States v. Martinez*, 76 M.J. 837, 840 (Army Ct. Crim. App. 2017).

Law

Article 66(c), UCMJ, mandates that this court "affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."

Given this statutory mandate, this court has “wide discretion” in determining whether a particular sentence is appropriate. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999). A service court has nearly unfettered discretion in reviewing a sentence to correct injustice. “A Court of Criminal Appeals must determine whether it [personally] finds the sentence to be appropriate.” *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). It is a “widely adopted view ‘that the punishment should fit the offender and not merely the crime.’” *United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980) (quoting *Williams v. People of State of N.Y.*, 337 U.S. 241, 247 (1949)). In reviewing a sentence, the C.A.A.F. has described the CCAs as having “‘*carte blanche* to do justice.’” *Kelly*, 77 M.J. at 406 (quoting *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). When assessing sentence appropriateness, the service courts consider the sentence severity, the particular appellant, the nature and seriousness of the offenses, and all matters contained in the record of trial. *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Argument

Appellant’s approved sentence is inappropriately severe, as it neither fits the circumstances detailed in the appellate record nor the offender, and due to the fundamentally unfair trial that resulted from the actions and inactions of

appellant's counsel, as well as the errors of the military judge. Defense counsel did not present a substantive mitigation case on the merits or at pre-sentencing, and they failed to investigate significant facts that would have allowed them to do so. Defense counsel also failed to properly request a forensically-trained expert which may have allowed for extensive evidence of mitigation and extenuation to have been presented during pre-sentencing.

Appellant's sentence does not account for appellant's struggles growing up, his military character, who he is as a person, his struggles, his resiliency, or his ability and desire to be rehabilitated. The behavior of a man in his 70s is far different than a man in his 30s. In this case, appellant was convicted of a crime he committed in his early 30s, and the military judge condemned him to die in prison. The military judge handed down this harsh sentence seemingly without regard for how appellant would grow and develop and who he might later become. The decision to send someone to prison until he dies should not be made after hearing fewer than two hours of evidence and only four defense witnesses providing perfunctory and ill-prepared testimony.

The sentence of confinement for life is overly harsh in the present case. Appellant thereby asks this court to reassess the sentence of confinement to a term of years which reflects the evidence presented in this appeal, and that which may

likely have been collected had defense counsel properly investigated the case, and appellant received proper assistance of an expert consultant in mitigation.

V. WHETHER THE MILITARY JUDGE PROPERLY ADVISED APPELLANT OF HIS FORUM RIGHTS?

Facts Relevant to Assignment of Error

The alleged offense occurred prior to 1 January 2019. (Charge Sheet). The charges were preferred on 8 May 2019, and referred on 17 April 2019. (Charge Sheet). On 8 May 2019, the military judge advised appellant that if appellant elected to be tried by the members, he would be sentenced by those members. (R. at 12). Alternatively, the military judge also explained that appellant could be tried and sentenced by the military judge alone. (R. at 12-13). Ultimately, appellant chose to be tried by military judge alone. (App. Ex. XLIII; R. at 243). The military judge did not explain to appellant that he could be tried by the members and, if the panel found him guilty of one or more offenses, sentenced by the members or the military judge alone. (R. at 12-13).

Standard of Review

This error presents a jurisdictional question, which this court reviews *de novo*. *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005).

Law

1. Article 25(d)(1), UCMJ applies to all courts-martial convened on or after 1 January 2019 regardless of the date of the alleged offense.

In the Military Justice Act of 2016 (MJA 16), Congress amended numerous provisions of the UCMJ and “gave the President the authority to designate the effective date of its provisions.” *United States v. Brubaker-Escobar*, ___ M.J. ___, slip op. at 5 (C.A.A.F. 7 Sept. 2021). Additionally, MJA 16 imposed upon the President “the duty to ‘prescribe in regulations whether, and to what extent, the amendments made by this [act] shall apply to a case in which *a specification alleges the commission, before the effective date of such amendments, of one or more offenses* or to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments.’” *Id.* (emphasis in original) (citing MJA § 5542(c)(1), 130 Stat. at 2967, *as amended by* National Defense Authorization Act (NDAA) 2018 § 531(n)(1), 131 Stat. at 1387). The President designated 1 January 2019 as the effective date of MJA 16, except as provided by Executive Order (EO) 13,825. *Id.*; EO 13,825, §10, 83 Fed. Reg. 9889 (1 March 2018).

This EO “was a valid exercise of the President’s rulemaking authority,” and it established that Articles 16, 25(d)(2) and (3), and 53, among others, did not go into effect for courts-martial involving offenses alleged to have been committed prior to 1 January 2019. *Brubaker*, ___ M.J. ___, slip op. at 3; EO 13,825, §10(a).

Conspicuously absent from EO 13,825, §10(a) is any reference to Article 25(d)(1), UCMJ (defined below). Therefore, a plain reading of the EO and the UCMJ suggests that both Congress and the President intended for Article 25(d)(1) to go into effect for courts-martial convened on or after 1 January 2019 without limitations.

As amended, Article 25 (d)(1), UCMJ, provides the accused “may, after the findings are announced and before any matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by the members.” Therefore, any accused tried at a court-martial convened after 1 January 2019 has the option to be sentenced by the military judge or by the same panel that just convicted him. If the accused had no choice but to be sentenced by the members, Article 25(d)(1) would be rendered superfluous, void, or ineffective, which is contrary to the Supreme Court’s standards for statutory interpretation. *Corley v. United States*, 556 U.S. 303, 314 (2009).

2. The failure to advise an accused of his rights pursuant to Article 25(d)(1) is jurisdictional error.

Broadly speaking, the right addressed and protected in Article 25 is the right of an accused service member to select the forum by which he or she will be tried. *Alexander*, 61 M.J. at 270. When the election is made, but not recorded, it is ministerial. *Id.* However, when the accused does not make the election at all or does not make an informed election, it is jurisdictional. *See Alexander*, 61 M.J. at

269; *United States v. Morgan*, 57 M.J. 119, 121 (C.A.A.F. 2002) (Appellant’s case was not jurisdictional, and he suffered no prejudice because the record showed “appellant made an *informed*, personal choice of forum.” (emphasis added)); *United States v. Townes*, 52 M.J. 275, 277 (C.A.A.F. 2000). Though *Alexander*, *Morgan*, and *Townes* are all cases in which the C.A.A.F. held there was substantial compliance with rule and tested for prejudice, the common thread through each case was that the military judge properly advised the accused of his forum rights, and there was no “allegation of coercion or that [the accused] was incompetent to making a knowing and intelligent decision” regarding his forum rights. *Townes*, 52 M.J. 275 (citing *Turner*, 47 M.J. at 350); *Alexander*, 61 M.J. at 269–70.

Article 16, UCMJ, which governs the request to be tried by military judge alone, further informs and supports the above cited Article 25 precedent. Article 16(b)(3), UCMJ. Military appellate courts have held that violations of Article 16, UCMJ, are not jurisdictional when there is “substantial compliance” with its requirements. *United States v. Goodwin*, 60 M.J. 849, 850 (N.M.C.C.A. 2005) (citing *United States v. Turner*, 47 M.J. 348, 350 (C.A.A.F. 1997; *United States v. Mayfield*, 45 M.J. 176, 178 (C.A.A.F. 1996)).

Substantial compliance may be non-jurisdictional when the record reflects that an appellant was informed of his rights, did not object to their counsel’s selection for them, and was not coerced or was incompetent to make a knowing

and intelligent waiver. *Turner*, 47 M. at 350; *Goodwin*, 60 M.J. at 851 (“Conversely, we have not found any authority suggesting that substantial compliance with Article 16, UCMJ, can be achieved without a rights advisement on the record.”); *see also Patton v. United States*, 281 U.S. 276, 312 (1930) (There must be the “express and intelligent consent of the defendant” to trial by judge alone); *United States v. Hansen*, 59 M.J. 410, 412 (C.A.A.F. 2004) (“What is important . . . is that the accused is aware of the substance of his rights and voluntarily waives them.”).

Argument

Everything in this court-martial occurred after 1 January 2019. The government preferred charges on 11 January 2019 and referred the case to a general court-martial approximately three months later. (Charge Sheet). Therefore, pursuant to the version of Article 25(d)(1) that took effect on 1 January 2019, the military judge was required to instruct appellant on his right to elect trial by members, and sentencing by *either* the military judge alone or the members. *See* Article 25(d)(1); *Brubaker*, __ M.J. __, slip op. at 3, 5; EO 13,825, §10(a). However, appellant was never properly advised of his forum rights pursuant to Article 25(d)(1). (R. at 12-13). Instead, the military judge simply advised appellant that if appellant elected to be tried by the members, he would be sentenced by those members. (R. at 12). Alternatively, the military judge


explained, appellant could be tried and sentenced by the military judge alone. (R. at 12-13).

Although appellant ultimately elected to be tried by military judge alone, this does not cure the error because his choice of forum was uninformed, creating a jurisdictional defect. (App. Ex. XLIII; R. at 243); *Morgan*, 57 M.J. at 121. This court cannot treat appellant's forum selection as "an informed personal choice" when the military judge's forum rights advisement was defective. *Morgan*, 57 M.J. at 121. This case presents the inverse of *Turner*, *Townes*, *Morgan*, and *Alexander*, in which the C.A.A.F. determined there was "substantial compliance" because the military judge properly informed the accused of his forum rights. *Townes*, 52 M.J. 275; *Turner*, 47 M.J. at 350; *Morgan*, 57 M.J. at 120; *Alexander*, 61 M.J. at 269–70. It logically follows that when the military judge does not properly inform the accused of his forum rights, there is no substantial compliance, and the error is jurisdictional. Any choice based on an erroneous forum rights advisement is the same as no choice at all. *See Morgan*, 57 M.J. at 121; *Turner*, 47 M.J. at 350; *Goodwin*, 60 M.J. at 851.


Therefore, due to this jurisdictional defect, appellant requests that this court set aside the findings and sentence.

Conclusion

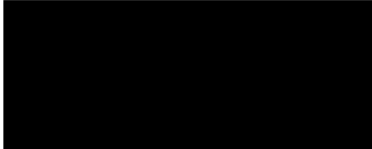
Wherefore, appellant asks this Honorable Court to set aside the findings and sentence.




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Appendix A: Matters Submitted Pursuant to *United States v. Grostefon*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant, through appellate defense counsel, personally requests that this court consider the following matters:

I. WHETHER THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT IN LIGHT OF THE GOVERNMENT'S FAILURE TO DISPROVE THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE OR SHOW THAT THE OFFENSE DID NOT QUALIFY AS THE LESSER-INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER?

II. WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED DEFENSE'S MOTION TO SUPPRESS APPELLANT'S STATEMENTS TO A MEDICAL PROVIDERS WHICH WERE TAKEN IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS?

III. WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED DEFENSE'S MOTIONS FOR A MISTRIAL FOLLOWING THE TESTIMONY OF AN INCOMPETENT CHILD WITNESS?

IV. WHETHER THE MILITARY JUDGE ERRONEOUSLY PERMITTED EVIDENCE OF INADMISSIBLE 404(B) EVIDENCE INVOLVING APPELLANT THREATENING A CONFINEE WHILE IN PRE-TRIAL CONFINEMENT?

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on January 20, 2022.



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