IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

United States, Appellee	INDEX OF BRIEF ON BEHALF OF APPELLANT
v.	Docket No. ARMY 20050514
Sergeant (E-5) **HASAN K. AKBAR,** United States Army, Appellant	Tried at Fort Knox, Kentucky, and Fort Bragg, North Carolina, 9 March, 10, 24 May, 2, 24 August, 2 December 2004, 31 January, 4 March, 1, 6-8, 11-14, 18-22, and 25-28 April 2005, before a general court-martial convened by Commander, Headquarters, XVIII Airborne Corps, Colonels Dan Trimble, Patrick J. Parrish, and Stephen Henley, Military Judges, presiding.

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

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PANEL 2

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Part One: Introduction[1,2]

Thirty-eight minutes. That is how long the defense's sentencing case lasted. Not a lot of time to tell the life story of anyone.

The life story of Sergeant Hasan Akbar has been one of turmoil and confusion. While the events of his life will be

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[1] Within this brief, appellant is referred to as "Hasan," "appellant" or "Sergeant (SGT) Akbar". In addition, in relating his life history and in some of the attached exhibits, appellant is sometimes referred to as "Hasan", or "Mark Kools".

[2] A Motion to Attach Defense Appellate Exhibit (DAE) B-D, G, I-LL, has been filed contemporaneously with this brief and attached in a Defense Appendix (DA) for the convenience of the Court. There will be no citation to DAE A, E-F, and H as they were already part of the record of trial and will be cited within the Brief as such.

described in more detail later, his youth and family-life were filled with poverty, physical abuse, sexual abuse, emotional abuse and mental illness. Hasan's biological father was in and out of jail, and suffers from HIV and severe depression. Hasan's step-father entered Hasan's life, fresh from jail on a conviction for rape, when Hasan was young. That step-father then beat Hasan, beat Hasan's mother with fists and weapons, and sexually abused his sisters and quite probably Hasan himself. After his step-father sexually abused his sisters, Hasan was sent to be mentally evaluated. That evaluation determined that Hasan had significant mental health issues that needed treatment or else they would become more severe. But that treatment never came. Nor did a healthy, normal, or loving family environment. He continued to live with a mother who had her own mental health issues, with no decent father figure, no treatment for his mental problems, and sometimes no bed to sleep in, and no roof over his head.

Despite all of these barriers, Hasan valiantly struggled to achieve. He used the one true asset he had, his intellect, to do well in school and attend college. However, another major barrier was waiting for him, Paranoid Schizophrenia. Hasan's intelligence wasn't enough to overcome this added barrier. Although he finally did graduate, it took him nine years.

After graduation, he did not use his engineering degree but instead took menial jobs – jobs he could not hold because he could not stay awake. Then Hasan made a desperate leap, he would join the military.

For a time, he again did moderately well. He was able to accomplish the tasks required of a junior enlisted Soldier. But then Hasan was promoted to Sergeant, and the added stress of leadership and responsibility once again aggravated his mental health condition. A slow decline began. He slowly but certainly lost his ability to do even menial tasks such as disposing of trash properly. He couldn't lead his men or even himself. He was mocked, joked about, belittled to his face. He couldn't stay awake during the day, mumbled to himself, laughed inappropriately, paced endlessly, stared off into space, and his disturbed behavior intensified until the fateful day of his offenses.

At his court-martial, what Hasan needed was someone to investigate and tell this life story. He needed someone to explain to the panel charged with determining his guilt and sentence that he was not a monster or the enemy, but a mentally disturbed human being who did something horrible. Someone to ensure that the panel was unbiased and fair members. An advocate that would strive for a fair trial and tell the true story to the panel before the panel made the decision to take or

spare Hasan's life. This lack of an effective advocate contributed to one final barrier Hasan had to face, a Constitutionally-flawed system that deprived him of substantial rights and fairness because of: improperly promulgated rules; unfair processes; arbitrary and discriminatory application of existing rules; and lack of equal protection under the law.

Hasan did not have an effective advocate. He had no one to tell his story. Instead, what Hasan got was representation by a series of attorneys, civilian and military, who were not remotely qualified to conduct a death penalty trial. What Hasan got were attorneys who failed to investigate his history; fight for the necessary funding for testing; evaluation and investigation; or work to ensure that the panel was reasonably free of bias. Hasan did not get advocates who were themselves free of conflict, but instead received attorneys who knew the victims in his case, were impacted by the events of his crime, and who had their own careers negatively affected by their participation on his case. Finally, Hasan received a panel filled with members who viewed his religion as selfish, who believed him already guilty of his offense, and who openly stated that, if Hasan was guilty, they would not spare his life, that if you take a life, you should forfeit your life.

Hasan has never received a full and complete mental health evaluation. He never had anything more than a cursory

investigation into his life prior to trial. His panel, flawed as it was, did not hear from one live family member or any expert on mitigation. There was no attempt to humanize Hasan, and no attempt to reveal to the panel the serious, crushing mental illness with which Hasan was struggling. His entire sentencing case consisted of three live witnesses and took thirty-eight minutes to present. Thirty-eight minutes on sentencing to convince the panel that he should not be put to death. Thirty-eight minutes to present the complex and detailed story of his life. His attorneys could not present that story, because they never took the time to investigate his life, and never used the expert assistance to do it for them. They completely failed in their responsibilities. Instead of a coherent and complete story, his attorneys cobbled together a few documents that were either highly prejudicial or minimally persuasive, presented that to the panel, and then threw up their hands.

So, to the panel, Hasan remained the enemy, the monster. His humanity was never displayed to the panel. His struggles with mental illness, both his own and that of those who surrounded him and were responsible for nurturing him, remained hidden from the panel. The physical, sexual and emotional abuse remained unseen as well. His life and humanity remained hidden because his advocates never spent the time and effort necessary

to investigate his life. His value as a human being unrevealed because not a single family member was placed on the stand to show their love for Hasan and their knowledge of another, more human side of him.

Thirty-eight minutes. That is less time than your favorite television show. Not enough time to give Hasan the hearing he deserved as an American Soldier. Not enough time to tell his story. The only thing it was sufficient time for was ensuring that he received a sentence of death.

Part Two: Statement of the Case

Sergeant Hasan K. Akbar, was tried by a general court-martial on 9 March, 10 and 24 May, 2 and 24 August, 2 December 2004; and 31 January, 4 March, and 1, 6-8, 11-14, 18-22, and 25-28 April 2005. Sergeant Akbar was tried by a panel of officer and enlisted members sitting as a general court-martial at Fort Bragg, North Carolina. Contrary to his pleas, SGT Akbar was convicted of attempted murder (three specifications) and murder (two specifications), in violation of Articles 80 and 118 of the Uniform Code of Military Justice [hereinafter UCMJ]; 10 U.S.C. §§ 880 and 918 (2002). The convening authority approved the adjudged sentence to death.

Part Three: Statement of the Facts

On 22 March 2003, grenades were tossed into tents and shots were fired at Soldiers of the 101st Airborne Division (Air

Assault). (R. at Charge Sheet.) Almost immediately following the attack, Sergeant (SGT) Hassan Akbar was grabbed, and as a weapon was pointed at his head, was asked if he "did it." Sergeant Akbar responded: "Yes." (R. at 1690.)

SGT Akbar was a suspect because, among other things, he had exhibited bizarre behavior and made odd statements for the entire time he was deployed to Kuwait. (R. at 3017-3023.)

Sergeant Akbar, of the Muslim faith, had heard numerous statements such as "You're dark like them. You're Muslim like them. You might die like them." (R. at 3038) He also heard references such as "towelhead," "camel jockey," "sand nigger," and "screwing camels five times a day" to describe Iraqis. (R. at 1595, 3038.) He also heard jokes about raping Muslim women. (R. at 1596.) When SGT Akbar approached his unit leadership about the statements, they down played his concerns. *Id.* Unfortunately, they were unaware that SGT Akbar suffered from mental illness, and that his perception of reality was much different than theirs. (DAE Z, AA, LL; DA 224-36, 413-517.)

The first Trial Defense Counsel representative on the scene was Major (MAJ) [redacted] (DAE S; DA 94-96.) Upon his arrival, MAJ [redacted] learned that appellant was suspected of killing two Soldiers assigned to the 101st Airborne Division, as well as wounding fourteen other Soldiers, including Captain [redacted] a fellow Judge Advocate and colleague. (R. at

5.) Soon thereafter, CPT [redacted] along with Lieutenant Colonel [redacted] and Captain [redacted] was assigned to represent appellant. (DAE T; DA 97-99.) None of appellant's counsel, but particularly MAJ [redacted] and CPT [redacted] had experience in capital litigation, nor did they meet the American Bar Association Guidelines for capital counsel. (R. at 10-16.)

Despite counsel's inexperience, they understood the need for mitigation assistance, and, on 25 August 2003 (R. at App. Ex. 127), requested that Deborah Grey be appointed as a defense mitigation expert. (R. at 15, App. Ex. 110.) Thus comprised, the defense team began to prepare for trial. However, stability would not be the hallmark of this team. In addition to military counsel, appellant would be represented in the pretrial phase by Mr. [redacted] and [redacted], civilian defense counsel. (R. at 10, 29, App. Ex. 127.) Both those counsel, as well as LTC [redacted] and CPT [redacted] would eventually leave the defense team. (R. at 446.) Thus, at his court-martial, appellant would be represented by only MAJ [redacted] and CPT [redacted] (R. at 768, 779, App. Ex. 180.)

Nor was Ms. Grey still a member of the defense team during appellant's court-martial (R. at 440, 575), although, as will be explained more fully below, trial defense counsel would rely upon her in presenting what trial defense counsel viewed as their sentencing case. (DAE X; DA 210-15.) On 1 July, 2004,

Grey was replaced as a mitigation expert by a mitigation team led by Charlotte Holdman. (R. at 545, 548, App. Ex. 128.) Ms. Holdman's place in appellant's court-martial, and her relationship (or lack thereof) with trial defense counsel is mysterious. (R. at 644; DAE G; DA 15-21.) Initially hired for the sum of $10,000.00 (a very small amount in an ordinary capital case), Ms. Holdman and her associates began their work. (R. at App. Ex. 128.) As that work progressed, and the need for additional funding became obvious, Ms. Holdman informed trial defense counsel that more time and funding were necessary to prepare appellant's mitigation case. (R. at App. Ex. 130.)

Appellant's clinical psychiatric expert, Dr. George Woods, shared the concerns of the mitigation experts, and informed trial defense counsel of these concerns as well. (DAE C, D, AA; DA 5-14, 224-28.) Doctor Woods, who holds a medical degree from the University of Utah and is board certified in psychiatry and Neurology (R. at App. Ex. 132, attachment B), had severe reservations regarding appellant's sanity, but trial defense counsel declined to request the additional testing that Dr. Woods deemed necessary to complete his diagnosis. (DAE C, D, AA; DA 5-14, 229-36.)

By the time of Dr. Woods' request, the trial team was dysfunctional, and communication between trial defense counsel and the mitigation experts ceased. (DAE R; DA 92-93.) While

unexplained, the defense team's breakdown is not surprising. First, both counsel were fishing in uncharted waters. Neither counsel had experience in capital litigation. (R. at 10-16.)

Second, both were representing appellant at a great personal and professional sacrifice. (R. at 435, 442-44.) Major [redacted] sacrificed a plum assignment as Chief of Criminal Law at Fort Drum. (R. at 435.) Both counsel also sacrificed two years of their careers. Additionally, they were representing a Soldier who was accused of attacking the institution they worked for, as well as wounding a colleague and fellow judge advocate. (R. at 5; DAE S, T; DA 94-96, 97-99.)

However, both counsel, especially MAJ [redacted] had an additional concern: potential complicity in an alleged attack by appellant upon a military police guard. (DAE U; DA 100-95.) On 30 March, 2005, MAJ [redacted] in an exception to policy, asked the military police (MPs) to be allowed to interview appellant in his TDS office rather than in a holding cell. *Id.* The MPs agreed to the request, but only if MAJ [redacted] first cleared his office of any items that could be used by appellant in harming either himself or others. *Id.* Major [redacted] agreed, and when appellant was brought to MAJ [redacted] office, MAJ [redacted] assured the MPs that his office was safe. *Id.*

Unbeknownst to the MPs, MAJ [redacted] failed to remove a pair of scissors from his office. *Id.* Appellant used the

scissors to attack a guard. *Id.* Thus, MAJ [redacted] could have become either a witness or even a suspect in appellant's attack. However, although recognizing the precarious ethical ground upon which they stood, trial defense counsel failed to inform either appellant or the court of the conflict. (DAE V; DA 96-97.) With the defense team torn asunder and with their own personal concerns weighing heavily, trial defense counsel proceeded to appellant's court-martial.

Voir dire began at 0904 on Wednesday, 6 April 2005 (R. at 795.) and ended at 1017 on that same day. (R. at 858.) After a ten-minute recess, individual voir dire began at 1027. (R. at 859.) A lunch recess was held from 1115 to 1329. (R. at 896.) The Court recessed for the day at 1415. (R. at 933.) Individual voir dire continued at 0900 on 7 April 2005. (R. at 934.) A lunch recess was held from 1123 to 1328. (R. at 1045.) Individual voir dire continued until a thirteen-minute recess from 1427 to 1440. (R. at 1095.) Individual voir dire concluded at 1546. (R. at 1160.) Subtracting the recesses, voir dire took total seven hours and fifteen minutes of which, individual voir dire took six hours and twelve minutes.

Upon completion of voir dire, the military judge commented to the panel: "Members, we have completed the selection process. It went a little faster than I had anticipated."(R. at 1181.) Less than eight hours to completely seat the full panel in a

capital case. This short time period included questions by the defense, the government, and the military judge.

To make up for the absence of mitigation expertise, the trial defense counsel reached back to Deborah Grey's work, introducing information and a summary of appellant's diary. (R. at Def. Ex. A.) Trial defense counsel did so even though Ms. Grey advised the defense team that the diary, which contained anti-American statements, was harmful to appellant, especially if not placed in any context. (DAE X; DA 210-15.) Trial defense counsel paid no heed to Ms. Grey's warning and placed before the panel the entire diary. A sampling of that diary: "Destroying America was my plan as a child, jovenile (sic) and freshmen in college. . . . My life will not be complete if America is not destroyed. It is my biggest goal"; he expressed a desire to "kill Caucasians;" appellant's plan "during his entire life" to "destroy America;" and that his life would "not be complete if America is not destroyed." (R. at Def. Ex. A.)

Proceeding with no cogent defense theory, trial defense counsel began to slowly plead appellant guilty, in violation of Article 45(b), UCMJ. Having thus predominantly established appellant's guilt, trial defense counsel presented the testimony of the aforementioned Dr. Woods. (R. at 2238-2292.) Dr. Woods, who testified reluctantly, advised the panel that appellant exhibited the characteristics of schizophrenia, yet was unable

to make a definite diagnosis. *Id.* Dr. Woods had not completed his diagnosis because trial defense counsel failed to gather the necessary background information or request the necessary testing for Dr. Woods to cement his conclusion. (DAE AA; DA 229-36.)

After the panel found appellant guilty, trial defense counsel presented a sentencing case that consisted of three witnesses and took thirty-eight minutes to present. (R. at 3005, 3053.) The panel returned a sentence of death. (R. at 3181.)

However, as is fully detailed below, trial defense counsel, appropriately qualified and fully prepared, would have presented an extreme case in mitigation and would have established why death was not an appropriate punishment for SGT Akbar. (DAE Z, AA, LL; DA 224-36, 413-517.)

The panel would have learned that SGT Hassan Akbar was born in Los Angeles into a dysfunctional family. (DAE LL; DA 433-34.) His childhood was marked by extreme poverty, physical abuse, possible sexual abuse, parental abandonment, domestic violence, and traumatic events, including an earthquake that left him homeless. *Id.* His mother, Quran Akbar Bilal, struggled financially throughout SGT Akbar's childhood, dependent on social services throughout SGT Akbar's childhood. At times, Quran, SGT Akbar, and his siblings were homeless. *Id.*

Despite the horrible conditions of SGT Akbar's youth, he was remarkably bright and managed to attend and eventually graduate from college. However, the panel would have learned that during those college years, delusional thoughts and ideas began to affect SGT Akbar. *Id.* at 440-445; *see also* DAE Z, DAE AA; DA 224-28, 229-36.) The panel would have also learned about the impact of childhood trauma on adults. (DAE LL; DA 437-40.) Wracked by sleeplessness and delusional thinking, SGT Akbar struggled through college, becoming more withdrawn and disturbed as time went along. *Id.*

The panel would have been informed through Dr. Woods that, as is usually the case for a schizophrenic, SGT Akbar began to suffer from that mental illness during his late teens and early twenties. (DAE AA; DA 229-36.) Coping only through the strength of his intelligence, SGT Akbar managed to graduate from college.

Sergeant Akbar joined the Army, and for awhile the Army structure allowed SGT Akbar to cope. But that structure was fractured when he was deployed to Kuwait, awaiting the invasion of Iraq. Wracked by mental illness, faced with the reality of warfare against others of the Muslim faith, and haunted by statements of fellow soldiers threatening to rape Muslim women, SGT Akbar snapped. (DAE Z, LL; DA 224-28, 413-517.)

Dr. Wood's would have explained to the panel that SGT Akbar's irrational thoughts and subsequent conduct was a result of mental illness, specifically schizophrenia. Dr. Woods would have further detailed how SGT Akbar's history supports such a diagnosis, and that the family traumas and family sexual abuse detailed below and in the Mitigation Report of Lori James Towns supports such a diagnosis.

Additionally, a mitigation expert, such as Lori James Towns, would inform the panel about who SGT Akbar really was, and tell his life story, explaining those factors that, while not excusing SGT Akbar's conduct, should be viewed in sparing him from execution. Ms. Townes would inform the panel of the horrible conditions of SGT Akbar's youth, and place into context SGT Akbar's actions with that life-story as backdrop, explaining why SGT Akbar did what he did - but also explaining why he should be spared.

In fact, Ms. James-Townes determined post-trial that there was no coherent picture presented of Hasan's life at his court-martial, no mitigation expert on the team who engaged in information management, no mitigation specialist on the team able or willing to testify about the findings, no defense expert was able explain the many facets of SGT Akbar's life, no expert to describe Hasan's medical issues (including severe sleep disturbances), no indication at Hasan's court-martial regarding

the horrendous abuse suffered as a child, no complete extensive social history to feed either the mitigation investigation findings or the presentation at trial, and no psychological examination completed with the benefit of a complete social history. (DAE LL; DA 420-23.)

Ms. James-Townes points to the critical importance of "execution impact testimony" in her report. *Id.* at DA 446. "Execution impact testimony" is testimony by family members and close friends that "allows the jury/panel to understand exactly how the death of the defendant will impact them." *Id.* The absence of any family members testifying "speaks volumes to a panel member who had to decide the life and death of SGT Akbar . . . ." *Id.* None of the evidence or additional testing that Ms. James-Townes deemed crucial in Hasan's case were presented or performed.

Instead, SGT Akbar received thirty-eight minutes to explain his life, and why that life should not be ended.

ASSIGNMENTS OF ERROR AND ARGUMENT

Part Four: Ineffective Assistance of Counsel

Summary

Appellant received ineffective assistance of counsel at every stage of his court-martial. As explained below, appellant's trial defense counsel were woefully prepared to defend appellant because they were inexperienced in capital litigation, their qualifications failing to even approach the ABA Guidelines for such representation. Thus hobbled, trial defense counsel, failed to adequately prepare appellant's case for court-martial. They failed to adequately investigate appellant's mental health and failed to provide appellant's psychiatric expert witness information necessary to prepare his diagnosis and testimony. Trial defense counsel also failed to properly utilize the mitigation experts provided by the convening authority, and failed to request additional funding for those experts. On the eve of trial, trial defense counsel ceased contact with these experts, effectively foreclosing the presentation of any meaningful mitigation evidence during sentencing.

Before evidence was ever presented, trial defense counsel failed to challenge members that exhibited a clear bias, knowledge of appellant's case, and an inflexible attitude towards sentencing. During the presentation of evidence, trial

defense counsel presented no tactically coherent theme. Instead, they flailed, presenting appellant's diary, which contained more aggravating than mitigating evidence, and essentially admitted appellant's guilt. Also, during merits, trial defense counsel placed the appellant's psychiatric expert on the stand even though that witness had been unable, because of poor coordination on the part of defense counsel, to arrive at a complete mental health diagnosis for appellant. At sentencing, instead of presenting a mitigation expert or other witness to describe SGT Akbar's background and mental condition, as is ordinarily done in death penalty cases, trial defense counsel presented marginal value witnesses: a high school teacher, his company commander, and his First Sergeant, as is more akin to sentencing presentations in the ordinary court-martial.

Assignment of Error I.

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 CRITICAL STAGE OF HIS COURT-MARTIAL.

The Sixth Amendment to the United States Constitution guarantees an accused the right to the "effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 653-56 (1984). The right to the effective assistance of counsel is likewise guaranteed to every member of the United States armed forces

before, during, and after trial. *See United States v. Scott*, 24 M.J. 186 (C.M.A. 1987); *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998); *United States v. Hicks*, 47 M.J. 90, 92 (C.A.A.F. 1997); see *also* Article 27, UCMJ; 10 U.S.C. § 827 (2002). This right is not confined only to representation during the trial on the merits, but equally to the sentencing portion of a trial because it is also a critical stage of a criminal proceeding where substantial rights of a criminal accused may be affected. *See Moore v. Michigan*, 355 U.S. 155, 160 (1957); *Mempa v. Rhay*, 389 U.S. 128, 134, (1967) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Townsend v. Burke*, 334 U.S. 736 (1948)). When a service member is denied effective representation by counsel, he is entitled to a new trial. *Scott*, 24 M.J. at 193.

Effective assistance occurs when counsel's performance, though not error free, constitutes a meaningful test of the prosecution's evidence. *Cronic*, 466 U.S. at 656; *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The tools of this testing include the presentation of evidence and probing cross-examination. *Cronic*, 466 U.S. at 659. Investigation is a *critical* precursor to application of such tools and thus essential for effective assistance to the client. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991); *Scott*, 24 M.J. at 188.

The law presumes counsel's competence. Courts are to accord heavy deference to avoid second-guessing counsel's professional decisions and performance. *United States v. Morgan*, 37 M.J. 407 (C.M.A. 1993); *Scott*, 24 M.J. at 188. An accused bears the burden of rebutting this presumption of competence. *United States v. Crum*, 38 M.J. 663, 665 (A.C.M.R. 1993).

The standard of review for ineffective assistance of counsel is governed by the well known standards enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and that standard of review, unless otherwise noted, applies to all the claims of ineffective assistance of counsel that follow.

The issue of ineffective assistance of counsel is a mixed question of law and fact. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). Whether counsel's performance was deficient, and if so, whether it was prejudicial, are questions which the appellate courts review *de novo*. *Id.* at 463.

To establish that a defense counsel was ineffective, an appellant must first show that his defense counsel's performance was deficient, and then show that he was prejudiced by the deficiency. *Strickland*, 466 U.S. at 687. The proper inquiry in the first prong is whether counsel's conduct fell below an objective standard of reasonableness, or was it outside the

"wide range of professionally competent assistance." *Id.* at 694. The second prong is satisfied by a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Under *Strickland*, appellant is not required to make an "outcome-determinative" showing that "counsel's deficient conduct more likely than not altered the outcome in the case." *United States v. Howard*, 47 M.J. 104, 106 n.1 (C.A.A.F. 1997)(quoting *Strickland*, 466 U.S. at 693). In addition to the test established in *Strickland*, a breakdown in the adversarial process alone can violate the right to counsel, requiring reversal *without regard to prejudice*. *Cronic*, 466 U.S. at 659. According to the *Cronic*, "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 657.

The first-prong of the *Strickland* test focuses on whether counsel rendered a deficient performance. Under this prong, an accused can rebut the presumption of competency of counsel by pointing out specific errors made by his defense counsel which were unreasonable under prevailing professional norms. The fact that other attorneys might have performed differently does not necessarily establish that counsel failed to render reasonably

effective assistance; rather, a claimant must show that the counsel's performance was outside "the wide range of reasonable professional assistance." *Quartararo v. Fogg*, 679 F. Supp. 212, 239 (E.D.N.Y. 1988)(quoting *Strickland*, 466 U.S. at 689 (1984)).

Reasonableness is to be evaluated from the counsel's perspective at the time of the alleged error and in light of all the circumstances, keeping in mind that the "counsel's function is to make the adversarial testing process work in the particular case." *Scott*, 24 M.J. at 188 (*citing Cronic*, 466 U.S. at 690). Reviewing courts will be "highly deferential" in their scrutiny of a counsel's performance. *Cronic*, 466 U.S. at 689.

As previously noted, the *Strickland* test applies to ineffectiveness claims both as to counsel's performance on the merits and on sentencing. As to the merits, the examination is whether there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Cronic*, 466 U.S. at 694. The test, as applied to sentencing, is "whether there is reasonable probability that, absent the errors, the sentencer -- *including an appellate court, to the extent it independently re-weighs the evidence* -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695 (emphasis added).

The status of this case as a capital case should have guided trial defense counsel's every action. While the trial defense counsel in this case were qualified in accordance with Article 27(b), UCMJ, and R.C.M. 1202(a), the detailed defense counsel were not qualified to represent Sergeant Akbar in his capital court-martial. *Cf. United States v. Murphy*, 50 M.J. 4, 8-9 (C.A.A.F. 1998); *see also* Assignment of Error (AE) I: A, *infra*.

In *Cronic*, the United States Supreme Court found "it [] entirely possible that many courts should exercise their supervisory powers to take great precautions to ensure that counsel in a serious criminal case are qualified." 466 U.S. at 665 n.38 (citations omitted).

Cronic was a non-capital mail fraud case. This is a capital murder case. The United States Supreme Court has required that capital appellate review "aspire to a heightened standard of reliability . . . . This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477 U.S. 399, 412 (1986). Also, the Court has consistently required that capital proceedings be policed at all stages with especially vigilant concern for procedural fairness and for the accuracy of fact-finding "and has [t]ime and again condemned procedures in

capital cases that might be completely acceptable in an ordinary case." *Strickland*, 466 U.S. at 704 (Brennan, J., concurring in part and dissenting in part) (citing *Bullington v. Missouri*, 451 U.S. 430 (1981); Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979) (per curiam); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280, (1976)).

Additionally, counsel is responsible for all aspects of the defense case, and must manage all aspects of the defense team. Counsel may not simply rely on experts to prepare a mitigation defense. In *Wilson*, the Tenth Circuit Court of Appeals held that, while counsel can rely to a certain extent on the expert, it is counsel's responsibility to conduct an investigation and to provide the results of that investigation to any expert witnesses:

> [C]ounsel may not simply hire an expert and then abandon all further responsibility. As another court has stated: "an attorney ha[s] a responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request." As in any managerial role, counsel must at a minimum continue to exercise supervisory authority over the expert, ensuring that the expert examines those sources of information that the ABA has indicated are necessary for adequate preparation for the sentencing phase. Only once either the expert or counsel

> has consulted all readily available sources can counsel's reliance on the expert's opinion be reasonable.

536 F.3d at 1089-90 (quoting *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir.1999)). *See also Wiggins*, 539 U.S. at 532 ("counsel's decision to hire a psychologist sheds no light on the extent of their investigation into Petitioner's social background").

Although the trial defense counsel in this case faced a daunting task, as do defense counsel in every capital case, the defense counsels' failure to effectively represent appellant at trial, including their failure to adequately investigate for mitigation evidence, fell drastically below the level expected of competent attorneys. The errors or deficiencies set forth below and the combination of these failures worked to materially prejudice Sergeant Akbar's substantial rights. Sergeant Akbar's legal representation at trial was deficient when his trial defense counsel: (1) failed to adequately investigate at any stage; (2) followed an unreasonable strategy during trial on the merits; (3) conceded guilt to a capital offense without the consent of Sergeant Akbar; (4) followed an unreasonable strategy in seating the panel during voir dire; (5) failed to present extensive and significant mitigation evidence; (6) failed to adequately use the appointed experts; (7) allowed introduction of evidence they had properly suppressed; and (8) failed to

adequately explain SGT Akbar's in court demeanor as mental illness but allowed the panel members to witness SGT Akbar consistently fall asleep during trial with no explanation.

Individually, each one of these failures by the trial defense counsel was so serious as to deprive Sergeant Akbar of the representation of counsel guaranteed by the Sixth Amendment to the United States Constitution. These deficiencies were of such a nature as to deprive Sergeant Akbar of a fair trial with a constitutionally "reliable" sentence. *See Scott*, 24 M.J. at 188. Since he was denied the effective assistance of counsel, Sergeant Akbar is entitled to a new trial. *Id.* at 193.

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings and sentence in this capital case, and order a new trial.

A. SERGEANT AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT AND DENIED HIS RIGHT TO REPRESENTATION BY COUNSEL QUALIFIED UNDER 18 U.S.C. § 3599 (2006), IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 36, UCMJ, WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO SEEK THE APPOINTMENT OF QUALIFIED COUNSEL TO REPRESENT SERGEANT AKBAR IN THIS CAPITAL COURT-MARTIAL.

The representation of SGT Akbar was doomed from the beginning because SGT Akbar's counsel were not qualified to represent him in this capital case.[3] None of the defense counsel

[3] While the trial defense counsel in this case were qualified in accordance with Article 27(b), UCMJ, and Rule for Courts-Martial

at trial had any capital defense experience. (R. at 12-16.) The gloss of capital litigation inexperience tarnished trial defense counsel's performance and thus appellant's court-martial.

On 9 March 2004, the military judge in this case convened the first Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2002), session in this court-martial. (R. at 2.) The military judge requested trial defense counsel put their qualifications "for handling a case that has been referred as a capital court-martial" on the record. (R. at 10-16.) Major [redacted] was the lead defense counsel at trial and CPT [redacted] was the assistant trial defense counsel.[4] *Id.* Neither counsel had any experience defending a capital case, although both had attended a capital litigation course at some point in their career. *Id.* The only capital experience between the two counsel was MAJ [redacted] experience at the Government Appellate Division when as branch chief he "participated in strategy sessions for *United States v. Murphy*" and "reviewed and edited a number of issues raised" in *United Stated v. Kreutzer,* both on direct appeal. (R. at 13-14.)

1202(a), the detailed defense counsel were not qualified to represent Sergeant Akbar in his capital court-martial. *Cf. United States v. Murphy*, 50 M.J. 4, 8-9 (1998).

[4] On 9 March 2004, civilian defense counsel, Mr. [redacted] was the lead trial defense counsel; however, he subsequently withdrew from representation before trial began. (R. at 425, 6; App. Ex. 85.)

At no time did the military judge advise SGT Akbar that his assigned counsel had never defended anyone in a capital case, nor did the military judge explain to Sergeant Akbar how his assigned counsel were "qualified" to represent him despite their lack of any prior capital defense experience. The military judge simply concluded with the standard boilerplate, stating, "Counsel for both sides appear to have the *requisite* qualifications." (R. at 16, emphasis added.)

Trial defense counsel failed to seek an order by the military judge for the appointment of qualified defense counsel to represent appellant in this capital case. Likewise, trial defense counsel failed to seek an order from a superior supervisory court for such an appointment. As a result, SGT Akbar was represented by inexperienced and unqualified counsel in a capital murder trial which resulted in a sentence of death.

A military accused is entitled to the effective assistance of counsel, regardless of whether the counsel is detailed or personally selected by the accused. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987); *Bates v. Blackburn*, 805 F.2d 569 (5th Cir. 1986). In 1989, the American Bar Association (ABA) promulgated Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases [hereinafter ABA Guidelines (1989)]. The ABA produced a revised edition in 2003 to provide "comprehensive, up-to-date guidance for professionals who work

in this specialized and demanding field", specifically to help "ensure effective assistance of counsel for all persons" charged with capital crimes. ABA Guidelines (2003), Introduction. Guideline 5.1 sets forth the qualifications of defense counsel and emphasizes "high quality legal representation" as the basis for qualifying counsel to undertake representation in death penalty cases, rather than the quantitative measures of attorney experience, such as years of litigation experience and number of jury trials. *Id.* at 36.

Guideline 5.1 Qualifications of Defense Counsel, states:

> In formulating qualification standards, the Responsible Agency should insure:
>
> 1. That every attorney representing a capital defendant has:
>
> a. obtained a license or permission to practice in the jurisdiction;
>
> b. **demonstrated** a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
>
> c. satisfied the training requirements set forth in Guideline 8.1.

ABA Guidelines (2003) (emphasis added). Guideline 8.1 Training, states:

> Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should

include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law;

2. pleading and motion practice;

3. **pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**

4. **jury selection;**

5. **trial preparation and presentation, including the use of experts;**

6. **ethical considerations particular to capital defense representation;**

7. **preservation of the record and of issues for post-conviction review;**

8. **counsel's relationship with the client and his family;**

9. post-conviction litigation in state and federal courts;

10. the presentation and rebuttal of scientific evidence, and **developments in mental health fields and other relevant areas of forensic** and biological science;

ABA Guidelines (2003) (emphasis added). Additionally, qualified attorneys will have demonstrated substantial knowledge and skill in the above areas of expertise. *Id.* at Guideline 5.1(B)(2)(a-h). While the ABA Guidelines have not yet been formally adopted by the United States Department of the Army, this Court should so require, at *a minimum*, ABA qualified counsel to represent an

appellant who may die as a consequence of a sentence of a court-martial.

The Army has long recognized the authoritative nature of ABA standards and guidelines, notably in the areas of ethical guidelines and standards for professional responsibility for attorneys, as was actually acknowledged when the United States Army largely adopted the ABA Model Rules of Professional Conduct. *See* Army Regulation 27-26, Rules of Professional Conduct for Lawyers, para. 7b. (1 May 1992) [hereinafter Army Reg. 27-26]. The rules set forth in the ABA Model Rules of Professional Conduct are essentially the Army rules of professional conduct (with minor variations significant to practicing law in the Army) by which every United States Army judge advocate must abide. *See* Army Reg. 27-26, Appendix B.

The Army's recognition of the authoritative nature of ABA guidelines is also reflected by the Army's mandate that military judges, counsel, and court-martial support personnel comply with the ABA Standards for Criminal Justice to the extent they are not inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial, and United States Army directives, regulations, or rules governing provision of legal services in the Army. *See* Army Regulation 27-10, Military Justice, para. 5-8c. (24 June 1996) [hereinafter Army Reg. 27-10]. Furthermore, the Army has directed that the 1972 ABA Code of Judicial Conduct

be applicable to all judge advocates performing judicial functions. *See* Army Regulation 27-1, Judge Advocate Legal Services, para. 7-1 (30 September 1996) [hereinafter Army Reg. 27-1]; Army Reg. 27-10, paras. 5-8(c).

Additionally, the Army also defers to the ABA's standards and accreditation in determining the qualifications of active duty counsel, Funded Legal Education Program selectees, and professional consultants. *See* Army Reg. 27-1, paras. 13-2, 14-5, 3-3, respectively. Finally, the Army recognizes that the rules and regulations governing military legal practice are not all inclusive. Judge advocates are encouraged to look to other recognized sources for guidance in interpreting United States Army standards and in resolving issues of professional responsibility, specifically, for example, ABA ethical opinions. Army Reg. 27-10, para. 5-8d; *see also* Army Reg. 27-26, para. 7d. According to The Judge Advocate General of the Army:

> Military attorneys and counsel are bound by the law and the *highest recognized standards* of professional conduct. The D[epartment of the] A[rmy] has made the Army Rules of Professional Conduct for Lawyers and the Code of Judicial Conduct of the A.B.A. applicable to all attorneys who appear in courts-martial. Whenever recognized civilian counterparts of professional conduct can be used as a guide, consistent with military law, the *military practice should conform*.

Army Reg. 27-10, Appendix C, para. C-1, (emphasis added).

Preceding the Attorney-Client Guidelines in Army Reg. 27-10, the following note was included:

> *Note.* These guidelines have been approved by T[he] J[udge] A[dvocate] G[eneral]. Military personnel who act in courts-martial, including all Army attorneys, will apply these principles insofar as practicable. However, the guidelines do not purport to encompass all matters of concern to *defense counsel, either trial or appellate*. As more problem areas are identified, TJAG will develop a common position and policies for the guidance of all concerned.

Army Reg. 27-10, Appendix C, Note, (emphasis added).

One professional requirement that the Army adopted directly from the ABA is the requirement of "competence" of counsel. *See* Army Rule 1.1. Competence is literally the first rule of professional conduct. *Id.* The text of this rule was drawn verbatim from the ABA Model Rule 1.1. *See* Model Rule 1.1. Furthermore, the official comments to both Army Rule 1.1 and Model Rule 1.1 state:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative *complexity and specialized nature of the matter*, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or consult with, a lawyer of established competence in the field in question. In most instances, the required proficiency is that generally afforded to clients by other lawyers in similar matters. *Expertise in a particular*

> *field of law may be required in some circumstances.*

Army Rule 1.1, Comment (emphasis added); *cf.* Model Rule 1.1, Comment. The Army has drawn from the authoritative experience of the ABA when it recognized that "*[e]xpertise in a particular field of law may be required in some circumstances.*" *Id.*

The ABA has identified capital litigation as one of those particular fields of law which requires specialized expertise and has defined the minimum level of expertise required to ethically defend a capital case, both at trial and on appeal. *See* ABA Guideline 1.1; ABA Guideline 1.1, Commentary; ABA Guideline 5.1; ABA Guideline 5.1. Commentary. These guidelines were fashioned after the National Legal Aid and Defender Association, Standards for the Appointment and Performance of Counsel in Death Penalty Cases at Standard 5.1(II) (2001). The ABA Guideline 5.1, Qualifications of Defense Counsel, delineates the minimum qualifications for trial defense counsel. Both of the appointed trial defense counsel in this case did not meet these *minimum* requirements set forth in the ABA Guidelines.

In this case, defense counsel were the opposite of qualified. Defense counsel's actions throughout the court-martial demonstrated that they lacked the knowledge, understanding, and skills for defending a capital client. Appellant has raised ineffective assistance of counsel at all

stages, to include failure to investigate, failure to use experts, failure to present a reasonable theory at trial, failure to present mental health evidence, failure to withdraw representation because of several conflicts of interest, failure to conduct proper jury selection, and failure to present mitigation evidence. *See* AE I: B-G, and AE II.

Following *Gregg v. Georgia*, 428 U.S. 153, 188, *reh'g denied*, 429 U.S. 875 (1976), a highly specialized body of death penalty jurisprudence evolved. Since 1976, the United States Supreme Court, federal appellate courts, and state appellate courts in the thirty-five "death penalty jurisdictions" within the United States have decided hundreds of capital cases. Attorneys who do not handle capital cases cannot be expected to keep up with the ever-changing developments in these jurisdictions. Therefore, they do not have the highly specialized knowledge and training necessary for the adequate representation of a defendant facing a death sentence.

The extremely high level of expertise required for counsel in capital cases has been widely recognized. Justice Thurgood Marshall, noted that "death penalty litigation has become a specialized field of practice, and even the most well-intentioned attorneys often are unable to recognize, preserve, and defend their client's rights." Justice Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of*

the Second Circuit, 86 Colum. L. Rev. 1, 1 (1986). Consistent with this point, the commentary to ABA Guideline 1.1 states:

> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary criminal cases. The quality of counsel's "guiding hand" in modern capital cases is crucial. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.

As a consequence of the complexity of issues, and because death penalty practice has become so specialized, Congress has provided that, for those facing a death sentence in U.S. District Court, the trial judge must assign, upon the defendant's request, two counsel "of whom 1 shall be learned in the law applicable to capital cases." 18 U.S.C. §3005.[5] Such legislation demonstrates the recognition by the United States Congress of the need for well-seasoned and qualified representation for an appellant faced with the death penalty.

Additionally, the Supreme Court has recognized that the ABA Guidelines are applicable in determining reasonable performance. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). As the Supreme

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[5] Under the military system, American Soldiers have less protection than civilians tried in federal court. The system used in the federal district courts must be implemented in order to ensure the equal protection of law for American Soldiers. *See also* AE XV.

Court noted in *Wiggins*, capital litigation involves not only the necessity for extensive investigation of the facts underlying the alleged crime, but also requires an extensive investigation into the background of the defendant and the preparation of an extensive case in mitigation, both of which are beyond the normal ken of a defense counsel. *Id.* at 524-526. *Wiggins* "now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms'" for representation and ineffective assistance of counsel in death penalty cases. *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

The failure of the Army to detail experienced and qualified death penalty trial defense counsel to represent SGT Akbar resulted in the denial of his rights set forth in the Fifth, Sixth, and Eighth Amendments to the United States Constitution, as well as his rights arising from Articles 27(b) and 36 of the Uniform Code of Military Justice.

The Eighth Amendment of the United States Constitution requires the different treatment of death penalty cases. *United States v. Curtis*, 32 M.J. 252, 255 (C.M.A. 1991), *cert. denied*, 502 U.S. 952 (1991). An exception to a Guideline for attorney qualification and competence is not warranted in this case, nor is a military exception to the Eighth Amendment of the United

States Constitution warranted. And there are no legitimate operational or military specific concerns that would necessitate anything less than counsel fully qualified by ABA Standards.

Unfortunately, if detailed trial defense counsel are not experienced and qualified in the defense of capital cases, "competent" representation may not ever occur. In *United States v. Curtis*, 48 M.J. 331 (1997)(Petition for Reconsideration Denied, Cox, Chief Judge (concurring)), Chief Judge Cox believed that to ensure military members who are sentenced to death have received a fair and impartial trial within the context of the death penalty doctrine of the United States Supreme Court, it should be expected that: (1) Each military service member has available a skilled, trained, and experienced attorney; (2) All the procedural safeguards required by law and the Manual for Courts-Martial have been followed; and, (3) Each military member gets full and fair consideration of all relevant evidence, for findings and for sentencing. *United States v. Curtis*, 48 M.J. 331, 332 (1997).

Ineffective assistance of counsel in capital litigation was addressed by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Curtis*, 46 M.J. 129 (1997). On reconsideration of that case, the Court of Appeals for the Armed Forces reversed the decision of the lower court as to sentence. *Id.* The CAAF concluded that trial defense counsel's performance during the

sentencing hearing was deficient and that there was a reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense. *United States v. Curtis*, 46 M.J. 129, 130 (1997). With that decision, the CAAF set a higher standard for counsel in capital cases. Capital defense should not be left to on-the-job-training. As this Court has stated:

> Just as soldiers who are asked to lay down their lives in battle deserve the very best training, weapons, and support, those facing the death penalty deserve no less than the very best quality of representation available under our legal system.

United States v. Gray, 32 M.J. 730, 735-36 (A.C.M.R. 1991).

The CAAF also examined the capital qualifications of counsel in *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). In *Murphy*, the CAAF found that Murphy "was defended by two attorneys who were neither educated nor experienced in defending capital cases, and they were either not provided the resources or expertise to overcome these deficiencies, or they did not request them." 50 M.J. at 9. The CAAF found the ABA Guidelines "instructive," but did not determine that the lack of qualifications was an "inherent deficiency." *Id.* at 9-10. However, the CAAF noted that both the Guidelines and 18 USC §3005 "implicitly suggest" that inexperienced counsel may provide ineffective representation. *Id.* at 10.

In this case, Sergeant Akbar's trial defense counsel were left to learn how to be capital defense litigators as they stumbled through his capital court-martial. Many of the errors made by counsel at Sergeant Akbar's court-martial are attributable to counsel's inexperience in defense of capital cases. Experience -- or the lack thereof -- is a primary factor for appellate courts to consider in assessing ineffectiveness claims. The average attorney is simply ill-equipped to understand the nuances of this intensely challenging specialty within the world of criminal jurisprudence. When assessing whether a defense counsel effectively and adequately represented a client, courts of appeals give greater deference to decisions made by *experienced* counsel. *See Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986). However, an appellate court must be highly critical of an inexperienced counsel's failures when assessing whether that counsel's failures resulted in the deprivation of the fundamental fairness ensured to every capital accused. *See, e.g., King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984).

In this case, the incredible burden of representing SGT Akbar in this capital court-martial initially fell upon a trial defense counsel who happened to be on the ground in the same

area where the offenses happened.[6] The counsel who represented Sergeant Akbar had no experience and inadequate training to defend a capital defendant. While the trial defense counsel in this case may have had some collective experience and success in criminal defense litigation in general, this was not enough in this capital case. In his treatise on the professional defense standards for capital defense representation, Professor of Law Gary Goodpaster stated:

> Trials about life differ radically in form and in issues addressed from those about the commission of a crime, and those cases must be tried differently. The differences are so fundamental that counsel quite able to try a complex criminal case may not be competent to handle a penalty trial in a capital case. Capital cases require perceptions, attitudes, preparation, training, and skills that ordinary criminal defense attorneys may lack. Indeed, counsel in a capital case who presents a seemingly skilled, but unsuccessful, defense at the guilt phase may have tried and lost the issue of his client's worthiness to live before the penalty trial has even begun.

Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983).

Consequently, Sergeant Akbar's trial defense counsel failed to recognize their lack of qualifications in the area of capital defense litigation. Likewise, those counsel sat silent when the

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[6] Appellant also claims that trial defense counsel were operating under a conflict of interest, in part, because of their proximity to events. *See* AE II: B.

military judge advised SGT Akbar that his counsel were, in fact, qualified to represent him. Additionally, and as asserted in Assignment of Error I: C, mitigation experts that were hired to work on the defense team recognized counsel's inexperience and urged for more time to conduct a proper mitigation investigation and appropriate medical testing.[7] (R. at App. Ex. 140; DAE D, G, I, J, GG; DA 7-32, 331-41.) Defense counsel's failure to conduct a thorough mitigation investigation is a clear sign that they were simply not qualified to handle a case of this magnitude. (DAE Z, AA, LL; DA 224-36.)

As a result of "the lack of well-trained and experienced defense counsel in [this] capital proceeding," the result of a sentence of death in Sergeant Akbar case is "unreliable in military jurisprudence." *See United States v. Curtis*, 48 M.J. 331, 333 (1997)(Petition for Reconsideration Denied, Cox, Chief Judge (concurring)). Consequently, Sergeant Akbar was denied the effective assistance of counsel, and, therefore, is entitled to a new trial. *See United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). Sergeant Akbar was entitled to counsel "learned in the law applicable to capital cases," but he was denied that entitlement, and thus was denied justice.

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[7] Appellant has also raised ineffective assistance of counsel for failure to use defense experts in the case. *See* AE I: B.

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings and sentence in this capital case, and order a new trial.

B. SERGEANT AKBAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE APPELLANT'S SOCIAL HISTORY, IGNORED VOLUMINOUS INFORMATION COLLECTED BY MITIGATION EXPERTS, CEASED USING MITIGATION EXPERTS, RESULTING IN AN INADEQUATE MENTAL HEALTH DIAGNOSIS BECAUSE THE DEFENSE "TEAM" FAILED TO PROVIDE NECESSARY INFORMATION TO THE DEFENSE PSYCHIATRIST WITNESS.

Introduction

Appellant was represented at his court-martial by a dysfunctional defense team. Whether because of defense counsel's error in ignoring and ceasing substantive communication with their experts, or because of defense counsel's frustration with ineffective experts, appellant was left with an inaccurate and insufficient mental health diagnosis, based on an incomplete and inaccurate mitigation investigation. Ultimately, the defense counsel are responsible, because the responsibility to ensure that appellant's mitigating facts were developed and presented to the panel was solely that of the defense counsel.

Statement of Facts

The defense team in appellant's case consisted of trial defense counsel, Dr. Woods, the defense psychiatric witness, and the mitigation experts. Originally, trial defense counsel

requested and was granted Deborah Grey as a mitigation expert. (DAE X; DA 210-15.) However, Ms. Grey left the team in June of 2004 because of a conflict with appellant's mother. *Id.* In her memorandum to the defense team, Ms. Grey estimated roughly between 151 and 208 hours of mitigation work remained in the case, but also cautioned that as the mitigation experts pursued the sources of information she had identified "other avenues of exploration may open up for him/her to pursue." *Id.* Ms. Grey also advised that the "mitigation specialist will need to consult with a psychologist and psychiatrist." *Id.*

While serving as appellant's mitigation expert, Ms. Grey prepared fifty-five pages of social history, twenty-seven pages of cumulative records, and a seven-page social history summary, none of which were presented at trial and most of which were not found in trial defense counsel's files. (DAE EE, FF; DA 267-330.) Nothing indicates that Ms. Grey ever consulted with Dr. Woods in this case. The only work done by Ms. Grey that was presented to the panel consisted of a one-page, unexplained family tree, a four-page timeline of appellant's life (with some notes), and a twenty-seven-page summation of appellant's journal, containing mostly quotes from the journal with some minor notes from Ms. Grey. (R. at Def. Ex. C.) This was largely cumulative with the submission by trial defense counsel

of appellant's entire journal. (R. at Def. Ex. A; *see also* AE I: G.)

After Ms. Grey left the defense team, Ms. Scharlette Holdman and her team, consisting of Ms. Scarlet Nerad and Mr. James Lohman, were appointed as appellant's mitigation experts on 1 July 2004. (R. at App. Ex. 129.) However, the convening authority only approved seventy-five hours of work and $10,000 for the Holdman mitigation experts. *Id.* (Ms. Holdman indicated that there were actually one thousand hours of work necessary, with a fee of $100,000. (R. at App. Ex. 129, 132.) Ms. Holdman outlined many of the same areas of the mitigation investigation that had not been completed but had been considered necessary by Ms. Grey. (R. at App. Ex. 132.) In response, the defense counsel did not request additional funding from the convening authority or from the military judge. (R. at App. Ex. 140; DAE G, I, GG; DA 15-27, 331-41.)

During sentencing, the trial defense counsel reached back to the files and submitted materials sent in by Ms. Grey on 15 March 2005. (R. at Def. Ex. C.) Ms. Grey provided thirty-three pages of commentary on appellant's diary (*Id.*), along with four interviews of varied utility from three high school teachers of appellant and his Imam during some part of his childhood. (R. at Def. Ex. N, O, P, and W.) Ms. Grey advised trial defense counsel that the analysis was not prepared for presentation to

the court, and that much of this information needed to be shaped for suitability in presenting to a jury. (DAE X; DA 210-215.) Another mitigation expert working with Ms. Holdman's team provided an interview of the wife of appellant's college roommate who had interacted with appellant during college. (R. at Def. Ex. T.)

Additionally, trial defense counsel submitted a competing and somewhat less sympathetic view of appellant's diary from the Federal Bureau of Investigation (FBI). (R. at Def. Ex. B.) This FBI report was an internal government document, definitely not prepared for the defense. *Id.* Portions of the report portray appellant as "an extremely self-conscious individual struggling to understand and adapt to a myriad of social, personal, sexual, and financial issues." *Id.* Also mentioned is appellant's "impoverished, abusive and loveless" home. *Id.* The report opines that any possible suicidal ideations were not made "seriously," and several paragraphs focus on appellant's "thoughts of violence and aggression," including his desire to kill white people and his belief that his "life is not complete until America is destroyed." *Id.* The report determined that "his [appellant's] actions come as no surprise" and compared appellant to a school or work shooter. *Id.* It concluded that "[N]one of this excuses what Akbar has done. Based on his

writings and pleas to Allah, Akbar clearly knew right from wrong." *Id.*

Doctor Woods had only a small fraction of the substantive contact with the trial defense attorneys and mitigation experts that he ordinarily has in a capital case. (DAE AA; DA 229-36.) Because of the insufficient mitigation investigation, Dr. Woods was unaware of several important pieces of mitigation information, including an incident where appellant ate his own vomit, extensive evidence of family mental health disease, and evidence of sexual and physical abuse of appellant by his step-father. *Id.* at DA 233. In Dr. Wood's opinion, this evidence was collectively so powerful that it would have been more than enough to solidify his forensic diagnosis of Paranoid Schizophrenia and would have led to an additional diagnosis of Complex Post-Traumatic Stress Disorder. *Id.* Doctor Woods repeatedly asked the trial defense attorneys to request additional expert assistance, particularly a forensic psychologist. (DAE B, DAE C, DAE AA; DA 3, 6, 233.) Doctor Woods, a clinical psychiatrist, was retained to do neuropsychiatric testing but not to do some of the psychological testing professionally reserved for psychologists. (R. at 2323.) Trial defense counsel continually replied that Dr. Woods and the mitigation experts' requests were pointless because the government would never agree to the expenditures. (DAE AA, DAE

GG; DA 233, 337.) Trial defense counsel never asked the Convening Authority or the military judge for additional funding for investigation or experts. Additionally, Dr. Woods advised that the testing done by the Sanity Board was insufficient and requested additional testing be funded. (DAE AA; DA 7-8.) Again, those requests went without action by the trial defense attorneys. *Id.*

Trial defense counsel did not call either Dr. Woods or any mitigation expert to testify at sentencing. There were no discussions between trial defense counsel, Dr. Woods, or the mitigation team about the possibility of any of the experts testifying at sentencing. *Id.* In their internal files, trial defense counsel, at the initial stages of investigation, apparently recognized the critical nature of sentencing evidence. (DAE CC; DA 257-64.) They identified that self-defense was not viable. *Id.* They also examined lack of premeditation as a possible defense theory, but concluded it "most likely will not work," but also determined that it was the only method open since it would not "alienate the panel." *Id.* Trial defense counsel do not mention the defense of lack of mental responsibility in the memorandum. The memorandum also discusses mitigation evidence, and sixteen separate and important "possible mitigation themes." *Id.* Counsel recognized that under Supreme Court and military case law "any strategic

choice to ignore or minimize this evidence would most likely be considered ineffective." *Id.* Yet, they did exactly that.

Argument

Deficient Performance:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). *See also Wilson v. Sirmons*, 536 F.3d 1064, 1089-90 (while counsel can rely to a certain extent on the expert, it is counsel's responsibility to conduct an investigation and to provide the results of that investigation to any expert witnesses); *See* also *Jacobs v. Horn*, 395 F.3d 92, 105 (3d Cir. 2005)(Jacobs counsel was ineffective on findings when he failed to adequately investigate and present mental health evidence that may have resulted in jury determining that Jacobs could not premeditate). This duty outlined by the Supreme Court is the fundamental underpinning of capital trial practice, particularly when the stakes are so absolute: the life or death of a Soldier.

To establish deficient performance, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. While

appellant will provide this Court extensive evidence of the failure of trial defense counsel in this case to reach a minimum objective standard of reasonable representation, this Court must analyze counsels' performance within the framework of the ABA Guidelines. While CAAF has not mandated that the ABA Guidelines must be followed, it repeatedly said that the ABA Guidelines are "instructive." *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998), *see also United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005) (repeatedly citing the ABA Guidelines in finding ineffective assistance of counsel in that case). While not mandatory, the ABA Guidelines in place during the time-frame of trial litigation in appellant's case (2003-2005) are the framework that this Court must use to assess whether or not trial defense counsel's performance was "reasonable."[8]

Turning to the requirements of the ABA Guidelines shows that one of the most important areas in capital litigation is the Defense Team. *See* ABA Guideline 4.1. The Commentary to this Guideline makes clear that "[N]ational standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate . . . expert witnesses, as well as personnel

[8] Also raised as an assignment of error, trial defense counsel were not qualified under the ABA Guidelines to represent appellant in this capital court-martial. *See* AE I: A.

skilled in social work and related disciplines . . . ." Commentary to ABA Guideline 4.1 at 30. The Commentary goes on to note that "analyzing and interpreting" the often unique and complex evidence in death penalty cases is "impossible without consulting experts." *Id.* In particular, the need for mental health experts is considered by the ABA as being "essential" in capital cases and counsel "can hardly be expected" to assess a client's mental state for Schizophrenia or other mental illnesses that "could be of critical importance." *Id* at 31.

The ABA Guidelines mandate "that at least one member of the defense team" be someone who is qualified to "screen for mental or psychological disorders or defects." *Id* at 32. The Commentary concludes by noting that a mitigation specialist is an "indispensable member of the defense team throughout all capital proceedings." *Id.* at 33. Trial defense counsel in this case apparently recognized the need for these experts, but either did not use them (in the case of Ms. Holdman, Ms. Nerad and Mr. Lohman), used them as an afterthought (as in the case of Ms. Grey), or withheld through gross negligence critical mitigation information crucial to an adequate diagnosis (in the case of Dr. Woods).

There is no substantive difference between not hiring experts at all and using them so little or so poorly as to render them useless. This Court cannot find counsel's

performance adequate merely because they checked the block by hiring experts. It is a mystery why defense counsel did not use the mitigation experts. If the experts were not experienced, or had issues that did not allow them to be useful, then defense counsel should have requested alternative experts. If there were no issues with the mitigation experts' performance, then defense counsel should have utilized their expertise. Of course, defense counsel are not absolutely required to use experts, but if they choose not to, they are not relieved of their burden to investigate appellant's background and social history for mitigating evidence.

Additional focus on the Defense Team is seen in ABA Guideline 10.4: The Defense Team. The duty for overall performance of the Defense Team is given to the lead counsel. *Id* at 63. This Guideline applied during the preparation of appellant's case and during appellant's trial. Nor is it a novel concept that a lead defense counsel would be overall responsible for the Defense Team. "Lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them." *Id.* at 66. While trial defense counsel originally recognized the need for mitigation experts, more funding for those experts, and the need to insure that information flowed from the mitigation experts to Dr. Woods,

trial defense counsel ignored these experts after they joined the defense team. Not only did they avoid substantial communication with any of their experts, but they failed to request any additional funding from either the convening authority or the trial court. Alternatively, trial defense counsel never complained to the military judge or the convening authority that their experts were inadequate or unacceptable. If problems arise between defense counsel and mitigation experts, trial defense counsel is not presented with a Hobson's Choice, but must ensure that steps are taken to solve the problems such that appellant is represented effectively.

ABA Guideline 10.7 addresses the standards for an appropriate investigation. This Guideline lays out the obvious, that "counsel should conduct thorough and independent investigations relating to both guilt and penalty issues." *Id.* at 76. The Guideline Commentary notes that "inadequate investigation by defense attorneys . . . have contributed to wrongful convictions in both capital and non-capital cases." *Id.* at 77-78. The crux of the need for a thorough investigation is that "[C]ounsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases

of the case." *Id.* at 80-81. The broad latitude given to present mitigation and extenuation in capital sentencing means that an attorney must consider "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant." *Id.* at 81 citing *Brown v. State*, 526 So. 2d. 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987)); *see also* R.C.M. 1004 (a)(3).

The attorneys in this case certainly "checked the block" by hiring mitigation experts and a clinical psychiatrist. However, "the mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." *Richey v. Bradshaw*, 498 F.3d 344, 366 (6th Cir. 2007) citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). The Sixth Circuit Court of Appeals in *Richey* rejected the idea that simply hiring experts suffices. If counsel substantively ignores experts, ceases substantive communication with them months before trial, and ignores or refuses to review or pass along to other experts large volumes of information from another expert, their decisions at trial cannot be said to be in any way "informed."

That is precisely what happened in this case. Defense counsel hired the experts, but then did not coordinate or communicate with them effectively, leaving the result (as is apparent by the sparse mitigation evidence presented at trial) the same as if no mitigation investigation had been conducted.

The vast majority of the information prepared by a mitigation expert and presented to the panel on sentencing was prepared by Ms. Grey. This information was gathered in February 2004, six months prior to Ms. Grey advising trial defense counsel that 150 hours or more of work still remained. (R. at Def. Ex. C.) No complete social history of appellant, or detailing of family mental health history, was presented to the panel for consideration on either merits or sentencing. This is not to say, however, that Ms. Grey did not have any of this.

Trial defense counsel gave notice to the trial court that Ms. Holdman would require significant time to complete her investigation. (R. at App. Ex. 132.) It is also clear that trial defense counsel realized that Dr. Woods was "relying on some of the same information that Ms. Holdman will be creating." (R. at 551.) After all, trial defense counsel informed the court on 24 August 2004 that "Dr. Woods -- in order to form his opinion to a reasonable degree of medical certainty, he's going to need at least until February to complete his tests and also to rely, in large part upon the information that Dr. Holdman is

able to obtain." (R. at 585.) "In order for Dr. Woods to make an accurate diagnosis, he will need to review the material prepared by Ms. Grey and Mrs. Holdman." (R. at App. Ex. 127.)

Trial defense counsel further informed the court that the testimony and evidence compiled by both Dr. Woods and Ms. Holdman's team would be "more than likely" used for both merits and sentencing. (R. at 554.) Dr. Woods and Ms. Holdman were "the heart of the defense strategy." (R. at 579.) What was apparent to all, at least at the early stages of the court-martial, was the critical nature of Ms. Holdman and her team, both to appellant's defense and Dr. Wood's mental health diagnosis. The need for additional time and money was equally obvious. Yet, trial defense counsel made no further effort to request additional money for the mitigation experts. Inexplicably, trial defense counsel appear to have recognized the critical nature of the incomplete mitigation material but did nothing to address it. Nor did defense counsel ever raise to the trial court in any way that their current experts were underfunded, insufficient, or performing unsatisfactorily. Inexplicably, counsel did not submit to the convening authority, the military judge, or an appellate court, a request for additional assistance.

Not only did trial defense counsel fail to request necessary funding, they ceased nearly all communication with

their mitigation experts. Several months before trial, trial counsel stopped all communication with the Center for Capital Assistance. They did not respond to inquiries asking relevant documents should be sent, such as mental health records of Sgt. Akbar's family members. They did not respond to requests for team meetings, instructions for further investigation, or pleas for communicating with us and family members. (DAE I; DA 22-27.) This lack of communication began sometime before or around 4 November 2004, as evidenced by an email from Ms. Nerad to trial defense counsel.

> For reasons I do not understand and have not been told, I have almost no communication with defense counsel, no access to the rest of the team, and no way of knowing, obtaining, reviewing, and analyzing relevant information and discovery. My requests for information and assistance from defense counsel go unanswered, causing me to delay and reschedule investigative tasks and to undertake investigation without appropriate preparation . . . . We have not been able to pursue or implement the plan in any meaningful way because of the prosecution's intrusion[9] into the defense case and defense counsel's failure for whatever reason to communicate with me or assist me.

(DAE R; DA 93.)

This corresponds with Dr. Woods' statement that trial defense counsel stopped substantively communicating with him

[9] While appellant is not certain of the type of intrusion by the government Ms. Nerad complains about, appellant believes it may be tied to disruptions in Ms. Nerad's ability to travel to interview potential witnesses.

around the same time as they stopped communicating with the mitigation team.

> For reasons unknown to me, defense counsel failed to communicate with me for five months prior to trial, failed to provide me relevant and necessary information related to the history of mental illness in Mr. Akbar's family, and failed to provide me with the results of the mitigation investigation that I normally rely upon in capital cases . . . . I also explained to trial [defense] counsel that the competency determination reached by the sanity board pre trial should not be relied upon in light of the limited information upon which it based its opinions and in light of the course of Mr. Akbar's mental illness over time. In my professional opinion, which I hold to a reasonable degree of medical certainty, a complete and reliable mental state assessment was not conducted on Mr. Akbar's behalf prior to trial, despite my best efforts.

(DAE B; DA 3-4.)

Because of this communication breakdown, appellant was defended by counsel who did not talk to his mitigation specialists or the defense psychiatrist in any meaningful way for substantial periods of time, and these experts failed to talk to each other for substantial periods of time. Appellant was bereft of a wide range of mitigating material, and Dr. Woods was unable to use that material to accurately diagnose appellant. Doctor Woods stated before, and even during, trial that additional testing was necessary to determine an accurate

mental health diagnosis, but these requests were ignored by trial defense counsel. (R. at 2291; DAE C, D; 5-14.)

Nothing in the record of trial or trial defense counsel's files indicate that the decision to no longer involve their experts was made after a thorough review of the evidence gathered from their mitigation experts, or that much, if any, of the evidence that was gathered was passed along to Dr. Woods.

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

Wiggins v. *Smith*, 539 U.S. 510, 524 (2003).

In appellant's case, as in *Wiggins*, trial defense counsel truly "abandoned" their investigation, particularly mitigation, after having acquired only a "rudimentary" understanding of appellant's social history. Ms. Grey and Ms. Holdman agreed that there was still much to do in the mitigation investigation of appellant. (R. at App. Ex. 132; DAE X; DA 210-15.) Doctor Woods, apprised of the nature and quantity of mitigation evidence he was not given, has changed his diagnosis,

specifically relying on the family mental health history he was not informed of before trial. (DAE C; DA 5-6.) Ms. Holdman identified this very material as existing in her files, but never delivered to defense counsel. (DAE G; 15-21.) The appellate mitigation specialist, appointed by this Court, Ms. Lori James-Townes, has also characterized the mitigation investigation as being largely incomplete and inadequate. (DAE LL; DA 413-517.) Evidence indicates that only a scintilla of mitigation evidence assembled by Ms. Holdman's team was ever presented to the panel, or made it to Dr. Woods. *Id.* Significant portions of Ms. Grey's self-described incomplete investigation did not make it into either counsel's files, nor was it presented to the panel, including a fifty-five page social history summary. (DAE EE; DA 267-322.) This raises a critical question. Why was the unused material in counsel's files not passed to either the jury or Dr. Woods when trial defense counsel clearly recognized the importance of the information both to the panel (R. at 554) and to Dr. Woods? (R. at 551, 585; App. Ex. 127.)

It is clear from defense counsels' files that they believed the bulk of their efforts should be targeted towards sentencing. Nonetheless, this early recognition did not translate into action. Counsel, in fact, ultimately ignored mitigation

evidence from Ms. Holdman and her team, and minimized what little mitigation evidence they did retrieve from Ms. Grey.

Instead of presenting a complete mitigation case, counsel merely placed three witnesses on the stand (other than the accused) on sentencing. Captain (CPT) David Storch, appellant's platoon leader at the time of the offenses, testified about appellant's unusual behavior and overall low level of effectiveness as a soldier and non-commissioned officer. (R. at 3017-3023.) Captain Storch also testified appellant did not receive a relief for cause report because the unit "probably didn't have enough evidence to backup a relief for cause NCOER." (R. at 3024.) On cross-examination, CPT Storch testified that he "never doubted" appellant's mental stability, and that he believed appellant was proficient in his specialty. *Id.* Counsel then called Sergeant First Class (SFC) Daniel Kumm, appellant's former squad leader, who testified simply that appellant was a "subpar" soldier. (R. at 3034, 3037.) Sergeant First Class Kumm testified about derogatory terms for Muslims and Iraqis used within the squad, but none of those terms were directed towards appellant. (R. 3038.) On cross-examination, SFC Kumm concurred with CPT Storch that there was no reason to question appellant's mental stability. (R. at 3040.) Of course, if trial defense counsel had sought out and examined the records and interviews compiled by Ms. Holdman's team they would

have found multiple incidences of appellant exhibiting extremely unusual behavior. (DAE Z, LL; DA 224-28, 413-517.)

The final witness called by trial defense counsel was Mr. Daniel Duncan, a former high school teacher of appellant. (R. at 3046.) Mr. Duncan recalled that appellant was a very good student, but that he did not interact with appellant much outside of the classroom. (R. at 3047.) Other than the three-sentence unsworn statement from appellant (R. at 3074), this comprised the entirety of trial defense counsel's presentation of mitigation witnesses, certainly not the stuff of a reasonably effective mitigation case, and on the whole, much more aggravating than mitigating.

The defense also presented the "analysis" of appellant's diary by the first mitigation expert, Deborah Grey, which was not prepared for trial, but instead prepared as part of the "process of creating a social history" of appellant. (R. at Def. Ex. C.) Significantly, Ms. Grey prepared this information in February, 2004, several months before she resigned from the case while informing trial defense counsel that there was a very large amount of information and work left to be done. (R. at Def. Ex. C; DAE X; DA 210-15.) Ms. Grey also warned defense counsel that they needed to be very careful in what was presented to the panel concerning appellant's diary. (DAE X; DA 210-15.) "It remains my belief that the defense team must find

a way to contextualize and if possible neutralize the elements of his journal that talk about killing Caucasians, etc." *Id.* Ms. Grey linked journal entries to possible evidence of "mood cycling" and the effect of "early exposure" to the Nation of Islam on appellant. *Id.*

Ms. Grey highlighted both the importance **and** the danger of appellant's journal, as well as the large volume of other critical mitigation information that needed to be assembled, including information from and observations of appellant by family members, mental health records of family members, observations of appellant by those with whom he had relationships in high school and college, the ex-wives of appellant, the Soldiers at appellant's unit who may have observed appellant's behaviors, as well as the need to possibly confront government mental health experts with mitigation evidence, and necessary consultation of the mitigation specialist with the defense clinical psychiatrist (Dr. Woods). *Id.*

It is clear from Dr. Woods' declarations and testimony at trial that consultation between Dr. Woods and the mitigation experts in this case was minimal at best. (DAE AA; DA 229-36.) There is no evidence that many of the recommendations of Ms. Grey (or Ms. Holdman's team) were followed by trial defense counsel. Certainly if trial defense counsel and the mitigation

experts reasonably investigated all of the relevant and necessary mitigation evidence, trial defense counsel could have formed reasonable tactical decisions regarding what to submit to the panel. However, that is not what took place here.

This case combines the errors the Supreme Court decried in *Rompilla* and *Richey* -- trial defense counsel hired experts but then failed to adequately communicate with them, and by so failing, also failed to adequately investigate and present mitigation evidence in appellant's case. Thus, trial defense counsel made uninformed decisions regarding the use of mitigation evidence, including whether to call Dr. Woods or a mitigation expert to testify on sentencing. These decisions, based on insufficient information, were certainly not informed tactical decisions.

This lack of forethought was also illustrated in trial defense counsel's decision to submit appellant's journal in its entirety. (R. at Def. App. Ex. A.) This was done with only minimal analysis and with no attempt to put the diary into context or explain or defuse the multiple incendiary statements. (R. at Def. Ex. C.) *See also* AE I: F. As a result of trial defense counsel's negligence in contacting and working with defense experts, much of the testimony and evidence that needed to be placed in front of the panel was not, while evidence and statements from appellant that should have either been

completely kept away from the panel or explained and contextualized were tossed at the panel unvarnished.

Viewing the declarations of Dr. Woods, Ms. Holdman, Ms. Nerad, and Mr. Lohman, along with the work of Ms. James-Townes (discussed in more detail *infra*), their consensus is that: 1) there was abundant information that was not provided by the mitigation teams to the attorneys; 2) that information, nor other information that was delivered to the attorneys was ever provided to Dr. Woods for his analysis; 3) a significant portion of the mitigation investigation remained to be completed when trial defense counsel stopped communications with the mitigation team; 4) trial defense counsel ignored repeated and specific requests for further testing by Dr. Woods even after he informed them that, without further testing, the defense would not be ready for trial and Dr. Woods would not be able to rule in or out certain diagnoses; 5) Dr. Woods did not have genetic information that would have also aided him in his diagnoses.

Trial defense counsel is not required to examine every file or every box of information relating to appellant's life. They are also not required to conduct every test requested by their experts or every recommendation of their experts. However, decisions regarding additional testing and investigations must be reasonable and informed decisions, as must decisions whether to communicate with experts. Merely hiring an expert is not

enough. Trial defense counsel must allow those experts to inform them, and give those experts the tools necessary to perform their tasks (or at least request those tools be provided).

In short, trial defense counsel's decision must be "informed." Trial defense counsel's decisions were not "informed" because Dr. Woods was provided sparse social history information on appellant (particularly the family mental health information), insufficient testing was done, and the mitigation team was ignored almost completely. Such a sparse investigation and use of mitigation evidence rendered Dr. Woods' diagnoses incomplete, and inaccurate. (DAE AA; DA 229-36.) Thus, appellant's trial defense counsel operated from a flawed, uninformed perspective **of their own making** regarding appellant's mental state and the presence, absence or importance of mitigation evidence.

The complete lack of family history of mental illness in is the more surprising because it is apparent from counsel's notes that they were aware of the importance of a genetic history of mental illness. (DAE DD; DA 265-66.) However, instead of seeking that history, trial defense counsel instead used the FBI investigation. *Id.* However, the FBI analysis: 1) was not designed to provide genetic history of mental illness to appellant's mental health; and 2) provided no substantive

evidence of appellant's family mental health history except for an interview with one brother who exhibited paranoid ideations. (R. at Def. Ex. B.) This was not an informed tactical or strategic decision counsel pursued after investigating, gathering and considering the available evidence.

Sadly, this information was largely available in the voluminous material that Dr. Holdman's team of mitigation experts compiled during the short time they worked on appellant's case. That information was so important that after being provided this information, Dr. Woods changed his diagnosis. (DAE AA; DA 229-36.)

Evidence compiled by Ms. Holdman and also obtained by Ms. James-Townes indicates that appellant's father suffered from drug addiction, mental illness (depression, anxiety disorder, panic disorder, and mood disorder), and had Acquired Immune Deficiency Syndrome (AIDS). (DAE LL; DA 431.) Mitigation specialists also believed appellant's mother had some mental health issues. *Id.* at DA 424. Appellant's brother would not even speak to investigators because he believed helicopters from the government were watching his house. (Def. Ex. B.) The fact that both parents exhibited mental health issues and his brother exhibited paranoid symptoms certainly would have been important to Dr. Woods in forming a diagnosis of Paranoid Schizophrenia. (DAE HH; DA 342-74.)

Even if this Court finds that defense counsel sufficiently "informed" themselves to make tactical decisions, the following decisions were unreasonable: (1) to ignore four boxes of mitigation information; (2) to cut-off the mitigation investigation despite the protestations of the mitigation experts that more needed to be done; (3) to fail to transfer much of that information to Dr. Woods to assist in his diagnosis of appellant; and (4) to fail to conduct testing relating to sleep issues and Schizophrenia recommended by Dr. Woods. Unreasonable tactical decisions will not defeat a claim of ineffective assistance of counsel. *See United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). The Court, will not give carte blanche to the tactical decisions of counsel in capital cases if the counsel's performance reflects inadequate investigation, limited capital experience[10], and does not meet the higher standard of performance expected of counsel in capital litigation:

> What follows in this opinion, however, demonstrates that a capital case -- or at least this capital case -- is not "ordinary," and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death. We have no quarrel with the Army Court regarding the obligation of an appellate court not to second-guess tactical judgments. Here, however, counsels'

[10] *See* AE I: A.

> lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.

United States v. Murphy, 50 M.J. 4, 13 (C.A.A.F. 1998.)

In *Murphy*, as in this case, counsel performed a sub-standard mitigation investigation. Counsel in *Murphy*, who did not have a mitigation expert, developed the mitigation evidence primarily by "correspondence and telephone." *Id.* at 12.

Counsel in appellant's case had mitigation specialists, but they failed to use them. No mitigation expert was called to testify, and no material from the mitigation file was analyzed or placed into evidence. Information from the mitigation team was not shared with the clinical psychiatrist, Dr. Woods. Nor was such information presented to the panel in any coherent form. Defense counsel actively ignored both the mitigation team and Dr. Woods. Thus, appellant's trial defense counsel placed themselves in the same situation as Murphy's counsel, attempting to try the case effectively without a functioning mitigation expert, an adequately informed mental health expert, and doing so without the capital trial experience necessary to overcome those deficiencies.

In *Murphy*, CAAF refused to simply cede to the ordinary, non-capital rationale that an attorney merely need have *a*

tactical reason for trial decisions, but recognized that capital trials are not "ordinary." *Id.* Attorneys in capital cases do not receive unlimited deference to their tactical choices. Their experience in capital litigation, their level of investigation of an appellant's background, and their use of experts must all be examined more critically, as must their performance in presenting sentencing material to a panel.

This problem is not unique in to appellant's case. While not binding, *Worthington v. Roper,* 619 F.Supp.2d 661, (E.D.Mo. 2009) is instructive in comparison to appellant's case. In *Worthington,* the accused pled guilty, was convicted of murder, and sentenced to death. *Id.* at 665. At trial, the prosecution called twenty-four witnesses while the defense counsel called only two witnesses. *Id.* at 666. Those two witnesses were Worthington's maternal aunt and a psychiatric pharmacist. *Id.* Worthington's maternal aunt testified primarily of Worthington's lifetime exposure to drug use and drug abuse, his rampant drug abuse in his early life, and the absence of a father figure in Worthington's life. *Id.* at 667. A psychiatric pharmacist testified that Worthington's drug abuse problems made Worthington unable to control his impulses and affected his decision-making. *Id.* The district court found that the defense counsel's performance and investigation was "inadequate." *Id.* at 675. Although the defense counsel made some investigation,

including calling witnesses and seeking records, the Court found that the defense counsel did not go far enough in finding other relevant mental health issues. *Id.* Similar to appellant's case, the district court found that Worthington's defense attorneys did not provide the mental health experts in the case with all of the relevant mitigation evidence. *Id.* The district court determined that the primary reason for Worthington's counsel not seeking additional mitigation evidence such as records or witnesses was not because of a determination that such an investigation would be futile, but because of money and time. *Id.* at 67.

Appellant's trial defense counsel did the same. When presented with the need for additional investigation, testing, and experts, trial defense counsel responded that there was no point in making a request because funding was unavailable. (DAE AA; DA 229-36.) Thus, appellant's case stands on all fours with *Worthington.*

Relying on *Wiggins* and *Rompilla*, the district court in *Worthington* found that Worthington's defense counsel terminated their investigation too soon and did not undertake to uncover all reasonably available mitigating evidence. *Id., citing Wiggins*, 539 U.S. at 527-28; *Rompilla,* 545 U.S. at 389. Additionally, the district court relied upon the ABA Guidelines

as a "guide" in determining what is "reasonable in a death penalty case." *Id.* at 674 *citing Rompilla*, 545 U.S. at 387.

The Court in *Worthington* next turned to prejudice. At Worthington's trial, there was evidence of drug use, childhood abuse, and expert testimony which emphasized the affect Worthington's drug abuse had on his ability to control his impulses and his decision-making. *Id.* at 667. The Court found that the additional evidence presented on appeal was mostly duplicative of the evidence already presented albeit much more detailed, and thus refused to overturn Worthington's conviction based on the new evidence. *Id.* at 678.

However, the Court did overturn Worthington's conviction based upon the failure of the defense counsel to uncover the additional evidence and present it to Worthington's assigned mental health experts. *Id.* at 684. On appeal, Worthington presented expert testimony describing mental health issues, such as Bipolar affective disorder with psychotic features, Tourette's syndrome, chemical dependencies and Post Traumatic Stress Disorder, from which Worthington suffered. *Id.* at 682. The experts emphasized of the critical importance of family mental health information to making an accurate mental health diagnosis. *Id.* The expert that Worthington had presented at his trial also testified at Worthington's habeas proceeding that the expert had minimal records provided to him at trial and that

he was "overwhelmed" by the volume of records that were available that he did not receive at trial. *Id.* at 683. All of the defense experts disagreed with the State's expert diagnosis of antisocial disorder. *Id.*

As in *Worthington*, appellant's defense counsel ceased seeking mitigation information early into the process. (R. at App. Ex. 140; DAE G, I, Z, AA, GG; DA 15-27, 224-341.) Similarly, appellant's defense counsels' claimed, at least in their conversations with their mitigation experts, that the reason for not conducting a more thorough mitigation investigation was funding. Doctor Woods, like the expert at trial in *Worthington*, was surprised by the quality and quantity of information he did not have to make an accurate diagnosis. (DAE AA; DA 234.) Finally, as in *Worthington*, the mental health diagnoses of appellant on appeal were more concrete, more severe, and more strongly supported than at trial. (DAE Z, AA; DA 224-36.) If anything, Worthington had the "luxury" of having an expert testify on sentencing, while appellant had none.[11]

In finding that Worthington was prejudiced, the Court found that it was reasonable to believe that the mental health expert at trial would have changed his diagnosis had he been given a

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[11] While Dr. Woods did testify on the merits and did discuss some differential diagnoses of appellant, he did not testify on sentencing and he never gave a definitive diagnosis of appellant's mental health on the merits.

complete social history investigation of Worthington. *Worthington*, 619 F.Supp. at 688. Doctor Woods has been clear both that he would have changed his diagnosis and specifically, he would have diagnosed Schizophrenia if provided a sufficient social history investigation. (DAE AA; DA 234.) Also like *Worthington*, this Court must find "the likelihood of a different result had properly prepared experts testified is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *citing Rompilla*, 545 U.S. at 389. Both appellant and Worthington, suffered from inadequately prepared experts.

In *Porter v. McCollum*, 558 U.S. __, 130 S.Ct. 447 (2009), the Supreme Court found that Porter's trial defense counsel was ineffective in investigating Porter's mitigation case, and that Porter was prejudiced. At trial, Porter's counsel presented one witness, Porter's ex-wife, and presented portions of a deposition. 130 S.Ct. at 449. "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." *Id.*

Post-trial, Porter's counsel discovered new evidence that Porter had an abusive childhood, that he performed heroically in the Korean War, that he was a long-term substance abuser, and that Porter had impaired mental health and mental capacity. *Id.* In addition to testimony regarding Porter's heroic Korean War

service, an expert in neuropsychology testified that Porter suffered from brain damage and was impulsive. *Id.* at 451.

The Court found that Porter's counsel at trial was ineffective. *Id.* at 453. Porter's counsel failed to assemble Porter's military, medical, or educational records, nor did he interview Porter's family. The Court rejected the counsel's claims that, because Porter was "fatalistic and uncooperative," counsel's failure to investigate was excused. *Id.* The Court found counsel's failure to present evidence of Porter's family background, military service, and mental health was unreasonable. *Id.*

The Court also found that Porter was prejudiced. *Id.* at 454-456. If Porter's counsel had properly investigated Porter's case, he would have informed the jury about Porter's military service, his abusive childhood, and his mental health deficiencies and mental limitations. *Id.* at 454. Porter was not required "to show "that counsel's deficient conduct more likely than not altered the outcome" of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Id.* at 455-456, quoting *Strickland*, 466 U.S. at 693-694. The Court found that Porter succeeded in undermining the confidence in his trial. *Id.* at 466. *See* also *Hamblin v. Mitchell*, 354 F.3d 482, 492-493 (6th Cir. 2003)(counsel ineffective in failing to further

investigate mental health and in presenting his client's mitigation case. Claim that counsel was unaware of what the investigation would reveal was not sufficient reason to fail to further investigate); *Hardwick v. Crosby*, 320 F.3d 1127, 1165-1169 (11th Cir. 2003)(counsel ineffective in failing to put forward a case in mitigation because it was the only means of showing that his client was less reprehensible than the facts of the crime suggested); *Smith v. Stewart*, 189 F.3d 1004, 1008 (9th Cir. 1999)(counsel ineffective in failing to conduct a full examination of mental health and in failing to put forth anything in addition to mental health in his client's case in mitigation).

Prejudice:

The decision to ignore the mitigation experts did not have merely a hypothetical impact on the case, because, based on the previously undisclosed information, Dr. Woods changed his determination of appellant's sanity at the time of the offense and trial from competent to legally not competent.[12] (DAE AA; DA 229-36.) The potential impact on the panel from being told that appellant, in the opinion of Dr. Woods, was not legally sane at the time of the offense and trial is immeasurable. Doctor Woods learned after trial about: 1) specific observations of appellant doing things such as eating his own vomit, a clear indicator of

[12] *See* AE I: C, AE VII.

psychosis; 2) significant additional evidence of serious mental health issues with multiple members of appellant's immediate and extended family; and 3) evidence of both physical and possibly sexual abuse of appellant by his step-father. (DAE AA; DA 229-36.) As a result, he revised his diagnosis to Paranoid Schizophrenia and Post Traumatic Stress Disorder, and finding that appellant was legally insane both at the time of the offense and at trial. *Id.* Combining Dr. Woods' revised diagnosis with the sheer volume of mitigation evidence uncovered by this Court's appointed mitigation expert, Lori James-Townes (DAE LL; DA 413-517), and buttressed by a similar preliminary diagnosis of appellant's mental health state by Dr. June Cooley (DAE Z; DA 228), a forensic psychologist, the quality and quantity of mitigation evidence that could have been provided to the panel with an effective use of experts in this case is stunning.

Both Lori James-Jownes (DAE LL; DA 420-427), and Dr. Cooley (DAE Z; DA 225), have noted the significantly insufficient social history investigation completed at trial in this case. Doctor Cooley has conducted a review of the mitigation materials provided at trial and by Ms. James-Townes and has found preliminary diagnoses of: Schizophrenia, Major Depressive Disorder, Recurrent, Severe with Psychotic Features and Post Traumatic Stress Disorder. (DAE Z; DA 225.) Doctor Cooley

specifically based her findings on the mental health history of appellant and his family. (DAE Z; DA 228.) She also listed nine separate categories of psychotic behaviors appellant has exhibited and the five functional causes underlying those behaviors. (DAE Z; DA 225-26.) Ms. James-Townes concurs with Dr. Cooley's findings that those issues not gathered in mitigation prior to trial and not presented to Dr. Woods to assist in his diagnosis were qualitatively and quantitatively critical pieces of information. (DAE LL; DA 420-27.) Additionally, Dr. Cooley found that appellant has never received a "comprehensive psychological evaluation" and that the psychological testing of appellant by the Sanity Board was incomplete. (DAE Z; DA 226-27.) Doctor Cooley then provided a laundry-list of psychological testing that appellant should have received as well as what a "comprehensive psychological evaluation" requires. *Id.*

Ms. James-Townes outlined in her report that:

> A. There was no team approach to address the mental health concerns experienced and demonstrated by SGT Akbar.
>
> B. Interviews were not multi-generational.
>
> C. There was no mitigation expert on the team who would have been available to manage information gathered and provide a coherent picture of the entirety of Sgt. Akbar's life.

D. There was not mitigation specialist on the team at the time of trial able or willing to testify about the findings.

E. Because of the lack of social history presentation, no defense expert was able explain the many facets of SGT Akbar's life: including but not limited to his struggle and confusion surrounding his religion (which began at the age of 4 when his parent's changes his name), obsessions with sex, identity issues; confusion regarding what memories were real versus fantasy; history of childhood trauma; his parents and family history and the impact it had on him, medical issues which included severe sleep disturbances.

F. There was no follow-up regarding the horrendous abuse suffered as a child (psychological abuse by mother, religious overtones to discipline, abuse by his stepfather, abandonment by father, horrendous living conditions, sexual abuse of female family members, possible sexual abuse suffered by him).

G. There was no complete extensive social history to feed neither the mitigation investigation findings nor the presentation at trial.

H. Without a social history report nothing about SGT Akbar's life was put into context.

I. Despite mountains of evidence regarding Sgt. Akbar's psychological conditions, no psychological examination was completed having the benefit of a complete social history.

(DAE LL; DA 420-21.)

Additionally, Ms. James-Townes found that "[t]he Failure to Recognize and Investigate Compelling Mitigating Factors Resulted in Failure to Integrate the Mitigation Into The Guilt/Innocence Stage of the Trial." *Id.* at DA 423. Ms. James-Townes also found that "the admission of Mrs. Grey's 'summary' of Sgt. [sic]

Akbar's diary entries was the only effort made by counsel to educate the jury panel regarding his severe psychiatric illness and long-standing physical disorders. . ." on sentencing. *Id.* at DA 424. Ms. James-Townes notes that "SGT Akbar's childhood was remarkable for extreme poverty, constant moving, unstable parenting, physical abuse, possible sexual abuse, parental abandonment, domestic violence, and traumatic events (earthquake)." *Id.* at DA 433. Ms. James-Townes goes into significant detail in her report about the abuse appellant suffered growing up and the impact of childhood trauma both generally and related to appellant. *Id.* at DA 433-39. Ms. James-Townes also details some of the medical issues appellant suffered during his nine years of college. *Id.* at 27-31. Ms. James-Townes points to the critical importance of "execution impact testimony" in her report. *Id.* at DA 446. "Execution impact testimony" is testimony by family members and close friends that "allows the jury/panel to understand exactly how the death of the defendant will impact them." *Id.* The absence of any family members testifying "speaks volumes to a panel member who had to decide the life and death of SGT Akbar . . . ." *Id.* Crucially, Ms. James-Townes states that she requires expert assistance to provide a complete report because "his current mental health state and sleep disorder symptoms is prohibiting my efforts. I would urge the court to appoint a

forensic psychologist and forensic psychiatrist to assist in these efforts." *Id.* at DA 448.

It is also important to note that Dr. Woods' adjusted diagnoses tracks very closely with the diagnoses of Dr. Cooley, differing only in Dr. Cooley's additional finding of Major Depressive Disorder, Recurrent, Severe with Psychotic Features. (DAE Z; DA 225.) This lends further credence to Dr. Woods' revised findings based on the uncovered social history evidence. There is a significant difference between a mental health expert being able to definitively diagnose appellant with Paranoid Schizophrenia, Post Traumatic Stress Disorder and unequivocally declaring him incompetent at the time of the offense and trial, and what happened at trial, where Dr. Woods found none of these diagnoses definitively and declared appellant not legally insane. (R. at 2313.) Additionally, had a complete and sufficient social history investigation been done, the facts would have lent greater weight and credibility to Dr. Woods' diagnosis. Appellant was also prejudiced by the lack of any expert testimony at his sentencing.

In a capital case, one test for prejudice when significant evidence is withheld from the panel is "whether a reasonable finder of fact, armed with this evidence, would come to the same conclusions that the court-martial did as to the findings and sentence." *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F.

1998), *citing United States v. Dock*, 26 M.J. 620 (ACMR 1988). If even one panel member would have come to a different conclusion as to either findings or sentence based on the large volume of unpresented mitigation evidence and a definitive and confident diagnosis from Dr. Woods, then this court-martial would have possibly resulted in a different finding, and definitely in a different sentence. This panel was not armed with the necessary evidence to arrive at an informed verdict.[13]

However, because appellant was effectively denied the assistance of a mitigation expert at trial, the standard for prejudice is more complex than an ordinary death penalty case. The CAAF's decision in *United States v Kreutzer*, 61 MJ 293 (CAAF 2005) addressed prejudice both in the context of ineffective assistance of counsel and a failure to grant a mitigation expert. For ineffective assistance of counsel, the CAAF found that "the appellant must demonstrate a reasonable *probability* that, but for counsel's deficiency, the result would have been different." *Kreutzer*, 61 M.J. at 301 *citing Strickland*, 466 U.S. 694. For denial of a mitigation expert, the CAAF said that the burden falls on the government to show that:

> There is no reasonable possibility that even a single court member might have harbored a reasonable doubt in light of the mental health evidence that the mitigation specialist could have gathered, analyzed,

[13] *See* AE V.

> and assisted the defense to present. Had but a single member harbored a reasonable doubt, death would have been excluded as a permissible punishment.

Id. at 301.

Appellant's case is a very similar to *Kreutzer*. Appellant was effectively denied the assistance of a mitigation expert because defense counsel failed to utilize them in anything more than a minimal fashion. Appellant is in the same position as Kreutzer, lacking the assistance of a mitigation expert either to present mitigating evidence to the panel or to assist Dr. Woods in forming an accurate and forensically supported diagnosis. Appellant is also left in the same position as Murphy in that significant evidence was not presented to the panel, calling into question whether the panel would have come to the same conclusion on findings or sentence had the evidence been presented.

Accordingly, appellant should not be required to rely on the high burden of proving prejudice under a standard ineffective assistance of counsel analysis. However, appellant meets that even higher standard. Though the burdens differ between ineffective assistance of counsel and denial of a mitigation expert in a capital case, the fundamental concern is the same. Is there a chance the result would have been different had the attorneys utilized the experts properly and

the missing evidence been introduced to the panel? Appellant, in this capital case, must only show that the ineffective assistance was "sufficient to undermine confidence in the outcome." *Id.* at 694.

Confidence in the outcome of a death penalty case is even more paramount than in a non-capital case. "One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *Murphy*, 50 M.J. at 14. The heightened need for a reliable result in a death penalty case requires that if this Court finds that appellant was denied the use of a mitigation expert, then it should find that prejudice exists if the government cannot show that one panel member might have harbored a reasonable doubt based on a proper mitigation investigation, necessary testing, and a mental health evaluation.

Even if this Court chooses to evaluate prejudice under the basic standard for ineffective assistance of counsel, the confidence in the outcome of both findings and sentencing is significantly undermined by Dr. Woods' change in diagnoses and the large volume of uncovered mitigation information not presented to the panel. Accordingly, this Court must order a rehearing.

Ineffective Assistance of Counsel - Voir Dire

C. SERGEANT AKBAR WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE TRIAL DEFENSE COUNSEL FAILED TO CHALLENGE FOR CAUSE ANY PANEL MEMBERS, EVEN THOUGH COUNSEL HAD MULTIPLE CAUSAL REASONS INCLUDING ACTUAL BIAS, IMPLIED BIAS, AN INELASTIC OPINION AGAINST CONSIDERING MITIGATING EVIDENCE AND ON SENTENCING, AND PANEL MEMBERS' DETAILED KNOWLEDGE OF UNCHARGED MISCONDUCT THAT THE JUDGE SPECIFICALLY RULED INADMISSIBLE.

Statement of Facts

There were nineteen members seated when the court was first assembled. (R. at Convening Order dated 19 Feb 2004.) At the conclusion of voir dire, fifteen members remained. Trial defense counsel challenged only one potential panel member. (R. at 1174.) Government counsel challenged Lieutenant Colonel [redacted] Major [redacted] Major [redacted] Sergeant Major [redacted] Command Sergeant Major [redacted] and First Sergeant [redacted] (R. at 1160.) Trial defense counsel opposed the challenges of only Lieutenant Colonel [redacted] Major [redacted] and Command Sergeant Major [redacted] *Id.* The unopposed challenges were granted by the military judge, while the opposed challenges were denied. (R. at 1174.) Trial defense counsel challenged one member, Major [redacted] on the basis of implied bias because he was a witness in a prior military death penalty case (*United States v. Kreutzer*) and was actually involved in capturing Kreutzer after his attack. (R. at 1174-75.) This challenge was

joined by government counsel and granted by the military judge. *Id.* The government used its preemptory challenge on Lieutenant Colonel [redacted] while the defense did not use its preemptory challenge. (R. at 1177.) Significantly, one panel member, Sergeant First Class [redacted] was a member of appellant's company size unit, and this issue was waived by trial defense counsel. (R. at 1178.)

Applicable Law and the Standard of Review

Because the trial defense counsel did not challenge any of the panel members seated in this case, this issue is ordinarily waived. R.C.M. 912(f)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) However, because of the plenary review authority of Article 66(c) this court "is not constrained from taking notice of errors by the principles of waiver and plain error." *See United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998) (citing *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). Therefore, this court should look anew at these errors without need of a waiver analysis, particularly in this capital case.[14]

However, if this Court chooses to apply the waiver doctrine, because appellant claims that his counsel were ineffective in voir dire and panel challenges, this Court must examine whether assigned counsel were ineffective in failing to challenge for cause members in this case.

[14] *See also* AE VIX.

Absent the showing of a strategic decision, failing to remove a biased member for cause constitutes ineffective assistance of counsel. *Hale v. Gibson*, 227 F.3d 1298, 1319 (3d Cir. 2000); *United States v. Quintero-Baraza*, 57 F.3d 836, 841-842 (9th Cir. 1995); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th *Cir. 1992)*. Although counsel is ineffective during voir dire and panel challenging, appellant must still show that a biased panel member sat on his panel. *Hale*, 227 F.3d at 1319. To show bias, appellant must show that the panel member had such a fixed opinion that he or she could not impartially judge appellant. *Id.* However, once bias is established, appellant need not show prejudice. *Hughes v. United States*, 258 F.3d 453, 463 (6th *Cir.* 2001); *Sanders v. Norris*, 529 F.3d 787, 791 (8th Cir. 2008).

The impaneling of biased juror is structural in nature, and must result in appellant receiving a new trial. *Hughes*, 258 at 463. "Defense counsel's failure to attempt to remove from the jury a person who has been established on voir dire to be biased constitutes prejudice under *Strickland.*" *Hale*, 227 F.3d at 1319. "Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself." *Johnson v. Armontrout*, 961 F.2d at 755.

Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(1)(N) provides that a court 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." This rule encompasses challenges based on both actual and implied bias.

The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). The emphasis for actual bias is a subjective one viewed through the eyes of the judge and the panel member. *See United States v. Napoleon*, 46 M.J. 279 (C.A.A.F. 1997). The focus is then on the efficacy of rehabilitative efforts in changing the stated subjective position of the panel member to one that will yield to the evidence presented and the judge's instructions.

Unlike actual bias, implied bias is viewed "through the eyes of the public, focusing on the appearance of fairness." *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). In an implied bias case, "the focus 'is on the perception or appearance of fairness of the military justice system.'" *Id.* (quoting *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995)). Implied bias exists when, "regardless of an individual

member's disclaimer of bias, most people in the same position would be prejudiced [that is, biased]." *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000). Implied bias is examined under an objective viewpoint. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004).

Error and Argument

In SGT Akbar's case, trial defense counsel's failure to challenge for cause panel members for both actual and implied bias amounted to ineffective assistance of counsel. The threat of implied bias infected the entire panel and each and every panel member. Implied bias is not discussed by either the trial defense counsel (or the military judge) regarding a single panel member. This strongly indicates that neither defense counsel appropriately considered implied bias. This is ineffective assistance of counsel.[15] Because of the ineffectual voir dire by defense counsel on implied bias (and the military judge's failure to address implied bias *sua sponte*), appellant was prejudiced.

Defense Counsel's Failure to Challenge Sergeant First Class (SFC) [redacted]

Sergeant First Class [redacted] stated that he had no interest in the events in appellant's life leading up to the offenses in this colloquy with defense counsel:

[15] Appellant, in AE VIX, claims that the military judge committed plain error in seating the panel as composed.

DC: Would you have any interest in facts regarding their life, and how that person got to that point, factors that might have influenced their decision? Do you think those things would be important?

SFC D: No, sir. Because, if they took a life, it wouldn't be important.

DC: And what do you think rehabilitation or the potential for rehabilitation - what do you think that means?

SFC D: Like not letting them out - like they'd be able to live, but they'd spend the rest of their life in prison.

DC: Okay. Well, that's a good lead in to the next question. So, in a case where you've got the person, you're convinced that the person committed a murder, you're 100 percent sure of that, and life without parole is also a possible punishment, meaning that person will never get out of jail, would you consider that?

SFC D: Yes. I'd consider it.

DC: What sort of factors would influence your decision as you choose between death or a person being removed permanently from society and sitting in jail for the rest of his life?

SFC D: Okay. Say for instance that that person was provoked to do that, then the person deserves another chance.

DC: Any other factors or circumstances that could be important?

SFC D: Unless they had a mental condition or whatever.

(R. at 1134.)

At no point does SFC [redacted] state that he will consider mitigation evidence, or the events and influences in appellant's life leading up to the charged offenses. This is not a matter of the member simply giving low weight to extenuation and mitigation. In this case, SFC [redacted] was clear that everything leading up to the charged offenses was unimportant and would not be important because appellant took a life. Thus, SFC [redacted] would not consider evidence in mitigation.

Defense counsel inexplicably missed or ignored SFC [redacted] responses to his questions. Given that this was a capital case, certainly defense counsel must have known that it was absolutely paramount to seat a panel with an eye as much towards sentencing as towards the merits. This is heightened here because the events in appellant's life leading up to the attack were intricately interwoven with his mental health. (*See* DAE, Z, AA, LL; DA 224-36, 413-517.) There can be no tactical or strategic reason to fail to delve more deeply into SFC [redacted] clear statement that he would not consider factors in appellant's life leading up to the offenses, and certainly there was no reason not to challenge SFC [redacted]

The military judge later attempted to rehabilitate SFC [redacted]

> MJ: Sergeant [redacted] if I understand you correctly, if we get to sentencing, you would be able to follow my instructions on

the full range of punishments whatever they may be?

SFC D: Yes, sir.

MJ: Life, life without parole ----

SFC D: Yes, sir

(R. at 1136.)

The judge asked if SFC [redacted] could consider the full range of appropriate punishments, but did not ask if he could consider the full range of mitigation and extenuation evidence to determine the appropriate punishment. The issue is not whether [redacted] would consider the full range of punishments (although his responses put that into question), but whether SFC [redacted] could consider the underlying extenuating and mitigating factors in determining an appropriate punishment. There is no evidence that SFC [redacted] ever expressed an ability or willingness to consider the evidence or the judge's instructions concerning extenuation and mitigation, and trial defense counsel certainly did nothing to address it.

Sergeant First Class [redacted] also misinterpreted the meaning of rehabilitation. To him, rehabilitation meant life without parole. (R. at 1134.) Later, SFC [redacted] mentioned provocation and mental condition in the context of life without parole. (R. [redacted] had a severely limited understanding of the concept of rehabilitation, coupled with a mindset that

mitigation is not important if appellant took a life. Thus, SFC [redacted] had an impermissibly inelastic opinion on sentencing. In a capital case, SFC [redacted] cannot be seated, yet defense counsel not only inexplicably failed to further explore these issues, there was no challenge of any type.

SFC [redacted] also informed the trial defense counsel that he suffered from a sleeping problem:

> DC: And you related that that started about the time of the first Gulf War when you came back. What I'd like to know is, is that trauma related to trauma or stress from participating in that, or did you just get in the habit of not getting a lot of sleep?
>
> SFC D: I don't know what it's from, sir.
>
> DC: So you don't feel that you wake up because you were under stress or trauma?
>
> SFC D: Well, being in the military is stressful.
>
> DC: That's very true. So you think it may just be related to the day-to-day life stress?
>
> SFC D: Yes, sir.
>
> DC: But you feel that you're able to function and get by on 3 to 4 hours of sleep?
>
> SFC D: Yes, sir.

(R. at 1132.)

First, trial defense counsel tried to explain away what appears to be a panel member who could not answer whether or not

his dramatically changed sleeping habits resulted from Gulf War-related trauma. *Id.* The trial defense counsel's duty was to conduct an examination which uncovered whether or not SFC [redacted] truly did suffer from mental health issues that may have called into question his fitness to sit on the panel. Instead, trial defense counsel attempted to rehabilitate SFC [redacted] *Id.* But most observers in the court room would view a panel member who, when asked without prodding, could not state whether his sleeping habits were due to trauma.

Many additional questions should have been asked by trial defense counsel. Has SFC [redacted] received any psychiatric counseling? How did this trauma affect SFC [redacted] other than severely altering his sleep habits for years? How sympathetic would he be to someone also claiming sleep related problems and the possible mental health issues related to them?

In any event, most in the public would view SFC [redacted] as caring little for anything else once it was determined that appellant was the one who committed the murders and he was not "provoked" or had a "mental condition." (R. at 1135.) Furthermore, a member of the public would view SFC [redacted] as someone wrestling with his own demons and who should not be allowed to sit as a member.

What was even more egregious about trial defense counsel's conduct is that they had the opportunity to excuse SFC [redacted]

automatically given that he was a member of appellant's company sized unit. (R. at 1178.) Instead, they chose to waive this protection.

Defense Counsel's Failure to Challenge Major (MAJ) [redacted]

When asked under what circumstances he would consider death, MAJ [redacted] responded, "I'm saying, like - my formula is if one person dies, then that the means that that person [who committed the act] should die also." (R. at 991.) Major [redacted] response indicated that MAJ [redacted] had a formula: if you kill someone, then you die too. Trial defense counsel's reaction to that response indicated that either the defense team had no issues with the response or they did not hear or understand the response. In any event, asking MAJ [redacted] if he could in fact consider the death penalty did nothing to address the magnitude of his "eye for an eye" formula.

In a capital murder trial, MAJ [redacted] response should have raised red flags with trial defense counsel that MAJ [redacted] had an inelastic attitude towards sentencing. Even if Major [redacted] meant something else, or may have been confused by an inartful question, trial defense counsel failed to ask questions to get at the meaning of MAJ [redacted] intent. However, the plain meaning of his spoken words indicate that MAJ

[redacted] believed in balancing the scales: a life for a life. At the very least, these issues required extensive exploration. Major [redacted] should not have served on appellant's panel, and no tactical reason exists for his inclusion.

In addition to MAJ [redacted] bias on sentencing, MAJ [redacted] exhibited a level of personal feeling about the case:

> I felt pretty upset over what happened. I felt for the family members and soldiers that were over there. And I realized - well, I was over there in 2002. So I kind of knew where that area was. And it was depressing.

(R. at 993.)

The fact that MAJ [redacted] had just been "over there" a year earlier is not fully fleshed out, nor is it addressed as to why it was "depressing" for him. However, most in the room would assume or consider that MAJ [redacted] had been impacted by and had some personal emotional connection to this case by virtue of being at or near the area where the incident occurred, or perhaps by virtue of an "it could have been me" thought process. At any rate, a panel member who labels the case before any evidence is presented as leaving him depressed is not a panel member most would believe could fairly sit on the case and evaluate it with an open mind. Trial defense counsel should have inquired into what, if any, personal ties or emotions MAJ [redacted] had with appellant's case.

Defense Counsel's Failure to Challenge Sergeant First Class (SFC) [redacted]

Sergeant First Class [redacted] indicated both in general and individual *voir dire* that he had expressed an opinion on appellant's guilt:

> MJ: In general *voir dire*, did you indicate that you had previously expressed an opinion on guilt or innocence of Sergeant Akbar?
>
> SFC C: Yes, sir.
>
> MJ: Can you relate what it was?
>
> SFC C: Yes, sir. When it was in the news and first came out - my wife and I are in the military. As weeks went by, from what we've known out of the news, I had said, "It sounds like guilty."

(R. at 1138.)

The military judge then attempted to rehabilitate SFC [redacted]

> MJ: Have you followed the case since it made the news in 2003?
>
> SFC C: Yes, sir. Pretty much.
>
> MJ: Do you still maintain that position?
>
> SFC C: No, sir.
>
> MJ: Can you set aside anything that you may have learned and decide the case only on this evidence?
>
> SFC C: Yes, sir.

(*Id.*)

Trial defense counsel inquired further:

DC: You indicated that you initially said - based upon the press reports that you saw, you said to your wife, "Looks like he must be guilty?"

SFC C: Yes, sir.

DC: And you said your opinion had changed?

SFC C: My opinion, sir, is based on news reports that I do not completely, 100 percent believe.

DC: Okay.

SFC C: It was - and I'm saying it now because I just want that put out. It was based on what I've seen - the input that I'd gotten. Has it changed? Well, sir, now I'm going to get the facts. This was based on that news report that I don't believe is 100 percent at all times.

(R. at 1157.)

Thus, based upon media reports, SFC [redacted] believed appellant guilty – but stated he would suspend further judgment until presented with the facts. Sergeant First Class [redacted] was clearly planning on weighing the evidence that he had seen in the media and what he expected to receive at trial. While appellant is not entitled to a blank slate, he certainly deserves a panel member who has not received enough information to come to a conclusion about his guilt or innocence.

No tactical explanation exists for trial defense counsel's failure to challenge SFC [redacted] Sergeant First Class [redacted] admitted that he had formed an opinion that appellant

was guilty—but would, if a compelling case was made, change that conclusion.

Sergeant First Class [redacted] clearly had formed an opinion that appellant was guilty. Sergeant First Class [redacted] would change that opinion—if appellant could prove his innocence. There is no reasonable explanation for defense counsel's failure to challenge this member, and therefore, defense counsel were ineffective for failing to do so.

Defense Counsel's Failure to Challenge Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] stated a clear bias against mental health professionals during questioning by the trial counsel:

> TC: Sir, the fact that your father's a practicing psychotherapist, would that cause you to have a greater belief in that as a science, the science of psychotherapy?
>
> LTC A: Quite possibly the opposite. Growing up in that environment was, at times, trying as a kid. We'd have - take disturbing phone calls from some patients, and I got tired of it real quick.
>
> TC: But, as a science, to - in the event - say we had expert witnesses testify from the witness stand who were psychologists or psychiatrists, would you give that testimony any more weight than any other witness?
>
> LTC A: No, probably not.

(R. at 971.)

Lieutenant Colonel [redacted] clearly indicated that the fact that his experience as a child of a psychotherapist would lead him to have a reduced belief in the science of psychotherapy and give less weight to the testimony of psychologists and psychiatrists. Given the crucial role of mental health evidence and testimony in appellant's mitigation case, because LTC [redacted] had such a low opinion of that evidence, the evidence was sure to fall on deaf ears.

Again, trial defense counsel missed the issue. The focus of defense voir dire was on the ability of LTC [redacted] to consider mental illness that "could impact maybe an appropriate punishment for their crime." (R. at 979.) This is certainly a necessary area of inquiry, but the issue was not the ability of LTC [redacted] to consider mental illness as extenuation, but rather the prejudice LTC [redacted] exhibited against psychotherapy as a science. Lieutenant Colonel [redacted] low opinion of psychotherapy left appellant with a panel member who was biased against the only significant defense evidence offered, Dr. George Woods. There can be no reasonable tactical or strategic reason for not challenging this member.

Defense Counsel's Failure to Challenge Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] indicated she had experience with family mental health issues (specifically depression):

TC: Now, ma'am, regarding the area of psychiatry, has a relative, a close friend, or even yourself ever been examined for a psychiatric condition or a mental condition?

LTC L: Yes. My stepfather had depression and committed suicide. My - I think my mother - no. I'm not sure about my mother. My sister I know was diagnosed with depression and is on some kind of medication for that.

TC: Okay. Your stepfather's suicide, was the depression discovered before or after?

LTC L: Before.

TC: Before?

LTC L: Uhm-hmm [nodding head to the affirmative].

TC: Had it been a longstanding depression or something of short duration?

LTC L: Probably like 3 to 5 years I think.

TC: And was he actually under psychiatric care at the time he committed suicide?

LTC L: Uhm-hmm [nodding head to the affirmative].

TC: Do you know - the diagnosis, was it depression; or was depression a symptom of another diagnosis?

LTC L: I'm pretty sure that the diagnosis was depression.

(R. at 952.)

She then informed the court that she had done her own personal research into depression and had garnered some individualized and specialized knowledge in this area:

DC: And, in the course of having family members with this mental illness, did you do any research yourself into ----

LTC L: Uhm-hmm [nodding head to the affirmative].

DC: ---- depression?

LTC L: A little bit, yeah.

DC: In that case, given that you may have developed some specialized knowledge, could you agree to set that aside in this court-martial and, if there is mental health testimony, just listen to what they say and evaluate what they say without regard to anything you've read in the past?

LTC L: That would be kind of hard because I thought we were supposed to use our own values and judgments?

. . .

DC: If you did have any specialized knowledge or any points that you seem to remember from something, would you agree to not try to influence the other members with that?

LTC L: I suppose it depends on the amount of information that we get from the - if there's enough of it, then I can do that.

(R. at 964, 965.)

Although LTC [redacted] eventually indicated that, with enough evidence, she would put her personal knowledge aside, it it can in no way remove the taint of implied bias of a panel member who has expressed such reluctance to do so. No tactical reason exists to retain this panel member. Additionally, LTC [redacted]

refusal to disavow using her individualized knowledge to influence the other panel members should she deem it necessary is an indication of actual bias towards her own personal knowledge of mental health issues over the testimony of any experts called at trial.

Defense Counsel's Failure to Challenge Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] testified that he was appellant's deputy brigade commander from approximately 15 July 2004 until 17 December 2004. (R. at 882.) This, standing alone, should have triggered increased scrutiny on the part of trial defense counsel. Additionally, LTC [redacted] indicated that he had seen "legal briefs" pertaining to appellant's case. (R. at 883, 884, 892.) Trial defense counsel failed to further inquire into the nature of these various briefings.

Lieutenant Colonel [redacted] testified that he "could not recall any specific details or charges" and that the legal briefs merely contained a "matrix of pending cases" with which the brigade commander was briefed. (R. at 883.) Lieutenant [redacted] did remember that there was information concerning "a hearing, or whatever, motions or whatever." *Id.* He also testified about learning about an "altercation" that occurred at a previous session, ostensibly between appellant and the guards. (R. at 893.)

Voir dire failed to establish how much LTC [redacted] knew about appellant's case, how much of that knowledge flowed from his official position and through official channels, and who gave him that information. What we do know is that LTC [redacted] was the second in command of appellant's brigade. He sat in on legal briefs about appellant's case. He learned of an altercation involving appellant and his guards. He told the court he was potentially impartial in the case (his own words). (R. at 892.) Someone who has been briefed or attended briefings on a regular basis about the very case upon which he eventually sits as a panel member cries out for a challenge for cause. *Napolitano*, 53 M.J. at 167. Given LTC [redacted] testimony, there can be no tactical or strategic reason to leave him on the panel.

Defense Counsel's Failure to Challenge Lieutenant Colonel (LTC) [redacted]

The attack for which appellant was charged involved a brigade of the 101st Airborne Division (Air Assault). (R. at Charge Sheet.) Lieutenant Colonel [redacted] who served on appellant's court-martial panel, was the brother of the then commander of the 101st Airborne Division. (R. at 910.) Lieutenant Colonel [redacted] claimed he did not talk with his brother about the case and was not in any way pressured. *Id.* While this might remove actual bias as a concern, it does not alleviate implied bias. A member of the public watching the

trial would be highly concerned that LTC [redacted] would feel a kinship with his brother, and the men and women under his brother's command. Trial defense counsel did not address the issue at all.

Additionally, during his time at the Pentagon in 2003, LTC [redacted] dealt with correspondence coming in from the Congressional Legislative Liaison. (R. at 918.) Lieutenant Colonel [redacted] read letters that contained information about appellant and appellant's alleged crime. *Id.* Lieutenant Colonel [redacted] learned details about this case and the incidents surrounding it through official and non-official channels, and trial defense counsel failed to adequately question him, let alone exercise a challenge of LTC [redacted]

Defense Counsel's Failure to Challenge Lieutenant Colonel (LTC) [redacted]

During voir dire, the following exchange occurred between defense counsel and LTC [redacted]

> DC: Sir, on your questionnaire, you indicated a view regarding the Muslim religion. Can you explain your views of the Muslim religion in a little more detail for me?
>
> LTC G: Well, some things I agree with it and some things I don't agree with it. I'd say - all I can say - I think I mentioned it's a passionate religions. And with a passionate religion, sometimes you can't think clearly and you take certain views that are selfish - for your own selfish pleasures, self-desire instead of the good of the man. It

> seems to be a male oriented religion. It seems to be - like a lot of institutional religions. They interpret it the way they want to interpret certain things for their own self-interests.

(R. at 944.)

Lieutenant [redacted] viewed appellant's faith as "selfish" and "passionate" and not aimed at "the good of the man." Although LTC [redacted] claimed that he would not allow his view of Islam to affect his ability to remain impartial, this did not sufficiently address actual bias. (R. at 945.) In any event, members of the public would believe LTC [redacted] has a animus toward appellant's religion and a belief that faith (although not the Islamic faith) would provide a bulwark to crime, despite a serious mental disease or defect.

When a panel member responds to a question about an appellant's religion as "passionate" and "selfish," follow-up questions are absolutely necessary. What do you mean by passionate? What do you mean by selfish? None of these questions were asked. The surface-level, minimal approach to voir dire exemplified by the examination of LTC [redacted] by trial defense counsel permeated the entire *voir dire* process at trial by defense. A member of the panel had a clear bias towards Islam.

Additionally, LTC [redacted] was overly concerned with future dangerousness:

> TC: Sir, what would be important to you in making the decision of whether a person should receive the punishment of life in prison without the possibility of parole or the death penalty?
>
> LTC G: I think it - the difference may be danger to society, whether this person is still a danger even though he may be in prison. He may be - society may not feel that there was just punishment. Maybe society believes that he should have got the death penalty for whatever reason, but maybe life without parole is a lesser sentence.

(R. at 942.)

Lieutenant Colonel [redacted] primary consideration in determining an appropriate sentence is whether the person is still a danger to society. This is particularly significant because he was aware of a "scuffle," where appellant allegedly assaulted and injured a military police officer with scissors. (R. at 947; App. Ex. 179.)

The defense counsel failed to connect LTC [redacted] statement of the importance of future dangerousness with LTC [redacted] knowledge that appellant stabbed a military police officer. There can be no reasonable tactical or strategic explanation for not further inquiring into this and for not challenging LTC [redacted]

Lieutenant Colonel [redacted] also testified that his older sister had a serious mental illness:

> TC: Now, sir, regarding the area of psychiatry, I think you indicated that

someone in your family has been diagnosed with a disorder?

LTC G: Yes.

TC: Sir, could you tell us what that diagnosis was?

LTC G: Yes. I have an older sister - my older sister, [redacted] she's age 49 now. About 15 years ago - well, when she was 13, she had a brain tumor . . . The doctors call it Organic Brain Disease, and she'll get progressively worse. She doesn't - she has problems doing sometimes simple things, focusing on things. She doesn't - she has good days and bad days. She's up and down. She lives by herself now. She doesn't live in a home, but people have to watch her so she doesn't do things like leave the stove on and start a fire; stuff like that.

TC: Has this illness caused her to run afoul of the law in any way and unable to conform her conduct?

LTC G: Not really. She has a strong conscience. She knows right and wrong. She had a - she's taken on religious faith. She tried to go to college classes to improve herself.

(R. at 936.)

The fact that LTC [redacted] had close, family experience with mental health issues should have led defense counsel to inquire what specialized knowledge LTC [redacted] because of his sister's condition, and if he could put that knowledge out of his mind and look only at the evidence in the case. Certainly, given some of the similar issues with several of the other panel members, this should not have surprised the

defense. Regarding organic brain disease, LTC [redacted] believed that her strong conscience and religious faith kept his sister out of trouble.

To members of the public watching this trial, LTC [redacted] response would suggest that LTC [redacted] would not consider a mental disease or defect as either an excuse or as mitigation for criminal conduct. Lieutenant Colonel [redacted] sister had organic brain disease, but he believed her strong conscience, religious faith, and knowledge of right from wrong kept her out of trouble. Thus, the public could likely infer that LTC [redacted] would at the very least be highly skeptical of any claim that appellant was not criminally responsible (in whole or in part) because he suffered from serious mental health issues, nor that appellant's mental health would in any way mitigate his possible sentence. There can be no reasonable tactical or strategic explanation for not further inquiring into this bias and for not challenging LTC [redacted]

Defense Counsel's Failure To Challenge Command Sergeant Major (CSM) [redacted]

Command Sergeant Major [redacted] showed a lack of understanding of the basic concepts of reasonable doubt and sentencing:

> TC: How do you feel about life in prison without the possibility of parole as a sentence for an intentional, deliberate, and premeditated murder?

> CSM H: As opposed to the death penalty, life without parole, sir, is - it's warranted if they - all of the facts aren't there - if like what was mentioned yesterday, you've got pieces of the puzzle and there's some pieces missing. You know, if you can't place all of the pieces together, then I would look at life without parole - but you can still see the picture.

(R. at 1066.)

> TC: Sergeant Major, have you ever had occasion to discuss the death penalty with members of your family, or friends, or other soldiers?
>
> CSM H: My wife and I have discussed it, sir.
>
> TC: And how did that discussion go?
>
> CSM H: My wife is opposed to it, and I told her I'm for it in certain circumstances. If all facts are proven, then, yes, that should warrant; if the facts are not proven totally, then it wouldn't warrant the death penalty, sir.

(R. at 1067.)

Command Sergeant Major [redacted] believed that life without parole was a valid punishment when you do not have "all of the pieces" on the merits. This seriously called into question whether he understood the beyond reasonable doubt standard. Later, he asserted that he was for the death penalty when the facts are proven, but for something short of death if the facts are not proven. His understanding of the reasonable doubt standard was not further clarified. The lack of a fuller

questioning of CSM [redacted] is indicative of the lack of deep questioning of any panel members. In a capital case, a higher standard of diligence and scrutiny is required.

Defense counsel at a minimum should have further inquired into CSM [redacted] understanding of reasonable doubt, and clarified what CSM [redacted] meant by saying if he did not have "all of the pieces" he would vote guilty, but ameliorate that by voting for a sentence of life without parole.

A plain reading of his responses can only lead to the belief that CSM [redacted] would vote for guilt even if there was evidence missing, and perhaps more importantly, that if all the pieces were there, then death is the only appropriate sentence. This demanded further exploration. Without such exploration, there is no reasonable explanation for defense counsel's failure to challenge this member.

Multiple Panel Members Were Aware of the Uncharged Misconduct the Military Judge Ordered Not to be Placed Before the Members: Defense Counsel Were Ineffective For Not Challenging Those Members[16]

Several of the panel members were aware that appellant had stabbed a military police officer prior to trial. Colonel [redacted]

[16] Defense counsel made a motion in limine, requesting a ruling from the court that trial counsel may not present evidence of the alleged assault as uncharged misconduct. (R. at 947, App. Ex. 179.) The military judge granted the motion, finding, in part that "the marginal probative value of such evidence, offered in a capital sentencing case, is substantially outweighed by the danger of unfair prejudice." (R. at 2685.)

had heard of a "scuffle with an MP." (R. at 868.) Colonel [redacted] knew an assault occurred with a pair of scissors. (R. at 879.) Lieutenant Colonel [redacted] heard of an "altercation." (R. at 892.) Lieutenant Colonel [redacted] read about a "scuffle." (R. at 917.) Lieutenant Colonel [redacted] heard "there was a scuffle, some other things." (R. at 947.) Command Sergeant Major [redacted] heard that there was an incident while appellant was moved from "point A to point B" and that "one of the guards was stabbed in the neck." (R. at 1042.) Command Sergeant Major [redacted] wife told him about "some type of fight between Sergeant Akbar and some guards." (R. at 1042.) Command Sergeant Major [redacted] learned that appellant "overtook one of the guards and injured himself and one of the guards." (R. at 1073.) Master Sergeant [redacted] heard appellant "overpowered a guard." (R. at 1117.) Sergeant First Class [redacted] radio about "an altercation between Sergeant Akbar and the MPs. I turned it off, but I heard most of it." (R. at 1157.)

Ten out of the fifteen panel members were aware of the misconduct that the military judge had ruled inadmissible. Leaving these members unchallenged had the effect of defense counsel rendering their own motion in limine ineffectual. There was no reasonable explanation for defense counsel's failure to challenge these members.

Multiple Panel Members Exhibited Personal Reactions to News of Appellant's Alleged Acts: Defense Counsel Were Ineffective For Not Challenging Those Members

A. Deficient Performance

Upon hearing of the attack, COL [redacted] stated he felt "Shock or disbelief. I could hardly conceive of that." (R. at 881.) Lieutenant Colonel [redacted] stated "Honestly, I was hurt, and really disappointed, and a little embarrassed." (R. at 906.) [redacted] said when she first heard the news that she "was pretty shocked that someone could do that to their fellow soldiers." (R. at 966.) Major [redacted] found the news "depressing." (R. at 993.) Command Sergeant Major [redacted] expressed "shock and disbelief" at the news. It was "a deep stab; primarily when it was announced that it was a Sergeant. My being a Command Sergeant Major, that took quite a deep stab there." (R. at 1031.) These are all deeply personal reactions.

Members on a death penalty panel cannot have such deeply personal reactions. These panel members have clearly internalized the attack. Anyone watching this trial would see a panel "shocked," "embarrassed," "disappointed," and "stabbed" by what they believe to be the acts of appellant. They would see those same panel members victimized from the events now expected to fairly and dispassionately sit in judgment of the alleged attacker. No one viewing such a panel would believe it to be

unbiased. Yet, the trial defense counsel did nothing to address this bias.[17]

B. Prejudice

Everyone on the panel knew the background of this case. (R. at 814.) With the various problems of actual and implied bias that touched every single member of the panel, appellant could not receive a fair trial. It was incumbent upon trial defense counsel to examine and address the panel member's knowledge of the case and the rumors surrounding the case.

The panel in this case was fatally flawed. An appellant facing death must have a panel free of bias and free of personal knowledge and opinion about the case. Appellant did not receive such a panel because appellant's trial defense counsel did not conduct the *voir dire* necessary to produce such a panel.

Because the presence of even one bias panel member is structural error, appellant is entitled to a rehearing on findings and sentence. *Hale,* 227 F.3d at 1319, *Johnson v. Armontrout,* 961 F.2d at 755.

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[17] The only defense challenge, Major [redacted], was removed for implied bias because he had seen the events in *United States v. Kreutzer.* (R. at 1174.) This was explicitly because of the personal ties he had to that case. (R. at 1175.) There is no difference here. Several if not all of these members should have been challenged in order to ensure that appellant was given the fair and impartial panel that he must receive under the law, and it was plain error not to do so.

WHEREFORE, this Court should remand this case for a new trial.

Ineffective Assistance of Counsel on the Merits

D. SERGEANT AKBAR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE MERITS STAGE OF HIS COURT-MARTIAL WHEN HIS TRIAL DEFENSE COUNSEL CONCEDED GUILT TO ALL THE ELEMENTS OF A CAPITAL OFFENSE, IN VIOLATION OF ARTICLE 45(b), UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 845(b)(2002), AND DEVISED A TRIAL STRATEGY THAT WAS UNREASONABLE AND PREJUDICIAL.

Sergeant Akbar's trial defense counsel were ineffective in their representation of Sergeant Akbar during the merits phase of his court-martial because they (1) conceded guilt to all elements of capital murder, in violation of the proscriptions of Article 45(b), UCMJ; 10 U.S.C. § 845(b) (2002); (2) devised an unreasonable trial strategy that consisted of admitting to all the elements of capital murder; and (3) presented by defense witnesses, of premeditation.

Trial Defense Counsel Violated *McFarlane* by Conceding Guilt to Capital Murder in Violation of Article 45(b), Uniform Code of Military Justice; 10 U.S.C. 845(b).

Appellant's trial defense counsel were ineffective when, during argument and in the presentation of evidence, they conceded guilt to all the elements of a capital offense. "A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." Article 45(b), UCMJ; 10 U.S.C. § 845(b)(2002). *See also* R.C.M. 910(a)(1), Manual for Courts-

Martial, United States, 1995. Furthermore, though a plea of guilty on its face may not appear to constitute a guilty plea to a capital offense, the underlying intent or spirit of Article 45, UCMJ, can be violated when the sum of an accused's pleas of guilty amount to a plea of guilty to a capital offense. *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957). *See also United States v. Dock*, 26 M.J. 620, 622 (A.C.M.R. 1988), *aff'd*, 28 M.J. 117 (C.M.A. 1989). Therefore, it is not just the pleas which are considered when examining a case for a violation of Article 45(b), "but the 'four corners' of the record to see if, 'for all practical purposes,' the accused pled guilty to a capital offense." *Dock*, 26 M.J. at 622 (quoting *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957)).

In *United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957), the then Court of Military Appeals was faced with a "strategy" similar to the one employed by appellant's counsel. In *McFarlane*, the accused was charged with felony murder and assault with intent to commit murder. He pled guilty to the assault, but he pled not guilty to the murder. At the request of the defense counsel in that case, the court-martial was instructed that under Article 45, UCMJ, the accused was precluded from pleading guilty to the murder. At trial, defense counsel, by failing to contest the government's case and by

waiving argument, in essence, conceded guilt. The Court of Military Appeals stated that,

> [U]ndoubtedly defending counsel should be afforded the fullest opportunity to plan and develop the tactics they will employ in their defense of one accused of a criminal offense. However, they cannot close their eyes to reality and adopt a method which clashes head-on with a mandate of the Uniform Code of Military Justice. . . Viewed from any reasonable vantage point, the means employed by counsel in this case were a direct violation of [Article 45, U.C.M.J.]. True . . . the record reflects the words not guilty were uttered by the accused, but in the record we can figuratively see defense counsel shaking his head and saying, "no, it isn't so." This just happens to be one of those occasions where the old rule that actions speak louder than words can be applied appropriately.

McFarlane, 23 C.M.R. at 323.

In *United States v. Dock,* this Court found the "defense's argument based on *McFarlane* . . . dispositive." 26 M.J. at 623. This Court set aside the findings and sentence in that capital court-martial where the appellant's pleas "taken in the context of [that] case, constituted a plea of guilty" to a capital offense. *Id.* When the Court of Military Appeals upheld this Court's decision in that case, the higher court found that the government could have rested its case and proved capital felony murder based solely on the accused's pleas to two lesser noncapital offenses. *United States v. Dock,* 28 M.J. 117, 118-19 (C.M.A. 1989).

In that case, through his pleas and the statements he made during the providence inquiry, Dock admitted to murdering his victim by stabbing him with a knife. Dock also admitted that, by means of force and violence, he stole a wallet from the victim. There was no evidence that the force and violence used was other than the act of personally stabbing the victim with a knife. This Court held that:

> [The] appellant's pleas, taken within the context of this case,[18] constitute a plea of guilty to felony murder, a capital offense. As such they were taken in violation of Article 45(b) . . . and should have been rejected [by the military judge] as required by Article 45(a), U.C.M.J.

Dock, 26 M.J. at 623.

Both *McFarlane* and *Dock* stand for the proposition that it is not just the pleas which are looked to but the "four corners" of the record to see if, "for all practical purposes," the appellant pled guilty to a capital offense. Although *Dock* did not reach the issue of ineffective assistance of counsel, both *McFarlane* and *Dock* make clear that pleading a client guilty to a capital offense is ineffective assistance of counsel.

In this case, Sergeant Akbar's defense counsel, like the counsel in *McFarlane*, had his client utter the words "not

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[18] This Court also considered the statements made by the trial defense counsel during argument in determining whether the appellant's pleas violated Article 45(b), UCMJ. *Dock*, 26 M.J. at 623.

guilty" to the charges, yet effectively pleaded him guilty by admitting all the facts and elements necessary for a finding of guilty to capital murder, to include aggravating factors under R.C.M. 1004(c)(4) and 1007(c)(7)(J). Sergeant Akbar pleaded "not guilty to all Charges and their Specifications." (R. at 617.) Although defense counsel initially made a motion for appropriate relief requesting a "curative instruction" that would explain to the panel the effects of Articles 18 and 45, U.C.M.J. and R.C.M. 201(f)(1)(C) and 910(a), they subsequently withdrew the request for the instruction. (R. at 139, App. Ex. 35.)[19] Contrary to the strictures of Article 45, UCMJ, the trial defense counsel conceded guilt (a) by claiming, in their opening statement that appellant could not premeditate; (b) soliciting testimony from the defense expert witness that appellant could

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[19] Appellate Exhibit 35, which was withdrawn, requested that the panel receive the following curative instruction:

> The court is advised that in a case which has been referred capital, such as this case, the accused is not allowed to enter a plea of guilty to an offense for which death is a possible punishment. (Art. 45, UCMJ and R.C.M. 910(a)). Additionally, the law does not allow an accused to request to be tried by military judge alone in a case which has been referred capital. Therefore, the accused must plead not guilty to any offense which involves the possible punishment of death and he must choose to be tried by military members.

premeditate; and (c) in their closing argument, conceded all elements of premeditated murder.

In Article 118(c)(2)(a), UCMJ; 10 U.S.C. § 918(c)(2)(a) (2002), premeditated murder is explained as:

> (3) Premeditation. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

Manual for Courts Martial, United States, Part IV, para. 43c(2)(a), 2002.

Premeditated murder requires proof of the element of a "premeditated design to kill." Article 118(1), UCMJ, Manual for Courts-Martial, United States, Part IV, para. 43b(19)(d). The phrase "premeditated design to kill" requires "consideration of the act intended." *Id.* at para. 43c(2)(a). This Court has described premeditated murder as a "killing . . . committed after reflection by a cool mind." *United States v. Viola*, 26 M.J. 822, 829 (A.C.M.R. 1988), citing 2 Wharton's Criminal Law § 140 at 181 (C. Tortia, 14th ed. 1979), *aff'd*, 27 M.J. 456 (C.M.A. 1988). Likewise, the Court of Military Appeals (now the CAAF)

adopted the "cool mind" distinction. *See United States v. Hoskins*, 36 M.J. 343, 346 (C.M.A. 1993). The Air Force Court of Military Review has observed, "'Premeditation' is a term of art commonly employed and universally understood in the law of homicide." *United States v. Mansfield*, 33 M.J. 972, 988 (A.F.C.M.R. 1991), *aff'd* on other grounds, 38 M.J. 415 (C.M.A. 1993), *cert. denied*, 511 U.S. 1052 (1994). The CAAF has noted that "[t]he words 'consideration of the act intended to bring about death' . . . have ordinary meanings and are readily understandable by court members." *United States v. Teeter*, 16 M.J. 68, 72 (1983). *See United States v. Loving*, 41 M.J. 213, 280 (C.A.A.F. 1994).

In this case, trial defense counsel's concessions during opening statements, closing argument, and the presentation of evidence were not only sufficient for a conviction of premeditated murder but also the following aggravating factors: (1) that the murder was committed under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered; and (2) that the accused has been found guilty in the same case of another violation of Article 118. R.C.M. 1004(c)(4) and 1004(c)(7)(J). Defense counsel was ineffective because they failed to meet the minimum pleading standards as interpreted by this court in *Dock*. *Dock*, 26 M.J. at 623.

Opening Statement

During his opening statement, defense counsel agreed with the government's version of the facts, stating "what happened really isn't in dispute" and "the defense isn't here to contest what happened". (R. at 1211.)

> Yes. The facts will show that Sergeant Akbar threw those grenades. Yes. The facts will show that he shot and killed Captain Seifert. 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 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.

(R. at 1212.)

The defense described SGT Akbar's "poor duty performance," his "inability to retain information," and "sleep disturbance." (R. at 1218.) In setting the stage for the expert testimony expected at trial, the defense merely stated that "[Dr. Woods] will describe for you that because he is mentally ill, Sergeant Akbar has trouble thinking. He becomes extremely paranoid." (R. at 1218.) The defense never linked the mental illness with the inability to premeditate. The defense finished the opening statement by telling the panel, "The evidence will show that

when Sergeant Akbar acted, it was out of desperation, fear, and confusion." (R. at 1219.) The opening statement by defense counsel in this case is nothing more than a concession by the defense that SGT Akbar was guilty of murder.

Defense Evidence Presented

Although the defense counsel told the panel that SGT Akbar could not premeditate because of mental illness, they presented evidence to the contrary. On the issue of premeditation, the defense presented testimony from three witnesses, all of whom stated their belief that SGT Akbar was able to make plans.

Doctor Tuton, a Clinical Psychologist and a defense witness, evaluated SGT Akbar in 1996 (nine years before trial) when SGT Akbar was fourteen years old, at the behest of the Child Protection Agency of Baton Rouge, Louisiana, because it was discovered that SGT Akbar lived in an abusive home. (R. at 2013-17.) Doctor Tuton stated that his evaluation consisted of "conducting an interview, and then a mental status examination and testing." (R. at 2020.) In describing what he learned, Dr. Tuton stated:

> Well, I found something very interesting. I found that he scored within the average range on his verbal skills and abilities; and, in that, ***I saw that he was average in his planning ability. He would plan out different social situations. He had good judgment and reasoning skills.*** He was

> average at that time. Then on the non-verbal test, the performance tests, he scored within the very superior range.

(R. at 2022-23.) (emphasis added)

Doctor Tuton's testimony that SGT Akbar could and would plan out different social situations and that he has an average planning ability stands in direct contrast to the defense assertion during opening that SGT Akbar could not premeditate. Doctor Tuton added that SGT Akbar showed no signs of psychosis; he was depressed and had unmet dependency needs but he was cooperative in the evaluation. (R. at 2025.) Doctor Tuton stated, "I saw him as having an adjustment disorder with depressed mood associated with a mixed specific developmental disorder." (R. at 2032.) Doctor Tuton's examination took place in 1986, when SGT Akbar was only fourteen, seventeen years before trial. (R. at 2014.) However, trial defense counsel presented no context for Dr. Tuton's testimony. Dr. Tuton only established that, when he was examined at the age fourteen, SGT Akbar was not impaired by mental illness and could premeditate.

Mr. Paul A. Tupaz was SGT Akbar's roommate from 1991-1993, and testified about SGT Akbar's college years. (R. at 2070.) Mr. Tupaz testified that he and SGT Akbar were "close friends" and that SGT Akbar was "somebody I could depend on." (R. at 2072.) When asked by defense counsel about SGT Akbar's ability to plan and to set goals, Mr. Tupaz replied that he spent time

talking to SGT Akbar about goals. They both had developed a goal "to establish ourselves financially, to develop ourselves with business skills, and to someday aspire to develop some sort of foundation, a non-profit foundation that would encourage minority students, at risk students from rural or urban areas to have access to college." (R. at 2073.) Mr. Tupaz testified that he and SGT Akbar spent a lot of time discussing these future plans. *Id.* The defense counsel asked whether "Sergeant Akbar [was] someone who made plans for near and short-term objectives?" *Id.* The answer was, "Yes." "He planned on finding a wife and having a family . . . he also - You know, he planned his day. I'd seen him do a lot of planning and organizing . . ." *Id.* Again, the defense's own witness established that SGT Akbar had the ability to plan. Again, trial defense counsel elicited testimony that SGT Akbar, at least by college age, was not impaired by mental illness and he could premeditate.

If Dr. Tuton and Mr. Tupaz did not do enough damage to appellant, the trial defense counsel's next witness surely did. Doctor George W. Woods, a clinical psychiatrist (R. at 2227-33), testified that he only appeared in those few cases where his "findings are consistent with the goals of the attorneys." (R. at 2233.) Dr. Woods testified, "So what we have is someone that has symptoms of depression, has significant symptoms of paranoia

and suspicion." (R. at 2233-81.) When the defense counsel asked Dr. Woods for his diagnosis, Dr. Woods gave three possibilities, which in psychological terms is called a differential diagnosis. (R. at 2283.) Dr. Woods testified:

> [T]he diagnosis I felt most solid with is Schizotypal Disorder . . . . The Schizotypal Personality Disorder is a disorder that is manifested by unusual thinking; high levels of paranoia; a vulnerability to decompensation under stress; psychomotor 12 agitation. Schizotypal personalities often are able to function pretty well in the world; but you really see, once again, this filter of paranoia that prevents them from being able to function as well as you would think. So that would be my first diagnosis . . . . That's an Axis II diagnosis . . . Axis II diagnoses are diagnoses of personality disorders. And personality disorders are maladapt ways of being in the world that usually start around adolescence.

(R. at 2288.)

Dr. Woods testified that his strongest diagnosis was a personality disorder. When asked how this translated to SGT Akbar's actions, Dr. Woods stated, "I think those symptoms allowed him to be overwhelmed emotionally and to really not think as clearly, to not really understand, and just to be overwhelmed emotionally." (R. at 2292.) This is hardly the type of expert testimony that will allow a panel member to conclude that SGT Akbar could not premeditate due to severe mental illness. In fact, any reasonable person would conclude

the opposite - Dr. Woods testimony directly contradicted any argument that SGT Akbar could not and did not premeditate on the night of the murders.

Based on these three defense witnesses, the panel had no choice but to conclude SGT Akbar committed premeditated murder. Therefore, the defense effectively conceded every element of the capital offense.

Closing Argument

Finally, the defense closing argument conceded guilt to every element of premeditated murder. The defense counsel began, "I'm going to spend about the next 25 minutes explaining to you why the evidence in this case shows that Sergeant Akbar, because of mental illness, did not and could not premeditate." (R. at 2596.) However, the defense continued, "I think we all recognize that the best decisions we make are those we make with calm, deliberate reflection. We realize that emotions can cloud our judgment." (R. at 2597.)

The defense correctly reminded the panel of the military judge's instruction to them, that "an accused, because of some underlying mental disease, defect, impairment, condition, deficiency, character, or behavior disorder may be mentally incapable of entertaining the premeditated design to kill." (R. at 2598.) Yet, they presented no evidence of such a mental impairment, much less did they explain how it was that SGT Akbar

was incapable of entertaining the premeditated design to kill. In fact, the trial defense counsel told the panel that "SGT Akbar had plans, plans that are consistent with what you saw in those diary entries." (R. at 2609.) Therefore, the defense conceded that he was guilty of premeditated murder.

In talking about SGT Akbar's actions the night of the murders, the defense argued that SGT Akbar planned poorly:

> At some point, he did get the grenades. But what does he do? He leaves the canisters in the battery box. He leaves some of the packing debris outside the vehicle. The next shift could just as easily come in and looked in that battery box, and done an inventory. And had they bothered to do that, they would've seen that the grenades were taken because the empty canisters are still in there. *That's not good planning;* that's just confusion. He knew that those soldiers were going to get out and walk around the vehicle, and there's the packing debris for the grenades, laying out there. Special Agent Massey told you that packing debris is readily recognizable as coming from a grenade, and it was just laying there. *That's not a good plan;* that's just confusion. The government mentioned the fact that he brought the radio back. There's more than one way to look at that because remember what happened with that radio. That was the radio that was used to call out there and find out that Sergeant Akbar was unaccounted for. It was the radio that was used when they called out there to find out the grenades were missing. Had they bothered to do that inventory, had they bothered to notice the packing debris on the ground, they could've used that radio to call it in, to get help, and to stop Sergeant Akbar. *A good plan would've been to take the radio.*

(R. at 2609-10.) (emphasis added.) A poor plan does not negate premeditation. In fact, a poor plan indicates that he in fact had a plan and the defense conceded that he executed his plan on the night of the murders. The defense continued to recite the events and concede guilt.

> Yeah, Sergeant Akbar went to a class on grenades earlier that day. He learned about the blast radius and the fuse time. But it didn't do him any good, because he still got caught by the fragmentations from one of those grenades, and that again demonstrates his confusion. He didn't have the sense to get out of the way of one of the grenades, even though he'd had a class earlier that day. From there, he went across the compound, and he runs into Captain [redacted] He could've shot and killed Captain [redacted] but he does nothing. What does Captain [redacted] do? Captain [redacted]n moves him over right here and lays him down. What's right there? The door to the TOC, unguarded. Sergeant Akbar has got two incendiary grenades and one frag grenade in his mask carrier. He's got a full clip of ammunition, and he's right outside the door to the TOC. If he's on this killing spree to inflict maximum damage, nothing is stopping him. He's right there. But he stops, because he doesn't have a plan. He stops, with a full clip and three grenades -- and he stops.

(R. at 2613-14.)

The defense argued that SGT Akbar committed the murders but, because he did not kill as many people as he could have, that somehow he had no plan. Yet, they had already conceded that he did have a plan, a poor plan. The defense then

concluded: "Yes, he did some deliberate acts. He moved across the camp. He operated those grenades. He turned off the light generator. He fired his weapon." (R. at 2621.) The defense argument on findings is a concession that SGT Akbar acted deliberately to cause death and therefore is a concession to premeditated murder.

Furthermore, not only did trial defense counsel concede guilt to all the elements of premeditated murder, but they did so with regards to two murders, thus admitting to both the R.C.M. 1004 aggravating factors at issue in this case: "that the accused has been found guilty in the same case of another violation of Article 118" and that the premeditated murder of CPT Siefert and MAJ Stone "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."[20] The appellant was prejudiced by the trial defense counsel's concession because it eliminated the panel members' need to deliberate and consider the government's evidence on either findings or sentence, and eliminated the need to deliberate on

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[20] Rules for Courts-Martial 1004(a)(4)(A) and 1004(c) both require the *members* to find, beyond a reasonable doubt, the aggravating factor relied upon by the government in order to secure the sentence of death. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1994 (emphasis added). Neither the Rules for Courts-Martial, nor the Uniform Code of Military Justice, indicate that the military judge may permit an accused in a capital case to enter pleas of guilty to essentially the aggravating factor relied upon by the government to secure a sentence of death.

the aggravating factor. In the context of this case, it was the difference between life without parole and a death sentence for SGT Akbar.

For all the reasons above, this court should find that defense counsel was ineffective for conceding guilt in his capital case.

Ineffective Assistance of Counsel at Sentencing

E. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON SENTENCING.

Introduction

Sergeant Hasan Akbar was a United States Soldier facing a possible sentence of death. His counsel spent less than one hour presenting witnesses at sentencing—calling three witnesses, no experts, and no family members. That presentation occupies thirty-eight pages of the record of trial. (R. at 3015-52, 3073-4.) Any United States Soldier deserves better than such minimal representation.

Statement of Facts

Appellant's sentencing case began on 27 April 2005 at 0900, and ended fifty-eight minutes later at 0958. (R. at 2005, 3053.) During that fifty-eight minute time frame, there was a three-minute Article 39a session (R. at 3027) and a seventeen-minute comfort break. (R. at 3042.) Trial defense counsel spent thirty-eight minutes on presenting witnesses on

sentencing. Counsel called three witnesses. Captain (CPT) David Storch, appellant's platoon leader at the time of the offenses, was called. (R. at 3015.) His testimony focused primarily on a few incidents of unusual behavior and an overall low level of effectiveness as a soldier and non-commissioned officer. (R. at 3017-3023.) Underlying this evidence was testimony that a relief for cause report was not generated because the unit "probably didn't have enough evidence to back up a relief for cause NCOER." (R. at 3024.) On cross-examination, CPT Storch testified that he "never doubted" appellant's mental stability, and that he believed he was proficient in his specialty. *Id.* Sergeant First Class (SFC) Daniel Kumm, appellant's former squad leader testified that appellant was a "subpar" soldier (R. at 3037), and that some derogatory terms for Muslims and Iraqis were used within appellant's squad, but none were directed towards appellant. (R. 3038.) On cross, SFC Kumm concurred with CPT Storch that there was no reason to question appellant's mental stability. (R. at 3040.)

The final witness called by trial defense counsel was Mr. Daniel Duncan, appellant's former high school teacher. (R. at 3046.) Mr. Duncan recalled that appellant was a very good student, but that Mr. Duncan did not interact with appellant outside of the classroom. (R. at 3047.) Other than the three-

sentence unsworn statement from appellant (R. at 3074), that comprised the defense mitigation case during sentencing.

Trial defense counsel did not call any of appellant's family as witnesses, even though both appellant's mother and father attended the court-martial. (DAE LL; DA 424.) Counsel never discussed the possibility of appellant's parent's testifying on appellant's behalf. *Id.* In fact, appellant's parents did not realize they would not be called. *Id.* Any reasonable defense counsel, while not necessarily calling family members to testify, would in some way present the fact that appellant has a family who cares enough to stand by him. The defense presented a few letters from some people tangentially involved in appellant's life (R. at Def. Ex. F, N, O, P, U, V.); these consisted mostly of his former high school teachers and peers who could attest to appellant's personality in vague terms when he was in high school. Appellant was almost universally described as intelligent, a loner, socially awkward, and rigid. *Id.* All expressed surprise that appellant would commit a criminal act, and none expressed any real intimate or long-term contact with or knowledge of appellant. None kept up with appellant following high school. The few remaining letters introduced by trial defense counsel were from friends or relatives who had more intimate contact with appellant. The only letter from someone who knew appellant around the time of

the offenses came from SSG Cordell, a squad leader in appellant's platoon, who essentially described appellant as a sub-standard Soldier. (R. at Def. Ex. U.) The only evidence submitted from a family member was a letter from appellant's brother Musa Akbar. (R. at Def. Ex. H.) While it did contain some mitigating information about the poverty appellant suffered, as well as some of the positive contributions appellant gave to his family (*Id.*), this information was superficial and barely scratched the surface of describing appellant's childhood. (DAE LL; DA 413-517.) The most detailed letters came from appellant's childhood Imam (R. at Def. Ex. W) and the ex-wife of his college roommate, Christine Irion. (R. at Def. Ex. T.) While each contained some helpful information about appellant's background, both were a mere glimpse into the life of appellant, recounting a few odd events which could easily be interpreted as peccadilloes - examples of mental illness.

As is explained at pages 40-48 of this Brief, trial defense counsel did not call either Dr. Woods or any mitigation expert to testify at sentencing. (DAE AA; DA 229-36.) There were no discussions between trial defense counsel and Dr. Woods or the mitigation team about the possibility of testifying at sentencing. *Id.* As explained earlier, trial defense counsel recognized the importance of sentencing evidence in appellant's

case, and discussed various defense theories. (DAE DD; DA 265-66.)

Eventually, trial defense counsel only submitted materials sent in by Ms. Deborah Grey on March 15, 2005, at the behest of trial defense counsel. (R. at Def. Ex. C; *see* Appellant's Brief at 43.)

Trial defense counsel presented an unexplained family tree, a four-page timeline of appellant's life with some notes, and a twenty-seven-page summation of appellant's journal containing mostly quotes from the journal with some minor notes, all prepared by Ms. Grey. (R. at Def. Ex. C.) This was largely cumulative with the submission by trial defense counsel of appellant's entire journal. (R. at Def. Ex. A; *see also* AE I: F, claiming defense counsel were ineffective for admitting appellant's entire diary without regard for the aggravating and prejudicial information it contained) Included in the documentation appellant's counsel received from Ms. Grey were fifty-five pages of social history, twenty-seven pages of "cumulative records", and a seven-page social history summary. (DAE EE, FF, JJ; DA 267-330, 380-407.) Again, as explained earlier, none of this information was presented at trial, and most does appear to be present in trial defense counsel's files. Ms. Grey's analysis was not prepared for presentation to the court and Ms. Grey advised counsel that much of this information

needed to be shaped for suitability before it was presented to a jury. (DAE X; DA 210-15.) For some reason, trial defense counsel submitted a damaging FBI Report as well. (*See* Appellant's Brief at 41-42.)

Patrick McClain and Peggy Hoffman, civilian attorneys, submitted appellant's clemency application under R.C.M. 1105 (hereinafter 1105 Submission). (R. at 1105 Submission.) In those matters, appellant asserted that: 1) inadequate counsel at trial; 2) appellant's inability to assist in his own defense due to lack of competency; 3) errors by the military judge. *Id.* Ms. Hoffman provided a rough, six-page social history of appellant which still was more comprehensive than anything presented at appellant's court-martial. *Id.* at 8-13. Additionally, appellant attached letters from sixteen family members and friends including his mother, father, siblings, grandfather and six family friends, as well as from an Imam. *Id.* at 14. None of these family members were called at trial. Appellant's mother wrote an impassioned plea for mercy. *Id.* at 15. Appellant's father's letter, while short, also pled for mercy. *Id.* at 33. The letters from his other family members and people who knew him all cited appellant's peaceful and loving nature.

Argument

Deficient Performance:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). This duty outlined by the Supreme Court is the fundamental underpinning of capital trial practice, particularly when the stakes are so absolute, the life or death of a Soldier. (*See supra* at, pp. 15-20, 24-36, for a discussion of the standard for ineffective assistance of counsel and the ABA standards.)

The Tenth Circuit has repeatedly recognized the importance of an adequate life history investigation. "The sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001). To perform adequately in a capital case, defense counsel must undertake "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Anderson v. Sirmons*, 476 F.3d at 1142 (internal quotations omitted) (emphasis in original). This

duty to investigate is particularly weighty and broad in a capital case, where counsel's "duty to investigate all reasonable lines of defense is strictly observed." *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997).

As noted earlier:

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

Wiggins v. Smith, 539 U.S. 510, 524 (2003).

In appellant's case, as in *Wiggins*, trial defense counsel truly "abandoned" their investigation, particularly the mitigation aspect, after having acquired only a "rudimentary" understanding of appellant's social history. Ms. Grey and Ms. Holdman agreed that there was still much to do in the mitigation investigation of appellant. (App. Ex. 132, DAE X; DA 210-15.) Dr. Woods, after being apprised of the nature and quantity of mitigation evidence he was not given, changed his diagnosis and cited specifically the family mental health history as a particular area he was not apprised of before trial. (DAE C; DA

5-6.) This was the very same material that Ms. Holdman identified as existing in the files that never made it to defense counsel. (DAE G; DA 15-21.) The appellate mitigation specialist, Ms. Lori James-Townes, has also characterized the mitigation investigation as being largely incomplete and inadequate, even now. (DAE LL; DA 415.) There is no evidence that more than a scintilla of mitigation evidence from Ms. Holdman's team ever made it to the panel or that more than minimal amounts made it to Dr. Woods. Significant portions of Ms. Grey's self-described incomplete investigation also did not make it into either counsel's files or in front of the panel, for example, a fifty-five page social history summary. This raises a critical question. Why was the unused material in counsel's files not passed to either the jury or Dr. Woods when trial defense counsel clearly recognized the importance of the information both to the panel (R. at 554) and to Dr. Woods? (R. at 551, 585; App. Ex. 127.)

It is clear from defense counsels' files that they had targeted sentencing for the bulk of their efforts, yet they failed to follow through. This early recognition did not translate into action. Counsel, in fact, ignored mitigation evidence from Ms. Holdman and her team, and minimized what little mitigation evidence they did retrieve from Ms. Grey. This minimization continued at trial.

Appellant has also raised the ineffective assistance of counsel in their use of expert assistance in this case. *See* AE I: B. The failure by trial defense counsel to use the defense experts to either perform an adequate social history investigation or an adequate mental health assessment played a large role in the ineffective assistance of counsel at sentencing in appellant's case. *Id.* Trial defense counsel did not temper those failures by either conducting their own social history investigation or by presenting a coherent and extensive sentencing case to the panel that might excuse the need for a mitigation expert. Neither expert was consulted on sentencing and there were no discussions on any expert testifying on sentencing. (DAE AA; 229-36.) None of appellant's trial defense counsel had any capital experience upon which to rely in lieu of the assistance of a capital mitigation expert. *See* AE I: A. Without the assistance of an experienced capital mitigation expert or capital experience themselves, trial defense counsel were left to muddle through, leading to some inexplicable decisions.

One example of such an inexplicable decision was the introduction of appellant's entire diary to the panel by the defense, despite Ms. Grey's warnings that the defense needed to tread cautiously concerning appellant's diary. "It remains my belief that the defense team must find a way to contextualize

and if possible neutralize the elements of his journal that talk about killing Caucasians, etc." (DAE X; DA 210-15.) Appellant's diary contained voluminous aggravating and inflammatory statements. *See* AE I: F. What mitigating evidence was contained in the diary required explanation by either a mitigation expert or Dr. Woods to place it into context. Trial defense counsel had two options. They could have determined that the aggravating nature of the diary was too dangerous and not introduced it. This option was available because the military judge ruled all but two statements of appellant's diary inadmissible. (R. at App. Ex. 145.) Or they could have introduced the diary, using expert testimony to ameliorate the aggravating evidence and highlight the mitigating evidence. Instead, they placed before the panel aggravating statements that were clear, powerful and particularly inflammatory - statements that the military judge had previously ruled were so unfairly prejudicial to appellant that they substantially outweighed any probative value. (R. at 783.) In fact, these statements were so inflammatory that the trial counsel used those statements to devastating effect during his sentencing argument. Three times trial counsel said, "This is what he wrote and this is what he did." (R. at 3090.) Each time, trial counsel alternated between an inflammatory statement from appellant's diary and a description of one of the victims. (R.

at 3090, App. Ex. 312.) The effect was devastating on appellant's case, it was a powerful argument for death, and it was made possible solely by trial defense counsel admitting the diary in whole.

In examining what was submitted to the panel, only a small fraction of what Ms. Grey recommended as necessary information was passed along. It is also clear from Dr. Woods' affidavits, and testimony at trial that consultation between Dr. Woods and the mitigation experts in this case was minimal at best. (DAE AA; DA 229-36.) There is little evidence that many of the recommendations of Ms. Grey (or Ms. Holdman's team) were followed by trial defense counsel. Certainly if trial defense counsel, through assigned mitigation experts, reasonably investigated all of the relevant and necessary mitigation evidence, a reasonable tactical decision could have been made as to what to use and what not to use in front of the panel. There is no evidence such an investigation was completed.

This case is a combination of the errors the Supreme Court decried in *Rompilla* and *Richey* because trial defense counsel hired experts but then failed to adequately communicate with them, and by such failure to communicate failed also to adequately investigate and present mitigation evidence in appellant's case. This resulted in very poor decisions being made on the use of mitigation evidence, such as whether to call

Dr. Woods or a mitigation expert to testify on sentencing, whether to introduce appellant's diary, and what witnesses to call. These decisions were not only unreasonable but also based on insufficient information upon which to make an informed tactical decision.

In effect, because of trial defense counsel's negligence in contacting and working with defense experts, much of the testimony and evidence that needed to be placed in front of the panel was not.

In looking at the affidavits of Dr. Woods, Ms. Holdman, Ms. Nerad, and Mr. Lohman, along with the work of Ms. James-Townes (discussed in more detail *infra*), the consensus is that: 1) abundant information was not passed from the mitigation teams to the attorneys; 2) neither that information nor most of the information that was passed to the attorneys was provided to Dr. Woods; 3) there was still a significant portion of the mitigation investigation incomplete when trial defense counsel stopped talking to the mitigation team; 4) trial defense counsel ignored repeated and specific requests for further testing by Dr. Woods; 5) Dr. Woods did not have information of family mental health issues that was necessary for his diagnoses.

In short, trial defense counsel's decisions must be "informed." Appellant's trial defense counsel made decisions in this capital case with no capital experience, and effectively

with no expert assistance, particularly at sentencing. This left appellant's trial defense counsel operating from a flawed, uninformed perspective **of their own making** regarding appellant's mental state and the presence, absence or importance of mitigation evidence. It also placed appellant in the exact same practical position as *Murphy* and *Loving*.

Even if this Court finds that defense counsel suitably "informed" themselves to make tactical decisions, the following decisions were unreasonable: (1) to ignore voluminous mitigation information; (2) to cut-off the mitigation investigation despite the protestations of the mitigation experts that more needed to be done; (3) to not transfer much of that information to Dr. Woods to assist in his diagnosis of appellant; and (4) to not do the testing tied to sleep issues and Schizophrenia recommended by Dr. Woods. Unreasonable tactical decisions will not defeat a claim of ineffective assistance of counsel. *See United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). The Court of Appeals for the Armed Forces (CAAF) has also held that it will not give carte blanche to the tactical decisions of counsel in capital cases if the counsel's performance reflects inadequate investigation, limited capital experience, and does not meet the higher standard of performance expected of counsel in capital litigation.

> What follows in this opinion, however, demonstrates that a capital case -- or at least this capital case -- is not "ordinary," and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death. We have no quarrel with the Army Court regarding the obligation of an appellate court not to second-guess tactical judgments. Here, however, counsels' lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.

United States v. Murphy, 50 M.J. 4, 13 (C.A.A.F. 1998.)

In *Murphy*, as in this case, counsel performed a sub-standard mitigation investigation. Counsel in *Murphy* developed the mitigation evidence primarily by "correspondence and telephone." *Id.* at 12. Counsel in *Murphy* did not have a mitigation expert at trial to assist them. Counsel in appellant's case had one appointed to them, but they simply did little to use them. In appellant's case, no mitigation expert was called to testify. Almost no material from the vast mitigation file was analyzed or placed into evidence. Information from the mitigation team was not adequately shared with the clinical psychiatrist, Dr. Woods. (DAE AA; DA 229-36.) Defense counsel actively ignored both the mitigation team and Dr. Woods. This left appellant's trial defense counsel in the same situation that Murphy's counsel were in, trying to conduct

the case effectively without a mitigation expert, an adequately informed mental health expert, or an adequate investigation of their own, and doing so without the capital trial experience necessary to overcome those deficiencies.

Prejudice:

The tactically unsound decisions by trial defense counsel throughout appellant's court-martial resulted in their thirty-eight minute sentencing presentation, and appellant was prejudiced.

If they had conducted the proper mitigation investigation, trial defense counsel could have presented a compelling case in mitigation. After all, Dr. Woods, when fully apprised of the family history and other available but unshared information regarding appellant, changed his clinical diagnosis to Paranoid Schizophrenia. There is a vast difference between an expert that reluctantly opines that an accused may have a mental illness, and an expert that confidently testifies that an accused is mentally ill. (The findings of Dr. Woods and Ms. James-Townes are discussed more fully *supra* at pp. 76-80.) Significantly, both Dr. Woods and Ms. James-Townes have concluded that appellant's mitigation case, both in the investigation conducted and in its presentation, was deficient.

Additionally, Ms James-Townes could have presented extensive mitigation testimony regarding appellant childhood,

poverty, and environment when growing up, as well as the physical and sexual abuse that he was exposed to. Additionally, she could have described the mental health issues that haunted appellant's family, and her testimony, combined with that of Dr. Woods, could have explained the correlation between that familial mental illness and that suffered by appellant. Also, the defense could have placed members of appellant's family on the stand to humanize him, to explain that he is indeed loved, and that his execution will deeply impact them.

Instead of presenting a compelling mitigation case, trial defense counsel put forward thirty-eight minutes of testimony and three witnesses. This lack of mitigation and expert assistance was not made up for by extensive presentation of witnesses. With only three witnesses called, and only a few of the documentary witness statements of any use whatsoever, this is not a case where trial defense counsel overcame a poor use of experts with an adequate presentation of the main mitigation factors of appellant's life. The panel learned little more about appellant after sentencing than they knew before, other than he was a little odd, grew up poor and apparently had no family member willing to personally speak on his behalf.

The test for prejudice in this case is "whether a reasonable finder of fact, armed with this evidence, would come to the same conclusions that the court-martial did as to the

findings and sentence." *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F. 1998), *citing United States v. Dock*, 26 M.J. 620 (ACMR 1988). If even one person on the panel would have come to different conclusion as to findings or sentence then this court-martial would have come to a different finding but definitely a different sentence. The panel was not presented the necessary evidence to sentence appellant.[21]

Also, this Court must examine the reliability of the result. The CAAF's decision in *United States v Kreutzer*, 61 MJ 293 (CAAF 2005) addressed prejudice both in the context of ineffective assistance of counsel and a failure to grant a mitigation expert. For ineffective assistance of counsel, the CAAF noted that the proper inquiry to establish prejudice is that "the appellant must demonstrate a reasonable *probability* that, but for counsel's deficiency, the result would have been different." *Kreutzer*, 61 M.J. at 301 *citing Strickland*, 466 U.S. 694. For denial of a mitigation expert, the CAAF said that the burden falls on the government to show that:

> There is no reasonable possibility that even a single court member might have harbored a reasonable doubt in light of the mental health evidence that the mitigation specialist could have gathered, analyzed, and assisted the defense to present. Had but a single member harbored a reasonable doubt,

[21] Appellant, in AE V, claims the panel members at trial were misinformed about appellant's mental condition at the time of the offenses.

> death would have been excluded as a permissible punishment.

Id. at 301.

Appellant's case is a hybrid of the two issues raised in *Kreutzer,* and also is very similar to the issue raised in *Murphy*. Appellant was effectively denied the assistance of a mitigation expert because of the ineffective assistance of trial defense counsel in utilizing them in anything more than a minimal fashion. Appellant is therefore left in the same effective position as Kreutzer was, without the assistance of a mitigation expert either to present mitigating evidence to the panel or to assist Dr. Woods in forming an accurate and forensically supported diagnosis of appellant's mental health condition. Appellant is also left in the same position as Murphy in that significant evidence was not presented to the panel, calling into question the panel's findings and sentence. Like the CAAF in *Murphy*, this Court must be satisfied that appellant got "a full and fair sentencing hearing." *Murphy*, 50 M.J. at 15.

Confidence in the outcome of a death penalty case is paramount. "One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *Murphy*, 50 M.J. at 14. The heightened need for a reliable result in a death

penalty case requires that, if this Court finds that appellant was denied the use of a mitigation expert through ineffective assistance of counsel as well as denied the presentation of relevant and necessary mitigation and mental health evidence to the panel, then it must find prejudice exists if appellant can show that one panel member might have harbored a reasonable doubt based on the evidence gathered through a proper mitigation investigation, necessary testing, and a mental health evaluation based on both. Even if this Court evaluates prejudice under simply the *Strickland* standard, the confidence in the outcome of sentencing is significantly undermined by the change in the diagnoses of appellant by Dr. Woods.

F. SERGEANT AKBAR'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR ADMITTING IN ENTIRETY APPELLANT'S DIARY WITHOUT ANY SUBSTANTIVE ANALYSIS AND WITHOUT APPROPRIATE REGARD FOR THE HIGHLY AGGRAVATING AND PREJUDICIAL INFORMATION IT CONTAINED.

Summary of Argument

Appellant's diary was replete with highly aggravating statements. "Destroying America was my plan as a child, jovenile (sic) and freshmen in college . . . . My life will not be complete if America is not destroyed. It is my biggest goal." Amazingly, trial defense counsel presented these statements, and in fact the complete diary to the panel - unexplained, unfiltered, and without any analysis. Thus, the defense counsel did the prosecution's job by presenting highly

inflammatory and prejudicial information to the panel in a death penalty case without explanation.

Argument

Initially, trial defense counsel moved to suppress appellant's diary. (R. at App. Ex. 155.) The defense argued that the diary was not logically and legally relevant pursuant to M.R.E. 401 and 403. *Id.* According to the defense, the "remote, rambling stream of consciousness" contained in the diary was of "minimal" probative value. *Id.* Additionally, trial defense counsel argued that the diary statements were "unfairly prejudicial," and that there was "a very real chance that the fact finder will have an emotional reaction to the evidence that will distort their ability to properly evaluate the other admissible evidence and reach an appropriate, non-emotional, result." *Id.* at 4. The military judge granted the motion, but allowed the government to introduce two 2003 entries because they were close in time to the charged offenses. (R. at 782.; App. Ex. 145.) Apparently, the military judge found that under R.C.M. 403, the probative value of the excerpts was substantially outweighed by the danger that they would grossly mislead or confuse the members. (R. at 783.) The two admitted entries contained two inflammatory statements: 1) "I will have to decide if I should kill my Muslim brothers fighting for

Saddam Hussein or my battle buddies;" 2) "But as soon as I am in Iraq, I am going to kill as many of them as possible." *Id.*

The excluded entries discussed appellant's desire to "kill Caucasians," appellant's plan "during his entire life" to "destroy America," and that his life would "not be complete if America is not destroyed." *Id.* Additional entries included "[N]ever attack a grown man unless you intend to hurt him," a statement that it is a duty in Islam to fight "those who insult your religion," and a "premonition" that if he re-enlisted he would "find myself in jail," because "I already want to kill several of them [Soldiers]." *Id.*

As is clear, these entries are not remotely mitigating or extenuating (even with expert analysis), but all of them are extremely aggravating. The statements ranged from 1992, before appellant joined the military, to 2002, several years after he did so. However, after successfully keeping out all but two of these highly damaging journal entries, trial defense counsel reversed course at trial and introduced the entire diary, aggravated entries included. (R. at Def. Ex. A, admitted R. at 2929.)

While some potential mitigating information is contained within the diary, those bits of information do not outweigh the harm incurred by the inflammatory entries. For defense counsel to simply toss the panel over one-hundred pages of material from

appellant's diary with no explanation or interpretation is simply inexplicable. The only analysis provided to the panel was part of a thirty-three page document, consisting of an unexplained family tree, a timeline of appellant's life, and a "summary" of appellant's journal (R. at Def. Ex. C), prepared by a mitigation expert, Ms. Deborah Grey, who had not been a part of the defense team for almost a year. (R. at 548.) This summary was not a detailed analysis of appellant's diary, but primarily a selection of quotes from the diary and a summarized re-statement of the quote side-by-side. (R. at Def. Ex. C.)

Ms. Grey's analysis was not prepared for trial and Ms. Grey advised counsel that much of the information in the diary needed to be shaped before presentation. (DAE X; DA 220-15.) Her work product provided no substantive analysis of appellant's diary, and no framing or explanation of the possible mitigating nature of the more aggravating and inflammatory statements. (DAE LL; DA 413-517.) Nor was any direct tie between the diary and any mental illnesses appellant suffered presented to the panel. The defense counsel presented no analysis by Dr. Woods or other expert during sentencing. The diary was simply dropped in the laps of the panel, to use it in any way they thought appropriate. The impacts of the aggravating excerpts from the diary were unexplained.

Besides dropping the inflammatory diary on the panel, a competent counsel would have had an expert testify as to the mitigating aspects of the diary. Although opening the expert up to cross-examination regarding negative parts of the diary, the expert would have placed the negative aspects into context. Alternatively, counsel could have made the informed decision to not introduce the diary at all. Both strategies may be reasonable.

Here, however, defense counsel made the tactically indefensible decision to place the entire diary, including portions of the diary that the military judge had already ruled so unfairly prejudicial to appellant. (R. at 783.) In fact, the trial counsel, not the defense counsel, used the diary with devastating effect during his sentencing argument, referring three times to: "This is what he wrote and this is what he did." (R. at 3090; App. Ex. 312.) Thus, the trial defense counsel introduced aggravating evidence that the government put to withering effect, and there was no tactical reason to do so.

Although, trial defense counsel deserve vast deference in strategic and tactical decisions, that deference is not unfettered. Patently unreasonable decisions or decisions based on an incomplete and inadequate mitigation investigation are given no deference, particularly in the realm of capital jurisprudence. *Rompilla v. Beard,* 545 U.S. 374, 387 (2005) ("It

is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.))); *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) ("We base our conclusion on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" (quoting *Strickland v. Washington*, 466 U.S. 688, 690-91 (1984))); *United States v. Murphy*, 50 M.J. 4, 13 (C.A.A.F. 1998) ("Here, however, counsels' lack of training and experience contributed to questionable tactical judgment, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.")

Much like in *Rompilla*, 545 U.S. at 387, and *Wiggins*, 539 U.S. at 533, defense counsel in this case did not do the requisite investigation to fully understand how to deal with appellant's diary. Much like *Murphy*, 50 M.J. at 13, the lack of any substantive training or experience in capital litigation, coupled with minimal assistance from a mitigation expert, led to the indefensible tactical decision to introduce appellant's diary without explanation, analysis or filter and should lead

this Court to conclude that in this area, "there are no tactical decisions to second-guess." *Murphy,* 50 M.J. at 13.

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the sentence to death in this case.

Cumulative Error

G. EVEN IF THIS COURT FINDS THAT THE INDIVIDUAL ALLEGATIONS BY APPELLANT OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE INSUFFICIENT TO MERIT RELIEF, TOGETHER THE CUMULATIVE ERRORS IN TRIAL DEFENSE COUNSEL'S REPRESENTATION OF APPELLANT DENIED HIM A FAIR TRIAL, THEREBY WARRANTING A REHEARING.

Statement of Facts

Appellant has alleged ineffective assistance of counsel in the following areas:

1. Voir dire.

2. Improper guilty plea.

3. Improper use of experts.

4. Improper investigation and use of merits witnesses.

5. Failure to request continuances/necessary testing.

6. Inadequate presentation of mitigation on sentencing.

7. Unreasonable trial strategy.

8. Failure to address appellant's sleep and mental health issues to the panel.

9. Inadequate investigation of mitigation and extenuation evidence.

This Court "can order a rehearing based on the accumulation of errors not reversible individually." *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). As set forth in *Dollente*, the cumulative-error doctrine requires:

> considering each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy-or lack of efficacy--of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial.

Id. (citation omitted). "When assessing the record under the cumulative-error doctrine, courts must review all errors preserved for appeal and all plain errors." *Id.* (internal quotation marks and citation omitted). "Courts are far less likely to find cumulative error where evidentiary errors are followed by curative instructions or when a record contains overwhelming evidence of a defendant's guilt." *Id.* (internal quotation marks and citation omitted.)

Error and Argument

Ineffective Assistance of Counsel

Applying the cumulative error doctrine in appellant's case necessitates at a sentence rehearing. The ineffective

assistance rendered by appellant's counsel infected the entire case, from pre-trial investigation, coordination with defense experts, voir dire, findings, and sentencing. No portion of the court-martial process was left unmarred by trial defense counsels' inexperience and deficient decisions. Trial defense counsel completely disregarded both mitigating and extenuating evidence during their investigation; failed to adequately voir dire or to challenge panel members; pled guilty; and woefully prepared and presented mitigation evidence.

The adversarial process failed in this case. Trial defense counsel did not aggressively seek expert assistance or mitigation evidence, did not effectively present what little information they had, and made no attempt to shape the panel in a manner favorable to appellant. When, as in this case, counsel exhibits such deficient performance at all stages, the process is no longer effectively adversarial. *See Cronic,* 466 U.S. at 656-657. "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-663.

Even if each allegation of deficient performance by itself does not rise to the necessary level of prejudice to meet the standard laid out in *Strickland,* the collective nature of these errors constitute the deficiency envisioned by *Strickland.*

The combined effect of the errors effectively left appellant standing at his capital court-martial without counsel.

Had trial defense counsel complied with the applicable standard in a capital case, the outcome would have been different. The trial defense counsel's grossly deficient performance on sentencing alone merits setting aside the sentence. Coupled with the other cumulative errors, trial defense counsel's performance certainly leaves no doubt that the system failed and that appellant was deprived of competent counsel in his case.

Rehearing

Comparison of the cumulative errors and sentence in *Dollente* with the cumulative errors and sentence in appellant's case must compel this Court to remand appellant's case for a rehearing on the findings and sentence. The appellant in *Dollente* was convicted of committing indecent acts and taking indecent liberties with a female under 16. During the merits portion of Dollente's court-martial, the military judge made the following three errors:

(1) He refused to admit expert testimony from a defense witness;

(2) He admitted prosecution expert testimony that bolstered the alleged victim's credibility in what was a he said-she said case;

(3) He admitted perpetrator-profile evidence.

The court held that, though alone the errors may have not been prejudicial, the cumulative effect of these individual errors adversely affected Dollente's right to a fair trial. 45 M.J. at 236. "[T]he combined effect of these . . . errors was so prejudicial so as to strike at the fundamental fairness of the trial". *Id.* (internal quotations and citation omitted.)

Appellant's case is even more aggravated than *Dollente*.[22] Certainly, the nature of the errors in appellant's case catapults it *beyond* the *un*fairness evidenced in *Dollente*. Not only did at least nine errors effect the investigation, merits, and sentencing phases of appellant's court-martial, even if appellant had been given the opportunity to put on such evidence, the panel was so infected with bias that a fair trial was impossible. Additionally, appellant's case is a capital case, requiring even more reliability of result. Thus, this Court must conclude that appellant was not afforded a

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[22] While the strength of the government's case in *Dollente* was admittedly weaker (the critical testimony of the alleged victim having been inconsistent) than the government's case against appellant, that distinction certainly does not remove the cumulative errors in appellant's case outside the realm of fundamental unfairness. While it may be said that the "strength of the government's case" factor weighed more in Dollente's favor than does it for appellant, the nature of the errors and the inability of the military judge to correct those errors in appellant's case work to more than sufficiently warrant finding appellant was denied a fair trial.

fundamentally fair court-martial, and a rehearing on findings and sentence must be granted.

WHEREFORE, the appellant respectfully requests that this Court set aside the findings and sentence.

Conflicts of Interest

Assignment of Error II.

SERGEANT AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO MOVE TO WITHDRAW FROM REPRESENTATION OF THE APPELLANT IN THIS CAPITAL CASE BECAUSE OF ACTUAL CONFLICTS WHICH ADVERSELY AFFECTED REPRESENTATION OF APPELLANT AT HIS COURT-MARTIAL.

Introduction

Sergeant Akbar's defense counsel in this case were prevented from affording appellant the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution because of several conflicting interests that existed both before and during their representation. These conflicts were of such a nature as to significantly hinder Sergeant Akbar's trial defense counsel, Major [redacted] and Captain [redacted] from adequately fulfilling their duties and responsibilities to their client.

Major [redacted] lead defense counsel in Sergeant Akbar's case, was deployed to Kuwait and was on the scene immediately after the grenade attack and shooting of two Soldiers in Kuwait by a fellow Soldier. Captain [redacted] was a defense counsel at Fort Campbell and was detailed to SGT Akbar's defense team the day after the incident. Both counsel had a relationship with one of SGT Akbar's victims, MAJ [redacted] Both counsel tried

cases against MAJ [redacted] at Fort Campbell and other military installations. Throughout the course of Sergeant Akbar's pretrial investigation, court-martial, and post-trial process, Major [redacted] and Captain [redacted] had divided loyalties because of their relationship to one of the victims in the case and their emotional ties to the incident. While defense counsel disclosed their relationship with the victim to SGT Akbar and to the military judge at trial, the military judge failed to obtain a valid waiver. Furthermore, the fact that lead defense counsel was himself a victim of the crime and was traumatized by the events was never disclosed, discussed, or explained to SGT Akbar or to the court. As such, there was no valid waiver.

Furthermore, during the pretrial investigation, another conflict of interest arose for the lead defense counsel. Major [redacted] was due to change assignments to be the Chief of Military Justice at Fort Drum but SGT Akbar was not willing to waive that particular conflict. The trial counsel then, having just come from an assignment at the Personnel Plans and Training Office (PP&TO), changed MAJ [redacted] assignment without the consent of either SGT Akbar or defense counsel. This clear ability for the prosecutor to control the course of the defense counsel's future assignments created a conflict for trial defense counsel that was never fully disclosed to SGT Akbar nor resolved by the military judge.

Finally, just before SGT Akbar's trial was to begin, trial defense counsel became embroiled in an additional conflict of interest that they concealed from both SGT Akbar and the court. This conflict arose when the lead defense counsel became a witness in a stabbing incident. Although not an eye-witness to the incident, lead defense counsel, through his own negligence, created the means for SGT Akbar to access scissors from his desk drawer and later use them to stab a guard. Major [redacted] negligence could have lead to a dereliction of duty charge against him, had the prosecution elected to pursue that charge. At a minimum, lead defense counsel could have been called as a witness because of his involvement had the government decided to charge SGT Akbar with additional offenses. Lead defense counsel had a personal interest in the government not moving forward on additional charges, and thus also in moving the trial along as fast as possible without regard to the needs and advice of defense experts. Because of career implications, both counsel had a personal incentive to get to trial as quickly as possible, but because defense counsel were implicated (through dereliction of duty if nothing else) in appellant's additional misconduct, counsel actually stood to personally gain if their client was sentenced to death, as that would significantly reduce the possibility that the government would pursue a second trial on the additional misconduct.

These numerous conflicting loyalties affected trial defense counsel's performance throughout their representation and denied SGT Akbar his Sixth Amendment right to competent and conflict-free representation.

Law

The Sixth Amendment's right to counsel requires effective assistance by an attorney, which has two components: competence and conflict-free representation. *Wood v. Georgia,* 450 U.S. 261, 271 (1981). In a conflict of interest case, prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington,* 466 U.S. 668, 692 (1984)(quoting *Cuyler v. Sullivan,* 466 U.S. at 350, 348)).

As the Supreme Court acknowledged in *Strickland,* "counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest," which is "perhaps the most basic of counsel's duties." 466 U.S. 668, 690, 692, 104 (1984). Rule 1.7 of the Rules of Professional Conduct for Lawyers, found in Appendix B of Army Regulation 27-26, states that loyalty is an essential element in the lawyer's relationship to a client and addresses all of the conflicts of interest faced by trial defense counsel in their representation of SGT Akbar in this capital case. *See* Army Reg. 27-26, Rules of Professional Conduct for Lawyers,

Appendix B, Rule 1.7(b). (1 May 1992). Rule 1.7(b) Conflict of Interest: General Rule, states:

> A lawyer shall not represent a client if the representation of that client may be *materially limited* by the lawyer's responsibility to another client or to a third person, or 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.

Id. (emphasis added).

Applying this rule to the encumbrances faced by trial defense counsel in their representation of Sergeant Akbar, counsel clearly had a professional duty to Sergeant Akbar to move to withdraw from his representation.

While an accused may waive his right to conflict-free counsel, waivers must be voluntary, and they must be "'knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Davis*, 3 M.J. 430, 433 n.16 (C.M.A. 1977)(quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Courts will "'indulge every reasonable presumption against the waiver'" of this right. *Id.* (citations omitted); *See also United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008).

Argument

A. THE MILITARY JUDGE ERRED IN ACCEPTING APPELLANT'S WAIVER OF HIS RIGHT TO CONFLICT-FREE COUNSEL AFTER DEFENSE COUNSEL DISCLOSED A RELATIONSHIP BETWEEN THEMSELVES AND A VICTIM IN THE CASE BECAUSE THE WAIVER WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY MADE.

On 26 April 2003, SGT Akbar signed a document in which the defense counsel purported to explain their relationship with one of the victims in the case, CPT [redacted] (DAE S, T; DA 94-99.) On 9 March 2004, the military judge conducted an article 39(a) session in which defense counsel brought this conflict to the attention of the court. (R. at 5-8.) Although trial defense counsel disclosed their relationship with CPT [redacted] and sought SGT Akbar's consent to remain on his defense team, the military judge failed to establish a valid waiver of the conflict.

A waiver must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter dependent in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *United States v. Augusztin,* 30 M.J. 707, 711 (N.M.C.M.R. 1990)(citing, *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). Under the facts and circumstances in this case, the military judge failed to conduct the proper inquiry into defense counsel's relationship with CPT [redacted] The military judge

elicited, for the most part, mere "yes" or "no" answers, and the details of his attorneys' conflicts of interest and the possible perils of such a conflict on his capital case were not adequately explained. *See United States v. Breese,* 11 M.J. 17, 22 (C.M.A. 1981)(*citing Davis,* 3 M.J. 434 (additional citations omitted)).[23] "For the defendant to knowingly and intelligently waive the right to conflict free counsel, he must be told (1) that a conflict of interest exists, (2) the consequences to his defense from continuing with conflict laden counsel; and (3) that he had a right to obtain other counsel." *Augusztin,* 30 M.J. at 711 (*citing Duncan v. Alabama,* 881 F.2d 1013, 1017 (11th Cir. 1989)).

The military judge failed to explore the relationship that existed between the defense counsel and the victim, neither did he explain to SGT Akbar the possible consequences to his defense from proceeding with defense counsel that have such divided loyalties. At one point SGT Akbar stated, "based on what I know now, yes [I want to keep these counsel]. . . I can't imagine what else would come up in the future that would make me not want to keep them, sir." (R. at 8.) At this point, the military judge should have explained the conflict in more

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[23] While the *Breese* court addressed conflicts arising from multiple representation, the analysis is applicable here because both cases involve instances of an attempted waiver of an attorney with divided loyalties.

detail. SGT Akbar should not have to "imagine" potential conflicts; rather, the military judge must inform him of the conflict and its consequences on his defense. The military judge should have asked defense counsel to explain how many cases they had tried with CPT [redacted] whether or not they attended office functions with CPT [redacted] and whether their families interacted - all consistent with Judge Advocates working in criminal law at the same installation. Captain [redacted] was a defense counsel at Fort Campbell since July 2002, and could be expected to have numerous interactions with CPT [redacted] for over a year's span. (DAE S, T; DA 94-99.)

Additionally, the military judge never informed SGT Akbar the possible consequences to his defense from continuing with conflict-laden counsel. He should have told him it was likely CPT [redacted] would testify at trial and that it could impact his counsel's cross-examination of the witness. Captain [redacted] did indeed testify on the merits and on sentencing. (R. at 1381, 2830.) Under the facts and circumstances of this case, SGT Akbar's waiver was not knowing and intelligent.

Even if this court finds that appellant's waiver was valid, this Court must nonetheless hold that "'even a knowing acceptance by a defendant of counsel's representation despite a potential conflict of interest does not preclude a showing, under the standard of *Cuyler*, that the conflict became actual

and had an adverse effect on representation.'"[24] *Yeboah-Sefah v. Ficco*, 556 F.3d 53, 71 (1st Cir. 2009)(citing *United States v. Rodriguez-Rodriguez*, 929 F.2d 747, 750 (1st Cir. 1991)(other citations omitted)); *see also United States v. Fahey*, 769 F.2d 829, 835 (1st Cir. 1985)(finding even though the petitioner executed a knowing and intelligent waiver of counsel's potential conflict of interest, a waiver did not foreclose the possibility that an actual conflict could adversely have affected the adequacy of representation and violated the Sixth Amendment right to assistance of counsel).

In this case, defense counsel failed to take the time needed to investigate mitigation evidence and blocked the defense expert witness access to the mitigation team. *See Strickland*, 466 at 691 (a defense attorney has a duty to make reasonable investigation into mitigating factors). These conflicts, whether conscious or unconscious, adversely affected defense counsel's representation of SGT Akbar and prevented them from providing the effective assistance of counsel. *See also* AE I.

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[24] Prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984)(quoting *Cuyler v. Sullivan*, 466 U.S. at 350, 348)).

B. DEFENSE COUNSEL WAS DIRECTLY IMPACTED BY THE CHARGED CONDUCT WHICH CREATED A CONFLICT OF INTEREST THAT ADVERSELY AFFECTED REPRESENTATION OF SGT AKBAR IN THIS CAPITAL CASE.

On 19 March 2003, the President of the United States had declared that military forces, on his orders, were "to disarm Iraq, to free its people and to defend the world from grave danger." Transcript from President Bush's speech made on 19 March 2003, http://www.cnn.com/2003/US/03/19/sprj.irq.int.bush.transcript/ (last visited Jan. 13, 2010). Sergeant Akbar and his trial defense counsel were among the Soldiers already deployed in Kuwait awaiting the order to enter combat in Iraq. On 20 March 2003, military forces "launched missiles and bombs at targets in Iraq as [] morning dawned in Baghdad, including a 'decapitation attack' aimed at Iraqi President Saddam Hussein and other top member of the country's leadership." War in Iraq: U.S. launches cruise missiles at Sadaam, http://www.cnn.com/2003/WORLD/meast/03/19/sprj.irq.main/ (last visited Jan. 14, 2010). Countless news stories reported the military involvement as Soldiers in Kuwait prepared to enter the fray. *See* Timeline and events leading up to the Iraq War, http://www.nytimes.com/interactive/2008/03/18/world/middleeast/20080319IRAQWAR_TIMELINE.html#tab2 (last visited Jan. 11, 2010.) On 22 March 2003, at Camp Pennsylvania, Kuwait, Soldiers were

attacked by one of their own. Major [redacted] was the Senior Defense Counsel assigned to the Trial Defense Service at Camp Doha, Kuwait, when word spread that this unprecedented attack came from inside Camp Pennsylvania. Major [redacted] was on the scene and was the first defense counsel to speak with SGT Akbar after the attack. (DAE S; 94-96.) Having been deployed to the same area of operation, MAJ [redacted] would have witnessed the impact of the attack on his fellow Soldiers. Nevertheless, the Regional Defense Counsel chose MAJ [redacted] to represent appellant and detailed him on 23 March 2003. *Id.*

Being deployed in Kuwait during the time of the grenade attack made defense counsel a victim of the attack. There was heightened anxiety as Soldiers prepared to enter Iraq. This was an attack on a nearby camp in Kuwait, allegedly by a fellow Soldier charged with throwing grenades into the same kind of tents which defense counsel would have used day in and day out. Furthermore, given the close proximity of the camps where the explosions occurred and the nature of defense counsel work, it is likely that defense counsel was at least acquainted with those impacted by the grenade attack at Camp Pennsylvania. The stress of a deployment and impending ground combat combined with the emotional attachment to fellow Soldiers in similar circumstances made it impossible for this defense counsel to represent SGT Akbar effectively. Whether consciously or

unconsciously, defense counsel was also a victim of the attack. This created a substantial conflict of interest that negatively affected representation of SGT Akbar.

Additionally, a conflict of interest such as this puts an intolerable strain on the military justice system. It is instructive that the government chose to detail someone off-site completely without any apparent attachment to those deployed Soldiers affected by the attack. It is humanly too much to ask for a Soldier and defense counsel to effectively advocate for a client that has caused such immediate destruction in that counsel's environment. This Court must consider the affect this conflict had on defense counsel, along with the other conflicts of interest raised, to conclude defense counsel was impaired by the impact of the offenses such that he was unable to provide effective assistance of counsel.

C. BOTH DEFENSE COUNSELS' CAREER ADVANCEMENT WAS IMPACTED AT THE DIRECTION OF THE PROSECUTION, CREATING A CONFLICT OF INTEREST ADVERSELY AFFECTING SGT AKBAR'S REPRESENTATION IN THIS CAPITAL CASE.[25]

On 9 March 2004, during an Article 39(a) session, defense counsel informed the court:

> DC: Sir, I am on orders to report to Fort Drum, New York, no later than 15 July to be

[25] Appellant, in AE VIII, claims that the prosecution's manipulation of trial defense counsel during appellant's court-martial amounted to unlawful command influence.

the Chief of Justice for the 10th Mountain Division.

MJ: Okay. How about you, Captain [redacted]

ADC: Sir, I'll be getting orders to report to Fort Eustis as the Deputy Staff Judge Advocate on 1 August.

MJ: Okay. But you're going to be around in the Army and available, right?

DC: Yes, sir. And, obviously, as these situations are handled, Sergeant Akbar has the opportunity and TDS would support it -- if he wants to continue with our service and just accept the conflict, he can do that. And they've also offered him, if he wants conflict-free counsel, the opportunity to appoint someone new, either at Fort Campbell or at Fort Bragg, to replace either one or both of us if that's what he wants to do. At this point, **he's indicated that he would prefer to have conflict-free counsel.**

MJ: What's the conflict?

DC: Well, I'll be the Chief of Justice, which is, obviously, on the other side of the fence.

MJ: But that's got nothing to do with this case.

DC: 10th Mountain Division is part of XVIII Airborne 2 Corps, sir.

MJ: I spent 5 years in TDS. It's not a conflict to me . . . .

(R. at 435.) (emphasis added.)

The prosecution responded:

TC: First, Your Honor, to address the PCS issue, Captain [redacted] was -- I know this having been the former Captains Assignment

Officer -- he was specifically deferred from an opportunity to go to the Grad Course to be on this case. I would represent to the court that he will remain on this case as long as this case is going, and no PCS will interfere [sic] with a conflict. If he's released for other grounds, it will be not because of a PCS. He is not currently on orders, and the job that he's going to fill is not open until January of 2005. There is no conflict with him remaining.

MJ: So when are you PCSing then, Captain [redacted]

ADC: Well, **Colonel [redacted] has facts that I don't have**, but I've been told that I'll receive orders and be PCSing with a report date of 1 August. . . .

ADC: Yes, sir. In any event, that's what I've been informed; that I would be PCSing to go to Fort Eustis for that position. Clearly, I have no problem with working and remaining on the case.

MJ: And, Major [redacted] what's your PCS date?

DC: My report date is 15 July, unless Colonel [redacted] has some further information on that. That's what I understand it to be.

MJ: **Let's ask him and find out.**

TC: Sir, I'm going to get some information on that very quickly.

MJ: How about finding out and then e-mailing all parties to find out, you know, if, in fact, what you say is that the position that Colonel -- Colonel, perhaps one day I'm sure --Captain [redacted] is going to is not open until 1 January?

> TC: Sir, I can represent to the court now, I just got off the phone with the Chief of PP&TO 3 minutes ago. Captain [redacted] will remain on this case. He will not get orders until this case is finished . . . .

(R. at 442-44.) (emphasis added.) On 24 August 2004, the defense counsel further discussed the issue with the military judge:

> DC: Sir, if I could, there's one issue I wanted to update the record on. It's something we discussed at length during the last hearing. At that time, I was the Senior Defense Counsel at Fort Campbell. I was pending a PCS to Fort Drum to be the Chief of Justice. I discussed that move and the potential conflict that might present with my client, Sergeant Akbar. He, at that time, indicated that he would rather release me and have new counsel appointed if that was going to be my assignment. We discussed that issue on the record. Colonel Parrish ruled that he did not believe it was a conflict in any sense to be the Chief of Justice and still represent Sergeant Akbar. I went ahead with my move, and I just wanted to update the court on what has happened since that time reference that issue. When I arrived at Fort Drum, I was told by the SJA that I was not expected to be at Fort Drum. And he indicated he had been contacted by PP&TO and told that -- Trial Counsel --Colonel [redacted] had indicated that he did not want to create that kind of conflict or have that issue. Therefore, PP&TO told Colonel Garrett, my SJA, that I would not be coming until after the trial. For whatever reason, that information was not passed to my chain of command or to me and I PCS'd anyway. So to resolve that issue, they've moved me into Administrative Law. So, to the extent that there was an issue of a potential conflict of me being the Chief of Justice, that has

been eliminated because I'm not in that position.

MJ: So you're essentially physically at Fort Drum ----

DC: Yes, sir.

MJ: ---- but performing other duties as assigned?

DC: Yes, sir.

(R. at 567-8.)

a. Conflicts of interest are especially problematic in the military justice system.

Military defense counsel, unlike their civilian counterparts, are not only subject to the ethical rules that apply to all attorneys, but are also subject to military law and regulations and ultimately supervised by the very same agency responsible for prosecuting Soldiers. *See generally* AR 27-10, Ch. 5, 6; *See also* Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service,* 2001 Army Law 1 (March 2001)("the Army is ultimately responsible both for the supervision and evaluation of all Army defense counsel and the prosecution of courts-martial."). In fact, the Trial Defense Service (TDS) was created, in part, to avoid conflicts arising from command control over the career development of the trial defense counsel.[26] *See* Lieutenant

[26] "The purpose of the new organization [TDS] is two-fold: (1) to improve the efficiency and professionalism of counsel through

Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983) (discussing the history and development of the Trial Defense Service.)

b. Trial counsel's manipulation of defense counsel's duty assignments created an actual conflict of interest.

In this case, trial counsel demonstrated his control over the future assignments of defense counsel. In fact, even the military judge recognized that trial counsel controlled MAJ [redacted] career development. (R. at 443.) This is precisely the kind of influence over defense counsel that TDS was created to abolish. Sergeant Akbar declined to waive any conflict of interest were his defense counsel to proceed with the scheduled change in assignment to be the Chief of Justice at Fort Drum and would have released MAJ [redacted] as his defense counsel. (R. at 435.) Even though the military judge did not believe that such a change would be a conflict of interest, the accused would have objected to MAJ [redacted] representing him at trial.[27] The

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direct supervision and evaluation within the defense chain; and (2) to eliminate perceptions of soldiers and others that defense counsel have a potential conflict of interest in carrying out their duties." *Fact Sheet: US Army Trial Defense Services*, ARMY LAW., Jan. 1981, at 27, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/01-1981.pdf.

[27] While there is no per se rule against a lawyer simultaneously serving as a prosecutor and defense counsel, it is a clear violation of ethical rules. *United States v. Lee*, 66 M.J. 387, 388-89 (2008) (citing Department of Justice, 1 Op. Off. Legal Counsel 110, 112 (1977), ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1235 (1972), Informal Op. 1474 (1982). In this case, if trial defense counsel had changed duty

trial counsel was more informed about defense counsel's future assignments than the defense counsels themselves. (R. at 443-445.) In fact, trial counsel made representations, in open court, for the Personnel, Plans, and Training Office (PP&TO), the same office that is responsible for all future assignments of counsel, demonstrating that the prosecutor had control over the careers of defense counsel.

While trial counsel may have been seeking to avoid a conflict of interest in the case (assigned as a prosecutor but working as a defense counsel on appellant's case), his actions created another, more serious conflict of interest, between counsel's duty of loyalty to his client and his personal interest in gaining favorable future assignments. Thus, defense counsel was forced to forgo a favorable assignment as the Chief of Military Justice at a combat division and remain as SGT Akbar's counsel. The lead trial counsel made it clear that he wielded extreme power to impact MAJ [redacted] career. With a simple phone call to PP&TO, the trial counsel, LTC [redacted] had

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assignments to act as the Chief of Justice while also representing appellant, over appellant's objection, it would have been reversible error and there would be no need to show that the conflict of interest adversely affected representation. *Id.*

MAJ [redacted] re-assigned. This conflict, or even its appearance, cannot be tolerated in the military justice system.[28]

Additionally, the military judge never discussed this issue with SGT Akbar to determine whether he still wished to be represented in such a situation, as called for by *United States v. Nicholson,* 15 M.J. 436 (C.M.A. 1983). In *Nicholson,* the Court of Military Appeals addressed an actual conflict of interest in the case where the trial counsel was the immediate supervisor of the opposing defense counsel and exercised command authority over him. *Id.* In such a case, the *Nicholson* court required a knowing waiver by the accused of such a conflict of interest stating "it is wholly inimical to the appearance of integrity of the military justice system." *Id.* Pertinent portions of the American Bar Association opinion, as quoted in *Nicholson,* are:

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[28] Making matters even worse, defense counsel went ahead with his move to Fort Drum, New York, even though PP&TO, upon request of trial counsel, had decided to keep defense counsel at Fort Campbell until after the trial. (R. at 567-68.) No one informed defense counsel that he was not supposed to make the move, nor apparently, were his orders actually revoked. *Id.* Thus, defense counsel moved his entire family all the way to Fort Drum and therefore spent the rest of the time before trial without the comfort, stability, and support of his family. Since defense counsel made the move, he was placed in the Administrative Law section to avoid the conflict of acting as a prosecutor and defense attorney at the same time. *Id.* This, however, did not fix the conflict that arose from trial counsel's clear ability to manipulate defense counsel's future assignments.

> The ethical requirements . . . that a lawyer must provide zealous representation, and give unswerving loyalty to a client free from any influence that might weigh against that fidelity -- **clearly are violated where a military lawyer's opposing counsel in a court martial or related proceeding is an officer who has command over him . . .**
>
> **No matter how fair the commanding officer may be, there is an inherent conflict between zealously representing a client and conducting oneself in a manner calculated to win the approval and favor of the officer exercising command authority.**

Id. at 438. (Quoting the American Bar Association's Standing Committee on Ethics and Professional Responsibilty Informal Opinion No. 1474 (1982)).

Appellant's case presents facts more troubling than those found in *Nicholson.* The trial counsel in SGT Akbar's case had more than just command authority over trial defense counsel - he took affirmative steps to impact the career development of the defense counsel during the trial. This triggered the requirement for a discussion between the military judge, trial defense counsel, and appellant to resolve this explicit conflict. Like *Nicholson,* the relationship between the trial counsel and defense counsel created a conflict "wholly inimical to the appearance of integrity of the military justice system." Without a waiver, prejudice must be presumed. *See United States v. Devitt,* 20 M.J. 240 (C.M.A. 1985); *United States v. Whidbee,* 28 M.J. 823, 826 (C.G.C.M.R. 1989)(finding the relationship

where the trial counsel had supervisory authority over the defense counsel, even though only in matters not relating to military justice, created "an actual conflict of interest that is inherent and irrefutable" and without waiver resulted in "conclusively presumed prejudicial error" requiring reversal).

Trial counsel's actions created an inherent conflict of interest. Trial counsel could impact defense counsel's assignment with a quick phone call, what other aspects of defense counsel's career could trial counsel impact? The defense counsel could zealously represent SGT Akbar or conduct himself in a manner to win approval **or** favor of the trial counsel. If defense counsel fought zealously, would trial counsel arrange for an assignment even less desirable than Fort Drum? Although, trial counsel did not write the fitness reports described in *Nicholson,* he clearly exercised control over defense counsel's future assignments and career, thus created a conflict of interest.

c. Trial defense counsel's conflict of interest adversely affected counsel's representation.[29]

From 9 March 04, defense counsel were conflicted. Instead of further delaying the case and conducting a reasonable investigation into the mitigation evidence, trial defense

[29] *See also* AE I: A-G.

counsel forged ahead to trial. According to trial counsel, the defense counsel should not be released:

> TC: Sir, I also don't find the conflict that Major [redacted] finds, and I also believe it's another indication --these two counsel have been on this case since this incident first happened. They have had the opportunity to walk the ground in Iraq. They've been at the Article 32. They've been with him through his sanity board. They've been with him through motions. They've been with him since day one. . . . The court should not allow the withdrawal of either one of the TDS attorneys. . . . And, Sergeant Akbar deserves his day in court, and that day should come a lot sooner than June of 2005 . . . . there is no reason that either one of those gentlemen could still not PCS, although they would be delayed for 90 days. But knowing their professionalism, I am sure they would sacrifice that 90-day period when they thought they were going to PCS to represent this man's life. So the government is opposed to any delay beyond the first week of October; specifically, the 4th.

(R. at 445-47.)

The government had an interest in moving ahead to trial and made that known to the defense counsel. However, that interest was adverse to SGT Akbar's interest in having a conflict-free counsel conduct a reasonable investigation into his case. The mitigation experts, as well as the psychological expert witness in the case, requested trial defense counsel move for more time to investigate the case and perform tests on SGT Akbar. (R. at App. Ex. 140; DAE B, C, D, G, I, R, AA, GG; DA 1-27, 92-93, 229-

341.)[30] Defense counsel ignored the advice and requests from their own defense team, resulting in an incomplete mitigation report, incomplete medical testing, and ineffective expert testimony. The appearance of impropriety is clear. Consequently, Sergeant Akbar was denied the effective assistance of counsel, and, therefore, is entitled to a new trial. *See United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

D. LEAD DEFENSE COUNSEL'S ROLE IN THE ADDITIONAL MISCONDUCT ALLEGEDLY COMMITTED BY SGT AKBAR CREATED A CONFLICT OF INTEREST THAT NEGATIVELY AFFECTED HIS REPRESENTATION IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

On 30 March 2005, SGT Akbar allegedly assaulted a military police officer with scissors that the lead defense counsel negligently left in the TDS Office desk drawer. That assault resulted in an CID investigation. During that investigation, MAJ [redacted] involvement was investigated. (*See* DAE U; DA 100-195.) According to the CID report, the MPs did a sweep of the room where SGT Akbar was to be held during trial. *Id.* at Sworn Statement from SSG [redacted] On 29 March 2005, MAJ [redacted] directed that his TDS office be used to hold the accused when the court was not in session. The MPs swept the room with MAJ [redacted] present. According to SSG [redacted]

> We found office type supplies and informed MAJ [redacted] that the items needed to come

[30] *See also* AE I: B.

> out of the office. He stated he would have someone remove the items and have the desk drawers locked. We did not remove anything from the office, because MAJ [redacted] stated he would have the items removed.

Id. at DA 177-79. SSG [redacted] explained that he did not further check the office on 30 March 05 because "we thought it was taken care of." *Id.*

CID requested statements about the stabbing from CPT [redacted] MAJ [redacted] and CPT [redacted]. *See* DAE U; DA 169-170 (CPT [redacted] was assigned to assist the defense and was also a witness to the stabbing incident). (DAE U; DA 165-72) However, all three counsel informed CID that "they would have to contact their higher headquarters to obtain guidance prior to providing statements to this office." *Id.* Ultimately, all three refused. *Id.* Any defense counsel with knowledge of their culpability for their client's access to a weapon would have concerns about being a witness should the government decide to bring additional charges and quite possibly about being charged with dereliction for their own negligence. In fact, defense counsel were aware of potential conflicts. In their notes, defense counsel wrote:

> **1) Are we still counsel**
> 2) Security -(1) us in the courtroom
> (2) In irons b/f panel
> 3) Injuries - visible to panel
> **4) What is the government going to do**
> 5) Charge = 32
> 6) Uncharged misconduct

7) Continuance = request
8) Mental health analysis
9) Change of venue
10) # of victim
11) 615 for all witnesses until they testify
12) Withdraw
13) Statements from guards - Ethics
* psy analysis: Request another 706?
Want someone the court & govt

(DAE V; DA 196-97.) (emphasis added.)

Prosecutors determined that there was enough information to charge SGT Akbar with an offense under the UCMJ but they chose not to do so. (DAE U; DA 100-195.) On 31 March 05, the defense filed a motion in limine to preclude the use of uncharged misconduct at appellant's court-martial. (R. at App. Ex. 179). Trial counsel opposed the motion and the military judge heard arguments on 22 April 05. (R. at 2658-62.) The government informed the court that although additional charges might not be preferred, it remained a possibility,

> MJ: Right. You always have a remedy, right?
>
> TC: Your Honor, that's correct.
>
> MJ: The government has a remedy available to it, short of introducing evidence of the uncharged misconduct at this trial, correct?
>
> TC: That's correct, Your Honor.

(R. at 2661.) Even though the government might prefer a charge to which counsel were witnesses or complicit, counsel continued to represent SGT Akbar. No defense counsel should labor under such a conflict of interest. In fact, ethical rules prohibit a

lawyer from continuing representation of a client when that lawyer may also be a witness. *See* Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Appendix B, Rule 3.7(b)(1 May 1992).

Rule 3.7(a) Lawyer as Witness, states, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . ." Although there are three exceptions to the rule, none are applicable here. *Id.*[31] Under the rule, an attorney is required to decline representing a client if it is "likely" that the lawyer will be a necessary witness. In this instance, while MAJ [redacted] was not called as a witness in this court-martial, he could have been. But for Major [redacted] (a potential witness in the pending court-martial for the additional offenses) negligent actions in failing to secure the room, there would have been no access to the weapon used in the crime. Additionally, MAJ [redacted] negligence is even more shocking considering his knowledge of appellant's psychotic state of mind.

An attorney has an ethical duty to identify conflicts of interest concerning the attorney's representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules, regardless of

[31] This rule is the same as Rule 3.7 of the American Bar Association's Model Rules of Professional Conduct.

whether a party-litigant has filed a motion to disqualify the attorney. ABA Model Rule of Professional Conduct 1.16; *see also* Dep't of the Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Appendix B, Rule 1.16 (May 1, 1992). One of the defense attorneys even compiled the aforementioned list in response to these new offenses. (DAE V; DA 196-97.) Defense counsel clearly identified the conflict of interest, and contemplated the ethical dilemma they were facing because of MAJ [redacted] involvement in this new offense. Furthermore, they clearly recognized concerns about continuing to represent SGT Akbar, but failed to bring it to the attention of the court. *Id.* There was an obvious conflict of interest which adversely affected counsel's performance. Trial defense counsel no longer had just SGT Akbar's interests in mind, but also their own interest in avoiding any punishment for their negligent role in the offenses. To be blunt, due to their own possible punitive exposure, the best outcome for defense counsel was a guilty verdict with a sentence to death, for then their careers could continue unimpeded and the government's interest in pursuing additional charges would be largely eliminated.[32]

Many courts have found an actual conflict of interest when a defendant's lawyer faces possible criminal charges or

[32] Once a sentence to death has been obtained, the government has every incentive to **avoid** taking action against the defense counsel as doing so would only highlight the conflict.

disciplinary consequences as a result of the lawyer's behavior related to the client's. *See, e.g., United States v. Greig*, 967 F.2d 1018, 1022 (5th Cir. 1992)(actual conflict when attorney implicated in obstructing justice to aid defendant); *Government of Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984)(actual conflict when attorney involved in the destruction of evidence in defendant's case); *United States v. White*, 706 F.2d 506, 507-08 (5th Cir. 1983)(actual conflict when attorneys being investigated concerning prior escape of defendant); *see also United States v. Fulton*, 5 F.3d 605, 609-10 (2d Cir. N.Y. 1993)("when 'an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great.'" (*quoting Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir.), cert. denied, 488 U.S. 908 (1988))).

In cases such as this, where the attorney is being investigated or otherwise involved with the criminal activity, courts are concerned that defense counsel's performance may be motivated primarily to avoid further incriminating himself. See *United States v. Arrington*, 867 F.2d 122, 129 (2d Cir.), cert. denied; *Davis v. United States*, 493 U.S. 817 (1989); *Zepp*, 748 F.2d 125, 136 (3d Cir. 1984) (stating that lawyer facing potential liability is not likely to "vigorously pursue his client's best interest free from the influence of his own

incrimination") (citation omitted). After all, when "counsel has been placed in the position of having to worry about allegations of his own misconduct, . . . [w]hat could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" *Arrington*, 867 F.2d 122, 129 (2d Cir. N.Y. 1989)(citations omitted). This was a clear and actual conflict of interest that required defense counsel to seek withdrawal or waiver from appellant after full disclosure. Instead, defense counsel concealed the conflict from the court and appellant.

The effect of this conflict was adverse to SGT Akbar's interests. Defense counsel had defense experts requesting more time to investigate and conduct testing of SGT Akbar to be ready for trial. Additionally, defense counsel were pressured to proceed to trial and avoid the wrath that these additional charges would bring. Had they done what they should have done - that is, seek to withdraw due to an actual conflict of interest - the trial may have been delayed for a year or more, contrary to the trial counsel's expressed wishes, which forseeably would have resulted in punitive action against defense counsel given the trial counsel's demonstrated manipulation of defense counsel's assignments.

Defense counsel never explained this conflict of interest to SGT Akbar or the court. Only those involved in the

investigation - the prosecutors and the defense counsel - would know of this conflict of interest. With the personal knowledge that he could not adequately represent the appellant in this case, MAJ [redacted] failed in his obligation to his client. Consequently, Sergeant Akbar was denied the effective assistance of counsel, and, therefore, is entitled to a new trial. *See United States v. Scott*, 24 M.J. 186 (C.M.A. 1987).

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings and sentence in this capital case.

At a minimum, a fact finding hearing under *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), must be ordered. *See United States v. Smith*, 36 M.J. 455, 457 (C.M.A. 1993)(a *DuBay* hearing ordered to determine whether there was 1) multiple representation, 2) whether an actual conflict of interest existed, and 3) whether the conflict of interest adversely affected counsel's representation of appellant).

Part Five: Trial Errors

Assignment of Error III.

WHEN READ WITH OTHER SUPREME COURT PRECEDENT, MILITARY CASE LAW, AND CASES FROM OTHER FEDERAL JURISDICTIONS, *RING V. ARIZONA,* 536 U.S. 584 (2002), AND ITS UNDERLYING RATIONALE REVEAL CHARGES WERE IMPROPERLY PREFERRED, INVESTIGATED, AND REFERRED, AND APPELLANT'S CONVICTION AND DEATH SENTENCE WAS UNCONSTITUTIONALLY ADJUDGED.

Introduction

The Supreme Court's decisions in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002), changed the fundamental definitions in all capital punishment systems, to include the military. After *Ring,* capital aggravating factors must be considered elements, not sentencing considerations and therefore must be found beyond a reasonable doubt. In light of *Ring,* the enactment of the entire capital sentencing procedure in the military is invalid and must be re-evaluated. Since this infirm procedure was applied to appellant, the findings and sentence must be set aside.

In *Apprendi*, the Supreme Court held that a criminal defendant is entitled to a jury determination of every element of the crime for which he is charged. 530 at 476. This requirement extends to any fact that increases the penalty for a crime. *Id.* at 491. The Court determined that provisions of New Jersey's hate crime enhancement statute were unconstitutional

because it placed the determination whether the sentence enhancement applied before the trial judge rather than before a jury. *Id.* at 495.

In *Ring*, the Court held that provisions of Arizona's death penalty law that were identical to those found in R.C.M. 1004(c) during the prosecution of appellant's case are not sentencing factors, but "the functional equivalent of an element" of the offense of capital murder that must be found by a jury beyond a reasonable doubt. *See Ring* at 608-09 (citation omitted). When read with other Supreme Court precedent, military case law, and cases from other federal jurisdictions, *Ring* and its underlying rationale require relief in appellant's case for the reasons summarized below and set forth in greater detail following an analysis of *Ring* and its general applicability to the military justice system.

Summary of Arguments Based on *Ring*

Issue 1

As elements of the offense of capital murder, the provisions of R.C.M. 1004(c) relevant to a particular capital case (1) must be alleged either expressly or by necessary implication in the charges preferred against an accused in accordance with R.C.M. 307; (2) they must be expressly investigated pursuant to R.C.M. 405 and Article 32 of the UCMJ, and; (3) they must be expressly referred to trial by court-

martial by the convening authority pursuant to R.C.M. 601. The R.C.M. 1004(c) provisions relevant to appellant's case were not expressly alleged in the charges preferred against him, they were not expressly investigated pursuant to R.C.M. 405 and Article 32, UCMJ, and they were not expressly referred to his court-martial by the convening authority. These jurisdictional defects in appellant's case require this Court to set aside the findings and dismiss the charges against him. Furthermore, to the extent the UCMJ or the R.C.M. provide alternate means for authorizing a death sentence, *Ring* has rendered unconstitutional any such alternate means.

Issue 2

As elements of the offense of capital murder, the provisions of R.C.M. 1004(c) applicable to a particular capital case must be enacted by Congress and may not be promulgated by the President. Accordingly, *Ring* has rendered unconstitutional on grounds of separation of powers, the provisions of R.C.M. 1004(c) relevant to appellant's case, which were promulgated by the President. This jurisdictional defect in appellant's case requires this Court to set aside the findings and dismiss the charges against him.

Issue 3

The rationale underlying *Ring* and the cases upon which it relies has also rendered unconstitutional R.C.M. 1004(b)(4)(C),

which fails to expressly require the "beyond a reasonable doubt" standard for a finding that any extenuating or mitigating circumstances are substantially outweighed by any admissible aggravating circumstances. Accordingly, this Court must set aside appellant's death sentence.

Analysis of *Ring*

In *Ring*, the Supreme Court reviewed Arizona's capital sentencing scheme, which, at the time, was in many ways very similar to the military's current capital sentencing structure. Like the existing UMCJ, the Arizona law under review in *Ring* authorized death or life imprisonment for premeditated murder. *Compare* Art. 118, UCMJ *with* ARIZ. REV. STAT. ANN. § 13-1105(C) (2001). Also similar to the military's current capital sentencing rules, Arizona's then existing capital sentencing procedure required the sentencing authority to make two crucial findings before the death penalty even became an eligible sentencing option. Upon a finding of guilt for premeditated murder, death was not an eligible punishment under Arizona law unless the sentencing authority conducted a two-pronged sentencing hearing where he or she had to find, (1) the existence of at least one aggravating factor beyond a reasonable doubt, and (2) "that there are no mitigating circumstances sufficiently substantial to call for leniency." ARIZ. REV. STAT. ANN. § 13-703(C) (2001). Without these findings, the maximum

punishment for premeditated murder under the then-existing Arizona law (and the current UCMJ) was life imprisonment. *Id.*

After reviewing Arizona's capital sentencing procedure, the Supreme Court found that although the Arizona murder statute authorized the death penalty for premeditated murder, death actually was not an eligible punishment unless the two-pronged capital sentencing requirements were satisfied. *See Ring*, 536 U.S. at 592-97. Upon a finding of guilt alone, a defendant was constitutionally eligible only for a mandatory maximum sentence of life in prison. *Id.* at 597. The Court then determined that the additional, constitutionally-required finding that at least one aggravating factor existed in a particular case exposed the defendant to a greater punishment than that authorized solely by the jury's guilty verdict. *Id.* at 609 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 541 (2000)). Those aggravating factors, the Court therefore held, are the functional equivalent of elements of the offense of capital murder. *Ring*, 536 U.S. at 609. Looking only at the aggravating factor finding, and relying on *Apprendi*, the Court then concluded constitutional considerations require the jury to make the finding that at least one aggravating factor existed in a particular case beyond a reasonable doubt. *Id.* at 609 (Given that *Ring* was resolved on the first prong of the then-existing Arizona capital sentencing structure, the Court did not need to review and did not rule on

the second prong, which, like the current UCMJ, required a weighing of aggravating and mitigating circumstances).

Ring's General Applicability to the Military Justice System

Although *Ring*'s holding explicitly attached the Sixth Amendment right to trial by jury to capital-aggravating factors, 536 U.S. at 609, it is applicable to the military justice system via the Due Process Clause of the Fifth Amendment for several reasons.[33]

First, although the proof beyond a reasonable doubt standard was implicit in the Arizona statute reviewed in *Ring*, the *Ring* Court expressly reiterated *Apprendi's* holding that each functional element must be proven beyond a reasonable doubt, 536 U.S. at 597 & 601-602, and, in fact, effectively extended *Apprendi's* rationale to capital sentencing factors. *Id.* at 609.

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[33] There is also merit to the argument that the Sixth Amendment right to trial by jury applies in the military justice system notwithstanding the United States Supreme Court's decision in *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942) and the decision of the Court of Appeals for the Armed Forces in *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001). Conceptually, there simply is no meaningful difference between the right to a criminal trial by an impartial jury, as codified in Article III, sec 2, and the Sixth Amendment, and the right to a court-martial by an impartial panel, either as codified in the UCMJ and the R.C.M., or as divined by our highest military court from the Sixth or Fifth Amendments. See *Lambert* at 295 ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members . . ."); *United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008) ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.") (citations and internal quotation marks omitted).

This extension is significant because the "beyond a reasonable doubt" standard is based on the Fifth Amendment's Due Process guarantee, which is applicable to the military. *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing *In Re Winship*, 397 U.S. 358, 363-64 (1970)("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged")); *see also Weiss v. United States*, 510, U.S. 163, 176-177 (1994) ("Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings"); *United States v. Mapes*, 59 M.J. 60, 65 (C.A.A.F. 2003) ("[T]he Constitution each servicemember swears to defend affords to every servicemember Constitutional protections"). Thus, *Ring* logically and legally applies to the military justice system.

Second, the Supreme Court has previously expressed Fifth Amendment Due Process concerns about facts that increase the maximum penalty for a crime:

> [U]nder 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.

Jones v. United States, 526 U.S. 227, 243 n.6. These same concerns helped shape *Ring's* rationale and holding. Indeed, as in *Jones*, the Court's focus in *Ring* was on facts that increased the maximum penalty for a crime. *See Ring*, 536 U.S. at 602 ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt"). Accordingly, although expressly made on *Sixth Amendment* grounds, *Ring*'s holding is premised on concerns that also trigger the *Fifth Amendment's Due Process Clause*, which is applicable to the military.

Additionally, after *Ring*, the Supreme Court found no difference between the applicability of the *Sixth Amendment* jury trial guarantee and the *Fifth Amendment Double Jeopardy Clause* when considering capital-aggravating factors as elements. As Justice Scalia wrote for the Court in *Sattazahn v. Pennsylvania*:

> In *Ring v. Arizona*, we held that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a greater offense. That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the

> Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an "offence" for purposes of the *Fifth Amendment's Double Jeopardy Clause*. In the post-*Ring* world, the *Double Jeopardy Clause* can, and must, apply to some capital-sentencing proceedings consistent with the text of the *Fifth Amendment*.

537 U.S. 101, 111-12 (2003)(internal quotation marks and citations omitted).

Just as there is "no principled reason" to distinguish between "what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the *Fifth Amendment's Double Jeopardy Clause*," *Id.*, there is no principled reason to distinguish between what constitutes an offense for purposes of the *Sixth Amendment's* jury-trial guarantee and what constitutes an offense for purposes of the *Fifth Amendment's Due Process Clause*. In the post-*Ring* world, the *Due Process Clause*, like the *Double Jeopardy Clause*, can, and must, apply to capital-sentencing proceedings consistent with the text of the *Fifth Amendment*.

As explained more fully below, when read with other Supreme Court precedent, military case law, and cases from other federal jurisdictions, *Ring* applies to the military justice system and

requires this Court to set aside the findings in appellant's case and dismiss the charges against him, or set aside his death sentence.

ISSUE 1: APPELLANT'S DEATH SENTENCE WAS ADJUDGED UNCONSTITUTIONALLY WHERE THE R.C.M. 1004(C) PROVISIONS RELEVANT TO HIS CASE WERE NOT EXPRESSLY ALLEGED IN THE CHARGES PREFERRED AGAINST HIM, WERE NOT EXPRESSLY INVESTIGATED PURSUANT TO R.C.M. 405 AND ARTICLE 32, UCMJ, AND WERE NOT EXPRESSLY REFERRED TO HIS COURT-MARTIAL BY THE CONVENING AUTHORITY.

Statement of Facts

On 22 May 03, the government preferred charges against appellant alleging two specifications of a violation of Article 118(1), UCMJ. (R. at Charge Sheet.) The government did not allege a capital aggravating factor under R.C.M. 1004(c) in the charge sheet. *Id.* Appellant's Article 32 hearing was held from 16 June 2003 until 20 June 2003. (R. at App. Ex. 75.) The investigating officer refused, despite defense requests, to make any findings regarding the existence of any factor under R.C.M. 1004. (R. at App. Ex. 75.) On 2 March 2004, the charges were referred by the convening authority to a general courts-martial with no special instructions. (R. at Charge Sheet.) On 9 March 2004, appellant received notice of two aggravating factors the government intended to prove at trial. (R. at App. Ex. 1.)

Standard of Review

The standard of review for violations of Appellant's due process rights is generally *de novo* plenary review. *See Miller*

v. Fenton, 474 U.S. 104 (1985); *United States v. Dearing*, 63 M.J. 478, (C.A.A.F. 2006); *United States v. New*, 55 M.J. 95, 100 (C.A.A.F. 2001); *United States v. Collier*, 36 M.J. 501, 504 (A.F.C.M.R. 1992). This Court has never reviewed this type of error with respect to pre-trial procedural rights. Appellant therefore asks this Court to look at the standard of review for *Apprendi*-type errors in the federal circuit courts. When reviewing an *Apprendi* error, Federal Circuit courts apply *de novo* review where the appellant has timely objected and preserved the objection. *See United States v. Mackins*, 315 F.3d 399, 405 (4th Cir. 2003) (applying *de novo* review to the failure to send *Apprendi* elements through the grand jury process). Appellant properly preserved his Fifth Amendment due process claim in his numerous and repeated objections to the failure to prefer aggravating factors before the Art. 32 hearing. (R. at 391-403; App. Ex. 90.) Appellant objected before the Art. 32 hearing, during the Art. 32 hearing process, after the Art. 32 hearing, and at the Art. 39(a) session held in the case. *Id.* Appellant properly objected to the referral without the aggravating factors as contrary to the statutory intent and a denial of due process, preserving his Fifth Amendment, statutory, and regulatory claims. (R. at App. Ex. 113.)

Argument

Preferral and referral of capital charges without notice of capital-aggravating factors or an Article 32 inquiry into the basis for those factors violates appellant's due process rights based on the framework in *Ring v. Arizona* and *Jones v. United States*. The court-martial system in place at the time of appellant's trial (and still in place today) attempted to satisfy the basic Fifth and Sixth Amendment notice and due process concerns by pleading each element of the offense on the charge sheet and submitting them to an Article 32 investigation. However, under R.C.M. 1004(b)(1), notice of capital-aggravating factors to be proven by the government in a court-martial, needed only be provided to an accused at any time before arraignment by the trial counsel. *See* R.C.M. 1004(b)(1). Appellant argues that (a) pre-trial Fifth Amendment Due Process protections are applicable to any fact that increases an accused's maximum punishment, (b) capital-aggravating factors receive pre-trial Fifth Amendment Due Process protections, (c) the military's pre-trial procedures are intended to be the replacement for constitutionally guaranteed Federal Fifth Amendment protections, (d) those protections were required for the capital-aggravating factors in appellant's trial, but were not afforded to appellant, and (e) the government cannot show that the error was harmless beyond a reasonable doubt.

a. Federal Fifth Amendment protections applicable to each offense before trial.

As generally described above, *Ring v. Arizona* and *Jones v. United States* establish that capital-aggravating factors in the federal criminal justice system must be pled in the indictment and submitted to the grand jury. Although *Ring* does not state explicitly that capital-aggravating factors must be pled in the indictment and submitted to the grand jury (arguably because of the "tightly delineated" nature of the appeal and the fact that it was a state proceeding to which the grand jury right does not apply, see *Ring*, 536 U.S. at 597 n.4), that conclusion follows inexorably from *Ring's* underlying rationale and *Jones*, where the Supreme Court noted that, "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones*, 526 U.S. at 232; *see also Apprendi*, 530 U.S. at 476 (2000) (applying the same rule to state convictions and the right to trial by jury under the *Fourteenth Amendment*).

Several federal circuit courts deciding the issue concur, and have ruled accordingly. The Second Circuit, for example, has found that federal criminal law requires capital-aggravating factors be pled in an indictment and submitted to a grand jury.

See United States v. Quinones, 313 F.3d 49, 53 n.1 (2d Cir. 2002); *see also United States v. Jackson*, 327 F.3d 273, 287 (4th Cir. 2003) ("to impose the death sentence on Jackson in this case, the indictment must allege all elements of an aggravated offense," which includes alleging at least one aggravating factor in the indictment). The Second Circuit stated, "statutory aggravating factors [] pursuant to *Ring v. Arizona* . . . must now be alleged in the indictment and found by a jury in capital cases." *Id.*

Additional support for the conclusion that capital-aggravating factors in the federal criminal justice system must be pled in the indictment and submitted to the grand jury is found in the majority of federal circuits that have reversed increased sentences where a sentencing consideration that increased a defendant's maximum punishment was not included in the indictment and submitted to the grand jury process. *See, e.g., United States v. Cotton*, 535 U.S. 625, 631-32 (2002) ("The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondent's enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*"); *see also United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (*en banc*) (collecting cases); *United States v. Stewart*, 306 F.3d 295, 320-23 (6th Cir. 2002) (collecting cases). Indeed, a majority of

circuits require that aggravating factors be pled in the indictment to ensure proper notice and due process. *See Thomas*, 274 F.3d at 663, 670-73; *Stewart*, 306 F.3d at 323.

b. Military Pre-trial Due Process protections applicable to an offense.

Under the military justice system, the Charge Sheet and Article 32 hearing fulfill the constitutional notice and due process requirements satisfied by the indictment and grand jury in the federal civilian system. As the Court of Military Appeals stated:

> The true test of the sufficiency of an indictment is . . . whether it contains the elements of the offense intended to be charged, and sufficiently *apprises the defendant of what he must be prepared to meet;* and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

United States v. Sell, 3 C.M.A. 202, 206, 11 C.M.R. 202, 206 (C.M.A. 1953) (emphasis added); *see also Stirone v. United States*, 361 U.S. 212, 218-19 (1960) (Because the primary purpose of the grand jury is to "limit [one's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either the prosecuting attorney or judge," the government must send all elements of the offense to the grand jury to ensure due process).

While "there is no clear analog to the 'formal indictment or information' in the Armed Forces," preferral or referral of charges are analogous. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992)). Indeed, the fundamental constitutional guarantees of notice, due process, and the ability to defend against the charge are satisfied by giving notice of the offense on the charge sheet. *United States v. Weymouth*, 43 M.J. 329, 333 (1995). Therefore, the charge sheet and statute should together inform the accused of all the conduct he will have to defend against at trial. *Id.* A bare recitation of the statute is inadequate notice of the offense charged. *Id.* at 335.

Similarly, just as the grand jury serves as the buffer between the state and the accused, "The Article [32 hearing] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges." *United States v. Samuels*, 10 C.M.A. 206, 27 C.M.R. 280, 286 (C.M.A. 1959). Thus, the Court of Appeals for the Armed Forces concluded, "even though the absolute requirement of a grand jury indictment in courts-martial has been rejected by the Supreme Court, Article 32, UCMJ . . . grants *rights to the accused greater than* he or she would have at a civilian *grand jury.*" *See United States v. Curtis*, 44 M.J. 106, 130 (C.A.A.F. 2006) (emphasis added). Because this hearing is so central to the due process protections afforded to military members, other

constitutional rights attach at the hearing, such as the right to counsel. *United States v. Mickel*, 9 C.M.A. 324, 326-27, 26 C.M.R. 104, 106-07 (C.M.A. 1958) (right to counsel fundamental at an Article 32 proceeding); *see also United States v. Loving*, 41 M.J. 213, 296-97 ("Article 32, UCMJ, 10 U.S.C. § 832, was intended to provide a substitute for the grand jury"); *United States v. Bell*, 44 M.J. 403, 406 (1996) (citations omitted) ("The Article 32 investigation is the military equivalent of a grand jury").

Finally, another facet of due process in the military, which has not been addressed in other capital cases, is the availability of discovery. Under *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985), an accused is entitled under the Fifth Amendment's Due Process Clause to discovery of exculpatory evidence before trial. *See generally United States v. Romano*, 46 M.J. 269 (1997). In the military, discovery rights begin upon referral of charges or as soon as practicable after preferral for *Brady* material. *See* R.C.M. 701(a)(6). In order to be helpful to the defense, however, discovery must come at a meaningful time before trial to prepare a defense. Thus, discovery given to the defense at the moment before trial is insufficient to meet the requirements of due process. *See United States v. Worden*, 38 C.M.R. 284, 286-7 (C.M.A. 1968) (failure to serve defense counsel with

charge sheets until one day before hearing may deny the accused the right to effective assistance of counsel).

c. The notice of aggravating factors the Appellant received failed to meet the constitutional requirements for notice, due process, and the ability to defend against the offense.

Under the current military justice system, and in place during the prosecution of appellant's case, notice of capital-aggravating factors to be proven by the government may be provided to a military accused at any time before arraignment. *See* R.C.M. 1004(b)(1); App. Ex. 1. Further, the procedure allows the trial counsel, not the convening authority, to merely give the notice to the defense counsel. *See* R.C.M. 1004(b)(1). In this case, charges against appellant were initially preferred on 25 March 2003. (R. at Charge Sheet.) Appellant did not receive notice of the aggravating factors the government intended to prove at trial, however, until 9 March 2004, the day of arraignment. (R. at App. Ex 1.) Moreover, this notice was deficient because it failed to apprise the defendant of the facts supporting the cited sections of the Manual. *See Weymouth*, 43 M.J. at 335; *see also United States v. Curtis*, 32 M.J. 252, 254 n.2 (C.M.A. 1991) ("it would be advisable for the notice to be precise as to what factors are being relied on for each specification which carries the death penalty").

The military's current procedure for notifying an accused of the aggravating factors alleged against him deprived

appellant of constitutionally adequate notice, due process, and effective assistance of counsel at his Article 32 hearing, which was held on 16 to 20 June 2003. (R. at App. Ex. 75.)

As the primary means of establishing probable cause for charges against an accused, the Article 32 proceeding must serve the "referee" function much like the grand jury. Though the convening authority is not required to follow the recommendations of the Article 32 investigating officer, the independent investigation is at least a check on government power that is not necessarily tied to the convening authority. For the military preferral and referral process to have sufficient safeguards to ensure due process, the Article 32 hearing and charge sheet must inform the accused of each element of the offense. *Loving*, 41 M.J. at 296-7; *see also* Art. 32 (b) and (d), UCMJ. After *Ring*, that includes, at a minimum, notice of the aggravating factors to be proved by the government from R.C.M. 1004(c).

Accordingly, R.C.M. 1004, as it existed at the time of appellant's trial, and as it currently exists, denies every capital accused the ability to fashion a defense because the elements of the offense are not necessarily known at the Article 32 hearing stage or even when charges are preferred. Any implicit notice by way of appellant's counsel's knowledge of R.C.M. 1004 is unhelpful and insufficient because appellant

would be left to decide which if any aggravating factor he would have to defend against without a specific statement of the aggravating factors he would face. "Mere recitation of statutory elements would provide service members no notice whatever in such cases . . . . Such an allegation would fail utterly to provide an accused the requisite due process notice and protection against double jeopardy." *Weymouth*, 43 M.J. at 335. As the Navy-Marine Court has noted, the focus should be on the language of the charge sheet and specification, not the statute or regulation, to determine double jeopardy protection and notice. *United States v. Ray*, 51 M.J. 511, 513 (N. M. Ct. Crim. App. 1999). The fact that several of the charges on the charge sheet might have implied particular aggravating factors also gives the appellant inadequate notice and no double jeopardy protection. In such a case, an accused is left to wonder what the potential aggravating factors would be. As this Court stated, "Among other things, the specification (e.g., the pleadings) should be 'sufficiently specific to inform the accused of the conduct charged [and] to enable the accused to prepare a defense . . . .'" *United States v. Looney*, 48 M.J. 681, 685 (A. Ct. Crim. App. 1998) (citing R.C.M. 307(c)(3), Discussion at ¶ (G)(iii)).

The aggravating factors in this case did not appear on the charge sheet and were not provided to the defense until 9 March

2004. *See* R. at App. Ex 1. The fact that two murders appeared on the charge sheet does not constitute notice of the third aggravating factor, *i.e.*, two violations of Art. 118, UCMJ in the same case. *See* R.C.M. 1004(c)(7)(J). The charges on the charge sheet do not supply notice of the aggravating factors the government would seek to prove. Rather, they leave Appellant wondering whether the government's evidence will prove these potential aggravating factors. *See United States v. Gallo*, 53 M.J. 556, 564 (A.F. Ct. Crim. App. 2000), *aff'd* 55 M.J. 418 (2001) (citing *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)) (the focus of sufficiency of a specification is on the words not the evidence). Appellant could only speculate about some possible aggravating factors given the other charges. Appellant did not even know at the pretrial stages that the case would be eligible for consideration of aggravating factors because a capital prosecution referral is required only after the Art. 32 hearing. *See* R.C.M. 601(e), Discussion. Neither specification of Art. 118, UCMJ, gave him actual notice of the aggravating factors that he would have to defend against. *See* R.C.M. 307(c)(3) (a specification is "sufficient if it alleges every element of the charged offense either expressly or by necessary implication."). The trial defense counsel were unprepared to cross-examine witnesses regarding the aggravating factors at the Article 32 hearing and unprepared to defend

against specific aggravating factors because they had no notice of the factors to be proven at trial.

Because Appellant was denied this notice and opportunity to defend against the elements to be proven by the government, the findings should be set aside and a new Article 32 hearing ordered.

d. In the alternative, referral of capital charges without notice of the capital sentencing factors on the charge sheet or at the Article 32 hearing renders the court-martial devoid of jurisdiction over the capital offense and violates appellant's rights under Articles 32 and 34, UCMJ to notice of the elements of the offense.

If this Court finds that the *Due Process Clause* was not violated by the manner in which capital-aggravating factors were pled, alternatively, the government's failure to give appellant notice of capital-aggravating factors on the charge sheet and allow investigation into the noticed factors at the Article 32 hearing rendered the court-martial devoid of jurisdiction over the capital offense and violated Appellant's rights under Article 32 and 34, UCMJ and R.C.M. 405.

1. Appellant's court-martial was devoid of jurisdiction over the capital offense.

Whether an offense is properly before a court-martial is a question of jurisdiction. *See United States v. Henderson*, 59 M.J. 350 (C.A.A.F. 2004). This Court conducts *de novo* review of jurisdictional issues. *Id.*

The convening authority has the sole non-delegable power to refer charges against an accused. *United States v. Roberts,* 22 C.M.R. 112, 116 (C.M.A. 1956). "Consistent with the legislative intent, [the Court of Military Appeals] has emphasized on many occasions that . . . referral of charges to trial by court-martial, requires the personal decision of the convening authority, which cannot be delegated." *United States v. Wilkins*, 29 M.J. 421, 424 (C.M.A. 1990) *citing United States v. Simpson*, 36 C.M.R. 293, 295 (1966)). Relying upon Articles 22, 23, and 24, UCMJ, the Court of Military Appeals in *Wilkins*, found that a general court-martial may only consider charges referred to it by the officer convening the court or his successor. *See Wilkins*, 29 M.J. at 424-25.

The Court of Military Appeals has recognized that, in the 1984 Manual for Courts-Martial, referral of a charge to trial by a competent authority is a jurisdictional prerequisite:

> Referral occurs when the convening authority personally orders that charges against an accused be tried by a specified court-martial. This is normally accomplished by an appropriate notation on the charge sheet (express referral). It may also occur in other ways that are functionally equivalent, such as by entering into a pretrial agreement to refer certain charges to a specified court-martial (constructive referral).

United States v. Longmire, 39 M.J. 536, 539-40 (A.C.M.R. 1994) *citing Wilkins*, 29 M.J. at 421; R.C.M. 201(b)(3).

Therefore, the convening authority in a capital case must refer a charge and specification with sufficient elements to permit the imposition of the death penalty. Under the Supreme Court's formulation of capital sentencing after *Ring v. Arizona*, 536 U.S. 584 (2002), the offense of capital murder and capital murder plus an aggravating factor are distinct offenses. The Supreme Court's decision in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), is instructive in this case. Addressing the application of the *Double Jeopardy Clause* to a capital sentencing hearing, the Court noted two relevant principles particular to capital murder cases: (1) capital sentencing hearings have all of the hallmarks of jury trials and, therefore, require all of the same constitutional protections afforded at trial; and (2) the application of *Apprendi* to capital sentencing leads to only one conclusion that "murder plus one or more aggravating circumstances is a separate offense from murder." *Id.* at 106-07, 110-13 (Scalia, J., concurring, Rehnquist, C.J., and Thomas, J., joining). The corresponding refinement of the distinction between elements and sentencing enhancements, led Justice Scalia to conclude that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.' Whereas the former exposes a defendant to a maximum penalty of life

imprisonment, the latter increases the maximum permissible sentence to death." *Id.* at 111.

As applied to the military referral process, the convening authority must refer a capital offense in order to give the court-martial jurisdiction over the death sentence. *See Wilkins*, 29 M.J. at 424-25; *see also* Drafters' Analysis, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), App. 21 at A21-8 ("a court-martial has the power to dispose only of those offenses which a convening authority has referred to it"). To constitute the required elements of a capital offense under the Supreme Court's definition in *Ring* and *Sattazahn*, the convening authority must refer a charge and specification under Art. 118 and sufficient aggravating factors to permit the imposition of the death penalty. *See Ring*, 536 U.S. at 596-98, 604, 609; *Sattazahn*, 537 U.S. 110-11. The military system, however, delegates the task of deciding which aggravating factors the government will prove at trial to the trial counsel. *See* R.C.M. 1004(b)(1); *see also* App. Ex. 113 (defense motion to require the convening authority to refer capital-aggravating factors).

In this case, consistent with the requirements in R.C.M. 1004 (b)(1), the trial counsel specified the aggravating factors the government would prove in this case, not the convening authority. (R. at App. Ex. 1.) Appellant objected at trial to this method of "referral" and requested that the convening

authority refer the capital-aggravating factors. (R. at 178, 211; App. Ex. 113.) The government opposed that motion, arguing the convening authority referred this case after reviewing the pretrial advice, which noted the existence aggravating factors. (R. at App. Ex. 44.) The government concluded that, "the convening authority had no duty to determine that an aggravating factor exists before referring a capital offense to this general court-martial." *Id.* *Ring v. Arizona* specifically contradicts this reasoning. Capital-aggravating factors are like "offenses and their elements" and do require the same procedural protections. *See Ring*, 536 U.S. at 604, 609. As the Supreme Court stated in *Apprendi v. New Jersey*:

> If the defendant faces punishment *beyond that provided by the statute* when an offense is committed under certain circumstances but not others, it is obvious that both loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not - at the moment the State is put to proof of those circumstances - be deprived of protections that have, until that point, unquestionably attached.

530 U.S. at 484 (emphasis added). One of those protections in the military is the personal action of the convening authority to refer the charges. However, R.C.M. 1004(b)(1) and the trial counsel's actions in this case deprived appellant of that protection.

In this case, the basis for specifying the aggravating factors was not the "personal decision" of the convening authority or even his constructive action. Rather, it was based solely on the trial counsel's determination of the aggravating factors present in the case. Therefore, the Court below did not have jurisdiction to try Appellant on the offense of murder plus an aggravating factor. The jurisdiction of the Court was limited to the charges properly referred by the convening authority, murder with a maximum possible punishment of confinement for life. *See* Art. 118(1) & (4), UCMJ and R.C.M. 1004(a).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of confinement for life.

2. The government's referral of capital charges minus aggravating factors violated Appellant's rights under Article 32 and 34, UCMJ and R.C.M. 405.

Article 32, UCMJ, states that no specification may be referred to court martial-without a "thorough and impartial investigation of all matters set forth therein." *See* Art. 32, UCMJ. The discussion in R.C.M. 405(a) specifically states, "If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged." R.C.M. 405(a), Discussion; *see also* Art. 32(c), (d)(2), UCMJ. In *United States*

v. Bender, 32 M.J. 1002 (N.M.C.M.R. 1991), the Navy-Marine Court of Criminal Appeals held that when evidence of additional offenses arises after an Article 32 hearing the investigation should be reopened upon a defense request. *See Bender*, 32 M.J. at 1003-04; *see also* Art. 32(c), UCMJ. In *United States v. Harris*, this Court applying the *Bender* rule stated that where the investigating officer recommends more serious charges than those preferred to the investigation, the convening authority should conduct an additional investigation into the more serious offenses before referring them to court-martial. 52 M.J. 665, 668-69 (A. Ct. Crim. App. 2000). In *Harris*, this Court recognized that where attempted rape was the preferred charge, the investigating officer's findings regarding rape constituted a new more serious offense. *Id.* at 669-70. The investigating officer in *Harris* made findings on the greater offense of rape when attempted rape was the preferred charge, without notifying the accused. *Id.* The convening authority subsequently referred the charge of rape without any additional investigation. *Id.* Though this Court found likely error, the Court noted that any objection was waived when the accused failed to ask for a new investigation based on the new charges and failed to object to the investigating officer's report within five days. *Id.*

The Supreme Court held in *Ring v. Arizona* that capital-aggravating factors, identical to those in R.C.M. 1004,

essentially change the elements of the offense of capital murder thus creating a more serious offense. *See Ring*, 536 U.S. at 609 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19 (2000)). The Article 32 hearing gave Appellant no notice of the aggravating factors to be proven at trial because as the investigating officer stated, he "would make no such findings regarding the existence or nonexistence of any factor under R.C.M. 1004". *See* App. Ex. 75; Transcript of Art. 32 Hearing at 944-5. Though no inquiry was made into capital-aggravating factors at the hearing, the Staff Judge Advocate in her Article 34 advice letter commented extensively on capital-aggravating factors and recommended that the charges be referred capitally. (R. at Article 34 Advice at ¶ 6b.) Based on these recommendations the convening authority referred the charges as capital on 2 March 2004. (R. at Charge Sheet.) Appellant objected to the Article 32 hearing and the recommendations of the investigating officer requesting the ability to defend at the hearing against charged aggravating factors. (R. at App. Ex. 110, attachment C (Request to Reopen the Article 32 Hearing dated 18 March 2008).) However, the Article 32 hearing was not reopened after these recommendations or service of the capital-aggravating factors.

The recommendations of the staff judge advocate concerning capital-aggravating factors that could be proven at trial

constituted recommendations for that greater offense. *See* Article 34 Advice at ¶ 6b. The staff judge advocate recommended a greater offense, murder plus aggravating factors, than that pled on the charge sheet, murder without a capital-aggravating factor. Once the staff judge advocate commented on specific capital-aggravating factors, the general court-martial convening authority should have reopened the Article 32 hearing to hear evidence and allow the defense to counter the alleged factors. *See Harris*, 52 M.J. at 669-70; *see also* Art. 32(c), (d)(2), UCMJ (investigation into all charges and specifications is required before referral); R.C.M. 405(a).

e. The remedy for the failure to give proper notice of capital-aggravating factors is a new trial based on a charge sheet that includes the capital-aggravating factors to be proven in sentencing.

Under federal constitutional law, timely objection to a defective grand jury indictment prior to trial mandates resubmission of the charges to the grand jury. *See Russell v. United States*, 369 U.S. 749, 770-71 (1962). In *United States v. Cotton* the Supreme Court reaffirmed the principle that if an error in the indictment were properly objected to before trial the only remedy would be "resubmission to the grand jury, unless the change is merely a matter of form." 535 U.S. 625, 631 (2002) (citing *Russell v. United States*, 369 U.S. 749); *see also*

United States v. Velasco-Medina, 305 F.3d 839, 846 (9th Cir. 2002).

The UCMJ requires that upon timely objection to a defective Art. 32, the government must reopen the Art. 32 Investigation. *See* Art. 32(c), UCMJ. In *United States v. Nickerson*, 27 M.J. 30, 31-32 (CMA 1988), the Court of Military Appeals stated that "in federal civilian courts, a criminal defendant does not have a *per se* right to revoke a waiver of an indictment by grand jury after a change of plea." *Id.* The Court noted that the same standard should be applied to waiver of the military Article 32 hearing because it is the equivalent of the grand jury. *Id.* (citing *United States v. Mickel*, 9 C.M.A. 324, 326 (C.M.A. 1958). The Court also stated that similar to the federal system, "If an accused is deprived of a substantial pretrial right, on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial." *Mickel*, 9 C.M.A. at 327. This Court has recently held that the enforcement of military pre-trial rights mandates that a new Article 32 hearing be held if there is a timely pretrial objection to the Art. 32 hearing that failed to follow the procedures in Art. 32(c) and (d), UCMJ. *United States v. Diaz*, 54 M.J. 880, 883 (N.M.Ct.Crim.App. 2000).

The standard for analyzing *Apprendi* type error in the federal system should be applied in this case as consistent with the standard in *Mickel* and *Diaz*. Appellant requested a new Article 32 hearing from the convening authority on 18 March 2004 and renewed these objections prior to trial in motions. (R. at App. Ex. 88.) Appellant specifically commented on his inability to rebut aggravating factors because of the lack of notice. *Id.* Appellant was not put on notice at the Article 32 hearing of which aggravating factors the government intended to prove at trial. Appellant appeared at his Article 32 hearing without knowledge of the "elements," or functional equivalent thereof, that he had to defend. This limited his ability to develop evidence in extenuation and mitigation at the Article 32 hearing. Without this notice appellant was denied crucial pre-trial ability to develop evidence to counter the aggravating factors. The ability to develop extenuation and mitigation evidence and intelligently cross-examine witnesses at the Article 32 is paramount to the development of the defense case and response to the referral process. Because the members ultimately found both aggravating factors existed beyond a reasonable doubt, the importance of this information is only magnified. (R. at App. Ex. 88.)

Though each of the aggravating factors the government ultimately did seek to prove were encompassed within other

charges, this fact is irrelevant to the prejudice in this case. The Supreme Court stated in *Russell* that to allow the prosecutor or a court to attempt to get into the head of the grand jury to decide what they would have recommended deprives the accused of the basic protection of the grand jury because the trial could be "based on facts not presented to the grand jury." *See Russell*, 369 U.S. at 769-70. Thus, constructive notice is insufficient where elements are not presented to the grand jury. *Id.* Similarly constructive notice is insufficient to put the accused on notice of the "functional equivalent of elements" the government intends to prove at a court-martial. *See Weymouth*, 43 M.J. at 335-36.

After *Ring* and *Sattazahn*, there was in fact a capital offense missing in this case from the Article 32 hearing: murder plus an aggravating factor. *See Sattazahn*, 537 U.S. at 112-13. Appellant had no notice at the time of the Article 32 hearing of the elements of the capital offense the government intended to prove. Thus, appellant never had an opportunity to defend or counter these aggravating factors because he had no notice the investigating officer would even make findings regarding them. In fact, the investigating officer refused to make findings regarding any aggravating factors, it was the staff judge advocate's recommendation where they first appeared. Therefore, the staff judge advocate's recommendation exacerbated the lack

of notice by giving the government an opportunity to obtain a recommendation on the aggravating factors without giving notice to appellant at the hearing. Therefore, even if the standard of review were a prejudice standard, appellant would prevail because there was a substantial detriment to appellant's pretrial right to develop evidence.

WHEREFORE, this Court should dismiss findings and sentence and remand this case for a new charge sheet and a new Article 32 hearing with notice of aggravating factors the government intends to prove at trial.

ISSUE 2: BASED ON THE SUPREME COURT'S REASONING IN *RING V. ARIZONA*, 536 U.S. 584 (2002), CONGRESS UNCONSTITUTIONALLY DELEGATED TO THE PRESIDENT THE POWER TO ENACT THE FUNCTIONAL EQUIVALENT OF ELEMENTS OF CAPITAL MURDER, A PURELY LEGISLATIVE FUNCTION.

Standard of Review

This Court should review whether appellant's conviction violates the separation of powers doctrine, a jurisdictional question, *de novo*. *See generally Mistretta v. United States*, 488 U.S. 361, 371 (1989) (ruling on the petitioner's separation of powers challenge after a guilty plea); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), *Seale v. Immigration and Naturalization Service*, 323 F.3d 150, 154-55 (1st Cir. 2003). If the Court determines the issue is not jurisdictional, the issue is one of law and this Court should conduct *de novo* review based on appellant's objection at trial.

See App. Ex. 94. Whether Congress has unconstitutionally delegated its authority is a question of law subject to *de novo* review. *See generally United States v. Allen*, 24 F.3d 1180, 1182 (10th Cir. 1994).

Argument

In *Loving v. United States*, the Supreme Court held that Congress could delegate to the President the authority to specify capital sentencing aggravating factors and that the President properly did exactly that in promulgating R.C.M. 1004(c). 517 U.S. 748, 770-74 (1996). The UCMJ prohibits the President, however, from independently permitting an offense to be punished by the death penalty. *See* Art. 18, UCMJ; *see also United States v. Curtis*, 32 M.J. 252, 261 (C.M.A. 1991). Thus, the Supreme Court's holding in *Loving* implicitly held, consistent with case law of the day, that capital-aggravating factors were not part of the offense of capital murder in the military. The Court of Military Appeals stated this succinctly in *United States v. Curtis*:

> If 'aggravating factors' used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President . . . . However, the Supreme Court has made clear that 'aggravating factors' are not elements of a crime.

Id. at 260 (citing *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990)).

Ring, however, fundamentally changed this separation of powers landscape and *sub silentio* overruled the Supreme Court's holding in *Loving v. United States* when it held that factors identical to those in R.C.M. 1004(c) are not sentencing factors, but "the functional equivalent of an element" of the offense of capital murder. *See Ring*, 536 U.S. at 608-09 (citing *Apprendi*, 530 U.S. at 494, n. 19, holding that *Walton* and *Apprendi* are irreconcilable, and expressly overruling *Walton*). Thus, when the President promulgated the "functional equivalent of an element" of the offense of capital murder in R.C.M. 1004(c), either the President exceeded his authority to prescribe procedures for sentencing in the military or Congress improperly delegated a strictly legislative function, *i.e.* the power to specify elements of a capital offense committed by a servicemember. Appellant's argument will: (a) analyze the Supreme Court's decision in *Loving v. United States* and its basis in prior precedent; (b) analyze the Supreme Court decision in *Ring v. Arizona* overruling precedent implicitly relied upon by the Supreme Court in *Loving*; (c) compare the decisions in *Ring* and *Loving* to demonstrate that this Court must conduct its own delegation doctrine analysis of the President's enactment of R.C.M. 1004(c) aggravating factors; (d) define the applicable

parts of the delegation doctrine; (e) demonstrate that the President violated the intelligible principle arm of the delegation doctrine in enacting R.C.M. 1004(c); and, finally, (f) demonstrate that the President violated the separation of powers doctrine in enacting R.C.M. 1004(c).

A. An analysis of *Loving v. United States.*

In *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), the Court of Appeals for the Armed Forces (CAAF) considered the separation of powers clause when reviewing the constitutionality of the military death penalty procedure promulgated in R.C.M. 1004 by the President via Exec. Order No. 12,473, 49 Fed. Reg. 3169 (Apr. 13, 1984). The Court had previously concluded the procedure for adjudging a death sentence set out in R.C.M. 1004 was constitutional in the case of *United States v. Curtis.* 32 M.J. 252 (C.M.A. 1991).

In *Loving*, the CAAF stated that the President had the authority to enact capital sentencing aggravating factors as part of the office's delegated power over military punishments. 41 M.J. 213, 291 (1994) (citing *Curtis*, 32 M.J. at 260-67). When it received the case on appeal, the Supreme Court agreed, also citing *Curtis*, holding that once Congress delegated the power over military punishments to the President, the executive branch could lawfully promulgate the capital sentencing

aggravating factors in R.C.M. 1004(c). *Loving v. United States*, 517 U.S. at 770-74.

Specifically, the Supreme Court concluded that Congress had no special, non-delegable authority over military *punishments*. *Id.* at 768-69 (emphasis added). Congress must specify the death penalty for an offense, because *the President does not have authority to determine offenses punishable by death*. *Id.* at 769 (emphasis added); *see also* Art. 18, UCMJ. The President did, however, have the authority to specify maximum punishments short of death for all offenses. *Id.* The Court noted that the President had for years used this delegated power to "increase the maximum punishment for non-capital offenses." *Id.*

Neither the CAAF nor the Supreme Court analyzed the inherent authority of the President to promulgate capital sentencing aggravating factors, although Loving raised that issue. *Id.* at 772-73 (citing *Curtis*, 32 M.J. 252 (C.M.A. 1991)). The Supreme Court stated that it need not decide whether the President had the inherent authority to prescribe sentencing factors in capital cases because the President undoubtedly had the power to prescribe those factors once Congress delegated the power over sentencing military members to him in Articles 18, 36, and 56, UCMJ. *Id.* Thus, the sole basis for the presidential promulgation of R.C.M. 1004, under the Supreme Court's reasoning when it decided *Loving*, was the

delegation of authority by Congress in the Uniform Code of Military Justice.

The Supreme Court noted that this delegation is further evidenced in Art. 106a, UCMJ, which contains factors similar to those in R.C.M. 1004(c) for the offense of espionage. *Loving*, 517 U.S. at 770. In Art. 106a, UCMJ, Congress specified three aggravating factors required to impose the death penalty for espionage and left open, in Art. 106a(c)(4), the option for the President to specify other factors. Art. 106a, UCMJ. The Supreme Court then pointed to Art. 106a, UCMJ, as evidence of the source of authority for the President to enact R.C.M. 1004 because Art. 106a, UCMJ, explicitly gave the President the authority to enact capital-aggravating factors via Art. 36, UCMJ. *Loving*, 517 U.S. at 770-74.

The Supreme Court also noted that Article 118 was passed before *Furman v. Georgia*, 408 U.S. 238 (1972), which required capital-aggravating factors to ensure the class of capital defendants was sufficiently narrowed to satisfy the Eighth Amendment. *Loving*, 517 U.S. at 771. *Furman*, decided in 1972, made factors similar to those in R.C.M. 1004(c) constitutionally necessary in all jurisdictions before they imposed the death penalty. Loving argued that Congress could not have known in 1950, when it passed Art. 36, UCMJ, that it was delegating to the President the ability to bring the military death penalty in

line with *Furman*. *Id.* Loving argued that Art. 36, UCMJ, dealt only generally with the President's authority to prescribe rules for courts-martial procedures and modes of proof. *Id.* at 775. Therefore, Loving argued, the general language of Art. 36, UCMJ, could not be the basis for the President's promulgation of R.C.M. 1004 because Congress could not have encompassed delegating a power which Congress did not then understand was required to be delegated. *Loving*, 517 U.S. at 771. The Supreme Court countered that *Furman* did not undo the delegation of power just because what would have been "an act of leniency" before *Furman* became a "constitutional necessity" after *Furman*. *Id.* at 771-72.[34] Ultimately the Court in *Loving* held that the promulgation of R.C.M. 1004 was a proper exercise of delegated powers by the President even after *Furman*. *Loving* at 772-73.

By tying its analysis of the delegation of authority to enact capital-aggravating factors to Articles 18, 36, and 56, UCMJ, the Supreme Court also constrained the President's authority within the language of those articles. *See Loving*, 517 U.S. at 772-73. The Supreme Court, citing Articles 18, 36,

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[34] ("[Article 118's] selection of the two types of murder for the death penalty, however, does not narrow the death-eligible class in a way consistent with our cases. Art. 118 (4), UCMJ, by its terms permits death to be imposed for felony murder even if the accused had no intent to kill and even if he did not do the killing himself. The Eighth Amendment does not permit the death penalty to be imposed in those circumstances . . . . As a result, additional aggravating factors establishing a higher culpability are necessary to save Article 118.").

and 56, UCMJ, stated that the President had authority over "punishments" and "sentencing." *Id.* at 774 (stating that "the President can be entrusted to determine what limitations and conditions *on punishments* are best suited to preserve [military discipline]") (emphasis added). Thus, the *Loving* Court was clearly relying on the characterization of capital-aggravating factors as part of the sentencing decision in capital cases.

Additionally, the Supreme Court stated that the Court would uphold delegations of power over criminal conduct "so long as *Congress* makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confine themselves within the field of the covered statute.'" *Id.* at 768 (emphasis added) (citing *United States v. Grimaud*, 220 U.S. 506, 518 (1911)). Therefore, the President could only have the power to promulgate R.C.M. 1004 under the covered statutes, Articles 18, 36, and 56, UCMJ, if R.C.M. 1004 governed a sentencing or trial procedure, the "field" of those statutes, and Congress defined the criminal offense.

This analysis by the Supreme Court suggests that the Court believed that the factors enacted in R.C.M. 1004(c) were sentencing considerations and not elements of an offense. At the time the Supreme Court decided *Loving* that was, in fact, the law. *See Walton v. Arizona*, 497 U.S. 639, 647-48 (1990). In *Walton* the Supreme Court considered capital-aggravating factors

to be sentencing factors, not elements of a crime. *Id.* Therefore, capital-aggravating factors were not governed by the full panoply of rights in the Fifth and Sixth Amendments or any other constitutional provision applicable to elements of an offense. *Id.* Thus, the Supreme Court in *Loving* suggested that the President's power was constrained by the *Walton* characterization by discussing the powers of the President over sentencing, though the Court never cited the distinction in the *Loving* opinion.

The Supreme Court came close to distinguishing between the President's power over sentencing versus determining the elements of an offense in its discussion of the inherent powers of the President. The Supreme Court stated, "Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight." *Id.* at 771. As the Supreme Court stated, however, that traditional authority of the President did not reach capital offenses and traditionally reached matters of punishments. *Id.* at 765-66, 772-73. However, most telling of the Supreme Court's reliance on *Walton v. Arizona* is the Court's recitation of the Court of Military Appeals analysis of Presidentially created aggravating factors in the military

system. *Id.* at 769. As noted earlier, the Court of Military Appeals in *Curtis* specifically addressed the *Walton v. Arizona* distinction in relation to the promulgation of R.C.M. 1004. *See Curtis*, 32 M.J. at 260-61. The Court of Military Appeals stated in *United States v. Curtis*:

> If aggravating factors used in channeling the discretion of the sentencing authority in death cases were elements of the crime, **we would have no choice** but to hold that they must be set forth by Congress and cannot be prescribed by the President. Consistent with Article I of the Constitution, only Congress has the power to legislate; and definition of the elements of a crime clearly is legislation. However, the Supreme Court has made clear that aggravating factors are not elements of a crime. *Cf. Walton v. Arizona*, 497 U.S. 639 (1990).

Curtis, 32 M.J. at 260 (emphasis added). Additionally in *Curtis*, the Court of Military Appeals undertook an extensive analysis of all the aggravating factors in the military system promulgated by the President. *Curtis*, 32 M.J. at 260-61 (citing aggravating factors for driving while drunk resulting in a death, larceny greater than $100, and desertion terminated by apprehension versus surrender). In that analysis, the Court of Military Appeals concluded that the "defendant has no right to a jury trial as to the existence of aggravating factors and the sentencer's rejection of a particular circumstance is not an acquittal of that circumstance for double jeopardy purposes.

Id. at 260 (citing *Poland v. Arizona*, 476 U.S. 147 (1986)). The Supreme Court cited that analysis with approval stating:

> As the Court of Military Appeals pointed out in *Curtis*, for some decades the President has used his authority under these Articles to increase the penalties for certain noncapital offenses if aggravating circumstances are present . . . . 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.

Loving, 517 U.S. at 769.

The Court of Appeals for the Armed Forces, after the Supreme Court decision in *Loving*, continued to rely upon the sentencing factor versus element distinction when reviewing the constitutionality of R.C.M. 1004 in subsequent cases. *See Loving v. Hart*, 47 M.J. 438, 444-45 (1998) ("Neither the aggravating factors nor the *Enmund/Tison* culpability requirement are elements of the offense. *See Walton v. Arizona* . . . .") ((citing *Walton*, 497 U.S. 639, 648-49 (1990), *Enmund v. Florida*, 458 U.S. 782 (1982), *Tison v. Arizona*, 481 U.S. 138 (1987)). Under the Court of Appeals for the Armed Forces analysis, the Supreme Court's reasoning in *Loving* would be inappropriate if R.C.M. 1004(c) aggravating factors did not refer to sentencing factors. Though made in *dicta*, the Court of Military Appeals' statement in *Curtis* now seems prophetic in light of *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

B. The *Apprendi v. New Jersey* Rule: The foundation of *Ring v. Arizona*.

The line of cases culminating in *Ring v. Arizona* came in response to a sentencing trend in the federal sentencing system and state courts. This trend increasingly allowed the sentencing judge, after the jury returned a guilty verdict on the substantive offense, to make certain findings that increased the maximum punishment for which the defendant was eligible. *See Jones v. United States*, 526 U.S. 227, 240-42 (1999). Often these findings were made under a standard lower than that of beyond a reasonable doubt. The Supreme Court's concern over this trend was twofold. First, the trend eroded the due process rights of an accused to proof of every element of the offense beyond a reasonable doubt. *Id.* at 240-42. Secondly, these schemes deprived a criminal defendant's right to a trial of the facts by a jury. *Id.* at 244-48.

Although the Supreme Court first acknowledged the potential constitutional implications of such sentencing schemes as early as its 1986 decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 88, (1986), it was not until its decision in *Jones v United States*, in 1999, that the Court began to clearly articulate the type of sentencing considerations it viewed as problematic. *See Jones*, 526 U.S. at 243 n.6. At issue in *Jones* was the interpretation of the federal carjacking statute's sentencing

provisions permitting steeper penalties if the crime was committed under certain conditions. *Id.* at 232-33. The statute's first paragraph appeared to set forth the elements of the offense, and reference the maximum penalty for committing the offense under three separate subsections. *Id.* at 230-31. The three numbered subsections addressed the maximum penalty under various aggravating circumstances ranging from a fine and fifteen years imprisonment to a maximum penalty of life imprisonment. *Id.* at 230. The fundamental question the statute presented was whether the numbered subsections represented additional elements of the offense. *Id.* at 232.

The Supreme Court in *Jones* noted, "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to the jury, and proven by the Government beyond a reasonable doubt." *Id.* (citations omitted). The Supreme Court's opinion reviewed the history of the Sixth Amendment and the inherent tension between judicial and jury fact finding in American history. *Id.* at 245-48. In that review the Supreme Court noted that the historical diminishment of the jury's role in finding facts which determined a "statutory sentencing range" was a trend the Supreme Court had not previously authorized. *Id.* at 248. The Supreme Court also reviewed its decisions in *Mullaney v. Wilbur*,

421 U.S. 684, 688, 696-97 (1975), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). The Court in those cases constrained the state's ability to "recharacterize" an issue as a sentencing consideration, thereby, prohibiting the State from manipulating elements out of the requirement of proof beyond a reasonable doubt. *Jones*, 526 U.S. at 240-41. In *Jones*, the Court concluded that to avoid "serious constitutional questions" it construed the subsections providing for increased penalties as creating additional offenses distinct from the unaggravated offense in the first paragraph of the statute. *Id.* at 251-52. Curiously, however, the majority opinion buried the basis for this construction of the statute in a footnote, stating, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

One year later, in *Apprendi v. New Jersey*, the Supreme Court considered a New Jersey sentencing statute that allowed the sentencing judge to increase a defendant's maximum possible sentence if the judge found that the defendant committed the crime in question with a biased motive. *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000). In *Apprendi*, the Court examined the principle set out in the *Jones* footnote in light of this New

Jersey statute and other state sentencing statutes that characterized certain findings of fact as sentencing factors and not elements of the offense. *Id.* at 475-76. The Court began the *Apprendi* opinion by highlighting the historical connection between the elements of a particular offense and its corresponding punishment. *Id.* at 476-79. The Court explained that, traditionally, legislatures authorized specific punishment for a specific offense, and that judges did not have much sentencing discretion, other than to impose the statutorily mandated sentence. *Id.* at 479. While noting that legislatures have gradually given judges more discretion in sentencing, the Court noted that judicial discretion was still limited to the statutorily prescribed maximum punishment. *Id.* at 481.

After reviewing this historical trend, the Court directly addressed the evolving sentencing trend known as sentencing factors. As noted earlier, the Court had been concerned for several years with the trend of legislatures attempting to circumvent the beyond a reasonable doubt standard and the protection of the jury trial by labeling essential facts as sentencing factors vice elements. *Id.* at 479-81. In *Apprendi*, that concern was grounded in the Court's belief that the Fourteenth Amendment Due Process Clause and Sixth Amendment jury trial guarantees applied to some determinations made during state sentencing proceedings much like the federal due process

and jury trial guarantees in *Jones*. *Id.* The Court concluded that "together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477. Therefore, the Court applied the *Jones* principle to the state statute. The Court held that it does not matter whether the state labels a finding of fact an element or sentencing factor, "the relevant inquiry is not one of form but of effect – does the required finding expose the defendant to a greater punishment" than the jury's guilty verdict alone. *Id.* at 476. If it does, the finding of fact must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 490. Based on this conclusion, the Court held that any finding, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and found beyond a reasonable doubt. *Id.* Thus, the statute in question was unconstitutional because it allowed the trial judge, instead of the jury, to make the finding of "biased motive," and allowed the judge to make that finding via a standard lower than beyond a reasonable doubt. *Id.* at 497.

In *Apprendi* the Court specifically noted that capital sentencing procedures were immune from this sentencing factor and element distinction. *Id.* at 496-97. The Supreme Court

noted that in *Walton v. Arizona*, the Court held that the Sixth Amendment did not require jurors to determine the existence of aggravating factors before a defendant may be sentenced to death. *Walton v. Arizona*, 497 U.S. at 647-48 (citing *Hildwin v. Florida*, 490 U.S. 638, 640-41 (1989)). In *Walton*, the Supreme Court stated that Arizona's capital-punishment system, where the judge made the entire sentencing decision, including finding that aggravating factors existed warranting the death penalty, was constitutionally permissible. *Id.* at 648-49. A judge, according to *Walton*, could constitutionally determine if aggravating factors were present when the legislature authorized death as a maximum punishment based on such factors. *Id.*

Thus, after *Apprendi*, in non-capital cases the entire range of Fifth and Sixth Amendment protections applied to findings of fact the increased the defendant's maximum punishment, or "the functional equivalent of elements." *Id.* at 497. The Court also hinted that the doctrine was not limited to the Fifth and Sixth Amendment's rights to jury trial and proof beyond a reasonable doubt. The Supreme Court stated,

> If the defendant faces punishment *beyond that provided by the statute* when an offense is committed under certain circumstances but not others, it is obvious that both loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not - at the moment the State is put to proof of those circumstances - be deprived of

> protections that have, until that point, unquestionably attached.

Id. at 484 (emphasis added).

Only two years later, the Court reversed course on the capital/non-capital distinction and, in *Ring v. Arizona*, extended *Apprendi* to capital sentencing proceedings. *See Ring v. Arizona*, 536 U.S. at 609. What made *Ring* even more significant, and applicable to the military, was the way in which the Court interpreted the sentencing procedure in question in that case.

C. The delegation doctrine after *Ring v. Arizona.*

The Court of Military Appeals noted a similar sentencing trend in the military system nearly a decade before *Jones v. United States* in *United States v. Curtis*. *Curtis*, 32 M.J. at 261 (noting that "the President for several decades" prescribed maximum punishments in the Manual for Court-Martial). However, in the military the trend was not the diminishment of the members' role, but the diminishment of Congress' role in determining the findings of fact that authorized maximum punishments in the military. *Id.* at 261-62. Similar to Arizona's scheme, a court-martial may not impose a death sentence without making findings that aggravating factors exist. *See* R.C.M. 1004(b)(4). However, unlike Arizona or the federal civilian system, a legislative body does not determine the

aggravating factors upon which an accused's death sentence must rest. Rather, in the military, an executive branch regulation sets out the aggravating factors that are required to impose death, the same branch that prosecutes the accused. *See* Exec. Order No. 12,473, 49 Fed. Reg. 3169 (Apr. 13, 1984).

In the federal civilian justice system, Congress must define the elements of a criminal offense and fix the punishment. *Mistretta v. United States*, 488 U.S. 361, 364 (1989). If Congress delegated to the executive branch the power to enact aggravating factors that determined the maximum sentence, in the federal civilian system, the statute would likely violate the separation of powers doctrine by uniting the power to define crimes with the power to prosecute those crimes. *Id.* at 391, n.17. The Supreme Court has decided whether Congress may validly give to the President the power to "define crimes." In *United States v. Grimaud* the Court stated that the President may pass regulatory acts the violation of which are a criminal offense so long as Congress specifies that a violation of the regulations is a criminal offense. *See United States v. Grimaud*, 220 U.S. 506, 518-19 (1911). In *Grimaud* the Court highlighted the key distinction between a proper delegation of authority over criminal punishments and improper delegation of the power over defining acts as criminal:

> when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.

Id. at 517. The fundamental principle in *Grimaud* was that *Congress* must state that the violation of a regulation is the offense and fix the punishment; the President may not do that. *Id.* at 517-18.

Furthermore, if Congress delegated to the President the power to create the aggravating factors that make a civilian defendant death eligible, such action would violate the separation of powers doctrine. *See United States v. Sampson*, 275 F. Supp. 2d 49, 100 (Dist. Mass. 2003) ("Congress may not delegate to the executive branch the authority to enlarge the class of people who are eligible for a federal death sentence, by allowing the Executive to either define new substantive crimes *or to add to the gateway mental states and statutory aggravating factors set forth in the FDPA.*") (emphasis added); *see generally United States v. Higgs*, 353 F.3d 281, 321 (4th Cir. 2003); *United States v. Kinter*, 235 F..3d 192, 201 (4th Cir. 2000) (noting that the Supreme Court's characterization of sentencing guidelines in *Mistretta* was extremely significant in the context of both *Apprendi* and *Jones v. United States*). Thus,

if federal civilian law were directly on point, *Ring v. Arizona* would require Congress to enact the aggravating factors required to impose a capital sentence.

In the military that question is slightly more complex due to the unique nature of the military justice system. The historical role of the President in determining the maximum punishment for non-capital offenses and enacting procedures for sentencing complicates the direct application of federal precedent. *See Loving*, 517 U.S. at 765-69, 772-73. However, the Supreme Court in *Loving* relied upon *Grimaud* to hold that Congress could delegate the authority to enact capital-aggravating factors because the aggravating factors only narrowed the class of death eligible offenders and imposed a "statutory penalty." *See Loving*, 517 U.S. at 768. The Supreme Court's opinion in *Loving v. United States* did not address whether the President had authority to create elements of an offense. As a result, the Supreme Court's conclusion in *Loving*, that R.C.M. 1004 was a "limitation and condition" on the death penalty, was directly overruled by *Ring v. Arizona*. *Compare Ring*, 536 U.S. at 603 *with Loving*, 517 U.S. at 773; *see also Ring*, 536 U.S. at 611 (Scalia, J., concurring) (noting there remained no logical reason to distinguish between aggravating factors prompted by *Furman* and any other legislatively created finding of fact increasing an accused's punishment). Therefore,

this Court must undertake its own delegation doctrine and separation of powers analysis.

D. The delegation doctrine generally.

The delegation doctrine analysis focuses on three separate concerns. As Chief Justice Rehnquist summarized, these three concerns of the delegation doctrine are:

> First . . . it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. . . Second, the delegation doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion . . . . Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

The first arm of the delegation doctrine is better referred to as the separation of powers doctrine. *See United States v. Brown*, 381 U.S. 437, 443 (1965). Like the due process clause and right to jury trial cited in *Apprendi*, the separation of powers stands as a "bulwark against tyranny" between the criminal accused and the state. *Compare Brown*, 381 U.S. at 443 *with Apprendi*, 530 U.S. at 477. In *Brown*, the Supreme Court

observed that "if a given policy can be implemented only by a combination of legislative enactment, judicial application and executive implementation, no man or group of men will be able to impose its unchecked will." *Id.* This characterization of the separation of powers doctrine arguably makes it one of the rights a "defendant should not . . . be deprived of merely because the circumstance is labeled an aggravating factor and not an element of the offense." *See Apprendi*, 530 U.S. at 484.

The intelligible principle arm of the delegation doctrine requires that Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform." *Id.* at 372 (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (internal quotations omitted). Applying this doctrine, the Supreme Court in *Mistretta* held that Congress had provided the Sentencing Commission with appropriate standards in delegating authority to establish the federal sentencing guidelines. *Id.* at 378-79. The Court stated that Congress had given appropriate guidance because, among other reasons, the Act did not criminalize acts never before criminalized and required the Commission to stay within ranges specified by Congress in Title 18 of the United States Code. *Id.* at 374-75.

E. The intelligible principle behind R.C.M. 1004(c) in light of *Ring*.

An analysis of the military capital sentencing system under either the intelligible principle or separation of powers arm of the delegation doctrine reveals that after *Ring v. Arizona* the President unconstitutionally enacted the aggravating factors in R.C.M. 1004(c). The Supreme Court's intelligible principle analysis of R.C.M. 1004(c), before *Ring*, focused on three separate arguments. First, the President's use of authority to increase penalties for non-capital offenses under Arts. 18 and 56, UCMJ. *Loving*, 517 U.S. at 769. Second, Congress' enactment of Art. 106a, which specifically delegated authority to create capital-aggravating factors. *Id.* at 770-71. Finally, the nature of the delegation and the authority of the President. *Id.* at 771-73. However, in light of *Ring v. Arizona*, the first and third arguments are no longer applicable. After *Ring*, the President's power over sentencing considerations in Art. 18 and 56, UCMJ is not the relevant framework for considering capital-aggravating factors. Capital-aggravating factors must be considered elements, not sentencing considerations. *Ring*, 536 U.S. at 602-03. Furthermore, the President's inherent authority does not extend and has never historically extended to determining the acts that may be punished by death in the military. *Loving*, 517 U.S. at 765-66, 772-73. Therefore, the

delegation is outside the scope of the President's powers. The remaining argument, that Art. 106a established an intelligible principle, is also distinguishable after *Ring*.

At the time the President promulgated the R.C.M. 1004(c) factors, the President likely based his action on an understanding of the nature of capital-aggravating factors as sentencing factors, which Congress shared. Congress may very well have acquiesced to Presidential creation of sentencing factors by passing Art. 106a, UCMJ, without codifying the additional aggravating factors contained in R.C.M. 1004. *Loving*, 517 U.S. at 769. However, Congressional silence can only be used to justify the validity of executive action when Congress has in fact remained silent on the issue. *Burns v. United States*, 501 U.S. 129, 136 (1991) (inference from congressional silence should be based on "textual and contextual evidence of congressional intent"). In this case we do not know what the congressional response will be after the decision in *Ring v. Arizona*. Therefore, we cannot say what the common understanding of the President and Congress will be concerning the continued vitality of the factors in R.C.M. 1004(c). To date there has been no congressional action. In fact, appellant is the first Army capital case post-*Ring*.

Congress could acquiesce post-*Ring v. Arizona* to the continued use of R.C.M. 1004(c)'s factors after the Supreme

Court's characterization of them as "the functional equivalent of an element." However, after *Ring*, the fact that Congress in Art. 106a, UCMJ, specifically authorized the President to promulgate additional capital sentencing aggravating factors for espionage no longer validates the President's action in R.C.M. 1004. The President has never specifically promulgated any additional factors under Art. 106a, UCMJ, thus Congress has never had an opportunity to evaluate the President's action after a specific delegation of authority over these capital-aggravating factors. A more specific delegation of authority, similar to the one passed by Congress in Art. 106a, UCMJ, but referencing the power to create elements or the "functional equivalent of an element," would be required to promulgate capital sentencing aggravating factors after *Ring*. The President exceeded his current delegated power over sentencing and procedures by enacting the "functional equivalent of an element" of a capital murder offense in R.C.M. 1004(c).

F. The separation of powers problem after *Ring v. Arizona*.

The more fundamental problem with the R.C.M. 1004 (c) after *Ring v. Arizona* is the prohibition on the President's ability to create military offenses or elements of military crimes under the separation of powers doctrine. The Supreme Court's statement that there is "no absolute rule . . . against Congress' delegation of authority to *define criminal*

punishments" in the military is still true after *Ring v. Arizona*. *Loving*, 517 U.S. at 768 (emphasis added). However, the historical prohibition of the President's power to define a military offense is equally as absolute. *See generally Curtis*, 32 M.J. at 260; *Khan v. Hart*, 943 F.2d 1261, 1264 (10th Cir. 1991) (interpreting the constitutionality of Art. 56, UCMJ, before *Apprendi*).

The power to regulate the military and punish servicemembers is a vastly different function than other criminal lawmaking in the federal system. The Supreme Court closely analyzed this power in *Loving*. However, the Court's understanding of the "regulation" at issue, R.C.M. 1004 (c), is now fundamentally different than it was when the Supreme Court analyzed the separation of powers issue in *Loving*. Congress has not merely given the President the power to narrow the class of capital eligible offenders. Rather the opposite is now true. The President's regulation, in fact, enlarges the class of capital eligible offenders from *none* to those meeting the requirements of R.C.M. 1004(c). Through the lens of *Ring*, it is clear that the President has been given the power to define the elements of capital murder and, thereby, create the offense of murder plus an aggravating factor. *Ring*, 536 U.S. at 609. The President has effectively determined what acts will be punishable by death in the military. Congress has fixed neither

the regulations, a violation of which will be criminal, nor the maximum punishment for those acts because Congress' only action in Art. 118, UCMJ, was insufficient to constitutionally impose the death penalty. *See United States v. Matthews*, 16 M.J. 354, 367-69 (C.M.A. 1983). By allowing the President to promulgate "the functional equivalent of an element" of the military offense of capital murder, Congress is abdicating its duty to define military offenses and fix the punishment of the offense. In uniting the power to define the crime with the President's power to enforce the offenses against military members, Congress disregards one of the fundamental checks and balances in our system of government. Such a combination of legislative and executive functions places no check on the President's power in military capital cases. Without the separation of lawmaking and law enforcement powers, the executive branch could specify new elements of military offenses, or define new conduct which would constitute an offense, and enforce them against members of the armed forces without any check on their power. Such unlimited discretion was never intended under the U.S. Constitution.

In *Loving*, the Supreme Court analyzed the historical roots of the Constitution's separation of powers in the regulation of the military to determine whether the history of the Constitution supported the President's enactment of R.C.M. 1004(c) factors. This analysis, undertaken three years before

Jones, *Apprendi*, or *Ring* were decided, made clear how the distinction between federal criminal law and military law permitted the President to enact capital-aggravating factors in 1984. *See Loving*, 517 U.S. at 757-66. Specifically, the Court analyzed whether Clause 14 of the Constitution prohibited Congress from delegating its power over military punishments. *See Loving*, 517 U.S. at 759-60. A re-analysis of that history will better demonstrate why the Constitution forbids Congress from delegating the power to enact R.C.M. 1004(c) under the separation of powers doctrine **after** *Ring v. Arizona*.

The analysis of the historical basis for the delegation of authority to promulgate capital-aggravating factors conducted by the Supreme Court in *Loving* began with the assertion that "history does not require us to read Clause 14 as granting Congress an exclusive, non-delegable power to determine military *punishments*." *Id.* at 761 (emphasis added). What is inescapable from the Court's analysis in *Loving* is that the decision was grounded on the basic premise that Congress does not have sole authority over military *punishments*. It cannot be overemphasized that such a discussion must be viewed in a different light after *Ring* because the Court in *Ring* considers capital-aggravating factors to no longer be a part of the punishment, but, rather, elements of the offense.

The Court's analysis focused on the history of the standing army and navy in England and the incorporation of that history into the notions of the separation of powers in the U.S. Constitution. *Id.* at 761-62. The American system of regulating our military flows directly from the manner in which the army and navy of England were governed. *Id.* at 760-61. In addition to the Supreme Court's analysis in *Loving*, the Court of Military Appeals has undertaken a similar analysis, though not specifically in a death penalty case. In 1962, Court of Military Appeals Judge Kilday wrote at length on the history of the separation of powers in relation to the armed forces. *See United States v. Smith*, 32 C.M.R. 105, 114-18 (C.M.A. 1962). Judge Kilday wrote that in England the king's power to regulate and make rules for governing the army, and to a lesser degree the navy, was virtually unchecked. *Id.* at 115 (citing 1 WILLIAM BLACKSTONE COMMENTARIES at 262 (Wendell ed. 1857)). Additionally, in his commentaries on English law, William Blackstone discusses at length the almost omnipotent power the king had with respect to governance of the army. Specifically, Blackstone commented that the king's power to court-martial members of the army was nearly absolute. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *401-04, *available at* http://www.yale.edu/lawweb/avalon/ blackstone/bk1ch13.htm. "This discretionary power of the court-martial is, indeed, to be guided by the directions of the crown; which, with regard to

military offenses, has almost an absolute legislative power. . . an unlimited power to create crimes, and annex to them any punishments not extending to life or limb." *Id.* at *403.

These authorities demonstrate that when the United States Constitution was drafted, one of the principal fears of the drafters was the danger of standing armies and unchecked executive power over them. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1177, 1182 (Boston, Hilliard, Gray and Co. 1833), *available at* http://www.constitution.org/js/js_321.htm. The framers of the U.S. Constitution, as well as the people of England, sought to guard against this evil by giving their respective representative bodies the sole power to raise and put down armies. *Id.* at § 1182. As the Supreme Court noted in *Loving*, the framers also distrusted the power of the crown "unchecked by civil power" in summary proceedings. *See Loving*, 517 U.S. at 765. The framers of our Constitution gave Congress the sole authority to regulate the army and navy because if the power were vested solely in the executive branch "the most summary and severe punishments might be inflicted at the mere will of the executive." *See* JOSEPH STORY, COMMENTARIES, 137, at § 1192. The framers gave this sole power to Congress with the service of the executive branch to aid in "establishing rules for governance of the military." *Loving*, 517 U.S. at 767.

Realizing this was the intent of the framers, the Supreme Court, when interpreting congressional power to regulate the land and naval forces, recognized that "Congress has the power to provide for the trial and punishment of military and naval offenses . . . ." *Dynes v. Hoover*, 61 U.S. 65, 79 (1857). The Supreme Court in 1857, continued, "Courts martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms." *Id.* at 82. Further, the Supreme Court stated that the terms of some offenses might be imprecise. *Id.* Clarification of these terms by the Commander-in-Chief was permissible for those offenses "which have been recognized to be crimes and offences by the usages" of military professionals. *Id.*

The Supreme Court reiterated this practice in more modern times in 1974, in *Parker v. Levy*, 417 U.S. 733, 753 (1974). In *Parker*, the Court stated that the Court of Military Appeals and other authoritative military sources, including the President, can define the scope of conduct which violates Articles 133 or 134, UCMJ. *Id.* at 754-55. The terms of Art. 133 and 134, the Supreme Court noted, were wrought with imprecision, and, therefore, may be interpreted in light of service norms of conduct. *Parker*, 417 U.S. at 748. The Supreme Court looked at

military orders and the Manual for Courts-Martial as illustrative examples of conduct that may be unbecoming or prejudicial to good order and discipline. *Id.* at 748-49. The Court also stated that the definition of what is prejudicial to good order and discipline and other elements of crimes in the Code are often open to interpretation by those skilled in military law. *Id.* Thus, the Court continued to recognize that the definition of elements of military crimes specified in the Articles of War, or now the UCMJ, is open to interpretation according to customs and traditions. *Id.* at 749.

What is impressive in *Parker* is what the Supreme Court stated was the permissible basis for setting forth even these imprecise elements. The Supreme Court pointed to only a single source for the elements of military offenses, "*the Code*." *Id.* at 748-50 (emphasis added). The President has the authority to assist in defining what is prejudicial to good order and discipline through service tradition and ethic, but only Congress may make conduct prejudicial to good order and discipline punishable under the Uniform Code of Military Justice.

However, after *Ring*, R.C.M. 1004(c) creates elements of capital murder and makes conduct punishable under the UCMJ by death. The President has no statutory or historical power to create offenses punishable by death. *See* Art. 118, UCMJ; *see*

also 1 WILLIAM BLACKSTONE, COMMENTARIES, at *403. The President was not defining a statutory term; the President was creating elements of an offense. The President has created what several Supreme Court justices term the separate offense of murder plus an aggravating factor. *See Sattazahn v. Pennsylvania,* 537 U.S. at 116 (Scalia, J., concurring; Rehnquist, C.J., and Thomas, J., joining). The President has never had that power and should not now have it in the wake of *Ring v. Arizona*.

Conclusion

After *Ring v. Arizona* and *Apprendi v. New Jersey* it is inescapable that fundamental definitions in all capital punishment systems have changed; the military is no exception. The enactment of the entire capital sentencing procedure in the military must be re-evaluated in light of *Ring*. This Court should follow the guidance of the Court of Military Appeals in *Curtis* and find that because aggravating factors are elements of the military's capital murder offense they must be set forth by Congress, not the President. *See Curtis*, 32 M.J. at 260. This Court should ensure that a military accused has the right to have offenses set out by a representative body. The separation of powers doctrine and Due Process Clause require nothing less.

WHEREFORE, appellant requests that this Court set aside the findings and his death sentence.

ISSUE 3: *RING V. ARIZONA* REQUIRES THAT THE MEMBERS FIND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

Statement of Facts

The military judge instructed the members, before they deliberated on the sentence, that they must be "convinced beyond a reasonable doubt" that at least one aggravating factor existed. (R. at 3135.) The military judge also gave the members the standard reasonable doubt instruction. (R. at 3136.) The military judge then instructed the members that "you may not adjudge a sentence of death unless you unanimously find that any and all extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." (R. at 3137.) The military judge never instructed the members on the definition of "substantially outweigh."

The military judge also instructed the members on four separate aggravating "circumstances." (R. at 3138.) The military judge stated that the members "may consider" these aggravating circumstances in determining whether the aggravating circumstances outweighed the mitigating circumstances as required in R.C.M. 1004(b)(4)(C). *Id.* Because the members imposed a death sentence, this Court must infer the members found that the aggravating factors substantially outweighed the mitigating circumstances.

Both before trial and before the sentencing hearing, appellant requested that the military judge instruct the members that they must find the aggravating circumstances substantially outweighed the mitigating circumstances beyond a reasonable doubt. (R. at 377-391, 510-513; App. Ex. 88.) The military judge denied that motion. (R. at 642.)

Standard of Review

The military judge's instructions are reviewed *de novo* for legal error. *See United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000).

Argument

Rule for Courts-Martial 1004(b)(4)(C) requires that the members in a capital sentencing proceeding, before imposing a sentence of death, must "concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances." Rule for Courts-Martial 1004(b)(4)(C), MANUAL FOR COURTS-MARTIAL (2000 ed.). This Court should set aside appellant's death sentence based on the military judge's refusal to instruct the members to weigh aggravating and mitigating circumstances under a beyond a reasonable doubt standard because: a) the weighing decision has been construed by the Court of Appeals for the Armed Forces as an eligibility finding of fact; b) the Due Process Clause

requires that eligibility findings of fact be made under the beyond a reasonable doubt standard; c) to avoid a constitutional question this Court can construe the UCMJ as requiring the beyond a reasonable doubt standard for the weighing determination; d) regardless of constitutional questions, this Court should require the beyond a reasonable doubt standard for such an important decision in a capital case; and e) the erroneous instruction in this case, failing to require the beyond a reasonable doubt standard, cannot be harmless error.

a. The weighing determination has been authoritatively construed by the Court of Appeals for the Armed Forces as a finding of fact.

The Court of Appeals for the Armed Forces has specifically stated that the weighing determination required by R.C.M. 1004(b)(4)(C) is an "eligibility" finding. *See Loving v. Hart*, 47 M.J. 438, 442 (1998). Eligibility findings are findings that increase the maximum punishment to death, versus selection findings that are the basis for the individualized determination of the sentence to be imposed. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994).

b. *Ring's* rationale and the *Fifth Amendment Due Process Clause* require a beyond a reasonable doubt standard for the eligibility finding in R.C.M. 1004(b)(4)(C).

When combined with the Court's traditional jurisprudence that legislatures must carefully tailor capital sentencing schemes, *Ring* yields the conclusion that the military's capital

sentencing scheme is invalid because 1) the *Due Process Clause* requires a beyond a reasonable doubt standard for all findings of fact that increase an accused's potential maximum punishment, 2) the weighing determination has been construed by other jurisdictions as a finding of fact requiring proof beyond a reasonable doubt, and 3) the standard in R.C.M. 1004(b)(4)(C) falls below the minimum requirements of Due Process.

1. Underlying Due Process Considerations in Applying the "Beyond the Reasonable Doubt" Standard to Sentencing Proceedings.

It is axiomatic that each element of an offense must be proven beyond a reasonable doubt in a courts-martial. The Court of Appeals for the Armed Forces specifically stated that "the Due Process Clause of the Fifth Amendment to the Constitution requires the Government to prove a defendant's guilt beyond a reasonable doubt." *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995). Additionally, Art. 51, UCMJ, requires that each element of the offense be proven "beyond a reasonable doubt." Therefore, any extension of the protection afforded a civilian criminal defendant by the "beyond a reasonable doubt" standard must similarly apply to military accused.

In *Apprendi v. New Jersey*, the Court extended this due process protection to certain determinations made during a sentencing proceeding. 530 U.S. at 468-69. The *Apprendi* Court considered a New Jersey sentencing statute that allowed the

sentencing judge to increase a defendant's maximum possible sentence if he or she found that the defendant committed the crime in question with a biased motive. *Id.* The Supreme Court concluded that due process considerations and the Sixth Amendment's right to a jury required a jury to make this "biased motive" finding beyond a reasonable doubt. *Id.* at 469. The Court began its opinion by reasserting *Winship's* constitutional tenet that due process considerations protected an accused from a criminal conviction unless the jury was convinced of his guilt beyond a reasonable doubt. *Id.* at 476. It likewise referenced a defendant's Sixth Amendment right to a jury trial in all criminal cases. *Id.* The Court concluded that "together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Id.* at 477. The Court then explained that these constitutional protections also "extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Id.* at 484 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998)(Scalia, J., dissenting)). Based on these principles, the Court concluded that any finding, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable

doubt. *Id.* at 490. "[T]he relevant inquiry" in this context, the Court noted, "is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. Based on this, the Court concluded that the statute in question was unconstitutional because it allowed the trial judge, instead of the jury, to make the finding in question, and allowed the judge to make that finding via a standard lower than beyond a reasonable doubt. *Id.* at 497.

In *Ring*, the Court extended *Apprendi* to capital sentencing proceedings. 536 U.S. at 609. What made *Ring* even more significant and applicable to the military, however, was the way in which the Court interpreted the sentencing procedure in question in that case. In *Ring*, the Court reviewed Arizona's capital sentencing scheme, which, in many ways, is very similar to the military's capital sentencing structure. Like the Uniform Code of Military Justice, Arizona's murder statute stated that premeditated murder is punishable by death or life imprisonment. *Compare* Ariz. Rev. Stat. Ann. § 13-1105(C) (2001) *with* Art. 118, UCMJ. Also similar to R.C.M. 1004, Arizona's capital sentencing procedure required the sentencing authority to make two crucial findings before the death penalty even became an eligible sentencing option. Upon a finding of guilt to premeditated murder, Arizona law required the trial judge to

conduct a sentencing hearing where he or she had to find: (1) the existence of at least one aggravating factor beyond a reasonable doubt, and (2) "that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(C). Without these findings, the maximum punishment was life imprisonment. *Id.*

The Supreme Court held that although the Arizona murder statute stated that death was an authorized punishment for premeditated murder, this punishment was really not an available option under the State's sentencing scheme unless the sentencing judge found the existence of an aggravating factor. *Ring*, 536 U.S. at 596-98. Upon a finding of guilt, alone, a defendant was only eligible for life in prison. *Id.* To this extent, the Court concluded, the trial judge's additional sentencing findings "exposed [the defendant] to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 604 (quoting Brief for Respondent, 9-19 and citing *Apprendi*, 530 U.S. at 541). Looking only at the first finding, and relying on *Apprendi*, the Court concluded that constitutional considerations mandated that the jury make this finding beyond a reasonable doubt. *Id.* at 609. Because the manner in which the first finding was made ran afoul of the Constitution and the constrained nature of the appeal, there was no need for the

Court to address second finding regarding weighing aggravating and mitigating facts. *Id.*

2. After *Ring v. Arizona* other jurisdictions construed the weighing determination as a finding of fact requiring proof beyond a reasonable doubt.

A number of state capital sentencing schemes have for a long time required that the sentencing authority make this "weighing determination" under the "beyond a reasonable doubt" standard. *See* Ark. Code Ann. § 5-4-603(a)(2) (2003); N.J. Stat. Ann. § 2C:11-3(c)(3) (2003); N.Y. CLS CPL § 400.27(11)(a) (2003); Ohio Rev. Code Ann. § 2929.03(D)(1) (West 2003); Tenn. Code Ann. § 39-13-204(f)(2) (2002); Utah Code Ann. § 76-3-207(5)(b) (2003). Additionally, the Supreme Courts of Colorado, Utah, and New Jersey, before the decision in *Ring*, interpreted their states' sentencing schemes to require that this "weighing determination" be made beyond a reasonable doubt as well. *See People v. Tenneson*, 788 P.2d 786, 790-96 (Colo. 1990); *State v. Woods*, 648 P.2d 71 (Utah 1982); *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987). Finally, Justice Stevens, as early as 1983, endorsed employing a "beyond a reasonable doubt" standard as the government's burden of persuasion regarding this weighing determination. *Smith v. North Carolina*, 459 U.S. 1056, 1056 (1983) (Stevens, J., respecting the denial of a petition for writ of certiorari). All these authorities made clear that it

was possible to attach a "beyond a reasonable doubt" burden of persuasion to the weighing determination in question.

After the Supreme Court's decision in *Ring*, the Supreme Courts of Nevada and Colorado in *en banc* opinions held that the weighing determination in their capital sentencing scheme was a finding of fact that increased the maximum punishment, and was, therefore, a functional element that must be found by a jury beyond a reasonable doubt. *See Johnson v. Nevada*, 59 P.3d 450, 460 (Nev. 2002); *Woldt v. People*, 64 P.3d 256 (Colo. 2003); *see also State v. Gales*, 265 Neb. 598, 631-32 (Neb 2003); *but see Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002); *Brice v. State*, 815 A.2d 314, 320-23 (Del. 2003). The Nevada Supreme Court noted that *Ring v. Arizona* did not reach the issue of whether such a weighing determination was a finding of fact for purposes of the Sixth Amendment. *See Johnson*, 59 P.3d at 460. However, the Court went on to apply *Ring* to the entire Nevada capital sentencing scheme. *Id.* The Nevada capital sentencing scheme has a bifurcated hearing process almost identical to the military process. *See* NEV. REV. STAT. 175.552-6 (2002). In Nevada, gate one of their capital process is, of course, that the defendant be unanimously found guilty beyond a reasonable doubt of a death-eligible offense. *Id.* at 175.552. The second gate in Nevada is that the jury must find that one or more aggravating circumstances were proven to exist beyond a

reasonable doubt. *Id.* at 175.554. The third gate is that the jury must find that "no mitigating circumstances [are] sufficient to outweigh the aggravating circumstance or circumstances found." *Id.* Finally, the jury must decide unanimously whether to impose the death penalty. *See Johnson*, 59 P.3d at 460. The Nevada Supreme Court stated that there are two "distinct findings" that make a defendant death eligible, to wit, that aggravating circumstances exist and that mitigating circumstances do not outweigh aggravating circumstances. *Id.; see also* NEV. REV. STAT. 175.554(3). Under the law ruled unconstitutional by the Nevada Supreme Court, a three-judge panel could impose the death sentence if a jury could not unanimously agree on a sentence in a death eligible case. *See Johnson*, 59 P.3d at 460. Specifically, the panel of judges could impose a sentence of death, without a jury, "if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." *Id.*

The Nevada Supreme Court held that the weighing determination, whether made by the jury or the panel of judges, was "*necessary* to authorize the death penalty in Nevada." *Id.* (emphasis added). Further, the Court stated that the weighing determination was "in part a *factual determination*, not merely discretionary weighing." *Id.* (emphasis added). The Nevada

Supreme Court concluded that "*Ring* requires" that the weighing determination be made by a jury beyond a reasonable doubt because "that fact no matter how the state labels it must be found by a jury beyond a reasonable doubt." *Id.* (quoting *Ring*, 536 U.S. at 602).

In light of *Ring*, the Supreme Court of Colorado in *Woldt v. People*, 64 P.3d 256 (2003), also invalidated that state's capital punishment statute. The Colorado statute also placed capital sentencing in the hands of a three-judge panel that employed a four step analysis in deciding whether to impose a death sentence. *Id.* at 265. The first step requires the finding that an aggravating factor exists. *Id.* Next, the panel determines whether any mitigating facts exist. *Id.* Thereafter, the panel determines whether any mitigating factors outweighed the aggravating factors. *Id.* Finally, the panel, considering all relevant factors, determines whether to impose a sentence of death. *Id.* In light of *Ring*, the Supreme Court of Colorado characterized steps one through three as findings of fact that made the defendant "death eligible." *Id.* at 265-66. The Court declared its capital sentencing statute unconstitutional because the panel of judges, as opposed to the jury, makes factual findings including the weighing of aggravation and mitigation. *Id.* at 266-67.

Even federal district courts reaching the issue have made similar findings. Under the Federal Death Penalty Act, juries in federal district courts have a similar weighing determination. *See* 18 U.S.C. § 3593(e) (2000). In the District of Massachusetts, in the case of *United States v. Gilbert*, 245 F. Supp. 2d 327 (D. Mass. 2003), the district court judge instructed a capital sentencing jury regarding this weighing determination. *See generally United States v. Sampson*, 245 F.Supp. 2d 327, 329, 335 n.1 (Dist. Mass. 2003). In its sentencing instructions the district judge instructed the jury, in light of *Ring*, that the weighing determination must be made beyond a reasonable doubt though the statute does not require it. *Id.*

3. Fifth Amendment implications of *Ring* on the R.C.M. 1004(b)(4)(C) finding.

The military sentencing scheme is similar to the sentencing scheme at issue in *Ring* because it requires, as a prerequisite to considering death as an eligible sentence, that the members find: (1) the existence of an aggravating factor, and (2) that aggravating factors and circumstances substantially outweigh the mitigating circumstances. *See* R.C.M. 1004(b)(4). As the title to R.C.M. 1004(c) states, these are "necessary findings" before the members may sentence a servicemember to death. *Id.* While the military's death-penalty scheme already requires that the

members make these findings, it does not require the members to be convinced beyond a reasonable doubt that the aggravating factors substantially outweigh the mitigating factors. *See* R.C.M. 1004(b)(4)(C).

Additional evidence suggesting that the military's weighing determination is a "finding" susceptible to the beyond a reasonable doubt standard comes from the fact that R.C.M. 1004(b)(4) is titled "necessary findings." R.C.M. 1004(b)(4). More importantly, as the Supreme Court stated, the question at hand "is one not of form but of effect" – "does this weighing determination expose an accused to a punishment greater than that authorized by the members' guilty verdict alone?" *Apprendi*, 530 U.S. at 494 (cited in *Ring*, 536 U.S. at 602). Because this weighing determination is a prerequisite to establishing death as an authorized sentence, the answer to this question is yes. R.C.M. 1004(b)(4)(C) must be decided beyond a reasonable doubt.

4. Appellant's sentence must be set aside because of an unconstitutionally low standard of proof.

In this case, appellant specifically requested that the beyond a reasonable doubt standard be applied to the members' determination under R.C.M. 1004(b)(4)(C). (R. at 377-391, 510-513; App. Ex. 88.) Appellant's request specifically cited the *Due Process Clause* as the basis for his request. *Id.*

The military judge denied this request without explanation. (R. at 642; App. Ex. 118.) In fact, the military judge's ruling merely states, "The defense motion to declare Rule for Courts-Martial 1004(b)(4)(C) unconstitutional is denied. *See U.S. v. Loving*, 41 M.J. 213 (1994) and *U.S. v. Gray*, 55 M.J. 1 (1991)". (R. at App. Ex. 108.) This ruling denied appellant due process under *Ring*, *Winship*, and Art. 51, UCMJ. The military judge defined reasonable doubt as "an honest, conscientious misgiving or doubt." (R. at 3136.) The military judge never defined the term "substantially outweigh", leaving it to the members to come up with their own interpretation of the standard. Clearly, the substantially outweighs standard would be lower in the minds of the members since the reasonable doubt standard is the highest standard under the law. Under these circumstances, the two concepts essentially reverse the burden of proof. Where beyond a reasonable doubt requires acquittal when there is something greater than a fanciful doubt, substantially outweighs requires a conviction where the aggravating factors only substantially outweigh the mitigating factors. *Id.*

The "substantially outweigh" standard did not provide a substitute for the moral certainty of the "beyond a reasonable doubt" standard of *Winship*. The weighing determination in R.C.M. 1004(b)(4)(C) was a "factual determination" necessary for the imposition of the death penalty, and, therefore, under *Ring*

and *Apprendi* must be found to the moral certainty of beyond a reasonable doubt. *See Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 494 n.19.

c. Art. 51 and 66, UCMJ, should be construed to require the beyond reasonable doubt standard for the weighing determination in R.C.M. 1004(b)(4)(C).

Appellant requests that his sentence be set aside based on the improperly low standard used in his case. However, this Court need not find R.C.M. 1004(b)(4)(C) unconstitutional on its face to resolve this issue. Courts have a "duty to avoid constitutional problems with a regulation. [W]here a regulation is attacked as unconstitutional or violative of a statute, 'a narrowing construction' is mandated, if possible, to avoid these problems." *United States v. Williams*, 29 M.J. 112, 115 (C.M.A. 1989) *(citing* Boos v. Barry, 485 U.S. 312 (1988)). The Court of Appeals for the Armed Forces has stated that the issue of whether an element should be determined by the members is an issue of statutory interpretation. *See United States v. New*, 55 M.J. 95, 103-04 (2001), *cert denied,* 534 U.S. 955 (2001). In *New*, the Court had to decide if the issue of an order's lawfulness was an element of an Art. 92, UCMJ, offense "and therefore should have been submitted to the members under Article 51(c)." *Id.* at 104. Here, if this Court finds that the weighing determination is the "functional equivalent of an element" of the offense, then it should be found beyond a

reasonable doubt pursuant to Art. 51, UCMJ. Because it is the members' responsibility to decide all elements of the offense beyond a reasonable doubt under Art. 51(c)(4), UCMJ, this Court should statutorily interpret the standard of proof for the finding of fact in R.C.M. 1004(b)(4)(C) to be beyond a reasonable doubt to avoid a constitutional question.

d. As a matter of fundamental fairness this Court should require the weighing determination in R.C.M. 1004(b)(4)(C) be made to the moral certainty of beyond a reasonable doubt.

If this Court finds that neither the Constitution nor Article 51, UCMJ mandates a beyond a reasonable doubt standard for the decision in R.C.M. 1004(b)(4)(C), this Court should nevertheless invoke its Art. 66, UCMJ, powers to promote fairness in capital sentencing. Specifically, this Court should declare that as a matter of fundamental fairness, no sentence of death in the military is permissible unless the finder of fact unanimously finds beyond a reasonable doubt that the aggravating factor(s) outweigh mitigating factors.

In the *Quiroz* line of cases, this Court exercised its Art. 66, UCMJ, power to establish a non-statutory framework for unreasonable multiplication of charges with the primary goals of protecting the "fundamental fairness" and "reputation of the military justice system." *See United States v. Quiroz* (*Quiroz II*), 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000) (*en banc*) *rev'd on*

other grounds 55 M.J. 334 (C.A.A.F. 2001). After remand from the Court of Appeals for the Armed Forces, the service court reaffirmed that commitment to the fundamental fairness of our system by continuing to use its Art. 66, UCMJ, powers to ensure that military accused are not subject to a piling on of charges even if the issue is not raised at trial. *See United States v. Quiroz* (*Quiroz IV*), 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002) *aff'd*, 58 M.J. 183 (C.A.A.F. 2003). In *Quiroz IV*, this Court promoted the fundamental fairness of the military justice system by dismissing unreasonably multiplied charges. *Id.* at 585-56. Further, the Court declined to invoke the waiver rule, though the Court clearly could have invoked this rule of criminal procedure, out of the same consideration for the fundamental fairness of our system. *Id.*

The Navy-Marine Court of Criminal Appeals has also exercised this power in *United States v. Swetzer*, No. 9602556, 1999 CCA LEXIS 14 (N.M.Ct.Crim.App. Jan. 20, 1999) (unpublished opinion) (attached)(DAE KK; DA 408-12), where the Court stated that it need not apply the waiver rule when the important issue of improper use of statements obtained in violation of the appellant's Sixth Amendment rights was at issue. *See Swetzer*, at *9-10 (citing *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)). (DAE KK; DA 408-412.) In *Swetzer* the Court said it would not apply the rule of waiver for failure to object based

on the concern for the fundamental fairness of the proceedings. *Id.*

This Court similarly invoked its Art. 66, UCMJ, power to protect the fundamental Due Process right of an accused to speedy posttrial processing in *United States v. Collazo*. *See* 53 M.J. 721, 727 (A.Ct.Crim.App. 2000). There this Court stated that under Art. 66, UCMJ, it was exercising its power to ensure fundamental fairness of posttrial action. *Id.* This Court went on to state, "[F]undamental fairness dictates that the government proceed with due diligence to execute a soldier's . . . posttrial processing rights . . . given the totality of the circumstances in the soldier's case." *Id.* The *Collazo* Court's exercise of Art. 66, UCMJ, power to ensure the fundamental fairness of a court-martial was vindicated in *United States v. Tardif*, where the Court of Appeals for the Armed Forces held that under Art. 66, UCMJ, the Courts of Criminal Appeals may fashion their own remedy to perceived injustices in the military system as warranted by the circumstances of the case. *See United States v. Tardif*, 57 M.J. 219, 224-25 (C.A.A.F. 2002).

Using this same power to ensure the fundamental fairness of the military justice system, this Court should require that a jury be convinced beyond a reasonable doubt that the aggravating circumstances substantially outweigh the mitigating

circumstances before a sentence of death may be imposed. The need for a high degree of certainty in this factual determination in a capital case cannot be overstated. Before affirming the ultimate punishment, this Court should require the highest degree of factual certainty on all issues affecting the members' sentence of death.

In *State v. Woods*, 648 P.2d 71 (Utah 1982), the Supreme Court of Utah addressed whether the beyond a reasonable doubt standard should be applied to a capital weighing process. That court held that the beyond a reasonable doubt standard was appropriate as "the fundamental respect for humanity underlying the Eighth Amendment . . . can only be achieved if sentencing procedures only permit imposition of the death penalty on the basis of a high degree of confidence that that penalty is appropriate." *Id.* at 81 (internal citations and quotations omitted). The Court also noted that:

> Even if Solomon-like wisdom were available in framing objective standards, their whole purpose could be thwarted if the governing procedural rules allowed the sentencing body to impose the death penalty in the face of evidence which creates a reasonable or substantial doubt as to the appropriateness of that penalty.

Id. Similarly, in *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987), the Supreme Court of New Jersey found both as a matter of statutory construction and as a matter of fundamental fairness

that the State was required to prove that aggravating factors outweighed mitigating factors by proof beyond a reasonable doubt. *Id.* at 156 ("If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt").

In *Winship*, 397 U.S. at 372, Justice Harlan, in a concurring opinion noted: "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Further, the Supreme Court has noted time and again that "death is a punishment different from all other sanctions[.]" *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976); *see also Wiggins v. Smith,* 539 U.S. 510, 557 (2003). These principles should guide the Court's assessment of the issue.

Should this Court determine that that R.C.M. 1004(b)(4)(C) need not be found beyond a reasonable doubt on constitutional grounds, appellant asks this Court follow the example of the Supreme Courts of New Jersey and Utah and declare that in light of the spirit of *Ring* and *Apprendi* and as a matter of fundamental fairness, and pursuant to Art. 66, UCMJ, that no sentence of death in the military is permissible unless the

finder of fact unanimously finds beyond a reasonable doubt that the aggravating factor(s) outweigh mitigating factors.

e. The proper remedy in this case is setting aside appellant's sentence because appellate reweighing and harmless error analysis are inapplicable.

Appellant's sentence should be set aside because harmless error analysis and reweighing of aggravating and mitigating circumstances are inapplicable to the improperly low burden of proof specified in R.C.M. 1004(b)(4)(C). The Supreme Court held that in order to uphold a capital sentence after an aggravating factor is set aside, the court must either perform harmless error analysis or, if provided in the statute, reweigh the aggravating versus mitigating factors. *See Stringer v. Black*, 503 U.S. 222, 232 (1992). Where the weighing process of a capital sentence is skewed by an invalid aggravating factor, reweighing or harmless error analysis are constitutionally required. *Id.* However, the error in this case occurs in the weighing determination itself, not one of the aggravating factors to be weighed. Thus, the burden of proof in the weighing determination is skewed: the scale which balances the aggravating factors is the problem, not the factors to be measured on the scale. Reweighing using this broken scale would yield the same erroneous results.

1. After *Ring v. Arizona*, appellate reweighing is an invasion of the jury's provenance.

Ring v. Arizona changed the fundamental reasoning of *Clemmons v. Mississippi*, 494 U.S. 738 (1990), and *Stringer v. Black*, 503 U.S. 222 (1992), have changed. Therefore, this Court must conduct a new analysis of whether it has the power to conduct reweighing analysis based on the principles articulated in *Ring v. Arizona* and *Apprendi v. New Jersey*. Because *Clemmons* was based on the *Walton v. Arizona* sentencing factor distinction it appears that the doctrine has been overruled. *See Clemmons*, 494 U.S. at 745. In *Clemmons*, the Court said, "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* The appellate judges in the *Clemmons* case were permitted to reweigh the aggravating factors specifically because the weighing determination was a sentencing factor, not an element of the crime. *See Clemmons*, 494 U.S. at 745; *see also Walton v. Arizona*, 497 U.S. at 649. Because the weighing determination, and all decisions in capital sentencing, were considered sentencing factors and not elements of the offense, appellate court determination of the issue did not interfere with the appellant's jury trial right. There was no need for jury determinations at any stage that sentencing factors were found beyond a reasonable doubt. Once *Ring v. Arizona* applied the element distinction to capital sentencing, the assumptions

of the *Clemmons* decision were overruled and appellate judge reweighing of what is now an element of the offense implicates an appellant's jury trial right guaranteed under *Ring*. Thus, if this Court finds that the beyond a reasonable doubt standard applies to the weighing determination, appellate reweighing is not permitted because the scale for weighing was broken at trial. Because the members in this case never made the weighing determination beyond a reasonable doubt, appellate judges may not make that decision in their place. The members must make that decision at least one time at trial. Without this determination being made by the members under the proper standard at least once, a proper weighing determination is not implicit in any decision of the members as is required in *Ring*. Appellant would be denied his right to a members' determination beyond a reasonable doubt if an appellate court reweighed the aggravating factors without the members ever reaching that decision. This Court would, in effect, supplant the members' necessary finding that it sought to correct.

2. Harmless error is inapplicable to problems with the military capital sentencing scheme after *Ring v. Arizona*.

Harmless error analysis of this error is also inapplicable. The Supreme Court in *Ring* left harmless error analysis as an open question for capital sentencing errors as a result of that decision. *See Ring*, 536 U.S. at 609 n.7. The *Ring* Court stated

that it "did not reach" the State's harmless error claim that the improperly decided aggravator was implicit in the jury's finding. *Id.* Instead, the Court left the question to lower courts to decide. *Id.* In *Clemmons*, the Supreme Court stated that a court's power to conduct harmless error analysis or reweighing is governed by local standards of review. *Clemmons v. Mississippi*, 494 U.S. 738, 754 (1990). The Court further stated in *Clemmons* that a case should be remanded for a new hearing when the appellate harmless error/reweighing process is extremely speculative. *Id.*

The error in this case was an improperly low burden of proof in the weighing stage of sentencing. Therefore, this Court should look to cases where an improperly low burden of proof in other contexts was the alleged error to determine the applicability of harmless error. Harmless error analysis in cases where an improper burden of proof was given to the jury has been held to be a structural error to which harmless error does not apply. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993). When a finding is based on a standard of proof lower than beyond a reasonable doubt, the improper burden vitiates the jury's findings. *See Sullivan,* 508 U.S. at 281. The Supreme Court in *Sullivan* characterized an improper jury standard as an error that is unquantifiable and, therefore, unable to determine what the jury would have found with the correct standard. *Id.* at

281-82. The Court concluded that to allow harmless error analysis in a case where the jury's findings were unquantifiable would allow the "wrong entity" to adjudge guilt, i.e. the judge not the jury. *Id.* at 282. Therefore, an improperly low burden of proof instruction is one of those cases where harmless error analysis is extremely speculative and the case should be remanded for a new hearing. *See generally Clemmons*, 494 U.S. at 754.

The failure to specify the beyond a reasonable doubt standard is equal to no trial at all on a finding of fact necessary to impose death. The Supreme Court in *Winship* stated that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. Without that standard, the members' verdict does not meet the requirements of due process and therefore cannot form the basis for harmless error analysis. *Sullivan*, 508 U.S. at 280-81. As the Court stated in *Sullivan*, "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Id.* at 280. Without a jury verdict beyond a reasonable doubt on an issue, "the most an appellate court can conclude is that a jury would

surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough." *Id.*

Several courts have addressed whether *Ring v. Arizona* allows harmless error analysis. In *Esparza v. Mitchell*, the Sixth Circuit held that harmless error review was inapplicable where a judge imposed a death sentence in a case where the jury was never instructed on the death-eligible offense. *See Esparza v. Mitchell*, 310 F.3d 414, 421 (6th Cir. 2002), *rev'd on other grounds*, 540 U.S. 12 (2003) (*per curiam*). The Court reasoned that allowing the judge to decide any element of the state's capital-aggravating system does not comply with the Eighth Amendment. *Id.* The Court found harmless error analysis in such a case would impermissibly supplant a judge's determination for the jury's. *Id.* However, several other courts have said that harmless error analysis is applicable to their system for *Apprendi* violations. *See Arizona v. Ring*, 65 P. 3d 915, 935-36 (Ariz. 2003) (citing *Apprendi* based decisions finding harmless error).

Even in those decisions that have held that harmless error analysis is applicable to errors related to *Ring v. Arizona*, none have dealt with harmless error in light of an improperly low burden of proof in the weighing determination after *Ring*.

Cf. Brice v. State, 815 A.2d at 326-27 (construing *Ring* not to apply to the weighing determination and holding generally that Delaware's system was constitutional because a jury found the aggravating factor(s) existed beyond a reasonable doubt). Most post-*Ring* cases involve a situation where an aggravating factor(s), or all aggravating factors, were invalidated due to judge's determination of aggravating factors. *Cf. Wrinkles v. State*, 776 N.E.2d 905, 907-08 (Ind. 2002) (finding implicit in jury's verdict of guilt beyond a reasonable doubt on three separate murders the aggravator of multiple murders). The Arizona Supreme Court specifically noted the difference between cases where the jury's verdict is susceptible to harmless error analysis, because the jury found facts sufficient to support an aggravating factor in the findings phase, and one where there is no process which to apply harmless error. *See State v. Jones*, 49 P.3d 273, 284, n.13 (Ariz. 2002). The Arizona Court noted that in cases where there was no jury trial on an alleged aggravator it would be "impossible to find harmless error." *Id.* at n.13.

The real question is, therefore, how does harmless error fit within each jurisdictions' capital sentencing process for the specific errors in their process. The military judge in appellant's case specifically instructed the members on the lower burden of proof for the weighing determination by never

defining the term "substantially outweigh". When compared with the beyond a reasonable doubt instruction given regarding aggravating factors, the members must have been left with the idea that the standard for weighing factors was lower or something different. (R. at 3136.) Without a traditional standard of proof for the weighing determination, the court cannot determine just how certain the members were of this decision. If there is any reasonable doubt that the aggravating circumstances were outweighed by mitigating circumstances appellant should not face a death sentence. However, this court has no way of knowing that from the record and no court can know that from the record. As the Supreme Court noted in *Sullivan*, the most this court can conclude is that the members would surely have found appellant guilty beyond a reasonable doubt, and that is not enough. *See Sullivan*, 508 U.S. at 79-80. This court must be able to say that the members *actually found* the appellant guilty beyond a reasonable doubt and that "the verdict actually rendered in this trial was *surely unattributable to the* error." *Id.* at 279. This Court cannot say that, because the members have never said that. Harmless error cannot be applied in this case where the members' verdict is devoid of a standard.

3. Assuming *arguendo* harmless error applies, the constitutional error in this case materially prejudiced the substantial rights of Appellant.

Even if harmless error were applied, the error cannot be harmless because the sentence of death was imposed. The military judge's instruction to the members at sentencing implicated a lower burden of proof for the weighing determination. However, the military judge stated that the members could not adjudge a death sentence unless they made this weighing determination unanimously. *Sullivan*, 508 U.S. at 279. In *United States* v. *Tighe*, 266 F.3d 1187, 1195 (9th Cir. 2001), the Ninth Circuit applied harmless error analysis to an *Apprendi* violation. *Id.* In *Tighe*, the accused received a greater sentence based on an aggravating factor that the judge determined existed merely by a preponderance of the evidence. *Id.* The Ninth Circuit Court found that the judge's determination that the aggravating factor existed by a preponderance of the evidence was an *Apprendi* error. *Id.* at 1193-94. The appellant in *Tighe* would have been ineligible for the greater sentence without the finding that the aggravating factor existed. *Id.* at 1195. However, the appellant in *Tighe* received a sentence greater than the maximum sentence available without the aggravating factor. *Id.* Since the determination that the aggravating factor existed was made by a judge and not by a jury beyond a reasonable doubt, the Court found that the

appellant was ineligible for the increased punishment without a jury finding on the aggravating factor. *Id.* The Court concluded that since the jury never made that decision, the appellant should not have been eligible for the increased punishment. *Id.* In effect the appellant should not have proceeded through that gate to the greater sentence. Since the appellant in *Tighe* received the aggravated sentence, the Court found the error prejudiced his rights and was not harmless beyond a reasonable doubt. *Id.* at 1195.

The military judge's instruction regarding the "burden of proof" for the weighing determination rendered the members' decision on the weighing determination gate improper, regardless of the basis for the error (i.e. statutory or constitutional). Since the members' decision at this gate was not proper, the court-martial should not have proceeded to the next step. *See Loving v. Hart*, 47 M.J. at 442 (only after making the weighing determination may a member be sentenced to death). That next step was the final decision to impose death. Thus, the prejudice in this case is the death sentence appellant received when, in fact, he could not have been awarded death based on the remaining proper findings of the members.

WHEREFORE, this Court should set aside appellant's death sentence and award him the only available sentence at the time of his trial, confinement for life.

Assignment of Error IV.

SERGEANT AKBAR'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE APPELLANT'S SEVERE MENTAL ILLNESS MAKES SUCH A PUNISHMENT HIGHLY DISPROPORTIONATE TO HIS CULPABILITY AND VIOLATES THE FIFTH AMENDMENT BECAUSE IT WOULD BE A DENIAL OF DUE PROCESS TO EXECUTE APPELLANT.

Introduction

The Supreme Court has barred the execution of offenders who are mentally retarded, juveniles, or insane. The reason underlying all three prohibitions is that in each category, the offender is either not criminally responsible, or is criminally responsible but has a lower culpability due to diminished capacity to engage in logical reasoning, impulse control, or in the ability to understand the impulses of others. Offenders, like appellant, who suffer from a severe mental disease or defect but are not legally insane, suffer from diminished mental capacity to an extent equal to, and often greater than, offenders who are juveniles or who are mentally retarded.

Appellant is not currently legally competent to assist in his appeal, nor was he legally competent at the time of trial or the time of the offenses. Assuming *arguendo* that this Court finds that appellant is currently legally competent and was legally competent at the time of the offenses and trial,[35]

[35] Appellant is not conceding that he is either sane now, or was so at the time of the offense or trial. *See* AE XIII.

appellant is nevertheless suffering from a severe mental disease or defect at the time of the offenses, trial, and on appeal, and thus his execution is prohibited.

Statement of Facts

Doctor Fred Tuton, a clinical psychologist, examined appellant when he was 14 years old in 1986. (R. at 2017.) Doctor Tuton examined appellant because of an allegation that appellant's step-father was sexually abusing his sisters. (R. at 2019.) At appellant's court-martial, Dr. Tuton diagnosed appellant using the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition, which did not exist at the time of his assessment. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM-IV]. (R. at 2032.) Doctor Tuton diagnosed appellant with a personality disorder, not otherwise specified, associated with paranoid and schizotypal features. (R. at 2035.) Doctor Tuton also assigned appellant a Global Assessment of Functioning (GAF) score of 60 at the time of his original interview. (R. at 2037.) Doctor Tuton explained that such a number was on a scale of 0-100; with mental health improving as the number increased, and represented a moderate level of mental instability, but that all of these assessments applied only to his observations *circa* 1986. *Id.* Doctor Tuton also testified that the federal cutoff for mental health disability was 55 and below. (R. at 2060.) Doctor Tuton

believed appellant at the age of 14 had "a very significant need for psychotherapy." (R. at 2038.) Doctor Tuton testified that a person with appellant's diagnosis would be at a greater risk, without therapy, to develop more severe mental illness. (R. at 2041.)

Doctor George Woods was the defense's clinical psychiatrist at trial. (R. at 2226.) Doctor Woods conducted three separate interviews of appellant. (R. at 2234.) In addition to interviewing appellant, Dr. Woods briefly interviewed a few family members to identify any mental health issues, and found that appellant's brother suffered from paranoid ideations. (R. at 1679.) Doctor Woods also found that appellant's father suffered from severe depression and attempted suicide. (R. at 1680.) Doctor Woods explained that a family history of mental disease increased the chances of someone also having a mental disease. (R. at 2245.) Doctor Woods determined that appellant suffered from paranoia, depression, and "unusual and bizarre" thinking. (R. at 2281.) Doctor Woods diagnosed appellant as being across a "schizophreniform spectrum" typified by an "inability to perceive reality accurately, specifically under stress." (R. at 2287.) Doctor Woods specifically diagnosed appellant as having Schizotypal Personality Disorder, an Axis II diagnosis in the DSM-IV, manifested by unusual thinking, paranoia, decompensation under stress, and psychomotor

agitation. (R. at 2288.) Doctor Woods offered two other possible diagnoses of Paranoid Schizophrenia and Schizo-affective Disorder. (R. at 2289.) Doctor Woods found evidence for all three diagnoses, but felt most strongly about Schizotypal Personality Disorder. (R. at 2291.) This difficulty in finding a definitive diagnosis was, in most part, due to a lack of background information. *See* AE I: B, E.

In addition to trial testimony, other evidence established appellant's mental illness. On 23 March 2005, less than two weeks before trial, a forensic neuropsychological report on appellant was prepared by Dr. Pamela Clement, Chief of Neuropsychology at Brooke Army Medical Center. (DAE M; DA 47-63.) While prepared in 2005, Dr. Clement's report relied upon testing conducted 27-29 May 2003. *Id.* at DA 49. While Doctor Clement agreed with the Sanity Board's diagnosis of Dysthmic Disorder (*Id.* at DA 58), she gave a differential diagnosis of "Schizophrenia, possibly Paranoid type" as the most likely diagnosis based on testing done on appellant.[36] *Id.* at DA 58. A "secondary possibility of Paranoid disorder" was also listed as an alternate diagnosis suggested by the results of testing on

[36] Doctor Clement noted that a solid diagnosis of Paranoid Schizophrenia would be supported by additional "historical and clinical data." (DAE M; DA 49.) The type of data Dr. Clement said was required was exactly the type that was largely ignored by appellant's trial defense counsel. (R. at App. Ex. 132; DAE B, C, D, G, I, AA, GG; DA 1-27, 229-36, 331-341).

appellant. *Id.* Doctor Clement noted that the totality of appellant's mental health issues "reflects a very significant degree of psychopathology." *Id.* Dr. Clement's report was not introduced at trial.

In addition to testifying at trial, Dr. Woods also provided additional evidence of appellant's mental health problems to trial defense counsel in a memorandum dated 28 February 2005. (DAE D; DA 7-14.) Doctor Woods' memorandum addressed appellant's continuing sleep and arousal issues. *Id.* at DA 8. Doctor Woods advised that the sleeping and arousal issues were likely not merely sleep apnea, but directly related to, and evidence of, psychiatric problems, specifically Schizophrenia. *Id.* at DA 11. Doctor Woods recommended that appellant receive more extensive psychological and physiological testing, and stated that such testing could not be done before trial. *Id.* at DA 14. Doctor Woods also expressed a clear concern that appellant's "ability to meaningfully participate in his defense is predicated upon a comprehensive and effective evaluation and treatment of his neurological condition." *Id.* at DA 7. At no point did defense counsel raise this issue of competency to the military judge's attention, nor did they request any testing or evaluation recommended by Dr. Woods.

Appellate counsel cannot, without expert assistance, definitively determine whether or not appellant currently has a

severe mental disease or defect.[37] However, Dr. Woods' current evaluation that appellant has Paranoid Schizophrenia now and had it at the time of the offense and trial strongly suggests that appellant is still afflicted with this serious mental disease and calls into question whether or not appellant is legally competent to be executed. *See* DAE AA; DA 229-36; *see also* DAE Z; DA 224-28. Even a relatively less serious diagnosis such as Schizoaffective Disorder would still be a serious mental disease that would call appellant's competence into question.

Among the symptoms associated with schizophrenia are "gross impairment in reality testing", "grossly disorganized behavior" and "structural brain abnormalities". AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL, 297, 300, 304-05 (4th ed., Text Revision 2000) (DSM-IV-TR); *see also* DAE HH; DA 342-74. Schizophrenia is among the most serious mental health disorders and thus is an Axis I diagnosis. DSM-IV-TR at 25-26 (distinguishing Axis I diagnoses from Axis II diagnoses), 275-76 (identifying Schizophrenia both as an Axis I diagnosis and a serious mental health disorder).[38]

The volume of mitigation and extenuation evidence missed and ignored in appellant's case was extensive. (*See* DAE LL; DA

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[37] *See* AE XIII.

[38] Appellant has also provided this Court with a primer on Schizophrenia from the National Institute of Mental Health. (DAE HH; DA 342.)

413-517; *see also* AE I: B.) The quality and quantity of the missing evidence was so extensive that it made it impossible for Dr. Woods and the Sanity Board to give an accurate diagnosis and impossible, without expert assistance, to determine appellant's current mental health status accurately. *Id.*

Applicable Law and the Standard of Review

The Eighth Amendment bars the execution of the criminally responsible but mentally retarded offender. *Atkins v. Virginia*, 536 U.S. 304 (2002), *see also State ex rel. Andrew Lyons v. George Lombardi and Chris Koster*, ___S.W. 3d___ (26 January 2010) (unpublished) (attached). (DAE Y; DA 216-23.)

The Eighth Amendment also bars the execution of the criminally responsible but juvenile offender. *Roper v. Simmons*, 543 U.S. 551 (2005). In both cases, the Supreme Court focused on the lowered culpability of offenders in each of these classes. *Atkins*, 536 U.S. at 318-19; *Roper*, 543 U.S. at 571. Additionally, the Supreme Court has found that the Eighth Amendment bars the execution of those who were criminally responsible at trial but who later became insane while pending execution. *Ford v. Wainwright*, 477 U.S. 399 (1986).

Argument

Sentencing a person to death who is severely mentally ill violates the Eighth Amendment because the sentence is categorically disproportionate to the criminally responsible

but mentally ill offender's culpability. In both *Atkins* and *Roper*, the Supreme Court found three consistent but separate reasons why the death penalty was unconstitutional in those circumstances: (1) that the death penalty was categorically disproportionate to the diminished culpability of mentally retarded and juvenile offenders; (2) that the death penalty did not serve penological purposes related to mentally retarded and juvenile offenders; and (3) that evolving standards of decency prohibited the execution of mentally retarded and juvenile offenders. *Atkins*, 536 U.S. at 318-319; *Roper*, 543 U.S. at 571.

(1) Diminished Culpability

For the mentally retarded and juvenile offenders, the offenders were still criminally culpable and could be punished with the most severe criminal sanction that was short of death. The Supreme Court found that the death penalty required a higher level of culpability than they could possess as juvenile and mentally insane offenders:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to

> engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, 536 U.S. at 318.

The Court also recognized that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation. *Atkins*, 536 U.S. at 320-21 (mentally retarded persons have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" in part because they "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."). *Id.* at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury").

By logical extension the analysis followed by the Supreme Court applies equally to those who suffer from a severe mental illness but who do not satisfy the legal test for insanity. There is nothing to significantly distinguish the culpability of a seriously mentally ill offender from the culpability of a juvenile offender or a mentally retarded

offender. In many cases, a seriously mentally ill offender is significantly less culpable than an older juvenile offender not suffering from mental illness or retardation. Similarly, an offender with mild mental retardation approaching the Intelligence Quotient (IQ) "cutoff" of 70 cannot be said to be any less culpable than an offender suffering from a reality-altering serious mental disease such as Schizophrenia. Maintaining the illusion that seriously mentally ill offenders are more culpable than many juvenile or mentally retarded offenders is an offense to justice, fairness and due process as well as the Eighth Amendment.

In *Roper*, the United States Supreme Court adopted a categorical prohibition against executing people under eighteen:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

Roper, 543 U.S. at 572-73.

The holdings in *Atkins* and *Roper* compel the conclusion

that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of those who suffer from serious mental illness.[39]

(2) Penological Purpose

The Court in *Atkins* identified retribution and deterrence as the two key penological purposes of the death penalty. 536 U.S. at 319. The Court then noted that unless the death penalty for those who are mentally retarded "measurably contributes to

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[39] *See Corcoran v. Indiana*, 774 N.E.2d 495, 502 (Rucker, J., dissenting) ("[T]he underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency."). *See also* Christopher Slobogin, *The Death Penalty and Mental Illness: Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 Cath. U. L. Rev. 1133, 1136-37 (2005) ("People with significant mental disorder at the time of the offense may often be culpable enough to deserve conviction for murder, but they are never as culpable as the consummately evil killer envisioned by the Supreme Court's death penalty jurisprudence"); Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. Rev. 349, 367-68 (2003) (The *Atkins* decision itself provides ample jurisprudential justification, mutatis mutandis, for the exclusion of juveniles and the mentally ill as well as the mentally retarded from capital prosecution."); Douglas Mossman, *Atkins v. Virginia, A Psychiatric Can of Worms*, 33 N.M. L. Rev. 255, 289 (2003) ("Increased knowledge about the biological underpinnings of mental illness may well help convince courts that sufferers of several mental disorders deserve the same constitutional protections that *Atkins* confers upon defendants with mental retardation."); John Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. Rev. 93 (2003); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293 (2003) (there is no rational basis for distinguishing the severely mentally ill and the mentally retarded).

one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)). The Court highlighted that for retribution, "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.*

Focusing on deterrence, the Court again focused on the problem with applying the same standards to those who are mentally retarded versus those who are not.

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable -- for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses -- that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320.

For offenders with a serious mental disease or defect like appellant, his cognitive and behavioral impairments are no less severe than someone with an IQ of 69, nor is he in any better position to learn from mistakes, process information correctly, control his impulses, or learn from the reactions of others.

Defendants who at the time of their offenses suffer from severe mental illness will not be deterred from committing their offenses by the threat of capital punishment. "The characteristic symptoms of schizophrenia," for example, "involve a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring . . . volition and drive, and attention." DSM-IV-TR at 299. As a result of these dysfunctions, schizophrenics often hold bizarre beliefs and make decisions based on distorted perceptions of reality. *Id.* As Justice Powell noted, "[T]he death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)).

A similar analysis was conducted by the Court in *Roper* with respect to juvenile offenders. The Court focused on retribution and deterrence. With respect to the former, the Court found that "[R]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Regarding deterrence, the Court found that the likelihood that a juvenile offender performed a "cost-benefit analysis that attaches any weight to

the possibility of execution" to be "so remote as to be virtually nonexistent." *Id.* at 572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

As with mentally retarded offenders, there is little chance that an offender such as appellant with a serious reality altering mental disease like Schizophrenia is going to have more culpability, or be more able to perform a cost-benefit analysis with a view towards possible execution than a juvenile at the age of 16 or 17 years old.

(3) Evolving Standards of Decency

Under the Eighth Amendment, death is an excessive penalty for a crime when it is contrary to "contemporary values" - that is, the "evolving standards of decency that mark the progress of a maturing society." *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989) (quoting *Trap v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), abrogated by *Atkins v. Virginia,* 536 U.S. 304 (2002)). The "evolving standard," the Court stated in *Atkins*, "should be informed by 'objective factors' to the maximum possible extent," including the actions of legislatures, juries and prosecutors, but "in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 311-12 (citing, *inter alia, Coker v. Georgia*, 433 U.S. 584, 597 (1977)). Furthermore, in *Atkins*, the

Court again recognized that social and professional opinions must play a significant role in defining the evolving standards of decency that mark the progress of a maturing society. *Id.* at 2249 n.21. The Court looked to the opinions of social and professional organizations with "germane expertise," the opposition to the practice by "widely diverse religious communities," international practice, and polling data, in determining that death is a disproportionate punishment for the mentally retarded. *Id.*

In *Roper*, the Court looked to international opinion, finding that "[T]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." 543 U.S. at 578. "[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty." *Id.* at 577. In rejecting juvenile executions, the Court stated: "[I]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.* at 578.

Many of the factors considered by the Court in *Atkins* point directly to a conclusion that death is disproportionate for

mentally ill defendants.[40] As in *Atkins*, professional organizations with relevant expertise are overwhelmingly opposed to the execution of the mentally ill. The American Bar Association supports a categorical exemption of the severely mental ill from capital punishment:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

Death Penalty and Mental Illness: Recommendations of the American Bar Association Section of Individual Rights and

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[40] *See* Conn. Gen. Stat. § 53(a)-46(a) (exempting a capital defendant from execution if "his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution"); *see also* N.C. House Bill 553 (prohibiting execution of offenders with severe mental disability (currently tabled pending study)). *See also New Jersey v. Nelson*, 803 A.2d 1, 42-44 (N.J. 2002) (Zazzali, J., concurring) ("An examination of *jury verdicts* in New Jersey capital sentencing trials . . . shows that attitudes toward those with mental illness or defects are evolving, with a growing reluctance to execute those whose mental disease or defect or intoxication contributes to their difficulty in reasoning about that they are doing . . . . Notably, *prosecutors* have sought the death penalty at a significantly decreased rate for defendants who present evidence" of mental defects or illnesses; these trends "suggest an evolving aversion in our community to subjecting defendants with mental disease or defects to execution") (emphasis added).

Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115, 1115 (2005). (*ABA Task Force Recommendations*).

The ABA Task Force Recommendations have been adopted by the National Alliance on Mental Illness (NAMI),[41] The National Mental Health Association (NMHA),[42] and the American Psychiatric Association,[43] and were approved by the ABA House of Delegates on 8 August 2006. *ABA Task Force Recommendations.*

According to the former president of the American Psychiatric Association, Dr. Alan A. Stone,

> From a biopsychosocial perspective, primary mental retardation and significant Axis I disorders [such as schizophrenia] have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens' words, 'do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.' 'Evolving standards of decency'

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[41] *See* Public Policy Committee of the Board of Directors and the NAMI Department of Public Policy and Legal Affairs, *Public Policy Platform of the National Alliance on Mental Illness*, § 10.9.1 at 56, (8th ed. May 2008), *available at* http://www.nami.org/TextTemplate.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=45722 (last visited Mar. 23, 2009).

[42] *See* Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illness*, Mental Health America, *available at* http://www.mentalhealthamerica.net/go/position-statements/54 (last visited Mar. 23, 2009).

[43] *See Report of the Task Force on Mental Disability and the Death Penalty*, para. 2, available at http://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf (This Task Force also included the American Psychological Association, and the American Bar Association as well as NAMI and NMHA) (last visited Jan. 13 2010).

> mean many different things to different people. But an important part of our standards of decency derive from our scientific understanding of behavior. I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.

Alan Stone, *Supreme Court Decision Raises New Ethical Questions for Psychiatry*, Psychiatric Times.[44] (internal citations omitted.)

Furthermore, the Human Rights Committee of the United Nations interprets the International Covenant on Civil and Political Rights (ICCPR) as forbidding the execution of persons with severe mental illness. *See* William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Crim. L.F. 95, 100-01 (1993); *see also* International Covenant on Civil and Political Rights, art. 6.[45] The United Nations Commission on Human Rights has called upon all states that maintain the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person." *See The Question of the Death Penalty*, U.N. Commission on Human Rights Res.

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[44] Alan Stone, *Supreme Court Decision Raises New Ethical Questions for Psychiatry*, Psychiatric Times, Sep. 2002, Vol. XIX; Issue 9, *available at* http://www.psychiatrictimes.com/display/article/10168/47996; (last visited Mar. 23 2009).

[45] International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (last visited Mar. 23, 2009).

2005/59, para. 7(c).[46]

Thus, just as in *Atkins* and *Roper*, where international law and considered professional opinion weighed against the execution of persons with diminished culpability due to youth or mental retardation, international law and professional opinion strongly weighs against the execution of the severely mentally ill. *See* Anthony Bishop, *The Death Penalty in the United States: An International Human Rights Perspective*, 43 S. Tex. L. Rev. 1115, 1138-1139 (2002).

Additionally, as in *Atkins*, public polling makes clear that Americans overwhelmingly reject death as punishment for the mentally ill. According to a Gallup Poll[47] surveying 1,012 Americans on 6-9 May 2002, 75 percent of those surveyed opposed executing the mentally ill, while only 19 percent supported it. Such data constitutes objective evidence of how our society views executing the mentally ill and raises the same concerns as the two classes we have already removed from capital

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[46] *See* The Question of the Death Penalty, U.N. Commission on Human Rights Res. 2005/59, 7(c), UN. Doc. E/CNAIRES/2005/59 (Apr. 20, 2005), available at http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-human-rights-standards/page.do?id=1101089 (last visited Jan. 14, 2010); http://www.defenderstakethefloor.org/un-moratorium-on-death-penalty.html; http://www.defenderstakethefloor.org/un-moratorium-on-death-penalty.html.

[47] *See* http://www.pollingreport.com/crime.htm (last visited Mar. 23, 2009) (this was not much different from the 82 percent who opposed executing the mentally retarded and greater than the 69 percent who opposed executing juveniles).

consideration.

Finally, a panel may view severe mental illness not as a mitigating factor but as an aggravating factor. The Supreme Court in *Atkins* recognized that juries are poorly positioned to properly weigh the mitigating aspects of mental retardation. *Atkins*, 536 M.J. at 320-21 (mentally retarded persons have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" in part because they "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes").

Because of these concerns, relying on juries to weigh the mitigating value of mental illness is inadequate to protect the right of mentally-ill defendants to be free of cruel and unusual punishment. The Court's reasoning in *Atkins* and *Roper* that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation and youth equally applies to severe mental illness. There is an intolerable risk that capital juries will treat mental illness as an aggravator, in part because they incorrectly assume that mental illness significantly increases future dangerousness. As with juvenile offenders and the mentally retarded, only a categorical ban on executing offenders who were severely mentally ill at the time of the crime can adequately protect their constitutional

rights.

Accordingly, because appellant is seriously mentally ill, his sentence of death must be set aside or reduced to confinement for life.

Assignment of Error V.

SERGEANT AKBAR'S DEATH SENTENCE IS INVALID BECAUSE THE PANEL WAS MISINFORMED ABOUT HIS MENTAL CONDITION AT THE TIME OF THE OFFENSES.

Statement of Facts

Dr. George Woods was a clinical psychiatrist who testified at trial. Since appellant's court-martial, Dr. Woods provided three declarations, dated 15 July 2008, 29 July 2008, and 26 January 2010 that indicate Dr. Woods believes appellant was suffering from severe mental illness at the time of his offense and court-martial. (DAE B, C, AA; DA 1-6, 229-36.) In a memorandum for trial defense counsel, dated 28 February 2005, Dr. Woods recommended further evaluation and testing based upon his finding that appellant suffered from neurological arousal dysfunction. (DAE D; DA 7-14.) According to Dr. Woods, evidence of mental disease in appellant's family, particularly the family's history of schizophrenia, observations of appellant by family members, friends, and co-workers, and the life and circumstances of appellant's youth were all necessary for a mental health specialist to diagnose and assess mental illness. (DAE D, DAE AA; DA 7-14, 232-234.) The inadequate social history received by Dr. Woods before and during the trial proceedings impaired his exploration and presentation of SGT Akbar's profoundly severe symptoms. *Id.* at DA 232-234.

In addition to requesting social history information, Dr. Woods recommended the appropriate diagnostic tests be conducted, to include neuropsychological testing by an expert in mental disorders, a thorough evaluation of SGT Akbar's phase-delayed sleep disorder, and neuroimaging of the kind routinely conducted by the Brain Behavior Laboratory at the University of the Pennsylvania School of Medicine. (DAE C; DA 6.) This testing was never done, and thus Dr. Woods was never provided the essential information necessary to offer a fully advised expert opinion in this case. (DAE AA; DA 233.)

According to Dr. Woods, the trial defense counsel stopped substantively communicating with him roughly five months before trial, and never provided him with the results of the mitigation investigation upon which he normally relies in capital cases. (DAE B, AA; DA 1, 232.)

> For reasons unknown to me, defense counsel failed to communicate with me for five months prior to trial, failed to provide me relevant and necessary information related to the history of mental illness in Mr. Akbar's family, and failed to provide me with the results of the mitigation investigation that I normally rely upon in capital cases.

(DAE B; DA 3.) Approximately a month before trial, Dr. Woods expressed his concern that SGT Akbar's apparent sleep disorder, in combination with his psychotic thought process, made him unable to understand the nature of the proceedings against him

and to meaningfully assist in his defense. (DAE B, C, D; DA 4, 6, 7-14; *see also* AE XIII.)

In a 28 February 2005 Memo, Dr. Woods stated, "I was concerned that Mr. Akbar's sleep disorder in combination with his psychotic thought process made him unable to keep pace with courtroom proceedings, understand the nature of the courtroom proceedings against him, and aid and assist counsel meaningfully." (DAE B; DA 4.) Dr. Woods also found the Sanity Board's conclusions unreliable because the Board lacked relevant information. *Id.* Additionally, the Sanity Board, dated 2 June 2003, was held almost two years before trial and only slightly more than a month after the charged offenses occurred. (R. at Pros. Ex. 240.) Thus, no mitigation report and no background investigation were available to the Board. (R. at 2504.) The Sanity Board was not even aware that appellant had undergone psychiatric counseling at the age of fourteen. (R. at 2515.)

The results of an additional competency examination ordered on 30 March 2005 were delivered to trial defense counsel, but nothing indicates that this examination was relied upon in determining SGT Akbar's competency. (R. at App. Ex. 185.) In Dr. Woods' professional opinion, a complete and reliable mental status assessment was not conducted on SGT Akbar's behalf prior to trial. (DAE B; DA 4.) Surprisingly, Dr. Woods was not

called at trial on either sur-rebuttal or sentencing. (*See also* AE I: E.)

Doctor Woods also believes that further neuroimaging, such as Magnetic Resonance Imaging (MRI) and Positron Emission Tomography (PET) scans, are necessary to adequately diagnose SGT Akbar's mental illness. (DAE C; DA 6.) Both Dr. Woods and Dr. Clements believe further brain scans might establish that SGT Akbar's brain architecture is consistent with schizophrenia, but neither is professionally qualified to evaluate the test results or such scans. *Id.* However, Dr. Woods believes that appellant suffered from paranoid schizophrenia at the time of trial. *Id.* In Dr. Woods' opinion, an expert in schizophrenia must review the testing results, including brain scans, to corroborate a diagnosis of schizophrenia, but his suggestions were ignored by trial defense counsel. *Id.*

Dr. Woods also indicated concerns about SGT Akbar's sleep issues during trial. (DAE D; DA 7-14.) The military judge and counsel tried to keep SGT Akbar awake with coffee, frequent breaks, and even had a paralegal assigned to nudge him.[48] Doctor Woods found SGT Akbar's sleep issues indicative of neurological disorders to include psychosis. (R. at 677-86; DAE D; DA 8.)

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[48] The record is replete with discussions about SGT Akbar's sleep issues and appellant's inability to stay awake during his court-martial. (R. at 96-7, 180-91, 429, 487, 566, 610, 677-86, 695, 770, 774, 786.)

After reviewing the sleep studies done by the government, Dr. Woods recommended further testing with specific doctors he already had consulted because he believed SGT Akbar's problem staying awake was neurological. (DAE D; DA 7-14.) A month before trial, Dr. Woods warned defense counsel, "It's important to rectify what we are witnessing, which is a disruption of Sgt. Akbar's neurological arousal mechanism." *Id.* at DA 9. Doctor Woods opined that the beginning of the sleep issues at age nineteen suggested paranoid schizophrenia. *Id.* at DA 7. Doctor Woods provided various studies and medical notes linking sleep arousal problems and psychosis, specifically schizophrenia, and found schizophrenia indicated by testing and personal history. *Id.* According to Dr. Woods, "It is my professional opinion that there is no appropriate protocol or acceptable way to conclude a clinically effective evaluation and treatment of Sgt. Akbar's arousal condition by April 5, 2005." *Id.* at DA 14. Doctor Woods further explained, "These impairments clearly limit [SGT Akbar's] ability to concentrate, communicate, and attend." *Id.* Doctor Woods recommended specific sleep studies, neurological testing, documentation of any sleep arousal or mental illness of family members, and a clear examination of family dynamics. *Id.*

As previously discussed, two mitigation specialists, Ms. Scharlette Holdman and Ms. Scarlet Nerad, were part of the defense team from August 2004 until a couple months before

trial. (App. Ex. 140; DAE G, GG; DA 15-21, 331-41.) According to Ms. Holdman, the mitigation specialists accumulated information (contained in four boxes) that was never transmitted to the defense team because the defense team ceased all communications with the mitigation team. Thus, information was not provided to the medical experts, including Dr. Woods. *Id.* at 20. This evidence included documentation of psychiatric symptoms, evidence of a detailed social history investigation including familial history of mental illness and appellant's "chronic exposure to trauma", and a wide array of school, medical, psychiatric and other records for appellant and his family. *Id.* Ms. Nerad also detailed her discussions with Dr. Woods, noting:

> "his initial impression is that SGT Akbar suffers from a thought disorder and may carry a diagnosis of schizophrenia. Dr. Wood's diagnosis is preliminary, is not a diagnosis he holds to any degree of medical certainty, and may change depending on the results of the medical and social history and subsequent testing."

(R. at App. Ex. 140.)

Mr. James Lohman, also a mitigation specialist, met appellant on multiple occasions and observed "symptoms of extreme paranoia consistent with schizophrenia and/or overt psychosis", and appellant relayed to him "experiences and incidents that could have only been auditory or visual

hallucinations." (DAE GG; DA 334.) Mr. Lohman believed appellant was not competent to stand trial and communicated that concern, both orally and in writing, to defense counsel. *Id.* at 334-35. Mr. Lohman was informed in early 2005 that no funds were available to continue the mitigation investigation. *Id.* at 340. While he and his team urged defense counsel to request more funds, no funding request was made by defense counsel. *Id.*

Applicable Law and the Standard of Review

In death penalty cases, this Court must focus on "reliability of result."

> One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result. Thus, the *sine qua non* of *Gregg v. Georgia*, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976); *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); and *Lockhart v. Fretwell; Strickland v. Washington;* and *Ake v. Oklahoma*, all *supra*, is that the Supreme Court has insisted there be a proper functioning of the adversarial system. A fair reading of these cases demonstrates that, in order for the adversarial system to work properly, the key ingredients are competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries.

United States v. Murphy, 50 M.J. 4, 14 (C.A.A.F. 1998).

The *Murphy* Court found it important to "ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a 'reliable result,' are part of the equation." *Id.* In *United States v. Dock,* another capital case, this Court granted a new trial. "[I]s the appellate court convinced beyond a reasonable doubt that a different result would not obtain if the trier of fact had this new evidence before it? If it is not so convinced, the accused is entitled to present his evidence before a court-martial." *United States v. Dock*, 28 M.J. 117, 120 (C.M.A. 1989).

Error and Argument

Even though *Murphy* failed to timely file for a new trial or meet his due diligence requirement, the *Murphy* Court analyzed the case under the test[49] outlined in R.C.M. 1210 because "[T]here are too many questions . . . to allow us to affirm a death sentence here." *Murphy*, 50 M.J. at 15-18. In effect, the *Murphy* Court focused on reliability of result.

Appellant has timely petitioned for a new trial, but otherwise he is similarly situated. The panel was given mental health information based on a Sanity Board that had insufficient information. (R. at 2504, 2515.) Doctor Woods lacked

[49] "Whether the newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." *Murphy*, 50 M.J. at 14 (citing R.C.M. 1210(f)(2)(c)).

necessary background evidence. Upon learning of the quality and quantity of what he did not know at trial, Dr. Woods modified his diagnosis, finding appellant more seriously impaired. (DAE B, AA; DA 1-4, 229-36.) However, there is yet more significant mental health information to be discovered. (DAE J, LL; DA 28-32, 413-49.) Appellant has the same difficulty as that discussed in *Murphy*, because the missing information is due largely to ineffective assistance of counsel.[50] However, "reliability of result" is paramount in death penalty cases. *Murphy*, 50 M.J. at 14. This Court cannot be assured of such a reliable result given the partial and incomplete presentation of appellant's mental health issues. The panel convicted and sentenced appellant based upon an incomplete and flawed mental health examination and investigation. Thus, this Court cannot be convinced of the reliability of the result in appellant's case.

Reliability does not mean absolute certainty.[51] Doctor Woods has determined that appellant was Schizophrenic at the time of the offense and trial, as well as currently, based upon

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[50] Appellant has filed multiple assignments of error concerning ineffective assistance of counsel. *See* AE I: A-G, II.

[51] Appellant was initially denied requested expert assistance on motion to this Court to determine the impact of additional investigation, and no additional mental health testing was done, so appellant is unable to directly make a comparison. (Appellant has renewed his request for mental health expert assistance on appeal in AE XII.)

the quality and quantity of mental health information available to him now(primarily the family mental health history) which he did not have available at the time of his original diagnosis. (DAE AA; DA 230.) With the proper testing and investigation, Dr. Woods would have presented the panel with a significantly different diagnosis. *Id.* On the merits, a diagnosis as severe as Schizophrenia would have led Dr. Woods to present to the panel a diagnosis that appellant was not mentally responsible for his acts, and so the panel could have concluded that appellant was not guilty. Also, had the Sanity Board been conducted later in time, with access to complete testing and background information, the Board may have reached a more severe diagnosis. (DAE Z, AA; DA 225, 229-36.) Certainly on sentencing, changes to both the Sanity Board's and Dr. Wood's diagnoses could have led the panel to believe that a sentence other than death was appropriate. The panel was misinformed based on significantly incomplete and inaccurate information used by both the Sanity Board and Dr. Woods, and thus, appellant must receive a rehearing.

WHEREFORE, this Court should remand this case for a new trial.

Assignment of Error VI.

THE MILITARY JUDGED ERRED TO THE SUBSTANTIAL PREJUDICE OF SERGEANT AKBAR WHEN HE FAILED TO GRANT THE DEFENSE MOTION FOR A CHANGE OF VENUE.

On 30 March 2004, amidst unprecedented media coverage of an offense unique in recent military history, Sergeant Akbar's trial defense counsel filed a motion[52] to change the place of trial. (R. at App. Ex. 29.) In that motion, the trial defense counsel argued that the existence of pervasive pretrial publicity virtually foreclosed any chance for SGT Akbar to receive a fair and impartial trial at Fort Bragg, North Carolina. *Id.*

Rule for Courts-Martial 906(b)(11) provides that the place of a court-martial may be changed when necessary to prevent prejudice to the rights of the accused. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 2002. A change of the place of a trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair

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[52] The defense motion references Army Times articles "designed to sensationalize the incident" and that "contributed to a general atmosphere of hostility towards SGT Akbar. Some of the headlines, follow: 'Two die-and a [S]oldier stands accused Sergeant's alleged grenade attack shocks 101st ' (Army Times 7 April 2003); 'Fragging unheard-of since Vietnam War'(Army Times 30 June 2003); Enemy in the ranks? Court-Martial recommended for sergeant for alleged attacks on his own unit in Kuwait' (Army Times 30 June 2003); 'Will Akbar face death penalty?' (Army Times 1 September 2003); 'Accused fragger faces July trial' (Army Times 9 March 2004)". A further sampling of articles appearing in various news media were also admitted for the military judge to consider on the motion. *See* R. at Def. Ex. 102.

and impartial trial there. R.C.M. 906(b)(11), Discussion, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 2002. Prior to R.C.M. 906(b)(11), the then Court of Military Appeals held that an accused is *entitled* to a fair trial and, if the accused can demonstrate that the court would be adversely influenced by a *general atmosphere of hostility* or partiality against him existing at the place of trial, he would be entitled to be tried in some other place. *United States v. Gravitt*, 17 C.M.R. 249 (C.M.A. 1954)(emphasis added)(Air Force accused tried on Army base alleged trial occurred in "hostile territory".)

Specifically, the defense motion requested the court change the place of trial and employ four steps to ensure that SGT Akbar received a fair and impartial panel:

> a. Change the place of the trial to a military installation other than the Army.
>
> b. Obtain a panel from a branch of service other than the United States Army.
>
> c. Distribute the requested pre-trial questionnaire to prospective panel members and alternates to determine the level of exposure to the facts of the case.
>
> d. Impose a restriction on the release of information to the press by anyone in the United States Armed Forces or dealing with this case on behalf of the United States or SGT Akbar.

Id.

On 10 May 2004, counsel argued the motion before the military judge and the defense submitted additional pretrial publicity

documents to be considered by the military judge before ruling on the motion. (R. at 39-44, App. Ex. 102.) On 24 May 2004, the military judge denied the motion for change of venue. (R. at 460.) As a consequence of the military judge's decision, Sergeant Akbar was tried and sentenced to death by panel of jurors selected from a community unified by the shared trauma of those directly victimized by his offenses and subjected to a huge wave of public passion. *See United States v. McVeigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997)(The court changed the place of the trial from Oklahoma because "the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized."); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The Supreme Court has held that a refusal to grant a motion for a change of venue may constitute a violation of due process. *Brecheen v. Oklahoma*, 485 U.S. 909, 912 (1988)(*denying cert.*)(Marshall, J., dissenting)(*citing Groppi v. Wisconsin*, 400 U. S. 505 (1971); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(failure to ensure the impartiality of a jury violates even the minimal standards of due process)). In *Groppi v. Wisconsin*, the Court wrote:

> On at least one occasion this Court has explicitly held that *only* a change of venue was constitutionally sufficient to assure the kind of impartial jury that is guaranteed by the Fourteenth Amendment. That was in the case of *Rideau v. Louisiana*, 373 U.S. 723. We held that "it was a denial

> of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth" to the prejudicial pretrial publicity there involved. [Citation omitted.] *Rideau* was not decided until 1963, but its message echoes more than 200 years of human experience in the endless quest for the fair administration of criminal justice.

400 U.S. 505, 510-511 (1971). The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." U.S. Const. amend. VI. *See also Chenoweth v. Van Arsdall*, 46 C.M.R. 183, 185 (C.M.A. 1973)(Constitutional requirement that the trial be held in the state and district wherein the crime was committed is inapplicable to military tribunals.)

The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155 (1878)(citing Chief Justice Marshall in 1 Burr's Trial 416 (1807)("[Light] impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and

deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him.")). The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(*citing In re Oliver*, 333 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)). "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). *See also Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Chandler v. Florida*, 449 U.S. 560 (1981); *Wainwright v. Witt*, 469 U.S. 412 (1985). *See also United States v. Curtis*, 44 M.J. 106, 139 (1996).

Although the Sixth Amendment may have "limited applicability" to military courts-martial, a servicemember does have, as a matter of fundamental fairness and Fifth Amendment due process, the right to impartial court members. *See United States v. Elfayoumi*, 66 M.J. 354, 356 (C.A.A.F. 2008); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(citations omitted). "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(citing *United States v. Mack*, 41 MJ 51, 54 (CMA 1994); R.C.M. 912(f)(1)(N), MCM (2002 ed.); *see also United*

States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004); Art. 25, UCMJ. Indeed, "'[i]mpartial court-members are a *sine qua non* for a fair court-martial.'" *Wiesen*, 56 M.J. at 174 (citing *United States v. Modesto*, 43 MJ 315, 318 (1995).

In *Chandler v. Florida*, the Supreme Court held, "Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial." *Chandler v. Florida*, 449 U.S. 560, 574 (1981). The basic theory underlying the right to an impartial jury is that the conclusions of the jurors should be based upon the evidence presented in trial and not upon any prejudgment which may occur as a result of pretrial publicity. *United States v. Curtis*, 44 M.J. 106, 139 (1996)(*citing Reynolds v. United States*, 98 U.S. 145, 154-57 (1878). Wherever circumstances are prevalent which "undermine the fairness of the fact finding process" by allowing the influence of prejudgment to dilute "the principle that guilt is to be established by probative evidence and beyond a reasonable doubt . . . the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *See United States v. Curtis*, 44 M.J. 106, 139 (1996)(*citing Estelle v. Williams*, 425 U.S. 501, 503-504 (1976)).

The right to a trial by an impartial jury is exceptionally critical in capital cases. "The Court, as well as the separate

opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998–99 (1983). The Supreme Court has also struck down capital sentences when it found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'" *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985)(O'Connor J., concurring in part and concurring in judgment)(citation omitted). In sum, the state must assure reliability in the process by which a person's life is taken. *See Gregg v. Georgia*, 428 U.S. 153, 198, 196–206 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Beck v. Alabama*, 447 U.S. 625 (1980); *Turner v. Murray*, 476 U.S. 28 (1986); *Penry v. Lynaugh*, 492 U.S. 302 (1989).

The Constitution requires that when the government seeks to exact upon a defendant the ultimate penalty of death, "the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892); *Irvin v. Dowd*, 366 U.S. at 728; *Aldridge v. United States*, 283 U.S. 308, 314 (1931)

(risk in denying adequate voir dire is "most grave when the issue is of life or death"). Compared to jurors in non-capital cases, who must weigh evidence against an exacting standard of proof, the juror in a capital sentencing proceeding faces a uniquely different task. A capital sentencing juror's task is inherently subjective as that juror must make a moral judgment and acts as the conscience of the community. *See California v. Brown*, 479 U.S. 538, 542 (1987)(O'Connor, J., concurring); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

In a capital case, the function of the sentencing authority is to decide the "ultimate question of life or death," and when a jury is composed of people who are familiar with the consequences of a defendant's crime, it cannot perform this function in an impartial manner. *Brecheen v. Oklahoma*, 485 U.S. 909, 912 (1988)(*cert. denied*)(Marshall, J., dissenting)(*quoting Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)). Trial court judges must therefore protect against the chance that a juror will substitute "public passion" for an impartial judgment. The uniqueness and finality of capital punishment motivated, in part, the trial judge in *McVeigh* to change the location of the trial in that highly publicized capital to another state. The trial judge in *McVeigh* wrote:

> Because the penalty of death is by its very nature different from all other punishments in that it is final and irrevocable, the issue of prejudice raised by the present [change of venue] motions must include consideration of whether there is a showing of a predilection toward that penalty. Most interesting in this regard is the frequency of the opinions expressed in recent televised interviews of citizens of Oklahoma emphasizing the importance of assuring certainty in a verdict of guilty with an evident implication that upon such a verdict death is the appropriate punishment.

United States v. McVeigh, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996).

When the United States Supreme Court vacated the conviction and death sentence in *Irwin v. Dowd*, the Court wrote, "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961)(*citing Stroble v. California*, 343 U.S. 181 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951)(concurring opinion); *Moore v. Dempsey*, 261 U.S. 86 (1923)). This result is consistent with the Court's later principle that a sentence of death may not be the product of passion. *See Gregg v. Georgia*, 428 U.S. 153, 166-167 (1979). No one may be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." *Sheppard v.*

Maxwell, 384 U.S. 333, 350 (1966)(*quoting Chambers v. Florida*, 309 U.S. 227, 236-237 (1940)).

An accused seeking to establish such a due process violation resulting from a trial judge's refusal to change the venue of a criminal trial must demonstrate either that his trial resulted in "identifiable prejudice" or that it gave rise to a presumption of prejudice because it involved "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Brecheen v. Oklahoma*, 485 U.S. 909, 912 (1988)(*cert. denied*)(Marshall, J., dissenting) (*quoting Estes v. Texas*, 381 U. S. 532, 542-543 (1965)).

In *United States v. Calley*, this Court recognized that the probability of prejudice in highly publicized criminal cases may present a concern in certain instances. The Court wrote:

> [The United States] Supreme Court decisions in the last decade have also expressed a view that actual prejudice on the part of a jury need not be shown in certain egregious instances. *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Rideau v Louisiana*, 373 U.S. 723 (1963).

United States v. Calley, 46 C.M.R. 1131, 1143 (A.C.M.R. 1973). Additionally, the Supreme Court has stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But [the American]

> system of law has always endeavored to *prevent even the probability of unfairness.*

In re Murchison, 349 U.S. 133, 136 (1954)(emphasis added).

In *Brecheen v. Oklahoma*, Justice Marshall observed:

> Most states have followed the well-trod course of granting motions for venue change when the totality of the circumstances establish "a reasonable likelihood that in the absence of such relief, a fair trial cannot be had." *Martinez v. Superior Court*, 629 P.2d 502, 503 (1981)(*quoting Maine v. Superior Court*, 438 P.2d 372, 377 (1968)). The *Martinez* court defined "reasonable likelihood" as a lesser standard of proof than "more probable than not." *Martinez v. Superior Court, supra*, at 578, 629 P.2d 503. *See also People v. Gendron*, 243 N.E.2d 208 (1968) (adopting "reasonable likelihood" standard), *cert. denied*, 396 U.S. 889 (1969); *State v. Cuevas*, 288 N.W.2d 525 (Iowa 1980); *State v. Beier*, 263 N.W.2d 622 (Minn. 1978).

Brecheen v. Oklahoma, 485 U.S. 909, 911 (1988)(*cert. denied*)(Marshall, J., dissenting). A probability of prejudice may come about where a community has been unified as a consequence of publicity generated by a criminal case or been unified by the trauma caused by certain offenses. *See Estes v. Texas*, 381 U.S. 532, 536 (1965); *United States v. McVeigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997). It is this latter concept upon which the trial defense counsel based the defense motion for a change of venue of Sergeant Akbar's capital court-martial. (*See* R. at App. Ex. 23.)

Pretrial publicity can create an insurmountable obstacle for the defendant in a criminal case for it may well set the community opinion as to guilt or innocence. *Estes v. Texas*, 381 U.S. 532, 536 (1965). As a consequence, a "pattern of deep and bitter prejudice" may exist in a community. *See Irvin v. Dowd*, 366 U.S. 717, 727 (1961); *cf. Stroble v. California*, 343 U.S. 181 (1952). In extremely rare occasions, the converse may be true. In *United States v. Calley*, this court found:

> Significantly, there was no showing at trial and no serious contention on appeal of any widespread and intense community prejudice against the appellant at the situs of his court-martial, Fort Benning, Georgia. In fact, there were indications that the climate there was somewhat favorable to Lieutenant Calley.

United States v. Calley, 46 C.M.R. 1131, 1146 (A.C.M.R. 1973). However, in that case Lieutenant Calley was tried at Fort Benning, Georgia, not at My Lai, The Republic of South Vietnam. It is not likely that the "climate" would have been as favorable to Lieutenant Calley if his court-martial had been convened at My Lai and the panel members drawn from that community. In some cases, deep and bitter prejudice may unite an entire community to the point where no impartial jury, let alone what *appears* to be an impartial jury, can be seated. *See McVeigh*, 955 F. Supp. at 1282. Where an accused can demonstrate that the court would be adversely influenced by an atmosphere of hostility or

partiality against him at the place of trial, he is entitled to be tried in a different place. *United States v. Loving*, 34 M.J. 956, 964 (A.C.M.R. 1992)(citing *United States v. Nivens*, 45 C.M.R. 194, 197 (C.M.A. 1972)), *aff'd* 41 M.J. 213, 254 (1994).

In *McVeigh*, the trial court changed the venue of the trial from Oklahoma to Colorado because "the entire state had become a unified community, sharing the emotional trauma of those who had been directly victimized." *United States v. McVeigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997). The trial judge in the *McVeigh* case made an observation which is both extremely poignant and highly relevant to this case and the 82d Airborne Division and the XVIIIth Airborne Corps, the judge observed that:

> Pride is defined as satisfaction in an achievement, and the people of Oklahoma are well deserving of it. But it is easy for those feeling pride to develop a prejudice, defined as "(a) an adverse judgment or opinion formed beforehand or without knowledge or examination of the facts and (b) a preconceived preference or idea." The American Heritage Dictionary of the English Language (3d ed. 1992). The existence of such a prejudice is difficult to prove. Indeed it may go unrecognized in those who are affected by it. The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it

> generates strong emotional responses and fits into a pattern of normative values.

Id. at 1472.

In those cases in which the atmosphere or the process undermines the fairness of the trial or of the tribunal, the specific mischief cannot be identified or proved with particularity, but prejudice to the accused may be presumed. *See Estes v. Texas*, 381 U.S. 532, 536 (1965)(discussing *Tumey v. Ohio*, 273 U.S. 510 (1926); *In re Murchison*, 349 U.S. 133(1954); *Rideau v Louisiana*, 373 U.S. 723 (1963)). Therefore, in deciding whether such a presumption of prejudice is warranted, appellate courts must examine "*any* indications in the totality of circumstances that petitioner's trial was not fundamentally fair." *Brecheen v. Oklahoma*, 485 U.S. 909, 912 (1988)(*cert. denied*)(Marshall, J., dissenting) (*quoting Murphy v. Florida*, 421 U. S. 794, 799 (1975)(emphasis added)).

The ability to secure an impartial jury is usually determined through the *voir dire* process. *See Estes v. Texas*, 381 U.S. 532, 536 (1965). Certainly, in cases of actual prejudice from adverse pretrial publicity, this would be true providing this issue was explored in depth during voir dire and also providing the veniremen responded honestly. In a case such as Sergeant Akbar's, the court must recognize that prejudice against the accused must be presumed and that the veniremen

should not be placed in a position where they would be reasonably torn between their loyalty to the unit, community, and victims and their duty as jurors.[53] In many cases, properly motivated and carefully instructed jurors can and have exercised the discipline to disregard extensive pretrial publicity and prior public awareness of the offenses of an accused and impact of those offenses. *See McVeigh*, 918 F. Supp. at 1473. However:

> Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.

McVeigh, 918 F. Supp. at 1473. While recognizing the uniqueness of Timothy McVeigh's offenses, the statement made by one of the defense counsel of a co-accused is appropriate in Sergeant Akbar's case:

> "It is too much to ask [potential jurors] to stand with their hand in the air and the other hand on the Bible and say, 'I believe Terry Nichols is innocent as he stands there.' That is a burden I don't think we can rationally expect."

Diana Baldwin, *Nichols Attorney Repeats Appeal for Venue Change*, The Daily Oklahoman, Oct. 19, 1995, at 12. (Public statement

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[53] Additionally, as argued in Assignments of Error I: C, the voir dire and challenges of the members of the panel was deficient.

about change of venue by attorney representing Terry Nichols.) Likewise, the United States Supreme Court observed that "adverse pretrial publicity can create such a *presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.*" *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)(emphasis added)(commenting on *Irvin v. Dowd*, 366 U.S. 717 (1961))(quoted by Kennedy, J., dissenting, *Mu'min v. Virginia*, 500 U.S. 415, 449 (1991)); *see also United States v. Gray*, 51 M.J. 1, 28 (C.A.A.F. 1991).

In *Irvin v. Dowd*, the Supreme Court recognized that the difficulty is that the impact of the quantity and character of pretrial publicity is so patently profound that the juror's personal belief in his impartiality is not sufficient to overcome the likelihood of bias. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). *See also United States v. Deain*, 17 C.M.R. 44 (C.M.A. 1954). Therefore, the task of an appellate court is not merely to ascertain the extent of the widespread publicity adverse to the accused, but to judge whether it was of a kind that inevitably influenced the court members against the accused, irrespective of their good-faith disclaimers that they could, and would, determine his guilt from the evidence presented to them in open court, fairly and impartially. *See Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971).

To support the motion for the change of venue the defense provided newspaper excerpts to the military judge. (R. at 39-44, App. Ex. 102.) Furthermore, the defense argued that because it was before combat operations were to begin, and given it was an Army Sergeant allegedly attacking others in his own unit, there was a heightened risk that the panel members would feel the need to send a message because "it goes directly to the heart of the Army Values we hold." (R. at 39-40.) The Army Times, a publication frequently read by military members, printed several articles that sensationalized the incident. (R. at App. Ex. 21.) With catchy headlines featuring issues of murder, or an enemy in the ranks, and memories of prior wars, the Army Times succeeded in its goal to grab and elicit emotional responses from its readers.[54] *Id.* The Army Times also published articles that discussed possible motives for SGT Akbar's offense, and potential defense strategies. In the "Will Akbar face the death penalty?", 1 September 2003, the Army Times quoted a civilian attorney specializing in military law,

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[54] Some of the headlines include: 'Two die-and a [S]oldier stands accused Sergeant's alleged grenade attack shocks 101st '(Army Times 7 April 2003); 'Fragging unheard-of since Vietnam War'(Army Times 30 June 2003); Enemy in the ranks? Court-Martial recommended for sergeant for alleged attacks on his own unit in Kuwait' (Army Times 30 June 2003); 'Will Akbar face death penalty?' (Army Times 1 September 2003); 'Accused fragger faces July trial' (Army Times 9 March 2004)". (R. at App. Ex. 21; *see also* R. at App. Ex. 102.)

> If it was my case, which it is not, I would not be worried that the [panel] would impose death because [Akbar] is black. . . [where the alleged crimes took place] in a combat zone, targeting American fighting men in leadership positions, doing their job overseas. . . he could be blond and blue-eyed, and I think the death penalty would likely be imposed under those circumstance.

(R. at App. Ex. 21.) In the article "Enemy in the ranks?" 30 June 2002 article, the Army Times quoted a Soldier saying that SGT Akbar called him to ask, "When we go to Iraq, will we really kill and rape Iraqis and stuff like that?" *Id.* The New York Times printed an article in which SGT Akbar was quoted as saying "You guys are coming into our countries and you're going to rape our women and kill our children." Under these circumstances, it is unreasonable to expect panel members to disregard these kinds of articles. A military community is a closely connected and proud community of individuals; it is "a specialized society separate from civilian society." *Parker v. Levy,* 417 U.S. 733, 743 (1974). Because this crime was committed by a Soldier against other Soldiers, in a combat zone, there can be little doubt that military members and their families are particularly aware of this case.

In a highly publicized case such as Sergeant Akbar's, all of the concerns of the Supreme Court in *Estes v. Texas,* 381 U.S. 532, 544-550 (1965), were realized. In *Estes*, the United States Supreme Court reversed a conviction when the accused's trial was

the object of intense pretrial publicity and was broadcast on television. The Court was concerned that when a case becomes the object of extensive media coverage, "the whole community, including prospective jurors, become interested in all the morbid details" of the case and the jurors, "knowing that friends and neighbors have their eyes upon them," will feel the pressures of the hostile community to return a verdict of guilty against the accused. It was, therefore, imperative that the military judge in this case grant the defense motion for a change of venue. If not to preserve some element of justice, then to interject at least an appearance of justice, the military judge should have granted the motion for a change of venue. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.). This couldn't be more important in appellant's case because the panel members were aware that the entire Army was watching.

The trial judge has a major responsibility to mitigate the effects of pretrial publicity. *United States v. Curtis*, 44 M.J. 106, 139 (1996)(*quoting Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-555 (1976)). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed

against the accused." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). However, despite the motion for appropriate relief from the trial defense counsel, the military judge failed to recognize the presumption of prejudice of trying Sergeant Akbar at Fort Bragg and the military judge, therefore, failed take the "strong measures" necessary to ensure a fair and impartial jury for Sergeant Akbar. *See Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

In cases surrounded by intensive publicity, the United States Supreme Court has placed an "affirmative constitutional duty" on trial judges to take whatever steps are necessary to eliminate the effects of the publicity on the defendant's right to a fair and impartial jury. *Gannett Co. v. De Pasquale*, 443 U.S. 368, 378 (1979); *see also Chandler v. Florida*, 449 U.S. 560, 574 (1981)(when publicity is intense, "[t]rial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and relevant law"); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 555 (1976)("the trial judge has a major responsibility" to mitigate the effects of adverse pretrial publicity); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, trial courts must take strong measures to ensure that

the balance is never weighed against the accused"); *Frazier v. United States*, 335 U.S. 497, 511 (1948); *see also Frank v. Mangum*, 237 U.S. 309 (1915)("[A]ny judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.")(Holmes, J. dissenting).

On 30 March 2004, the military judge issued an order to prospective court members "to avoid reading certain matters." (R. at 30, App. Exhibit 2.)[55] This order was apparently published on 30 March 2004, and served on the prospective panel members either that same day or as late as 4 April 2004. (R. at App. Exhibit 2, 3.) Therefore, potential panel members at Fort Bragg had over a year to absorb the information sensationalized by the media. The fact that the case was transferred from the 101st Airborne Division to XVIII Airborne Corps in no way mitigated the prejudice SGT Akbar was facing by being tried in the airborne community located at Fort Bragg.[56] The military judge should have recognized that there is still a presumption of prejudice in trying Sergeant Akbar at Fort Bragg because they are the same deploying airborne Soldiers found at the 101st

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[55] During an Article 39(a), U.C.M.J., session held on 10 May 2004, the military judge stated, "I did provide at the request of the government without objection by defense, an order to court members to avoid reading certain matters." (R. at 30.)
[56] The case was transferred from the 101st Airborne Division to XVIII Airborne Corps on 15 July 2003.

Airborne Division. The XVIII Airborne Corps is higher headquarters for the 101st Airborne Division and the 82nd Airborne Division, therefore the case was merely pulled up to a higher headquarters within the same elite command. This transfer of jurisdiction is therefore not the "strong measures" necessary to ensure a fair and impartial jury for Sergeant Akbar. Moreover, there is no need to speculate in this case whether the panel members were affected by the pretrial publicity because it was clearly uncovered during *voir dire* that panel members were not only aware of the media coverage they were also effected by it.[57] *See* AE I: C, and VIX.[58]

During an Article 39(a), U.C.M.J., session, the military judge denied the defense motion for change of venue, concluding,

> . . . pretrial publicity in this case is not prejudicial, inflammatory, and has not saturated the community. The news reports are not sensational. Fort Bragg is thousands of miles away from Fort Campbell, the home of the 101st Airborne Division, the unit to which the accused and the victims were assigned in March of 2003. There is simply no evidence that the accused will be unable to receive a fair and impartial trial here at Fort Bragg.

(R. at 460.)

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[57] For example, SFC Joseph Cascasan stated that based on the press reports that he saw, he believed "he [appellant] must be guilty." (R. at 1138.)

[58] Appellant additionally asserts that defense counsel were ineffective by not objecting to these members sitting on the basis of their knowledge of the media coverage, even after the court order was in place. *See* AE I: C.

These comments by the military judge about Fort Bragg being thousands of miles away from Fort Campbell was not only an indication that the military judge had a poor sense of geography, but also was a clear indication that he was only analyzing the potential venue from an actual prejudice perspective and completely disregarded the possibility of a "hostile environment" within the Fort Bragg military community which would result in the presumption of prejudice. *See United States v. Gravitt*, 17 C.M.R. 249 (C.M.A. 1954); *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992) (citing *United States v. Nivens*, 45 C.M.R. 194 (C.M.A. 1972)), *aff'd* 41 M.J. 213, 254 (1994); *see also United States v. McVeigh*, 955 F. Supp. 1281 (D. Colo. 1997). This disregard for the entire body of law which mandates a change of venue when the environment is so hostile as to deprive an accused of the due process of law was a prejudicial abuse of discretion by the military judge. The judge also erroneously disregarded the close knit nature of the Army community and in particular the interconnectedness of the XVIII Airborne Corps.

There was no possible way Sergeant Akbar could have received a fair trial by an impartial panel at Fort Bragg. As the extensive pretrial publicity repeatedly emphasized, Sergeant Akbar was an enemy in the ranks. The trial court failed to

prevent the probability of unfairness and certainly did little to secure the appearance of justice. In this case, neither justice, nor the appearance of justice was satisfied by the military judge's denial of the venue motion. *See Offutt v. United States*, 348 U.S. 11, 14 (1954)(Frankfurter, J.).

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings of guilty to the contested offenses and set aside the sentence to death in this case.

Assignment of Error VII.

THE MILITARY JUDGE ERRED IN NOT SUPPRESSING THE STATEMENT "YES" BY APPELLANT TO MAJOR [redacted] WHEN THAT STATEMENT WAS GIVEN WHILE APPELLANT WAS AT GUNPOINT AND IN CUSTODY AND APPELLANT WAS NOT GIVEN RIGHTS WARNINGS UNDER EITHER MIRANDA V. ARIZONA OR ARTICLE 31(b) OF THE UNIFORM CODE OF MILITARY JUSTICE.

Statement of Facts

On 22 March 2003, Major (MAJ) [redacted] was the S-2 for 1st Brigade, 101st Airborne Division. (R. at 1644.) He was working in the brigade headquarters tent during the night of the alleged attack by appellant. (R. at 1645.) Following the explosions, MAJ [redacted] set about insuring that the perimeter and internal security was established, including securing two Kuwaiti interpreters. (R. at 1647-1671.) After assisting in securing the area, MAJ [redacted] reported to the brigade commander, Colonel (COL) [redacted] (R. at 1678.) Colonel [redacted] the attacker "may have been one of their own." *Id.* Colonel [redacted] further informed MAJ [redacted] that "2d Battalion is missing an engineer soldier. His name is Sergeant Akbar." (R. at [redacted] informed MAJ [redacted] that some ammunition was missing. *Id.* Armed with the information that both appellant and ammunition were missing, MAJ [redacted] continued to establish security while also disseminating appellant's name in such a way as to not cause appellant to launch a "final-ditch

attack." (R. at 1680.) Major [redacted] proceeded to a bunker of Soldiers to address security issues and stumbled upon appellant. (R. at 1686.)

After identifying appellant, MAJ [redacted] took appellant down from behind and secured him face-down on the ground, at gunpoint, telling him "not to fucking move." (R. at 1688.) Major [redacted] then identified himself to the other Soldiers in the bunker and directed one of them to guard appellant. (R. at 264.) Major [redacted] positioned appellant spread-eagle on the ground. (R. at 1689.) With appellant thus secured, with a weapon pointed at appellant, MAJ [redacted] knelt down and asked appellant "[D]id you do this? Did you bomb the tent?" Appellant replied "yes." (R. at 1690.)

Sergeant First Class (SFC) Butler, along with SFC Burns, came upon MAJ [redacted] as he was subduing appellant. (R. at App. Ex. 99.) Sergeant First Class Butler pointed his weapon at appellant and heard MAJ [redacted] ask appellant, "SGT Akbar, you can make this process easy on yourself. Did you commit this act?" Appellant responded, "Roger that Sir, I did." *Id.* Major [redacted] did not ask any questions concerning possible accomplices or co-conspirators. After this exchange, MAJ [redacted] told appellant, "[D]o not move. If you move, he will shoot you in the head." (R. at 266.) Major [redacted] did not read appellant his

Article 31(b) rights or give the required warning under *Miranda*. (R. at App. Ex. 116, para. 1(c).)

Trial defense counsel moved to suppress appellant's response of "yes" to MAJ [redacted] questions, along with statements made to two other soldiers. (R. at App. Ex. 85.) Counsel raised both the issue of lack of warnings required by Article 31(b), UCMJ, and the voluntariness of appellant's confession "due to the fact that weapons were being pointed at him." (*Id.* at para. 6.) The Government, in response, argued that appellant's statement "yes," was allowed without rights warnings because of the public safety exception outlined in *New York v. Quarles*, 467 U.S. 649 (1984). (R. at App. Ex. 86 at 15-16.)

The first motion was litigated before COL Patrick Parrish. (R. at 233.) At the hearing, MAJ [redacted] testified that appellant was the only suspect he apprehended. (R. at 253-54.) After hearing testimony and argument, the military judge denied the motion in part. (R. at App. Ex. 116.) In his ruling, the military judge found that MAJ [redacted] did not ask appellant about any weapons and did not ask who else might have been involved in the attacks. *Id.* at para. 1(c)-(e). He found that after asking appellant if he bombed the tent, he did not ask any further questions. *Id.* He also noted that many soldiers were in the area "cursing" appellant, including SFC Butler and SFC Burns,

before Chief Warrant Officer 2 (CW2) Pryor arrived on the scene to read appellant his rights. *Id.* The military judge found that MAJ [redacted] had a "real and unquestionable urgency to determine who was involved in the attack." *Id.* at para. 3(a). He ruled that MAJ [redacted] was acting not in a law enforcement or disciplinary capacity, but simply acting with a view towards his "operational responsibilities to help protect the brigade combat team." *Id.* The military judge ruled that, in any event, the "public safety exception" applied to this case. *Id.* at para. 3(b). He further ruled that because appellant was not "mistreated" or "threatened" with a weapon, that his statement "yes" to MAJ [redacted] was not involuntary. *Id.* at para. 3(d). He also found that appellant's statements to SFC Burns and SFC Butler admissible. *Id.* at para. 3(c).

Upon taking the bench in appellant's case, COL Steven Henley reconsidered the defense motions, but sustained the previous judge's ruling regarding appellant's statement to MAJ [redacted] and suppressed the statements made to SFC Burns and SFC Butler. (R. at 463, 467, 471, 640-41; R. at App. Ex. 121.)

Applicable Law and the Standard of Review

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed

de novo. *Id.* (citing *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002)). As the military judge's determination that a statement is voluntary is a question of law, it requires an independent, *de novo* review by this Court. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)).[59]

Error and Argument

"A statement is 'involuntary' if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3). The necessary inquiry in determining the voluntariness of a statement is "whether the confession is the product of an essentially free and unconstrained choice by its maker." *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996) (citing *Culombe v. Connecticut*, 367 U.S. 568 (1961)). If, instead, the maker's will was overborne and his capacity for self-determination was critically impaired, use of his confession would offend due process." *Id.* This requires an assessment of

[59] "I do not believe 'abuse of discretion' adequately captures the full breadth of the legal review required of this Court on [suppression-motion appeals]. . . . On resolution of the legal questions raised in a suppression motion, we do not defer to a military judge's discretion." *United States v. Payne*, 47 M.J. 37, 44 (C.A.A.F. 1997) (Sullivan, J., concurring).

the "totality of all the surrounding circumstances," a "holistic assessment of human interaction." *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) and *United States v. Martinez*, 38 M.J. 82, 87 (C.M.A. 1993)).

The question of voluntariness is especially critical here because the "'public safety exception' does not make admissible a statement that was truly involuntary." *United States v. Jones*, 26 M.J. 353, 357 (C.M.A. 1998). However, in order for that exception to apply, the military judge in appellant's case had to find that appellant's statement was voluntary, and there is nothing in the record to support such a finding.

Appellant was tackled with no warning by MAJ [redacted] (R. at 1688.) While tackling him, MAJ [redacted] had his pistol pointed at appellant's back. (R. at App. Ex. 116, para. 1(c).) After taking him down, MAJ [redacted] ordered a nearby Soldier, in a voice loud enough for that Soldier to hear, to guard appellant. (R. at 1689.) While appellant may not have seen the weapon MAJ [redacted] pointed at him during the "take-down", he had to hear MAJ [redacted] order another Soldier to point his weapon at appellant. Appellant was forcefully tackled, forced to lay spread-eagle at gunpoint, told "not to fucking move," suggesting a degree of force that would reasonably "overbear" appellant's will and capacity for self-determination. Appellant was the opposite of

"unconstrained," as he was very much constrained with multiple weapons pointed at him.

As the Court of Military Appeals noted in *Jones*, "if appellant's statements to Sjostrom were 'coerced,' they were inadmissible -- even if Sjostrom coerced them for the laudable purpose of saving the life of someone whom he thought was severely wounded." *Jones*, 26 M.J. at 357. This is similar to appellant's case. Major [redacted] coerced the statement "yes" from appellant, even for the laudable purpose of establishing that there were no co-conspirators and thus no further threat. Appellant's statement is inadmissible.

Major [redacted] was acting in a capacity which required him to warn appellant of his rights under Article 31(b) of the UCMJ. Article 31(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

See also Mil. R. Evid. 305(d). Military Rule of Evidence 305(b)(2) defines "interrogation" to include "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning."

In *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), the Court of Military Appeals held that:

> [I]n each case, it is necessary to ask whether: (1) A questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation.

Here we have ample evidence that appellant was a suspect, as demonstrated by MAJ [redacted] actions. Major [redacted] was informed by the brigade commander that appellant was the only Soldier unaccounted for. (R. at 1678-79.) Major [redacted] was also told that the attack may have been from "one of our own." (R. at 1678.) Appellant was a "suspect." After all, MAJ [redacted] immediately tackled appellant upon encountering him.

Clearly, the question "Did you do this," would lead to an incriminating response. Major [redacted] was acting in official capacity and there was nothing casual about his conversation with appellant. This, and the involuntary nature of the questioning, triggered the rights-warning requirement and the public safety exception is inapplicable.

Even if this court finds that the statement "yes" was voluntary, the reasonable purpose of MAJ [redacted] question was not focused on public safety. Major [redacted] considered appellant a suspect. He knew that the brigade commander identified SGT Akbar as the sole missing Soldier and that the attack may be

from "one of our own." (R. at 1678-79.) Major [redacted] was not alone in considering appellant a suspect. Sergeant First Class Butler and SFC Burns did as well. Major [redacted] testified he was thinking of an effective way to disseminate appellant's name immediately prior to encountering appellant. (R. at 1680.) Upon recognizing appellant, he tackled him, had him guarded, and asked him "if he did it." (R. at 1688-90.) He did not ask him where the weapons he used were, because those were on or near him and already secured. He did not ask if anyone else was involved because he knew from his brigade commander that the only suspect was appellant. He did not ask any questions to determine if there were other accomplices because he knew there were none.

The burden is on the government to prove that the erroneous admission of appellant's statement to MAJ [redacted] was harmless beyond a reasonable doubt. *See United States v. Gardinier*, 65 M.J. 60, 67 (C.A.A.F. 2007). The burden remains the same if this Court finds only a violation of Article 31(b) of the UCMJ. *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006) (reviewing Article 31(b), UCMJ, error under standard of harmless beyond a reasonable doubt).

The harm to appellant was clear. Hearing the evidence against appellant certainly was important, but nothing more persuasive as hearing what amounts to a confession by appellant.

Evidence may be contradicted or explained, but a confession is often as powerful as all of the rest of the evidence in a case combined. *Arizona v. Fulminante,* 499 U.S. 179, 296 (1991). While it is true that the coerced confession to the attacks was not the only evidence against appellant, it was the most powerful, and thus was not harmless beyond a reasonable doubt.

WHEREFORE, the appellant respectfully requests that this Court set aside all findings of guilty and the sentence.

Assignment of Error VIII.

THE PROSECUTION'S MANIPULATION OF TRIAL DEFENSE COUNSEL DURING APPELLANT'S COURT-MARTIAL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE THAT IMPACTED THIS CAPITAL CASE.

Facts[60]

On 9 March 2004, the military judge conducted an Article 39(a) session in which defense counsel brought a potential conflict to the attention of the court:

> DC: Sir, I am on orders to report to Fort Drum, New York, no later than 15 July to be the Chief of Justice for the 10th Mountain Division.
>
> MJ: Okay. How about you, Captain [redacted]
>
> ADC: Sir, I'll be getting orders to report to Fort Eustis as the Deputy Staff Judge Advocate on 1 August.
>
> MJ: Okay. But you're going to be around in the Army and available, right?
>
> DC: Yes, sir. And, obviously, as these situations are handled, Sergeant Akbar has the opportunity and TDS would support it -- if he wants to continue with our service and just accept the conflict, he can do that. And they've also offered him, if he wants conflict-free counsel, the opportunity to appoint someone new, either at Fort Campbell or at Fort Bragg, to replace either one or both of us if that's what he wants to do. At this point, he's indicated that he would prefer to have conflict-free counsel.
>
> MJ: What's the conflict?

[60] *See also* discussion of facts set forth in AE II: C.

DC: Well, I'll be the Chief of Justice, which is, obviously, on the other side of the fence.

MJ: But that's got nothing to do with this case.

. . .

MJ: I spent 5 years in TDS. It's not a conflict to me.

(R. at 435-36.) The prosecution responded:

TC: First, Your Honor, to address the PCS issue, Captain [redacted] was -- I know this having been the former Captains Assignment Officer -- he was specifically deferred from an opportunity to go to the Grad Course to be on this case. I would represent to the court that he will remain on this case as long as this case is going, and no PCS will interfere [sic] with a conflict. If he's released for other grounds, it will be not because of a PCS. He is not currently on orders, and the job that he's going to fill is not open until January of 2005. There is no conflict with him remaining.

MJ: So when are you PCSing then, Captain [redacted]

ADC: Well, Colonel [redacted]igan has facts that I don't have, but I've been told that I'll receive orders and be PCSing with a report date of 1 August.

. . .

ADC: Yes, sir. In any event, that's what I've been informed; that I would be PCSing to go to Fort Eustis for that position. Clearly, I have no problem with working and remaining on the case.

MJ: And, Major [redacted] what's your PCS date?

DC: My report date is 15 July, unless Colonel [redacted] has some further information on that. That's what I understand it to be.

MJ: Let's ask him and find out.

TC: Sir, I'm going to get some information on that very quickly.

MJ: How about finding out and then e-mailing all parties to find out, you know, if, in fact, what you say is that the position that Colonel -- Colonel, perhaps one day I'm sure --Captain [redacted] is going to is not open until 1 January?

TC: Sir, I can represent to the court now, I just got off the phone with the Chief of PP&TO 3 minutes ago. Captain [redacted] will remain on this case. He will not get orders until this case is finished.

(R. at 442-44.) On 24 August 2004, at another Article 39(a) session, defense counsel discussed the issue with a new military judge:

DC: Sir, if I could, there's one issue I wanted to update the record on. It's something we discussed at length during the last hearing. At that time, I was the Senior Defense Counsel at Fort Campbell. I was pending a PCS to Fort Drum to be the Chief of Justice. I discussed that move and the potential conflict that might present with my client, Sergeant Akbar. He, at that time, indicated that he would rather release me and have new counsel appointed if that was going to be my assignment. We discussed that issue on the record. Colonel Parrish ruled that he did not believe it was a conflict in any sense to be the Chief of Justice and still represent Sergeant Akbar. I went ahead with my move, and I just wanted to update

the court on what has happened since that time reference that issue. When I arrived at Fort Drum, I was told by the SJA that I was not expected to be at Fort Drum. And he indicated he had been contacted by PP&TO and told that -- Trial Counsel --Colonel Mulligan had indicated that he did not want to create that kind of conflict or have that issue. Therefore, PP&TO told Colonel Garrett, my SJA, that I would not be coming until after the trial. For whatever reason, that information was not passed to my chain of command or to me and I PCS'd anyway. So to resolve that issue, they've moved me into Administrative Law. So, to the extent that there was an issue of a potential conflict of me being the Chief of Justice, that has been eliminated because I'm not in that position.

MJ: So you're essentially physically at Fort Drum ----

DC: Yes, sir.

MJ: ---- but performing other duties as assigned?

DC: Yes, sir.

(R. at 567-68.)

Law and Argument

Unlawful command influence is "'the mortal enemy of military justice.'" *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). Article 37(a), UCMJ, 10 U.S.C. § 837(a) (2000), prohibits unlawful command influence by all persons

subject to the UCMJ.[61] "Where it is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding." *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (citing *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988)). The "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *Id.* (internal quotations and citations omitted); *see also United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

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[61] Article 37(a), UCMJ; 10 U.S.C. § 837(a)(2000), establishes the congressional prohibitions against unlawfully influencing the action of a court-martial:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

On appeal, in addressing allegations of actual unlawful command influence, "The defense must (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." *United States v. Biagese*, 50 M.J. 143, 150 (C.A.A.F. 1999). This Court must be convinced beyond a reasonable doubt that there was no unlawful command influence or that the unlawful command influence did not affect the findings and sentence. *Id.* at 151.

In this case, the actions of the trial counsel in manipulating the assignments of defense counsel during an on-going court-martial amounted to unlawful command influence. Article 37(a) is an unambiguous congressional order, broadly worded, and "clearly applies to command subordinates." *United States v. Hilow*, 32 M.J. 439, 441 (C.M.A. 1991); *see generally United States v. Levite*, 25 M.J. 334, 339 n.6 (C.M.A.1987); *United States v. Thomas*, 22 M.J. 388, 398 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987). The trial counsel was a command subordinate because it was his duty to carry out the command's decision to refer court-martial charges against the accused. *See generally, Lewis*, 63 M.J. at 407 (finding unlawful command influence when the command, through its trial counsel and SJA, forced the recusal of the military judge.) The Court in *Lewis* considered both the specific unlawful influence, the unseating

of the military judge, and the damage to the public perception of fairness by the appearance of unlawful command influence created by the Government achieving its goal of removing the military judge. *Lewis,* 63 M.J. at 416.

Here, the government, through the actions of the trial counsel, created an appearance of unlawful command influence by manipulating the assignments of defense counsel to keep counsel on the case and prevent any further continuances in the case. Had trial counsel not taken such actions, defense counsel would have changed duty assignments and the accused would have dismissed him as counsel.[62] This influence over the court-martial personnel was blatant and went unchecked by the military judge. There is a palpable unfairness in any system where the trial counsel is able to control and direct the career of opposing counsel during trial.

"Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002) (*quoting United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). To find that the appearance of command

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[62] Defense counsel was originally scheduled to be the chief of justice at Fort Drum. This assignment would have created a conflict of interest that SGT Akbar was not willing to waive. (R. at 435); *See also* AE II: C.

influence was harmless beyond a reasonable doubt, "the Government must convince [this Court] that the disinterested public would now believe [appellant] received a trial free from the effects of unlawful command influence." *Lewis*, 63 M.J. at 415. Based on the proven power of the trial counsel over the career and assignment process of the defense counsel, coupled with the military judge's complicit actions to solidify that power, a disinterested public would not think that appellant had a fair trial.

Therefore, a rehearing in this case, "is an appropriate remedy where the error cannot be rendered harmless" and no alternative remedy is available which would "eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system." *Lewis*, 63 M.J. at 416; see also Gore, 60 M.J. at 189.

WHEREFORE, appellant requests that this Honorable Court dismiss the findings and sentence.

Assignment of Error VIX.

THE MILITARY JUDGE, BY FAILING TO SUA SPONTE DISMISS FIFTEEN DIFFERENT PANEL MEMBERS FOR CAUSE, ON VARIOUS GROUNDS, INCLUDING ACTUAL BIAS, IMPLIED BIAS, AN INELASTIC OPINION AGAINST CONSIDERING MITIGATING EVIDENCE AND ON SENTENCING, AND DETAILED KNOWLEDGE OF UNCHARGED MISCONDUCT THAT THE JUDGE SPECIFICALLY RULED WOULD NOT COME INTO EVIDENCE, DENIED APPELLANT A FAIR TRIAL.

Statement of Facts[63]

Of the sixteen panel members in the pool, trial defense counsel opposed the challenges of only Lieutenant Colonel [redacted] Major [redacted] and Command Sergeant Major [redacted] (R. at 1171.) The unopposed challenges were granted by the military judge, while the opposed challenges were denied. (R. at 1174.) Trial defense counsel challenged one member, Major [redacted] on the basis of implied bias because he was a witness in a prior military death penalty case (*United States v. Kreutzer*) and was actually involved in capturing Kreutzer after his attacks. (R. at 1174-75.) This challenge was joined by government counsel and granted by the military judge. *Id.* Government counsel challenged Lieutenant Colonel [redacted] Major [redacted] Major [redacted] Sergeant Major [redacted] Command Sergeant Major [redacted] and First Sergeant [redacted] (R. at

[63] Many of the facts applicable to this AE are also applicable to AE I: C. However, for simplicity's sake and for the Court's convenience, appellant has set forth the facts again in this AE, albeit, in some instances with a different gloss.

1160.) The government used its preemptory challenge on Lieutenant Colonel [redacted] while the defense did not use its preemptory challenge. (R. at 1177.)

Applicable Law and the Standard of Review

The military judge committed plain error in seating the panel in appellant's case.[64] To succeed under a plain error analysis, appellant must persuade the court that there was an error, it was plain or obvious, and the error materially prejudiced an accused's substantial right. *United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001) (citing *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)).

Rule for Courts-Martial 912(f)(1)(N) provides that a court 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." This rule encompasses challenges based on both actual and implied bias.

The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). Actual bias is subjective, viewed through the

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[64] Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(4), Manual for Courts-Martial, United States (2008 ed.); *see United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998) (holding that a member challenge raised for the first time at appeal will be reviewed only for plain error).

eyes of the judge and the panel member. *See United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). The focus is then on the efficacy of rehabilitative efforts in changing the stated subjective position of the panel member to one that will yield to the evidence presented and the judge's instructions. *Id.* (citing *Reynolds,* 12 M.J. at 294 (C.M.A. 1987).

Unlike actual bias, "implied bias is reviewed under an objective standard, through the eyes of the public." *Id.* at 283. In an implied bias case, "[t]he focus 'is on the perception or appearance of fairness of the military justice system.'" *Id.* (quoting *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995) (internal quotation marks omitted)).

"Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e., biased]." *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000) (citations and internal quotation marks omitted).

Military judges are given less deference in an implied bias case than in a case where actual bias is present because implied bias is "viewed through the eyes of the public." *Id.* at 166 (quoting *United States v. Warden,* 51 M.J. 78, 81 (C.A.A.F. 1999). This standard of review is less deferential than abuse of discretion but more deferential than *de novo*. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (quoting *United*

States v. Miles, 58 M.J. 192, 195 (C.A.A.F. 2003). Generally, implied bias should rarely be used as the reason for granting a challenge for cause in the absence of actual bias. *Id.* (citing *Warden*, 51 M.J. at 81-82.); *but see United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997) (Effron, J., concurring in part and in the result) (disagreeing that the doctrine of implied bias should be "rarely applied" in the military justice system).

Because of the awesome plenary review authority of Article 66(c) this court "is not constrained from taking notice of errors by the principles of waiver and plain error." *See United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (citing *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)). Therefore, this Court can look anew at such errors without need of either a waiver or plain error analysis and it should do so in the interest of justice, particularly in a capital case such as this where appellant's life is at stake.

Once a biased member is seated, appellant need not show prejudice. *Hughes v. United States*, 258 F.3d 453, 463 (6th *Cir.* 2001); *Sanders v. Norris*, 529 F.3d 787, 791 (8th Cir. 2008). The impaneling of biased juror is structural in nature, and must result in appellant receiving a new trial. *Hughes*, 258 at 463. "Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself." *Johnson v. Armontrout*, 961 F.2d 755.

In federal district court cases, plain error is applied. *See United States v. Hill*, 552 F.3d 541, 545 (7th Cir. 2008)(review of deficient voir dire by federal district court judge reviewed for plain error); *United States v. Visinaiz*, 428 F.3d 1300, 1313 (10th Cir. 2005)(same); *United States v. Girouard*, 521 F.3d 110, 115 (1st Cir. 2008)(*Batson* claim post-trial reviewed for plain error); *United States v. Contreras-Contreras*, 83 F.3d 1103, 1105 (same).

Error and Argument

Sergeant First Class (SFC) [redacted]

Sergeant First Class [redacted] stated that he had no interest in the events in appellant's life leading up to the offenses:

> DC: Would you have any interest in facts regarding their life, and how that person got to that point, factors that might have influenced their decision? Do you think those things would be important?
>
> SFC D: No, sir. Because, if they took a life, it wouldn't be important.
>
> DC: And what do you think rehabilitation or the potential for rehabilitation - what do you think that means?
>
> SFC D: Like not letting them out - like they'd be able to live, but they'd spend the rest of their life in prison.
>
> DC: Okay. Well, that's a good lead in to the next question. So, in a case where you've got the person, you're convinced that the person committed a murder, you're 100

> percent sure of that, and life without parole is also a possible punishment, meaning that person will never get out of jail, would you consider that?
>
> SFC D: Yes. I'd consider it.
>
> DC: What sort of factors would influence your decision as you choose between death or a person being removed permanently from society and sitting in jail for the rest of his life?
>
> SFC D: Okay. Say for instance that that person was provoked to do that, then the person deserves another chance.
>
> DC: Any other factors or circumstances that could be important?
>
> SFC D: Unless they had a mental condition or whatever.

(R. at 1134-35).

At no point did SFC [redacted] change his position and indicate that he would consider events and influences in appellant's life leading up to the charged offenses. This was not a panel member simply giving low weight to extenuating evidence. In this case, [redacted] was clear he that he would give no weight to appellant's life prior to the charged offenses because appellant took a life. The military judge later attempted to rehabilitate [redacted]

> MJ: Sergeant [redacted] if I understand correctly, if we get to sentencing, you would be able to follow my instructions on the full range of punishments whatever they may be?

SFC D: Yes, sir.

MJ: Life, life without parole ----

SFC D: Yes, sir

(R. at 1136).

Although the judge asked if SFC [redacted] could consider the full range of appropriate punishments, he failed to inquire into whether he could consider the full range of mitigation and extenuation evidence needed to determine the appropriate punishment. The problem was not whether SFC [redacted] could consider the full range of punishments (although his response to the question concerning rehabilitation calls that into question), but whether or not SFC [redacted] would consider the underlying extenuating and mitigating factors in arriving at an appropriate punishment. Clarifying SFC [redacted] ability to consider a full range of punishments does not address SFC [redacted] statement that mitigation was, in his view, unimportant. [redacted] never expressed an ability to yield to the evidence or the judge's instructions concerning extenuation and mitigation.

Sergeant First Class [redacted] also misunderstood [redacted] rehabilitation apparently means life without parole. Sergeant First Class [redacted] only mentioned provocation and mental condition as two possible factors he would consider in the context of life without parole. Sergeant First Class [redacted] severely limited understanding of the

concept of rehabilitation is never addressed during voir dire. This, combined with his assertion that events in appellant's life leading up to the offenses were not important if he took a life resulted in a panel member sitting on appellant's panel with an impermissibly inelastic opinion on sentencing sitting on appellant's panel.

Even if SFC [redacted] did not exhibit actual bias, most observers would have seen SFC [redacted] as viewing extenuation and mitigating evidence as unimportant, as misunderstanding the basis concept of rehabilitation, and possessing a limited view regarding mitigation, especially as it pertains to death or a lesser sentence. A panel member who considers appellant's past "unimportant" for sentencing purposes is not a panel member that would be seen as "keep[ing] an open mind and decid[ing] the case based on evidence presented in court and the law as announced by the military judge." *See Reynolds*, 23 M.J. at 294.

Sergeant First Class [redacted] answers in response to his self-reported sleeping problem call into question his fairness and impartiality:

> DC: And you related that that started about the time of the first Gulf War when you came back. What I'd like to know is, is that trauma related to trauma or stress from participating in that, or did you just get in the habit of not getting a lot of sleep?
>
> SFC D: I don't know what it's from, sir.

DC: So you don't feel that you wake up because you were under stress or trauma?

SFC D: Well, being in the military is stressful.

DC: That's very true. So you think it may just be related to the day-to-day life stress?

SFC D: Yes, sir.

DC: But you feel that you're able to function and get by on 3 to 4 hours of sleep?

SFC D: Yes, sir.

(R. at 1132-33).

Most public observers would believe SFC [redacted] sleeping problems were related to stress or trauma, and would believe SFC [redacted] participation on the panel was thus problematic. How did this trauma affect him other than severely altering his sleep habits? How sympathetic would he be to an accused also claiming sleep related problems and the possible mental health issues related to them if SFC [redacted] has not determined whether his own sleep issues are trauma-based? Most people in SFC [redacted] position would be hard-pressed to be sympathetic to any arguments based on severe sleep issues. Most in the public would view SFC [redacted] as narrowly focused on guilt, provocation, and appellant's mental condition, but caring little for any other evidence. (*See* R. at 1135.) In fact, some members of the public would question whether SFC [redacted] had recovered

psychologically from his own combat experiences. Despite the failure of defense counsel to challenge SFC [redacted] the military judge committed plain error by failing to *sua sponte* to voir dire and conduct an actual and implied bias analysis and excuse [redacted] from the panel.

Major (MAJ) [redacted]

Major [redacted] sentencing "formula" was simple: "[I]f one person dies, then that the means that that person should die also." (R. at 991.) Major [redacted] sentencing formula in a capital murder trial should have raised alarm bells with the military judge. The military judge failed to inquire further, thus leaving the plain meaning of his words - Major [redacted] balances the scales a life for a life. Major [redacted] had an inelastic attitude regarding sentencing.

Even if no actual bias existed, a member of the public observing appellant's court-martial and hearing MAJ [redacted] formula would believe that MAJ [redacted] vote for death was preordained. Despite MAJ [redacted] enunciation of his "formula," the military judge failed to make further inquiry. Leaving MAJ [redacted] on the panel was plain error. Major [redacted] was, in the event of a conviction, an automatic vote for death.

Additionally, MAJ [redacted] exhibited an excessive level of emotion and knowledge about the events of the case:

> I felt pretty upset over what happened. I felt for the family members and soldiers that were over there. And I realized - well, I was over there in 2002. So I kind of knew where that area was. And it was depressing.

(R. at 993.)

The military judge failed to inquire why it was "depressing" for MAJ [redacted] and ask about MAJ [redacted] level of knowledge about the case. The public would presume [redacted] had some personal connection with the case, or had been in some way personally impacted by it, and thus would have formed an opinion regarding the case. Therefore, it was plain error for the military judge to allow MAJ [redacted] to sit on the panel.

Sergeant First Class (SFC) [redacted]

Sergeant First Class [redacted] indicated both in general and individual *voir dire* that he had previously expressed an opinion on appellant's guilt:

> MJ: In general *voir dire*, did you indicate that you had previously expressed an opinion on guilt or innocence of Sergeant Akbar?
>
> SFC C: Yes, sir.
>
> MJ: Can you relate what it was?
>
> SFC C: Yes, sir. When it was in the news and first came out - my wife and I are in the military. As weeks went by, from what we've known out of the news, I had said, ***"It sounds like guilty."***

(R. at 1138, emphasis added.)

The military judge attempted to rehabilitate SFC [redacted]

> MJ: Have you followed the case since it made the news in 2003?
>
> SFC C: Yes, sir. ***Pretty much.***
>
> MJ: Do you still maintain that position?
>
> SFC C: No, sir.
>
> MJ: Can you set aside anything that you may have learned and decide the case only on this evidence?
>
> SFC C: Yes, sir.

(*Id.*, emphasis added.)

Later, trial defense counsel made further inquiry:

> DC: You indicated that you initially said - based upon the press reports that you saw, you said to your wife, "Looks like he must be guilty?"
>
> SFC C: Yes, sir.
>
> DC: And you said your opinion had changed?
>
> SFC C: My opinion, sir, is based on news reports that I do not completely, 100 percent believe.
>
> DC: Okay.
>
> SFC C: It was - and I'm saying it now because I just want that put out. It was based on what I've seen - the input that I'd gotten. Has it changed? Well, sir, now I'm going to get the facts. This was based on that news report that I don't believe is 100 percent at all times.

(R. at 1157.)

Sergeant First Class [redacted] was not saying his opinion had changed, but that now he will get "the facts," which would either reinforce his opinion or not. Sergeant First Class [redacted] was clearly planning on weighing the evidence that he saw in the media and what he expected to receive at trial. Appellant certainly deserves a panel member who has not come into the case having already received enough media information to come to a conclusion about his guilt or innocence.

Additionally, SFC [redacted] had an opinion about the appropriate sentence.

> SFC C: If here were found guilty, have I ever said what he's going to get? No, sir.
>
> DC: Or what you thought he should get?
>
> SFC C: My belief on that, sir, is it will fit the crime. I've never said to anybody, "This is what's going to happen." No, sir. And I said - that's why I use, "I think"; "If you ask me"; "My personal opinion."

(R. at 1158.)

Thus, SFC [redacted] has not stated his own personal opinion to others, had formed a "personal," rather than an "official" opinion. Only after sentencing would he make that opinion more than "personal."

In any event, implied bias was implicated by SFC [redacted] answers. A member of the public viewing voir dire would view SFC [redacted] as previously asserting that appellant was guilty,

but also refusing to completely put aside the media accounts that formed that belief. His disclaimer regarding the accuracy of news reports would not persuade most in the general public that SFC [redacted] could completely and fully ignore those reports, but merely would need confirmatory information to seal his verdict. His claim to have only personally expressed an opinion about the appropriate sentence would further concern most viewing the court-martial.

It was plain error to leave SFC [redacted] who previously believed appellant guilty, on the panel. In a capital case, the military judge must remove, *sua sponte*, a member who has expressed an opinion about guilt or innocence.

Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] stated a clear bias against mental health professionals during questioning by the trial counsel:

> TC: Sir, the fact that your father's a practicing psychotherapist, would that cause you to have a greater belief in that as a science, the science of psychotherapy?
>
> LTC A: Quite possibly the opposite. Growing up in that environment was, at times, trying as a kid. We'd have - take disturbing phone calls from some patients, and I got tired of it real quick.
>
> TC: But, as a science, to - in the event - say we had expert witnesses testify from the witness stand who were psychologists or

> psychiatrists, would you give that testimony any more weight than any other witness?
>
> LTC A: No, probably not.

(R. at 971.)

Lieutenant Colonel [redacted] expressed an antipathy to psychotherapy and thus would give little, if any, weight to the testimony of psychologists and psychiatrists. Given the crucial role of mental health evidence and testimony in appellant's case, LTC [redacted] animus toward the very evidence appellant was relying so heavily upon should have resulted in his being removed, *sua sponte,* by the military judge.

In any event, implied bias must result in LTC [redacted] removal. In a capital case, mental health testimony and evidence is usually the strongest mitigation evidence presented, and having a panel member who disregards such evidence as a matter of course puts appellant, in the eyes of the public, at a clear disadvantage. Is was plain error for LTC [redacted] to sit.

Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] indicated she had family members with mental health issues, particularly depression:

> TC: Now, ma'am, regarding the area of psychiatry, has a relative, a close friend, or even yourself ever been examined for a psychiatric condition or a mental condition?

LTC L: Yes. My stepfather had depression and committed suicide. My - I think my mother - no. I'm not sure about my mother. My sister I know was diagnosed with depression and is on some kind of medication for that.

TC: Okay. Your stepfather's suicide, was the depression discovered before or after?

LTC L: Before.

TC: Before?

LTC L: Uhm-hmm [nodding head to the affirmative].

TC: Had it been a longstanding depression or something of short duration?

LTC L: Probably like 3 to 5 years I think.

TC: And was he actually under psychiatric care at the time he committed suicide?

LTC L: Uhm-hmm [nodding head to the affirmative].

TC: Do you know - the diagnosis, was it depression; or was depression a symptom of another diagnosis?

LTC L: I'm pretty sure that the diagnosis was depression.

(R. at 952.)

She then indicated a specialized knowledge of depression:

DC: And, in the course of having family members with this mental illness, did you do any research yourself into ----

LTC L: Uhm-hmm [nodding head to the affirmative].

DC: ---- depression?

LTC L: A little bit, yeah.

DC: In that case, given that you may have developed some specialized knowledge, could you agree to set that aside in this court-martial and, if there is mental health testimony, just listen to what they say and evaluate what they say without regard to anything you've read in the past?

LTC L: That would be kind of hard because I thought we were supposed to use our own values and judgments?

DC: If you did have any specialized knowledge or any points that you seem to remember from something, would you agree to not try to influence the other members with that?

LTC L: I suppose it depends on the amount of information that we get from the - if there's enough of it, then I can do that.

(R. at 964, 965.)

Not only is this evidence of actual bias, it can in no way remove the taint of implied bias. Lieutenant Colonel [redacted] could not be expected to put aside her personal mental health knowledge and experience gathered as a result of a family mental health tragedy in lieu of the mental health evidence and testimony submitted at trial. Few could separate out the things LTC [redacted] learned through her family struggle and consider only the evidence before them. Few would also believe that she had no bias concerning mental health, and specifically depression. Depression was the sanity board's diagnosis of

appellant. (R. at 2493). Thus the military judge plainly erred in allowing LTC [redacted] to sit.

Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] testified that he was appellant's deputy brigade commander from approximately 15 July 2004 until 17 December 2004. (R. at 882.) Lieutenant Colonel [redacted] testified that he had seen "legal briefs" prior to appellant's court-martial. (R. at 883, 884, 892.) Lieutenant Colonel [redacted] "could not recall any specific details or charges," and the legal briefings merely contained a "matrix of pending cases" with which brigade commander was ordinarily briefed. (R. at 883.) However, LTC [redacted] could remember that there was information concerning "a hearing, or whatever, motions or whatever." (*Id.*) He also testified that he was informed of an "altercation" that occurred between appellant and the guards. (R. at 893.)

Although sparse facts were elicited during voir dire, the public would question what LTC [redacted] level of involvement in this case as the second in command of appellant's brigade. He sat in on legal briefings concerning appellant's case. He learned of an altercation involving appellant and the military police. He also felt the need to bring to the attention of the court his "potential impartiality" in the case. (R. at 892.) To have this member sit on appellant's panel in a capital case

is something that the general public viewing would view skeptically. Thus, the military judge plainly erred in sitting LTC [redacted]

Lieutenant Colonel (LTC) [redacted]

This case was tried at Fort Bragg, North Carolina. Appellant was charged with attacking a brigade tactical operation center (TOC) of the 101st Airborne Division (Air Assault), based at Fort Campbell, Kentucky. (R. at Charge Sheet.) The case was transferred to Fort Bragg on 15 July 2003. A panel member, LTC [redacted] was the brother of the then commander of the 101st Airborne Division. (R. at 910.) Lieutenant Colonel [redacted] testified that he did not talk with his brother about appellant's case or felt in any way pressured by his familial relationship. *Id.* However, a member of the public watching the trial would be highly concerned that LTC [redacted] relationship with his brother, and his concern for the men and women under his brother's command, would influence his verdicts on both findings and sentence. For members of the public already skeptical of the unique and unusual manner in which the military selects panels for court-martial, the brother of the commander of the 101st Airborne Division sitting on the panel would call into question that panel's freedom from bias against appellant. The military judge should have *sua sponte*

removed LTC [redacted] from the panel, and it was plain error to allow him to sit as a member.

Lieutenant Colonel (LTC) [redacted]

Lieutenant Colonel [redacted] another panel member, testified:

> DC: Sir, on your questionnaire, you indicated a view regarding the Muslim religion. Can you explain your views of the Muslim religion in a little more detail for me?
>
> LTC G: Well, some things I agree with it and some things I don't agree with it. I'd say - all I can say - I think I mentioned it's a passionate religions. And with a passionate religion, sometimes you can't think clearly and you take certain views that are selfish - for your own selfish pleasures, self-desire instead of the good of the man. It seems to be a male oriented religion. It seems to be - like a lot of institutional religions. They interpret it the way they want to interpret certain things for their own self-interests.

(R. at 944.)

In effect, LTC [redacted] was not only very skeptical about appellant's mental health defense, but also views appellant's faith – Islam – as "selfish," and "passionate," and not aimed at "the good of the man." *Id.* No attempt at rehabilitation of LTC [redacted] would suffice, and even if it did, most members of the public would view LTC [redacted] as skeptical of the motives of appellant's religion; and, most members of the public would assume that LTC [redacted] thinks that conscience and religious

beliefs (other than Islam), would have kept appellant out of trouble, even if appellant suffered from a serious mental disease or defect. Keeping LTC [redacted] on the panel was plain [redacted] informed the military judge that he would disregard any mental health defense.

Also, LTC [redacted] clearly indicated that future dangerousness was his primary consideration in determining whether death or life without parole was the appropriate sentence for appellant.

> TC: Sir, what would be important to you in making the decision of whether a person should receive the punishment of life in prison without the possibility of parole or the death penalty?
>
> LTC G: I think it - the difference may be danger to society, whether this person is still a danger even though he may be in prison. He may be - society may not feel that there was just punishment. Maybe society believes that he should have got the death penalty for whatever reason, but maybe life without parole is a lesser sentence.

(R. at 942.)

Lieutenant Colonel [redacted] testified that he was aware of a "scuffle" that occurred involving appellant. (R. at 947.) This "scuffle" was an incident that occurred on 30 March 2005 where appellant allegedly assaulted and injured a military police officer with scissors. (R. at App. Ex. 179.) Defense counsel moved the court to rule that the evidence of the alleged

assault was uncharged misconduct, and thus inadmissible. *Id.* The military judge granted the motion, finding that the probative value the evidence was substantially outweighed by the danger of unfair prejudice. (R. at 2685.) Yet, having made that determination, no one at trial connected the dots between that unfair prejudice, LTC [redacted] views regarding future dangerousness, and LTC [redacted] knowledge that appellant may have stabbed a military police officer with scissors. Most members of the public would question the utility of granting the motion in limine and keeping a panel member who already know about the alleged stabbing.

Lieutenant Colonel [redacted] also testified that his older sister had a serious mental illness:

> TC: Now, sir, regarding the area of psychiatry, I think you indicated that someone in your family has been diagnosed with a disorder?
>
> LTC G: Yes.
>
> TC: Sir, could you tell us what that diagnosis was?
>
> LTC G: Yes. I have an older sister - my older sister, [redacted] she's age 49 now. About 15 years ago - well, when she was 13, she had a brain tumor . . . The doctors call it Organic Brain Disease, and she'll get progressively worse. She doesn't - she has problems doing sometimes simple things, focusing on things. She doesn't - she has good days and bad days. She's up and down. She lives by herself now. She doesn't live in a home, but people have to watch her so

> she doesn't do things like leave the stove on and start a fire; stuff like that.
>
> TC: Has this illness caused her to run afoul of the law in any way and unable to conform her conduct?
>
> LTC G: Not really. She has a strong conscience. She knows right and wrong. She had a - she's taken on religious faith. She tried to go to college classes to improve herself.

(R. at 936.)

The fact that LTC [redacted] had close, family experience with mental health issues should have led the military judge to inquire what specialized knowledge LTC [redacted] had garnered because of his sister's condition, and if he could put that knowledge out of his mind and look only at the evidence in the case. Regarding organic brain disease, LTC [redacted] believed that her strong conscience and religious faith kept his sister out of trouble. To members of the public watching this trial, LTC [redacted] response would suggest that LTC [redacted] not consider a mental disease or defect as either an excuse or as mitigation for criminal conduct. Lieutenant Colonel [redacted] sister had organic brain disease, but her strong conscience, religious faith, and knowledge of right from wrong kept her out of trouble. Thus, the public could likely infer that LTC [redacted] would at the very least be highly skeptical of any claim that appellant was not criminally responsible (in

whole or in part) because he suffered from serious mental health issues, nor that appellant's mental health would in any way mitigate his possible sentence. The military judge committed plain error in allowing LTC [redacted] to sit.

Command Sergeant Major (CSM) [redacted]

Command Sergeant Major [redacted] completely misunderstood the basic concepts of beyond reasonable doubt and sentencing in the following two exchanges:

> TC: How do you feel about life in prison without the possibility of parole as a sentence for an intentional, deliberate, and premeditated murder?
>
> CSM H: As opposed to the death penalty, life without parole, sir, is - it's warranted if they - all of the facts aren't there - if like what was mentioned yesterday, you've got pieces of the puzzle and there's some pieces missing. You know, if you can't place all of the pieces together, then I would look at life without parole - but you can still see the picture.

(R. at 1066.)

> TC: Sergeant Major, have you ever had occasion to discuss the death penalty with members of your family, or friends, or other soldiers?
>
> CSM H: My wife and I have discussed it, sir.
>
> TC: And how did that discussion go?
>
> CSM H: My wife is opposed to it, and I told her I'm for it in certain circumstances. If all facts are proven, then, yes, that should warrant; if the facts are not proven

> totally, then it wouldn't warrant the death penalty, sir.

(R. at 1067.)

Thus, CSM [redacted] believed that life without parole is appropriate when you don't have "all of the pieces" on the merits, and death is appropriate when the case is proven beyond a reasonable doubt – and not missing any "pieces". Command Sergeant Major [redacted] did not understand the "beyond reasonable doubt" standard. His misunderstanding went unchallenged by the military judge. Command Sergeant Major [redacted] view of the standard could have done nothing but colored his view of the evidence during the entire case. While his membership on the panel may pass muster in most courts-martial, a capital case requires a higher standard of diligence and scrutiny, and the military judge had to further question CSM [redacted] Thus, it was plain error to allow him to sit as a member.

Multiple Panel Members Were Aware of the Uncharged Misconduct the Military Judge Ordered Not to be Placed Before the Members

Several of the panel members were aware that appellant had allegedly stabbed a military police officer. Colonel [redacted] had heard of a "scuffle with an MP." (R. at 868.) Colonel [redacted] knew that an assault had occurred with a pair of scissors. (R. at 879.) Lieutenant Colonel [redacted] heard of an "altercation." (R. at 892.) Lieutenant Colonel [redacted] read about a "scuffle." (R. at 917.) Lieutenant Colonel [redacted] heard "there was a

scuffle, some other things." (R. at 947.) Command Sergeant Major [redacted] heard that there was an incident while appellant was being moved from "point A to point B" and that "one of the guards was stabbed in the neck." (R. at 1042.) Command Sergeant Major [redacted] wife told him about "some type of fight between Sergeant Akbar and some guards." (*Id.*) Command Sergeant Major [redacted] heard that appellant "had overtook one of the guards and injured himself and one of the guards." (R. at 1073.) Likewise, Master Sergeant [redacted] heard appellant "overpowered a guard." (R. at 1117.) Finally, Sergeant First Class [redacted] heard on the radio about "an altercation between Sergeant Akbar and the MPs. I turned it off, but I heard most of it." (R. at 1157.)

Ten out of the fifteen panel members, whether because of pretrial publicity, "legal briefs," or gossip, were informed about the very same uncharged misconduct the military judge had ruled inadmissible as unfairly prejudicial to appellant. After making such a ruling, it was plain error to seat panel members with knowledge of that uncharged misconduct. It rendered defense counsel's motion in limine ineffectual, and allowed the government to have a panel pre-packaged with knowledge of the stabbing. Ten members on the panel were thus actually, or at least impliedly, biased on sentencing. Because they were informed appellant was capable of future dangerousness, the

military judge should have conducted more extensive *voir dire* to ascertain the exact nature and extent of each panel member's knowledge of the alleged stabbing. Because he did not, the military judge should have *sua sponte* removed those panel members so that appellant could have a fair panel.

Multiple Panel Members Exhibited Personal Reactions to News of Appellant's Alleged Acts

There were several panel members who used intensely emotional terms to describe the effect of appellant's alleged crime had on them. Upon hearing that a Soldier was involved, COL [redacted] stated he felt "Shock or disbelief. I could hardly conceive of that." (R. at 881.) Lieutenant Colonel [redacted] indicated, "Honestly, I was hurt, and really disappointed, and a little embarrassed." (R. at 906.) Lieutenant Colonel [redacted] said that she "was pretty shocked that someone could do that to their fellow soldiers." (R. at 966.) Major [redacted] found the news "depressing." (R. at 993.) Command Sergeant Major [redacted] expressed "shock and disbelief" at the news, which was "a deep stab; primarily when it was announced that it was a Sergeant. My being a Command Sergeant Major, that took quite a deep stab there." (R. at 1031.)

Members on a death penalty panel cannot have these deeply emotional reactions. They have clearly internalized the impact. Thus, the public would view them "shocked," "embarrassed,"

"disappointed," and "stabbed" by what they believe to be appellant's crimes, and unable to fairly and dispassionately sit in judgment of the attacker. No one viewing the panel would believe it to be one removed of bias or personal connection to the attack. The military judge did nothing to address this inherent bias.[65] The only defense challenge, MAJ [redacted] was removed for implied bias because he had seen the events in *United States v. Kreutzer*. (R. at 1174.) This was explicitly because of his ties to that case. (R. at 1175.) The sitting members has similar ties. Thus, these members should have been removed by the military judge, and it was plain error not to do so.

With a panel so compromised, appellant could not get a fair trial. Even if some of the individual errors do not by themselves rise to the magnitude of plain error, the sum total of issues of actual and implied bias for these panel members, and in accordance with the heightened standard in a capital case, the military judge erred in seating this panel. An appellant facing a death sentence must have a panel as free of bias and from personal knowledge and opinion about the alleged acts of appellant.

WHEREFORE, this Court should remand this case for a new trial.

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[65] *See also* AE VI, discussing the closely knit XVIII Airborne Army community.

Part Six: Sentence Appropriateness

Assignment of Error X.

> UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE APPROVED SENTENCE, WHICH INCLUDES A SENTENCE TO DEATH, IS INAPPROPRIATELY SEVERE.
>
> Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.

Furman v. Georgia, 408 U.S. 238, at 287 (Brennan, J., concurring)

Death is the ultimate punishment. It differs, quantitatively and qualitatively, from any other punishment that a court-martial can adjudge. Once carried out, it is absolutely final. An individual who is wrongly executed has no recourse. Wrongful or unjust sentences to imprisonment can be somewhat, although not entirely, ameliorated through monetary awards or governmental expressions of regret. *See, e.g.*, CAL. PENAL CODE §§ 4900 et seq. (2001). In contrast, it is impossible to even begin to meaningfully compensate an individual who has been wrongly executed.

Over the last 40 years, the United States has struggled with the issue of when capital punishment can justly be imposed. In *Furman v. Georgia*, 408 U.S. 238, 240 (1972), the Supreme Court held that the death penalty, - as it was then imposed in

the United States - violated the Eighth Amendment in that it constituted "Cruel and Unusual Punishment". The Court did not hold that capital punishment was per se cruel, or that it was in all circumstances unconstitutional. Rather, the Court ruled that the arbitrary and haphazard manner in which death sentences were adjudged and carried out violated Constitutional norms. In sum, capital punishment is unconstitutional when it is "wantonly and freakishly imposed", 408 U.S. at 310 (Stewart, J., concurring).

Critical to the Supreme Court's analysis in *Furman* was its acknowledgment that the death penalty should be imposed sparingly as well as fairly. As Justice Brennan pointed out, "what was once a common punishment has become, in the context of a continuing moral debate, increasingly rare." According to Justice Brennan, the "calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity". *Furman*, 408 U.S. at 299, 290 (Brennan, J., concurring).

In response to *Furman*, the various state governments began to erect statutory capital punishment schemes that attempted to eliminate the arbitrariness that the Supreme Court had found to be constitutionally prohibited. These sentencing schemes sought to direct and limit capital punishment in such a way that its imposition would not be arbitrary. The schemes were designed to

comply with the Court's requirement that they "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." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 159 (opinion of Stewart, Powell, and Stevens, JJ.).

In a series of decisions, the Supreme Court held that capital punishment sentencing schemes, in general, narrowed the class of persons eligible for the death penalty by setting forth a listing of objective "aggravating circumstances," and permitted a defendant to introduce a wide-ranging array of mitigating factors, were constitutionally permissible because they accomplished the prescribed narrowing of persons for whom the death penalty was appropriate punishment. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). The system prescribed in R.C.M. 1004 of the Manual for Courts-Martial, which is an example of a "balancing scheme," was found to be constitutionally adequate – at least with regard to its

promulgation by the President - by the Supreme Court in *United States v. Loving*, 517 U.S. 748, 756 (1996).[66]

Article 66(c) of the UCMJ mandates that this Court conduct an independent review of the sentence in every case referred to it. As the statute instructs, this Court "may affirm only such findings of guilty and the sentence or such part of amount of the sentence, as it finds correct in law and fact and determines, *on the basis of the entire record*, should be approved". 10 U.S.C. § 866(c) (1988)(emphasis added). According to CAAF, the requirement to review cases for sentence appropriateness is vested in the service courts. *See, e.g., United States v. Lacy*, 50 M.J. 286 (1989).

In this case, the record is woefully inadequate for this Court to meaningfully discharge its duty of sentence review. This Court has a statutory duty to disapprove any sentence, which, in view of the entire record, is not fair and just. U.C.M.J., art. 66(c); 10 U.S.C. § 866(c)(1996). The appropriateness of a sentence should be judged by "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267 (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (1959)). Indeed, sentence appropriateness involves the judicial

[66] *See also*, AE III: B.

function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

A Soldier "should not receive a more severe sentence than otherwise generally warranted by the offense, the circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record." *United States v. Aurich*, 31 M.J. 95, 97 n. (C.M.A. 1990). Accordingly, the punishment should "fit the offender and not merely the crime." *United States v. Wright*, 20 M.J. 518, 519 (A.C.M.R. 1985); *see also United States v. Mack*, 9 M.J. 300, 317 (C.M.A. 1980); *Williams v. New York*, 337 U.S. 241, 247 (1949). Intent, or lack thereof, is a significant factor in assessing the circumstances surrounding the offense.

Even if the application of aggravating factors alleged in this case passes constitutional muster,[67] appellant asserts that the approved sentence in his case is inappropriately severe. Given the host of mental illness issues involved, this is not a case in which the death sentence is appropriate.

For the last forty years, the Supreme Court has repeatedly emphasized that death sentences should be reserved only for the most aggravated of crimes and the offenders who present no mitigation, or the least mitigating of circumstances. *Lockett v.*

[67] *See generally*, AE III.

Ohio, 438 U.S. 586 (1978); *Perry v. Lynaugh*, 492 U.S. 302 (1989). *See also Woodson v. North Carolina*, 428 U.S. 280 (1976).

Given the constitutional mandate that the death penalty be reserved for truly aggravated offenses, appellant's case does not qualify for a capital sentence. This is a case in which the appellant, a junior noncommissioned officer with no previous record of criminal conduct but a significant history of mental illness and emotional instability (*See* DAE LL; DA 413-517)[68] acted out of confusion under the extreme psychic distress of his circumstances. *Id.*

Though severe punishment is warranted by the evidence, the death penalty is not. Under R.C.M. 1004, the death penalty may be adjudged only when one or more of the aggravating factors set forth in the Rules for Courts-Martial are proved beyond a reasonable doubt, and determined by the court-martial panel to "substantially outweigh" any mitigating circumstances. R.C.M. 1004(a)(4)(C).

In this case, although not presented to the court-martial because of counsel error,[69] there are a myriad of mitigating circumstances to balance against the aggravating factor. Some of the mitigating circumstances were evident in the record, to

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[68] *See also,* AE IV, V, VII, and VIII.
[69] *See also,* AE I: E.

include: based on clear warning signs evident to the chain of command, the failure of the unit to take appropriate steps to prevent SGT Akbar from acting or to prevent him from deploying; SGT Akbar's history of violent ideations, which was ignored by the unit; and his apparent emotional disturbance at the time of the offenses, as testified to by witnesses.

However, as detailed in the Mitigation Report, Dr. Cooley's Report, and Dr. Woods' affidavit, appellant suffers from mental illness. In Dr. Woods' view, reinforced by Dr. Cooley's review of documents, appellant suffers from schizophrenia, and has so suffered for some time, long before the crimes for which he was convicted and sentenced to death. Furthermore, that diagnosis, and a myriad of other mitigation evidence, was not presented to the panel that sentenced appellant. Furthermore, Dr. Woods' diagnosis impacts not only the appellant's sentence, but raises the possibility that appellant was not mentally responsible at the time of the offenses.

A sentence of death is inappropriate where serious questions remain about the mental responsibility of the condemned. Furthermore, a death sentence is inappropriate in appellant's case because he has never been afforded the opportunity to present a meaningful case in mitigation.

Under Article 66(c), this court has the independent power and duty to conduct the same balancing of aggravating factors

and mitigating circumstances that the court-martial panel did. Unless this Court is satisfied that the death sentence is "correct in law and fact", this Court cannot not approve the sentence. Especially when confined to the inadequate evidence of record presented at trial, the balance is clear: this offense, and this appellant, do not deserve a death sentence.

WHEREFORE, appellant respectfully requests that the Court set aside findings and sentence.

Assignment of Error XI.

APPLICATION OF *UNITED STATES V. CURTIS,* 32 M.J. 252 (C.M.R. 1991) *AND ITS PROGENY* TO APPELLANT'S CASE MANDATES THAT HIS DEATH SENTENCE BE SET ASIDE AS DISPROPORTIONATE TO THE SENTENCE IMPOSED IN *UNITED STATES V. KREUTZER.*

Pursuant to *United States v. Curtis*, 33 M.J. 252(C.M.A. 1991), R.C.M. 1004 provides sufficient safeguards to an accused at a capital court-martial against unbridled sentencing, and the prohibitions against cruel and unusual punishment established in the Eighth Amendment to the United States Constitution and Article 55, UCMJ are not trammeled. 33 M.J. at 108-109.

However, recognizing that the military justice system is not exempt from the overarching constitutional requirement that the death penalty not be executed arbitrarily, the *Curtis* court announced that military appellate courts must - in exercising their Article 66(c) authority - make the following determinations prior to affirming an adjudged death sentence:

> (1) One or more valid aggravating factor has been unanimously found by the court-martial and that this finding is factually and legally sufficient;
>
> (2) That any corrective action taken by the military appellate court results in setting aside a factually and/or legally insufficient aggravating factor while leaving intact at least one aggravating factor - whether the error requiring corrective action affected imposition of the death sentence;
>
> (3) The death sentence adjudged is proportionate to other death sentences that have been imposed; and,

> (4) Under all of the facts and circumstances of the case, the death sentence is appropriate.

Curtis, 32 M.J. 252, 271 (C.M.A. 1991).

The Court of Military Appeal's general guidance for undertaking the requisite Article 66, UCMJ proportionality review was that any such review "need not be limited to death sentences from [the] accused's own service or even to death sentences imposed by courts-martial." 32 M.J. at 270. Additional guidance respecting the parameters of the Article 66 proportionality review was announced in *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991) (Curtis II), and subsequently in *United States v. Loving*, 41 M.J. 213 (C.A.A.F 1994), and *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996) (Curtis III).

Pursuant to *Curtis* II, the Court of Military Review should:

> determine whether the sentence . . . is appropriate for the crimes for which the accused stands convicted and whether the sentence is *generally* proportional to those imposed by other jurisdictions in similar situations.

33 M.J. at 109 (Emphasis in original).

In *Loving*, a proportionality review based on a computer search of all cases reviewed by the Supreme Court since *Furman* was upheld as being "generally proportional to those imposed by other jurisdictions in similar situations." Loving, 41 M.J. 213, 290, citing *Curtis II*, 34 M.J. at 969. The *Curtis* III court re-affirmed the proportionality review approved in *Loving*.

44 M.J. at 166, citing *Loving*, 41 M.J. at 290-91. In so doing, the *Curtis III* court referenced its earlier declination to decide whether an appellant's case had to be compared with a data base and what the appropriate methods and means of comparison were, and it expressly declined to require a comparison of:

> (1) all cases in which a defendant committed an offense which would potentially be referred capital;
> (2) cases where discretion at some point in the proceeding removed death as a possible sentence;
>
> (3) cases wherein a finding of an offense less than that of premeditated murder or felony murder was reached; and,
>
> (4) all cases wherein a life sentence instead of a death sentence was adjudged.

Curtis, 44 M.J. at 166. The Court, in *Curtis I*, quoted *Zant v. Stephens*, 462 U.S. 862, 879, 103 S. Ct. 2733, 2744, 77 L.Ed. 2d 235 (1983) for the proposition that a death penalty adjudged by a court-martial must reflect "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Curtis* I, 32 M.J. at 256, quoting *Zant v. Stephens*, 462 U.S. 862, 879, (1983).

Appellant's Death Sentence is Disproportionate to the Sentence Adjudged in the One Similar Military Capital Case Decided Since *United States v. Furman*

In order to do justice to the individualized determination required in *Zant* and the prohibition against arbitrary

imposition of death sentences expressed in *Furman*, this court should itself look at appellant's character and the specific circumstances surrounding his offenses. It can readily, if not only do that by comparing appellant's case to that of *United States v. Kreuzter*, Army Dkt. No. 20080004. In so doing, this Court can only conclude appellant's death sentence must be set aside as disproportionate.

United States v. Kreutzer

In 1995, SGT Kreutzer, a Caucasian man, was convicted of one specification of premeditated murder, eighteen specifications of attempted premeditated murder, as well as one specification of larceny of government munitions and one specification of violating a lawful general regulation. Sergeant Kreutzer planned to kill members of his brigade as that brigade assumed the status as the "division ready brigade." Sergeant Kreutzer established a fighting position in a woodline adjoining the field where his brigade would be in formation. When the unit was in formation, SGT Kreutzer opened fire, killing one officer and wounding 19 other Soldiers. Upon being apprehended, SGT Kreuzter struggled, shot an officer in the foot, and then asked that he too be killed. While SGT Kreuzter had an enduring fascination with weapons and death, his background, as reflected during his trial, also suggested a mental illness or defect prompted him to commit the offenses for

which he was convicted, although, because his counsel were ineffective, they failed to present that evidence.

United States v. Akbar

Sergeant Akbar's alleged offenses are detailed above, but the similarity of his actions and SGT Kreutzer's are striking. Both Soldiers attacked their units, and both exhibited odd behavior and made odd statements prior to their acts. Also, in both *Kreutzer* and appellant's case, although each exhibited characteristics of mental illness, neither could adequately present that information to the panel because of their counsel's inexperience in capital litigation and inability to present an adequate mitigation case. It was hinted at in both cases, but not fully developed due to the ineffective assistance of counsel.

Even suspending for the moment the fact that SGT Kreutzer's death sentence was set aside because his opportunity for putting mitigation evidence on at trial was thwarted (no doubt an appropriate separate basis for setting aside *appellant's* death sentence), a comparison between appellant's case and SGT Kreuzter's indicates appellant's culpability was markedly similar to SGT Kreutzer's. Coupled with appellant's own inability to put on mitigation evidence at his sentencing hearing, as was also true in SGT Kreutzer's case, this court must set aside appellant's death sentence.

The Death Sentence is Inappropriate in Appellant's Case

Application of Curtis' fourth factor mandates that this court set aside appellant's death sentence as inappropriate. The fourth *Curtis* factor - that "under all of the facts and circumstances of the case, the death sentence is appropriate" - specifically embodies this Court's duty under Article 66(c), UCMJ to "affirm only such findings of guilty and the sentence of such part or amount of the sentence, as it finds correct in law and fact and determines, *on the basis of the entire record*, should be approved." UCMJ Art. 66 (emphasis added).

In reviewing the record of trial and considering the numerous assignments of error in this case, this court cannot with confidence affirm appellant's death sentence. The following errors during appellant's court-martial, to name just a few, place into question the propriety of appellant's death sentence:

> (1) Appellant's trial defense counsel had unresolved conflicts of interest, which negatively affected their ability to represent him.
>
> (2) Appellant's ineffective assistance of counsel throughout appellant's court-martial, capped by a thirty-eight minute sentencing case.
>
> (3) Appellant's significant mental health issues at the time he committed the offenses for which he was convicted, at the time of his court-martial, and now.

(4) The military judge's erroneous and prejudicial refusal to instruct the panel about how to properly balance the aggravating and mitigating factors (i.e., the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt), as requested by trial defense counsel.

Finally, the record of trial simply does not provide a sufficient basis for this court to conduct a meaningful Article 66 review of appellant's case. Indeed, the absence of critical background details about appellant's mental health issues - as mitigating factors to be considered by the panel in its sentencing deliberations - runs counter to the necessity of a sentencing authority to give independent mitigating weight to aspects of the defendant's character and record and to the circumstances of his offense. The result is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Matthews*, citing *Lockett v. Ohio*, 438 U.S. 586, 605, 98, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion). *See also United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990). Based on this, there is no way this Court can ensure appellant's death sentence fits both him and the offenses for which he has been convicted.

WHEREFORE, appellant respectfully requests that the Court set aside findings and sentence.

Part Seven: Post Trial Errors

Assignment of Error XII.

BECAUSE SGT AKBAR'S TRIAL DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE APPELLANT'S CASE, THIS COURT SHOULD ORDER THE GOVERNMENT TO FUND THE APPELLANT'S REQUESTED FORENSIC PSYCHIATRIST AND PSYCHOLOGIST, DR. RICHARD DUDLEY AND DR. JANICE STEVENSON, OR PROVIDE AN ADEQUATE SUBSTITUTE.

Introduction

"We are not helpless, however, to render justice when due. One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F. 1998).

"We will ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a "reliable result," are part of the equation. In the final analysis, we have heretofore examined . . . the record of trial in capital cases to satisfy ourselves that the military member has received a fair trial." *Murphy*, 50 M.J. at 15 (emphasis added).

Standard of Review

The standard of review in this case for determining whether appellant should receive expert assistance on appeal is *de novo*. R.C.M. 703(d).

Argument

The test for showing the necessity of expert assistance is "[F]irst, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *United States v. Gonzalez,* 39 M.J. 459, 461 (C.M.A. 1994).

1. Why the expert assistance is needed.

Appellant has been prevented on appeal, despite the stated need: (1) from providing experts requested by the Army Court's appointed mitigation expert Lori James-Townes; (2) from identifying deficiencies in the mental health examination process at trial; (3) from reviewing and understanding the psychological significance of mitigation evidence never presented to any mental health expert at trial; (4) from understanding how the relevant mitigation evidence could have been used on merits and sentencing at trial; (5) from addressing appellant's competency at the time of the offense, at trial, and during appeal.

Appellate defense counsel could not fully prepare several extremely significant assignments of error because of an absence of a thorough and professionally conducted mental health investigation and evaluation. Specifically, appellate defense counsel could not fully prepare a Motion for New Trial or fully

prepare assignments of error dealing with appellant's mental health, specifically appellant's current ability to assist in his own appeal, and past competency either at trial or at the time of the offense, or those dealing with ineffective assistance of counsel on merits and sentencing.

Appellant received ineffective assistance of counsel at trial.[70] There were severe deficiencies in the mental health examination of appellant before trial. (App. Ex. 140; DAE B, C, D, G, I, R, Z, AA, GG; DA 1-27, 92-94, 224-36, 331-41, 413-517.) Additionally, Dr. Woods' could not complete his diagnosis because mitigation and background evidence was never presented to him before or during trial. *Id.* At trial, Dr. Woods testified that he was unable to either rule in or rule out Paranoid Schizophrenia or Schizo-Affective Disorder as diagnoses because he required more information, testing, and treatment. (R. at 2291 and 2330.)[71] Doctor Woods also testified that he was "struggling" to put "an Axis I name on Axis I symptoms". (R. at 2349.) Doctor Woods was thus unable to diagnose Schizophrenia because of a lack of adequate information is extremely concerning. The inadequate mitigation case resulted from a

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[70] *See* AE I: A-G.

[71] While Dr. Woods did say he had "everything I needed," this statement was focused only to having "everything" that Dr. Woods needed from the redacted Sanity Board Report and therefore did not require the un-redacted version of the Sanity Board Report, not "everything" he needed to accurately diagnose appellant. (R. at 2319.)

dysfunctional defense team and defense counsel who failed to properly coordinate and supervise that team's efforts. (App. Ex. 140; DAE B, C, D, G, I, R, Y, Z, AA, GG; DA 1-27, 92-94, 224-36, 331-41, 413-517; *See also* AE I: B.)

Additionally, Dr. Clement, a civilian who at the time was the Chief of Neuropsychology at Brooke Army Medical Center reported that "[A] psychiatric diagnosis of Schizophrenia, possibly paranoid type, or secondarily Paranoid Disorder should be considered (DA 98)," and, "[I]f there is additional clinical or historical data to support a diagnosis of Schizophrenia, that diagnosis would supersede a diagnosis of Dysthymic Disorder." (DAE M; DA 49.) Dr. Clement corroborated Dr. Woods' concern that Schizophrenia was indicated and urged more testing and assembling of historical data. *Id.* Lori James-Townes, who has much experience in death penalty litigation and is this Court's appointed mitigation expert, has also outlined the necessity for a forensic psychologist and a forensic psychiatrist. (DAE J; DA 28-32.)

Finally, the fact that Dr. Woods and the rest of the defense team were effectively ignored by trial defense counsel during much of the pre-trial process is corroborated by what was and was not presented at trial and on sentencing.[72] Doctor Woods and the mitigation experts were not engaged in effective and

[72] *See* AE I: B.

substantive communication to the extent necessary to allow Dr. Woods to make an adequate diagnosis based. (DAE AA; DA 229-36.) At trial on the merits, Dr. Woods could identify two serious mental health issues as possibly affecting appellant but could not definitively diagnose either because of a lack of information. (R. at 2291, 2330.) After talking to members of the defense mitigation team after trial and learning of the quality and quantity of the background information (specifically family mental health history) not made available to him. Doctor Woods now believes that appellant likely has Paranoid Schizophrenia and did at the time of the offense and at the time of trial. (DAE B, C, AA; DA 1-6, 229-36.)

During sentencing, trial defense counsel submitted no evidence and solicited no testimony from Dr. Woods, and counsel neither submitted evidence nor solicited testimony from any member of the Defense Mitigation Team. Instead, counsel submitted an unfiltered and unexplained diary. (R. at Def. Ex. A; AE I: F.) Defense counsel's also submitted a memo from Deborah Grey (R. at Def. Ex. C), who had ceased being a member of the Defense Mitigation Team roughly ten months earlier. (R. at 548.) Ms. Grey's submission was an unedited and unfiltered running commentary of appellant's diary prepared for counsel. (R. at Def. Ex. C.; AE I: F.)

Appellant may have had Paranoid Schizophrenia or Schizo-Affective Disorder at the time of the offenses, trial, and now. Doctor Wood's inability to make either diagnosis at trial was because defense counsel failed to exchange within the defense team, information as well as trial defense counsel's refusal to request further testing of appellant. (R. at App. Ex. 140; DAE B, G, I, R, GG; DA 1-6, 22-27, 92-93, 331-41.) Based on the quality and quantity of the new information, Dr. Woods now believes appellant had Paranoid Schizophrenia at the time of the offense and at the time of trial. (DAE C, AA; DA 5-6, 229-36.) Doctor Cooley concurs with this diagnosis. (DAE Z; DA 224-228.)

With this large volume of evidence, appellant has established that expert assistance is necessary. The necessary and complete psychological and psychiatric testing that was not done before trial still has not been done. The psychological analysis on the boxes of unseen background material that was not done before trial still has not been completed. The follow-up background investigation that was not done before trial has been completed, and Ms. James-Townes has again stated the need for additional experts and recognized the serious deficiencies in both the quality and quantity of social history information that Dr. Woods had to rely on at trial. (DAE LL; DA 415.)

More importantly, Ms. James-Townes has indicated that her mitigation report has been hindered and is unable to be

completed because of appellant's current mental health condition. *Id.* at DA 447. The testing and background materials would establish the basis for a proper diagnosis for appellant and assist appellant and this Court in determining what the impact of such diagnosis (as well as its presentation via expert testimony) may have had on either the merits or the sentencing case at trial. Without this testing and expert assistance, appellant and this Court can only surmise what the diagnosis might have been. When appellant faces death he is entitled to the resources necessary to develop the record with expert analysis and opinion. He should not have to guess and be forced to offer speculation in support of his appeal.

In short, this Court cannot rely on the result of this trial because appellant never received the necessary mental health analysis, based upon an adequate social history investigation.[73]

2. What Expert Assistance Would Accomplish.

A forensic psychiatrist and psychologist would assess appellant's psychological and mental health, as well as his brain's structure and chemistry. Doctor Woods consulted with

[73] Doctor June Cooley is assisting appellant pro bono. She has not had the time or funding to conduct the necessary psychological or physical testing of appellant. Doctor Cooley's assistance to appellant is neither a substitute for, nor waiver of, the need for the requested mental health experts in this case.

Dr. Clement before trial and together they concluded that there was some issue with the neuroimaging done on appellant and that further testing and analysis was required. (DAE C; DA 5-6.) That request for more testing was ignored by trial defense counsel. Additional testing would reveal whether there is structural damage to appellant's brain. It is unlikely that brain structure would have significantly changed (other than to possibly worsen) since the time of the offenses.[74]

Doctor Woods, Dr. Clement, and Dr. Cooley all believe that further testing is required. (DAE B, C, D, M, Z, AA; DA 1-14, 47-63, 224-36.) Both also believe further background information and investigation by mitigation experts is needed to arrive at the proper mental health diagnosis for appellant.[75]

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[74] That there is a structural component to Schizophrenia-type mental health disorders is supported generally by the Diagnostic and Statistical Manual of Mental Disorders IV—Text Revision (2000) (hereinafter DSM-IV-TR). DSM-IV-TR at 305 (describing literature on the physiological differences in the brain structure of people with Schizophrenia versus people without Schizophrenia). It is supported more specifically by a much more recent article from Oxford University Press noting that "extensive literature, presented in reviews and meta-analyses, documents consistent morphometric differences between patients with schizophrenia and healthy people." (DAE W, Raquel E. Gur, Matcheri S. Keshavan, and Stephen M. Lawrie, *Deconstructing Psychosis With Human Brain Imaging*, in Schizophrenia Bulletin, Vol. 33, No. 4, 921-931, 922 (2007); DA 198-209).

[75] Doctor Clement stated, "[I]f there is additional clinical or historical data to support a diagnosis of Schizophrenia, that diagnosis would supersede a diagnosis of Dysthmic Disorder" and "[A] psychiatric diagnosis of Schizophrenia, possibly Paranoid type, or secondarily Paranoid Disorder should be considered." (DAE M; DA 47-63.)

Id. The requested experts would conduct the relevant and necessary testing. The new mitigation and extenuation evidence uncovered by appellant's current mitigation specialist would also assist the requested experts in making a thorough and sufficient mental health assessment and diagnosis.

Mental health experts would also assist appellant in two other key areas: (1) assessing and addressing the magnitude of harm caused by trial defense counsel's deficient performance in conducting the sentencing case; and (2) assessing the need for an additional R.C.M. 706 Sanity Board in this case. While a Sanity Board may eventually become necessary, it will not by itself solve or remove appellant's need for mental health experts, including critically the need to consult confidentially with experts in the field. Appellant is still allowed to challenge the results of any Sanity Board, if necessary, and should be allowed to do so armed with more than his attorneys who are only laymen in this field.

3. Why Defense Counsel Are Unable To Gather And Present The Evidence That Expert Assistance Would Be Able To Develop.

Appellate defense counsel are not trained or qualified in psychological or psychiatric testing or analysis. Appellate defense counsel require the special expertise of the requested experts to identify what testing should have been done, what was missing, and what should have been presented to the panel had

the appropriate mental health investigation been completed. The experts are also required to conduct testing, including the testing recommended by Dr. Woods during the course of the trial. The declarations of the mental health professionals and mitigation specialists involved in the case show that not only was there a tremendous volume of mitigation information actively ignored by the trial defense counsel, but that actual testing was either not done, or if done, was neither properly analyzed nor presented to the panel.

Appellant's counsel can certainly identify the vast majority of the possible deficient performance of trial defense counsel, but appellant's counsel are not qualified to identify or diagnose appellant or to conduct testing to adduce what appellant's true mental health state is now or as existed at either trial or the time of the offense.[76] Without it, appellant will be left making suppositions instead of being able to present factual information through testing and expert analysis of appellant's actual mental health status now, at the time of trial, and at the time of the offense. This Court will be left,

[76] Appellate counsel and Lori James-Townes have observed numerous troubling behaviors of appellant suggesting serious mental illness but counsel is not qualified to determine the exact severity or type of mental illness appellant suffers from currently or at the time of the offense or trial and Ms. James-Townes, while qualified to make limited diagnoses, is still not able to order or assess the additional testing and analysis required.

much as the panel was, to rely on inadequate mental health examinations based on inadequate social history information. Even if this Court orders a Sanity Board, appellate counsel cannot credibly and competently explore or confirm the diagnosis of the Sanity Board absent years of advanced training and without expert assistance in lieu of that training. Appellate counsel cannot completely assess how appellant's diagnosis would change given all of the new mitigation information without expert assistance. Appellate counsel certainly cannot, without expert assistance, assess whether appellant is currently legally insane and therefore ineligible for the death penalty. *See Ford v. Wainwright*, 477 U.S. 399 (1986). Appellate counsel cannot determine if appellant was legally insane at the time of the offense or trial without expert assistance. Expert assistance is necessary for, and impacts upon, every facet of this case.

This Court's prior precedent in capital cases dealing with experts also is compelling in establishing the necessity of experts in this case. In *Murphy*, experts were not specifically addressed (in large part because the request for post-trial experts was granted); however, the CAAF made clear that "we must be satisfied that the adversarial process has worked, and that appellant has had a fair and complete trial." *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F. 1998). *Murphy* placed the emphasis in a death penalty case where it should be, on getting

a "fair and complete trial." *Id.* *See also Gregg v. Georgia*, 428 U.S. 153 (1976); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Furman v. Georgia*, 408 U.S. 238 (1972). The CAAF in *Loving* also recognized the different playing field in death penalty litigation. *See Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) ("'death is different' is a fundamental principle of Eighth Amendment law. This legal maxim reflects the unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence, and mandates a plenary and meaningful judicial review before the execution of a citizen").

In *Kreutzer*, again the defense request for post-trial experts was granted, and thus that case did not address the necessity for experts. *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005). While the CAAF in *Kreutzer* did not establish a *per se* rule for mitigation experts in capital cases, in noting the American Bar Association Guidelines, the CAAF did establish that mitigation experts are "core members" of the defense team. *Id.* at 302. *Kreutzer* also recognized the critical role of the mitigation expert "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." *Id.* (*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)) (emphasis added). This does not mean that appellant believes that because *Murphy* and *Kreutzer* involved granted expert assistance on appeal that they are not "on point" with appellant's case. In fact, they deal with the same exact issues, lack of a competently performed mitigation investigation and lack of an adequate mental health examination.

In appellant's case, Ms. Lori James-Townes, this Court's appointed mitigation expert, has identified the need for experts to evaluate appellant and has identified two experts as having particular skill and experience in addressing that need. (DAE J; DA 28-32.) To ignore her affidavit is to ignore the critical role of a mitigation expert recognized by this Court's superior court in *Kreutzer* and it ignores the expert advice of an expert the Army Court appointed.

In sum, because of the heightened considerations given to death penalty jurisprudence, appellant's case cannot afford to not competently and completely address the mental health status of appellant at the time of the offense or the time of trial.

Previous Motions for Requested Experts:

In response to appellant's prior request for mental health experts (*United States v. Akbar*, No. 20050514 (A.Ct. Crim. App., Apr. 29, 2009), this Court relied upon the three part test in *United States. v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005). The CAAF in *Bresnahan* did refer to the three-part standard in *Gonzalez*. 39 M.J. 459, 461 (C.M.A. 1994). In that test, the defense must show:

> (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.

39 M.J. at 431.

However, the essence of CAAF's ruling in *Bresnahan* was that the military judge did not abuse his discretion:

> This was a close call. Just as we hold that the military judge did not abuse his discretion by denying the request, we would also conclude that the military judge would not have abused his discretion had he granted the request. Because the military judge was not clearly erroneous in his findings of fact and he did not base his decision on an incorrect view of the law, we conclude that he did not abuse his discretion in denying the defense's request for expert assistance.

62 M.J. at 143-44.

Appellant's case does not involve a review of a military trial judge's denial of expert assistance but involves an

initial request for experts on appeal. Appellant initially moved this Court for experts, but this Court informed appellant that requesting the convening authority first was the appropriate course of action. Appellant did so, and that request was, unsurprisingly, denied. (DAE N, O; DA 64-75.) A request for experts that is denied by a convening authority "may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute." R.C.M. 703(d). The purpose of requesting experts first from the convening authority is simply to give the convening authority "the opportunity to make available such services as an alternative." *See* Analysis R.C.M. 703(d).

Thus, the appropriate standard of review either at trial, or by analogy, on appeal is de novo. This is made even more clear by the lack of any case-law making a military judge's (or in this case appellate panel's) decision on experts in any way tied to the decision by a convening authority.

It is also important to examine the dissent in *Bresnahan* by Judge Erdmann (joined by Judge Effron). Judge Erdmann points out the "defense counsel dilemma," that is "a defendant requests assistance from an expert consultant, rather than an expert witness, he should not initially be required to show conclusively that evidence favorable to his case exists." *Id.*

at 147-148. As in *Bresnahan*, appellant in this case is not seeking an expert witness, but merely expert consultants. Therefore, appellant should only be required to make a "colorable showing" that the issues of competency and mitigation/sentencing are present in this case. *Id.*

Additionally, "a colorable showing" is the appropriate standard because this is a capital case. Although the *Gonzalez* test is the same, appellant should only be required to make a colorable showing.

This Court cited *Gray*[77] in its Opinion but it is unclear to what purpose. This Court does not cite to its superior court's decision in *United States v. Gray*[78] [hereinafter *Gray II*]; however, both cases are completely different from appellant's case both, factually and legally.

(a) *Gray* Is Factually Different.

The putative diagnosis in *Gray* was organic brain injury. *Gray II* at 14. The putative diagnosis in appellant's case is primarily be Paranoid Schizophrenia. (DAE B, C, D, Z, AA; DA 1-14, 224-36.) Gray's diagnosis was addressed at trial and on initial appeal, and there were no experts, government or defense, who found that it was a critical factor effecting guilt, nor did it significantly lower his culpability. *Gray II*

[77] *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991), *writ appeal pet. Den.*, 34 M.J. 164 (C.M.A. 1991).
[78] *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999).

at 14. Appellant's diagnosis was unable to be addressed because Dr. Woods, the defense expert at trial, did not have enough information or testing to rule it in or out. (R. at 2291 and 2330.)

Gray engaged in "battling experts" by presenting to CAAF a single expert who neither interviewed appellant, nor reviewed expert testimony but merely looked through the file and determined that *Gray* had organic brain injury that *"probably impaired his capacity to distinguish right from wrong and conform his conduct to the law."* *Gray II* at 13. (emphasis original.)

In appellant's case, the original expert at trial was unable to address Paranoid Schizophrenia, as well as Schizo-Affective Disorder, because of a lack of testing and information. Doctor Woods was not impeaching his own testimony. He stated this before trial. (DAE D; DA 7-14.) He requested more testing and doubted his diagnosis before trial, and during trial. (R. at 2291 and 2330.) He stated this after trial. (DAE B, C, D; DA 1-14; *See also* Def. Ex. H ("I would strongly recommend a reexamination of Sargeant [sic] Akbar.") This is not a case of a confident expert at trial who then has a change of heart. Doctor Woods, "struggling" to come up with a diagnosis, was not a confident witness at trial. Nor is Dr. Woods coming in after the fact and years later, having not even

interviewed appellant or reviewed trial testimony. This is the defense expert at trial who has repeatedly stated his continuing concerns with the case.

(b) Gray Is Legally Different

Appellant claims ineffective assistance of counsel based upon the failure of counsel to utilize experts, similar to *Wiggins v. Smith*, 539 US 510 (2003), and *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) ("the mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable."). Neither case had been decided prior to the decision in *Gray* or *Gray II*.

In *Gray II*, the CAAF determined that the lower court had a "sufficient basis in the record for considering the mental-state issues" before it. *Gray II* at 21. In appellant's case, appellant has established that there is missing background and mitigation evidence, that requests for testing and more investigation were ignored, that experts were both ignored and not communicated with, and that an expert at trial changed his opinion and diagnosis based on new information he did not have at trial. This Court, unlike the Court in *Gray*, cannot be satisfied that it has a "sufficient basis in the record for considering the mental-state issues" in this case.

Gray was issued in 1993. Death penalty jurisprudence has evolved considerably since that time, and this Court should rely upon more recent death penalty case-law in forming and shaping its decision. *Gray* appears to lay out a requirement that, in order to get expert assistance, counsel must first try to gather the necessary expertise "through consultation with other appellate defense counsel, the Trial Defense Service, or government psychiatrists located in the National Capital area. Counsel admitted in oral argument that he has not availed himself of the ample supply of government psychiatrists." *Gray*, 32 M.J. at 732. First, this is a requirement not seen in more recent death penalty jurisprudence, and ignores the advent of mitigation specialists. Second, appellant, under such a requirement would be forced to reveal confidential information to a host of people without any privilege. Finally, appellant cannot force experts (government or private) to assist appellant *pro bono* and cannot be required to exhaust all *pro bono* avenues before requesting experts. The entire principle behind allowing adequate government substitutes is to allow the government to effectively substitute *pro bono* (but sufficient) experts to assist appellant.

Kreutzer and *Murphy* demonstrate the significant evolution of death penalty jurisprudence since 1993. In *Murphy*, expert assistance was not at issue (in large part because the request

for post-trial experts was granted); however, that Court made clear that "we must be satisfied that the adversarial process has worked, and that appellant has had a fair and complete trial." *Murphy* at 15. *Murphy* placed the emphasis in a death penalty case on a "fair and complete trial." In *Gray*, the CAAF focused upon applying the standard rules for experts without regard to the different playing field of death penalty litigation, but did so without the benefit of *Wiggins*. This Court should look not to *Bresnahan* and *Gray*, but to *Murphy* and *Kreutzer* for guidance in determining the need for mental health experts on appeal in this case.

Before this Court forwards the death warrant for appellant, this Court must be satisfied that appellant has had "a full and complete trial." This Court cannot be satisfied that is true in appellant's case.

WHEREFORE, appellant requests that this Court grant a forensic psychiatrist and/or psychologist to appellant, or in the alternative, set aside the findings and sentence in this case.

Assignment of Error XIII.

AN EVIDENTIARY HEARING IS REQUIRED TO DETERMINE WHETHER APPELLANT IS LEGALLY COMPETENT TO ASSIST IN HIS OWN APPEAL, AND WHETHER APPELLANT WAS LEGALLY COMPETENT AT THE TIME OF THE OFFENSE AND THE TIME OF TRIAL.

Statement of Facts

Appellant was not competent at the time of trial because he suffered from: Paranoid Schizophrenia; Major Depressive Disorder, Recurrent, Severe with Psychotic Features; Post Traumatic Stress Disorder; and Dysthymia. (DAE C, Z; DA 5-6, 224-28; *see generally* HH; DA 342-374.) Appellant likely suffered from Paranoid Schizophrenia, Major Depressive Disorder, Recurrent, Severe with Psychotic Features, Post Traumatic Stress Disorder, and Dysthymia at the time of the offense as well. (DAE Z, AA; DA 224-36.)

Appellant's behavior calls into question his competency to assist with his appeal.[79] (See generally DAE Z, II, LL; DA , 224-28, 375-79, 413-517.) This behavior has persisted throughout his entire time in confinement. *Id.* Prison personnel reported and documented multiple such instances:

> 1. Regurgitating food onto his hand after a meal and then licking the regurgitated food from his hand;

[79] Appellate Counsel have prepared an affidavit describing the various behaviors observed by counsel or reported to counsel by prison personnel and the mitigation expert ordered by this Court. (DAE II; DA 375-79).

2. Repeated instances of laughing and smiling for "no apparent reason;"

3. Loudly singing prayers in his cell;

4. Inappropriate touching of his genitals immediately prior to placing his hands in the communal ice bucket used for all Death Row inmates at the United States Disciplinary Barracks (USDB);

5. Requesting to be placed on and then taken off Zoloft;

6. Inability to orient himself to time and place, asking when disciplinary boards were taking place during the actual conducting of the disciplinary board;

7. Screaming at all hours including phrases like "Somebody help me!" Attempting to give his prayer rug and Koran to a guard commander and asked the guard commander to "forgive him." Described by guard commander as "frantic;"

8. Frequent staring for long periods of time;

9. Frequently claiming that he changed religion from Islam to Christianity back to Islam;

10. Requesting Captain (CPT) Frank Ulmer as "his attorney" eight days after meeting with CPT Ulmer and releasing in writing CPT Ulmer as his attorney;

11. Hiding in the janitorial closet and refusing to come out. Tears were on his face but guards also noted a "distant look" on his face and he was non-responsive;

12. Standing in front of his cell or in front of the cells of other Death Row inmates with his genitals exposed.

Id.

Appellate defense counsel have also observed appellant's off behavior and actions, and believe appellant cannot competently assist in his appeal. These observations are from visitations or phone conversations dating back to May 2008. In almost every instance, appellant:

> 1. exhibits no change in demeanor regardless of the subject matter of the conversation. Appellant is emotionless, not laughing, smiling, frowning, or expressing any emotion at all;
>
> 2. often will "zone out" during conversations with appellate counsel; Appellant repeatedly asks appellate counsel to repeat statements made to appellant just seconds earlier;
>
> 3. is often non-responsive to questions from appellate counsel. When appellant is responsive, he is slow and seems to be communicating with great difficulty;
>
> 4. almost always appears tired and counsel have difficulty in keeping appellant awake;
>
> 5. repeatedly informs counsel that he is being drugged. Appellant asserts that the drugging has been taking place since college and has continued on throughout his life. Appellant states that when he is drugged, he finds it difficult to focus and concentrate, as if something is holding him back and he is in a fog. Appellant states he believes it is either put on his hat or possibly in his food. Appellant has repeated this allegation to the Court ordered mitigation expert, Lori James-Townes;

> 6. has set-up appointments with appellate counsel, but during the scheduled appointment is unaware that he had set-up an appointment and has nothing to say;
>
> 7. repeats questions that have been asked and answered and which concern fairly uncomplicated issues. This is inconsistent with appellant's high intelligence quotient (R. at Pros. Ex. 240);
>
> 8. has told prior counsel that he would eat only Ramen noodles because those noodles were less likely to be poisoned. The fact that he has in the past restricted his diet to Ramen noodles was confirmed by prison personnel.
>
> 9. will repeatedly change his mind on what he wants to do in the course of his appeals. Appellant gives no reason and seems to do so for reasons which are unapparent and inexplicable even to him.

Id.[80]

Applicable Law and the Standard of Review

This Court must determine whether appellant was competent at the time of the offense and the time of trial. UCMJ, Art. 50a(a); 10 U.S.C.A. § 850a(a). This Court must also assess the mental health status of appellant prior to approving a sentence of death. *Ford v. Wainwright*, 477 U.S. 399 (1986) (The Eighth Amendment bars the execution of those who were criminally responsible at trial but who later became insane while pending

[80] Appellant has requested this Court assign expert assistance to assist appellate counsel in determining the ability of appellant to assist in his own appeal, as well as his competency at the time of the offense and at trial. (AE XII, XIII.) Such support has been previously denied by this Court.

execution.) A fact-finding hearing must be ordered under *United States v. DuBay*, 37 C.M.R. 411 (1967) to assist this Court in determining whether or not appellant is competent to assist in his own appeal, and whether or not appellant is legally insane and therefore barred from execution.

Error and Argument

This Court can only affirm such findings and sentence in appellant's case "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ, Art. 66(c); 10 U.S.C.A. § 866(c). Given the prohibition by Art. 50(a) against convicting an accused who was not legally competent either at the time of the offense or at trial, and the prohibition by *Ford* against executing those who are found insane pending execution, this Court must be satisfied that appellant was legally competent at the time of the offense, trial and currently on appeal. To determine this, this Court must order a *DuBay* hearing. As explained below, an R.C.M. 706 Sanity Board would be insufficient to determine the competency of appellant at the time of the offense, trial and on appeal. Appellant has requested expert mental health assistance. *See* AE XII. Without this assistance, appellate counsel would not have the expertise to digest, completely understand or, if necessary, challenge the findings of a Sanity Board. *See Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008)(Holding that a death

row inmate was entitled to a full and fair hearing where such a hearing would bring about facts which, if proven true, support habeas relief.)

There is no guarantee that a Sanity Board would consider the vast social history of appellant in determining appellant's past and current mental health status. Because no rules govern the actual conduct of Sanity Boards, nothing assures that appellant will receive a consistent and thorough examination of his mental health. The conduct of the Sanity Board, the tests selected to examine appellant, and the depth of the overall examination are at the sole discretion of the senior member of the Sanity Board. Certainly, appellant's previous Sanity Board conducted considered almost no social history, and conducted only some of the testing necessary to fully evaluate appellant's mental health. (DAE Z; DA 22428.) Appellant must receive a full fact-finding *DuBay* hearing, with mental health experts for appellant and the government, before this Court can be assured that it has appellant's correct mental health assessment and determinations of his competency at the time of the offense, trial, and on appeal.

If this Court grants appellant's request, appellant will still require expert assistance to serve as a check on the accuracy and competency of the Sanity Board's findings. Only through the adversarial crucible of a *DuBay* hearing, with

experts for both appellant and government, will this Court be able to gather the necessary facts to determine the mental health status of appellant at all three crucial points in his trial and appeal.

In accordance with *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), appellant requests that the *DuBay* hearing examine: (1) whether appellant was suffering from a severe mental disease or defect at the time of the offense; (2) the clinical diagnosis of appellant at the time of the offense; (3) whether appellant was able to appreciate the nature and wrongfulness of his conduct at the time of the offense; (4) whether appellant was suffering from a severe mental disease or defect at the time of trial; (5) the clinical diagnosis of appellant at the time of trial; (6) whether appellant was suffering from a mental disease or defect at trial which rendered him unable to understand the nature of the proceedings against him or to cooperate intelligently in his own defense; (7) whether appellant is currently suffering from a severe mental disease or defect; (8) appellant's current clinical diagnosis; (9) whether appellant is currently suffering from a mental disease or defect which renders him unable to understand the nature of the proceedings against him or to cooperate intelligently in his own appeal.

For reasons stated above, appellant requests a *DuBay* Hearing.

Part Eight: Systemic Errors

Assignment of Error XIV.

DENYING APPELLANT THE RIGHT TO OFFER A PLEA OF GUILTY IN A CAPITAL TRIAL IMPROPERLY LIMITS APPELLANT'S ABILITY TO PRESENT POWERFUL MITIGATION EVIDENCE TO THE PANEL.[81]

Statement of Facts

Appellant pled not guilty to all charges and their specifications. (R. at 617).

Applicable Law and the Standard of Review

"A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." Article 45(b), UCMJ; 10 U.S.C. § 845 (2005), *see also United States v. Matthews*, 13 M.J. 501 (A.C.M.R. 1982). An accused does not have an absolute Constitutional right to have a plea of guilty automatically accepted by a military judge, but he does ordinarily have the right to submit an offer to plead guilty outside of capital trials. *United States v. Pennister*, 25 M.J. 148, 151 (C.M.A. 1987). A military judge may reject a plea of guilty for various reasons but may not do so "arbitrarily." *United States v. Johnson*, 12 M.J. 673 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 23 (1982). "In courts-martial an accused has virtual *carte blanche* to present whatever he desires in extenuation and mitigation." *Matthews*, 13 M.J. at 527. "A

[81] *But see also* AE I: C.

plea of guilty is a mitigating factor." R.C.M. 1002(f)(1). The importance of mitigation evidence as a fundamental right of an accused is made clear by this Court's ruling in *United States v. Callahan*, 26 C.M.R. 443, 448 (1958) (holding that mitigation evidence "is an integral part of military due process and the denial of such a right is prejudicial to the substantial rights of an accused."). The right to present mitigation evidence also has "meaningful-opportunity-to-be-heard" Constitutional due process concerns. *United States v. Sumrall*, 45 M.J. 207, 209 (C.A.A.F. 1996) (*citing generally Weiss v. United States*, 510 U.S. 163 (1994)).

Error and Argument

Procedures permitting, but not requiring, the imposition of a death penalty sentence following a guilty plea do not violate the United States Constitution[82], and have been adopted by statute in thirty-five of the nation's thirty-eight death penalty jurisdictions.[83] The Constitutionality of pleading

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[82] The framers of the Constitution explicitly provided that a defendant could be convicted of a capital offense, treason, by pleading guilty. *See* U.S. Const. art. III, 3 ("No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court"); *see also Ex Parte Garland*, 71 U.S. 333, 340 (1866) (noting that the framers of the Constitution permitted the accused to enter a plea of guilty and could be subjected to capital punishment); *United States v. Wiltberger*, 18 U.S. 76, 79 (1820) (citing a 1790 Congressional statute that provided the same procedure).

[83] *See* 18 U.S.C. 3593 (1994); Ala. Code 13A-5-42, -43, -45 (1994); Ariz. Rev. Stat. 13-703(B) (West 2001); Cal. Penal Code 190.4 (West 1999); Colo. Rev. Stat. 16-11-103(1) (2000); Conn. Gen. Stat. Ann. 53a-46a (West 1958); Del. Code Ann. tit. 11,

guilty in a capital trial is clear given the above. The question then becomes: is the prohibition of presenting powerful mitigation evidence by pleading guilty in a capital court-martial by Article 45(b), UCMJ likewise Constitutional? The answer must be no.

Appellant can find no legislative history which establishes why Congress chose to deny military members the right to plead guilty in capital court-martials.[84] However, this Court's superior Court in *United States v. Matthews* seemed to state that the prohibition against pleading guilty in capital cases was due to "special treatment given to capital cases by courts and legislatures and the irreversible effect of executing a capital sentence." *Matthews*, 16 M.J. 354, 362 (C.M.A. 1983). While it

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4209 (1995); Fla. Stat. Ann. 921.141 (West 2001); Ga. Code Ann. 17-10-32 (1997); Idaho Code 19-2515 (Michie 1997); 720 Ill. Comp. Stat. Ann. 5/9-1 (West 1993); Ind. Code Ann. 35-50-2-9(d) (1998); Kan. Stat. Ann. 22-3210(a) (Supp. 2000); Ky. Rev. Stat. Ann. 532.025(1)(a) (Michie 1999); Md. Code Ann., art. 27, 413 (1996); Miss. Code Ann. 99-19-101 (West 1999); Mo. Ann. Stat. 565.006 (West 1999); Mont. Code Ann. 46-18-301 (West 1999); Neb. Rev. Stat. 29-2520 (1995); Nev. Rev. Stat. Ann 175.552 (Michie 2001); N.H. Rev. Stat. Ann. 630:5 (Michie 1996); N.M. Stat. Ann. 31-18-14 (Michie 1978); N.C. Gen. Stat. 15A-2000 (Lexis 1999); Ohio Rev. Code Ann. 2929.02 (Anderson 1996); Okla. Stat. Ann. tit. 21, 701.10 (West 1983); Or. Rev. Stat. 163.150 (1999); 42 Pa. Cons. Stat. Ann. 9711(b) (West 1998); S.C. Code Ann. 16-3-20 (Law. Co-op. 1985); S.D. Codified Laws 23A-27A-4 (Michie 1998); Tenn. Code Ann. 39-13-205 (1997); Tex. Crim. Proc. Code Ann. 1.13-1.15 (Vernon Supp. 2001); Utah Code Ann. 76-3-207 (Lexis 1999); Va. Code Ann. 19.2-257, 19.2-264.4 (Lexis 2000); Wash. Rev. Code Ann. 10.95.050 (West 1990); Wyo. Stat. Ann. 6-2-102 (Lexis 2001).

[84] There is no Federal law prohibiting civilians from pleading guilty in Federal capital cases.

is true that special treatment is given to capital cases and certainly there is no greater or more permanent punishment than death, there are a host of court cases since *Matthews* that provide more than adequate protection both on the merits and on sentencing that remove the fear that pleading guilty in a death penalty case somehow equates to judicial suicide. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005). The protections of those cases remove any argument for continuing the practice of denying an accused the opportunity to present the powerful mitigating evidence of an offer to plead guilty. *See Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., and Rehnquist, C.J., dissenting)("While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, 'admission of guilt . . . if not coerced, [is] inherently desirable'" (*quoting United States v. Washington*, 431 U.S. 181, 187 (1977))) (emphasis added) (alteration in original).

When the panel has to make a decision on a sentence in a capital court-martial, an accused has an interest in focusing the panel, in the entirety of the case, on sentencing factors and mitigating and extenuating evidence rather than first

advancing a meritless defense on the merits which only serves to anger the panel and arguably renders any post-conviction expressions of responsibility at best, lessened in impact, and at worst, self-serving.

An accused's interest in demonstrating that he has taken responsibility for his conduct, is remorseful, and is seeking to spare the victim's family and the court system unnecessary time and expense is a valid, and arguably critical factor in garnering a sentence other than death. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 672 (1984). (defendant "pleaded guilty to . . . three capital murder charges [and] . . . he accepted responsibility for the crimes. The trial judge told respondent that he had 'a great deal of respect for people who are willing to step forward and admit their responsibility' at the sentencing hearing," defense counsel adopted a "reasonable" strategy of "arguing that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty." *Id.* at 673); *see also* Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1559 (1998) (laying out the results of a study of what would make respondents more or less likely to vote for the death penalty; 21.7% of those interviewed answered that a defendant's failure to display remorse would make them much more likely to vote for death).

A guilty plea in a death penalty case would remove the need for a defense counsel to come up with some novel, and often meritless, argument that an accused was not guilty of the charged offense. This would allow counsel to focus the panel solely on remorse and mitigation. More importantly, it would address the "meaningful-opportunity-to-be-heard" right of appellant required by Constitutional Due Process. *Sumrall*, 45 M.J. at 209.

Certainly, there is no Constitutional right to have a guilty plea accepted by a military judge. *Pennister*, 25 M.J. at 151. However, this is yet another protection in the system that ameliorates any legitimate concern against pleading guilty in a capital case. A military judge can reject a guilty plea for a whole host of reasons (*e.g.* incompetency or improvidency) so long as it is not done arbitrarily. *Johnson*, 12 M.J. 673. So long as the plea of guilty is done knowingly and voluntarily and an accused is competent to stand trial, the protections the system provides are adequate enough that there remains no valid reason to forcibly remove from an accused the ability to present arguably the strongest mitigating factor there is; a plea of guilty.

Appellant was denied the use of this strong mitigating factor. Appellant could have asked for an instruction that could have been given telling the panel that appellant was not

allowed to plead guilty, it was never given to the panel in this case, and even if it had been, at best it reduces the possible anger of the panel but does nothing to provide the mitigating impact of accepting responsibility at the outset. In this case, appellant had no choice but to assert his innocence and leave any expressions of remorse or taking of responsibility to the end of the trial during sentencing. This unconstitutionally robbed him of the chance to present a powerful and consistent focus to the panel on mitigating factors in his case.

WHEREFORE, the appellant respectfully requests that this Court set aside the findings and sentence in his case.

Assignment of Error XV.

THE LACK OF A SYSTEM TO ENSURE CONSISTENT AND EVEN-HANDED APPLICATION OF THE DEATH PENALTY IN THE MILITARY VIOLATES BOTH APPELLANT'S EQUAL PROTECTION RIGHTS, AND ARTICLE 36, UCMJ.

Facts

Congress passed the Federal Death Penalty Act in 1994. 18 U.S.C. § 2245. Less than a year later, the federal government issued a formal protocol for United States (U.S.) Attorneys to follow in all federal cases in which a defendant is charged with an offense subject to the death penalty. Per this protocol, the U.S. Attorney Manual (USAM) requires that any U.S. Attorney first seek the authorization of the Attorney General of the United States before pursuing the death penalty. *United States Department of Justice, U.S. Attorney's Manual* § 9-10.020 (June 1998). A U.S. Attorney may not pursue the death penalty without getting approval from this cabinet-level authority. *Id.* This requirement ensures consistent and even-handed national application of the federal capital sentencing scheme across the more than ninety U.S. Attorneys offices.

Under the USAM, United States Attorneys must immediately notify the Capital Case Unit if intending to obtain an indictment on a capital offense, regardless of whether the U.S. Attorney intends to seek the death penalty. USAM § 9-10.050. After indictment, the U.S. Attorney then has to give the

defendant a reasonable opportunity to present any mitigating information for the U.S. Attorney to consider. *Id.* The U.S. Attorney must then consult with the family of the victim. USAM § 9-10.070. Within 90 days of the indictment, the U.S. Attorney must prepare a prosecution memorandum for the Assistant Attorney General. *Id.* at § 9-10.030-.040. That prosecution memorandum is very much like a staff judge advocate's pretrial advice and includes the U.S. Attorney's recommendation. The Assistant Attorney General then forwards the file to the Capital Case Unit for recommendation by a Capital Review Committee. *Id.* at § 9-10.050. The Attorney General reviews the recommendations of the committee and then makes a decision whether to seek the death penalty in the case. *Id.* This internal authorization process "is designed to promote consistency and fairness." *Id.* at § 9-10.080. Thus, in determining whether or not to seek the death penalty, the U.S. Attorney, the Attorney General's Committee and the Attorney General "must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death." *Id.*

The modern military capital system came about in 1984, after the President promulgated R.C.M. 1004 in response to *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). Nearly twenty-five years have passed and the federal government has not issued a formal protocol for convening authorities to follow in military cases in which a defendant is facing a capital referral. There is no process to ensure consistent and even-handed national and military-wide application of the military capital sentencing scheme across the more than ninety Army GCMCAs, let alone the numerous GCMCAs in the sister services. In the military, any general courts-martial convening authority can refer a case capital. R.C.M. 504.

Equal Protection Demands that Appellant Receive the Same Benefits that 18 U.S.C. § 2245 Provides to Those Accused of Capital Crimes in District Courts

The Fourteenth Amendment requires that states provide "equal protection of the laws." This principle is applied to the federal government through the Due Process Clause of the Fifth Amendment. *Vance v. Bradley*, 440 U.S. 93 (1979). The equal protection component of the Due Process Clause applies to servicemembers. *United States v. Leonard*, 63 M.J. 398, 399 (C.A.A.F. 2006) citing *United States v. Downing*, 56 M.J. 419, 421 (C.A.A.F. 2002); *United States v. Murphy*, 30 M.J. 1040, 1055 (A.C.M.R. 1990) (finding no equal protection violation because

there was actually no classification); *United States v. Loving*, 34 M.J. 956, 968 (A.C.M.R. 1992).

If the government passes a law or rule that confers the protection or burden of a law on one class of persons but not on another, that classification is subject to judicial review. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) ("Judicial inquiry under the Equal Protection Clause does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.") If those persons subject to the classification are part of a suspect class, the classification receives strict scrutiny. *Johnson v. California*, 543 U.S. 499 (2005). If those persons are part of a semi-suspect class (sex, alienage, nationality, illegitimacy) or if the classification impacts a fundamental interest (voting, travel, family relations), the classification receives a heightened level of review. *Romer v. Evans*, 517 U.S. 620, 628 (1996). All other classifications receive rational basis review. *Id.* citing *Heller v. Doe* 509 U.S. 312, 319-320 (1993).

Servicemembers do not fall into a suspect or semi-suspect class. However, the heightened due process that the Supreme Court gives to capital cases indicates that classifications that involve the death penalty do impact a fundamental interest, or

at the least, do invoke review that is heightened. *See Jacobs v. Scott*, 513 U.S. 1067, 1070 (Stevens, dissenting). Equal protection is at issue in capital cases specifically because "serious questions are raised 'when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens.'" *Id.* citing *United States v. Powers*, 467 F. 2d 1089, 1097-1098 (CA7 1972) (Stevens, J., dissenting). This concern is amplified because of the "heightened need for reliability" in capital cases. see *Caldwell* v. *Mississippi,* 472 U.S. 320, 323 (1985) (internal quotation marks omitted).

Equal protection was one of the Constitutional norms that the pre-1973 capital schemes violated. In 1972, the Supreme Court struck down existing capital schemes because the death penalty was administered arbitrarily and discriminatorily - defendants were not receiving equal protection of the law: "There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.'" *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) (internal citation omitted). The Court, in *Griffin v. Illinois*, 351 U.S. 12 (1956), stated how central equal protection is to our justice system: "[B]oth equal protection

and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin*, 351 U.S. at 17. The central aim of our entire justice system is that all people - including servicemembers - charged with a crime must receive the equal protection of the law.

Since *Furman v. Georgia*, 408 U.S. 238 (1972), every Supreme Court opinion on capital punishment has enforced the proposition that because of its severity and irrevocability, the death penalty is qualitatively different than any other punishment. Military courts have followed the Supreme Court's lead, noting "One continuous theme is found throughout the death-penalty cases handed down by the Supreme Court over the last 30 years. That theme is reliability of result." *Murphy*, 50 M.J. at 14. This Court's superior court has stated that in conducting its appellate review of capital cases, it "will ensure that fundamental notions of due process, full and fair hearings, competent counsel, and above all, a 'reliable result,' are part of the equation." *Id.* at 15; *see also Ford v. Wainright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, [the Supreme Court] has demanded that fact finding procedures aspire to a heightened standard of reliability."). The Court of Appeals for the Armed Forces also noted, "The Supreme Court,

however, has now made clear that the Eighth Amendment requires a different treatment of death-penalty cases." *United States v. Curtis*, 32 M.J. 252, 255 (C.M.A. 1991). The Court further recognized that Congress "has exhibited a special concern for capital cases." *Id.* at 256.

Due to this difference, criminal trials involving the ultimate sanction of the death penalty must be accompanied by a heightened standard of due process and reliability with commensurate procedural safeguards. *See generally Caldwell* v. *Mississippi*, 472 U.S. 320, 340 (1985); *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976).

"Death is a different kind of punishment" thereby entitling a capital defendant to a higher standard of due process. *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977). "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment in any capital case.'" *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). "There is no question that death as punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the court has been particularly sensitive to insure that every procedural safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1979) (internal citations omitted).

"Because of the qualitative difference [between death and any other punishment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). "(D)eath is a different kind of punishment from any other which may be imposed in this country." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). "(B)ecause there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Zant v. Stephens*, 462 U.S. 862, 884 (1983). "(I)n capital proceedings, generally this court has demanded that fact finding procedures aspire to a heightened standard of reliability. This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). "The decision to exercise the power of the state to execute a defendant is unlike any other decision citizens are called upon to make. Evolving standards of societal decency have imposed a

correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." *Mills v. Maryland*, 486 U.S. 367, 383 (1989).

Further, the death penalty is justified only in a narrow category of the most serious crimes, for those who have committed particularly heinous crimes where there are no compelling mitigating factors that lower their blameworthiness: *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005)

When viewed in this context, classifications that impact this fundamental interest - that a capital defendant receive an individualized and reliable sentence - must receive some form of heightened review. This review should be intermediate level of review (the means must be necessary to achieve a compelling government objective, *See Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969)).

If this court chooses to apply a rational basis review, that review must be meaningful. Under rational basis review, the means must be rationally or reasonably related to a legitimate government interest, *see Dandridge v. Williams*, 397 U.S. 471, 487 (1970). However, there are different levels of rational basis review. In the field of economic regulation, the review is the most deferential - the government is not even required to produce evidence that the classification actually

served the intended purpose, provided a legislature *could* have rationally decided that a classification would serve the purpose. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). However, when we move away from economic legislation, the test is meaningful; the court is not willing to presume that whatever the government proffers is actually true, but rather, the government must produce evidence to support its position. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (requiring that the record support the rational basis for the classification); *Romer v. Evans*, 517 U.S. 620, 626 (1996) (rejecting the government's proffer as to what the legitimate government purpose was). At a minimum, this court must require that the government prove that whatever purpose that the government advances for its classification of capital cases is, in fact, the purpose of this classification, and the government must make the record that the means chosen is actually related to the interest.

Article 36 Demands that Appellant Receive the Same Benefits that 18 U.S.C. § 2245 Provides to Appellants in District Courts

A military accused is protected by Article 36. Pursuant to Article 36, Congress permits the President to promulgate rules, but those rules "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". Article 36, UCMJ.

"Shall, so far as he considers practicable" is a high standard.

> The implication is that Congress intended that, to the extent 'practicable,' trial by court-martial should resemble a criminal trial in a federal district court. Even though Article 36 is principally concerned with 'procedures' and 'rules of evidence,' it can be inferred that, unless there is a reason not to do so, an interpretation of a provision of the Uniform Code should follow a well-established interpretation of a federal criminal statute concerning the same subject.

United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000). This standard means that if the principles of law that are applied in federal courts are *capable* of being put into practice in the military system, then the President should promulgate rules that match those offered to defendants facing trial in a federal court "unless there is a reason not to do so." *Id.* The question is can it be done without jeopardizing the military's mission. If it can be done, then he must do it.

This Court's superior court has construed Article 36 to mean that district court rules should apply unless contrary to the UCMJ. "[W]e comply with the congressional mandate that *courts-martial* 'apply the principles of law . . . generally recognized in the trial of criminal cases in the United States

district courts, but which may not be contrary to or inconsistent with [the UCMJ].'" *United States v. Loving*, 64 M.J. 132, 140 (C.A.A.F. 2006) (internal cite omitted) (emphasis added). *See also United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000):

> Article 36(a), UCMJ, 10 USC § 836(a), provides that, in prescribing "procedures, including modes of proof," before courts-martial, the President may prescribe 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." The implication is that Congress intended that, to the extent "practicable," trial by court-martial should resemble a criminal trial in a federal district court.

Id. at 191.

The standard in Article 36 is a higher standard than that the rational basis test that is found in the equal protection component of the Due Process Clause. The President must have more than just a rational basis for his decision to classify servicemembers differently than persons subject to federal jurisdiction: he can only classify against servicemembers if the principles of law applied in federal courts are *incapable* of being done, or cannot be put into practice in the military system. This analysis is also different than the equal protection analysis. Here, Congress has already noted, in

promulgating Article 36 that having the courts-martial process approximate federal criminal process is an important government interest. ("The implication is that Congress intended that, to the extent practicable, trial by court-martial should resemble a criminal trial in a federal district court." *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000) (internal quotations omitted)). The only analysis left is the means test, and here, Congress set out a rigorous test - if the principle of law *can* be applied in courts-martial, then that principle of law *must* be applied. *Id.*

When viewed in this capital context, Article 36 analysis has real meaning. Congress has already stated the government interest - that courts-martial resemble a criminal trial in a federal district court. *See* Article 36, UCMJ. In the capital context, this is crucial.

The military is inexperienced in capital litigation. Only one military death warrant has been signed in the last half-century. Deb Riechmann, *Military Execution Gets Bush Approval,* Chi. Trib., July 29, 2008, http://www.nysun.com/national/bush-oks-execution-of-army-death-row-prisoner/82755/ (last visited Jun. 26, 2010.

The lack of capital experience in the military bar has been noted in the few military capital cases that have reached the appellate stage. The CAAF noted that the defense counsel in

United States v. Murphy "were neither educated nor experienced in defending capital cases, and they either were not provided the resources or expertise to enable them to overcome these deficiencies, or they did not request same." *United States v. Murphy*, 50 M.J. 4, 9 (1998). The court noted that the counsel lacked training and experience "leading us to the ultimate conclusion that there are no tactical decisions to second-guess." *Id.* at 13. The concerns over lack of capital training for military attorneys was similarly noted in *United States v. Curtis*. 48 M.J. 331, 332 (1997) (Cox, C.J., concurring). It has similarly been noted in military cases that the military capital defense counsel do not meet ABA standards. *Loving*, 41 M.J. at 300. In fact, "[M]ost of the focus in capital litigation since Curtis has been on the lack of capital experience among military defense counsel." Mary M. Forman, *Military Capital Litigation: Meeting the Heightened Standards of United States v. Curtis*, 174 Mil. L. Rev. 1, 39 (Dec. 2002).[85]

While the inexperience of military defense counsel has driven the conversation, military judges and military prosecutors are all inexperienced in capital litigation. With rare exceptions, everyone sitting in front of the bar in a capital case will be sitting on their first capital case. If Congress meant for courts-martial to resemble the federal

[85] *See* AE I: A.

practice in *any* area, it must *at least* be in this area - where the military's federal counterparts have much experience in this area of the law and the military bar has next to none.

The government cannot claim that the military is different from the civilian sector to overcome Article 36; the government must produce some evidence that the President has actually considered this issue and made a declaration that the military is incapable of implementing a national, cabinet-level review of potential capital cases. Congress has said that the President must consider. Inaction or inattention is not consideration. The President needs a specific reason to break from the federal court practice as, "unless there is a reason not to do so, an interpretation of a provision of the Uniform Code should follow a well-established interpretation of a federal criminal statute concerning the same subject." *United States v. Valigura*, 54 M.J. 187, 191 (C.A.A.F. 2000).

No Reason for a Military Accused to Have Different Protections then a Federal Accused

As noted by the Supreme Court, the government interest in capital punishment is moral retribution. *Eutzy v. Florida*, 471 U.S. 1045, 1047 (1985). Moral retribution depends on the individual accused and his particular circumstances. *Id.* Thus, the punishment is appropriate based upon the individual

accused's misconduct, rather than the overarching concerns of the military.

> When speaking of the sentencing decision, the Court has characterized the jury's function as making a retributive assessment of the defendant's moral blameworthiness and guilt; it has declined to analyze deterrence; and has characterized incapacitation as a secondary consideration. Thus, Justice O'Connor declared in *Enmund v. Florida* that the Eighth Amendment concept of proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness. In *Tison v. Arizona*, it explained that, "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Concerning the primacy of retributive over incapacitative purposes in jury sentencing, in *California v. Ramos*, Justice Marshall challenged incapacitation as a justification for imposing a death sentence, saying "capital punishment simply cannot be justified as necessary to keep criminals off the streets." A year later in *Spaziano v. Florida*, the Court explicitly gave secondary standing to the goal of incapacitation, saying "incapacitation has never been embraced as a sufficient justification for the death penalty" and that "retribution clearly plays a more prominent role in a capital case." The Court concluded, "in the context of capital felony cases, therefore, the question whether the death sentence is an appropriate, non-excessive response to the particular facts of the case will depend on the retribution justification."

William J. Bowers and Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 623 (February 1999) (footnotes

omitted). The government is, thus, not free to pursue a military interest that comes at the expense of the individualized interest identified by the Supreme Court.

The government might argue that the goal of capital litigation is to ensure good order and discipline in the military and to promote efficiency and effectiveness in the military establishment. *See* Article 30(b); Manual for Courts-Martial, United States, pt. I, ¶ 3. That reason, however, is insufficient to justify diverging from the individualized consideration required for this, most severe, irrevocable, and qualitatively different punishment. *See Eutzy v. Florida*, 471 U.S. 1045, 1047 (U.S. 1985).

The United States Attorneys Manual (USAM), Title 9-10.030 (Purposes of the Capital Case Review Process), states (emphasis added):

> The review of cases under this Chapter culminates in a decision to seek, or not to seek, the death penalty against an individual defendant. Each such decision must be based upon the facts and law applicable to the case and *be set within a framework of consistent and even-handed national application of Federal capital sentencing laws.* Arbitrary or impermissible factors—such as a defendant's race, ethnicity, or religion—will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.

The USAM, Title 9-10.130 (Standards for Determination) (emphasis added), further explains this goal:

> The standards governing the determination to be reached in cases under this Chapter include *fairness, national consistency,* adherence to statutory requirements, and law- enforcement objectives.
>
> . . .
>
> B. National consistency requires *treating similar cases similarly, when the only material difference is the location of the crime.* Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care *to contextualize a given case within national norms or practice.* For this reason, *the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision- making context, and thereby, to reduce disparities across districts.*

The Executive Office of the United States Attorneys has, thus, developed a system that would only serve to benefit the military as well. The military has just as much reason to be concerned about the consistent and even-handed application of capital punishment. The military too would benefit from a system which ensures that similar cases are treated similarly. Most importantly, however, it is certainly 'practicable' for the military to implement the system used in the federal district courts, and it is essential to ensure the equal protection of American Soldiers.

Prejudice

The federal system for capital cases was put in place specifically to ensure that similar cases are treated when the only material difference is the location of the crime. USAM, Title 9-10.130. Appellant has been specifically prejudiced by the lack of such a system for servicemembers.

Yet, serious and potentially capital cases occur all over the military. In 2006, Specialist Jamaal Lewis was tried and convicted at Fort Lewis, WA, Fort Lewis, for a double murder that occurred in 2005. Fox News, *Fort Lewis Soldier Guilty of Murder*, http://www.foxnews.com/wires/2006Oct18/0,4670,SoldierGuilty,00.html. The accused walked up to a car that was parked in the parking lot of a bar and killed a male service member and the female spouse of a deployed service member who were inside. *Id.* The case was initially referred capital. *Id.* However, ultimately the convening authority referred the case non-capital. *Id.*

In Iraq, four Army Soldiers and one civilian, Steven Green (he was on active duty at the time of the offense but was later discharged), were involved in the rape and murder of a fourteen-year old girl and then the murders of three of her family members. James Dao, *Ex-Soldier Gets Life For Killings In Iraq,* N.Y. Times, May 22, 2009, Section A; Column 0; National Desk;

Pg. 12. Green was the shooter. *Id.* All of the accused involved were spared the death penalty. *Id.* Green, who was tried as a civilian, was the only accused facing death at the time of his trial. *Id.* Green received life without parole. Significantly, Green received the benefit of Attorney General review before he was tried, but the other three soldiers, if their cases had been referred capital, would not have received such a review, although the underlying crime was the same. Thus, Green stature at the time of his arrest and trial resulted in him receiving more due process than that afforded Soldiers.

In Iraq, members of a Marine unit were accused of murdering as many as twenty-four Iraqi civilians in the town of Haditha following a roadside bombing which killed a US Marine. None of the cases will be referred capital.

In 2005, the Fort Riley OSJA tried the case of *United States v. Stanley*. Sergeant Stanley was involved in methamphetamines along with three other NCOs. He believed that two of the NCOs were talking about him to CID, and one night, he and one of the other NCOs lured the other two NCOs to a desolate farmhouse. There, Sergeant Stanley shot and killed the two NCOs. The Fort Riley OSJA referred the case non-capital.

In March of 2007, GM2 Alfred Sims, while in Guam, with little or no provocation, shot to death his leading petty officer and shot and wounded a second Sailor. After killing one

Sailor and grievously wounding the second Sailor, GM2 Sims then laid down his weapon, walked to another office in the adjoining building, and immediately surrendered himself by informing the persons therein that he had just killed the LPO and wounded the second Sailor. He was tried on premeditated murder and attempted murder charges at NAS Pensacola, FL. The government referred his case non-capital in exchange for the defense waiving the Article 32 investigation.

However, of the four capital cases that have been referred across the entire military over the past decade, four have been tried by the XVIII Airborne Corps at Fort Bragg, North Carolina. For the Army, this one GCMCA - approximately 1% of all GCMCAs in the Army - is responsible for 100% of the capital cases. For each of these cases, the XVIII Airborne Corps had to take affirmative action to get jurisdiction over the cases.

In 2005, the XVIII Airborne Corps took jurisdiction over *United States v. Martinez*, a case out of the 42nd Infantry Division (the New York National Guard). United States v. Martinez, 2008 CCA LEXIS 616 (A.C.C.A. Aug. 5, 2008). Staff Sergeant Alberto B. Martinez was accused of murdering his company commander and another officer in Iraq. *Id.* at 1. Initially, the Multi-National Corps - Iraq (MNC-I) took control of the case from the 42nd Infantry Division. At the time, MNC-I was manned by the XVIII Airborne Corps and commanded by the

XVIII Airborne Corps commander. After taking jurisdiction of the case, the XVIII Airborne Corps commander referred the case capital.

In 2006, the XVIII Airborne Corps recalled MSG Timothy Hennis out of retirement to prosecute him for the rape and murder of a woman and the murder of two of her children in 1984. MSG Hennis was convicted in 1986 in state court and sentenced to death. See generally *State v. Hennis*, 323 N.C. 279 (N.C. 1988). That conviction was overturned, and MSG Hennis was later acquitted in state court. *Id.* After new evidence surfaced, the XVIII Airborne Corps called him out of retirement and has since referred his case with a capital instruction.

In *United States v. Kreutzer.* After Sergeant Kreutzer's case was reversed, his case was returned to the commander of Fort Leavenworth, KS. See generally *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005). The XVIII Airborne Corps took jurisdiction of the case from that commander.

The fourth is the case at bar. Appellant was a member of the 101st Airborne Division at Fort Campbell, KY, but the XVIII Airborne Corps took jurisdiction over the case. On 28 April 2005, appellant was sentenced to death by the Fort Bragg panel after only seven hours of deliberation. (R. at 3165, 3181.) Because no systemic approach was taken, the charges, referral,

and trial of appellant were unconstitutional and denied him equal protection under the law.

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings and sentence in this capital case, and order a new trial.

Assignment of Error XVI.

THE SECRETARY OF THE ARMY'S DECISION TO EXEMPT FROM COURT-MARTIAL SERVICE OFFICERS OF THE SPECIAL BRANCHES NAMED IN AR 27-10 WHICH CONTRADICTED ARTICLE 25(d)(2), UCMJ, WAS PREJUDICIAL TO APPELLANT

Applicable Law and the Standard of Review

In *Bartlett*, C.A.A.F. held that the Secretary of the Army's implementation of portions of AR 27-10 contradicted Article 25, UCMJ, which was a narrowly tailored legislation by Congress. *United States v. Bartlett*, 66 M.J. 426, 429 (C.A.A.F. 2008). "The Army regulations limiting detail of commissioned officers to court-martial duty, collected in AR 27-10, directly conflicted with the provisions of Article 25, UCMJ, on the same subject." *Id.* Thus, the contradictory portions of AR 27-10 could not stand. Appellant was court-martial pursuant to those offensive portions of AR 27-10. "The government has the burden of showing the error was harmless." *Id.* at 431.

Argument

The question before this court is one of prejudice. Appellant's case differs from *Bartlett*, in one monumental way. Appellant was tried in a capital case, whereas Bartlett pled guilty and submitted only the decision on a proper sentence to a panel. *Id.* The significance of each panel member cannot be understated when several unanimous votes are required to reach a sentence of death.

The specialized skills of the potential individual panel members wrongfully excluded by the Secretary of Army would have had a significant impact on the panel in appellant's case. Members of the medical corps, doctors, nurses, and psychologists, would have likely been more receptive to the mitigation evidence regarding appellant's psychological condition and personal history presented, albeit minimally (*see* AE I), at trial. Furthermore, members of the medical community could have countered the views and input of panel members with preconceived notions about mental illness. Lieutenant Colonel [redacted] expressed skepticism regarding the fields of psychology and psychiatry. (R. at 971.) The specialized skills of officers from the medical corps could have counter acted the views and opinions of the aforementioned officers during deliberations and possibly change the outcome of appellant's case, particularly, when a unanimous vote is required.

The specialized skills of chaplains could have had much the same effect as adding medical officers. Generally, chaplains have a specialized knowledge of all major religions, including Islam, and are more religiously tolerant than ordinary Soldiers. Specifically, a chaplain could have countered the skeptical and misinformed view of Islam expressed by LTC [redacted] (R. at 944.) A chaplain's specialized knowledge of religion and Islam could have changed the dynamic of the panel and resulted in a

different result, particularly when one vote controlled the appellant's fate.

The Secretary of the Army's decision to exclude officers of special branches from service on panels was prejudicial to appellant and altered the outcome of his case.

WHEREFORE, Sergeant Akbar respectfully requests this Court set aside the findings and sentence in this capital case, and order a new trial.

Assignment of Error XVII.

SERGEANT AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO REQUEST AN INSTRUCTION ON THE INABILITY TO PLEAD GUILTY IN THIS CAPITAL COURT-MARTIAL.[86]

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XVIII.

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CAPITAL CRIMINAL CASES TO TRIAL, PERSONALLY APPOINTING MEMBERS OF HIS CHOICE, RATING THE MEMBERS, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION WITHIN HIS COMMAND, RATING HIS LEGAL ADVISOR, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY THROUGH A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY. *SEE UNITED STATES V. JOBSON*, 31 M.J. 117 (C.M.A. 1990)(COURTS-MARTIAL SHOULD BE "FREE FROM SUBSTANTIAL DOUBT AS TO LEGALITY, FAIRNESS, AND IMPARTIALITY."); *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 296-97 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

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[86] *See also* AE XIV.

Assignment of Error XIX.

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM IN SELECTING COURT-MARTIAL MEMBERS DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XX.

APPELLANT WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION. *BUT SEE CURTIS III*, 44 M.J. AT 130-33.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXI.

THE CONVENING AUTHORITY DID NOT UNDERSTAND THE LAW AND HIS OPTIONS, INCLUDING DETAILING AN ALL-ENLISTED PANEL AND RANDOM SELECTION OF MEMBERS FOR HIS FURTHER SCREENING, REGARDING DETAILING OF ENLISTED MEMBERS UNDER ARTICLE 25, UCMJ. *BUT SEE CURTIS*, 44 M.J. AT 132.

WHEREFORE, this Court should set aside findings and sentence.

Assignment of Error XXII.

THE PANEL'S RECONSIDERATION OF THE SENTENCE IN APPELLANT'S CASE VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE "NO PERSON. . . SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE." SEE BURLINGTON V. MISSOURI, 451 U.S. 430 (1981) (APPLYING THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION TO CAPITAL SENTENCING); SEE ALSO R.C.M. 922(B)(2) (ANALYSIS: RULE WAS AMENDED TO CONFORM TO R.C.M. 1004(A) REQUIREMENT THAT A SENTENCE OF DEATH BE UNANIMOUS. THE RULE PRECLUDES THE USE OF RECONSIDERATION UNDER R.C.M. 924 TO CHANGE AN INITIAL NONUNANIMOUS FINDING OF GUILTY INTO A UNANIMOUS VERDICT FOR THE PURPOSE OF AUTHORIZING A CAPITAL SENTENCING PROCEEDING. THE SAME CONCERNS ARE PRESENT IN BARRING THE RECONSIDERATION OF A NONUNANIMOUS SENTENCE FOR DEATH INTO A UNANIMOUS SENTENCE OF DEATH).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXIII.

THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE CONSTITUTION DO NOT PERMIT A CONVENING AUTHORITY TO HAND-PICK MILITARY SUBORDINATES, WHOSE CAREERS HE CAN DIRECTLY AND IMMEDIATELY AFFECT AND CONTROL, AS MEMBERS TO DECIDE A CAPITAL CASE. *BUT SEE CURTIS*, 41 M.J. AT 297; *LOVING* 41 M.J. AT 297.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXIV.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE MEMBERS WERE NOT RANDOMLY SELECTED. *BUT SEE UNITED STATES V. THOMAS*, 43 M.J. 550, 593 (N.M.CT.CRIM.APP., 1995).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXV.

THE SELECTION OF THE PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE DIRECTLY VIOLATES THE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 55, UCMJ BY IN EFFECT GIVING THE GOVERNMENT UNLIMITED PEREMPTORY CHALLENGES.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXVI.

THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS TO ESTABLISH PROCEDURES FOR COURTS-MARTIAL WHEN HE GRANTED TRIAL COUNSEL A PEREMPTORY CHALLENGE AND THEREBY THE POWER TO NULLIFY THE CONVENING AUTHORITY'S ARTICLE 25(D) AUTHORITY TO DETAIL MEMBERS OF THE COURT. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 130-33 (C.A.A.F. 1996).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXVII.

THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE MEMBER WITHOUT CAUSE, IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION IN CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *UNITED STATES V. LOVING*, 41 M.J. 213, 294-95 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXVIII.

THE DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS DENIED APPELLANT A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 150 (C.A.A.F. 1996); *UNITED STATES V. THOMAS*, 43 M.J. 550, 602 (N.M.CT.CRIM.APP., 1995).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXIX.

THE DENIAL OF THE RIGHT TO POLL THE MEMBERS REGARDING THEIR VERDICT AT EACH STAGE IN THE TRIAL DENIED APPELLANT A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 150 (C.A.A.F. 1996); *UNITED STATES V. THOMAS*, 43 M.J. 550, 602 (N.M.CT.CRIM.APP., 1995).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXX.

THE MEMBERS ERRED BY RECONSIDERING THEIR SENTENCE, A VOTE NOT SUSCEPTIBLE TO RECONSIDERATION.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXI.

THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER ALLOWING DIFFERENTIAL TREATMENT AND SENTENCING DISPARITY IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 279-80 (C.A.A.F 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXII.

SERGEANT AKBAR WAS DENIED HIS RIGHT UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION TO A GRAND JURY PRESENTMENT OR INDICTMENT. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 130 (C.A.A.F. 1996) (QUOTING *JOHNSON V. SAYRE*, 158 U.S. 109, 115 (1895)).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXIII.

COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS ARTICLE III RIGHT TO A JURY TRIAL. *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 132 (C.A.A.F. 1996) (CITING SOLORIO V. UNITED STATES, 483 U.S. 435, 453-54 (1987) (MARSHAL J., dissenting).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXIV.

DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF A FIXED TERM OF OFFICE. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXV.

THE SYSTEM WHEREBY THE JUDGE ADVOCATE GENERAL OF THE ARMY APPOINTS TRIAL AND APPELLATE JUDGES TO SERVE AT HIS PLEASURE IS UNCONSTITUTIONAL AS IT VIOLATES THE APPOINTMENTS CLAUSE OF THE U.S. CONSTITUTION. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXVI.

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE JUDGES OF THIS COURT ARE "PRINCIPAL OFFICERS" WHOM THE PRESIDENT DID NOT APPOINT AS REQUIRED BY THE APPOINTMENTS CLAUSE OF THE U. S. CONSTITUTION. *SEE* U.S.CONST., ART. II, § 2, CL. 2; *BUT SEE UNITED STATES V. GRINDSTAFF*, 45 M.J. 634 (N.M.CT.CRIM.APP. 1997). *BUT CF. EDMOND V. UNITED STATES*, 1520 U.S. 651 (1997)(CIVILIAN JUDGES OF THE COAST GUARD COURT OF CRIMINAL APPEALS ARE "INFERIOR OFFICERS" FOR PURPOSES OF THE APPOINTMENTS CLAUSE, AND THUS DO NOT REQUIRE PRESIDENTIAL APPOINTMENT)

WHEREFORE, this Court should set aside findings and sentence.

Assignment of Error XXXVII.

THIS COURT LACKS THE JURISDICTION AND AUTHORITY TO REVIEW THE CONSTITUTIONALITY OF THE RULES FOR COURTS-MARTIAL AND THE UCMJ BECAUSE THIS COURT IS AN ARTICLE I COURT, NOT AN ARTICLE III COURT WHICH HAS THE POWER OF CHECKING CONGRESS AND THE EXECUTIVE BRANCHES UNDER *MARBURY V. MADISON*, 5 U.S. (1 CRANCH) 137 (1803); *SEE ALSO COOPER V. AARON*, 358 U.S. 1 (1958)(THE POWER TO STRIKE DOWN UNCONSTITUTIONAL STATUTES OR EXECUTIVE ORDERS IS THE EXCLUSIVE CHECK OF THE ARTICLE III JUDICIARY); *BUT SEE LOVING*, 41 M.J. AT 296.

WHEREFORE, this Court should set aside findings and sentence.

Assignment of Error XXXVIII.

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL CIVILIANS IN THE UNITED STATES ARE AFFORDED THE OPPORTUNITY TO HAVE THEIR CASES REVIEWED BY AN ARTICLE III COURT, BUT MEMBERS OF THE UNITED STATES MILITARY BY VIRTUE OF THEIR STATUS AS SERVICE MEMBERS ARE NOT. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XXXIX.

R.C.M. 1001 UNCONSTITUTIONALLY FORCES AN ACCUSED TO FORGO MITIGATION EVIDENCE, WHICH IS CONSTITUTIONALLY REQUIRED UNDER THE EIGHTH AMENDMENT, BECAUSE THE GOVERNMENT MAY RELAX THE RULES OF EVIDENCE FOR REBUTTAL UNDER 1001(D) IF THE ACCUSED RELAXES THE RULES OF EVIDENCE (1001(C)(3)). *SEE UNITED STATES V. JACKSON*, 390 U.S. 570, 583 (1968)(THE FACT THAT A STATUTE DETERS A DEFENDANT FROM ASSERTING HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO PLEAD NOT GUILTY AND REQUEST A JURY TRIAL BY REMOVING THE SPECTER OF A DEATH SENTENCE IS AN UNCONSTITUTIONAL CONDITION ON THOSE RIGHTS).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XL.

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IAW AR 15-130, PARA. 3-1(d)(6), HIS APPROVED DEATH SENTENCE RENDERS HIM INELIGIBLE FOR CLEMENCY BY THE ARMY CLEMENCY AND PAROLE BOARD, WHILE ALL OTHER CASES REVIEWED BY THIS COURT ARE ELIGIBLE FOR SUCH CONSIDERATION. *BUT SEE UNITED STATES V. THOMAS*, 43 M.J. 550, 607 (N.M.CT.CRIM.APP., 1995).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLI.

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE THE CAPITAL REFERRAL SYSTEM OPERATES IN AN ARBITRARY AND CAPRICIOUS MANNER. *BUT SEE LOVING*, 41 M.J. AT 293-94.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLII.

THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 293 (C.A.A.F. 1994). THE COURT RESOLVED THE ISSUE AGAINST PRIVATE LOVING, ADOPTING THE REASONING OF THE DECISION OF THE ARMY COURT OF MILITARY REVIEW. *SEE UNITED STATES V. LOVING*, 34 M.J. 956, 967 (A.C.M.R. 1992). HOWEVER, PRIVATE LOVING'S ARGUMENT BEFORE THE ARMY COURT WAS PREDICATED ON THE TENTH AMENDMENT TO THE U.S. CONSTITUTION AND THE NECESSARY AND PROPER CLAUSE. *ID.* APPELLANT'S ARGUMENT IS PREDICATED ON THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLIII.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE CONVENING AUTHORITY HAS NOT DEMONSTRATED HOW THE DEATH PENALTY WOULD ENHANCE GOOD ORDER AND DISCIPLINE IN THE ARMY.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLIV.

THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE DOES NOT HAVE THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED. *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 297 (1994).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLV.

DUE TO INHERENT FLAWS IN THE MILITARY JUSTICE SYSTEM, THE DEATH PENALTY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER ALL CIRCUMSTANCES. *BUT SEE THOMAS*, 43 M.J. 550, 606 (N.M.CT.CRIM.APP., 1995).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLVI.

THE DEATH PENALTY IS IN ALL CIRCUMSTANCES CRUEL AND UNUSUAL PUNISHMENT FORBIDDEN BY THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION. *SEE GREGG V. GEORGIA*, 428 U.S. AT 227 (BRENNAN, J., dissenting); *BUT SEE ID.* AT 168 (death penalty is not unconstitutional *per se*).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLVII.

THE DEATH PENALTY CANNOT CONSTITUTIONALLY BE IMPLEMENTED UNDER CURRENT EIGHTH AMENDMENT JURISPRUDENCE. *SEE CALLINS V. COLLINS*, 510 U.S. 1141, 1143-1159 (BLACKMUN, J., dissenting)(cert. denied).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error XLVIII.

R.C.M. 1209 AND THE MILITARY DEATH PENALTY SYSTEM DENIES DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS TANTAMOUNT TO FORESEEABLE, STATE-SPONSORED EXECUTION OF INNOCENT HUMAN BEINGS BECAUSE THERE IS NO EXCEPTION FOR ACTUAL INNOCENCE TO THE FINALITY OF COURTS-MARTIAL REVIEW. *CF. TRIESTMAN V. UNITED STATES*, 124 F.3D 361, 378-79 (2D CIR. 1997).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LIX.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE U.S. CONSTITUTION AND ART. 55, UCMJ, BECAUSE THE CONVENING AUTHORITY HAS UNLIMITED DISCRETION TO APPROVE IT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error L.

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE INTRODUCTION OF EVIDENCE BEYOND THAT OF DIRECT FAMILY MEMBERS AND THOSE PRESENT AT THE SCENE IN VIOLATION OF THE FIFTH AND EIGHTH AMENDMENT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LI.

R.C.M. 1001(b)(4) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED TO THE APPELLATE AND CAPITAL SENTENCING PROCEEDINGS BECAUSE IT PERMITS THE INTRODUCTION OF CIRCUMSTANCES WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY THE APPELLANT AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS. *SEE SOUTH CAROLINA V. GAITHER*, 490 U.S. 805, 811-12 (1985); *SEE ALSO PEOPLE V. FIERRO*, 821 P.2D 1302, 1348-1350 (Cal. 1991) (Kennard, J., concurring in part, dissenting in part); *BUT SEE PAYNE V. TENNESSEE*, 501 U.S. 808, 842 (1991).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LII.

THE MILITARY JUDGE ERRED IN ADMITTING VICTIM IMPACT EVIDENCE REGARDING THE PERSONAL CHARACTERISTICS OF THE VICTIM WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY THE APPELLANT AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS. *SEE SOUTH CAROLINA V. GAITHER*, 490 U.S. 805, 811-12 (1985); *SEE ALSO PEOPLE V. FIERRO*, 821 P.2D 1302, 1348-1350 (Cal. 1991) (Kennard, J., concurring in part, dissenting in part); *BUT SEE PAYNE V. TENNESSEE*, 501 U.S. 808, 842 (1991).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LIII.

THE STAFF JUDGE ADVOCATE WAS DISQUALIFIED FROM ADVISING THE CONVENING AUTHORITY REGARDING HIS POST-TRIAL ACTION BECAUSE THE STAFF JUDGE ADVOCATE ACTIVELY PARTICIPATED IN THE PREPARATION OF THE GOVERNMENT'S CASE. SEE *UNITED STATES V. GUTIERREZ*, 57 M.J. 148 (C.A.A.F. 2002)

WHEREFORE, this Court should set aside Staff Judge Advocate's Recommendation and Convening Authorities Action and remand the case to the convening authority for a new action.

Assignment of Error LIV.

THE MILITARY JUDGE ERRED IN ADMITTING THE GOVERNMENT'S CRIME SCENE PHOTOGRAPHS TO THE PREJUDICE OF THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENT.

WHEREFORE, this Court should set aside the findings and sentence.

Assignment of Error LV.

THE TRIAL COUNSEL COMMITTED REVERSIBLE ERROR BY USING THE VOIR DIRE OF THE MEMBERS TO IMPERMISSIBLY ADVANCE THE GOVERNMENT'S THEORY OF THE CASE. *SEE* R.C.M. 912(B), DISCUSSION.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LVI.

THE MILITARY JUDGE FAILED TO ADEQUATELY INSTRUCT THE MEMBERS THAT THE DISCRETION NOT TO IMPOSE THE DEATH PENALTY WAS INDIVIDUAL. RECORD AT 3147.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

Assignment of Error LVII.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE *EX POST FACTO* CLAUSE, THE FIFTH AND EIGHT AMENDMENTS, THE SEPARATION OF POWERS DOCTRINE, THE PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ, BECAUSE WHEN IT WAS ADJUDGED NEITHER CONGRESS NOR THE ARMY HAD SPECIFIED A MEANS OR PLACE OF EXECUTION. *SEE* AR 190-55 (17 January 2006); *BUT SEE UNITED STATES V. TIPTON*, 90 F.3D 861, 901-03 (4th CIR. 1996).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

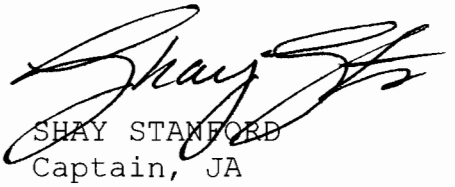
Assignment of Error LVIII.

THE PANEL'S RECONSIDERATION OF THE SENTENCE IN APPELLANT'S CASE VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE "NO PERSON. . . SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE." *SEE BURLINGTON V. MISSOURI*, 451 U.S. 430 (1981) (APPLYING THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION TO CAPITAL SENTENCING); *SEE ALSO* R.C.M. 922(B)(2) (ANALYSIS: RULE WAS AMENDED TO CONFORM TO R.C.M. 1004(A) REQUIREMENT THAT A SENTENCE OF DEATH BE UNANIMOUS. THE RULE PRECLUDES THE USE OF RECONSIDERATION UNDER R.C.M. 924 TO CHANGE AN INITIAL NONUNANIMOUS FINDING OF GUILTY INTO A UNANIMOUS VERDICT FOR THE PURPOSE OF AUTHORIZING A CAPITAL SENTENCING PROCEEDING. THE SAME CONCERNS ARE PRESENT IN BARRING THE RECONSIDERATION OF A NONUNANIMOUS SENTENCE FOR DEATH INTO A UNANIMOUS SENTENCE OF DEATH).

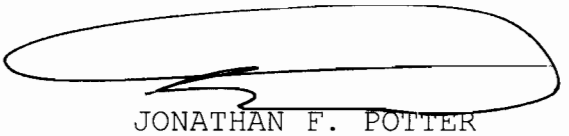
WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment.

WHEREFORE, Sergeant Akbar respectfully requests this Honorable Court grant the requested relief.

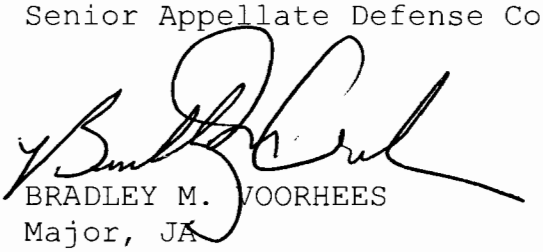
TIMOTHY THOMAS
Major, JA
Appellate Defense Counsel



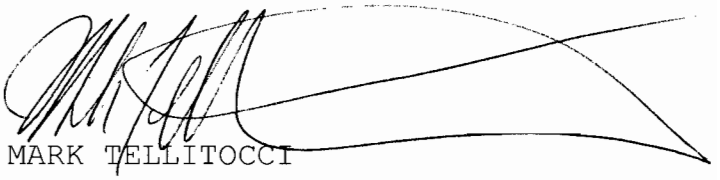
SHAY STANFORD
Captain, JA
Appellate Defense Counsel



JONATHAN F. POTTER
Lieutenant Colonel, JA
Senior Appellate Defense Counsel



BRADLEY M. VOORHEES
Major, JA
Branch Chief, Appellate Defense Division



MARK TELLITOCCI
Colonel, JA
Chief, Appellate Defense Division

CERTIFICATE OF SERVICE

UNITED STATES v. Akbar

Army Docket No. 20050514

Assignment of Error ✓

Motion _____

Other _____

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on 1 February 2010.

Paralegal/Attorney
Defense Appellate Division