

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, GALLAGHER, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant HASAN K. AKBAR
United States Army, Appellant

ARMY 20050514

Headquarters, XVIII Airborne Corps and Fort Bragg
Dan Trimble, Military Judge (arraignment)
Patrick J. Parrish, Military Judge (motions hearing)
Stephen R. Henley, Military Judge (motions hearing & trial)
Colonel Malinda E. Dunn, Staff Judge Advocate (pretrial)
Lieutenant Colonel Tyler J. Harder, Acting Staff Judge Advocate (recommendation)
Colonel W. Renn Gade, Staff Judge Advocate (addendum)

For Appellant: Captain E. Patrick Gilman, JA; Captain Kristin B. McGrory, JA (argued); Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Bradley M. Voorhees, JA; Major Timothy W. Thomas, JA; Captain Shay Stanford, JA (on brief & petition for new trial); Colonel Mark Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter, JA; Major Laura R. Kesler, JA; Captain E. Patrick Gilman, JA; Captain Kristin B. McGrory, JA (on reply brief & supplemental brief); Mr. Louis P. Font, Esquire.

For Appellee: Major Adam S. Kazin, JA; Captain Chad M. Fisher, JA (argued); Major Christopher B. Burgess, JA; Major Adam S. Kazin, JA; Captain Nicole L. Fish, JA; Captain Joshua W. Johnson, JA (on brief); Colonel Denise R. Lind, JA; Lieutenant Colonel Mark H. Sydenham, JA; Major Adam S. Kazin, JA; Captain Nicole L. Fish, JA (petition for new trial); Major Amber J. Williams, JA; Captain Chad M. Fisher, JA (on supplemental brief); Colonel Norman F.J. Allen, III, JA; Colonel Denise R. Lind, JA; Lieutenant Colonel Steven P. Haight, JA (additional pleadings).

Amicus Curiae on behalf of Appellant: Colonel Mark Cremin, JA; Captain Elizabeth Turner, JA (on brief)—for the United States Army Trial Defense Service.

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13 July 2012

MEMORANDUM OPINION
AND
ACTION ON PETITION FOR NEW TRIAL

BURTON, Judge:

A fifteen-member panel composed of officer and enlisted members, sitting as a general court-martial, unanimously convicted appellant, contrary to his pleas, of three specifications of attempted premeditated murder, and two specifications of premeditated murder, in violation of Articles 80 and 118, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 918 (2000) [hereinafter UCMJ]. The court-martial sentenced appellant to be put to death. The convening authority approved the adjudged sentence.

Appellant's case is before this court for review pursuant to Articles 66 and 73, UCMJ. On 19 June 2008, appellant's request for appellate expert assistance in the form of a mitigation specialist was granted. On 5 May 2009, appellant requested additional funding for his mitigation specialist, which was denied. Appellant also requested appointment of additional experts in forensic psychiatry and psychology, which was also denied. Subsequently, appellant filed two petitions for extraordinary relief with our superior court on 19 and 26 May 2009, renewing the foregoing requests for expert assistance. On 23 June 2009, the Court of Appeals for the Armed Forces (CAAF) stayed the proceedings before this court in order to consider appellant's petitions and the government's consolidated response thereto. On 3 September 2009, CAAF denied appellant's petitions and, on 16 September 2009, lifted the stay of proceedings.

Appellant has alleged fifty-eight assignments of error and three supplemental assignments of error. Appellant also filed a petition for a new trial. We have reviewed all of the assignments of error and the petition for a new trial. We find five of the assignments of error merit discussion, but no relief.

FACTUAL BACKGROUND

Appellant was assigned to the 326th Engineers which was attached to the 1st Brigade, 101st Airborne Division (Air Assault) during a deployment to Iraq. On 22 March 2003, the 1st Brigade was located at Camp Pennsylvania preparing to cross the line of departure (LOD) from Kuwait into Iraq. Earlier in the day, the platoon

received training on the proper use of grenades. That evening, appellant and a junior soldier were assigned to guard his squad's grenades for two hours. The first hour, Private First Class (PFC) CP stood guard with him. Private First Class TW stood guard with appellant during the second hour. The grenades were stored under the passenger seat in High Mobility Multipurpose Wheeled Vehicle-Alpha 21 (HMMWV-A21), which belonged to appellant's squad located on Pad 4. When PFC CP arrived for guard duty he inventoried the grenades and all of the grenades were there. There was no requirement that the grenades be inventoried. During the two-hour guard shift, appellant was left alone with the grenades twice, both times while the junior soldier went to wake up the next shift. At an underdetermined time, appellant removed four M-67 fragmentation grenades and three M-14 incendiary grenades from HMMWV-A21 and placed them into his pro-mask carrier and his Joint Service Lightweight Integrated Suit Technology (JSLIST) bag.

When appellant's guard duty ended he returned to his sleep tent located on Camp Pennsylvania's Pad 4. Staff Sergeant (SSG) EW assumed guard duty from appellant, but did not inventory the grenades at the beginning of his guard shift.

Appellant left Pad 4 on foot and travelled to Pad 7 where the brigade headquarters was located. Upon arrival at Pad 7, appellant turned off the stand-alone generator, killing all the exterior lights on Pad 7. Appellant then tossed an incendiary grenade into Tent 1 which was occupied by the brigade commander, brigade Command Sergeant Major, and the brigade executive officer. After the explosion in Tent 1, the brigade executive officer, Major (MAJ) KR, exited the tent and was shot by appellant. Appellant next moved to Tent 2, which was occupied by several staff officers, and pulled the pin from a fragmentation grenade and yelled into the tent, "We're under attack." He then tossed the grenade into the tent. Appellant then went to Tent 3, which was occupied by several Captains on the brigade staff, and threw a fragmentation grenade inside. As Captain (CPT) CS exited Tent 3, appellant shot him in the back. As a result of appellant's actions, MAJ GS and CPT CS were killed and fourteen other soldiers were injured. Some of the soldiers suffered permanent damage. Appellant also injured himself.

As the unit leadership was reacting to the attack, setting up security and conducting an accountability check, appellant was identified as being absent from his unit and grenades were reported as missing from HMMWV-A21. After helping set up a secure perimeter around the Tactical Operations Center (TOC) and placing two Kuwaiti interpreters under guard, MAJ KW, the brigade staff intelligence officer, proceeded to the sleeping area to set up a secure perimeter around the tents. Upon noticing soldiers at a bunker outside of the perimeter, MAJ KW approached them in an effort to identify them and prevent accidental fratricide. As MAJ KW approached the first soldier, he asked "Who do we got out here?" and received the response of "Sergeant Akbar." Recognizing the name as belonging to the

unaccounted-for soldier, MAJ KW maintained his composure, asked “who else we got out here?” and then moved to restrain appellant by shoving him to the ground and drawing his sidearm. Major KW then identified himself and ordered a nearby soldier to help guard appellant. Major KW then asked appellant if he bombed the tent and appellant confirmed that he was responsible by saying, “Yes.” Major KW then directed two non-commissioned officers (NCOs) to guard appellant and went to seek legal advice on how to proceed.

When appellant was apprehended he had one M-67 and two M-14 grenades in his protective mask. An additional three M-14 canisters were discovered in appellant’s JSLIST bag. These were confiscated along with appellant’s assigned M-4 rifle. One expended shell casing from an M-4 was found in front of Tent 1 and two expended shell casings from an M-4 rifle were found in front of Tent 3. Ballistic analyses of bullets recovered from MAJ KR, who appellant shot in the hand when MAJ KR was exiting Tent 1, and CPT CS, who appellant shot and killed as CPT CS was exiting Tent 3, confirmed that the bullets were fired from appellant’s assigned M-4 rifle. The shell casings recovered near Tents 1 and 3 also confirmed appellant’s rifle was used in the attack. Appellant’s uniform and hands both contained residue from M-14 and M-67 grenades. Additionally, appellant’s fingerprints were discovered on the Pad 7 light generator that had been shut off.

For his actions on 22 March 2003, appellant was charged with three specifications of attempted premeditated murder by throwing grenades into Tents 1, 2, and 3, and by shooting MAJ KR. Appellant was also charged with two specifications of premeditated murder for causing the death of MAJ GS and CPT CS. These charges were referred by the convening authority with special instructions to be tried as capital offenses. As previously noted, appellant was convicted of these charges and sentenced to death.

LAW AND DISCUSSION

I. PRESCRIPTION AND PLEADING OF RCM 1004(c) AGGRAVATING FACTORS¹

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the United States Supreme Court held that the aggravating factors in Arizona’s capital punishment scheme were

¹ Appellant’s allegations of improper delegation, prescription, pleading, investigation, and referral of the aggravating factors were presented in Assignment of Error III and Supplemental Assignment of Error III.

the “functional equivalent” of elements which the Fifth and Sixth Amendments required to be determined by a jury. Appellant seeks to extrapolate from this precedent a precept applicable to the military capital punishment scheme: that aggravating factors must, for all purposes, be treated as elements.

In the first instance, appellant avers that Congress impermissibly delegated the authority to prescribe, or the President exceeded his authority by prescribing, the capital aggravating factors found in Rule for Courts-Martial [hereinafter R.C.M.] 1004(c), because just like elements of a crime, aggravating factors must be prescribed by Congress. In addition, appellant avers that, just like elements of a crime, aggravating factors must be included in the charge sheet. Included in this latter complaint are attendant failures to properly investigate and refer the capital charges of which appellant was convicted.

A. Background

The government preferred, *inter alia*, two specifications of murder against appellant, each alleging violations of Article 118(1), UCMJ.² The charges against appellant were investigated pursuant to Article 32, UCMJ and the investigating officer recommended that the charges against appellant be referred to a general court-martial. (App. Ex. 75, p. 2; App. Ex. 75, Article 32 Tr. at 945).

The staff judge advocate (SJA) thereafter provided her pretrial advice and recommendation to the convening authority, *see* UCMJ art. 34, in which she recommended that appellant’s case be referred as a capital case. In her recommendation, the SJA specifically referenced two R.C.M. 1004 aggravating factors:

² The specifications of Charge II read:

SPECIFICATION 1: In that Sergeant Hasan K. Akbar, U.S. Army, did, at or near Camp Pennsylvania, Kuwait, on or about 22 March 2003, with premeditation, murder CPT [CS] by means of throwing an armed grenade into his sleep tent and by shooting him in the back with a rifle.

SPECIFICATION 2: In that Sergeant Hasan K. Akbar, U.S. Army, did, at or near Camp Pennsylvania, Kuwait, on or about 22 March 2003, with premeditation, murder Major [GS] by means of throwing an armed grenade into his sleep tent.

The aggravating factors are: that the premeditated murder of Major [GS], a violation of UCMJ Article 118(1), was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered (R.C.M. 1004(c)(4)); and if the accused is found guilty of Specifications 1 & 2 of Charge II, the accused will have been found guilty of a violation of UCMJ Article 118(1), and will also have been found guilty in the same case of another violation of UCMJ Article 118 (R.C.M. 1004(c)(7)(J)).

The convening authority approved the SJA's pretrial recommendation and referred the charges against appellant to a general court-martial with special instructions that it was "to be tried as a capital case." Shortly thereafter and prior to arraignment, the prosecution notified appellant in writing that it intended to prove two aggravating factors—the same two factors referenced in the SJA's pretrial recommendation. (App. Ex. I).³

The panel at appellant's court-martial unanimously found him guilty of both premeditated murder specifications. The prosecution then moved, without objection from the defense, to limit the aggravating factor in appellant's case to R.C.M. 1004(c)(7)(J): multiple convictions of premeditated murder in the same case. The military judge granted the prosecution's motion and instructed the panel as follows:

³ In a document titled "Notice of Aggravating Factors," the government notified appellant:

2. The prosecution intends to prove the aggravating factor cited under R.C.M. 1004(c)(4), to wit: that the premeditated murder of Major [GS], a violation of U.C.M.J. 118(1), was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered.
3. The prosecution further intends to prove the aggravating factor cited under R.C.M. 1004(c)(7)(J), to wit: that having been found guilty of premeditated murder, a violation of U.C.M.J. Article 118(1), the accused has been found guilty in the same case of another violation of U.C.M.J. Article 118.

(App. Ex. I).

[A] death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that the aggravating factor existed. The alleged aggravating factor in this case is: having been found guilty of the premeditated murder of Major [GS], a violation of U.C.M.J. Article 118(1), the accused has been found guilty in the same case of another violation of U.C.M.J. Article 118(1), the premeditated murder of Captain [CS].

(App. Ex. 306, p. 5). The panel found this aggravating factor beyond a reasonable doubt and sentenced appellant to death. (App. Ex. 307).

B. The Military System's Capital Aggravating Factors

Where preserved for appeal, we review de novo matters of constitutionality, to include those of congressional delegation, presidential rule-making, due process, and constitutionally required notice.⁴

Article 118, UCMJ, authorizes the death penalty for premeditated murder. Although the statute permits imposition of the death penalty without regard to aggravating factors, the Supreme Court held in *Loving v. United States (Loving II)*, 517 U.S. 748, 755 (1996), “that aggravating factors are necessary to the constitutional validity of the military capital punishment scheme as now enacted.”⁵

⁴ See, e.g., *Loving v. United States (Loving II)*, 517 U.S. 748 (1996) (reviewing the constitutionality of a congressional delegation of authority and the presidential authority to prescribe aggravating factors); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (reviewing the constitutionality of the notice provided in a charge sheet); *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010) (reviewing the constitutionality of a statute); *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004) (reviewing the President’s Article 56, UCMJ, prescription of a maximum punishment); *United States v. Czeschin*, 56 M.J. 346 (C.A.A.F. 2002) (reviewing the President’s Article 36, UCMJ, rule-making authority); *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998) (reviewing the President’s Article 36, UCMJ, rule-making authority); *United States v. Zachary*, 61 M.J. 813 (Army Ct. Crim. App. 2005) (reviewing the President’s Article 56, UCMJ, prescription of aggravating factors).

⁵ In *Loving*, the Supreme Court assumed applicability of *Furman* and the resulting case law for convictions under Article 118, UCMJ, for murder committed in the United States during peacetime as the government did not contest such application. Similarly, the government in this case has not contested the applicability of Supreme

(continued . . .)

By applying its Eighth Amendment death-penalty jurisprudence to the military justice system, *see, e.g., Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion), the Court remarked that Article 118, UCMJ, by its own terms, too broadly defined the eligible class of individuals against whom the death penalty may be imposed. “[A] capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Loving II*, 517 U.S. at 755 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), and *Zant v. Stephens*, 462 U.S. 862, 877 (1983)) (internal quotation marks omitted).

In the military justice system, this narrowing of the class is achieved through application of R.C.M. 1004. The presidentially prescribed R.C.M. 1004(c)⁶ lists the aggravating factors that must be proven to exist for the death penalty to be lawfully imposed.⁷

In *Loving*, the Supreme Court considered, and rejected, appellant’s claim that the President’s prescription of aggravating factors was “inconsistent with the Framers’ decision to vest in Congress the power ‘To make Rules for the Government and Regulation of the land and naval Forces.’” *Loving II*, 517 U.S. at 759 (quoting the U.S. Const. art. I, § 8, cl. 14). After considering the history of military capital punishment in both England and in the United States, the Court held that Congress’s delegation to the President, through Articles 18, 36, and 56, UCMJ, and the President’s subsequent prescription of R.C.M. 1004 was constitutional. *Id.* at 759–70. *See also* U.S. Const. art. II, § 2, cl. 1. “We hold that Articles 18, 36, and 56

(. . . continued)

Court death-penalty jurisprudence to the military justice system, and we will assume its applicability to the circumstances of this case, although the crime occurred in a foreign country on the eve of battle. *See Loving II*, 517 U.S. 748; *Kennedy v. Louisiana*, 129 S.Ct. 1, 2 (2008).

⁶ Exec. Order No. 12,460, 49 Fed. Reg. 3169 (Jan. 24, 1984) *reprinted as amended in Manual for Courts-Martial*, (2002 ed.) [hereinafter *MCM*, 2002], pt. II, R.C.M. 1004.

⁷ At courts-martial, the existence of an aggravating factor is for the panel to determine, and it must be found unanimously and beyond a reasonable doubt. R.C.M. 1004(b)(4), 1004(c).

together give clear authority to the President for the promulgation of RCM 1004.” *Loving II*, 517 U.S. at 770.

Subsequent to its decision in *Loving*, the Supreme Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* involved the constitutionality of the State of Arizona’s capital punishment scheme. In Arizona, the maximum punishment for first-degree felony murder was death or life imprisonment; however, a death sentence could be imposed only if, *inter alia*, at least one aggravating factor was found to exist. The existence of any aggravating factor was to be determined by the trial judge and not the jury. After petitioner Ring was convicted of felony murder, the Arizona trial judge determined two aggravating factors existed and sentenced him to death. Ring petitioned the Supreme Court, asserting that the Arizona capital punishment scheme was unconstitutional because “the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.” *Ring*, 536 U.S. at 243 n.4. This “tightly delineated” claim was rooted in the decisions of *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), in which the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490 (recognizing this right under the Due Process Clause of the Fourteenth Amendment). *Jones*, 526 U.S. at 243 n.6 (recognizing this right under the Fifth and Sixth Amendments).

Although it had previously rejected a similar challenge in *Walton v. Arizona*, 497 U.S. 639 (1990), the *Ring* Court narrowly agreed with the petitioner. The Supreme Court’s ultimate conclusion depended upon the Arizona Supreme Court’s predicate construction of the state’s capital punishment scheme. In its opinion below, the Arizona high court concluded that under Arizona law “a defendant cannot be put to death solely on the basis of a jury’s verdict . . . It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death.” *State v. Ring*, 200 Ariz. 267, 279 (2001), *rev’d sub nom. Ring v. Arizona*, 536 U.S. 584 (2002). The *Ring* Court rejected the prosecution’s claim that the Arizona system allowed for the imposition of either death or life imprisonment based upon the jury’s verdict. “In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury’s guilty verdict.” *Id.* at 604 (quoting *Apprendi*, 530 U.S. at 494) (internal quotations and alterations omitted). Accordingly the Court held, “Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of a greater offense,’ *Apprendi*, 530 U.S. at 494 n.19[], the Sixth Amendment requires that they be found by a jury.” *Ring*, 536 U.S. at 609.

Appellant argues that *Ring*, which was decided six years after *Loving*, changed the legal character of aggravating factors in the capital system, so much so that *Loving* is no longer good law.

The concerns present in *Ring* simply do not apply to this case.⁸ Unlike the civilian laws at issue in *Ring*, *Jones*, and *Apprendi*, imposition of the death penalty for a violation of Article 118(1), UCMJ, does not require any additional finding of fact because Congress, without reservation, authorized the maximum punishment of death for Article 118(1), UCMJ. *Loving II*, 517 U.S. at 769. The aggravating factors promulgated by the President in R.C.M. 1004 serve to restrict the opportunities at courts-martial for imposition of the death penalty, not to increase the authorized maximum punishment. *Id.* (“This past practice suggests that Articles 18 and 56 support as well an authority in the President to restrict the death sentence to murders in which certain aggravating circumstances have been established.”).

In *Apprendi*, the Supreme Court specifically noted that its holding did not divest the term “sentencing factor” of meaning:

The term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense. On the other hand, when the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense.

Apprendi, 530 U.S. at 494 n.19. The aggravating factors present in R.C.M. 1004 are not elements, nor even the functional equivalent of elements as they do not provide for an “increase beyond the maximum authorized statutory sentence.” *Id.* The validity of the Supreme Court decision in *Loving* remains unaltered by *Ring*. Accordingly, we reject appellant’s argument that R.C.M. 1004 aggravating factors are elements requiring legislative prescription.

⁸ In this case, the panel found the aggravating factor beyond a reasonable doubt and sentenced appellant to death. (App. Ex. 307).

C. Notice of the Aggravating Factors

Appellant also alleges constitutionally deficient notice because the R.C.M. 1004 aggravating factor was not included in the charge and specifications, not investigated, and not properly referred.⁹ *Cf. Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (stating that “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt”).¹⁰

This argument fails for the same reasons cited above. R.C.M. 1004 aggravating factors are not elements or the functional equivalent of elements, so they are not required to be included within the charges and specifications. This argument also fails to account for constitutional distinctions. “In courts-martial, there is no right to indictment by grand jury.” *United States v. Easton*, 71 M.J. 168, ___ (C.A.A.F. 2012) (citing U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .”)). “In addition, there is no Sixth Amendment right to trial by jury in courts-martial.” *Id.* (citing *Ex parte Quirin*, 317 U.S. 1, 39 (1942); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F.2002) (per curiam)). Thus, the Supreme Court’s pronouncement in *Jones* regarding the pleading of sentence enhancements is not clearly applicable to the military capital punishment scheme in the first instance.¹¹

⁹ The aggravating factor in this case was the premeditated killing of a second individual. This, of course, was pled on the charge sheet, in so far as appellant was charged with the premeditated murder of two individuals. Appellant fails to clearly identify what fact should have been included within the specifications that was not.

¹⁰ *Ring* specifically did not concern or apply to indictments. *Ring*, 536 U.S. at 243 n.4.

¹¹ See, e.g., *People v. McClain*, 343 Ill.App.3d 1122 (2003); *State v. Hunt*, 582 S.E.2d 593 (N.C. 2003); *McKaney v. Foreman*, 209 Ariz. 268 (2004); *Goff v. State*, 14 So.3d 625, 665 (Miss. 2009) (“We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. *Spicer[v. Mississippi]*, 921 So.2d [292,]319 (citing *Brown[v. Mississippi]*, 890 So.2d [901,]918”)); *Kormondy v. State*, 845 So.2d 41 (Fla. 2003) (“*Ring* does not require . . . notice of the aggravating factors that the State will present at sentencing.”).

In *Loving*, the Supreme Court specifically rejected the argument that Article 36, UCMJ,¹² limited the President’s discretion to define aggravating factors for capital crimes. *Loving II*, 517 U.S. at 770. Congress delegated the power to prescribe aggravating factors in capital cases to the President, who “acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance.” *Id.* at 773.

Recognizing a distinction between sentencing factors and sentence enhancements, R.C.M. 307 requires sentence enhancements to be pled while specifically excepting aggravating factors per R.C.M. 1004 from the need to be expressed in the charging document itself. R.C.M. 1004(b)(1)(B), 307(c)(3); R.C.M. 307(c) analysis at A21-22 (citing *Jones* and *Apprendi*). R.C.M. 1004 procedures afford constitutional protections. The prosecution is required “to give the defense written notice of the ‘aggravating factors’ set out in (c) that it intends to prove.” *United States v. Loving (Loving I)*, 41 M.J. 213, 266–267 (C.A.A.F. 1994) (citing RCM 1004(b)(1)). This notice must be provided to the accused prior to arraignment. R.C.M. 1004(b)(1)(B). The analysis to R.C.M. 1004 explains that the timing of notice under the rule is intended to “afford some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases.” R.C.M. 1004 analysis at A21-76. *See also* R.C.M. 307(c) analysis at A21-22.

This system clearly comports with the Supreme Court holding in *Ring* and its underlying rationale. There is no constitutional infirmity.

¹² Article 36, UCMJ, states in part:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

II. SUPPRESSION OF STATEMENT¹³

Appellant avers that two different military judges erred in not granting his motion to suppress his response of “yes” which was made to MAJ KW in the aftermath of the attack and without the benefit of rights warnings under either Article 31, UCMJ, or *Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree.

At the time of the unwarned questioning, MAJ KW was a brigade staff officer who was reacting to an attack on his unit and who was “focused solely on the accomplishment of an operational mission,” that being to protect the soldiers in his unit from further attack and to prevent friendly fire casualties in the confusion that ensued following the attack. *United States v. Cohen*, 63 M.J. 45, 50 (citing *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999)). Major KW’s actions in ascertaining appellant’s identity, subduing him, and asking him if he was responsible for the attack were taken pursuant to “unquestionable urgency of the threat” and “limited” in scope to those “required to fulfill his operational responsibilities.” *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990) (citations omitted). Furthermore, his actions taken immediately after ascertaining that appellant was responsible for the attack indicate that MAJ KW was not attempting “to evade [appellant’s] constitutional or codal rights.” *Id.* Instead of trying to elicit more incriminating evidence from appellant, MAJ KW placed him under guard, sought legal advice, and thereafter ensured that appellant was informed of his Article 31(b) rights by a trained interrogator prior to detailed questioning. Accordingly, we find that MAJ KW was neither “acting,” nor “could [he] reasonably be considered to [have been] acting in an official law enforcement or disciplinary capacity,” and therefore, there was no requirement for him to have provided an Article 31(b), UCMJ, rights warning to appellant prior to asking the questions he asked.

When MAJ KW asked appellant if he was responsible for the attack, MAJ KW had no way of knowing if there was more than one attacker or if the attack was even over. This scenario clearly fits within the “public safety exception” in regard to the requirements for *Miranda* warnings. See *United States v. Quarles*, 467 U.S. 649 (1984). We find, therefore, that neither of the military judges abused their discretion in denying appellant’s motion to suppress his statement to MAJ KW.

¹³ Appellant’s allegations concerning the admission of his statement were presented in Assignment of Error VII.

III. WHETHER SERGEANT HASAN K. AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AT EVERY STAGE OF HIS COURT-MARTIAL.¹⁴

Appellant alleges he received ineffective assistance of counsel at every critical stage of his court-martial, ranging from the appointment of counsel through the presentencing case. We reviewed every aspect of appellant's claim, including consideration of the training, experience, and abilities of the trial defense counsel; the pretrial proceedings and motions practice; the investigative efforts of the defense team, to include the assistance from mitigation experts; the selection of the court members; the trial strategy; and the performance of counsel throughout the trial and during the presentencing phase. We reject appellant's claim of ineffective representation.

A. Standard of Review and Applicable Law

The Sixth Amendment guarantees an accused the right to the effective assistance of counsel. U.S. Const. amend. VI; *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (citing *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001)). We review de novo claims that an appellant did not receive the effective assistance of counsel. *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009). "In assessing the effectiveness of counsel we apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in *United States v. Cronin*, 466 U.S. 648, 658 (1984)." *Gooch*, 69 M.J. at 361. To overcome the presumption of competence, the *Strickland* standard requires appellant to demonstrate "both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687).

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?

¹⁴ Appellant's numerous allegations of ineffective assistance of counsel were presented in Assignments of Error I, II, and XVII. Only those found in Assignments of Error I and II merit discussion.

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?

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991). Hindsight in these matters is not usually countenanced by this court or by the Supreme Court, which said in *Strickland*:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133–34 [] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See Michel v. Louisiana*, [350 U.S. 91, 101 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See* [Gary] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983).

Strickland, 466 U.S. at 689–90.

B. Procedural Posture

Assessing the truth of appellant's factual allegations under the first part of the *Polk* test raises an important procedural issue. Where evidence is provided on appeal, as to the competence or ineffectiveness of counsel during the court-martial process, we must first determine whether resort to a post-trial fact-finding hearing is

necessary. *See United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). As a rule, we cannot decide a disputed question of fact “in a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties.” *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, in cases where the record of trial compellingly demonstrates the improbability of the facts supporting the appellant’s post-trial claim of ineffectiveness, this Court “may discount those factual assertions and decide the legal issue.” *Ginn*, 47 M.J. at 248. Additionally, if the factual assertions “allege an error that would not result in relief even if any factual dispute were resolved in appellant’s favor,” then the conflict may be ignored and the legal issue decided. *Id.*

In this case, appellant did not submit a post-trial affidavit. However, in some respects there are conflicts between inferential facts supporting appellant’s ineffectiveness claims, affidavits submitted by others in support of those claims, and the post-trial documents, to include affidavits, submitted by appellant’s defense counsel to rebut these claims. Ultimately, we conclude that there is no conflict that requires a post-trial fact-finding hearing in this case.

C. Appellant’s Defense Counsel’s Qualifications

Appellant was defended at court-martial by MAJ DB and CPT DC.¹⁵ Appellant first alleges that he was denied due process of law by the absence of

¹⁵ Appellant was originally detailed three counsel: MAJ DB, CPT DC and CPT JT. An individual military counsel (IMC) request was approved for a fourth military defense counsel, Lieutenant Colonel (LTC) VH. In addition, appellant hired two civilian attorneys, Mr. MD-F and Mr. WA-H, to represent him during the motions phase of the trial. However, prior to trial, appellant released LTC VH, CPT JT, Mr. MD-F, and Mr. WA-H from further representation, leaving MAJ DB and CPT DC to represent appellant during the court-martial. Of the remaining counsel, MAJ DB began his representation of appellant on 23 March 2003, the day following the charged offenses, and he continued this representation throughout the court-martial process, to include the Article 32, UCMJ, investigation, a pre-referral briefing concerning the capital referral of the case, the discovery phase, the pretrial motion practice, and the trial itself. At one point in time, MAJ DB was reassigned to a new duty station (PCS’d), but appellant completed a successful IMC request for MAJ DB’s continued representation. In this request, appellant stated, “MAJ DB is the only member of the defense team with any level of prior capital experience.” It is also worth noting that CPT DC was promoted to Major just prior to trial, but will be referred to as CPT DC throughout this opinion for ease of reference.

formalized standards for assigning counsel to capital cases and that his detailed counsel were unqualified to represent him in a capital case. We disagree.

There has been no bright light rule to determine what qualifications are necessary for capital cases, and we will not impose such a standard here. In *United States v. Murphy*, 50 M.J. 4, 9–10 (C.A.A.F. 1998), and *United States v. Loving (Loving I)*, 41 M.J. 213, 300 (C.A.A.F. 1994), the Court of Appeals for the Armed Forces (CAAF) followed the route illuminated by the Supreme Court in *Cronic*; the same route will be followed in this case.

That route compels us to look to the adequacy of the counsel's performance, rather than viewing the limited experience of counsel as an inherent deficiency. Of course, as the ABA Guidelines and 18 USC § 3005 implicitly suggest . . . inexperience—even if not a flaw *per se*—might well lead to inadequate representation. In the final analysis, what we must consider is whether counsels' performance was "deficient" and whether "counsels' errors were so serious as to deprive the defendant of a fair trial," one where the "result [of the trial] is reliable."

Murphy, 50 M.J. at 10 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)) (internal citations omitted). Thus, while the American Bar Association guidelines, Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), and civilian federal law, 18 U.S.C. §§ 1359,¹⁶ 3005 (2006), are "instructive," the adequacy of counsels' representation is judged by their actual performance, and not any per se rules established by outside organizations. *Id.* at 9–10.

Unlike the counsel in *Murphy*, MAJ DB and CPT DC provided a detailed listing of their trial experience and their knowledge of capital cases. On the record both counsel detailed the number of cases each counsel had tried and how long counsel had been admitted to their respective state bar. Both counsel further detailed the number of contested felony cases involving voir dire examination of witnesses, cross-examination, and opening and closing statements. Counsels' experience with expert witnesses in the fields of mental and medical health, forensic psychiatry, and ballistics was also detailed.

¹⁶ 18 USC § 1359 (2006) was not promulgated until 9 March 2006; therefore it was not in effect at the time of appellant's court-martial in 2005.

MAJ DB possessed an L.L.M. in military law from The Judge Advocate General's Legal Center and School, with a specialty in criminal law. He also possessed significant military justice experience, to include experience with capital cases. For one year, MAJ DB worked as a government appellate counsel for the Army, where he briefed approximately fifty appellate cases dealing with a variety of issues to include a variety of expert witnesses. In anticipation of handling the case of *United States v. Kreutzer*, a capital case pending appeal at the time, MAJ DB attended a capital litigation course. Additionally MAJ DB, served in the Trial Counsel Assistance Program (TCAP) providing training to trial counsel at various military installations and rendering advice in the case of *United States v. Ronghi*, where a capital referral was contemplated. After leaving TCAP, MAJ DB was assigned as a branch chief at the Government Appellate Division where he participated in strategy sessions and reviewed and edited the government brief for *United States v. Murphy*, a capital case, on appeal. He also reviewed and edited the government briefs in *United States v. Kreutzer* in addition to hundreds of other appellate briefs. MAJ DB has argued approximately seven cases before CAAF and approximately seven cases before this court.

CPT DC gained experience using collateral resources in the Army, Department of Defense, and civilian sector to assist in the investigation and defense of cases. In September 2003, CPT DC attended a week-long death penalty course designed to prepare an attorney to try and defend a capital case.

Post-trial affidavits revealed the myriad outside resources and capital litigation consultants¹⁷ to which the defense counsel had access and used prior to trial. Counsel obtained materials from two other death penalty cases to include death penalty motions and case analysis. Additionally they read numerous law review articles in preparation for appellant's case.

Appellant was not denied due process of law due to an absence of formal standards for the representation of soldiers in capital cases, nor by the assignment of

¹⁷ Counsel consulted with the following legal experts: Colonel Robert D. Teetsel, Chief, Defense Appellate Division; Lieutenant Colonel E. Allen Chandler Jr., Deputy Chief, Defense Appellate Division (developing the mitigation case, appointment of experts and possibility of a plea); Lt. Col. Dwight Sullivan (USMC) and Lieutenant Michael Navarre (USN) (voir dire and motions); Mr. Isaiah "Skip" Grant, head of the National Capital Resource Counsel Project with the Federal Defenders of Nashville, Tennessee (trial strategy and tactics); and Tom Dunn, Georgia Resource Center (trial strategy and frontloading mitigation evidence).

MAJ DB and CPT DC to represent him in his capital case. We find MAJ DB and CPT DC were well-qualified to handle a capital case. They had significant trial experience and conducted adequate preparation prior to handling appellant's court-martial. Though neither MAJ DB nor CPT DC had tried a capital case, they were nonetheless qualified to represent appellant with "a degree of competence well above the constitutional minimums at his court-martial." *Loving I*, 41 M.J. at 300.

D. Appellant's Defense Counsel's Conflicts of Interest

Appellant next alleges that MAJ DB's and CPT DC's performance at trial was hindered due to several conflicts of interest. We find no merit in these allegations. Appellant's counsel were free from any conflict, perceived or otherwise. Assuming *arguendo* a conflict did exist, appellant knowingly and intelligently waived any such conflict without raising any objections at trial.

The right to effective assistance of counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). To establish an actual conflict of interest, appellant must show that (1) "counsel actively represented conflicting interests" and (2) that the "actual conflict of interest adversely affected his lawyer's performance."¹⁸ *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). To show an adverse effect, a petitioner must show "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005) (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996)). "[P]rejudice is presumed when counsel is burdened by an

¹⁸ The Army's ethical rules regulate a lawyer's responsibility in this regard as well. The Army Rules of Professional Conduct state, "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless; (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Army Reg. 27-26, Legal Services: Rules of Professional Conduct for Lawyers [hereinafter AR 27-26], Rule 1.7(b) (1 May 1992). "A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." AR 27-26, comment to Rule 1.7.

actual conflict of interest.” *Strickland*, 466 U.S. at 692 (citing *Cuyler*, 446 U.S. at 345-50).

“An accused may waive his right to conflict-free counsel,” *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (citing *United States v. Davis*, 3 M.J. 430, 433 & n.16 (C.M.A. 1977)), when the waiver is a “knowing intelligent [act] done with sufficient awareness of the relevant circumstances and likely consequences.” *Id.* (quoting *Davis*, 3 M.J. at 433). The discussion to R.C.M. 901(d)(4) provides:

Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused’s choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an appropriate record can be made.

CAAF affirmed this process in *United States v. Lindsey*, 48 MJ 93, 98 (C.A.A.F. 1998).

The first conflict alleged is that the military judge erred in accepting appellant’s waiver of conflict-free counsel after defense counsel disclosed a relationship between themselves and MAJ AM,¹⁹ a victim in the case. We disagree.

MAJ AM, who was assigned as the trial counsel for 1st Brigade, 101st Airborne Division (Air Assault), was injured when appellant tossed a grenade into his tent. Before the deployment, MAJ AM was a military prosecutor at Fort Campbell which is also the home station of 1st Brigade. As a result, MAJ AM and MAJ DB possessed an adversarial, professional relationship, working with one another for about a year on various military justice issues. MAJ DB disclosed this relationship to the appellant in writing. MAJ DB further disclosed that he maintained a strictly professional relationship with MAJ AM and that he did not know MAJ AM in any capacity outside of their professional adversarial role. MAJ AM had also worked with CPT DC in an adversarial capacity. CPT DC also advised

¹⁹ At the time MAJ DB and CPT DC interacted with AM he held the rank of Captain. However, he was subsequently promoted to Major prior to testifying at appellant’s court-martial.

the appellant in writing of this relationship; specifically, that he, as a defense counsel, had tried a case against MAJ AM in 2002.

Both counsel advised appellant that their previous working relationship with MAJ AM would not affect their ability to represent him. Neither counsel had any reservations about representing the appellant and did not believe that appellant's interest would be adversely affected. The appellant signed both of the documents confirming that he understood the prior professional relationship between his counsel and MAJ AM and that it was his desire to have MAJ DB and CPT DC remain on his case.

At the first Article 39(a), UCMJ, session, defense counsel informed the military judge of the foregoing and provided the court with appellant's acknowledgment and desire to continue with his detailed counsel. The military judge discussed with appellant his constitutional right to be represented by counsel who have undivided loyalty to him and his case. Appellant informed the military judge that after discussion with his defense counsel, he decided for himself that he wanted MAJ DB and CPT DC to still represent him: "Because of my - - my familiarity with MAJ DB and CPT DC over the past year that I've had in dealing with them and their familiarity with my case. I think to bring another lawyer on that I'm not familiar with, I would have to basically build up a level of trust with him. I already have that with these two officers, sir." (R. at 8). The military judge concluded that appellant knowingly and voluntarily waived his right to conflict-free counsel and could be represented by MAJ DB and CPT DC.

We do not find that MAJ DB's and CPT DC's adversarial relationship with MAJ AM amounts to representation of conflicting interests. Moreover, even assuming a potential for such representation, we conclude appellant waived the issue after both inquiry by the court and consultation with counsel. Counsel properly disclosed to the appellant and to the court any possible conflict stemming from their professional relationship with MAJ AM. The military judge's inquiry with the appellant was brief; however, coupled with the appellant's signed acknowledgement of the prior relationship and his desire for both of his counsel to remain on the case, the inquiry was sufficient. No evidence has been submitted to establish what a more detailed inquiry would have shown.

In any event, appellant failed to establish any adverse effect from the conflict alleged. MAJ AM testified at trial in reference to the facts surrounding the explosion on 22 March 2003 and the injuries he received as a result of the explosion. He offered no evidence implicating appellant as he never knew or saw appellant until the day he testified. There was nothing to challenge MAJ AM about through cross-examination. Additionally, there is nothing to suggest that the defense counsel's dealings with MAJ AM were ineffective or unreasonable. Their

relationship with MAJ AM was not an attorney-client relationship, and therefore, appellant's counsel faced no fear of revealing privileged information. Appellant has provided no evidence or argument as to any alternative strategy or tactic that was not employed due to his defense counsel's acquaintance with MAJ AM. *See Carter v. Scribner*, 412 Fed. Appx. 35, 37 (9th Cir. Jan. 24, 2011) (unpub.) (finding no actual conflict of interest where the defendant failed to demonstrate how his defense counsel's friendship with the victim limited any plausible alternative legal strategy or tactic).

Appellant further avers that MAJ DB was conflicted because he was stationed in Iraq at the time of the attack and witnessed the impact of the attack on his fellow soldiers thus making MAJ DB a victim. MAJ DB's mere presence in Iraq does not create a conflict. The record is void of anything that MAJ DB may have observed or experienced in Iraq that would create a conflict.

Appellant also claims that MAJ DB is conflicted because of his role in alleged additional misconduct committed by appellant. Shortly before trial began, appellant allegedly assaulted a military police officer (MP) by stabbing him in the neck with scissors in the latrine of the Trial Defense Service office. Statements were requested from both MAJ DB and CPT DC. They did not provide statements, and appellant was never charged with any crime related to this event.

It is clear that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue. . . ." AR 27-26, Rule 3.7(a). One day after the alleged stabbing, counsel filed a motion in limine to preclude use of uncharged misconduct to prove future dangerousness of appellant. The motion was granted without prejudice.²⁰

These actions dissolved any concerns counsel may have had about the alleged stabbing. The record is devoid of any evidence that MAJ DB or CPT DC were ever

²⁰ The same day of the alleged stabbing, appellant's defense counsel requested that the sanity board be reconvened. The sanity board reconvened and concluded that appellant had the sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and appellant had a rational as well as a factual understanding of the proceedings against him. Appellant also had sufficient mental capacity to understand the nature of the proceeding against him and to conduct or cooperate intelligently in his defense. The board further concluded that appellant was a physical threat to himself and others.

involved in or witnessed the alleged attack on the MP. There is also no evidence that MAJ DB or CPT DC were ever considered suspects in this matter or that either had any prior knowledge of the impending attack. No charges were filed stemming from the alleged stabbing. Appellant's defense counsel could hardly be described as "necessary" to appellant's uncharged, potential trial on unrelated charges. See *United States v. Smith*, 35 M.J. 138, 141 (C.M.A.1992) (citing *In re Grand Jury Subpoena (Legal Services Center)*, 615 F.Supp. 958, 964 (D.Mass. 1985)) (stating the "[g]overnment must show 'that there is no other reasonably available source for' the evidence" to compel a lawyer to testify against his client).

Accordingly, we find no merit in any of appellant's allegations about his defense counsel's allegiances. They did not represent conflicting interests nor was their performance adversely affected by the circumstances alleged by appellant.

E. Development of the Mitigation Case

Appellant also contends that he was denied his right to effective assistance of counsel because his trial defense counsel failed to adequately investigate appellant's social history, ignored voluminous information collected by mitigation experts, and ceased using mitigation experts, resulting in an inadequate mental health diagnosis because the defense failed to provide necessary information to the defense psychiatrist witness. We find no merit in these allegations.

Mitigation specialists are uniquely important to the defense of a capital case. As CAAF explained in *United States v. Kreutzer*:

Mitigation specialists typically have graduate degrees, such as a Ph.D or masters degree in social work, and have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.

United States v. Kreutzer, 61 M.J. 293, 302 (C.A.A.F. 2005) (quoting Judicial Conference of the U.S., Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 24 (1998)).

At the outset, trial defense counsel understood the importance of obtaining the services of a mitigation specialist. In their post-trial affidavits they state:

[We] perceived the role of mitigation specialist as assisting us by conducting a thorough social history investigation and psycho-social assessment; identifying factors in the client's background or circumstances that require expert evaluations; assisting in locating appropriate experts; providing background materials and information to experts to enable them to perform competent and reliable evaluations; consulting with us regarding the development of the theory of the case and case strategy, assuring coordination of the strategy for the guilt-innocence phase with the strategy for the penalty phase; identifying potential penalty phase witnesses; and working with the client and his family while the case was pending.

A request was submitted for the services of a mitigation specialist on 15 April 2003, less than one month after the incident. Though their request was denied the defense maintained their request insisting that the mitigation specialist would gather information that would be critical to the referral process.

Ms. JY, a mitigation specialist and attorney, was the defense choice for assistance in this case. However, she was not approved. Instead the defense chose Ms. DG from a list of substitute experts provided by the government. Ms. DG's services were approved on 18 September 2003. Ms. DG was a competent mitigation specialist; nonetheless appellant's mother refused to cooperate with her and directed other family members to do the same. In May 2004, Ms. DG was informed that her services were no longer needed. Prior to her departure she provided a continuity memo detailing the work she had completed and what she believed to be remaining work. She also provided the defense with four boxes of documents pertaining to this case.

Defense requested and received a new mitigation specialist, one with which appellant's mother was willing to work. Ms. SH of the Center for Capital Assistance (CCA) was appointed and approved for seventy-five hours of work at a cost of \$10,000. Due to an undisclosed medical condition Ms. SH was replaced on 30 September 2004 by Ms. TN of the CCA, who had previously been working with Ms. SH. An additional authorization was approved on 12 December 2004 to have Mr. JL and Ms. RR assist Ms. TN. Counsel confirm in their post-trial affidavit that they had limited contact with Mr. JL and Ms. RR yet they continued their contact with Ms. TN. Counsel also state in their post-trial affidavit that Ms. TN "regularly gave reports of her activities to the defense. The information she was uncovering, while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. [DG]." Nevertheless, Ms. TN did discover that

appellant had been treated by Dr. FT as a child, and the defense determined that this information was significant.

As appellant's mental state of mind was in question, mental health experts were consulted. Defense counsel briefly consulted with Dr. WM, a clinical psychologist. Dr. PW was consulted to focus on appellant's sleep disorder and his results were admitted into evidence. Dr. DW, an Air Force major and forensic psychiatrist, was retained to assist the defense by observing appellant's R.C.M. 706 board. Dr. PC, the chief of neuropsychology at Brooke Army Medical Center, conducted the R.C.M. 706 board and employed an extensive battery of neuropsychological tests on appellant. Appellant's defense counsel made a tactical decision not to call Dr. PC and instead provided her results, but not some of appellant's underlying and particularly damaging statements, to their own expert witness, Dr. GW, who they later called during trial. In addition, Dr. FT, another clinical psychologist, was called by the defense at trial.

Other witnesses identified by the mitigation experts testified and documents prepared by the mitigation experts were admitted into evidence.

Appellant now contends that the mitigation specialists' work was not complete. Not every aspect of appellant's life has to be investigated to determine that the investigation was thorough or complete. Though the mitigation specialist employed on appeal now offers in her affidavit information that, in her opinion, should have been offered at trial, we defer to qualified counsel to make reasonable decisions as to when to terminate the investigation and in how their case is presented. In *Loving v. United States (Loving III)*, 68 M.J. 1, 15–16 (C.A.A.F. 2009), CAAF emphasized that there is a distinction between cases where no life history or mitigating evidence was presented and an allegation that additional life history or mitigating evidence was available. The Supreme Court stated in *Wiggins v. Smith*, 539 U.S. 510, 533 (2003):

[W]e emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the “constitutionally protected independence of counsel” at the heart of *Strickland*, 466 U.S. at 689[].

Defense counsel were also not required to call a mitigation specialist in sentencing. “While use of an analysis prepared by an independent mitigation expert

is often useful, we decline to hold that such an expert is required. What is required is a reasonable investigation and competent presentation of mitigation evidence. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses.” *Loving I*, 41 M.J. at 250. Moreover, appellant has brought forth no new evidence on appeal that would alter the outcome of this case. The documents relied on by the appellate mitigation specialist are the same documents the defense counsel had at the time of trial. In our view, a reasonable investigation was conducted and a competent presentation was placed before the panel.

F. Panel Selection

Appellant’s defense counsel challenged only one panel member for cause. Appellant now claims that this tactic was ineffective because many of the fifteen remaining members were either actually or impliedly biased against him. However, we conclude that appellant’s defense counsel employed a sound strategy against pursuing potential challenges and, therefore, were not ineffective.

In this case, the panel members did not actually possess an unrehabilitated bias. R.C.M. 912(f)(1)(N) prescribes the rule for challenges based on both actual bias and implied bias: “A member shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.” Actual bias exists where any bias “is such that it will not yield to the evidence presented and the judge’s instructions.” *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997) (quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)), *United States v. Leonard*, 63 M.J. 398, 401–02 (C.A.A.F. 2006).

Appellant alleges Sergeant First Class (SFC) KD, MAJ DS, and CSM MH possessed an inelastic opinion on sentencing or a misunderstanding about sentencing procedures. Appellant’s further, specific allegations of actual bias against SFC JC, LTC TA, LTC DL, LTC JE, LTC WT, and LTC TG consist mainly of claims of personal knowledge of case facts, medical knowledge in general, or a general bias against certain evidence. Finally, appellant claims that several panel members should have been challenged based on their vague, second-hand knowledge of appellant’s uncharged misconduct. However, all of the foregoing panel members expressed their willingness to consider, without reservation, the evidence, the military judge’s instructions, and whether the punishment of life in prison, as opposed to death, should be imposed. Thus, even where appellant’s allegations may have provided a basis for an actual bias objection, we find the members’ rehabilitative pronouncements sufficient to expunge any taint of actual bias.

In addition, the grounds alleged in this case do not fall within that rare category meriting a challenge for implied bias. Unlike actual bias, implied bias exists when “regardless of an individual member’s disclaimer of bias, most people in the same position would be prejudiced.” *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010) (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). “[W]hen there is no actual bias, ‘implied bias should be invoked rarely.’” *Leonard*, 63 M.J. at 402 (quoting *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). Here, the grounds for implied bias are lacking, especially considering the defense counsel’s panel selection strategy.

It is important to note that appellant’s defense counsel made tactical decisions not to raise any of the foregoing grounds during panel selection. As detailed in their affidavit to this court, defense counsel chose this strategy to maximize the number of panel members. (Gov. App. Ex. 1, pp. 44–46). This tactic was used to increase the chance that at least one member of the panel—the “ace of hearts”—would not vote for a death sentence. *United States v. Simoy*, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev’d on other grounds*, 50 M.J. 1 (C.A.A.F. 1998). “To use a simple metaphor, if appellant’s only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards or 8?” *Id.* We will not fault appellant’s counsel for employing this strategy and certainly do not find it amounts to ineffective assistance of counsel. This tactic was reasonable and, as discussed below, it complemented the defense’s goal of avoiding imposition of the death penalty during the findings and presentencing phases of appellant’s court-martial.

G. Findings Phase

Appellant alleges that counsel was ineffective during the findings phase of his court-martial because they conceded guilt to all of the elements of a capital offense and devised a trial strategy that was unreasonable and prejudicial. We disagree.

Prior to trial, appellant’s defense counsel filed and litigated in excess of fifty motions. These motions covered every aspect of the trial. Defense counsel stated during their opening statement:

What the government has just given you, their version of the facts, is only half the story. They told you what happened. But what happened really isn’t in dispute. The defense isn’t here to contest what happened. Yes. The facts will show that Sergeant Akbar threw those grenades. Yes. The facts will show the he shot and killed Captain [CS]. Those are the facts. That is what happened. But what happened is only half the story. Equally important in

your quest for the truth is the understanding why, because the elements of the offense, are pieces of the puzzle that you cannot leave out. Premeditation requires you to look inside Sergeant Akbar's mind and understand why. Until you answer that question, until you know why, you cannot fairly pass judgment. The evidence in this case will show that the answer to that question lies in mental illness. The evidence will show that Sergeant Akbar comes from a family with a history of mental illness. The evidence will show that Sergeant Akbar himself was first diagnosed with mental illness at the age of 14. The evidence will show that the symptoms of that mental illness are verifiable through independent witnesses who have known him throughout the course of his life. The evidence will show that those symptoms grew progressively worse. The evidence will show that on [22] March 2003, Sergeant Akbar did not and could not premeditate due to mental illness.

This strategy was reasonable in light of the overwhelming evidence identifying appellant as the attacker.

The elements of premeditated murder are:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the act or omission of the accused;
- (c) That the killing was unlawful; and
- (d) That, at the time of the killing, the accused had a premeditated design to kill.

MCM, 2002, pt. IV, ¶ 43.b.(1).

Though the defense conceded appellant's identity they challenged the "premeditated design to kill" based on appellant's alleged mental illness, thus not conceding guilt. Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a strategy accepted as reasonable by the Supreme Court. *Florida v. Nixon*, 543 U.S. 175, 191–92 (2004). "In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" *Nixon*, 543 U.S. at 191 (quoting Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Sec. 10.9.1 commentary (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev 913, 1040). "In this light counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id.* at 191–

92 (quoting *Cronic*, 466 U.S. at 656–657 & n.19, and Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev 1557, 1589–1591 (1998)).

Employing this tactic was not only reasonable but it gave the defense an opportunity to avoid a death-eligible offense and leave open the option for mitigating evidence focused on mental health. The defense counsel wove their theme of mitigation and mental instability throughout both the government case and their own case-in-chief.

1. The Government's Case

As the government presented their case in chief, the majority of the witnesses testified to the events of the evening of 22 March 2003 and their reactions after they heard the explosion. They also testified to the horrific injuries that many of the soldiers suffered. These matters were not in dispute and these witnesses were not challenged or cross-examined.

Government witnesses who may have had information pertaining to the appellant were effectively cross-examined. These witnesses highlighted the defense theory of appellant's inability to premeditate the murders because of his mental capacity. Captain GS, the assistant brigade engineer, testified on cross-examination that he first saw appellant on the security detail after the explosion. He had worked with appellant during training exercises and was aware that appellant had been fired from his squad leader position because he forgot some of his equipment. Appellant couldn't perform simple tasks and did not perform at an E-5 level. While pulling security that night, appellant was unmotivated and unfocused and not paying attention. Captain GS had seen this type of behavior before from appellant at Fort Campbell and was aware that appellant was a substandard NCO.

Mr. BH, a former soldier, had served as the unit armorer and issued appellant's M-4. He testified about the weapon he issued appellant prior to the deployment. When questioned by the defense, he testified that he thought appellant was always unfocused and daydreaming and that appellant always had a smile on his face for no apparent reason.

Private First Class CP²¹ was a member of appellant's team. He slept next to appellant during the deployment and pulled the first hour of guard duty with appellant on the night of the murders. During guard duty, PFC CP and appellant did not talk. According to PFC CP, appellant did not like to talk to other people but he did like to talk to himself. Private CP often saw appellant pacing and talking to himself. This behavior increased when they deployed as appellant seemed to be in his own world. Private CP heard Soldiers using derogatory terms towards Iraqis, making derogatory statements about appellant as well as making jokes about raping or sexually assaulting Iraqi women. Private CP was also aware that appellant had a sleep disorder, because appellant fell asleep while counseling him. Prior to the deployment, PFC CP heard NCOs expressing concern about deploying with appellant.

Private First Class TW²² was also a previous member of appellant's team. During the deployment he was the assigned driver for HMMWV-A21 and pulled the second hour of guard duty with appellant on 22 March 2003. Private TW testified that appellant fell asleep during guard duty. He thought appellant was a fair NCO with bad duty performance and no common sense. Previously he referred to appellant as "retarded" because of some of his odd behavior. Private TW heard derogatory terms used about the Iraqis and saw some derogatory words on the wall in the latrine.

Staff Sergeant EW,²³ a former member of appellant's squad, was called to testify. He pulled guard duty on 22 March 2003 immediately following appellant. On cross-examination he testified that ever since he has known appellant, he thought he was odd because appellant would pace a lot. Appellant had difficulty sleeping at night which resulted in him falling asleep in class and limited his effectiveness.

The government also offered two entries from appellant's diary. Appellant maintained a diary from 1992, before joining the military, until 2002. The entries admitted by the government provided some aggravating matters purportedly written close to the time of the attack. The defense counsel successfully argued to keep the

²¹ At the time of trial, PFC CP had been promoted to Specialist. For ease of reference, he will be referred to as PFC CP.

²² At the time of trial, PFC TW had been discharged from the service and testified as a civilian.

²³ At the time of trial, SSG EW had been discharged from the service and testified as a civilian.

remainder of appellant's journal out of evidence, as they argued that the diary was "unfairly prejudicial" and could potentially lead to an emotional reaction to the evidence.

2. The Defense Case-in-Chief

As the defense presented their case, their theme continued. Witnesses were called who testified that appellant comes from a family with a history of mental illness, that appellant was first diagnosed with mental illness at the age of fourteen, that the symptoms of appellant's mental illness are verifiable through independent witnesses who have known him throughout the course of his life, and that the symptoms grew progressively worse. Again, the focus was on appellant's lack of mental capacity to premeditate murder.

Dr. FT

Dr. FT, an expert in clinical psychology, testified about the start of appellant's mental problems. Dr. FT testified that he treated appellant in 1986 when appellant was fourteen years old, because appellant's sister had been a victim of sexual abuse, and appellant had been in an abusive home situation. Treatment included a battery of tests which indicated that appellant was within the average range for verbal skills and abilities and average in his planning ability; however, appellant was in the superior range for nonverbal skills. Dr. FT opined that these test results indicated that appellant was having problems which were exhibited in the repression of his verbal responses and that appellant could visually see things well and copy them down, but he lacked visual motor development. This was unexpected because appellant had scored so high on all of the performance and intelligence tests. Appellant's wide range of cognitive functions and discrepancies showed significant lags and suggested a learning disability. Though Dr. FT saw no sign of psychosis, there was a real constriction in appellant's functioning. Dr. FT opined that appellant was repressing his feelings and emotions which normally causes people to lose energy and strength, and leads to depression. Appellant appeared to be depressed at the time and had a lot of unmet dependency needs. Appellant also did not identify with people and had a real lack of attachment to any parent image or to people in general.

According to Dr. FT, further testing revealed that appellant's greatest fear was "being a bum on the street corner" and that he worried "about becoming a nothing." The happiest time of appellant's life was when he was in the country,

away from his uncle and step-father.²⁴ Appellant indicated his desire to go to college and revealed his bad feelings about his treatment of his siblings. On some level, appellant felt responsible for his siblings as he is the oldest child. Appellant informed Dr. FT that he had problems falling asleep because of intrusive or obsessive thoughts and that he was annoyed with his mother for not protecting the children. Additionally, appellant indicated that he does not trust anyone which further emphasized his lack of attachment. Appellant stated he felt like he was losing control and he did not know how to reestablish self-control, he wanted to earn money; when he is alone he cries; and he hates his step-father. Appellant describes himself as being very quiet in school and not interested in dating. The one thing appellant wished for most was to be happy all the time.

Dr. FT spent four hours with appellant and during this time appellant showed no normal emotions when talking about significant traumatic things or happy joyful matters. Though Dr. FT would have preferred more time to evaluate appellant, the time was sufficient for him to make a diagnosis. He noted that appellant could not relate to people and diagnosed appellant with an adjustment disorder and depressed mood associated with a mixed specific developmental disorder.²⁵ Appellant's symptoms did not meet the full diagnosis for one of the ten major personality disorders; however, Dr. FT would have diagnosed him with a personality disorder not otherwise specified associated with paranoid and schizo-typical features. With the information Dr. FT had at the time he saw appellant in 1986, he would give appellant a General Adaptive Functioning (GAF) score of 60, which shows a moderate level of problems.²⁶ Dr. FT has not seen appellant since 1986 and did not review any information pertaining to the charges.

²⁴ Appellant's step-father abused his sister.

²⁵ Both diagnoses fit on Axis I of the DSM-IV. "Axis I is for reporting all the various disorders or conditions in the Classification except for the Personality Disorders and Mental Retardation (which are reported on Axis II) Also reported on Axis I are Other Conditions That May Be a Focus of Clinical Attention." See Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 27 (4th ed., text revision, 2000) (DSM-IV-TR).

²⁶ The GAF score gauges an individual's overall level of functioning and his or her ability to carry out activities of daily living. Scores range from 0 to 100. A score of 1 indicates a persistent danger of severely hurting oneself or others. A score of 100 indicates superior functioning in a wide range of activities. Am. Psychiatric Ass'n,

(continued . . .)

Dr. FT has treated thousands of children with problems similar to the appellant. At the time of treatment, appellant's prognosis was guarded because he had a lot of serious things to overcome; however, improvements could be made if appellant sought counseling, remedial assistance, family therapy, and protective supervision. Dr. FT had no information as to whether his recommendations were followed. If the recommendations were not followed, appellant was at risk of further deterioration of his mental state in the future.

At the conclusion of Dr. FT's direct testimony, a copy of the report prepared by Dr. FT was admitted into evidence without objection. (Def. Ex. D). The report summarized Dr. FT's direct testimony and was available to the panel members for findings and sentencing.

Mr. PT

The defense next called Mr. PT as a witness. Mr. PT was a college roommate and good friend to appellant while they studied at the University of California at Davis. Mr. PT testified that appellant talked about his goals but sometimes had problems sticking to them. He observed that appellant was not very social and spent time by himself. Mr. PT often saw appellant pacing, talking to himself, and getting sweaty and clammy. Initially, Mr. PT thought it was normal until these things started happening excessively. There were quite a few evenings when appellant would not sleep but instead would be pacing. Mr. PT testified that appellant had strong religious beliefs about taking care of himself; as such, he did not smoke or drink alcohol nor did he curse. During the time they lived together, there was only one time that Mr. PT thought appellant might hit him. Mr. PT returned to the apartment and appellant was very angry over a wrestling incident that had occurred two years prior. Appellant confronted Mr. PT and Mr. PT apologized and appellant seemed okay. The only other time Mr. PT saw appellant in an agitated state was when appellant was telling him about his sister being molested or violated. The two talked about it, and Mr. PT believed the incident had just occurred or that appellant had just found out about it.

On cross-examination by the government, Mr. PT testified that initially appellant was a better student than he was; however, as they continued to live together, appellant seemed to be struggling and did not have the same focus. Based on questions from the panel, Mr. PT testified that appellant had another name but

(. . . continued)

Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed., text revision 2000) (DSM-IV-TR).

changed his name because he is Muslim. He did not remember why appellant chose “Hasan” or how old he was when he changed his name.

Specialist CS

Specialist (SPC) CS was called by the defense and knew appellant when they were both assigned to the 326th Engineers. He believed appellant was a poor NCO who was not able to carry out minor tasks and unable to transfer knowledge to his junior enlisted soldiers. Specialist CS testified that other NCOs viewed appellant as under-qualified, and they did not believe he should be a leader. As far as SPC CS knew, appellant did not have a social life. Prior to the deployment, SPC CS noted that appellant isolated himself from conversations and would instead pace and talk to himself. Appellant also had difficulty staying awake as he would fall asleep during class. Even after being told to stand up he would fall asleep while standing. Other soldiers would also fall asleep; however, appellant fell asleep more than other soldiers and more than other NCOs. Prior to the deployment, SPC CS heard soldiers using derogatory terms towards Iraqis or Muslims such as “Punjab,” “raghead,” and “camel jockey.” Specialist CS testified that sometimes these terms were used to refer to appellant behind his back but that it was possible appellant overheard some of these conversations. Specialist CS recalls hearing soldiers basically say, “Hey look at that moron; that fricken—one of those ragheads. He is always screwing up.” Specialist CS also testified about a conversation wherein appellant expressed concerns to Sergeant First Class (SFC) TM, appellant’s platoon sergeant, about going to war against other Muslims. Sergeant First Class TM allegedly responded that if appellant did not kill the enemy, SFC TM would kill him.

Specialist JR

The defense also called SPC JR, another soldier in appellant’s platoon. He testified that he saw appellant daily and was aware that appellant had sleep apnea. He presumed that sleep apnea contributed to appellant’s unflattering and negative performance. While in Iraq, SPC JR observed appellant pacing, laughing, and smiling at inappropriate times. He further testified that, prior to the move across the LOD, appellant began staring at the ground when eating chow or during downtime. Appellant appeared detached and when orders were issued, appellant’s team leaders took care of what needed to be done, freeing appellant up to “deal with himself.”

Sergeant First Class TM

Sergeant First Class TM was appellant’s platoon sergeant. He testified that appellant’s substandard performance did not reflect his education. Sergeant First Class TM confirmed that he had a conversation with the squad leaders about a

possible deployment to Afghanistan during which he asked appellant, “[I]f we were to deploy on a mission, and we were approached by an enemy soldier, I said, the word, raghead, --‘Would you engage an enemy soldier?’” Appellant responded that “[i]t depended on the level of jihad the enemy soldier was on.” Sergeant First Class TM dismissed appellant and immediately reported the incident to his chain of command. Sergeant First Class TM denied that he ever told appellant he would kill him if he refused to kill enemy soldiers.

Staff Sergeant SB

Staff Sergeant SB was called to testify. He was appellant’s squad leader when appellant was a team leader. He testified that appellant had poor duty performance, did not have friends, and fell asleep often.

Sergeant First Class BR

Sergeant First Class BR was another one of appellant’s platoon sergeants called to testify about appellant’s sleep apnea and about the use of hateful statements within the unit. SFC BR first testified that he was aware of appellant’s sleep apnea and felt that it impacted his duty performance. He next stated that he overheard other NCOs use derogatory terms for Iraqis and Muslims, and that he may have used derogatory terms himself when he deployed to Iraq. Sergeant First Class BR further testified that appellant called him at home, very early in the morning, to ask if his unit was going to rape and kill women and children. Though SFC BR found this strange, he did not report the phone call. On cross-examination, SFC BR testified that prior to deployment he asked appellant about fighting other Muslims, and appellant said he was ready to go and looking forward to making a lot of money.

Special Agent DF

The defense offered into evidence a stipulation of expected testimony from FBI Special Agent (SA) DF, who interviewed and investigated appellant’s family members. (Def. Ex. FF). SA DF stated that appellant’s half-brother, Mr. MB, believes that the CIA, U.S. Army, and FBI are tapping his phone, shooting infrared rays into his home, and spraying chemicals on the trees at his residence. Based upon the interview and his observations, SA DF believed that appellant’s half-brother is unstable and out of touch with reality. SA DF also stated that appellant’s father was on parole for aggravated rape and subsequently arrested for violating the terms of his parole by possessing firearms. Mr. MB informed SA DF that he had recently been discharged from the United States Air Force and that he was not allowed to pray when he wanted to while in the Air Force. He also believes that Muslims are

discriminated against in the United States. Based upon the interview and his observations, SA DF believes that Mr. MB is unstable and out of touch with reality. SA DF found no evidence that indicated appellant or his family members had any links or contacts with any terrorist or extremist organizations.

Dr. GW

Dr. GW, an expert in forensic psychiatry testified. Dr. GW became involved in appellant's case in October 2004. To diagnose appellant he used methodology in three areas: family and genetic information; environment and medical; or psychological information. He reviewed appellant's family history, academic records, and military records, to include his medical records and his diary. He conducted three forensic interviews with appellant over an eight-hour period. Additionally, Dr. GW reviewed statements from appellant's roommate, a 1986 psychological evaluation, and records regarding appellant's mother's homelessness. The raw data from psychological tests was also provided to Dr. GW as well as a redacted copy of the 2003 R.C.M. 706 board report and a copy of the Article 32, UCMJ, proceedings.

According to Dr. GW, genetics are important when looking at disorders of perception because when more than one family member has a perception disorder it increases the likelihood that other family members will have similar disorders. The family history included information pertaining to appellant's father having a history of depression, sleep problems, and previous suicidal issues. The history also included the military records of appellant's maternal uncle which revealed that he was discharged from the Marines for psychiatric problems. Dr. GW also reviewed the interview of appellant's half-brother which was conducted by SA DF and noted significant paranoia. These disorders generally develop in adolescence. In this case, Dr. GW concluded appellant began to manifest signs of a perception disorder during his teen years in high school. Dr. GW used appellant's diary and high school and college behavior to show how these changes manifested.

Dr. GW testified that appellant had difficulty picking up social cues, perceiving situations accurately, and differentiating reality from non-reality. He developed profound sleep problems where he was unable to sleep at night and could not stay awake during the day. He testified that the perception disorder could also be seen in appellant's academic and social deterioration. It took appellant seven years to complete college. Appellant's pacing in college showed that his psychomotor skills are agitated. Dr. GW testified that there is a parallel between appellant's college behavior and his behavior in the military, in that appellant initially performed well in both. By March 2003, however, appellant was

deteriorating. He was pacing, talking to himself, receiving no respect from soldiers and peers, and struggling with basic tasks.

Dr. GW administered a variety of psychological tests. These revealed that the appellant was depressed, paranoid and his thinking was unusual and bizarre. The tests also showed that appellant was not malingering. Dr. GW was not able to make a definitive diagnosis because of various symptoms, such as bizarre thinking, decompensation under stress, history of depression, paranoia, suspicion, inability to read social cues, sleep problems, psychomotor agitation, and impulsivity. However, Dr. GW made three differential diagnoses, all on the schizophrenia spectrum, each of which translate to appellant's inability to perceive reality accurately, typically under stress: (1) schizotypal disorder, an Axis II disorder; (2) Schizophrenia paranoid type, an Axis I disorder; and (3) Schizoaffective disorder, an Axis I disorder. Of particular importance, Dr. GW opined that symptoms which resulted in his diagnosis impacted appellant's actions on 22 March 2003 by causing him to be overwhelmed emotionally and to not think clearly. Nevertheless, Dr. GW concluded that appellant is sane and when he threw the grenades into the tents, he understood the lethality of the weapon and was capable of understanding the natural consequences of his actions.

Using Dr. GW, the defense admitted several pieces of evidence, but did not admit appellant's diary.²⁷ Instead Dr. GW testified about those portions admitted by the government. He stated that appellant's diary was reflective of appellant's personal perspective and shows a clear level of paranoia and suspicion. Dr. GW opined that appellant's diary does not reflect that he was capable of planning but shows that appellant is trying to put something together to understand why his life is the way it is. He also testified, "I think it is important to look at the diary as a whole" and that the appellant's capabilities are impacted by his symptoms. Appellant's paranoia, suspicion, and inability to understand social cues, combined with his stress, damaged his capability to understand the consequences of his actions.

²⁷ Other evidence introduced through Dr. GW included: appellant's birth certificate and amended birth certificate (Def. Ex. AA); appellant's medical records from Fort Knox and UC Davis (Def. Exs. BB and CC); appellant's name change; previous diagnosis of obstructive sleep apnea; transcripts from UC Davis (Def. Ex. R); the military records of appellant's uncle, which indicate he was discharged from the U.S. Marine Corps due to a diagnosis of emotionally unstable personality (Def. Ex. KK); and appellant's Minnesota Multiphasic Personality Inventory-2 (MMPI-2) test results (Def. Ex. RR).

It is of note that, on cross-examination, Dr. GW testified that he did not review appellant's statements from the R.C.M. 706 board because the copy he received had been redacted to remove several damaging statements made by appellant.²⁸ He acknowledged that the R.C.M. 706 board was conducted six weeks after the incident; however, he relied on appellant's version of the events during their interviews. Dr. GW opined that all of the test results were valid and showed no signs of the appellant malingering. The R.C.M. 706 board did not find appellant suffering from any of the three diagnoses that Dr. GW found. Although Dr. GW did not make a definitive diagnosis of schizophrenia, he expressed concern that it was nonetheless present.

In response to questions from the panel, Dr. GW testified that a person with a schizotypal disorder can tell the difference between right and wrong. People can function normally with these schizotypal disorders, but they can be dangerous to other people because they do not understand their environment. There is a passage in appellant's diary about killing battle buddies about a month prior to the attack but the passage goes on to talk about his plans after the military. Dr. GW's diagnosis of schizotypal disorder is consistent with appellant's ability to think something out for a month. Dr. GW does not believe that appellant received any psychological treatment before deployment and did not seek counseling other than at school, though he did seek help for his sleep problems. It was appellant's belief that the statements were made to him and, particularly a statement made on the evening of 22 March 2003, meant that he was to be killed. People with mental illnesses are more vulnerable to misinterpreting the environment and have fewer coping mechanisms.

In closing argument, the defense counsel continued with the theme that appellant could not have premeditated these murders. Their argument focused on Dr. GW's testimony and the testimony of the various soldiers in reference to appellant's bizarre behavior. The defense strategy was reasonable and the defense counsel's performance in executing this strategy did not "fall measurably below expected standards." *Polk*, 32 M.J. at 153. Accordingly, appellant's allegations that

²⁸ In post-trial affidavits, appellant's defense counsel stated that they recognized the incredibly damaging statements appellant made to the sanity board and chose not to make these statements discoverable. (Gov. App. Ex. 1). Dr. GW did not rely on statements appellant made to the R.C.M. 706 board. This issue was litigated during the court-martial. The military judge ruled that the government was not entitled to this portion of the R.C.M. 706 board as they were the ones who elicited testimony from Dr. GW on this issue.

his defense counsel were ineffective during the findings phase of his court-martial are without merit.

H. Presentencing Phase

At presentencing the government presented witnesses who described their injuries and the impact on the command and the surviving family members. As appellant points out, once the government rested, the defense's presentencing case lasted only thirty-eight minutes—a presentencing case that appellant claims was constitutionally infirm.

We agree that thirty-eight minutes is not sufficient to tell the life story of a person facing the death penalty. On the record, the defense presentencing case spans thirty-eight minutes; however, their case goes far beyond that. Prior to the defense starting its presentencing case, defense counsel requested that each panel member be provided a binder which consisted of fifteen documents. The defense requested that the panel members be allowed to take the binders home and review them prior to the defense calling their first witness. Their request was granted.

Each member was provided a binder which contained the following defense exhibits: a complete copy of appellant's diary (Def. Ex. A); a law enforcement review of the diary (Def. Ex. B); a forensic social worker's analysis of appellant's diary (Def. Ex. C); a social history prepared by a mitigation specialist (Def. Ex. C); a search authorization for appellant's email account (Def. Ex. I); definitions of relevant Islamic terms taken from "The Oxford Dictionary of Islam," (Def. Ex. K); appellant's petition for change of name (Def. Ex. L); an interview of appellant's high school guidance counselor (Def. Ex. N);²⁹ an interview of one of appellant's high school teachers (Def. Ex. O);³⁰ an interview of appellant's college advisor and

²⁹ The interview of appellant's high school guidance counselor, Ms. DD, was conducted by appellant's mitigation specialist, Ms. DG. According to Ms. DD, appellant had potential for college so she referred him for college counseling. Appellant had no problems in school and he was always very quiet. Ms. DD met appellant's mother once and she appeared rigid and was difficult to engage in conversation.

³⁰ Ms. RC taught leadership to appellant his senior year. Ms. RC was interviewed by appellant's mitigation specialist, Ms. DG. Ms. RC said that appellant always followed through with his commitments and was a high achiever; however he was not socially able to have relationships. Appellant respected men more than women. Ms. RC believed college would have been difficult for appellant because more

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counselor (Def. Ex. P);³¹ an interview of a college acquaintance (Def. Ex. T);³² memoranda from two soldiers (Def. Exs. U and V);³³ an interview of appellant's

(. . . continued)

whites would be at UC Davis than appellant had been previously exposed to and it was located in the country as opposed to the city. She was surprised he joined the Army and believed that appellant's lack of social skills would cause him serious difficulties. She was shocked when she heard appellant was charged with murder.

³¹ Mr. JM was interviewed by Ms. DG on November 17, 2003. Mr. JM was appellant's college advisor and counselor. When appellant attended Locke High school, the school was about 90% African-American and 10% other ethnicities, and there were a lot of gangs and gang-related activity. According to Mr. JM, appellant was very serious and studious. Appellant was a member of the academic decathlon and participated at the highest level. The academic decathlon required students to prepare in ten separate categories and prepare a speech. His recollection is that the appellant did very well, "probably had the highest score on the team." Appellant was a peer counselor which included counseling students to fill out college applications. While in high school, appellant had good study habits and he would have expected him to do well in college. Mr. JM notes that appellant was almost always a loner who studied a lot. Appellant was very polite but seldom smiled. Appellant was always dressed neatly in slacks and printed shirts and never wore jeans. To the best of Mr. JM's knowledge appellant did not have problems staying awake. He took appellant home on some occasions and believed that appellant was living with an aunt in a notoriously rough area. He also believed appellant's mother was supportive and that appellant came from a low-income family. He was surprised to learn that appellant had joined the military and states that he never said anything that would have led him to predict that appellant would be capable of such acts. Pictures of Locke High School depicting the high gates surrounding the school were attached to this interview.

³² Ms. CI is the ex-wife of appellant's college roommate. She stated that appellant was not sociable and was struggling financially in college. She stated appellant could not always understand things that other people could understand. Appellant also had horrible eating habits, often "fasting." Ms. CI said that appellant gave her a Koran for a wedding gift and talked to her about converting to Islam.

³³ Staff Sergeant CC was in the same unit as the appellant, and SFC PL was the brigade equal opportunity advisor. Staff Sergeant CC stated appellant was in three to four different platoons. Appellant was moved because he was incompetent and messed up all the time. One platoon sergeant told appellant that he wanted to place

(continued . . .)

childhood Imam (Def. Ex. W);³⁴ and the criminal records of appellant's father (Def. Ex. HH).³⁵

Without objection, the military judge provided the following instruction to the panel members:

Members, as I just stated, we're going to go ahead and recess for the day. The defense has requested, the government does not oppose, and I'm going to allow you to take several defense exhibits with you when we recess for the day in a few moments. They are in the black binders in front of you. The exhibits contain a lot of material, and it will help if you have read through the documents before the defense calls its witnesses starting tomorrow. Since counsel estimate it may take some time to do so, rather than require you to read it in open court, which is what would normally happen, I'm going to let you read it at home or work.

A couple cautionary instructions however. You are only to read the exhibits. Please do not conduct any independent research based on anything you may read. Also, please, do not discuss the

(. . . continued)

appellant in his squad before they deployed, but that he would only accept appellant as an E-4 not as an NCO. He further stated that appellant's duty performance in Kuwait was substandard as usual and that appellant could not be trusted with an important detail. SFC PL stated that she taught classes on how to treat Muslims. She stated that she heard several derogatory terms used to describe Iraqis and cautioned soldiers not to use them.

³⁴ Imam AH led the mosque that appellant attended as a child. He recalled meeting appellant when he was approximately ten years old. He stated that appellant was a "nerd." Appellant would not start a conversation but would engage in a conversation. He did not see appellant as very religious, but he was accepting of the religion because of his parents. He stated that he was surprised appellant could survive boot camp.

³⁵ Appellant's father was found guilty of aggravated rape and sentenced to imprisonment at hard labor in the Louisiana state penitentiary for life. His sentence was commuted to thirty-two years in 1979 and he was paroled on 1 February 1980.

exhibit with anyone, to include friends and family members, or yourselves. You can only discuss the exhibits with each other once you begin your formal deliberations, which probably won't happen until Thursday. Also do not copy the exhibits or let anyone else read them. And please bring them back with you when you return to court tomorrow morning at 9 a.m.

Court adjourned at 1139 on 26 April 2005 to give panel members time to read and review the evidence they had been provided. Court was called to order at 0900 on 27 April 2005.

With the binder of materials as their backdrop, the defense called three witnesses to provide additional information about appellant. Two witnesses repeated testimony about appellant's poor duty performance as an NCO. The other witness was appellant's high school teacher. He testified that the school was in a rough neighborhood with gangs and poverty and that appellant was an excellent physics student who was never in any trouble. The witness had no interaction with appellant outside of the classroom and no contact with appellant since 1991.

At the close of the testimony, defense provided additional exhibits to each panel member. The first exhibit was questions provided to Ms. RW, a high school classmate of appellant's. (Def. Ex. F). Ms. RW recalled that appellant was a part of the advanced placement program and student government. Appellant also spent a lot of time by himself reading. She admitted that they were not friends because appellant had very specific views about the role of women. Ms. RW believed that appellant had an abundance of potential.

The second exhibit consisted of questions to and answers by appellant's younger brother, MA. (Def. Ex. H). According to MA, his second child was due any day; therefore, he was not able to leave his wife's side to testify for his brother. MA's first son is named after appellant because of all the things appellant has done for him. MA describes appellant as a very quiet, caring person who will do anything for his family. He does not believe appellant has very many friends as he does not know how to relate to others. As children, both appellant and his brother grew up in a very poor environment and they were constantly moving. There were even times they had to sleep in the car or on the floor. There was very little contact with their father while they were growing up. In fact, it was not until appellant was arrested that he had any contact with his father. Their mother always tried to provide for them and she worked hard and did her best under the circumstances.

When appellant was in college, MA went to live with him for periods of time because his mother was having trouble supporting him. Appellant also sent money

to his mother, sometimes going without money himself. When appellant left college he came home to live with his mother until he could find a job; however, appellant was kicked out because their mother was tired of him arguing with her about his sisters' behavior. When appellant left his mother's house, he stayed with MA for a short period of time and then joined the Army. MA had been previously kicked out of his mother's house because he was dating the woman who is now his wife and she is not Muslim. Appellant allowed MA to withdraw money from his account so that MA could take care of his family and he has never asked for the money back. Before appellant deployed, he and MA talked about starting a video store, once appellant left the Army. MA would be the "people person" while appellant would be responsible for the books because appellant was not good at relating to others and is not outgoing. Appellant was anxious about his deployment but wanted to do his duty. Appellant was also hoping there would not be a war and that he would be home soon.

Prior to appellant's unsworn statement the defense counsel informed the military judge they would not be calling any additional witnesses. The military judge inquired about Ms. RW and appellant's parents because they were listed on appellant's witness list. Counsel indicated they had discussed this with appellant and they had sound tactical reasons for not calling these witnesses.

Appellant gave the following unsworn from the witness stand:

ADC: Sergeant Akbar, you and I prepared an unsworn statement for you, correct?

ACC: Yes, sir.

ADC: In fact, I typed it out; is that correct?

ACC: Yes, sir.

ADC: It added up to about 6 pages?

ACC: Yes, sir.

ADC: My advice to you was just to give the panel members those 6 pages, let them read what you had to say?

ACC: Yes, sir.

ADC: You decided you didn't want to do that, correct?

ACC: Yes, sir.

ADC: Instead, you believed you wanted to address the panel members directly?

ACC: Yes, sir.

ADC: Because you believed the 5 or 6 pages sounded more like an excuse?

ACC: Yes, sir.

ADC: Sergeant Akbar, I'm going to give you the opportunity now to go ahead and address the panel.

ACC: I want to apologize for the attack that occurred. I felt that my life was in jeopardy, and I had no other options. I also want to ask you to forgive me.

ADC: Please take your seat.

All evidence properly admitted during the findings phase is to be considered on sentencing. R.C.M. 1001(f)(2). In his sentencing instructions, the military judge advised the panel members that they should consider the following mitigating circumstances, which came from evidence presented by the defense both in findings and in the presentencing phase:

One, Sergeant Akbar's age at the time of the offenses of 32;

Two, the lack of any previous convictions;

Three, Sergeant Akbar's education, which includes a bachelor's degree in Mechanical and Aeronautical Engineering;

Four, that Sergeant Akbar is a graduate of the following service schools: Basic Training, Satellite Communications AIT, Combat Engineering AIT, Sapper School, and PLDC;

Five, the 768 days of pretrial confinement;

Six, Sergeant Akbar's impoverished childhood, as referenced in the interview of Imam [AH], the Department of Social Services records, and Sergeant Akbar's diary;

Seven, the statement of Ms. [RW] concerning Sergeant Akbar's involvement in leadership and academic activities in high school and his inability to make good friends, as referenced by [DG]'s interviews of [Ms. DD, Ms. RC, and Mr. JM];

Eight, the testimony of Mr. [DD] regarding the difficult academic environment at Locke High School, Sergeant Akbar's exceptional performance as a student, and that the offenses were out of character for him, as also referenced in the interviews of [Ms. DD, Ms. RC, and Mr. JM];

Nine, Dr. [FT]'s and Dr. [GW]'s testimony that Sergeant Akbar lacked a proper father figure as a child;

Ten, [DG]'s and Special Agents [TN's] and [ER]'s conclusions that, in his 13 year diary, Sergeant Akbar reveals the difficulties in his life, his low sense of self-esteem, and his preoccupation with his academic progress, financial difficulties, loneliness, social awkwardness, sleep difficulties, lack of any parental guidance, and his grandiose plan to earn a PhD, become a respected and wealthy businessman, provide for his mother and siblings, and protect the down trodden of the world;

Eleven, the FBI profile of Sergeant Akbar in which Special Agents [TN] and [ER] opine that Sergeant Akbar's main motivations for keeping his diary were loneliness and a need to convey his inner most thoughts, plans, dreams, and fears; and that Agents [TN] and [ER] believe that the diary became a substitute confidante because SGT Akbar had nobody with whom to share these thoughts and no one else to communicate with;

Twelve, the FBI assessment that Sergeant Akbar's diary reflects many years of lonely struggle to attain the love, affection, and respect he so anxiously needed with the root of this need being traced to feeling unloved and unvalued at home; that years of perceived failures and rejections took their toll on SGT Akbar; that besides contributing to his already low self image, they caused sleep disturbances which in turn only added to his stress, his trouble concentrating, his difficulty staying awake, his difficulty thinking clearly, and rendered him vulnerable to even the slightest insult;

Thirteen, Dr. [FT]'s 1986 psychological evaluation of Sergeant Akbar when he was 14 years and 10 months old, and Dr. [FT]'s testimony that Sergeant Akbar was dealing with a significant amount of underlying depression and had very few coping skills as well as an inability to identify with others on an emotional level plus the significant impact of his stepfather's molestation of his sisters;

Fourteen, that Dr. [FT] recommended that Sergeant Akbar receive therapy and treatment for his mental illness;

Fifteen, the sleep disturbance suffered by Sergeant Akbar before and in the Army, and its effect on his academic achievements and his duty performance, as discussed in Sergeant Akbar's diary, documented in his medical records, and testified to by Sergeant First Class [DK], Sergeant First Class (Retired) [TM], Captain [DS], Captain [JE], Staff Sergeant [BR], Specialist [CP], Specialist [CS], Specialist [DR], Staff Sergeant [SB] and [Mr. EW];

Sixteen, Dr. [GW]'s testimony and Agents [TN's] and [ER]'s analysis of the diary that Sergeant Akbar discussed being the object of ridicule and abuse by his military peers;

Seventeen, the abusive nature of Sergeant Akbar's childhood to include an emotionally absent mother and a physically abusive stepfather;

Eighteen, the financial difficulties experienced by Sergeant Akbar as a young adult as reflected in the social services records, Sergeant Akbar's diary, the interview of Ms. [CI] and the testimony of Mr. [PT];

Nineteen, that it took Sergeant Akbar 9 years to obtain his bachelor's degree;

Twenty, the testimony of Captain [GS], Sergeant First Class [DK], Sergeant First Class (Retired) [TM], Captain [DS], Captain [JE], Staff Sergeant [BR], Specialist [CP], Specialist [CS], Specialist [DR], Staff Sergeant [SB] and [Mr. EW] that Sergeant Akbar was a poor leader, a substandard duty performer, got his stripes too soon, struggled as a leader and was incapable of accomplishing minor tasks;

Twenty-one, the testimony of Specialist [CP], Specialist [CS], Staff Sergeant [SB], Sergeant First Class [sic] [BR] and Sergeant First Class (Retired) [TM] that soldiers used such derogatory terms as Punjab, camel jockey, raghead, sand nigger, towelhead, and skinny in Sergeant Akbar's presence and recited derogatory jody calls during company runs.

Twenty-two, Specialist [CP]'s testimony that Sergeant Akbar's squad leader, while the unit equal opportunity advisor, used derogatory terms towards Iraqis;

Twenty-three, Dr. [GW]'s testimony that the MMPI-2 test results show that Sergeant Akbar had elevated levels of paranoia, depression, and schizophrenia;

Twenty-four, Dr. [GW]'s testimony regarding Sergeant Akbar's family history of mental illness;

Twenty-five, that Sergeant Akbar frequently paced and talked to himself;

Twenty-six, the testimony of Dr. [GW] that Sergeant Akbar believed unit members were ridiculing Muslims and threatening to do acts of violence against them, to include raping Iraqi women;

Twenty-seven, that the FBI found no ties between any extremist organizations and Sergeant Akbar;

Twenty-eight, that Sergeant First Class [DK], Captain [DS], Captain [JE] and Staff Sergeant [CC] recommended against taking Sergeant Akbar to Kuwait;

Twenty-nine, that numerous soldiers observed odd behavior exhibited by Sergeant Akbar in Kuwait and did not report it to the chain of command;

Thirty, that, notwithstanding his belief that Sergeant Akbar may be suicidal, Captain [JE] did not request any mental evaluation or assessment be done, even though services were available in Kuwait; and

Thirty-one, Sergeant Akbar's expression of regret and remorse and request for forgiveness.

You are also instructed to consider in extenuation and mitigation any other aspect of Sergeant Akbar's character and background and any other extenuating or mitigating aspect of the offenses you find appropriate. In other words, the list of

extenuating and mitigating circumstances I just gave to you is not exclusive.

You may consider any matter in extenuation and mitigation, whether pre-offense or post offense; whether it was presented before or after findings; and whether it was presented by the prosecution or the defense. Each member is at liberty to consider any matter which he or she believes to be a matter in extenuation and mitigation, regardless of whether the panel as a whole believes that it is a matter in extenuation and mitigation. A panel member may also consider mercy, sympathy and sentiment in deciding the weight to give each extenuating and mitigating circumstance and what sentence to impose.

Defense counsel continued their pursuit of a sentence less than death in their closing argument. They recommended to the panel that appellant be given a sentence of life without the possibility of parole. Argument then focused on appellant's mental health, appellant's diary ("a unique look into his mind"), the analysis of appellant's diary by both Ms. DG and the FBI, appellant's sleep apnea, his poor performance as an NCO, his poor family and lack of loving parents, neglect, a background of religious and racial intolerance, his difficulties with education, and appellant's lack of friends.

Appellant now contends that there is other evidence that should have been considered by the panel. We disagree. Appellant avers that Dr. GW did not have all of the information necessary to reach his opinions and conclusions at trial. During his testimony, Dr. GW determined that he had sufficient information to make a diagnosis. He further stated:

I think the idea that a name somehow defines the work is not accurate. What is accurate are the symptoms that Sergeant Akbar shows. The fact that it may not be called schizophrenia or what have you is, in the long run, less important because a person can be schizophrenic and not be paranoid for example. So I think the real issue is: What are the symptoms that Sergeant Akbar has shown consistently. The fact that it's not -- it may not be called schizophrenia is not clinically relevant.

At trial Dr. GW testified confidently and never indicated that he needed additional testing. However, in his post-trial affidavit to this court, Dr. GW now contends that he needed additional information at the time of trial.

In addition, Ms. LJ-T, the appellate mitigation specialist, contends in her post-trial affidavit that there are other mitigation tasks that should have been completed. It is of note that Ms. LJ-T has never consulted with trial defense counsel in this case nor was she involved with any of the case preparation for trial.

It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.

The widespread use of the tactic of attacking trial counsel by showing what “might have been” proves that nothing is clearer than hindsight-except perhaps the rule that we will not judge trial counsel’s performance through hindsight. We reiterate: The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.

Grossman v. McDonough, 466 F.3d 1325, 1347 (11th Cir. 2006) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1513–14 (11th Cir. 1995) (citations, internal quotation marks, and alterations omitted)).

Appellant alleges that his diary should not have been submitted in its entirety without any substantive analysis and without appropriate regard for the highly aggravating and prejudicial information it contained. Though the defense counsel successfully kept the diary out during findings, it became relevant during sentencing. Two analyses of appellant’s diary were submitted in an attempt to explain its contents, particularly those admitted during the government’s case. Additionally Dr. GW testified, “I think it is important to look at the diary as a whole.” Though there may have been some aggravating and prejudicial information in the diary, there were also mitigating matters in the diary as well as insight into appellant’s childhood and family life. Again we defer to qualified counsel to

determine what evidence should be presented and presume that because counsel in this case were qualified, their strategic decisions were sound; therefore, appellant did not receive ineffective assistance of counsel.

CONCLUSION

We have considered the record of trial, the assigned errors, the supplemental errors, the briefs submitted by the parties, the oral arguments by both parties on the assignments of errors raised, and the Petition for New Trial.

We hold that there was no constitutional infirmity in the delegation, prescription, and pleading of the aggravating factor, nor in the investigation or referral of the capital charges of which appellant was convicted. We also conclude that the military judge did not abuse his discretion by denying appellant's motion to suppress his inculpatory statements to MAJ KW. In addition, we hold appellant's ineffective assistance of counsel claims lack merit. "When we look for effective assistance, we do not scrutinize each and every movement or statement of counsel. Rather we satisfy ourselves that an accused has had counsel who, by his or her representation, made the adversarial proceedings work." *Murphy*, 50 M.J. at 8 (citing *United States v. DiCupe*, 21 M.J. 440 (C.M.A. 1986)). The adversarial process worked in this case because MAJ DB and CPT DC, through their due diligence and hard work, provided appellant with competent representation. Finally, we conclude appellant's remaining assignments of error, as well as the grounds supporting his petition, lack merit.

The Petition for New Trial is denied. On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge SIMS and Judge GALLAGHER concur.



FOR THE COURT:

A handwritten signature in black ink, reading "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court