IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,
Appellee

v.

Sergeant
HASAN K. AKBAR,
United States Army,
Appellant

BRIEF ON BEHALF OF APPELLEE

Docket No. 20050514

Tried at Fort Knox, Kentucky and Fort Bragg, North Carolina on 9 March, 10 and 24 May, 24 August, and 2 December 2004; 31 January, 4 March, and 1, 6-8, 11-14, 18-22, and 25-28 April 2005, by a general court-martial, appointed by the Commander, XVIII Airborne Corps and Fort Bragg, Colonels Dan Trimble, Patrick J. Parrish, and Stephen R. Henley, military judges, presiding.

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Captain, JA
Appellate Government Counsel

NICOLE L. FISH
Captain, JA
Appellate Government Counsel

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Major, JA
Chief, Branch IV, Government Appellate Division

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Panel 2

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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

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 . .....

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 .....

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 .....

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 .....

E. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON SENTENCING .....

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 .....

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 .....

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

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 .....

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 .....

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 CAPIAL CASE .....

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 .....

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

A. 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 .....

B. 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 .....

C. ISSUE 3: *RING V. ARIZONA* REQUIRES THAT THE MEMBERS FIND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT

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 .....

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 .....

Assignment of Error VI:

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.....

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 .....

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 .....

Assignment of Error IX:

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 .....

Assignment of Error X:

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE APPROVED SENTENCE, WHICH INCLUDES A SENTENCE TO DEATH, IS INAPPROPRIATELY SEVERE .....

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*, ARMY DKT NO. 20080004 ..

Assignment of Error XIII:

AN EVIDENTIARY HEARING IS REQUIRED TODETERMINE 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 .....

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 .....

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 ....

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 .....

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 .....

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) .....

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 .....

Assignment of Error XX:

APPELLANT WAS DENIED HIS RIGHT TO A TRIAL BY AN IMPARTIAL JURY COMPOSED OF A FAIR CROSSSECTION OF THE COMMUNITY IN VIOLATION OF THE SIXTH AMENDMENT TO THE U. S. CONSTITUTION. *BUT SEE CURTIS III*, 44 M.J. AT 130-33 .....

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 .....

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) .....

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 .....

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) .....

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 .....

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) .....

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 I S 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) .....

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) .. ..

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) .....

Assignment of Error XXX:

THE MEMBERS ERRED BY RECONSIDERING THEIR SENTENCE, A VOTE NOT SUSCEPTIBLE TO RECONSIDERATION .....

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) .....

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)) .....

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) .....

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) .....

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) .....

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) .....

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 .....

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) .....

Assignment of Error XXIX:

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) .....

Assignment of Error XL:

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT OF 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) .....

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 .....

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 .....

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 .....

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) .....

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) .....

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) .....

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) .....

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) .....

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 .....

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 FI FTH AND EIGHTH AMENDMENT .....

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) ... .

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) ... .

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) .....

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 .....

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 .....

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 .....

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) .....

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) .....

Conclusion .....

Certificate of Service .....

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas,[1] of premeditated murder (two specifications) and attempted premeditated murder (three specifications), in violation of Articles 80 and 118 of the Uniform Code of Military Justice (UCMJ).[2] The panel sentenced appellant to death on 28 April 2005.[3] The convening authority approved the adjudged sentence on 16 November 2006.[4] Appellant's case was docketed with this Court on 6 December 2006.

Statement of Facts

Appellant stands convicted of the premeditated murder of Army Captain (CPT) Christopher Siefert and Air Force Major (MAJ) Gregory L. Stone, as well as the attempted premeditated murder of sixteen other Officers on the night of 22 March 2003. Appellant was a member of Company A, 326th Engineer Battalion, 1st Brigade Combat Team, 101st Airborne Division (Air Assault) staged at Camp Pennsylvania, Kuwait on the eve of Operation Iraqi Freedom.

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[1] R. 618.
[2] R. 2652; 10 U.S.C. §§ 880 and 918 (2002); Charge Sheet.
[3] R. 3181.
[4] Action.

The Crimes

On the night of the murders appellant was assigned to guard grenades with Private First Class (PFC) Christopher Pannell.[5] The grenades were located in High Mobility Multipurpose Wheeled Vehicle (HMMWV) Alpha 21, which was appellant's squad vehicle.[6] PFC Pannell went to find his replacement, PFC Thomas Wells, and left appellant alone with the grenades.[7] Appellant was also left alone with the grenades when PFC Wells went to wake up their relief later in the evening.[8] When left alone, appellant hid four M-67 fragmentation grenades and three M-14 incendiary grenades in his pro-mask carrier and some of the canisters in his Joint Service Lightweight Integrated Suit Technology (JLIST) bag.[9] After his guard duty ended, appellant returned to his tent on Camp Pennsylvania's Pad 4.[10]

Appellant donned the Interceptor Body Armor (IBA) of PFC Pannell and left the sleep tent, leaving his own IBA behind.[11] Appellant then walked from Pad 4 to Pad 7, where the Brigade Headquarters was located;[12] a distance of approximately 500 to 600 meters.[13] Appellant went to the stand-alone light generator and switched it off, plunging the outside of Pad 7 into

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[5] R. 1583-87.
[6] R. 1583-86, 1607, 1627; Prosecution Exhibit (PE) 163.
[7] R. 1588, 1609.
[8] R. 1610-11.
[9] R. 1628-29, 1713-14; PEs 88, 162.
[10] R. 1590-91.
[11] *Id.*
[12] PE 1; R. 1225, 1259, 1290.
[13] PE 1 and 223; R. 1225-26.

darkness.[14] Appellant moved from the generator to the entrance of Tent 1, which displayed a sign that identified it as the brigade command team's sleep tent, occupied by Colonel (COL) [redacted] (Brigade Commander), Command Sergeant Major (CSM) [redacted] (Brigade Command Sergeant Major), and MAJ [redacted] (Brigade Executive Officer).[15] Appellant removed an M-14 incendiary grenade, pulled the pin, and threw the grenade into Tent 1.[16] The incendiary grenade ignited, filling the tent with smoke and fire.[17] Appellant then pulled out an M-67 fragmentation grenade, pulled the pin, and threw it into Tent 1.[18] The grenade exploded, shredding the inside of the tent and wounding COL [redacted][19]

Appellant then waited outside of Tent 1. After the explosions, MAJ [redacted] grabbed his M-9 pistol and exited Tent 1.[20] MAJ [redacted] heard a noise, and when he turned, appellant fired his M-4 rifle at MAJ [redacted][21] The bullet fired from appellant's rifle went through MAJ [redacted] pistol and his fingers, traveled up his arm, and deflected into his leg.[22] MAJ [redacted] fell back into Tent 1 and attempted to charge his weapon, but was unable to do so because of the wounds to his

[14] PE 2; R. 1248, 1267, 1334, 1388, 1649, 1478.
[15] R. 1235-36; PE 188.
[16] R. 1245-46.
[17] R. 1771, 1774, 1788-89; PE 8.
[18] R. 1791; PEs 9 and 10.
[19] R. 1515.
[20] R. 1247-48.
[21] R. 1248-50.
[22] R. 1250.

hands.[23] MAJ [redacted] survived the gunshot, but his hands were permanently disabled.[24]

After shooting MAJ [redacted] appellant moved to Tent 2 and pulled another fragmentation grenade. Appellant yelled into the tent, "We're under attack!" before throwing the grenade into the tent.[25] The grenade exploded, sending shrapnel flying through the air, wounding several of the tent's occupants and setting the tent on fire.[26] One of the officers sleeping inside Tent 2 was MAJ Stone.[27] The explosion from appellant's grenade shredded MAJ Stone's body with eighty-three shrapnel wounds.[28] MAJ Stone bled to death.[29]

Appellant then moved toward Tent 3, which had a sign in front of it that read, "The Captains Club."[30] At that moment CPT [redacted] having heard the other explosions, exited Tent 3 and bumped into appellant.[31] CPT [redacted] yelled, "What the fuck?!?"[32] Appellant responded, "We're under attack."[33] After CPT [redacted] moved out, appellant moved to the entrance of Tent 3 and threw a fragmentation grenade inside.[34] The grenade

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[23] R. 1250-51.
[24] PEs 215 and 216; R. 2735-36, 2739-40.
[25] R. 1262, 1282, 1284, 1294-96, 1312-14, 1319, 1328-29.
[26] R. 1263-65, 1296, 1313, 1330-31, 1346-47; PEs 15-21.
[27] PE 22; R. 1273, 1285-86.
[28] R. 1264, 1297-98, 1315-17, 1332; PE 195 at 3.
[29] PEs 18 and 195 at 3; R. 1298-99.
[30] R. 1353; PEs 29, 200.
[31] R. 1360, 1370-71
[32] R. 1371.
[33] R. 1360, 1371, 1389.
[34] R. 1371, 1378.

exploded, severely injuring numerous officers residing in the tent and plunging the tent into smoky chaos.[35] CPT Seifert received a shrapnel wound in his hand from the grenade.[36] CPT Seifert grabbed his gear and exited the tent.[37] At the same time, First Sergeant (1SG) [redacted] exited Tent 4 and could see CPT Seifert with his gear.[38] 1SG [redacted] observed appellant move up behind CPT Seifert.[39] Appellant shot CPT Seifert in the back with his M-4 rifle from a distance of one or two feet, before running off into the night.[40] CPT Seifert suffered agonizing pain before he died from the gunshot wound.[41]

During his attack on Pad 7 appellant was wounded by one of his own grenades.[42] As appellant limped away from murdering CPT Seifert he encountered CPT Jerry Buchannan just outside of the Tactical Operating Center (TOC) tents.[43] When CPT Buchannan asked appellant what was happening, appellant responded that he was "hit."[44] CPT Buchannan noticed that appellant was favoring his knee and limping.[45] CPT Buchannan told appellant to wait

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[35] R. 1361-63, 1373, 1389-93, 1402-04, 1408-09, 1413, 1423-26, 1428, 1434-39, 1449, 1451-52; PEs 23-28, 201, 233, 262, and 273-284.
[36] PE 195 at 2.
[37] R. 1471-72.
[38] R. 1472-73.
[39] R. 1473.
[40] R. 1264, 1434, 1453, 1473-76, 1483, 1491.
[41] R. 1337-38, 1417, 1429, 1477, 1802-03; PE 195.
[42] R. 1516-17; PEs 197 and 198.
[43] R. 1739.
[44] *Id.*
[45] R. 1740.

while he went to find medical assistance; however, when CPT Buchanan returned appellant was gone.[46]

The Brigade believed that they were under enemy attack and that their perimeter was compromised.[47] MAJ [redacted] the Brigade S-2, began moving from area to area to set up a perimeter and coordinate any response that might be necessary.[48] MAJ [redacted] enlisted the assistance of First Lieutenant (1LT) Grant Sketo in setting up a perimeter around the TOC.[49] 1LT Sketo approached the Soldier on his left side, who turned out to be appellant.[50] When 1LT Sketo asked appellant what he was doing on Pad 7, appellant told him, "I was using the latrine."[51] 1LT Sketo assigned appellant a sector of fire,[52] and they waited there until Sergeant First Class (SFC) Thomas Butler sent appellant to a nearby bunker to push out the perimeter.[53]

When MAJ [redacted] went to brief COL [redacted] on the security situation, COL [redacted] told MAJ [redacted] "This may have been one of our own. 2d Battalion is missing an engineer soldier. His name is Sergeant Akbar. . . . There's some ammo missing."[54] MAJ [redacted] went back out to continue his security duties.[55] MAJ

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[46] *Id.*
[47] R. 1387, 1429, 1477, 1512, 1648, 1668, 1778.
[48] R. 1497, 1648-52, 1661-62.
[49] R. 1496, 1653-54.
[50] R. 1497-98.
[51] R. 1498.
[52] *Id.*
[53] R. 1499.
[54] R. 1678-79.
[55] R. 1680.

[redacted] approached a group of Soldiers at a bunker and asked them to identify themselves.[56] Appellant identified himself as "Sergeant Akbar."[57] MAJ [redacted] approached appellant and saw the letters A-K-B-A-R on appellant's helmet band.[58] MAJ [redacted] moved up behind appellant and tackled him to the ground.[59] After restraining appellant, MAJ [redacted] asked appellant if he bombed the tents, and appellant confirmed that he did.[60] MAJ [redacted] put appellant under armed guard. A medic was called to tend to appellant's wounds,[61] and appellant was taken into custody.

When appellant was apprehended he was found with the one remaining M-67 and two remaining M-14 grenades in his protective mask.[62] The three M-14 canisters were discovered in appellant's JLIST bag.[63] Appellant's assigned weapon was immediately confiscated by SFC Butler.[64] SFC Butler cleared a single round from appellant's rifle,[65] leaving twenty-six of a possible thirty rounds in the magazine.[66] One expended shell casing from an M-4 rifle was discovered in front of Tent 1,[67] and two expended shell

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[56] R. 1685-86.
[57] R. 1686.
[58] R. 1687.
[59] R. 1688.
[60] R. 1690.
[61] R. 1516-19.
[62] R. 1744-45, 1849, 1926-28, 1950-51; PEs 77, 79, 180, 230.
[63] R. 1824, 1843; PE 126.
[64] R. 1744.
[65] R. 1745, 1752.
[66] R. 1867-68; PE 144.
[67] R. 1781, 1809.

casings from an M-4 rifle were found in front of Tent 3,[68] accounting for the other three rounds. Ballistics analyses of the bullets that wounded MAJ [redacted] and killed CPT Siefert, as well as the casings recovered near Tents 1 and 3, confirmed they were fired from appellant's assigned M-4 rifle.[69] Appellant's uniform and hands were tested and contained the residue of both M-14 and M-67 grenades.[70] Appellant's fingerprint was discovered on the Pad 7 light generator that was shut off just before the attack.[71]

The Federal Bureau of Investigation (FBI) obtained a federal search warrant for appellant's storage unit in Kentucky.[72] In the storage unit the FBI discovered appellant's computer which contained his diary.[73] On 2 February 2003 (forty-eight days before the murders), appellant wrote in his diary, among other things, "I may have to make a choice very soon about who to kill . . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies."[74] On 4 February 2003 (forty-six days before the murders) appellant wrote, among other things, "I suppose they want to punk me or just humiliate me. Perhaps they feel I will

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[68] R. 1836; PE 115.
[69] R. 1563; PEs 52, 96a-b, 99, 140, 145, 146, 147, 191 at 2.
[70] R. 1962-64; PEs 157, 158, 160, 194.
[71] R. 1707-08, 1964; PEs 122, 155, 161, 196
[72] R. 1977-79, 1984.
[73] R. 1984, 1994; PEs 174, 192.
[74] PE 176a at 2.

not do anything about it. They are right about that. I am not going to do anything about it as long as I stay here. But, as soon as I am in Iraq, I'm going to kill as many of them as possible."[75]

The Trial

Appellant was represented throughout his entire trial by MAJ [redacted] and MAJ [redacted][76].[77] In preparation for trial, appellant received the assistance of no less than three "mitigation specialists": Ms. Deborah Gray, Ms. Scharlette Holdman, and Ms. Scarlet Nerad.[78] A report detailing Ms. Grey's investigation into appellant's life history, complete with

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[75] PE 176a at 1.

[76] MAJ [redacted] was promoted to Lieutenant Colonel (LTC) and is presently the Chair of the Criminal Law Department at The Judge Advocate General's Legal Center and School (TJAGLCS) (Government Appellate Exhibit (GAE) 1 at 1). MAJ [redacted] left active duty and is presently a member of the U.S. Army Reserves, as well as being selected for promotion to Lieutenant Colonel (*Id.*). For purposes of this brief, the Government will refer to trial defense counsel by their ranks at the time of trial.

[77] R. 2. MAJ [redacted] became a member of appellant's defense team on 23 March 2003 and MAJ [redacted] joined the defense team shortly after. *Pretrial Allied Papers, Request for Individual Military Counsel for the Case of United States v. Hasan K. Akbar*, dtd, 23 July 2004. In addition to MAJs [redacted] and [redacted] appellant was represented by LTC [redacted] and CPT [redacted] at the time of the Article 32 investigation (Appellate Exhibit (AE) 75). Appellant released LTC [redacted] and CPT [redacted] (R. 446). Appellant also hired two separate civilian counsel, Mr. [redacted] (R. 2) and Mr. [redacted] (R. 29), during the motions stages of the trial, but released them before trial on the merits began. R. 425-28, 768-70, 778-79; AE 180.

[78] AEs 129, 130, and 140. Ms. Grey was granted funding on 28 August 2003 for 400 hours of work, at $75.00 per hour (R. 547). Ms. Holdman was authorized 75 hours of work and an additional $10,000 on 24 June 2004 (R. 548-49). Ms. Holdman's experience as a mitigation specialist and the executive director of the Center for Capital Assistance (CCA) is detailed in AE 132, Attachment A. Ms. Holdman was referred to the defense team by the Federal Public Defender's Office in Nashville, TN (AE 129). Ms. Nerad, also a member of CCA and a Senior Mitigation Specialist according to Ms. Holdman (AE 132, Attachment A at 14; AE 140), was assigned to the case in the fall of 2004 (R. 547). Ms. Nerad, as well as the rest of the CCA, was authorized an additional $56,700 to assist appellant (Convening Authority's Memos dated 30 September 2004 and 16 November 2004).

family tree and year-by-year analysis, was submitted into evidence at trial.[79] On 20 February 2004, prior to referral, trial defense counsel presented the convening authority with a seven-page "Mitigation Report"[80] and received a personal audience with the convening authority.[81]

Trial defense counsel did not present a lack of mental responsibility defense.[82] Instead, trial defense counsel presented evidence on findings and argued that appellant suffered from a mental illness that negated his ability to form the premeditated intent to kill.[83] To this end, appellant and the trial defense team received the assistance of several mental health experts. Dr. (MAJ) David Walker, a forensic psychiatrist, was appointed as a defense consultant on 9 May 2003.[84] Dr. Walker was present during appellant's R.C.M. 706 sanity board in March of 2003.[85] Though he did not testify, Dr. Walker remained a defense consultant, continuing his consultation even after leaving active duty.[86]

Dr. Gregory Woods, a clinical neuropsychiatrist, was appointed at appellant's request as a defense mental health

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[79] Defense Exhibit (DE) C.
[80] Allied Papers, *Mitigation Report - SGT Hasan K. Akbar*, dtd 20 February 2004.
[81] GAE 1 at 9-10.
[82] *Id.* at 17-19; GAE 10 at 93; AE 183.
[83] *Id.*; R. 1211-12, 1219-20.
[84] Allied Papers, *Response to Defense Requests in the Case of U.S. v. Hasan K. Akbar*, dtd 9 May 2003.
[85] R. 2490.
[86] Allied Papers (ROT Vol. II), *Response to Defense Request for Continued Appointment of Dr. David Walker...*, dtd 3 March 2004; GAE 1 at 41-43.

expert in June of 2004.[87] Dr. Fred Tuton, a clinical psychologist who conducted a 1986 psychological evaluation of appellant, was appointed as a defense consultant on 28 January 2005 to assist Dr. Woods.[88] Dr. Pamelia F. Clement, a neuropsychologist, consulted with Dr. Woods and conducted neuropsychological tests on behalf of the defense.[89]

Dr. Woods testified for the defense at trial during the merits portion, giving his diagnosis and evaluation of appellant.[90] Dr. Woods testified that he testifies in only 7.6 percent of cases he is asked to consult on because he will not testify if his findings conflict with the defense.[91] Dr. Woods testified that he relied on his eight hours of interviews with appellant, the Article 32 transcript, statements from appellant's roommate, the 1986 psychological evaluation, records regarding appellant's mother's homelessness, appellant's high-school and college records, his Army medical records, the raw data from the Minnesota Multiphasic Personality Inventory (MMPI) administered to appellant, FBI interviews of appellant's brother Mustafa (which Dr. Woods testified was evidence of a family history of mental illness), evidence concerning appellant's

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[87] R. 2349; Allied Papers (ROT Vol. II), *Response to Defense Request for Appointment of Dr. George W. Woods...*, dtd 25 March 2004.
[88] Allied Papers (ROT Vol. II, *Response to Defense Request for Appointment of Fred L. Tuton...*, dtd 28 January 2004; GAE 1 at 41.
[89] GAE 1 at 43-44.
[90] R. 2226-2421.
[91] R. 2233.

father having depression and sleep problems, the military discharge paperwork of appellant's uncle, and a redacted copy of a 2003 R.C.M. 706 sanity board report.[92] The full sanity board report was purposefully not provided to Dr. Woods, in order to avoid disclosure to the Government of appellant's sanity board statements under Military Rule of Evidence (M.R.E.) 302(b)(1).[93] Dr. Woods testified that he had "everything that [he] needed."[94]

The sanity board report provided to Dr. Woods listed the battery of neuropsychological testing administered to appellant by Dr. [redacted], the sanity board neuropsychologist, and reviewed by Dr. [redacted] as part of her consultation with Dr. Woods on behalf of the defense.[95] Dr. Woods testified that he coordinated with a psychologist in interpreting this testing data.[96] Dr. Woods testified about which testing he relied on in his evaluation of appellant, stating that the "most important objective testing was the Minnesota Multiphasic Personality Inventory,"[97] which Dr. Woods discussed at length during his testimony. Dr. Woods gave a differential diagnosis during his

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[92] R. 2217, 2240-42, 2314-17.
[93] R. 2217, 2316-23, 2438-40. Appellant discloses for the first time on appeal the unredacted sanity board report. Defense Appellate Exhibit (DAE) BB (Defense Appendix (DA) 250-53).
[94] R. 2319.
[95] DAE M (DA 48-63); DAE BB (DA 250-53).
[96] R. 2323-24.
[97] R. 2264.

testimony of "a schizophreniform spectrum,"[98] "schizotypal disorder,"[99] and "schizoaffective disorder,"[100] which he characterized as "disorders of perception."[101] Dr. Woods then offered an opinion as to how appellant's symptoms may have impacted his actions on the day of the murders, by stating that he thought "those symptoms allowed [appellant] to be overwhelmed emotionally and to really not think as clearly, to not understand, and just to be overwhelmed emotionally."[102]

Dr. Woods acknowledged during his testimony that the 2003 R.C.M. 706 sanity board did not find appellant was schizophrenic,[103] nor did the sanity board find that appellant had schizotypal or schizoid personality disorder.[104] Dr. Woods confirmed that he also was not diagnosing appellant as a schizophrenic, but that he was "concerned that he may be."[105] Dr. Woods admitted that he never "put an Axis I name on Axis I symptoms."[106] Dr. Woods testified that appellant understood the

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[98] R. 2283-87; *See also American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington D.C., 2000 (hereafter DSM IV-TR) at 317-19.
[99] R. 2287; *See* DSM IV-TR at 697-701.
[100] R. 2290; *See* DSM IV-TR at 319-23.
[101] R. 2286.
[102] R. 2292.
[103] *See* DSM IV-TR at 297-343.
[104] R. 2329-29.
[105] R. 2331.
[106] R. 2349.

lethality of the grenades[107] and that he understood the natural consequences of his acts.[108] He also stated:

> I think the idea that a name somehow defines the work is inaccurate. What is accurate are the symptoms that Sergeant Akbar shows. The fact that it may not be called schizophrenia or what have you is, in the long run, less important because a person can be schizophrenic and not be paranoid for example. So I think the real issue is: What are the symptoms that [appellant] has shown consistently. The fact that it's not - it may not be called schizophrenia is not clinically relevant.[109]

Also testifying for the defense was Dr. Tuton, the clinical psychologist who conducted the 1986 psychological evaluation of appellant that Dr. Woods relied on in his assessment.[110] Dr. Tuton's evaluation was in reference to allegations of sexual abuse in appellant's family when appellant was a child.[111] Based upon his clinical evaluation and testing, Dr. Tuton diagnosed appellant in 1986 as having "an adjustment disorder with depressed mood associated with a mixed specific developmental disorder."[112] Dr. Tuton did not testify that appellant's adjustment disorder was a severe mental disease or defect or that appellant was ever incapable of appreciating the nature, quality, and wrongfulness of his actions.

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[107] *Id.*
[108] R. 2351.
[109] R. 2357.
[110] R. 2013-65; DE D.
[111] R. 2017.
[112] R. 2019-37. *See* DSM IV-TR at 679-83.

Dr. [redacted] who was the forensic psychiatrist that conducted appellant's 2003 R.C.M. 706 sanity board, also testified regarding appellant's mental health.[113] Dr. [redacted] testified that Dr. [redacted] a licensed neuropsychologist, conducted the psychological testing for the sanity board; that the test results were included in the full report; and that Dr. Woods utilized those tests in his evaluation.[114] Dr. [redacted] testified that the only mental defect appellant suffered from at the time of the murders was a dysthemic disorder, which "is a low-grade, long-standing depression."[115] Appellant's dysthemic disorder was not considered a "severe mental disease or defect," appellant could appreciate the criminality of his conduct, and appellant had the ability to premeditate.[116]

Any additional facts necessary for the disposition of this appellant are set forth in argument.

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[113] R. 2484.
[114] R. 2490, 2492, 2508-13.
[115] R. 2493, 2499. *See* DSM IV-TR at 376-80.
[116] R. 2493, 2499-2500, 2515.

Assignments 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.

Standard of Review

An allegation of ineffective representation presents a mixed question of law and fact which the Court reviews *de novo*.[117] Counsel at the trial level are presumed competent by our appellate courts.[118] As the United States Supreme Court makes clear "[j]udicial scrutiny of counsel's performance must be highly deferential."[119] Moreover, the effectiveness of counsel is determined by reviewing the overall performance of counsel throughout the proceedings.[120]

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[117] *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (citation omitted).
[118] *Id.* at 474-75 (citations omitted).
[119] *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The Supreme Court further elaborated that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* at 689-90.

[120] *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998).

In *Strickland v. Washington*, the Supreme Court provided the legal standard for reviewing claims of ineffective assistance of counsel. First, appellant "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial."[121] The military justice system developed a three-pronged framework for analyzing whether an appellant has overcome the presumption of competence:

> 1. The appellant must prove his allegations are true; "and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?"
>
> 2. If the allegations are true, appellant must prove that his defense counsel's "level of advocacy f[ell] measurably below" an objective standard of reasonableness. That is, whether the defense counsel's performance fell significantly below what we ordinarily expect from "fallible lawyers."
>
> 3. "If defense counsel was ineffective, is there 'a reasonable probability that, absent the errors,' there would have been a different result." Were "the errors . . . so serious as to deprive the defendant of a fair trial?"[122]

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[121] *Strickland*, 466 U.S. at 687.
[122] *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).

Military courts firmly established that appellant must first raise a colorable claim warranting further inquiry,[123] and in order to prevail "must present more than a prima facie case to meet his very heavy burden."[124] The prejudice prong requires appellant to show, even in a capital case, a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[125] Therefore, even if defense counsel's performance was deficient, appellant is not entitled to relief unless he was prejudiced by that deficiency,[126] meaning he must demonstrate that he would not have been convicted and sentenced to death.[127]

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[123] *United States v. Lewis*, 42 M.J. 1, 4 (C.A.A.F. 1995).
[124] *United States v. Young*, 50 M.J. 724 n.3 (Army Ct. Crim. App. 1999) (citing *United States v. Crum*, 38 M.J. 663, 666 n.3 (A.C.M.R. 1993), *aff'd*, 43 M.J. 230 (C.A.A.F. 1995)).
[125] *Smith v. Spisak*, 130 S.Ct. 676, 685 (2010) (quoting *Strickland*, 466 U.S. at 694).
[126] *United States v. Quick*, 59 M.J. 383, 385-86 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).
[127] *Spisak*, 130 S.Ct. at 685; *Loving v. United States*, 68 M.J. 1, 7 (C.A.A.F. 2009), *cert. denied*, ___ U.S. ___, 2010 WL 621383 (October 4, 2010).

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.

Law and Argument

It is not clear how the trial defense counsel could have been qualified under 18 U.S.C. § 3599 when the statute did not exist at the time of his trial in 2005.[128] In existence at the time of appellant's trial was 18 U.S.C. § 3005, which stated that "[w]hoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours." By the statute's express terms, it does not apply to trial by courts-martial, but only to those defendant's "indicted" in an Article III court. The Court of Appeals for the Armed Forces (CAAF) has expressly declined to hold that the federal statute applies to courts-martial, finding

[128] As the headnote to Assignment of Error I.A. indicates, this statute did not become law until 9 March 2006, nearly a full year after appellant's court-martial.

it merely "instructive."[129] Appellant cannot be denied a right he does not have.

Appellant does not provide any discussion or analysis of 18 U.S.C. §§ 3005 or 3599, but instead relies almost exclusively on the 2003 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003 ABA Guidelines) as an exhaustive list of what makes a defense counsel "learned" in the laws of capital cases.[130] However, as CAAF noted in both *United States v. Murphy* and *United States v. Loving*,[131] the ABA does not have the authority for determining the qualifications of defense counsel practicing before a court-martial. Congress expressly granted that authority to the Judge Advocates General.[132] Furthermore, the statute itself states that "the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts."[133] The language of the statute makes clear that the courts, not the ABA, make the final determination of whether a particular counsel is "learned" in the laws of capital cases. "[T]he question as to the qualifications required of learned counsel [under 18 U.S.C. § 3005] is less than clear-cut and the

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[129] *Murphy*, 50 M.J. at 9.
[130] Appellant's Brief (AB) at 26-43.
[131] *Murphy*, 50 M.J. at 9 (citing *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996)).
[132] UCMJ art. 27(b)(2).
[133] 18 U.S.C. § 3005.

question whether an individual lawyer qualifies as learned counsel may depend on circumstances that vary markedly from case to case."[134]

Appellant attempts to do with the 2003 ABA Guidelines that which the Supreme Court expressly prohibited; treating them as "inexorable commands" that all defense attorneys must follow.[135] "*Strickland* stressed, however, that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition."[136] "What we have said of state requirements is *a fortiori* true of standards set by private organizations: '[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'"[137]

As CAAF noted in *Murphy*, while the ABA Guidelines and civilian federal law are "instructive," the adequacy of counsels' representation is judged by their actual performance, and not any *per se* rules established by outside organizations.[138] This approach is consistent with long-standing Supreme Court

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[134] *In re Sterling-Suarez*, 323 F.3d 1, 2 (1st Cir. 2003).
[135] *Bobby v. Van Hook*, 130 S.Ct. 13, 18 (2009).
[136] *Id.* (citing *Strickland*, 466 U.S. at 688).
[137] *Id.* (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).
[138] *Murphy*, 50 M.J. at 9-10 (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

precedent.[139] Therefore, the standard for determining if appellant received effective assistance of counsel under the Sixth Amendment is whether trial defense counsel made objectively reasonable choices during the course of their representation of appellant.

Unlike *Murphy*,[140] the counsel in this case provided a very detailed listing of their trial experience and their knowledge concerning capital litigation,[141] and the record demonstrates that knowledge and ability in action. MAJ [redacted] and MAJ [redacted] requested and received numerous experts that ensured they had sufficient resources to prepare for appellant's case.[142] Trial defense counsel consulted with numerous outside experts in the area of capital litigation.[143] Trial defense counsel litigated numerous motions that reflected heightened knowledge of the law concerning capital litigation,[144] including arguments

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[139] *Cronic*, 466 U.S. at 665 ("The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.")

[140] *Murphy*, 50 M.J. at 9 ("Nothing in the record of trial gives any indication of the training, experience, or abilities of [Murphy's] counsel. The record of trial does not tell us the number of cases each counsel had tried, how long counsel had been admitted to a state bar, or whether either had actually represented a client in a contested felony case involving *voir dire* examination of witnesses, cross-examination, or opening and closing statements.").

[141] R. 12-16. In their affidavit, trial defense counsel also provide this court a more detailed listing of their impressive qualifications at the time of trial as well as their additional training and research into capital litigation. See GAE 1 at 22-31.

[142] R. 15.

[143] GAE 1 at 28-31; GAE 6.

[144] *Jackson v. United States*, 638 F. Supp.2d 514, 538-39 (W.D.N.C. 2009) (District Court took note of the numerous pleadings filed by trial defense attorney in assessing his competence.)

concerning Due Process,[145] attacking the capital referral,[146] as well as challenging the constitutionality of the death penalty under the UCMJ.[147] Appellant raises many of these same arguments, some nearly verbatim, on his appeal before this Court. It is clear from the record that MAJ [redacted] and MAJ [redacted] were properly trained and prepared in the area of capital litigation.

[145] AEs V ("Heightened Due Process"); XIX ("Bar Witherspoon Challenges"); LV ("Bar Victim Impact Testimony").
[146] AEs LIX, LXI, LXIII; and LXV.
[147] AEs LXVII, LXIX, LXII, LXXIII, LXXXIII, LXXXVIII, XC, XCIV.

C.[148] 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.

IX.[149]

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.[150]

As an initial matter, appellant's allegation in Assigned Error I.C. that trial defense counsel "failed to challenge for cause any panel members"[151] is factually inaccurate. The defense did not oppose the Government's removal of Major [redacted] Sergeant Major [redacted] and First Sergeant [redacted][152] The defense team then moved to challenge for cause Major [redacted] and that unopposed challenge was granted.[153]

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[148] Because many of appellant's arguments concerning Assigned Errors I.B, I.E, and I.F. overlap the Government will consolidate its response to those allegations below.
[149] Appellant labels this Assigned Error "VIX" in his brief but appears to mean "IX." AB at 362. For clarity, the Government has renumbered it.
[150] The Government's response to Assigned Error IX is consolidated here with Assigned Error I.C., as the two serve as multiple attempts to make the same argument. Appellant admits the facts are the same for the two assignments of error although in "some instances with a different gloss." AB at 362 n.63.
[151] AB at 85.
[152] R. 1171.
[153] R. 1174-75.

Standard of Review

The challenge of a member for cause raised for the first time on appeal is reviewed for plain error.[154] Appellant concedes plain error is the appropriate standard of review for his arguments regarding trial defense counsel and the military judge.[155] The plain error standard is met when "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused."[156] Appellant has the burden of demonstrating plain error.[157]

In order for plain error to be found, appellant must first establish that an error occurred.[158] An error is a "deviation from a legal rule."[159] A complete plain error analysis is not required if there was no error.[160]

Appellant fails to show that either the trial defense counsel or the military judge committed error by not challenging

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[154] *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998) (citing *United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998) (stating the defense counsel did not even challenge the member and finding the military judge committed no error in not removing the member)). *See also* R.C.M. 912(f)(4), Manual for Courts-Martial (MCM), United States (2002 ed.).
[155] AB at 86, 114 n.17, 363, 366.
[156] *United States v. Mullins*, 69 M.J. 113, 116 (C.A.A.F. 2010).
[157] *United States v. Jones*, 68 M.J. 465, 473 n.11 (C.A.A.F. 2010) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998) (stating that under a plain error analysis, appellant has the burden of persuading the court below that there was plain error)).
[158] *United States v. Terlep*, 57 M.J. 344, 347 (C.A.A.F. 2001) (citing *United States v. Barner*, 56 M.J. 131, 138 n.5 (C.A.A.F. 2001) (holding a complete plain error analysis is not required if there was no error)).
[159] *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (citing *United States v. Olano*, 507 U.S. 725, 732-33 (1993)).
[160] *Barner*, 56 M.J. at 138 n.5.

or removing certain panel members based on actual bias or implied bias. Appellant further fails to conduct a complete analysis by failing to demonstrate, or even argue, that any alleged error was plain and obvious or prejudicial under the three-part plain error test.

Law

R.C.M. 912(f)(1)(N) provides that a member must be excused whenever he should not sit "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[161] This rule encompasses challenges based upon both actual and implied bias.[162] Grounds for challenge under this rule may include situations where the member has a direct personal interest in the result of trial; is closely related to the accused, a counsel, or a witness; has participated as a member or counsel in a closely related case; has a decidedly friendly or hostile attitude towards a party; or has an inelastic opinion concerning an appropriate sentence for the offense charged.[163]

Actual bias exists where any bias "is such that it will not yield to the evidence presented and the judge's instructions.[164]

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[161] R.C.M. 912(f)(1)(N).
[162] *United States v. Bagstad*, 68 M.J. 460, 462 (C.A.A.F. 2010).
[163] R.C.M. 912(f)(1)(N) discussion.
[164] *United States v. Leonard*, 63 M.J. 398, 401-02 (C.A.A.F. 2006) (citing *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)).

Actual bias is reviewed through the eyes of the military judge or the court members.[165]

Implied bias exists when "regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced."[166] The test for determining an R.C.M. 912(f)(1)(N) challenge for implied bias is objective and "viewed through the eyes of the public, focusing on the appearance of fairness."[167] The "hypothetical 'public' is assumed to be familiar with the military justice system,"[168] and a "reasonable, disinterested layman"[169] "considering the record as a whole."[170] In carrying out this objective test, the Court determines "whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high."[171]

Challenges for actual bias or implied bias are evaluated based on the totality of the circumstances.[172] Importantly, CAAF has "determined that when there is no actual bias, implied bias should be invoked rarely."[173]

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[165] *Id.* at 402.
[166] *Bagstad,* 68 M.J. at 462.
[167] *Id.*
[168] *Id.*
[169] *Napoleon,* 46 M.J. at 283.
[170] *United States v. Townsend,* 65 M.J. 460, 465 (C.A.A.F. 2008) (stating a reasonable observer, considering the record as a whole, would have harbored no questions about the member's neutrality, impartiality, and fairness).
[171] *Id.*
[172] *Bagstad,* 68 M.J. at 462.
[173] *Leonard,* 63 M.J. at 402.

Argument

A. Neither the trial defense counsel nor the military judge had good cause to challenge the members.

Appellant's assertions of error regarding the panel members are not supported by the record or the law.[174] Appellant fails to demonstrate how either the defense counsel[175] or the military judge[176] committed legal error as required under a plain error analysis. To do so, appellant must show that there was actual bias or implied bias to serve as a basis for challenging a particular panel member. None of the panel members mentioned by appellant would satisfy the tests for either actual bias or implied bias.

Appellant's myopic view of the record and selective culling of portions of *voir dire* fails to establish plain error. The record shows that the members were impartial and committed to reaching a decision based solely on the evidence and law. Furthermore, appellant's hypothetical member of the public for an implied bias analysis looks like an interested, passionate member of the defense bar. Appellant's argument seems to suggest that implied bias is presumed in a capital case and this is, of course, nowhere to be found in the law.

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[174] Appellant makes essentially the same argument regarding the same nine panel members in both Assigned Errors I.C. and IX with the "different gloss" for the particular Assigned Error. AB at 362 n.63.

[175] R.C.M. 912(f)(3) describes the procedure by which a party makes a challenge to a panel member.

[176] R.C.M. 912(f)(4) states that a military judge *may*, in the interest of justice, excuse a member against whom a challenge for cause would lie.

SFC [redacted]

Appellant argues SFC [redacted] had an "inelastic opinion on sentencing"[177] as he supposedly would "not consider evidence in mitigation"[178] and "misinterpreted the meaning of rehabilitation."[179] Appellant also transforms SFC [redacted] difficulty sleeping into possible "mental health issues"[180] and describes him as someone "wrestling with his own demons."[181] Appellant also attempts to make much out of SFC [redacted] being in the same company-sized unit.[182]

In fact, SFC [redacted] stated he would consider life without the possibility of parole as a sentence.[183] He said he would consider evidence of appellant's mental condition[184] - something of value to the defense since they hoped to focus on diminished mental capacity and mental health.[185] He said he would follow the judge's instructions on the full range of punishments;[186] would give appellant a fair trial;[187] that nothing would impair his impartiality;[188] he would not form an opinion on sentencing

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[177] AB at 93.
[178] AB at 91.
[179] AB at 92.
[180] AB at 94.
[181] *Id.*
[182] AB at 95.
[183] R. 1134.
[184] *Id.*
[185] GAE 1 at 8.
[186] R. 1136.
[187] R. 814.
[188] R. 816.

until he heard all of the evidence;[189] and he would be fair in determining an appropriate sentence.[190] SFC [redacted] also said, despite appellant's fear of him being in his company-sized unit at Fort Bragg, that he did not even know appellant.[191] There is no evidence of actual bias and a reasonable, disinterested member of the public consulting the entire record would in no way question the impartiality of SFC [redacted]

MAJ [redacted]

Appellant argues MAJ [redacted] had an inelastic "attitude towards sentencing"[192] because of his "eye for an eye"[193] formula, and - exhibiting more amateur psychology by appellant - attempts to argue MAJ [redacted] had a "personal emotional connection"[194] to this case. Yet, MAJ [redacted] said that he would want there to be more than one murder before considering the death penalty[195] - certainly not an example of an inelastic opinion on sentencing from appellant's perspective and not an "eye for an eye." He said he would consider life without the possibility of parole;[196] would not form an opinion on punishment until all of the evidence is received;[197] and would reach a sentencing

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[189] R. 819-20.
[190] R. 820.
[191] R. 812.
[192] R. 95.
[193] AB at 95.
[194] AB at 96.
[195] R. 987-88.
[196] R. 988.
[197] R. 820.

decision on an individual basis.[198] In fact, the Government attempted to challenge MAJ [redacted] for cause based on his negative views of the death penalty, but the defense objected and the challenged was denied.[199] There is no evidence of actual bias and a reasonable, disinterested member of the public consulting the entire record would in no way question the impartiality of MAJ [redacted]

SFC [redacted]

Appellant argues SFC [redacted] formed a pre-conceived opinion that appellant was guilty.[200] However, the record does not support appellant's argument. SFC [redacted] said that he did not maintain any position on appellant's guilt; he could set aside all pre-conceived notions; he agreed that not everything published in the media is necessarily true; he agreed that appellant is presumed innocent; and he promised to follow the judge's instructions.[201] SFC [redacted] also said that he was Roman Catholic and the death penalty is a last resort[202] - a member that could be beneficial to the defense in a case very much about avoiding the death penalty.[203] There is no evidence of actual bias and a reasonable, disinterested member of the

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[198] R. 820-21.
[199] R. 1172-74.
[200] AB at 99.
[201] R. 1139-40.
[202] R. 1149.
[203] GAE 1 at 46.

public consulting the entire record would in no way question the impartiality of SFC [redacted]

LTC [redacted]

Appellant argues LTC [redacted] had a "clear bias against mental health professionals."[204] The record does not support appellant's argument. LTC [redacted] said that he would not give the testimony of psychiatrists or psychologists any more weight than other witnesses.[205] LTC [redacted] father was a practicing psychotherapist and social worker, and LTC [redacted] agreed that evidence of mental illness impacts a sentencing decision because "sometimes when events start going down a certain path, that train just keeps building and building. And really it has -- they have no control over events that follow."[206] Contrary to appellant's argument, LTC [redacted] never said that he would give less credence to psychotherapy and never demonstrated a "prejudice against psychotherapy"[207] as a science. There is no basis for actual or implied bias.

LTC [redacted]

Appellant argues LTC [redacted] supposed reluctance in setting aside her personal knowledge about mental health had a taint of implied bias.[208] Yet, she said that she would base her

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[204] AB at 99.
[205] R. 971.
[206] R. 975-76, 978-79.
[207] AB at 100.
[208] AB at 102.

decision on the evidence presented during the court-martial[209] and she would follow the judge's instructions.[210] She said she could give appellant a fair trial; there was no matter to impair her impartiality; and she would form no opinion until all of the evidence was received.[211] There is no evidence of actual bias and a reasonable, disinterested member of the public consulting the entire record would in no way question the impartiality of LTC [redacted]

LTC [redacted]

Appellant argues that LTC [redacted] should have been challenged because he was a former deputy commander in appellant's brigade and may have seen information about the case in his position.[212] However, LTC [redacted] made clear that he saw nothing other than what was presented on a matrix and did not recall any details.[213] LTC [redacted] disclosed this information himself during *voir dire* to ensure there was no appearance of partiality.[214] He was never briefed on the case and knew none of the facts of the case.[215] He did not know any more than any other panel member in this case. There is no evidence of actual bias and a reasonable,

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[209] R. 965.
[210] *Id.*
[211] R. 814-18.
[212] AB at 104.
[213] R. 883.
[214] R. 882.
[215] R. 884.

disinterested member of the public consulting the entire record would in no way question the impartiality of LTC [redacted]

LTC [redacted]

Appellant argues there is implied bias because LTC [redacted] is the brother of the commander of the 101st Airborne Division (Air Assault) at the time of appellant's trial[216] and because he may have seen some case-related documents when he worked at the Pentagon.[217] In fact, his brother was not in command at the 101st before, during, or after the attacks, or even when appellant was also assigned to the unit, since General Petraeus transferred the case to Fort Bragg while he was still in command.[218] LTC [redacted] said he felt no pressure from his brother's position and never discussed the case with his brother.[219] LTC [redacted] also recalled no details about this case from his time at the Pentagon.[220] No objective, disinterested, reasonable member of the public with access to the entire record would question LTC [redacted] impartiality.

[216] AB at 104-05.
[217] AB at 105.
[218] AE 30 at enclosure 1; R. 910.
[219] R. 910.
[220] R. 918.

LTC [redacted]

Appellant claims LTC [redacted] had a clear bias towards appellant's Islamic faith.[221] LTC [redacted] stated that his views on Islam would not affect his ability to be impartial and he would be fair minded.[222] Appellant's other claims regarding LTC [redacted] lack merit and also fail to meet the test for either actual or implied bias.

CSM [redacted]

Appellant argues CSM [redacted] was biased because he misunderstood the concept of reasonable doubt.[223] Appellant claims that there was no further inquiry into CSM [redacted] statement that life without the possibility of parole was an appropriate punishment if "all the facts aren't there."[224] However, the record directly rebuts appellant's argument. Trial defense counsel followed up with CSM [redacted] to clarify his statements to the trial counsel, asking what the "other factors" were in considering if death were an appropriate punishment once a finding of guilty beyond a reasonable doubt is rendered.[225]

CSM [redacted] stated that he would still have to consider the "mental status of the individual" because "we have to look at the -- what was the individual thinking about; what was going on

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[221] AB at 106.
[222] R. 945-46.
[223] AB at 111.
[224] AD at 110 (citing R. 1066).
[225] R. 1073.

during the time of the event; and what would have -- what would have caused the individual to commit this type of crime."[226] CSM [redacted] answers, when viewed in context, demonstrate the understanding that not all "facts" are adduced during findings, and that additional facts on sentencing are relevant. CSM [redacted] never intimated, as appellant suggests, that he would convict someone on a lesser standard of proof in order to achieve a lesser sentence. There is no merit to appellant's assertions and his claims do not come close to either actual or implied bias.

Uncharged Misconduct and Personal Reactions

Appellant also argues that multiple panel members were aware of uncharged misconduct and had personal reactions to the news of his charged offenses.[227] The argument is without merit. Every panel member stated that he or she could give appellant a fair trial;[228] no matter would impair, or appear to impair, their impartiality;[229] they would presume appellant innocent until legal and competent evidence proved his guilt beyond a reasonable doubt;[230] they would form no opinions until receiving

[226] R. 1073-74.
[227] AB at 111, 113.
[228] R. 814.
[229] R. 816.
[230] R. 817.

all the evidence;[231] and they would be fair on an appropriate punishment. There certainly was no actual bias in this case.

CAAF has also "determined that when there is no actual bias, implied bias should be invoked rarely."[232] The law recognizes panel members, as members of society and as part of the "human condition," are likely to have strongly held personal views on certain kinds of conduct.[233] "The question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law."[234] A "reasonable observer, considering the record as a whole, would have harbored no questions about the panel member's neutrality, impartiality, and fairness" and thus there is no implied bias in this case.[235]

Appellant fails to demonstrate error as required in making a plain error analysis. He selectively chooses portions from the record and fails to tether them to any applicable law. Appellant fails to demonstrate any actual or implied bias of any member he highlights and thus fails to show any error by defense counsel or the military judge. Appellant received a fair trial

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[231] R. 818.
[232] *Leonard*, 63 M.J. at 402.
[233] *United States v. Elfayoumi*, 66 M.J. 354, 357 (C.A.A.F. 2008).
[234] *Id.*
[235] *Townsend*, 65 M.J. at 465.

from an impartial panel. He therefore fails to show any error - let alone plain error - in this case.

B. Trial defense counsel's strategy regarding challenges for cause during *voir dire* was reasonable - as well as wise - and thus should not be second-guessed by this Court.

Courts will not "second guess" on appeal strategic or tactical decisions made by a defense counsel unless there was no reasonable or plausible basis for the defense counsel's actions.[236] If trial defense counsel had a "reasonable trial strategy," actions taken pursuant to that strategy will not be deemed ineffective.[237] An attorney's actions during *voir dire* are considered to be matters of trial strategy and a strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.[238] Appellant even acknowledges that there is no ineffective assistance of counsel if there is a "showing of a strategic decision."[239]

There is no doubt trial defense counsel acted strategically during *voir dire* with the use of challenges. In fact, it was their strategy to "keep anyone who did not have a clear basis

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[236] *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001) (quoting *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)).
[237] *United States v. Ingham*, 42 M.J. 218, 224 (C.A.A.F. 1995).
[238] *Miller v. Webb*, 385 F.3d 666, 672-73 (6th Cir. 2004).
[239] AB at 87.

for a challenge for cause."[240] This strategy was driven by defense counsel's discussion with Lt. Col. Dwight Sullivan, an expert on the military death penalty,[241] documentation they read on capital *voir dire,* and their reading of case law.[242] It was their strategy to maximize the numbers on the panel in order to increase the probability that at least one panel member - the "ace of hearts" - would not vote for death.[243] The defense counsel executed this strategy and ended up with a panel of 15 members.[244] They challenged one member for cause and did not object to three others to ensure those clearly biased were kept off the panel.[245] Defense counsel had a clear strategy and executed it.

Defense counsel's strategic decision to keep as many members with no clear bias on the panel was both reasonable and wise. It was based on literature documenting how removing members reduces the statistical chance of finding the one vote necessary to avoid a death sentence.[246] The strategy was also based on case precedent in which it was noted that "little mathematical sophistication is required to appreciate the profound impact in this case of reducing the court-martial panel

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[240] GAE 1 at 44.
[241] GAE 1 at 24, 29.
[242] GAE 1 at 44-45.
[243] GAE at 45-46.
[244] *Id.*
[245] *Id.*
[246] Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty,* 158 Mil. L. Rev. 1 (1998).

size."[247] "To use a simple metaphor, if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards or 8?"[248] The defense agreed with this logic and did everything they could to maximize the numbers on the panel to find appellant's "ace of hearts."[249] Appellant's case was not a "whodunit."[250] The best service the defense could provide appellant was to pursue a defense strategy aimed at avoiding a death sentence. Maximizing the number of members not clearly biased on the panel was one of the most effective ways to do that. Defense counsel even thought they had found their "ace of hearts" when the panel requested instructions on reconsideration.[251]

This strategy – and the case law the defense relied upon – was quite prescient as the appellate defense bar has alleged ineffective assistance of counsel in another capital case for defense counsel challenging too many members and thus reducing the probability of finding the "ace of hearts."[252] This is further proof that the strategy was reasonable.

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[247] *United States v. Simoy*, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, 50 M.J. 1 (C.A.A.F. 1998) (reversing on the ground that the military judge gave erroneous instructions to the panel and not on the issue of *voir dire*).
[248] *Id.*
[249] GAE 1 at 45-46.
[250] GAE 1 at 1.
[251] GAE 1 at 46.
[252] *See United States v. Walker*, 66 M.J. 721, 759 (N.M. Ct. Crim. App. 2008) (Assigned Error XXII - Appellant received ineffective assistance of counsel

Appellant also argues it was ineffective assistance of counsel not to challenge the panel members for their knowledge of uncharged misconduct.[253] Yet, this was also a reasonable strategic decision by defense counsel.[254] The defense did not want to push too hard delving into this topic out of concern that it could lead to additional charges by the Government or highlight a matter that they did not want the panel to consider in the first place.[255] This was certainly a reasonable strategy.

There were clear strategic decisions in this case during *voir dire* and those strategies were more than reasonable. Therefore, there can be no ineffective assistance of counsel.

Conclusion

Neither the trial defense counsel nor the military judge committed error regarding challenges for cause. Appellant fails to meet his heavy burden of proving plain error. Even if the Court analyzed this issue under the rubric of ineffective assistance of counsel, appellant enjoys no better fortune. The defense strategy to keep as many members who did not have a clear bias in order to increase the odds of their client not

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because his detailed defense counsel voluntarily reduced the size of the panel by using a challenge for cause and a peremptory challenge).

[253] AB at 111.

[254] GAE 1 at 46.

[255] *Id.*

receiving the death penalty was surely reasonable - and quite wise - and thus should not be second guessed by this Court.[256]

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.

Law and Argument

An unusual aspect of this allegation is that appellant also claims it was ineffective for his defense counsel not to seek an instruction that appellant wanted to plead guilty, but was prevented to by statute.[257] By appellant's logic, his counsel would be ineffective for conceding their client was the perpetrator and ineffective for not telling the panel that their client wanted to plead guilty. However, as a matter of accuracy, the trial defense counsel did not concede "all of the elements" of a capital offense before the panel.[258] While trial defense counsel did not dispute that appellant was the perpetrator, they argued that the element of premeditation was not met by the Government, due to appellant's alleged mental illness.[259]

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[256] *Anderson*, 55 M.J. at 202.
[257] AB at 466 (Assignment of Error XVII).
[258] AB at 115.
[259] R. 1211-12, 1219-20.

The strategic decisions of a trial defense counsel are not subject to twenty-twenty hindsight.[260] Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a strategy accepted as reasonable by the Supreme Court.[261] The defense was faced with overwhelming evidence that appellant murdered CPT Seifert and MAJ Stone.[262] "In such cases, 'avoiding execution [may be] the best and only realistic result possible.'"[263] "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"[264] The Supreme Court noted that even "[r]enowned advocate Clarence Darrow famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold."[265]

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[260] *Bell v. Cone*, 535 U.S. 685, 702 (2002) (citing *Strickland*, 466 U.S. at 689) ("[A] court must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.").
[261] *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004).
[262] GAE 1 at 1.
[263] *Nixon*, 543 U.S. at 191 (quoting 2003 ABA Guideline § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. 913, 1040.
[264] *Nixon*, 543 U.S. at 191-192 (quoting *Cronic*, 466 U.S. at 656-657 n.19 and Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L.Rev. 1557, 1589-1591 (1998) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney."); ("interviews of jurors in capital trials indicate that juries approach the sentencing phase 'cynically' where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense"); id. at 1597 ("in capital cases, a 'run-of-the-mill strategy of challenging the prosecution' case for failing to prove guilt beyond a reasonable doubt' can have dire implications for the sentencing phase.")).
[265] *Nixon*, 543 U.S. at 192 (citations omitted).

Trial defense counsels' notes, submitted by appellant as Defense Appellate Exhibit CC, demonstrate that this was a strategy that began development almost a year before trial. Trial defense counsel stated:

> By raising an attack on premeditation, we enable ourselves to present much of the mitigation evidence developed by Mrs. Grey and the defense team during the merits portion of the trial. The manner that this evidence is presented is such that it will not alienate the panel members. While it is unlikely we will prevail on the premeditation issue, it does allow for a smooth transition to the sentencing ease. It also enables us to explain how the unit's actions and SGT Akbar's mental state created a situation where he would feel (unreasonably so) compelled to act.[266]

Appellant's trial defense counsel laid out their strategy before the panel from the very beginning. They were candid with the panel at findings and employed a strategy that would not undermine their sentencing case. The defense claimed that appellant did not have the ability to form a premeditated intent to kill because of his alleged mental illness.[267] Therefore, their argument was not a *de facto* plea of guilty because they did not concede an essential element of the offense: premeditation. This strategy allowed them an opportunity to avoid a death-eligible offense, while leaving their options open for sentencing arguments that also focused on the mental health

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[266] DAE CC (DA 262).
[267] R. 1211-12, 1219-20, 2596, 2598-99, 2612, and 2622.

evidence.[268] This strategy did not violate Article 45(b), UCMJ, and was a reasonable strategy under *Strickland*.

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.

E. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON SENTENCING.

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.

Argument

Appellant's characterization of trial defense counsels' performance at trial is inaccurate, unsupported by the law or the facts, and insulting to the efforts MAJs [redacted] and [redacted] made on appellant's behalf.

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. . . . But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. . . . That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts

[268] R. 3111-14, 3119-21, and 3131-32.

> of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, in retrospect, one may always identify shortcomings, but perfection is not the standard of effective assistance.
>
> The widespread use of the tactic of attacking trial counsel by showing what "might have been" proves that nothing is clearer than hindsight -- except perhaps the rule that we will not judge trial counsel's performance through hindsight. We reiterate: The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.[269]

Investigation and Presentation of Mitigation Evidence

Appellant glibly claims that the entire sentencing case comprised of only thirty-eight minutes and three witnesses.[270] This synopsis represents a misperception of the law, as well as ignores the very trial strategy promoted by the 2003 ABA Guidelines appellant relies upon throughout his argument.[271] As a matter of law, all evidence properly admitted during the findings phase is to be considered on sentencing.[272] It is very clear from the record of trial that much of the evidence presented on the merits by the defense to counter the

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[269] *Grossman v. McDonough*, 466 F.3d 1325, 1347 (11th Cir. 2006), *cert. denied*, 550 U.S. 958 (2007) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1513-14 (11th Cir. 1995), *cert. denied*, 516 U.S. 856 (1995) (citations, internal quotation marks, and alterations omitted)).

[270] AB at 1, 147.

[271] The Government cites to the 2003 ABA Guidelines only because they are so heavily relied on by appellant. The Government does not concede that the American Bar Association's opinions have any special status or a "privileged position." *See Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring).

[272] R.C.M. 1001(f)(2).

premeditation element was equally applicable to sentencing. As noted above, the trial defense counsel planned from the very beginning to begin presenting their mitigation evidence during the merits portion.[273]

The Commentary to the 2003 ABA Guideline endorses this type of strategy by noting "counsel should begin to develop a theme that can be presented consistently through both the first [guilt] and second [penalty] phases of the trial. Ideally, 'the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.'"[274] "In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are 'imperfect' versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense."[275]

Given the law and the facts, appellant's criticism of trial defense counsel for not re-calling Dr. Woods or the other merits witnesses to the stand on sentencing rings hollow. Dr. Woods provided lengthy testimony during "phase 1" of the court-martial (findings) and that evidence was applicable to "phase 2" (sentencing) without having to re-testify. The trial defense counsel would have appeared rather foolish if they called

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[273] DAE CC (DA 262); GAE 1; GAE 10 at 83.
[274] 2003 ABA Guideline 10.11 (Commentary), 31 Hofstra L.Rev. at 1059 (quoting Andrea D. Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L. Rev. 695 (1990)).
[275] 2003 ABA Guideline 10.11 (Commentary), 31 Hofstra L.Rev. at 1059 n.274.

witnesses to repeat themselves. MAJ [redacted] specifically referenced the testimony of the experts from findings as part of his sentencing argument, which focused heavily on appellant's mental health.[276] The military judge even instructed the panel that they should consider, in mitigation, the testimony that Dr. Woods and Dr. Tuton gave during the findings portion.[277]

Appellant relies very heavily on the criticism of his latest "mitigation specialist," Ms. Lori James-Townes.[278] Ms. James-Townes criticizes the investigation and presentation by MAJs [redacted] and [redacted] but it is very apparent, regardless of her credentials, that she is unqualified to render such an opinion. First, Ms. James-Townes is not a lawyer. She does not know what it is to prepare for trial, pick a jury (or a panel), question a witness within the rules of evidence, or deliver a closing argument grounded in the facts and law. Second, she was not present at appellant's trial, and for all her sound-and-fury about diligent investigation, she never even attempted to talk to MAJs [redacted] and [redacted] about what their trial preparations entailed and what difficulties arose in the process.[279] It is all too easy for Ms. James-Townes, as well as the other "experts" who provided affidavits for appellant five years after

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[276] R. 3111, 3114, 3120-21, and 3131-32.
[277] R. 3140.
[278] AB at 15-16, 60, 77-79, 139, 153, 294, 395, 410 (citing DAE LL).
[279] GAE 1 at 33.

the trial,[280] offer criticism, and drafting an essay about appellant's life that is not subject to any rules of evidence, procedure, or scrutiny during a cross-examination.[281]

Ms. James-Townes opines that appellant's "trial team failed to conduct what should be deemed by the court as an adequate mitigation investigation."[282] Ms. James-Townes and appellant both cite to *Wiggins v. Smith* in support of their argument.[283] However, in *Wiggins* the Supreme Court "emphasiz[ed] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case."[284]

In *Wiggins*, the Supreme Court noted that the two public defenders' entire investigation into their client's life history at trial consisted of reviewing Presentence Investigation (PSI) and Department of Social Services (DSS) reports provided to them, with no follow-up investigation.[285] The public defenders offered almost no information on Wiggins' background during sentencing and did not call any witnesses during the sentencing

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[280] DAE G (Scharlette Holdman) and DAE GG (James Lohman).
[281] "But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance." *Grossman*, 466 F.3d at 1347 (quoting *Waters*, 46 F.3d at 1513-14).
[282] DA 427.
[283] AB at 138, 155; DAE LL (DA 427, 448).
[284] *Wiggins*, 539 U.S. at 533.
[285] *Id.* at 523-24.

hearing.[286] The Supreme Court determined that the public defenders' decision to conduct no investigation at trial was unreasonable.[287] Recently, in *Loving v. United States*, CAAF highlighted that there is a distinction between cases where no life history or mitigating evidence was presented and an allegation that additional life history or mitigating evidence was available.[288] When one removes the blinders appellant chooses to wear and looks at the entire record, it is quite clear that, unlike in *Wiggins*, trial defense counsel conducted a thorough investigation and provided a wealth of mitigation evidence to the panel.

One piece of evidence for the defense was appellant's diary. Appellant criticizes his trial defense counsel for submitting his diary with no "explanation."[289] However, the decision to admit the entire diary is not as "inexplicable" as appellant claims.[290] Trial defense counsel recognized both the benefits and risks contained within appellant's diary, as most evidence of this nature can be a double-edged sword. Trial

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[286] *Id.* at 516; *Wiggins v. Corcoran*, 288 F.3d 629, 635 (4th Cir. 2002) ("The defense introduced no mitigating evidence other than the stipulated statutory mitigating factor that Wiggins had no prior violent convictions.").
[287] *Wiggins*, 539 U.S. at 534.
[288] "Without question, this case involves a defendant with a disadvantaged background. However, in contrast to cases like *Rompilla* [v. Beard], 545 U.S. [374,] 378 [(2005)]; *Wiggins*, 539 U.S. at 515, and *Williams v. Taylor*, 529 U.S. 362, 369, 389 (2000), which addressed defense counsel's complete failure to inform the sentencing panel about the defendant's difficult past, trial defense counsel in this case presented a mitigation case to the members that devoted a significant degree of attention to Loving's troubled childhood." *Loving*, 68 M.J. at 15-16.
[289] AB at 153.
[290] *Id.*

defense counsel recognized that the military judge allowed the Government to present "the most damaging aspects of [appellant's diary]."[291] They made the strategic decision to admit the diary as a whole on sentencing, a decision based on proper research and investigation, because they believed that the diary as a whole supported the argument that appellant suffered from mental illness;[292] an argument supported by Dr. Woods.[293] Under *Strickland*, this reasonably calculated decision is not subject to second-guessing.

Furthermore, the trial defense counsel did not just submit appellant's diary without substantive analysis, as appellant claims, but also provided three different sources of analysis for his diary. First, there was Dr. Woods' discussion of the diary during his testimony.[294] Second, the trial defense counsel made good use of the FBI's written assessment of his diary. The FBI Assessment, submitted as a Defense Exhibit B, states that "appellant's diary reflects many years of lonely struggle to attain the love affection, and respect he so anxiously needed. The root of this need can almost certainly be traced to feeling unloved and unvalued at home."[295] The report goes on to detail

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[291] GAE 1 at 46-48; AB at 151.
[292] GAE 1 at 46-48. During sentencing argument, MAJ [redacted] stated that the diary provided a "unique look" into appellant's mind and "[y]ou have to look at the complete diary." R. 3112.
[293] R. 2365 ("I think it's important to look at the diary as a whole.").
[294] R. 2250-52, 2263, 2331, 2342-48, and 2354-65.
[295] DE B at 6.

appellant's loyalty to his family despite being abused and how life in the military exacerbated many of his deep-seeded problems.[296] Third, the trial defense counsel submitted Deborah Grey's lengthy analysis of appellant's diary.[297]

During the merits the defense also called Paul Tupaz (appellant' college roommate), who discussed appellant's behavior in college;[298] as well Specialist (SPC) Charles Seitzenger, SPC Joshua Rice, SFC(R) Timothy Means, SSG Scott Brandt, SFC Billy Rogers, and 1LT John Evangelista (from appellant's unit).[299] The testimony of these witnesses were listed as evidence in mitigation during the military judge's sentencing instructions and referenced by MAJ [redacted] during his sentencing argument.[300]

In addition to Dr. Woods' testimony, the testimony and report of Dr. Tuton, and the other evidence and witnesses presented during the merits,[301] as well as appellant's diary and the accompanying analysis, the trial defense counsel admitted Defense Exhibits F, G, H, I, K, L, N, O, P, T, U, V, W, and HH. At the request of the defense, each of the fifteen panel members received a binder of the defense exhibits and was permitted to

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[296] *Id.* at 7.
[297] DA C at 7-32.
[298] R. 2070, 2075-79.
[299] R. 2091, 2107, 2151, 2168, 2185, and 2388.
[300] R. 3042-45, 3112-13, and 3129; AE 313.
[301] DE D, R, Z, AA, BB, CC, FF, GG, II, JJ, LL, PP, and RR. DE FF was stipulated testimony from FBI Special Agent [redacted], who related his interview of appellant's half-brother, Mustafa Bilal. SA [redacted] related that Mustafa was unstable and out-of-touch with reality.

take it home and read through it, ensuring each panel member had ample time and opportunity to review the mitigation evidence.[302] These documents included stipulated testimony from Ms. Regina Weatherford,[303] a high school classmate of appellant's, and Musa John Akbar,[304] appellant's brother. The defense also submitted interview synopses by Ms. Grey and Laura Rogers (two of the "mitigation specialists") of Doris Davenport (high school guidance counselor),[305] Ronda Cox (high school teacher),[306] John Mandell (college advisor/counselor),[307] Christine Irion (college acquaintance),[308] and Imam Abdul Karim Hasan.[309]

In addition to the evidence and witnesses presented during the findings that was relevant to sentencing, and the documentary evidence provided to the panel members, the defense called three additional witnesses during presentencing. The defense called CPT David Storch (appellant's former Platoon Leader) and SFC Daniel Kumm (appellant's former Team Leader), whose testimony was used to support the defense arguments that appellant's problems coping with the Army were widely known, that he should not have been deployed in the first place, and that appellant was exposed to derogatory comments about Muslims

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[302] R. 3004-11.
[303] DE F.
[304] DE H.
[305] DE N.
[306] DE O.
[307] DE P.
[308] DE T.
[309] DE W.

prior to his attack on Pad 7.[310] The defense also called appellant's high school science teacher, Mr. Daniel Duncan. Mr. Duncan described appellant's home area in Los Angeles as an unsafe neighborhood "very poor, low socioeconomic, high crime; a lot of gang activity in the neighborhood."[311] Mr. Duncan described appellant as an excellent student, and that he never would have expected appellant to commit the crimes he did.[312]

Appellant and Ms. James-Townes criticize trial defense counsel for not calling appellant's parents to the stand.[313] The record shows that both of appellant's parents were on the witness list and present at the trial, however, the trial defense counsel made a decision not to call them.[314] They informed the military judge that they made this tactical decision after consulting with appellant.[315] Even Ms. James-Townes acknowledges that "most members of [appellant's] family are very closed and difficult . . . ."[316] The fact that appellant's parents were "present and available"[317] does not mean that they would have presented as good witnesses. These are the

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[310] R. 3018-26, 3034-40. The trial defense counsel elicited similar testimony from 1LT John Evangilista (another of appellant's former Platoon Leaders) during the defense case on findings. R. 2389-98, 2404-11.
[311] R. 3044.
[312] R. 3046-49.
[313] AB at 133; DAE LL (DA 424).
[314] R. 3068-69
[315] R. 3069.
[316] DA 446.
[317] DA 425 FN*.

types of decisions that professional attorneys must make, which are not subject to twenty-twenty hindsight.

Trial defense counsel identified areas of mitigation in April of 2004[318] and through their investigative efforts presented evidence to the court-martial concerning each of these areas. For example, Dr. Grey's timeline of appellant's life shows that appellant's father was sent to prison before appellant was three years old, that upon his release from prison he converted the entire family to Islam when appellant was three, that appellant had a religious crisis at age five, that at age six appellant's father began a long history of drug abuse, and that appellant's life was filled with "chaos and poverty" when his mother moved the family to Louisiana.[319] Trial defense counsel also submitted the Los Angeles Department of Social Services records showing appellant's family being placed on welfare and food stamps in the 1980s.[320]

In Musa John Akbar's statement, he wrote that his family grew up poor, that appellant supported his mother financially while he was in college and took his brother in on two separate occasions.[321] His statement also confirmed that appellant was concerned about his sisters.[322] Dr. Tuton's report and testimony

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[318] DAE CC (DA 262).
[319] DE B at 3.
[320] DE G.
[321] DE H.
[322] *Id.*

also revealed that the sexual abuse of appellant's sisters had a profound impact on him.[323]

Trial defense counsel submitted appellant's college transcripts which showed that he received a Bachelor's of Science in 1997 in Aeronautical Science and Engineering and Mechanical Engineering, but only after nine years of study and inconsistent academic performance.[324] Ms. Grey's synopsis of her interviews Doris Davenport,[325] Ronda Cox,[326] and John Mandell[327] all note appellant's academic successes. However, the evidence also showed that appellant was socially awkward. Christine Irion noted that in college appellant was "strange and different" and that appellant did not socialize.[328] Appellant held a grudge against Paul Tupaz for two years over a harmless comment.[329]

The sentencing evidence also supported the theory that appellant was paranoid and held a very low opinion of himself, which related to the claims of mental illness. In appellant's diary entry on 7 December 2002 he declares himself a "joke" and a coward.[330] Appellant's diary entry on 16 February 2003 appellant declares himself a "loser" and that he was not

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[323] DE QQ at 2-3.
[324] DE R.
[325] DE N.
[326] DE O.
[327] DE P.
[328] DE T.
[329] DE T.
[330] DE Z at 8.

respected.[331] Appellant believed that if he were married members of his unit would feel like they could rape his wife.[332]

The military's judge's instructions to the panel on mitigating and extenuating circumstances highlight the substantial amount of mitigation evidence presented at trial and the fallacy of appellant's criticism. The military judge not only listed thirty-one separate points to consider in mitigation and extenuation, but directed the panel to the evidence in the record presented by the defense during the trial that supported each point. These included:

> One, Sergeant Akbar's age at the time of the offenses of 32;
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> Two, the lack of any previous convictions;
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> Three, Sergeant Akbar's education, which includes a bachelor's degree in Mechanical and Aeronautical Engineering;
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> Four, that Sergeant Akbar is a graduate of the following service schools: Basic Training, Satellite Communications AIT, Combat Engineering AIT, Sapper School, and PLDC;
>
> Five, the 768 days of pretrial confinement;
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> **Six, Sergeant Akbar's impoverished childhood, as referenced in the interview of Imam Abdul Hasan, the Department of Social Services records, and Sergeant Akbar's diary;**
>
> **Seven, the statement of Ms. Regina Weatherford concerning Sergeant Akbar's involvement in leadership and academic activities in high school and his inability to make good friends, as**

[331] DE Z at 3.
[332] DE Z at 3.

referenced by Deborah Grey's interviews of Ms. Doris Davenport, Ms. Ronda Cox, and Mr. John Mandell;

Eight, the testimony of Mr. Daniel Duncan regarding the difficult academic environment at Locke High School, Sergeant Akbar's exceptional performance as a student, and that the offenses were out of character for him, as also referenced in the interviews of Ms. Doris Davenport, Ms. Ronda Cox, and Mr. John Mandell;

Nine, Dr. Fred Tuton's and Dr. George Woods' testimony that Sergeant Akbar lacked a proper father figure as a child;

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

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

Twelve, the FBI assessment that Sergeant Akbar's diary reflects many years of lonely struggle to attain the love, affection, and respect he so anxiously needed with the root of this need being traced to feeling unloved and unvalued at home; that years of perceived failures and rejections took their toll on SGT Akbar; that besides contributing to his already low self-image, they caused sleep disturbances which in turn only

added to his stress, his trouble concentrating, his difficulty staying awake, his difficulty thinking clearly, and rendered him vulnerable to even the slightest insult;

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

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

Fifteen, the sleep disturbance suffered by Sergeant Akbar before and in the Army, and its effect on his academic achievements and his duty performance, as discussed in Sergeant Akbar's diary, documented in his medical records, and testified to by Sergeant First Class Daniel Kumm, Sergeant First Class (Retired) Paul Means, Captain David Storch, Captain John Evangelista, Staff Sergeant Billy Rogers, Specialist Christopher Pannell, Specialist Charles Seitzinger, Specialist Dustin Rice, Staff Sergeant Scott Brandt and Eric Walter;

Sixteen, **Dr. Woods' testimony and Agents [redacted] and [redacted] analysis of the** diary that Sergeant Akbar discussed being the object of ridicule and abuse by his military peers;

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

Eighteen, the financial difficulties experienced by Sergeant Akbar as a young adult **as reflected in the social services records, Sergeant Akbar's diary, the interview of Ms. Christine Irion and the testimony of Mr. Paul Topaz;**

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

Twenty, the testimony of Captain Grant Sketo, Sergeant First Class Kumm, Sergeant First Class (Retired) Means, Captain Storch, Captain Evangelista, Staff Sergeant Rogers, Specialist Pannell, Specialist Seitzinger, Specialist Rice, Staff Sergeant Brandt and Eric Walter that Sergeant Akbar was a poor leader, a substandard duty performer, got his stripes too soon, struggled as a leader and was incapable of accomplishing minor tasks;

Twenty-one, the testimony of Specialist Pannell, Specialist Seitzinger, Staff Sergeant Brandt, Sergeant First Class Rogers and Sergeant First Class (Retired) Means that soldiers used such derogatory terms as Punjab, camel jockey, raghead, sand nigger, towelhead, and skinny in Sergeant Akbar's presence and recited derogatory jody calls during company runs.

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

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

Twenty-four, **Dr. Woods' testimony** regarding Sergeant Akbar's family history of mental illness;

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

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

> Twenty-seven, that the FBI found no ties between any extremist organizations and Sergeant Akbar;
>
> Twenty-eight, that Sergeant First Class Kumm, Captain Storch, Captain Evangelista and Staff Sergeant Charles Cordell recommended against taking Sergeant Akbar to Kuwait;
>
> Twenty-nine, that numerous soldiers observed odd behavior exhibited by Sergeant Akbar in Kuwait and did not report it to the chain of command;
>
> Thirty, that, notwithstanding his belief that Sergeant Akbar may be suicidal, Captain Evangelista did not request any mental evaluation or assessment be done, even though services were available in Kuwait; and
>
> Thirty-one, Sergeant Akbar's expression of regret and remorse and request for forgiveness.[333]

Reading appellant's brief, one would think that appellant and the military judge sat through two different trials. Even the prosecution noted in the Government's sentencing argument that the defense focused on appellant's "social history."[334]

MAJ [redacted] closing statement highlights the trial defense team's use of the mitigation evidence.[335] MAJ [redacted] referenced the evidence of appellant growing up in a poor family, filled with neglect and molestation and that his community was racially intolerant.[336] MAJ [redacted] continued to talk about appellant's "social history" by discussing appellant's progression through

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[333] R. 3139-45 (emphasis added).
[334] R. 309.
[335] R. 3108-3134.
[336] *Id.*

high school, college, and into the Army.[337] MAJ [redacted] discussed appellant's underachieving and his struggles. Throughout MAJ [redacted] discussion of appellant's "social history," he talked at length about appellant's mental health, referring to both the testimony from the experts and from members of the unit who testified about appellant's behavior.[338] MAJ [redacted] echoed Dr. Woods' claim that appellant had irrational fears about his unit.[339] The entire point of MAJ [redacted] argument was that life without the possibility of parole was a more appropriate punishment than death.[340]

This Court should also consider the fact that appellant's own actions undermined his trial defense counsels' work.[341] Through their investigative efforts, trial defense counsel came upon what they believed was powerful mitigation evidence. The warden of the pretrial confinement facility as well as the senior enlisted guard were willing to testify that appellant was a model prisoner and did well in confinement.[342] However, shortly before trial, appellant stabbed a military police officer in the neck with a pair of scissors.[343] After that

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[337] R. 3118-3121.
[338] R. 3112-3134.
[339] R. 3121-22, 3134.
[340] R. 3110, 3122-33; AE 313.
[341] *Gardner v. Ozmint*, 511 F. 3d 420, 427 (4th Cir. 2007) ("when determining whether counsel has delivered a constitutionally deficient performance, a state court also may consider a defendant's own degree of cooperation, even in a capital case."), *cert. denied*, 129 S.Ct. 125 (2008).
[342] GAE 1 at 20-21.
[343] *Id.* at 21; *See also* Answer to Assignment of Error II.D. *infra*.

incident, the witnesses were no longer willing to testify that appellant did not represent a danger to society.[344] Appellant, thorough his own acts, destroyed key pieces of mitigation evidence.[345]

Appellant's characterization of his trial defense counsel's efforts is not supported by the record. It is clear from the record that trial defense counsel conducted a lengthy mitigation investigation and presented substantial mitigation evidence at trial.

Use of Experts

In preparation for trial, appellant received the assistance of numerous "mitigation specialists," including Ms. Deborah Gray, Ms. Scharlette Holdman, Ms. Scarlet Nerad,[346] and various other members of the Center for Capital Assistance (CCA). Ms. Grey was originally granted funding on 28 August 2003 for 400 hours of work, at $75.00 per hour.[347] Ms. Grey was forced to leave when conflicts between her and appellant's mother prevented Ms. Grey from continuing her work.[348] When Ms. Holdman was hired to replace Ms. Grey, she was not starting from scratch, but was picking up where Ms. Grey left off. Therefore,

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[344] GAE 1 at 21.
[345] Trial defense counsel described the incident as "devastating" to the defense case, because "several defense sentencing witnesses, specifically the Warden of the RCF, who learned of it through official channels indicated that they no longer wished to testify on SGT Akbar's behalf." *Id.*
[346] AEs 129, 130, and 140.
[347] R. 547.
[348] R. 440-41; GAE 1 at 8-9.

Ms. Holdman was authorized seventy-five hours of work and an additional $10,000 on 24 June 2004.[349] Ms. Holdman was only assigned to the case for a few brief weeks, until she left due to an undisclosed medical issue.[350] Ms. Nerad was assigned to the case in the fall of 2004.[351] Appellant claims that the defense counsel did not request any additional funds,[352] however, according to the record, Ms. Nerad and the rest of the Center for Capital Assistance (CCA) were authorized an additional $56,700 to assist appellant in the fall of 2004.[353] As such, trial defense counsel dealt with the problem of conflicts between experts and appellant's family by hiring new experts, in the process obtaining $96,700 to fund the mitigation investigation.

The members of CCA that now criticize MAJs [redacted] and [redacted] do so with a shocking level of disingenuousness. For example, James Lohman states that appellant's "military lawyers had no capital trial experience whatsoever and they were completely unequipped for handling a capital trial, especially one of this magnitude. Not only were they totally overwhelmed by the complexity and seriousness off the case, they seemed

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[349] R. 548-49
[350] GAE 1 at 12-13. The funding for Ms. Holdman was approved on 1 July 2004 and Ms. Holdman withdrew from the case on 13 September 2004. GAE 1 at 13, 15.
[351] R. 547
[352] AB at 17, 45.
[353] See Allied Papers (ROT Vol. II), *Convening Authority's Memos*, dtd 30 September 2004 and 16 November 2004.

wholly unable to understand or appreciate in any way the extent of Sgt. Akbar's mental illness, the life experiences that shaped his development, and the devastating impact all of this had on his behavior and functioning."[354] However, Mr. Lohman's e-mails to counsel paint a very different picture. Mr. Lohman's involvement was limited, focusing primarily on his theory that an anti-malaria drug had some role to play in appellant's crimes.[355] Rather than raising any concerns with trial defense counsels' performance, Mr. Lohman told them on 23 June 2005 (weeks after the trial was completed) that it was "privilege" to assist them in the case.[356] Similarly, Ms. Holdman's criticisms lack any force, given that she participated for a few short weeks, and was not a member of the defense team when the case went to trial.

Appellant's reference to Ms. Nerad's 5 November 2004 e-mail is equally meaningless. Appellant cites to this e-mail, where Ms. Nerad inaccurately claimed that she had no contact with the defense, as proof that trial defense counsel ceased using their mitigation specialists and cut off the mitigation investigation.[357] While appellant provided Ms. Nerad's e-mail,[358] he failed to produce the response to this e-mail by MAJ

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[354] DAEs I and GG (DA 24 and 337).
[355] GAE 9 at 117-18, 122
[356] GAE 9 at 137.
[357] AB at 57.
[358] DAE R (DA 93).

[redacted] three days later.[359] Trial defense counsel were perplexed by Ms. Nerad's e-mail.[360] MAJ [redacted] reminded Ms. Nerad that MAJ [redacted] provided her "an in depth overview of how we viewed the mitigation case and what was needed from your services to fill in the gaps[,]" which Ms. Nerad termed an "excellent roadmap."[361] Furthermore, MAJs [redacted] and [redacted] were in continuous contact with Ms. Nerad, to include a phone conversation seven days prior to her e-mail.[362]

Rather than relying on appellant's snapshot of a single moment, the court should look to evidence in the record of what occurred before and after Ms. Nerad's e-mail. A review of the record of trial shows that Ms. Nerad's concerns on 5 November 2004 were not provoked by defense counsel, but by her frustration on 4 November 2010, when her request to have funding for Ms. Rogers to conduct parts of the mitigation investigation were denied by the Government because, at that time, Ms. Nerad was the only individual authorized to provide "mitigation services" to appellant.[363] After consulting with MAJs [redacted] and [redacted] Ms. Nerad provided the trial court with an affidavit on 1 December 2004, detailing her frustrations that the Government was "interfering" with her investigation, but made no

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[359] GAE 9 at 98-99.
[360] *Id.*; GAE 1 at 16-17.
[361] GAE 9 at 98; See also GAE 9 at 85.
[362] GAE 9 at 98. See also GAE 9 at 20, 24, 26, 29, 45, 50, 51, 53, 62, 63, 71, 73, 80, 81, 82, 84, 86, 91, 93, and 96.
[363] AE 140 at 7.

mention of any problems with trial defense counsel.[364] Ms. Nerad's affidavit was used to support trial defense counsel's argument on 2 December 2004 for a delay in the case from February 2005 to June 2005.[365]

Furthermore, Ms. Nerad's issues were resolved on 16 December 2004, when the convening authority agreed to trial defense counsel's request to authorize other members of CCA to utilize Ms. Nerad's funding to assist her in the mitigation investigation.[366] Following MAJ [redacted] e-mail and efforts on her behalf, Ms. Nerad abandoned her concerns and resumed her investigation with the assistance of the other CCA members,[367] uncovering what trial defense counsel believed was the most significant piece of mitigation evidence: Dr. Tuton.[368]

The trial defense counsel properly utilized numerous experts in the case. When issues presented themselves (as they will in any case), the trial defense counsel aggressively worked to solve problems. However, the defense counsel were neither required to call experts to the stand, nor were they required to agree with or follow the "orders" of these so-called "mitigation specialists." Appellant seems to believe that so-called

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[364] *Id.*
[365] R. 644-62. The defense request for a delay to June 2005 (the date Ms. Nerad requested) was denied, but was granted to April 2005. R. 662.
[366] Allied Papers (ROT Volume II), *Response to Defense Request for the Appointment of the Center for Capital Assistance . . . .*, dtd 16 December 2004.
[367] GAE 9 at 100-136.
[368] GAE 1 at 17; GAE 9 at 100-02.

"mitigation specialists" are in charge and if they say something, the trial defense attorneys are required to blindly follow along.[369] Such a view turns the entire Sixth Amendment right to counsel on its head.

Opinions from "mitigation specialists" do not carry the weight of a voice from a burning bush. If a defense attorney and a mitigation specialist disagree as to trial strategy or the use of resources, the defense attorney's opinion rules on that issue. For example, prior to finding Dr. Tuton, Ms. Nerad was uncovering information that "while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. Grey."[370] Furthermore, trial defense counsel did not agree with Ms. Nerad's philosophy that "a mitigation investigation was effectively endless and that it was her practice to always request more time and more funding until the state - government relented on pursuing the death penalty. If the government did not relent, then, according to Mrs. Nerad, there would be a built in appellate issue."[371]

Unlike Ms. Nerad and Ms. James-Townes,[372] the courts recognize that a mitigation investigation cannot be endless, and

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[369] AB at 63-64.
[370] GAE 1 at 16.
[371] GAE 1 at 20. In fact, Ms. Nerad's appellate strategy is exactly what appellant has placed before this court.
[372] Ms. James-Townes also endorses the never-ending mitigation investigation, speaking of a "complete life history" without offering any objective, discernable standard for when a life history is complete. DAE LL (DA 418).

that attorneys can make a reasonable decision to terminate the investigation and give their client his day in court.[373] In this case, the trial defense counsel conducted a long and reasonable investigation, spending nearly $100,000 on mitigation specialists alone. The information from this investigation was used in the preparation for trial and at trial. The defense attorneys were not required to admit every scrap of information to the panel, but used the information in a focused and logical presentation.

Investigation and Preparation of Mental Health Evidence

Appellant claims that he did not have anyone on the defense team who was qualified to "screen for mental or psychological disorders or defects."[374] To the contrary, trial defense counsel consulted with numerous mental health experts as part of their preparation. Not only did they have Dr. Woods, but curiously absent from appellant's brief is any acknowledgement of Dr. Walker, the forensic psychologist who was appointed as a defense

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[373] "[W]e emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does Strickland require defense counsel to present mitigating evidence at sentencing in every case." *Wiggins*, 539 U.S. at 533. "But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook*, 130 S.Ct. at 20. See also *Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1997), *cert. denied*, 519 U.S. 838 (1997) ("Presumably the lawyer is not required to investigate the defendant's past with the thoroughness of a biographer.").

[374] AB at 51.

consultant on 9 May 2003,[375] and remained a consultant to the defense team throughout the trial. In fact, Dr. Walker's name does not even appear in appellant's brief. Dr. Walker was actually present as an observer during appellant' R.C.M. 706 sanity board,[376] and concurred with their findings and analysis.[377] Furthermore, trial defense counsel also had the services of Dr. Pamelia Clement, a neurpopsychologist who could conduct additional testing.[378] The trial defense team were in frequent contact with all of their mental health experts throughout the pretrial and trial process.[379]

Appellant also claims that Dr. Woods was not provided sufficient information to provide an accurate mental health evaluation.[380] However, the record of trial demonstrates otherwise. Dr. Woods testified that he had "everything that [he] needed."[381] Dr. Woods testified that relied on his eight hours of interviews with appellant, the Article 32 transcript, statements from appellant's roommate, a 1986 psychological evaluation, records regarding appellant's mother's homelessness, appellant's high-school and college records, his Army medical

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[375] Allied Papers (ROT Vol. II), *Response to Defense Requests in the Case of U.S. v. Hasan K. Akbar*, dtd 9 May 2003.
[376] DAE BB (DA 238).
[377] GAE 1 at 18.
[378] Dr. Clement is not new to capital litigation, as she was involved in both the *Loving* and *Murphy* cases. See *Loving*, 41 M.J. at 240 and *United States v. Murphy*, 67 M.J. 514, 517 (Army Ct. Crim. App. 2008).
[379] GAE 10.
[380] AB at 58-59, 65-66.
[381] R. 2319.

records, the raw data from the Minnesota Multiphasic Personality Inventory (MMPI) administered to appellant, FBI interviews of appellant's brother Mustafa (which Dr. Woods claimed was evidence of a family history of mental illness), evidence concerning appellant's father having depression and sleep problems, the military discharge paperwork of appellant's uncle, and a redacted copy of a 2003 R.C.M. 706 sanity board report.[382] Most of the records relied on by Dr. Woods were those collected by defense during the mitigation investigation. The full sanity board report was not provided to Dr. Woods, in order to avoid disclosure to the Government of appellant's sanity board statements under M.R.E. 302(b)(1).[383]

The redacted sanity board report provided to Dr. Woods listed the battery of neuropsychological testing administered to appellant by Dr. [redacted] and reviewed by Dr. Clement.[384] Dr. Woods testified that he coordinated with a psychologist in interpreting this testing data.[385] Dr. Woods testified about which testing he relied on in his evaluation of appellant,

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[382] R. 2217, 2240-42, 2314-17.
[383] R. 2217, 2316-23, 2438-40. Trial defense counsel recognized the incredibly damaging statements appellant made to the sanity board. GAE 1 at 18. Many of these statements confirmed the Government's theories of the case. Appellant told the sanity board that he decided to target the brigade leadership, that he hid inside a latrine to prepare the grenades, and that he did not continue his attack on the TOC after his injury because he did not want to be killed. DAE BB (DA 242). When asked why he attacked his unit he told the sanity board "I was doing this for Islam to prove my loyalty to Allah." DAE BB (DA 243).
[384] DAE M (DA 48-63); DAE BB (DA 250-53).
[385] R. 2323-24.

stating that the "most important objective testing was the Minnesota Multiphasic Personality Inventory,"[386] which Dr. Woods discussed at length during his testimony. Dr. Woods gave a differential diagnosis during his testimony of "a schizophreniform spectrum,"[387] "schizotypal disorder,"[388] and "schizoaffective disorder,"[389] which he characterized as "disorders of perception."[390] Dr. Woods then offered an opinion as to how appellant's symptoms may have impacted his actions on the day of the murders, by stating that he thought "those symptoms allowed [appellant] to be overwhelmed emotionally and to really not think as clearly, to not understand, and just to be overwhelmed emotionally."[391]

Dr. Woods acknowledged during his testimony that the 2003 R.C.M. 706 sanity board did not find appellant was schizophrenic,[392] nor did the sanity board find that appellant had schizotypal or schizoid personality disorder.[393] Dr. Woods confirmed that he also was not diagnosing appellant as a schizophrenic, but that he was "concerned that he may be."[394] Dr. Woods admitted that he never "put an Axis I name on Axis I

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[386] R. 2264.
[387] R. 2283-87; *See also* DSM IV-TR at 317-19.
[388] R. 2287; *See* DSM IV-TR at 697-701.
[389] R. 2290; *See* DSM IV-TR at 319-23.
[390] R. 2286.
[391] R. 2292.
[392] *See* DSM IV-TR at 297-343.
[393] R. 2329-29.
[394] R. 2331.

symptoms."[395] Dr. Woods testified that appellant understood the lethality of the grenades[396] and that he understood the natural consequences of his acts.[397]

Dr. Woods discussed his three-pronged approach to diagnosis at trial.[398] First, there was his review of "genetic information," where Dr. Woods identified several family members.[399] Second, Dr. Woods discussed environmental factors, including the information he received on appellant's upbringing and his sleep problems.[400] Third, there was the "objective" psychological information, where Dr. Woods discussed the MMPI in great detail.[401] Dr. Woods testified, "What this objective testing is telling us is that: SGT Akbar is depressed, SGT Akbar is paranoid; and SGT Akbar's thinking is unusual and bizarre."[402]

Dr. Woods now claims that information was withheld from him that would have led to a "forensic diagnosis" of paranoid schizophrenia.[403] Specifically, Dr. Woods references allegations

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[395] R. 2349.
[396] *Id.*
[397] R. 2351.
[398] R. 2236 Trial defense counsels' notes from 17 March 2005 confirm that Dr. Woods discussed this approach with the trial defense counsel prior to his testimony. DAE DD (DA 266).
[399] R. 2236-42. Specifically, Dr. Woods discusses petitioner's maternal uncle's psychiatric problems, Mustafa Bilal's (half-brother) FBI report concerning paranoid ideation, and petitioner's father's history of depression, sleep problems, and suicidal ideations. *Id.*
[400] R. 2238, 2245-64, and 2281-82.
[401] R. 2271-81.
[402] R. 2281.
[403] DAE AA (DA 233-34.) The use of this tactic is not new to capital litigation. A similar argument was rejected by the Ninth Circuit in 1995.

of "odd behavior", such as appellant eating his own vomit while in pretrial confinement in June of 2003.[404] First, the defense counsel were aware of this incident and others, and made them known to Dr. Woods when they provided him the documents from the confinement center.[405] However, this "vomit incident" was one of several behaviors in confinement that the mental health workers believed were part of an attempt by appellant to fake more serious symptoms of mental illness.[406] While in pretrial confinement appellant would display "odd behavior" and then miraculously recover when discussing the matter with mental health professionals, leaving them to conclude that appellant was malingering symptoms in order to gain a more favorable diagnosis at trial.[407]

Second, and more importantly, Dr. woods made very clear that he did not think that a diagnosis of schizophrenia was important to his testimony, stating, **"I think the idea that a name somehow defines the work is inaccurate. What is accurate are the symptoms that Sergeant Akbar shows. The fact that it may not be called schizophrenia or what have you is, in the long**

Hendricks v. Calderon, 70 F.3d 1032, 1038-40 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996). The Ninth Circuit noted the absurdity of this argument, stating "To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert[,]" making the role of the expert "superfluous". *Id.* at 1039.

[404] *Id.* (DA 233).

[405] GAE 1 at 35-36; GAE 3; GAE 10 at 37.

[406] GAE 3 at 6-16.

[407] *Id.*

run, less important because a person can be schizophrenic and not be paranoid for example. So I think the real issue is: What are the symptoms that [appellant] has shown consistently. **The fact that it's not - it may not be called schizophrenia is not clinically relevant.**"[408]

Neither Dr. Woods nor appellant adequately explain how Dr. Woods could have testified at the court-martial in such a definitive and confident manner if he did not believe he had adequate information. Not once throughout his sworn testimony did Dr. Woods suggest he needed additional testing. If Dr. Woods believed at the time of trial that trial defense counsel did not "appreciate[] the complexity of psychiatric, neurologic, and medical issues that needed to be addressed prior to trial in order to present an effective and accurate presentation during the course of trial[,]"[409] he does not now explain why he told the panel, under oath, that he testifies in only 7.6 percent of all cases he consults on and will not testify in a case where there is a conflict between his evaluation and the defense case. Dr. Woods was eager to bolster his testimony in front of the panel, but now diminishes it to support appellate strategy.

Dr. Woods also claims in his affidavit that trial defense counsel "failed to communicate with me for five months prior to

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[408] R. 2357 (emphasis added).
[409] (DA 4); DAE AA at 6.

trial."[410] This allegation is incorrect based on the actual record. Dr. Woods testified that he began work on appellant's case in early October 2004 and worked on the case for five or six months, which extends to April 2005, when petitioner's trial took place.[411] Dr. Woods testified that he spent a "lot of hours . . . 30 to 40 at least" on appellant's case.[412] Dr. Woods testified on 19 April 2005.[413] Dr. Woods' memorandum to MAJ [redacted] which references phone conversations, is dated 28 February 2005.[414] Trial Defense counsel's notes on 17 March 2005 (which were provided to this Court by appellant) show that the defense was preparing his testimony four weeks before he was scheduled to testify.[415] Furthermore, trial defense counsel provided this court numerous e-mails showing regular contact with Dr. Woods throughout the pretrial and trial process.[416]

On 1 March 2005, Dr. Woods broached the idea of consulting with Dr. Gur, and again discussed using other experts in an e-mail on 7 March 2005.[417] However, on 8 March 2005, MAJ [redacted]

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[410] DAE B (DA 3).
[411] R. 2356-57.
[412] R. 2310.
[413] R. 2212, 2226.
[414] DAE D (DA 8).
[415] An evidentiary hearing is not necessary to resolve the issue of Dr. Woods' declaration. "[I]f the affidavit is factually adequate on its face but the appellate filings and the record as a whole compellingly demonstrate the improbability of those facts, the court may discount those factual assertions and decide the legal issue." *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). The record of trial as well as the objective documents from the trial defense counsels' files compellingly demonstrate the improbability of Dr. Woods' allegations.
[416] GAE 10.
[417] GAE 10 at 65 and 82.

correctly pointed out that the defense already had mental health experts appointed to the defense team, but that those experts' opinions "do not support the defense."[418] MAJ [redacted] also correctly noted that the defense is not permitted to shop around for experts until they find the ones that support the defense theory.[419]

MAJ [redacted] explained that he understood Dr. Clement's testing showed some evidence of schizophrenia, but that they should not call her to the stand because she "will be subject to damaging cross."[420] He also pointed out that Dr. Walker, the defense's forensic psychologist, "is not even convinced there is schizophrenia."[421] MAJ [redacted] then went on to explain, in great clarity, the defense's strategy of using Dr. Woods, Dr. Tuton, appellant' diary, and lay witnesses toward the "ultimate goal" of using "the mental responsibility defense to lay the foundation for the mitigation case. We want to firmly establish that the client is mentally ill so that even if the panel does not accept the defense, they will have some sympathy built in when it comes time to determine a punishment."[422]

On 17 March 2005, MAJ [redacted] e-mailed Dr. Woods and told him he "enjoyed our meeting and I left feeling very comfortable

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[418] GAE 10 at 83.
[419] *Id.*; *Loving*, 41 M.J. at 250; *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990), *cert. denied*, 498 U.S. 821 (1990).
[420] GAE 10 at 83.
[421] *Id.*
[422] *Id.*

with our case as far as demonstrating severe mental illness."[423] MAJ [redacted] relayed the idea of not pursuing a complete mental responsibility defense, and instead using the mental health evidence to attack premeditation, discussing the very three-pronged approach Dr. Woods would later use at trial.[424]

In an e-mail to Dr. Woods on 30 March 2005, in response to appellant's attack on an the military police officer, MAJ [redacted] asked Dr. Woods if the defense should stay with a partial mental responsibility defense or go with a "full blown" insanity defense.[425] MAJ [redacted] also asked Dr. Woods what specific tests he believed needed to be done on appellant.[426] Dr. Woods responded that the defense should "hold the course," and that an MMPI-II and Personality Assessment Inventory were the tests he recommended.[427] Dr. Woods did not mention anything about brain scans or any other type of additional testing. Dr. Woods was clearly involved in the discussion and preparation of defense strategy and the testing that he requested was administered. Throughout this time Dr. Woods had regular contact with Ms. Nerad and the other CCA workers.[428]

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[423] GAE 10 at 93.
[424] *Id.*
[425] GAE 10 at 122.
[426] *Id.*
[427] GAE 10 at 123.
[428] GAE 9 at 17, 18, 20-21, 50, 92, and 121. Dr. Woods and Ms. Nerad actually interviewed appellant together. *Id.* at 50 and 92.

On 9 April 2005, MAJ [redacted] e-mailed Dr. Woods portions of his opening argument, which Dr. Woods commented on favorably.[429] On 27 April 2005, three days after Dr. Woods testified, Dr. Woods simply wished MAJ [redacted] "good luck,"[430] and the following day he provided some additional advice, finishing his e-mail with, "You're representing him well."[431] Dr. Woods continued to e-mail MAJ [redacted] after the trial to ask how he was doing and to secure the remainder of his funding,[432] even supplying MAJ [redacted] with a signed copy of the DSM-IV.[433] In Dr. Woods' opinion on 2 May 2005, MAJ [redacted] "worked [his] ass off."[434]

There are two things that are clear from the e-mails and documents provided by trial defense counsel.[435] First, it is perfectly clear that this Court can rely on the objective documents provided by the trial defense counsel, along with the record of trial itself, to properly reconstruct the activities of the trial defense team, rather than relying on the dubious declarations of Scharlette Holdman, James Lohman, and Dr. Woods.[436] Second, it is obvious that MAJs [redacted] and [redacted] ran a fully integrated and professionally managed trial defense

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[429] GAE 10 at 130-33.
[430] GAE 10 at 139.
[431] GAE 10 at 142.
[432] GAE 10 at 144-147.
[433] GAE 1 at 37.
[434] GAE 10 at 144.
[435] GAEs 3-10.
[436] *Ginn*, 47 M.J. at 248.

team. Both trial defense counsel had a complete grasp of the mental health and mitigation evidence, were fully engaged with their experts, and made tactical decisions based on thorough investigation.

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.

Argument

"The implied premise of the cumulative-error doctrine is the existence of errors, 'no one perhaps sufficient to merit reversal, yet in combination they all necessitate the disapproval of a finding" or sentence. Assertions of error without merit are not sufficient to invoke this doctrine."[437] In this case appellant has done nothing more than make scattershot allegations, hoping that any imperfections in trial defense counsel's performance will be considered "error," and that prejudice will be presumed because this was a capital case.

However, the Courts have made clear that perfection is not the standard when looking at an attorney's performance,[438] and that even in capital cases an accused is required to demonstrate prejudice.[439] Trial defense counsel provided an objectively

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[437] *Gray*, 51 M.J. at 60 (quoting *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992)).
[438] *Grossman*, 466 F.3d at 1347.
[439] *Loving*, 68 M.J. at 7; *Van Hook*, 130 S.Ct. at 19-20.

reasonable defense, and their performance was well above what we should expect and what the Constitution requires. The fact that trial defense counsel did not achieve perfection does not mean that appellant may walk free. Because there is no error to accumulate, there is no need to invoke the cumulative error doctrine.

Conclusion

The ends of attempting to save appellant from a death sentence do not justify the means of unfairly tarnishing the reputations of the dedicated trial defense counsel who vigorously defended him. While appellant fired two other military defense counsel and civilian defense counsel came-and-went, MAJs [redacted] and [redacted] stayed with the case from beginning to end. It is clear that appellant and the "mitigation specialist club" have determined that the best way to get appellant's case overturned is to sell MAJs [redacted] and [redacted] down the river, and neither the facts nor the law will get in their way. However, the record is clear that appellant received a thorough and professional defense from two dedicated lawyers who were faced with a difficult task of defending a horrific crime. It was not any contrived deficiencies on their part that led to appellant's sentence of death. The evidence shows that appellant earned that sentence all by himself.

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.

Law

Where an allegation of ineffective assistance arises from a claimed conflict of interest, deficiency is assessed using the two-pronged test of *Cuyler v. Sullivan.*[440] Under that test, an accused who raised no objection at trial must demonstrate (1) that an actual conflict of interest existed, and (2) that it adversely affected his counsel's performance.[441] The Supreme Court reiterated this standard in *Mickens v. Taylor*, holding that even in cases of concurrent or successive representation an appellant must establish that an actual conflict adversely affected his counsel's performance.[442] An actual conflict of interest exists if the attorney's own interests materially limit his representation of the client.[443] The fact that a potential conflict was not disclosed to the trial court does not relieve

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[440] 446 U.S. 335 (1980).
[441] *Id.* at 348; *see Strickland v. Washington*, 466 U.S. 668, 692 (1984); *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999); *United States v. Thompson*, 51 M.J. 431, 434-35 (C.A.A.F. 1999); *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988).
[442] *Mickens v. Taylor*, 535 U.S. 162, 173-75 (2002).
[443] Dep't of Army Regulation 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Appendix B, Rule 1.7(b)(1 May 1992) (AR 27-26) (as cited by *United States v. Best*, 59 M.J. 886, 892 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 376 (C.A.A.F. 2005)).

appellant of his burden. "[T]he rule applied when the trial judge is not aware of the conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance -- thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown."[444]

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.

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.

Argument

An accused may waive his right to conflict-free counsel.[445] Although courts indulge every reasonable presumption against waiver of this right,[446] waiver may nonetheless be found where the record shows it was a voluntary and "knowing intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[447] In *United States v.*

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[444] *Mickens*, 535 U.S. at 172-73.
[445] *United States v. Lee*, 66 M.J. 387 (C.A.A.F. 2008)(citing *United States v. Davis*, 3 M.J. 430, 433 n.16 (C.M.A. 1977)).
[446] *Id.* (citations omitted).
[447] *Id.* (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)).

Lindsey,[448] CAAF succinctly summarized the proper procedure for addressing such issues on the record.

> Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused's choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an appropriate record can be made.[449]

That is exactly what happened in this case. The trial defense counsel informed appellant, in writing, that they knew one of the victims in this case, MAJ [redacted].[450] Appellant executed a written waiver of any potential conflict of interest.[451] The military judge discussed this waiver, on the record, with appellant and trial defense counsel.[452]

Appellant argues that this waiver was not valid because the military judge did not interrogate MAJs [redacted] and [redacted] enough.[453] Such an argument fails upon the evidence in the record. The record shows that the potential conflict concerning MAJ [redacted] was one of the earliest issues addressed during the

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[448] 48 M.J. 93 (C.A.A.F. 1998).
[449] *Id.* at 98.
[450] DAEs S and T (DA 95-99).
[451] DAE T (DA 99).
[452] R. 5.
[453] AB at 167-69.

first Article 39(a) session.[454] The military judge did not simply elicit "yes or no" answers from appellant, but made appellant explain why he wanted MAJ [redacted] and MAJ [redacted] to remain as his attorneys.

> MJ: Okay. Well, let me ask the three Defense Counsel that are here now, are any of you -- or, for that matter, any counsel from the government, aware of any conflict of interest in this case?
>
> DC: Sir, the defense is aware of one area of potential conflict that applies to myself and [Major] [redacted] We both, in the past, have had dealings with Captain [redacted], who was one of the Trial Counsel from Fort Campbell who was injured in these alleged incidents. We've discussed that -- the potential conflict and made it clear to Sergeant Akbar that our relationship with Captain [redacted] was strictly professional as Trial Counsel and Defense Counsel. We tried cases against one another at Fort Campbell and at other locations. And other than that strictly professional relationship, we didn't have any further contact with him or -- nor is there any reason to doubt that our ability to represent Sergeant Akbar would in any way be impacted by our previous professional relationship with Captain [redacted]
>
> MJ: Is that true there, Sergeant Akbar?
>
> ACC: Yes, sir.
>
> MJ: Let me just ask counsel also, Major [redacted] you were the counsel detailed to the court-martial. How did [Major] [redacted] come to also be on the defense team?
>
> ADC: Sir, I was also detailed to the case.
>
> MJ: Okay. So there are two detailed Defense Counsel in this court-martial?

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[454] R. 5.

ADC: That's correct, sir.

MJ: Sergeant Akbar, do you understand that you have a constitutional right to be represented by counsel who have undivided loyalty to you and your case?

ACC: Yes, I do.

MJ: Do you understand that a lawyer, ordinarily, should not represent a client when there may be a conflict or an appearance of a conflict in that they had some -- as in this case, had some dealings with a victim in the alleged charge and specifications -- a victim alleged in the charges or specifications? Do you understand that?

ACC: Yes, sir.

MJ: For a lawyer to represent you in a case like this when they may have had some dealings with an alleged victim, you have to consent to this representation. Do you understand that?

ACC: Yes, sir.

MJ: After discussing the matter with your -- all of your Defense Counsel, did you decide for yourself that you would like to have Major [redacted] and Captain [redacted] still represent you?

ACC: Yes, sir.

MJ: Understanding that even if an actual conflict of interest does not presently exist between your Defense Counsel representing you but that one could possibly develop, do you still desire to be represented by Major [redacted] and Captain [redacted]

ACC: I didn't understand that last comment, sir.

MJ: Even if an actual conflict of interest does not exist right now, knowing that it's theoretically possible that a conflict could later develop, because of the knowledge that your

two military counsel have about one of the victims alleged in this case, do you still desire to be represented by these two military counsel?

ACC: Based on what I know right now ----

MJ: Yes.

ACC: I would still like to be represented by them. I can't imagine what else would come up in the future that would make me not want to keep them, sir.

MJ: Okay. Do you understand that you are entitled to be represented by another lawyer where no potential conflict of interest would ever arise?

ACC: Yes, sir.

MJ: Knowing this, please tell me why you want to give up your right to conflict-free counsel and still be represented by your two military counsel here today.

ACC: Because of my -- my familiarity with Major [redacted] and Captain [redacted] over the past year that I've had in dealing with them and their familiarity with my case. I think to bring another lawyer on that I'm not familiar with, I would have to basically build up a level of trust with him. I already have that with these two officers, sir.

MJ: Do you have any questions about your right to conflict-free counsel?

ACC: Negative, sir.

MJ: I find that the accused has knowingly and voluntarily waived his right to conflict-free counsel and may be represented by Major [redacted] and by Captain [redacted] [redacted] at this court-martial.[455]

[455] R. 5-9 (emphasis added).

Appellant knowingly and intelligently stated his desire to retain the two attorneys with whom he built a "level of trust" and who had the necessary familiarity with his case.[456]

Appellant next attempts to claim that even if the waiver was valid, the trial defense counsel's "poor performance" proves that there was a "conscious or unconscious" conflict.[457] This circular and self-serving logic does not withstand scrutiny. First, appellant's claims that his trial defense counsel failed to investigate mitigation evidence is directly rebutted by the record.[458] Second, appellant offers no proof that the trial defense counsel sabotaged appellant's defense out of loyalty to MAJ [redacted] Third, appellant fails to establish that defense counsel's dealings with MAJ [redacted] during trial were ineffective or unreasonable. MAJ [redacted] testimony did nothing more than establish the facts surrounding the explosion inside his tent on the night of 23 March 2003.[459] MAJ [redacted] never identified or implicated appellant in the crimes; he testified that he never knew or saw appellant until that day he testified.[460] There was simply nothing to question or challenge MAJ [redacted] about through cross-examination, regardless of the defense attorneys' identities.

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[456] *Id.*
[457] AB at 170.
[458] *See* Answers to Assignment of Error I, *supra*.
[459] R. 1381-1395
[460] R. 1395.

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 CAPIAL CASE.

Argument

This portion of the assignment of error is addressed in the Government's response to Assignment of Error VIII.

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.

Argument

On 30 March 2005, shortly before trial on the merits was to commence, appellant stabbed SPC [redacted], a military police officer assigned as an escort, with a pair of scissors.[461] Appellant obtained the scissors from a desk while waiting in the defense office. Appellant asked to go to the latrine, and when he came out from the stall he stabbed SPC [redacted] Appellant was eventually subdued by SPC [redacted] and another military police officer. At the time neither MAJ [redacted] nor MAJ [redacted] were in the building.[462]

Appellant's entire argument that this incident created a conflict of interest is based on the faulty premise that MAJ [redacted] was under investigation or suspicion for having committed a criminal offense in conjunction with appellant's

[461] DAE U (DA 101-195).
[462] *Id.* (DA 169).

attempted murder of SPC [redacted].[463] Such an argument is preposterous. Appellant repeatedly uses the word "negligent" in his argument,[464] however, there is no support that MAJ [redacted] was ever accused of being negligent or that he was to blame for appellant attempting to kill again.

In fact, the record demonstrates that MAJ [redacted] and MAJ [redacted] continued to zealously represent the interests of appellant after this incident. The defense team declined to provide statements to investigators without first considering their ethical obligations to appellant.[465] The notes taken by trial defense counsel referred to by appellant in his brief demonstrate nothing more than a diligent attorney thinking of all the issues that arose by appellant attacking a guard within weeks of his capital murder trial.[466] MAJ [redacted] and MAJ [redacted] effectively kept appellant's most recent homicidal act away from the panel,[467] therefore, there was no risk of them having to testify.

However, even if the attempted murder of SPC [redacted] had been allowed before the panel, there was no reasonable basis to believe that MAJ [redacted] could be a witness in the case.

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[463] AB at 189.
[464] AB at 185, 187, 188
[465] DAE U (DA 169-70)
[466] AB at 186 (citing DAE V (DAE 196-97)). The notes were written shortly after the incident while the MPs were clearing the offices. "The notes represent a spontaneous list of issues [the trial defense team] believed that [they] needed to consider as a result of the incident. All of those issues were ultimately resolved to [their] satisfaction. GAE 1 at 85.
[467] AE 179 and 297; R. 2684-85.

There was no dispute that appellant obtained the scissors from the drawer of the defense office. Whether it was MAJ [redacted] or the MPs that should have checked the office drawers is completely irrelevant to appellant's decision to stick those scissors in SPC [redacted] neck.

There is no need for an evidentiary *Dubay*[468] hearing on this issue. There are no factual disputes and appellant's claims, even if true, do not support a conflict of interest claim.[469] MAJ [redacted] did not have a "role" in the additional misconduct that would create either a real or perceived conflict with his representation of appellant.

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[468] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[469] If the facts "allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Ginn*, 47 M.J. at 248.

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.

A. 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.

Law and Argument

The law does not require that aggravating factors be placed in the charge sheet or investigated at the Article 32 hearing. As the military judge correctly found,[470] the mandates of *Jones v. United States*,[471] *Apprendi v. New Jersey*,[472] and *Ring v. Arizona*,[473] require only that the existence of any aggravating factor that authorizes a sentence of death be decided by the fact-finder beyond a reasonable doubt. In *Jones* and *Apprendi*, the Supreme Court held that the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution require that "any fact (other than prior conviction) that increases the maximum penalty

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[470] AE 114. Appellant raised this issue at trial in AE 90; the Government's response is at AE 91.
[471] 526 U.S. 227 (1999).
[472] 530 U.S. 466 (2000).
[473] 536 U.S. 584 (2002).

for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[474] The Supreme Court held that if a particular fact, such as racial bias, was going to increase the maximum penalty, the accused had a constitutional right to have that factual issue determined by a jury (unless a jury is waived), beyond a reasonable doubt.[475]

In *Ring*, the Supreme Court applied *Apprendi* to capital sentencing procedures and found that if a sentence of death is only authorized on a finding of a particular fact or "aggravating factor," that fact needed to be determined by a jury, beyond a reasonable doubt.[476] Consistent with *Ring*, R.C.M. 1004(c) requires that the members find the existence of an aggravating factor beyond a reasonable doubt before an accused is eligible for the death penalty.

There is no discussion in *Ring* about indictments or Grand Juries. In fact, the words "indictment" and "Grand Jury" are nowhere to be found in the decision. The entire focus of *Ring* was on what facts must be determined by the trial jury in order

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[474] *Apprendi*, 530 U.S. at 476 (quoting *Jones* 526 U.S. at 243, n. 6.) The reference to "indictment" was specific to charging practice in state and civilian federal law that was before the Supreme Court, and did not purport to contradict the Fifth Amendment's exception to the indictment and Grand Jury requirements for courts-martial. *See* U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . .) (emphasis added); *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).

[475] *Apprendi*, 530 U.S. at 490, 491-92.

[476] *Ring*, 536 U.S. at 609.

to authorize the death penalty, not on what must be contained in the charging documents.

Some federal circuits have subsequently found that aggravating factors must be included in the indictment in federal civilian cases.[477] However, these cases are not applicable to courts-martial because they rely on the unique requirement of a Grand Jury indictment. In civilian practice a jury cannot consider allegations not first presented to a grand jury and placed in an indictment. However, by express Constitutional mandate, the military justice system does have Grand Juries or indictments. "The Fifth Amendment expressly excludes 'cases arising in the land or naval forces' from the requirement for indictment by grand jury."[478] Therefore, any case requiring the aggravating factor be placed in an indictment is inapplicable to trial by courts-martial.

The manner and form in which to charge an accused under the Uniform Code of Military Justice is left to Congress, subject to Constitutional requirements of fair notice to the accused. Congress did not specify the particulars of charging, instead

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[477] *See generally, United States v. Bourgeois*, 423 F.3d 501, 507 (5th Cir. 2005), *cert. denied*, 547 U.S. 1132 (2006); *United States v. Allen*, 406 F.3d 940, 942-43 (8th Cir. 2005), *cert. denied*, 549 U.S. 1095 (2006); *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003), *cert. denied*, 543 U.S. 999 (2004)); and *United States v. Lecroy*, 441 F.3d 914, 921 (11th Cir. 2006).

[478] *Loving*, 41 M.J. at 296. *See* U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .) (emphasis added); *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).

delegating the creation of pretrial procedures to the President in Article 36, UCMJ.

In promulgating R.C.M. 1004(b)(1), the President directed that if a case is referred capital by the convening authority, the accused must be notified of any aggravating factors under R.C.M. 1001(b)(4) prior to arraignment. The existence of this aggravating factor must then be found by the trier of fact (the panel), unanimously and beyond a reasonable doubt. So long as the accused received proper notice, and so long as the finder of fact determines the existence of the aggravating factor, there is no Constitutional or statutory requirement that an aggravating factor be pled in the charge sheet or investigated by the Article 32 investigating officer.

The aggravating factor in this case is that having been found guilty of the premeditated murder of MAJ Stone, a violation of Article 118(1), UCMJ, the accused was found guilty in the same case of another violation of Article 118(1), UCMJ, the premeditated murder of CPT Seifert.[479] The military judge properly noted that the facts contained in the aggravating factor in this case were a part of the Article 32 investigation.[480] The murders of CPT Seifert and MAJ Stone were explicitly included in Specifications 1 and 2 of Charge II.[481]

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[479] AE I.
[480] AE 114 at 2.
[481] Charge Sheet.

The investigating officer specifically found that there was probable cause to support that appellant committed both premeditated murders.[482] The military judge noted in his findings that the defense could not proffer any additional evidence it would have presented or areas of inquiry it would have explored with the witnesses at the Article 32 hearing had the aggravating factor been separately mentioned in the charge sheet.[483] Therefore, appellant was afforded a full opportunity to investigate the facts surrounding the basis for the aggravating factor in this case.

Appellant was given notice of the aggravating factor before arraignment, pursuant to the provisions in R.C.M. 1004(b)(1).[484] The Government proved that factor to the panel, unanimously and beyond a reasonable doubt, before a sentence of death was adjudged.[485] Both CAAF and the Supreme Court have upheld the capital sentencing procedures under R.C.M. 1004.[486] No court has ever held that *Jones*, *Apprendi*, or *Ring* require the aggravating factor be included in a court-martial charge sheet or

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[482] AE 75.
[483] AE 114 at 2.
[484] AE I. The Government gave notice of two aggravating factors under both R.C.M. 1001(c)(4) and 1001(c)(7)(J). However, the prosecution chose to withdraw the aggravating factor under R.C.M. 1001(c)(4) (R. 2655-2666) and the panel was only instructed on R.C.M. 1001(c)(7)(J). R. 3135-36; AEs 306 at 5 and 307 at 1.
[485] AE 307.
[486] *Loving v. United States*, 517 U.S. 748, 769 (1996) (citing *United States v. Curtis*, 32 M.J. 252, 269 (C.M.A. 1991) ("In sum, as we construe R.C.M. 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safe-guards for the accused.")).

investigated at an Article 32 hearing. No court has construed *Jones*, *Ring*, or *Apprendi* to override the capital sentencing procedures in the military justice system, as petitioner asks this Court to do now.

B. 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.

Appellant acknowledges that the Supreme Court in *Loving* expressly affirmed the power of Congress to delegate to the President the power to establish aggravating factors.[487] Appellant argues, however, that *Ring* "fundamentally changed this separation of powers landscape and *sub silentio* overruled the Supreme Court's holding in *Loving*[.]"[488] *Ring* did no such thing.

The Supreme Court did not even consider the federal separation of powers in *Ring*, as *Ring* involved an Arizona state law.[489] Overruling by implication is a "disfavored practice."[490] "[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents."[491] "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons

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[487] AB at 226. "Having held that Congress has the power of delegation, we further hold that it exercised the power in Articles 18 and 56 of the UCMJ." *Loving*, 517 U.S. at 769.
[488] AB at 227.
[489] *Ring*, 536 U.S. at 592.
[490] *United States v. Pack*, 65 M.J. 381, 383-84 (C.A.A.F. 2007) (citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005); *State Oil Co. v. Khan*, 522 U.S. 3, 19 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).
[491] *Khan*, 522 U.S. at 19.

rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."[492] Appellant's creative and inaccurate reading of *Ring* does not serve to overrule the directly applicable precedent found in *Loving*.

C. ISSUE 3: *RING V. ARIZONA* REQUIRES THAT THE MEMBERS FIND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

Law and Argument

Ring does not require that the panel apply the "proof beyond a reasonable doubt standard" to their balancing test between aggravating and mitigating circumstances. In *Ring*, the Supreme Court only addressed the statutory aggravating factor, that is, a particular fact necessary to make an accused eligible for the death penalty.[493] Consistent with *Apprendi*, the Supreme Court considered the aggravating factor to be a functional element that must be proven to the jury.[494] R.C.M. 1004(c), similar to the Federal Death Penalty Statute at 18 U.S.C. § 3593(c), is consistent with *Ring*, requiring proof of the aggravating factor beyond a reasonable doubt.

The Supreme Court has never extended its holding in *Ring* to the balancing test between aggravating and mitigating

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[492] *Rodriguez de Quijas*, 490 U.S. at 484.
[493] *Ring*, 536 U.S. at 609.
[494] *Id.* (citing *Apprendi*, 530 U.S. at 494 n.19).

circumstances, as found in 18 U.S.C. 3593(e) or its military analog, R.C.M. 1004(b)(4)(C). Appellant does not cite a single jurisdiction that has found that the U.S. Constitution requires the balancing test be determined beyond a reasonable doubt. Appellant points to several states that changed the standard to proof beyond a reasonable doubt through legislative action.[495] However, states are free to create standards more burdensome on the prosecution than the U.S. Constitution requires. While some states require proof beyond a reasonable doubt for balancing aggravating and mitigating circumstances, not all states made that legislative choice,[496] nor did the Federal Government in either civilian or military practice.

Appellant claims that the balancing test between aggravating and mitigating circumstances is a "finding of fact" that must be proven beyond a reasonable doubt, and cites CAAF's decision in *Loving v. Hart* in support.[497] However, in *Loving v. Hart*, CAAF was not reviewing the balancing determination found in R.C.M. 1004(b)(4)(C), but was considering a specific aggravating factor in 1004(b)(4)(A), namely the "actual

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[495] AB at 266 (citing 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 (0) (1) (West 2003); Tenn. Code Ann. § 39-13-204 (f)(2) (2002); Utah Code Ann. § 76-3-207(5)(b)(2003).

[496] *Miller v. State*, 843 A.2d 803, 815 (Md. 2004) ("[A] majority of this Court holds to the belief that *Apprendi* and *Ring* do not render the preponderance standard, applied only to the judgmental weighing process and not to any fact actually deducible from evidence, unconstitutional.").

[497] AB at 261 (citing *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998), *cert. denied*, 525 U.S. 1040 (1998)).

perpetrator" aggravating factor found in R.C.M. 1004(c)(8) that applies to "felony murder" convictions under Article 118(4), UCMJ.[498] CAAF did not declare the balancing test an "eligibility" finding, but discussed the distinction between "weighing" and "non-weighing" factors.[499] CAAF noted that the first two "gates" under R.C.M. 1004(a)(2) and 1004(b)(4)(A) were non-weighing factors, but the third gate, the balancing between aggravating and mitigating circumstances under R.C.M. 1004(b)(4)(C) was a "'weighing' gate."[500] At no time did CAAF ever declare the weighing a finding of fact.

In considering this very question, the U.S. Court of Appeals for the Fifth Circuit held that "the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves'. . . . The *Apprendi/Ring* rule applies by its terms only to findings of fact, not to moral judgments."[501]

The Supreme Court's post-*Ring* decision in *Kansas v. Marsh* supports the Fifth Circuit's analysis. In *Marsh*, the Supreme Court reaffirmed "that a state death penalty statute may place

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[498] *Loving*, 47 M.J. at 441.
[499] *Id.* at 442.
[500] *Id.*
[501] *United States v. Fields*, 483 F.3d 313, 345-47 (5th Cir. 2007), *cert. denied*, 552 U.S. 1144 (2008) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) and citing *Ring*, 536 U.S. at 602)).

the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances."[502] If the burden can be constitutionality shifted to the defense, then there is no reason why the Government has to "prove" the balancing to the panel beyond a reasonable doubt. Appellant's expansive view of *Ring* is not supported by the plain language of that decision or the Supreme Court's subsequent analysis in *Marsh*. The balancing standard for aggravating and mitigating circumstances found in R.C.M. 1001(b)(4) remains valid.

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.

Law and Argument

Appellant is correct that the Supreme Court has, at times, created classes of offenders that are not eligible for the death penalty based on a determination that a consensus exists within a community that the evolving standards of decency in our society makes such executions cruel and unusual under the Eighth Amendment to the U.S. Constitution. The Supreme Court declared that imposition of the death penalty against juveniles (*Roper v.*

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[502] 548 U.S. 163, 173 (2006) (citing *Walton v. Arizona*, 497 U.S. 639 (1990)).

Simmons[503]) and those who are found to be mentally retarded (*Atkins v. Virginia*[504]) violates the Eight Amendment to the U.S. Constitution. Furthermore, the Supreme Court held that a person cannot be executed if, at the time of the execution, they are insane (*Ford v. Wainwright*)[505] However, appellant was neither a juvenile, nor mentally retarded, at the time he murdered CPT Siefert and MAJ Stone, and he does not claim that he is incompetent to be executed. Instead, appellant attempts to create an entirely new class of murderer who is no longer subject to execution: those who have a "severe mental disease or defect but are not legally insane."[506]

Appellant attempts to rely on academic papers from private organizations in support of a "national consensus", simply because the Supreme Court made reference to such organizations in a footnote in *Atkins v. Virginia*.[507] However, one must read the entire footnote. The reference to "several organizations with germane expertise" was made only in conjunction and comparison to comprehensive legislative action at the state level.[508] The first step in determining if there is a consensus against the imposition of the death penalty against a particular

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[503] 543 U.S. 551 (2005).
[504] 536 U.S. 304 (2002).
[505] 477 U.S. 399 (1986).
[506] AB at 289.
[507] AB at 303 (citing *Atkins*, 536 U.S. at 316 n.21.) and 305.
[508] *Atkins*, 536 U.S. at 316, n. 21.

class of offender is to look at state legislatures.[509] Appellant replaces the determinations made by the elected representatives of the State Governments with those of his preferred organizations because he cannot meet the first criteria in establishing a consensus of society's moral standard.

The Supreme Court found in Atkins a "dramatic shift in the state legislative landscape," and that there was a "legislative consensus that the mentally retarded should be categorically excluded from execution."[510] In *Ford*, the Supreme Court found that "no State in the Union permits the execution of the insane."[511] Similarly, in *Roper*, the Supreme Court stated "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18[.]"[512] Appellant fails to point to a single legislative body in the United States that has adopted his proposed standard.

The Fifth Circuit squarely rejected that *Atkins* or *Roper* were extended to "mentally ill persons."[513] The Eleventh Circuit noted in 2009 that interpreting "*Atkins* to prohibit the execution of the mentally ill . . . would constitute a new rule

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[509] [W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment." *Atkins*, 536 U.S. at 313.
[510] *Atkins*, 536 U.S. at 318.
[511] *Ford*, 477 U.S. at 408.
[512] *Roper*, 543 U.S. at 568.
[513] *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006), *cert. denied*, 546 U.S. 1161 (2006) (citing *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005)).

of constitutional law."[514] The Supreme Court of Ohio rejected a nearly identical claim in *State v. Hancock*.[515] The Ohio Supreme Court noted that that "[m]ental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees."[516] The Ohio Supreme Court noted that the defendant's argument (the same as appellant's here) would "establish a new, ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case."[517]

However, one need not look any further than the Supreme Court itself. In *Wilson v. Ozmint*,[518] *amici* representing the very organizations cited by appellant filed a brief with the Supreme Court making the same argument that *Atkins* and *Roper* should be extended to those with a "severe mental illness."[519]

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[514] *Carroll v. Secretary, DOC*, 574 F.3d 1354, 1370 (11th Cir. 2009), *cert. denied*, 130 S.Ct. 500, 175 L.Ed.2d 355 (2009). See also, *Magwood v. Culliver*, 481 F.Supp.2d 1262 (M.D. Ala. 2007), *aff'd in part, rev'd in part*, 555 F.3d 968 (11th Cir. 2009), *rev'd on alt grounds*, 130 S.Ct. 2788 (2010).
[515] 840 N.E.2d 1032, 1059-60 (Ohio 2006).
[516] *Id.*
[517] *Id. See also, Lewis v. State*, 620 S.E.2d 778, 764 (Ga. 2005); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006); *State v. Weik*, 587 S.E.2d 683, 687 (SC 2002) (citations omitted) ("[W]hile it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant the imposition of such a sentence upon a mentally ill person is not disproportionate."); and *People v. Runge*, 917 N.E.2d 940, 985-86 (Ill. 2009).
[518] 352 F.3d 847 (4th Cir. 2003), *cert. denied*, 542 U.S. 923 (2004).
[519] *Wilson v. Ozmint, Brief of Amicus Curiae National Alliance of the Mentally Ill, National Alliance of the Mentally Ill South Carolina, and National Mental Health Association in Support of Petitioner*, 2004 WL 1159402 (2004), *cert. denied*, 542 U.S. 923 (2004).

However, not only did the Supreme Court not take up the issue, but it has allowed the execution of others diagnosed with mental illnesses since *Atkins* was decided. For example, in *Smith v. Spisak*, the Court discussed the fact that several witnesses "testified that Spisak suffered from some degree of mental illness . . ." including " . . . schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability[,]" that "'substantially impair his ability to conform himself" to the law's requirements.'"[520] Yet there was no invocation of *Atkins* or *Roper*, and Spisak is presently scheduled for execution on 17 February 2011.[521] If there is a national consensus on preventing a non-insane, "mentally ill" prisoner from being executed, the Supreme Court has not addressed it.

In *Panetti v. Quarterman*, the Supreme Court reaffirmed that a severe mental illness alone is not sufficient to render an offender incompetent to be executed.[522] Despite the fact that Panetti had a well-documented history of mental illness,[523] the Supreme Court remanded the case to the district court to consider if the mental illness "prevent[s] him from

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[520] *Spisak*, 130 S.Ct. 676, 687 (2010).
[521] Ohio Department of Rehabilitation and Correction Execution Schedule at http://www.drc.ohio.gov/Public/executionschedule.htm (last visited, 25 October 2010).
[522] 551 U.S. 930, 960-61 (2007).
[523] *Id.* at 936-40, 954-56.

comprehending the meaning and purpose of the punishment to which he has been sentenced[,]" rather than engage in a new consensus-style analysis found in *Ford*, *Atkins* and *Roper*.[524] Here, appellant makes no claim that he lacks an understanding of the meaning and purpose of his sentence.

The Supreme Court chose to draw Eighth Amendment lines in *Ford*, *Atkins*, and *Roper*. There is no support that the Supreme Court, or any other court, has moved those lines in a direction that envelopes appellant. Appellant is not insane, a juvenile, or mentally retarded. Therefore, the Eighth Amendment does not prohibit his sentence of death.

V.

SERGEANT AKBAR'S DEATH SENTENCE IS INVALID BECAUSE THE PANEL WAS MISINFORMED ABOUT HIS MENTAL CONDITION AT THE TIME OF THE OFFENSES.

Law and Argument

The panel was not "misinformed" about appellant's mental condition at the time of the offenses. The panel heard from three separate medical professionals. The Courts have long noted that psychiatry and psychology are not exact sciences, and that disagreement and changes in a diagnosis are very common. "We initially note that divergence of opinion among psychiatrists is not novel and does not provide a legal basis

[524] *Id.* at 960. After remand, the District Court found that Panetti was, despite his history of mental illness, competent to be executed. *Panetti v. Quarterman*, 2008 WL 2338498, *37 (W.D. Tex. 2008).

for concluding that one or the other is performing inappropriate tests or examinations. In *Ake*, the Supreme Court said: 'Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on care and treatment, and on likelihood of future dangerousness.'"[525] Four mental health experts were assigned as members of appellant's defense team, and they did not all agree on the diagnosis.[526]

The fact that different doctors might diagnose appellant differently does not mean that appellant's mental health examinations were inadequate. Appellant is not permitted to ignore his own evidence simply because he wishes to replace it with a more favorable opinion. Appellant's entire argument is based on Dr. Woods' attempt to impeach his own testimony, while blaming his first diagnosis on trial defense counsel. However, trial defense counsel conducted a lengthy investigation and preparation of the mental health evidence presented at trial. The mental health professionals gave their expert opinions, but it is ultimately the panel's decision on what mental health evidence deserves the greatest weight.[527]

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[525] 51 M.J. at 17 (quoting *Ake*, 470 U.S. at 81).
[526] Dr. Woods, Dr. Walker, Dr. Clement, and Dr. Tuton.
[527] *United States v. Martin*, 56 M.J. 97, 107, 109-10 (C.A.A.F. 2001).

Appellant's case is completely distinguishable from *United States v. Murphy*. In *Murphy*, the defense attorneys did not receive any training in capital litigation, "no expert witnesses were employed by the defense," and the defense did not present mental health evidence at any point during trial.[528] All of the mental health evidence at issue in *Murphy* rose for the first time on appeal.[529] Such is not the case here. MAJs Brookhart and Coombs detailed their litigation experience as well as the training they received that was specific to capital litigation. Furthermore, unlike *Murphy*, mental health was a central theme in appellant's trial. Three different mental health providers testified and numerous mental health evaluations were included as evidence.

Appellant's listing of red herring issues demonstrates a myopic view of the record. Appellant references a warning from Dr. Woods on 28 February 2005 that appellant's sleep issues were interfering with his ability to participate in trial.[530] What appellant fails to mention was that in response to these concerns, trial defense counsel coordinated with Dr. (MAJ) Paul Walting the very next day,[531] and obtained a second neurology examination on 24 March 2005.[532] These sleep studies were

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[528] *Murphy*, 50 M.J. at 9-10.
[529] *Id.* at 13-14.
[530] AB at 310 (citing DAE D (DA 7-14).
[531] GAE 10 at 66-68.
[532] DE LL.

provided to Dr. Woods and included as part of his preparation for testimony.[533] The entire history of appellant's sleep problems was submitted as mitigation evidence.[534]

Appellant further claims they need "brain scans," in the form of Magnetic Resonance Imaging (MRI)[535] and Positron Emission Tomography (PET)[536] scans.[537] Again, Dr. Woods testified at trial that he needed no further testing in order to testify about his opinions, under oath, in a court of law.[538] When MAJ [redacted] specifically asked what additional testing Dr. Woods wanted on 30 March 2005 (twenty days before he testified),[539] Dr. Woods

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[533] GAE 3 at 3.
[534] DE LL.
[535] An MRI is a structural neuroimage of a patient's brain. In MRI, grayscale images are constructed from the electromagnetic signals that are emitted by the proton nuclei of hydrogen atoms, which are found predominantly in tissue water. To obtain these images, the body is placed in the strong external magnetic field of the MRI scanner, and the nuclei are pulsed with radio frequency waves. See Jeffery A. Coffman, *Computed Tomography in Psychiatry, in Brain Imaging: Applications in Psychiatry* at pp. 5 (Nancy C. Andreasen ed., 1989) ("Computed tomographic imaging systems measure the attenuation of X-ray beams passing through target tissue."); See also Nancy C. Andreasen, *Nuclear Magnetic Resonance Imaging, in Brain Imaging: Applications in Psychiatry*, at 67, 69, 74; *The Basic Arithmetic of Digital Images, Diagnostic Imaging*, Nov. 1993, at 94-95.
[536] A PET scan is a functional neuroimage of a patient's brain depicted by a computer generated image of the brain. In a PET scan, positron-emitting radioisotopes are used to "label" molecules of water or glucose in the bloodstream. A PET scanner detects the spatial distribution of these isotopes throughout the brain. Radioisotope "count" data from the PET scanner are then analyzed by a computer to determine the relative differences in metabolic rates across brain structures. These differences in metabolic rate are depicted in the PET scan by regional variations in color patterns of cross-sectional computer generated images of the brain. *See generally* Henry H. Holcomb, Jonathan Links, Caroline Smith & Dean Wong, *Positron Emission Tomography: Measuring the Metabolic and Neurochemical Characteristics of the Living Human Nervous System, in Brain Imaging: Applications in Psychiatry*, Ed. N. Andreasen, American Psychiatric Press, 1989 at 236 to 243.
[537] AB at 313.
[538] Dr. Woods also did not mention the need for "brain scans" in his August 2004 declaration to the trial court (AE 132 at attachment B).
[539] GAE 10 at 122.

mentioned only an "MMPI-II and a Personality Assessment Inventory."[540] Finally, appellant actually received an MRI of his brain on 5 May 2003, shortly after the murders, which is prominently referenced in the sanity board report.[541]

The MRI revealed a "normal imaging study" and there was no indication of any structural problem with appellant's brain.[542] Neither Dr. Woods nor appellant addresses or explains why the scan of appellant's brain conducted in May of 2003 is inadequate, why Dr. Woods chose to ignore the MRI during his testimony at trial, or how new scans will be useful in evaluating appellant's mental state at the time he murdered CPT Siefert and MAJ Stone.[543]

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[540] GAE 10 at 123.

[541] DAE BB at 12 (DA 249). The most reliable and effective way to examine the structure of appellant's brain was by using the MRI. The MRI has superior anatomical resolution for soft tissue structures and the absence of ionizing radiation, permitting multiple scans of the same subject without the danger of radiation over-exposure. *See* Andreasen, supra, *Nuclear Magnetic Resonance Imaging, in Brain Imaging: Applications in Psychiatry*, at 68 (MRI scans permit visualization of tiny structures and provide excellent resolution).

[542] DAE BB (DA 249).

[543] The DSM-IV-TR describes some literature on physiological differences in the structure of brains of people with schizophrenia and those in control groups, discovered through structural neuroimaging (MRI), however, there is no mention of functional neuroimaging (PET Scans). DSM IV-TR at 305. In *United States v. Mezvinsky*, the federal district court described PET scans as a new technique that "neuroscientists use to measure the glucose metabolic rates of different parts of the brain." 206 F. Supp. 2d 661, 675 (E.D. PA 2002). Most importantly, the district court noted that the government expert in that case, who is the very same Dr. Ruben Gur referenced by Dr. Woods, agreed that "a PET scan is only a 'snapshot' of a patient's brain at one particular time, and that one cannot make retrospective appraisals of that brain from such snapshots. Thus, neither expert could make any inference about the state of Mezvinsky's brain at any point during the twelve years in question . . . ." *Id.* at 675. Even the article provided by appellant, written in 2007, acknowledges that "[s]everal steps are essential for progress toward the *eventual* clinical utility of brain imaging in psychiatry." DA 206. The article notes that as of 2007, "[t]he breadth of approaches has precluded the establishment of a functional imaging phenotype of schizophrenia." DA 205.

Furthermore, appellant fails to note that many of the "bizarre behaviors" he references during his time in pretrial confinement were reviewed by separate psychologists, both of whom came to the conclusion that appellant was malingering.[544] The doctors noted that appellant would act strangely, and then miraculously recover when speaking to the doctors.[545] Appellant would frequently ask if his symptoms were being recorded or if his actions made him look crazy.[546] Appellant also attempted to mimic symptoms that were described to him by his own attorney, in particular the incident of "eating his own vomit" which he allegedly did two days after being told a similar anecdote by a trial defense attorney who had just co-authored a law review article about insanity defenses.[547]

The trial defense team long considered the possibility of a complete or partial mental responsibility defense. Dr. Woods consulted frequently with both trial defense counsel, as well as Ms. Nerad. The record is clear that trial defense counsel gathered a voluminous amount of information and provided that information to Dr. Woods, and that Dr. Woods testified after receiving all relevant information and consulting frequently

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[544] GAE 3 at 6-16.
[545] GAE 3 at 7 and 12.
[546] GAE 3 at 11 and 12.
[547] GAE 1 at 35. *See* Major Jeff A. Bovarnick and Captain Jackie Thompson, *Trying to Remain Sane Trying an Insanity Case: United States v. Captain Thomas S. Payne*, The Army Lawyer, June 2002. As noted previously, [redacted] was one of appellant's original lawyers before being released by appellant. AE 75 and R. 446.

with trial defense counsel. As such, the panel was not "misinformed" about appellant's mental health.

VI.

THE MILITARY JUDGED [sic] ERRED TO THE SUBSTANTIAL PREJUDICE OF SERGEANT AKBAR WHEN HE FAILED TO GRANT THE DEFENSE MOTION FOR A CHANGE OF THE VENUE.

Standard of Review

A military judge's ruling on a motion for change of venue is reviewed for an abuse of discretion.[548] Trial court judgments on the necessity for a change of venue are granted a "healthy measure of appellate-court respect."[549] The Supreme Court has noted that when pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes especially good sense."[550] Appellate courts "making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by the trial judge."[551] The Supreme Court has repeatedly emphasized that jury selection is "particularly within the province of the trial judge."[552]

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[548] *United States v. Loving*, 41 M.J. 213, 282 (C.A.A.F. 1994).
[549] *Skilling v. United States*, 130 S.Ct. 2896, 2913 n.11 (2010).
[550] *Id.* at 2918.
[551] *Id.*
[552] Id. at 2917-18.

Law and Argument

The military judge properly denied appellant's motion for a change of venue in which appellant argued prejudicial pretrial publicity.[553] "Members of the armed forces are entitled to have their cases adjudged by fair and impartial court-martial panels whose evaluation is based solely upon evidence, and not upon prejudgment that may occur as a result of pretrial publicity."[554] An accused is entitled to a change of venue only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial."[555] Pretrial publicity does not necessarily establish that court members have been influenced, rather the question is "whether the members, having been exposed to publicity, can fairly and honestly try the issues."[556] The defense may raise the issue of unfair pretrial publicity by "demonstrating either presumed prejudice or actual prejudice."[557]

Appellant falls well short of establishing either presumed or actual prejudice in this case.

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[553] AE 29; R. 36-44, 459-60.
[554] *United States v. Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2003) (citing *Curtis*, 44 M.J. at 139).
[555] R.C.M. 906(b)(11) discussion. The language in the MCM mirrors the language in Federal Rule of Criminal Procedure 21 - the rule governing venue transfer in federal court. *See Skilling*, 130 S.Ct. at 2913 n.11.
[556] *Loving*, 41 M.J. at 254.
[557] *Simpson*, 58 M.J. at 372.

A. Presumption of Prejudice

To establish presumed prejudice, "the defense must show that pretrial publicity (1) is prejudicial, (2) is inflammatory, and (3) has saturated the community" where the trial is held.[558] The potential for prejudice may be "ameliorated through measures such as a continuance, change of venue, sequestration, and regulation of public comment by counsel."[559]

As the Supreme Court stated this past term in *Skilling v. United States,* a case regarding pretrial publicity and change of venue, "a presumption of prejudice, our decisions indicate, attends only the *extreme case.*"[560] Pretrial publicity, "even pervasive, adverse publicity, does not inevitably lead to an unfair trial."[561] A presumption of prejudice has been found where there was a "trial atmosphere utterly corrupted by press coverage."[562] "Prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance."[563]

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[558] *Simpson,* 58 M.J. at 372. *See also United States v. Gray,* 51 M.J. 1, 28 (C.A.A.F. 1999).
[559] *Simpson,* 58 M.J. at 372.
[560] 130 S.Ct. at 2915 (emphasis added).
[561] *Id.* at 2916.
[562] *Id.* at 2914.
[563] *Skilling,* 130 S.Ct. at 2914-15. *See also Irvin v. Dowd,* 366 U.S. 717, 722 (1961) (stating that jurors are not required to be totally ignorant and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case); *Reynolds v. United States,* 98 U.S. 145, 155-56 (1879) (stating that every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it).

The Supreme Court has "rightly set a high bar for allegations of juror prejudice due to pretrial publicity."[564]

Appellant cannot carry the heavy burden of demonstrating presumed prejudice and his court-martial shares little in common with those trials in which courts have approved a presumption of prejudice.[565] His situation is not an "extreme case"[566] where a presumption of prejudice is considered and there was certainly no "trial atmosphere utterly corrupted by press coverage"[567] similar to those where the courts have presumed prejudice.[568] Appellant's case does not even rival those highly charged cases with extensive pretrial publicity where a motion for change of venue was similarly denied.[569]

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[564] *Skilling,* 130 S.Ct. at 2925 n.34 (noting also the importance of publicity as news coverage of criminal trials of public interest conveys to society at large how the systems operate).

[565] Appellant relies heavily on the change of venue in *United States v. McVeigh*. AB at 322, 328, 331-32, 334 (citing *United States v. McVeigh*, 955 F. Supp. 1281 (D. Colo. 1997). A reading of *McVeigh*, however, makes clear that the analogy between the two cases is "nonsense upon stilts" and glosses over the fact appellant's case, unlike McVeigh's, had already been moved to another venue. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 743 (2004) (Scalia, J., concurring) (using Jeremy Bentham's oft-quoted language to describe an argument as "nonsense upon stilts").

[566] *Skilling*, 130 S.Ct. at 2915.

[567] *Id.* at 2914.

[568] *See Estes v. Texas,* 381 U.S. 532 (1965) (finding a presumption of prejudice where extensive pretrial publicity swelled into excessive exposure, led to considerable disruption, and interfered with the "judicial serenity" that the accused was entitled to); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (finding presumption of prejudice where bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, thrusting jurors into the role of celebrities); *Rideau v. Louisiana,* 373 U.S. 723 (1963) (finding a presumption of prejudice where the police surreptitiously filmed the defendant's confession and a local television station broadcast the film on three separate occasions to audiences ranging from 24,000 to 53,000 individuals in a small community).

[569] *See Skilling,* 130 S.Ct. at 2913 n.11 (discussing *United States v. Yousef*, No. S12 93 Cr. 180 (KTD) (S.D.N.Y. 1997), *aff'd,* 327 F.3d 56, 155 (2d Cir. 2003) (denying change of venue away from New York City in prosecution

Appellant failed to present sufficient evidence to meet the high hurdle of presumed prejudice. The military judge correctly found that the evidence "the defense presented concerning pretrial publicity is not prejudicial, inflammatory, and has not saturated the community."[570] The news stories presented by appellant as evidence of prejudice did not "present the kind of vivid, unforgettable information the Courts have recognized as particularly likely to produce prejudice."[571] The news articles were routine factual descriptions, stale in time,[572] from a variety of news outlets, and were hardly the barrage of prejudicial, sensationalized, and inflammatory accounts directed at prospective panel members required under the law to warrant relief.[573] The military judge properly ruled that "there is no evidence that the accused will be unable to receive a fair and impartial trial here at Fort Bragg."[574] Of course, the military judge emphasized that *voir dire* could uncover any prejudice

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resulting from the 1993 bombing of the World Trade Center); *United States v. Lindh*, 212 F.Supp.2d 541, 549-551 (E.D.Va. 2002) (denying change of venue in prosecution of John Walker Lindh, referred to in the press as the "American Taliban")).

[570] R. 460; AE 102.

[571] *Skilling*, 130 S.Ct. at 2916.

[572] Nearly all of the articles provided by appellant were from 2003 and immediately following the event in March 2003. AE 102. The pool of prospective panel members at Fort Bragg - not Fort Campbell - was ordered to avoid any media regarding the case a year later in March 2004. AE 2. *Voir dire* did not begin until two years after the event on 6 April 2005. R. 795.

[573] AE 102.

[574] R. 460.

resulting from pretrial publicity not shown through appellant's purported evidence of prejudice.[575]

The Government took appropriate steps to ameliorate any possibility of prejudice and even conducted a *de facto* change of venue when it moved the trial from Fort Campbell, Kentucky to Fort Bragg, North Carolina. First, the Government moved the court-martial from Fort Campbell – the home of the 101st Airborne Division (Air Assault) and the unit to which appellant and the victims were assigned in March of 2003 – to Fort Bragg – an installation with no Soldiers assigned to the 101st Airborne Division (Air Assault) and hundreds of miles away from Fort Campbell.[576] Second, the military judge sent a detailed order to all prospective court members to avoid reading matters or discussing appellant's case in the interests of "the fair administration of justice and due process of law" and to disclose to the court if they had already been exposed to any pretrial publicity.[577] Third, the panel did not consist of any members of the 101st Airborne Division (Air Assault) – the unit

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[575] R. 38-39; AE 102.

[576] Appellant attempts to strike a blow at the military judge by questioning his geographic knowledge in terms of the distance between Fort Bragg and Fort Campbell, claiming that the military judge found that Fort Bragg was "thousands of miles away from Fort Campbell." AB at 341-42. But appellant misses his mark, as the military judge made no such error. The military judge stated that "Fort Bragg was thousands of miles away from the site of the incident," i.e. Kuwait, and "hundreds of miles away from Fort Campbell." R. 460; AE 30 at enclosure 1.

[577] R. 30; AE II. Prospective court members acknowledged receipt of the court order. AE III. Similar orders were given in other well-known cases where the appellate courts affirmed the trial judge's denial of a change of venue. *See, e.g., Simpson*, 58 M.J. at 373; *Gray* 51 M.J. at 28-29; *Loving*, 41 M.J. at 282.

most directly affected by appellant's actions.[578] Fourth, the court-martial was delayed more than a year after the incident occurred in Iraq.[579] Fifth, the court conducted *voir dire* to ensure there was no prejudice due to any pretrial publicity.[580] These measures eliminated any possibility of prejudice.

The Supreme Court in *Skilling* highlighted three principles that factor in assessing a claim of presumed prejudice and they apply to this case – (1) the size and characteristics of the community in which the crime occurred; (2) the time delay between the occurrence of the widely reported crime and the trial; and (3) the type of news stories, especially whether they were blatantly prejudicial of the type readers could not reasonably be expected to shut from sight.[581]

First, the trial in appellant's case occurred in a community entirely separate from where the crime occurred and from those most affected. Appellant's attempts to paint the 101st Airborne Division (Air Assault) located at Fort Campbell, Kentucky as the same community as the XVIII Airborne Corps, Fort Bragg, North Carolina would come as a surprise to those in the

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[578] AE 30 at enclosure 3.
[579] Appellant committed his crimes on 22 March 2003 and the military judge sent his order to prospective panel members on 30 March 2004. AE III. *Voir dire* did not begin until two years after the crimes on 6 April 2005. R. 795.
[580] R. 814, 816, 818, 820, 843-44, 1138-39, 1157.
[581] *Skilling*, 130 S.Ct. at 2915-16. The Supreme Court also mentioned a fourth factor especially relevant to Skilling's case – the jury acquitted him of nine counts. This is not relevant to this case since the Government would argue any reasonable panel in any given venue would convict appellant given the overwhelming evidence of his guilt. *See infra* Part VII.E.

Army - especially those stationed at these distinct and proud installations.[582] Appellant's argument proves too much as he would have us believe that he could not get a fair and impartial panel from any U.S. Army installation, and his argument carried to its illogical conclusion would prevent appellant from getting an impartial panel anywhere in the military.[583] This is certainly not supported by the law and appellant cites no authority other than to allege a "hostile environment"[584] and that "the entire Army was watching"[585] without a shred of evidence to support these assertions. Appellant's straw man of a "community unified by the shared trauma of those directly victimized" also comes without a scintilla of evidence.[586]

Second, this was not a situation where the trial swiftly followed a widely reported crime. The prospective panel, located at a separate community from that affected, was sent the order not to read about or discuss this case more than a year after the crimes occurred in Iraq.[587] The media reports relied upon by appellant were nearly all circulated in 2003 following

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[582] AB at 340-41. It surely would come as a surprise to the Air Assault Soldiers at Fort Campbell and the Paratroopers at Fort Bragg that "they are the same deploying airborne Soldiers." *Id.* It is also disingenuous to claim they are the same community simply because the 101st technically falls under the XVIII Airborne Corps for certain command and control requirements. AB at 341. Appellant cites no authority for his arguments that these two distinct communities and military units are one in the same.
[583] AB at 342; AE 29.
[584] AB at 342.
[585] AB at 338.
[586] AB at 322.
[587] AE 2.

the event.[588] *Voir dire* did not begin until two years after the crimes in 2005.[589] The time delay ameliorated any possibility of prejudice.

Third, there was no blatantly prejudicial information of the type readers could not avoid.[590] Similar to *Skilling*, appellant's case had little in common with those where a presumption of prejudice was recognized.

B. Actual Prejudice

To establish actual prejudice, "the defense must show that members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused."[591] Without such a showing, "evidence that the members had knowledge of highly significant information or other incriminating matters is insufficient."[592] There is no hard-and-fast formula that dictates the necessary depth or breadth of *voir dire*.[593] An impartial panel need not consist of "ignorant members" but it is "sufficient if the jurors can set aside their impressions or opinions and render a verdict based on the evidence presented at court."[594] "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality,

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[588] AE 102.
[589] R. 795.
[590] AE 102; R. 460.
[591] *Simpson*, 58 M.J. at 372.
[592] *Id.*
[593] *Skilling*, 130 S.Ct. at 2917.
[594] *Id.* at 2925.

for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record."[595] Jury selection "is particularly within the province of the trial judge."[596]

Appellant does not make a compelling argument regarding actual prejudice as there is no support in the record. Instead, he relies on his meritless argument that the *voir dire* process and challenges of members was deficient.[597] Appellant does argue that panel members were affected by the media coverage and cites SFC [redacted] as an example.[598] However, appellant fails to mention that individual *voir dire* was conducted on SFC [redacted] by the military judge, trial counsel, and defense counsel and he stated that (1) he did not maintain any position on appellant's case; (2) he could set aside anything he learned through the media; and (3) most importantly, he could follow the judge's instructions.[599] The *voir dire* process was extensive and all members were able to "set aside their impressions or opinions and render a verdict based on the evidence presented at court."[600]

When assessing actual prejudice, courts take into account the measures used to mitigate the adverse effects of publicity

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[595] *Id.* at 2918.
[596] *Id.* at 2917.
[597] AB at 334 n.53.
[598] AB at 341.
[599] R. 1139.
[600] *Skilling*, 130 S.Ct. at 2925; R. 814, 816, 818, 820, 843, 1138-39, and 1157.

to include questionnaires, *voir dire*, and judicial instructions.[601] There were several steps in this case to ensure no actual prejudice was present on the panel: (1) the panel was initially screened through the standard questionnaire and an additional questionnaire;[602] (2) the military judge ordered the panel to avoid the media and to disclose any knowledge they had of the case;[603] (3) *voir dire* was extensive - it covered pretrial publicity and only kept those members able to be impartial and set aside any impressions and render a verdict based on the evidence and law;[604] and (4) the military judge admonished the panel to only render a verdict based on the evidence and nothing else.[605] Of course, the case was also transferred from Fort Campbell to Fort Bragg and this further mitigated any prejudice.[606]

Appellant fails to make any showing that the "members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused."[607] Appellant fails to show any actual prejudice as a result of pretrial publicity.

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[601] *Skilling*, 130 S.Ct. at 2918-19. *See also Gray*, 51 M.J. 28-29.
[602] AE 81.
[603] AE 2.
[604] R. 814, 816, 818, 820, 843, 1138-39, 1157.
[605] R. 797-98, 800, 804-05.
[606] AE 30 at enclosure 1.
[607] *Simpson*, 58 M.J. at 372.

Conclusion

The military judge correctly denied appellant's motion for a change of venue. Appellant falls well short of the high hurdle needed to establish presumed prejudice with pretrial publicity and fails to establish any actual prejudice. Appellant's case was heard by a fair and impartial court-martial panel.

VII.

THE MILITARY JUDGE ERRED IN NOT SUPPRESSING THE STATEMENT "YES" BY APPELLANT TO MAJOR KYLE [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.[608]

Standard of Review

A military judge's ruling on the suppression of evidence is reviewed for an abuse of discretion.[609] The military judge's findings of fact are examined under the clearly erroneous standard and his conclusions of law are reviewed *de novo*.[610] In

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[608] Military judge (COL) Patrick Parrish first heard this motion and issued a ruling denying the defense's motion to suppress this particular statement. AE 116 at 6. Military judge (COL) Stephen Henley took over in appellant's case and reconsidered the defense motion. He adopted Judge Parrish's findings of fact and also denied the defense motion to suppress this particular statement. AE 317 at 1-2.

[609] *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005).

[610] *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "At least one court has defined the clearly erroneous standard by stating that it must be 'more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993) (quoting *Parts and Electric Motors Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

reviewing a ruling on a motion to suppress, the evidence is viewed in "the light most favorable to the prevailing party."[611] "In order to be overturned on appeal, the judge's ruling must be arbitrary, fanciful, clearly unreasonable, clearly erroneous, or influenced by an erroneous view of the law."[612]

Law and Argument

A. Major [redacted] was not required to administer warnings under Article 31(b), UCMJ, since he was neither performing a law enforcement nor a disciplinary investigation.[613]

Article 31, UCMJ, warnings are required where (1) the questioner is performing a law enforcement or disciplinary investigation; and (2) the person questioned is suspected of an offense.[614] Our highest military court has long intimated that Article 31, UCMJ, "requires warnings only when questioning is done during an official law enforcement investigation or disciplinary inquiry."[615] Whether the questioner should be considered to be performing such an investigation is determined by "assessing all the facts and circumstances at the time of the interview to determine whether the military questioner was

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[611] *Rodriguez*, 60 M.J. at 246-47 (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).
[612] *Datz*, 61 M.J. at 42.
[613] The Government does not concede that MAJ [redacted] was required to administer warnings under either Article 31(b), UCMJ, or *Miranda v. Arizona*. While both military judges stated that MAJ [redacted] was not serving a law enforcement or disciplinary purpose, neither military judge directly answered whether warnings were required prior to questioning appellant but rather only explicitly answered whether the "public safety" exception was applicable under *New York v. Quarles*. AE 116 at 3-4, AE 317 at 1-2.
[614] *United States v. Cohen*, 63 M.J. 45, 49 (C.A.A.F. 2006) (citing *United States v. Swift*, 53 M.J. 439, 446-47 (C.A.A.F. 2000)).
[615] *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990).

acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity."[616] The status of a servicemember as a suspect and the nature of the official inquiry as either law enforcement or disciplinary are ultimately legal questions.[617]

The military courts recognize a difference between questioning focused on the accomplishment of an operational mission and questioning to elicit information for use in disciplinary proceedings.[618] Where there is a mixed purpose behind the questioning, the "matter must be resolved on a case-by-case basis looking at the totality of the circumstances, including whether the questioning was 'designed to evade the accused's constitutional or codal rights.'"[619] While questioning by a military superior in the chain of command will normally be presumed for disciplinary purposes, the "presumption is not conclusive"[620] or so broad and inflexible.[621] Evidence that the primary purpose of the questioning is "administrative or operational" may overcome the presumption that "a superior in the immediate chain of command is acting in an investigatory or disciplinary role."[622]

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[616] *Id.*
[617] *United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991).
[618] *Cohen*, 63 M.J. at 50.
[619] *Id.* (quoting *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999)).
[620] *Swift*, 53 M.J. at 446.
[621] *United States v. Pittman*, 36 M.J. 404, 407 n.7 (C.M.A. 1993).
[622] *Bradley*, 51 M.J. at 441 (discussing the "administrative and operational exception to Article 31" as recognized by the Court's case law).

The facts of this case make clear that MAJ [redacted] was not participating in a law enforcement or disciplinary investigation and thus was not required to administer warnings under Article 31, UCMJ. MAJ [redacted] was acting in a force protection role ensuring the safety of the Soldiers on Camp Pennsylvania when he encountered and briefly questioned appellant - he was not serving an investigatory purpose.[623] MAJ [redacted] took it upon himself as the Brigade S-2 to set up a perimeter for safety and coordinate any response to the attack.[624] He even briefed the Brigade Commander on the status of security.[625] MAJ [redacted] approached the bunker where appellant was located for operational security reasons.[626] His spur of the moment and narrowly tailored questioning of appellant was not intended for a law enforcement or disciplinary purpose or to obtain testimonial evidence.[627] The questions were limited to the operational purpose of determining the source of the attack and reflected the urgency of the situation.[628] Once it was determined appellant was the source of the attack, the questioning immediately stopped.[629]

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[623] AE 116 at 3-4, AE 317 at 1; R. 1649-1690.
[624] AE 116 at 1; R. 1497, 1648-52, 1661-62.
[625] R. 1678-79.
[626] AE 116 at 4, AE 317 at 1; R. 1681.
[627] AE 317 at 2; R. 1690.
[628] AE 116 at 4, AE 317 at 1-2; R. 1690.
[629] AE 116 at 2, AE 317 at 1; R. 1690-91.

Nothing about the facts and circumstances indicated that MAJ [redacted] was conducting an investigation or disciplinary inquiry. Appellant fails to make a showing that the military judge's findings of fact – first made by Judge Parrish and then adopted by Judge Henley - were clearly erroneous. MAJ [redacted] was not given a charge to serve as an investigator or gather information on appellant. MAJ [redacted] never coordinated with the military police, Criminal Investigation Command (CID), or the unit trial counsel before his serendipitous meeting with appellant. In fact, he sought legal advice only after he confirmed who was responsible for the attack.[630] MAJ [redacted] did not know the accused, was not in his chain of command, and only learned his name shortly before their chance encounter.[631] There is no evidence MAJ [redacted] was trying to avoid any constitutional or statutory rights due appellant.[632] None of this behavior is indicative of someone conducting an investigation or disciplinary inquiry.

This case is similar to *United States v. Loukas* where the Court of Military Appeals found "the prosecution satisfactorily showed that Article 31 warnings were not required in this operational context."[633] There are four key principles the Court found in *Loukas* that are also present in appellant's case: (1)

[630] AE 116 at 4.
[631] AE 317 at 2.
[632] AE 116 at 4, AE 317 at 2.
[633] *Loukas*, 29 M.J. at 389.

the military questioner was in an operational environment and responsible for safety; (2) the questioning of the accused was limited to that required to fulfill the operational responsibility; (3) there was no evidence suggesting the inquiry was designed to evade constitutional or codal rights; and (4) the unquestionable urgency of the threat and the immediacy of the questioner's response underscore the legitimate operational nature of the query.[634] The situation in *Loukas* is mirrored in this case and thus Article 31 rights were not required before MAJ [redacted] questioned appellant.

B. MAJ [redacted] was not required to administer warnings under *Miranda v. Arizona* since he was not a law enforcement official nor was he acting in a law enforcement capacity.

Article 31 rights are broader than the warnings required under *Miranda*[635] which are required only in circumstances amounting to "custodial interrogation."[636] Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[637] A person is in custody if he or she "was restrained in a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[638] Most importantly, *Miranda*

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[634] *Id.*
[635] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[636] *Swift*, 53 M.J. at 445.
[637] *United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009).
[638] *Id.* at 438.

warnings apply to a suspect in custody and only where his interrogation is conducted by *law-enforcement officials*.[639]

As argued above, MAJ [redacted] was not acting in a law enforcement capacity and was not required to give Article 31 rights. Therefore, MAJ [redacted] was not obligated to give any *Miranda* warnings as he was not required to give Article 31 rights and thus there could be no custodial interrogation. As in *Loukas*,[640] there is no contention that MAJ [redacted] was a law-enforcement official and thus *Miranda* warnings could not apply in this situation. Trial defense counsel correctly understood the law as they did not even raise *Miranda* as an issue in their motion to suppress.[641] MAJ [redacted] was not required to give warnings under *Miranda* or Article 31, UCMJ.

C. Assuming, *arguendo*, MAJ [redacted] was required to administer warnings under Article 31(b), UCMJ, or *Miranda*, any failure to do so was justified under the "public safety" exception.

The military judge correctly ruled any failure to administer warnings by MAJ [redacted] was justified by public safety considerations.[642] The military courts have held that the "public safety" exception excuses a lack of rights warnings

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[639] *Loukas*, 29 M.J. at 389 (finding that *Miranda* warnings were not required since there was no contention that appellant's superior and questioner - Sergeant Dryer - was a law-enforcement official)(emphasis added).
[640] *Id.*
[641] AE 85.
[642] AE 317 at 1.

under both *Miranda* and Article 31(b).[643] Unwarned statements can be admitted under the "public safety" exception when investigators ask questions reasonably prompted by a concern for the public safety.[644] The "public safety" exception does not depend on the subjective motivation of the questioner but rather applies so long as the questioning "relates to an objectively reasonable need to protect the police or the public from any immediate danger."[645] A need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.[646]

MAJ [redacted] questioned appellant with the purpose of determining if appellant or others were responsible for the attack and based on the legitimate and immediate concern for the safety of the Brigade Soldiers.[647] MAJ [redacted] questioned appellant shortly after the attacks and did not know the source or extent of the attack against the unit.[648] The risk remained to the unit until the source of the threat was discovered.[649] The questions posed had a rational and objectively reasonable

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[643] *United States v. Jones*, 26 M.J. 353, 356-57 (C.M.A. 1988) (extending the application of the "public safety" exception to cover Article 31(b) as well as *Miranda*). *See also United States v. Morris*, 28 M.J. 8, 14 (C.M.A. 1989).
[644] *New York v. Quarles*, 467 U.S. 649, 656 (1984).
[645] *Quarles*, 467 U.S. at 655-56, 659.
[646] *United States v. Catrett*, 55 M.J. 400, 405 (C.A.A.F. 2001) (quoting *Quarles*, 467 U.S. at 657-58).
[647] AE 116 at 4, AE 317 at 2; R. 1668-90.
[648] AE 317 at 1; R. 1668.
[649] *Id.*

relationship to diffusing both the perceived and actual danger to Soldiers of the Brigade.[650] MAJ [redacted] wanted to know if appellant was the source of the attack.[651] A need for an answer in appellant's situation posing a distinct threat to public safety outweighs the need for a prophylactic rule protecting appellant's privilege against self-incrimination.

Two circumstances in *Quarles* played a central role in the Supreme Court's decision to allow the "public safety" exception and those circumstances are also present in this case. First, there was an "immediate necessity of ascertaining the whereabouts" of the threat.[652] In this case, the unit was under attack from an unknown source just 20 to 30 miles from the Iraqi border.[653] MAJ [redacted] had previously observed several wounded members of the unit while he tried to establish security.[654] Second, the individual "asked only the questions necessary to locate" the source of the threat.[655] Here, MAJ [redacted] only asked whether appellant was responsible for the attacks and immediately stopped questioning after he discovered that appellant was the source of the attack.[656]

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[650] AE 317 at 2.
[651] R. 1690.
[652] *Quarles*, 467 U.S. at 657.
[653] AE 116 at 1.
[654] R. 1656, 1658-59.
[655] *Quarles*, 467 U.S. at 659.
[656] AE 317 at 1; R. 1690-91.

As in *Quarles*, the unwarned statement in this case is admissible under the "public safety" exception. The military judge properly admitted the statement.[657]

D. Appellant's confession was voluntary as it was not the product of coercion, unlawful influence, or inducement.

The voluntariness of a confession is a question of law reviewed *de* novo.[658] The "public safety" exception does not make admissible a statement that was truly involuntary.[659] The statement by appellant will be admissible if the military judge correctly determined it was (1) properly warned or within the "public safety" exception for unwarned statements; and (2) voluntary.[660] As discussed above, appellant's confession was voluntary in that there was no failure to warn under Article 31, UCMJ, or *Miranda* (or any failure was excused by the "public safety" exception), but the statement was also voluntary as it was not the product of coercion, unlawful influence, or unlawful inducement.

A confession must be the product of an essentially free and unconstrained choice by its maker.[661] Courts review the totality of the circumstances to determine whether the appellant's will was overborne and his capacity for self-determination was

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[657] AE 317 at 2.
[658] *United States v. Ellis*, 57 M.J. 375, 378 (citing *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991)).
[659] *Jones*, 26 M.J. at 357.
[660] *Id.*
[661] *Chatfield*, 67 M.J. at 439 (citing *United States v. Bubonics*, 45 M.J. 93, 95 (C.M.A. 1991)).

critically impaired.[662] The factors to consider are "'both the characteristics of the accused and the details of the interrogation.'"[663] Voluntariness of a confession is "not to be equated with the absolute absence of intimidation"[664] as very few people give incriminating statements in the absence of some sort of official action.[665] Appellant's statement was voluntary under the totality of the circumstances.

There is simply no evidence to show appellant's will was overborne and his capacity for self-determination impaired. At the time of the questioning, appellant was a 31-year-old NCO who had been in the Army for five years with a GT score of 124 and a college degree in aeronautical science.[666] There was no evidence appellant suffered from any psychological handicaps at the time of questioning that affected his decision making ability. Quite the contrary, appellant was a mature, intelligent, seasoned Soldier. His age, education, and experience make clear his will and capacity for self determination was not easily overborne. In fact, appellant was calm and controlled during the questioning.[667] He looked at MAJ [redacted] eye-to-eye and did not turn away.[668]

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[662] *Id.* (quoting *Bubonics*, 45 M.J. at 95 and *Schenckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).
[663] *Id.*
[664] *United States v. Braxton*, 112 F.3d 777, 783 (4th Cir. 1997).
[665] *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).
[666] AE 116 at 5.
[667] R. 1691.
[668] R. 1691.

Appellant was not beaten or coerced, nor was he promised anything if he responded.[669] Appellant was subjected to very brief questioning.[670] He was not under the influence of drugs or alcohol.[671] The focus is on whether appellant's will was overborne and his capacity for self-determination impaired based on the totality of the circumstances. The focus is not whether there was some evidence of official action or some purported intimidation. The statement was voluntary under the totality of the circumstances.

E. Assuming, *arguendo*, the confession was erroneously admitted, any error was harmless beyond a reasonable doubt given the overwhelming evidence against appellant.

"When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt."[672] Any error in admitting appellant's statement of "Yes" to MAJ [redacted] was harmless beyond a

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[669] AE 317 at 2.
[670] R. 1690.
[671] *Id.*
[672] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *See also Catrett*, 55 M.J. at 405-406 (finding the "public safety" exception applied under the circumstances and also finding any error in admitting the statement would have been harmless beyond a reasonable doubt given the evidence against appellant).

reasonable doubt. Appellant's argument to the contrary is completely unsupported by evidence in the record.[673]

The Government's case was overwhelming even without the statement challenged by appellant as it included the following damning evidence: (1) appellant had the opportunity to obtain the grenades as he was assigned to guard the grenades the night of the murders and was left alone more than once;[674] (2) appellant hid four M-67 fragmentation grenades and three M-14 incendiary grenades in his pro-mask carrier and some of the canisters in his JLIST bag;[675] (3) appellant was observed by 1SG Stevenson moving up behind CPT Seifert and shooting CPT Seifert in the back;[676] (4) appellant was wounded by one of his own grenades;[677] (5) appellant was unaccounted for during the incident;[678] (6) appellant was apprehended and found with the one remaining M-67 and two remaining M-14 grenades in his protective mask and three M-14 canisters were discovered in appellant's JLIST bag;[679] (7) appellant's assigned M-4 rifle, taken from appellant when he was apprehended, was confirmed by ballistics analyses to have fired the rounds during the attack;[680] (8) appellant's uniform and hands were tested and contained the

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[673] AB at 352-53.
[674] R. 1583-88, 1609, 1610-11.
[675] R. 1628-29, 1713-14; PEs 88, 162.
[676] R. 1264, 1434, 1453, 1473-76, 1483, 1491.
[677] R. 1516-17; PE 197, 198.
[678] R. 1678-79.
[679] R. 1744-45, 1824, 1843, 1849, 1926-28, 1950-51; PEs 77, 79, 126, 180, 230.
[680] PEs 52 96a-b, 99, 140, 145, 146, 147, 191 at 2; R. 1563.

residue of both M-14 and M-67 grenades;[681] (9) appellant's fingerprint was discovered on the Pad 7 light generator that was shut off just before the attack;[682] and (10) appellant's diary contained such statements as "I may have to make a choice very soon about who to kill . . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies,"[683] and "I am not going to do anything about it as long as I stay here. But, as soon as I am in Iraq, I'm going to kill as many of them as possible."[684]

Conclusion

The military judge properly admitted appellant's statement. Even assuming rights warnings were required, the failure to do so by MAJ [redacted] is justified by the "public safety" exception and any error is harmless beyond a reasonable doubt.

[681] R. 1962-64; PEs 157, 158, 160, 194.
[682] R. 1707-08, 1964; PEs 122, 155, 161, 196.
[683] PE 176a at 2.
[684] PE 176a at 1.

VIII.

THE PROSECUTION'S MANIPULATION OF TRIAL DEFENSE COUNSEL DURING APPELLANT'S COURT-MARTIAL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE THAT IMPACTED THIS CAPITAL CASE.[685]

Law

"At trial, the burden of raising the issue of unlawful command influence rests with the defense."[686] Failure to raise the claim of unlawful command influence at trial when the facts concerning the allegation are known to the defense forfeits the issue on appeal.[687] Issues that are forfeited cannot serve to overturn a conviction or sentence unless the accused demonstrates plain error.[688]

To demonstrate on appeal that there was unlawful command influence, "appellant 'must show (1) facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness."[689]

Argument

There was no "unlawful influence" in this case. Appellant selectively quotes from the record without giving the proper context to the issue concerning the issue of Permanent Change of

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[685] The answer to Assignment of Error II.C. is also answered in this portion of the Government's brief.
[686] *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).
[687] *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999).
[688] *Harcrow*, 66 M.J. at 157-58.
[689] *Richter*, 51 M.J. at 224 (citing *Biagase*, 50 M.J. at 150).

Station (PCS) orders potentially effecting the representation of appellant by MAJs [redacted] and [redacted] On 24 May 2004, appellant's civilian defense counsel, Mr. [redacted], argued that he needed a continuance until June of 2005.[690] Mr [redacted] listed several grounds for the continuance, to include the pending transfer of appellant's military defense counsel to new assignments.

> CDC: . . . .**The next issue of course is my military counsel. They both are facing what I believe is called PCS. They are being transferred.**
>
> MJ: Gentlemen, where are you going?
>
> 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

[690] R. 431.

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 Corps, sir.

MJ: Nothing to do with this case though?

DC: Yes, sir. Still, sir, I would be working for the Convening Authority who is the Convening Authority for this case. Ultimately, if you follow the upper chain of command ----

MJ: I guess, ultimately, we all work for the President, don't we?

DC: Yes, sir. Anyway, TDS ----

MJ: If you want to follow that, all of the military guys work for the President, if you want to follow that conflict all the way up.

DC: Yes, sir. I understand that, sir.

MJ: That's a rather tenuous line there.

DC: I guess I'm using TDS terminology. We would refer to that as a conflict, because it's -- I'm not in TDS anymore. I'm doing a different job.

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

DC: Yes, sir. Well, that's the term I would use to describe it because I am in a different job, definitely further away. Even if I choose -- you know, if he wants to keep me on, of course, I'll do that.

MJ: All the more reason not to delay this case until June of 2005.

DC: Yes, sir. But, at any rate, I'm on orders to report no later than 5 July, sir.

MJ: Okay. Sir, I didn't mean to interrupt you.

CDC: No problem, Your Honor. **And I do want to compliment, on the record, the fine work of the two military lawyers. At least from what I've experienced to date, they are outstanding attorneys. I have no problem with their performance.**

We, as I said, have a weekly discussion; and we talk about their availability. And, **at least with respect to Major [redacted] he is not sure how much time he will be able to put in on the case once he is transferred because he has other duties that he'll have to work on. That is the primary reason for asking that there be a change in counsel so that there will be someone who will be fulltime on the case from the military.** He's not able to do that, and I understand that Captain [redacted] will also not be able to do that once he is transferred.

Consequently, we cannot see, at this point, how we could provide effective assistance of counsel without our seasoned lawyers remaining on board fulltime or having a continuance to where we can actually come up to speed on the case.

MJ: Okay. But under the professional -- under our rules, a PCS does not terminate, in and of itself, an attorney-client relationship.

ADC: That's correct, sir. We've explained the fact that we're going to new positions and it's up to Sergeant Akbar if he has any issues with that. **He's indicated that he would want to have new counsel if we were, in fact, no longer in TDS.**

MJ: Okay. But your two jobs would not represent a conflict. I'm not going to resolve that right now. You're on the case.

DC: Yes, sir. I understand.

MJ: **Even if the accused wants to excuse you, the judge -- the court has to grant permission to excuse counsel; and just because counsel have moved does not, by itself, require -- isn't good cause for excusal.**[691]

Following additional argument from Mr. [redacted] the military judge inquired with both the Government and military defense counsel on their positions.

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.

With regards to being deferred, he is correct. I was scheduled to go to the Grad Course and, because of the fact that I was still working on this case, I was informed that I could not, in fact, go to the Grad Course and work on the case. So I elected to defer the Grad Course.

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[691] R. 434-438 (emphasis added).

I have now been in TDS for 48 months. This will be going on my 50th straight month in TDS.

MJ: Nothing wrong with that. It's a great job.

ADC: I love TDS, sir.

MJ: I spent 5 years in TDS. It's a great job.

ADC: Yes, sir. It's good to know someone has a future when they spend that much time in TDS.

MJ: It's a bright future.

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.

MJ: Okay. But I would like to have something from someone other than the government representative that that's what's happening with Captain [redacted]

TC: Yes, sir.

MJ: I don't feel comfortable with the government representative telling me that. If that's PP&TO's position, then an e-mail from PP&TO addressed to Captain [redacted] -- you know, if someone provides me a copy, we can put it in the record.

TC: Yes, sir.

MJ: That would be much more preferable. I don't -- I'm not saying I disbelieve you, but I think it's preferable if we have something from the assignments branch itself on that position.

TC: Yes, sir.

MJ: Go ahead.

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.**

He's also had the opportunity to IMC one of the few appellate -- excuse me -- one of the few TDS capital-qualified attorneys, Lieutenant Colonel [redacted] who he IMC'd and then released. He's also released Captain [redacted] He's now also released at least one Civilian Defense Counsel, and it has to stop. The court should not allow the withdrawal of either one of the TDS attorneys.

And if Mr. [redacted] is too busy in his schedule to try this case before June of 2005, then maybe he should decline representation. It is unheard of in military jurisprudence for an accused to sit in pretrial confinement for in excess of 2 years. He also, probably right now

to the best of my recollection in the 15 years I've been on active duty, currently holds the pretrial confinement record. He has been in pretrial confinement for in excess of a year. That is not due process.

Many of the defense motions have been due process; that we need to be fair to Sergeant Akbar. And Sergeant Akbar deserves his day in court, and that day should come a lot sooner than June of 2005.

The government is not saying that Mr. [redacted] should be forced into court, given the nature of the discovery he received, which I would note for the court is just a duplicate of everything the civilian -- the military counsel had previously been given, and a full copy of everything that Mr. [redacted] had been given. There is nothing new in that discovery.

The government would concede there needs to be some additional time for Mr. [redacted] to get ready; but, certainly, between now and no later than the first week of October, that can be accomplished. **If, in fact, that was the trial date set and a reasonable motions schedule followed appropriately, 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.[692]

Later that day, in partially granting the defense motion for a continuance, the military judge made the following finding:

[692] R. 447 (emphasis added).

MJ: Although the two military counsel may be PCSing, a PCS is not a good cause to sever an attorney-client relationship. Neither job to which the two military counsel may be PCSing conflicts with their current responsibilities as Defense Counsel to Sergeant Akbar.

Counsel have a professional responsibility to their client, and the court is confident that counsel will be as zealous in representing their client in the future as they have up to this date.[693]

Weeks later, MAJ [redacted] updated the military judge on his status:

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**

[693] R. 457 (emphasis added).

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.

MJ: Sergeant Akbar, you've had a chance to discuss this issue with Major [redacted]

ACC: Yes, sir.

MJ: Do you still want him to represent you in this case?

ACC: Yes, sir.

MJ: I know you've probably discussed this issue several times with Judge Parrish, but you want to be represented by Mr. [redacted] Captain [redacted] and Major [redacted]

ACC: Yes, sir.

MJ: Anybody else?

ACC: No, sir.[694]

The defense did not file any objections or motions with the trial court concerning "unlawful command influence" by LTC [redacted] At no time did MAJ [redacted] or MAJ [redacted] file a

[694] R. 567-69 (emphasis added).

request on behalf of appellant to withdraw from the case. In fact, the only person that withdrew from the case was Mr. [redacted].[695]

There was nothing unlawful, unethical, or manipulative about LTC [redacted] actions with respect to MAJ [redacted] and MAJ [redacted] Appellant, through his civilian defense counsel, complained in open court that the Army was taking away his invaluable trial defense attorneys and reassigning them to positions that the defense believed might create conflicts with their representation. Not only were LTC [redacted] actions appropriate, they were imperative.

"The right to effective assistance of counsel and to the *continuation of an established attorney-client relationship is fundamental in the military justice system.*"[696] LTC [redacted] as a representative of the Government, contacted the appropriate assignment authority to ensure that the assignments process did not interfere with appellant's right to effective counsel. One can only imagine the outcry on appeal if appellant lost--due to reassignment--the two trial defense attorneys who were with him since the case began.[697] Appellant expressed to the military judge early in the case the importance of MAJ [redacted] and MAJ

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[695] AE 180; R. 778-79.
[696] *United States v. Baca*, 27 M.J. 110, 118 (C.M.A.1988)(emphasis added)(citing *United States v. Palenius*, 2 M.J. 86 (C.M.A.1977)).
[697] *For example, see United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010), *rev. pending*, No. 10-5003/MC (C.A.A.F. 2010).

[redacted] "Because of my -- my familiarity with Major [redacted] and Captain [redacted] over the past year that I've had in dealing with them and their familiarity with my case. I think to bring another lawyer on that I'm not familiar with, I would have to basically build up a level of trust with him. I already have that with these two officers, sir."[698]

While the military judge was correct that reassignment within The Judge Advocate General's Corps would not be sufficient to terminate the attorney-client relationship, Mr. [redacted] stated that he believed reassignment could create a conflict-of-interest or, at the very least, would interfere with his ability to prepare for appellant's case. Prudence and institutional vigilance within The Judge Advocate General's Corps demanded that those in charge of the assignments process be made aware of the situation. LTC [redacted] discussed his efforts in open court, without any objection from the two trial defense counsel or the civilian defense counsel. Appellant provides no evidence that the trial defense counsel were adversely affected in either their representation of appellant or their career progression.[699] Any argument that the efforts to ensure appellant received the continued assistance of his detailed trial defense counsel somehow created an actual or

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[698] R. 8.

[699] Both MAJ [redacted] and MAJ [redacted] admitted that they never felt conflicted by LTC [redacted] actions. GAE 1 at 50-52.

perceived appearance of command influence, or conflict of interest, is unsupported by any facts or law.

IX.

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.

The Government's response to this assignment of error is consolidated above with assignment of error I.C. as the two serve as multiple attempts to make the same argument.[700]

X.

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE APPROVED SENTENCE, WHICH INCLUDES A SENTENCE TO DEATH, IS INAPPROPRIATELY SEVERE.

Law

Under Article 66, UCMJ, an appellate court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[701] Determining sentence appropriateness is a function

[700] Appellant admits the facts are the same for the two assignments of error although in "some instances with a different gloss." AB at 362 n.63.
[701] UCMJ art. 66.

of this Honorable Court's duty to do justice.[702] However, granting clemency or mercy is not a matter for the Court.[703] In *United States v. Healy*, Chief Judge Everett wrote:

> Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy--treating an accused with less rigor than he deserves .... Article 66, UCMJ ... assigns to the Courts of Military Review only the task of determining sentence appropriateness: doing justice.[704]

Sentence appropriateness is determined by an individualized consideration of the accused, taking into account the entire record of trial, the nature of the offense, and the character of the accused.[705]

At the outset, appellant attempts to argue that his sentence is inappropriately severe based on information that is contained outside of the record of trial.[706] Appellant also attempts to graft his claims of legal error into the sentence appropriateness analysis.[707] Neither approach is permissible.

When reviewing a matter for sentence appropriateness, the Court is limited to the evidence presented to the panel and to

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[702] See UCMJ, art. 66(c); *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005).
[703] *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1988).
[704] *Id.* at 395-6.
[705] *Id.* at 395; *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).
[706] AB at 395-96.
[707] *Id.*

matters presented to the convening authority.[708] Also, sentence appropriateness does not involve a review of legal error. If there is legal error in a trial, Article 59(a), UCMJ, mandates that a sentence cannot be set aside "unless the error materially prejudices the substantial rights of the accused."[709] Appellant cannot use Article 66 to circumvent Article 59, UCMJ. A proper sentence appropriateness review in this case involves a review of the evidence presented at appellant's trial and those matters submitted to the convening authority. A review of this evidence demonstrates that a sentence of death is fair and just.

Appellant claims that the record is "is woefully inadequate for this Court to meaningfully discharge its duty of sentence review."[710] Appellant's assessment of his case is decidedly one-sided. Missing from appellant's assessment of the case is any mention of the crimes of which he was actually convicted, (the word murder is not even used in his argument) or the victims in the case.

Appellant began planning to murder members of his unit even before the deployment,[711] for no other reason than not liking them,[712] or because he felt a loyalty to assist his "Muslim

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[708] *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citing *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973) and *United States v. Fagnan*, 30 C.M.R. 192, 195 (C.M.A. 1961)).
[709] UCMJ art. 59(a).
[710] AB at 393.
[711] PE 176a at 1 and 2.
[712] PE 176a at 2.

brothers fighting for Saddam Hussein."[713] Appellant did not snap and begin opening fire randomly. Appellant waited until he was alone and could steal the grenades. Appellant did not attempt to kill those nearest to him in a fit of anger or confusion. Appellant went out of his way to target the Brigade leadership. Appellant took numerous steps to conceal his identity and to kill in stealth. Appellant had the foresight to turn off the light generators to create confusion, and he attacked the tents with ruthless efficiency. Given the horrific injuries suffered by those that survived appellant's attacks, it was only luck that more were not killed.

Appellant murdered two fellow Soldiers in cold blood. The grenade that killed MAJ Stone shredded his body with eighty-three shrapnel wounds.[714] MAJ Stone slowly bled to death.[715] Appellant, in a further act of cowardice, shot CPT Seifert in the back.[716] CPT Seifert did not just die of his wounds, he suffered first.[717] This attack occurred on the eve of battle, and the unit was nearly rendered combat ineffective.[718] The

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[713] PE 176a at 1.
[714] R. 1264, 1297-98, 1315-17, 1332; PE 195 at 3.
[715] R. 1298-99, PEs 18 and 195 at 3.
[716] R. 1264, 1434, 1453, 1473-76, 1483, 1491.
[717] R. 1337-38, 1417, 1429, 1477, 1802-03; PE 195.
[718] R. 2690-2700.

injuries to CPT [redacted] CPT [redacted] and MAJ [redacted] were both debilitating and permanent.[719]

Also missing from appellant's argument is any acknowledgement of the impact his crimes had on the victims and their families. MAJ Greg Stone was a talented Air Force officer and a loving father to two sons.[720] CPT Christopher Seifert was twenty-eight years old when appellant murdered him; CPT Siefert's son was only four months old at the time. Both families were devastated by the loss. MAJ Stone's children could not bear to discuss what happened to their father.[721] MAJ [redacted] took young [redacted] Seifert to get his first haircut because CPT Seifert's widow, [redacted] could not bring herself to do it without her husband.[722]

The panel heard all about appellant's claims of mental illness; they heard from three different mental health experts. However, they also heard that appellant was fully capable of understanding his acts, understood the lethality of his weapons, and understood that appellant's crimes were the product of his free will and choice. The evidence of appellant's planning and execution of his murderous mission is overwhelming. The harm to the victims and the families is equally overpowering.

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[719] R. 2727, 2731-40, 2830-32, 2835-37, 2842-43, 2851-52, 2854, 2857-62, 2870-2909; PE 215, 216, 262, 263 265, 266, 270, 271, 273, 274, 275, 276, 277, 278, 279, 280, 281.
[720] R. 2940-41, 2950; PE 169.
[721] PE 210.
[722] R. 2745.

Appellant has never accepted responsibility for his crimes, and he continues to evade responsibility. Appellant blames his family, his unit, and now his lawyers. However, appellant cannot hide from the gravity of his offenses. When weighing the nature of the crime, the impact on the victims, and the characteristics of the accused, the sentence of death is both just and appropriate.

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*, ARMY DKT NO. 20080004.

Law

"Generally, the appropriateness of an accused's sentence is to be determined without reference or comparison to sentences in other cases."[723] However, the military appellate courts slightly deviated from this standard in *United States v. Curtis (I)*.[724] In that case, CAAF held that before affirming a death sentence under Article 66, UCMJ, a service court must determine:

> (a) whether one or more valid aggravating factors have been unanimously found by the court-martial and this finding is factually and legally correct; (b) if any corrective action results in setting aside any such finding but leaves intact at least one "aggravating factor," whether this error affected imposition of the sentence; (c)

[723] *United States v. Olinger*, 12 M.J. 458, 460 (C.M.A. 1982) (internal citations omitted).
[724] *United States v. Curtis (I)*, 32 M.J. 252, 271 (C.M.A. 1991).

> whether the death sentence adjudged is proportionate to other death sentences that have been imposed; and (d) whether under all of the facts and circumstances of the case the death sentence is appropriate, Art. 66(c).

Later, in *Curtis II*, CAAF stated that in capital cases Article 66 review "encompasses a limited proportionality review of death sentences."[725]

In *Curtis III*, CAAF recognized that "[w]hat was left unanswered, however, was guidance on how to conduct the proportionality review, specifically the scope of the universe of cases for comparison and the mechanics of conducting such comparison."[726] In *Curtis III*, CAAF upheld the Navy Court's proportionality review, which "'reject[ed] the position that we should compare all cases in which a defendant committed an offense which would potentially be referred capital, cases where discretion was exercised at some point in the proceeding which removed death as a possible sentence, cases in which a finding of some offense less than premeditated or felony murder was reached, and all cases where a life sentence instead of death was adjudged.'"[727] The Court went on to note that the proportionality review conducted by this court in *United States v. Loving* was an appropriate benchmark.[728] In *Loving*, this Court "used a computer search to examine cases reviewed by the Supreme

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[725] *United States v. Curtis (II)*, 33 M.J. 101, 109 (C.M.A. 1991).
[726] *United States v. Curtis (III)*, 44 M.J. 106, 165 (C.A.A.F. 1996).
[727] *Id.* (quoting *United States v. Curtis*, 38 M.J. 530, 543 (N.M.C.M.R. 1993)).
[728] *Curtis* (III), 44 M.J. at 165 (citing *Loving*, 41 M.J. at 290-91).

Court . . . concluding 'that the sentence is generally proportional to those imposed by other jurisdictions in similar situations.'"[729]

Argument

Appellant's argument is that his death sentence should be set aside because Sergeant William Kreutzer, Jr. was not sentenced to death.[730] Beyond appellant's superficial comparisons,[731] the fact that SGT Kreutzer's death sentence was overturned on appeal, and that he received a life sentence on remand, does not mean that appellant receives a free pass on his death sentence. Furthermore, CAAF specifically rejected comparisons to cases that could potentially be capital, but were not adjudged a death sentence for one reason or another.[732] Therefore, *Kreutzer* is not an appropriate case for sentence comparison.

Even if a comparison were done, there are several facts that distinguish appellant's case from SGT Kreutzer's. First, SGT Kreutzer originally received a death sentence, and no Court ever stated that his death sentence was inappropriate under

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[729] *Loving*, 41 M.J. at 290-91 (quoting *Loving*, 34 M.J. at 969).
[730] *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 293 (C.A.A.F. 2005). SGT Kreutzer's case was returned to the convening authority, where he ultimately pled guilty as part of a pretrial agreement for a non-capital referral. See Army Docket No. 19961044; *United States v. Jones*, 64 M.J. 596, 599 (Army Ct. Crim. App. 2007) (citations omitted) (appellate courts may take judicial notice of their own records).
[731] AB at 401-02.
[732] *Curtis (III)*, 44 M.J. at 165 (citation omitted).

Article 66, UCMJ.[733] The findings and sentence in *Kreutzer* were overturned on a legal error.[734] Second, while SGT Kreutzer wanted to kill more people, he managed to only murder one,[735] as opposed to the two murders committed by appellant. Third, on remand, SGT Kreutzer offered to plead guilty in exchange for a non-capital referral;[736] an offer that appellant specifically withdrew and never re-submitted.[737] In fact, in his R.C.M. 1105 matters, appellant claimed that he was not really guilty.[738]

Fourth, appellant's crimes also had the extra impact of being in a combat zone while his unit was about to go to war. Such a factor will not be found in many military cases, and will be non-existent in a survey of civilian cases. These types of distinctions are important to note because it reaffirms the long-standing truism that no two cases are the same, and generalized comparisons must be treated with care.

Furthermore, this Court should look to other affirmed death penalty cases within the military and in the civilian world to see if appellant's crimes fall within the range of murderers approved for a death sentence.[739] In *Loving*, the accused also

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[733] *Kreutzer*, 59 M.J. at 774.
[734] *Id.* at 780-81, and 784.
[735] *Id.* at 774-75.
[736] *Kreutzer*, Army Docket No. 19961044.
[737] GAE 1 at 6-9; *Allied Papers* (ROT Vol. I), *Memorandum for Record, Re: U.S. v. Akbar Offer to Pled Guilty*, dtd 1 April 2005 and *Offer to Plead Guilty*, dtd 20 June 2003.
[738] Allied Papers (ROT Vol. I), Handwritten Letter to Convening Authority, Stamped received on 5 May 2006.
[739] *Curtis* (III), 44 M.J. at 165 (citing *Loving*, 41 M.J. at 290-91).

killed two fellow Soldiers, albeit in a different context, as well as committed a string of robberies.[740] PVT Loving murdered two taxi drivers; PVT Christopher Fay, who was an active duty Soldier working part-time as a taxi driver to earn extra money, and MSG(Ret.) Bobby Sharbino.[741] PVT Loving's death sentence for these two murders was affirmed by this Court, CAAF, and the Supreme Court of the United States, and has survived repeated collateral challenges.[742]

In *Gray*, the accused was convicted of raping and murdering a female civilian, and a female Soldier, as well as raping and attempting to rape another female Soldier.[743] SPC Gray was also convicted in North Carolina State court of two additional premeditated murders of separate victims.[744] SPC Gray's death sentence was affirmed by both this Court and CAAF, denied review by the Supreme Court, and approved for execution by the President.[745] While these cases all present unique facts, they do not vary in such a degree as to call appellant's sentence of death "disproportionate."

When compared to civilian cases, as this Court did in *Loving*, appellant's case falls well within the range of

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[740] *Loving*, 41 M.J. at 229-31.
[741] *Id.*
[742] Loving, 68 M.J. at 2-5.
[743] *Gray*, 51 M.J. at 10-11.
[744] *Id.* at 11.
[745] Id., *cert. denied*, 532 U.S. 919 (2001). Gray is presently challenging his execution order in the Federal District Court of Kansas. See *Gray v. Gray*, 5:08-cv-03289-RDR.

premeditated murder cases that received a death sentence. As noted above, in *Smith v. Spisak*, the Supreme Court affirmed a death sentence for Spisak's murder of three people and attempted murder of a two others, despite evidence "that Spisak suffered from some degree of mental illness . . ." including " . . . schizotypal and borderline personality disorders characterized by bizarre and paranoid thinking, gender identification conflict, and emotional instability[,]" that "'substantially impair his ability to conform himself" to the law's requirements.'"[746] Spisak is presently scheduled for execution on 17 February 2011.[747]

The state of Ohio executed Mark Brown on 4 February 2010.[748] Brown was convicted and sentenced for the murder of two men in a convenience store.[749] During its proportionality review, the Ohio Supreme Court noted:

> [Brown's] history, character, and background provide some mitigation. He grew up in an unstable home environment. He moved around a great deal and was frequently left to live with persons other than his mother or, when he was with his mother, was expected to care for himself. [Brown] was also surrounded by drug and

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[746] *Spisak*, 130 S.Ct. at 687.
[747] Ohio Department of Rehabilitation and Correction Execution Schedule at http://www.drc.ohio.gov/Public/executionschedule.htm (last visited, 25 October 2010).
[748] Ohio Department of Rehabilitation and Correction, Ohio Executions - 1999 to Present at http://www.drc.ohio.gov/web/Executed/executed25.htm (last visited, 27 October 2010).
[749] *State v. Brown*, 796 N.E.2d 506, 519 (Ohio 2003), *cert denied*, 540 U.S. 1224 (2004). See also *Brown v. Bradshaw*, 531 F.3d 433 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 1617, 173 L.Ed.2d 1002 (2009).

> alcohol abuse, and was sexually abused at an early age.[750]

Despite finding these mitigating factors, the Ohio Court gave them little weight in light of the fact that there "was no evidence that the victims induced or facilitated the murders. Nor was there sufficient evidence of duress, coercion, or strong provocation[.]"[751] Furthermore, the Ohio Court noted that Brown's death sentence was "appropriate and proportionate when compared to similar capital crimes involving the purposeful killing or attempt to kill two or more persons."[752]

Similarly, the mitigation evidence appellant presented at trial, as well as the alleged additional mitigation evidence appellant now claims should have been presented at trial, pales in comparison to the aggravating nature of his crimes and the impact on his victims.[753] Appellant's death sentence is both appropriate and proportionate when comparing to similar capital crimes involving the killing or attempted killing of two or more persons,[754] accounting for the uniquely aggravating circumstances

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[750] *Brown*, 796 N.E.2d at 520. The Ohio Court also noted that appellant suffered from substance and borderline personality disorder. *Id.*
[751] *Id.* (citations omitted).
[752] *Id.* (citing State v. Taylor, 781 N.E.2d 72 (Ohio 2002); State v. Davie, 686 N.E.2d 245 (Ohio 1997); *State v. Lundgren*, 653 N.E.2d 304 (Ohio 1995).
[753] See *Loving*, 68 M.J. 17-18.
[754] *Loving*, 41 M.J. at 290-91 (quoting *Loving*, 34 M.J. at 969); *Brown*, 796 N.E.2d at 520. *See also Elliott v. Commonwealth*, 593 S.E.2d 270, 291 (Va. 2004), *cert. denied*, 543 U.S. 1081 (2004); *Hill v. State*, 688 So.2d 901, 902-03, 907 (Fla. 1996), *cert. denied*, 522 U.S. 907 1997); *State v. Boyd*, 473 S.E.2d 327, 330-31, 340 (N.C. 1996), *cert. denied*, 519 U.S. 1096 (1996); *Osborne v. State*, 430 S.E.2d 576, 576-77, 579 (Ga. 1993), *cert. denied*, 510 U.S. 1170 (1994); *State v. Smith*, 32 S.W.3d 532 (Mo. 2000), *cert. denied*, 540 U.S. 978 (2003).

of appellant attacking and murdering members of his own unit on the eve of combat.

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.

Additional Facts

On 7 August 2008, twenty months after his case was docketed with this Court, appellant submitted a motion for appointment and funding (in the amount of $67,500) for a forensic psychologist and a forensic psychiatrist. The Government submitted a response in opposition. On 29 August 2008, this Court issued an order denying appellant's request without prejudice, advising that appellant should first take his request to the appropriate convening authority.

On 9 September 2008, appellant submitted his request for expert assistance to the Commander of Fort Sill, the current convening authority for appellant. On 19 November 2008, the Commander of Ft. Sill formally requested that the Commander of Ft. Leavenworth accept jurisdiction of appellant's case for purposes of post-trial actions. The Acting Commander of Ft. Leavenworth accepted jurisdiction over appellant's case on 21 November 2008. On 3 December 2008, acting on advice from his

Staff Judge Advocate, the Acting Commander of Ft. Leavenworth denied appellant's request.

Appellant filed a second motion with this Court for appointment of his experts on 12 December 2008. The Government filed a brief in opposition on 24 December 2008. On 19 February 2009, this Court heard oral argument on appellant's motion and conducted a scheduling conference. On 20 February 2009, this Court issued an order denying appellant's motion for psychiatric experts. On 19 May 2009, appellant filed a petition for extraordinary relief with CAAF, asking CAAF for a writ of mandamus to this Court for an order to the Government to provide psychiatric experts. CAAF stayed the appellate proceedings and issued a show-cause order to the Government on 23 June 2009. CAAF denied appellant's petition for extraordinary relief on 3 September 2009.

Law and Argument

"[I]t is well-established that an accused service member has a limited right to expert assistance at government expense to prepare his defense."[755] Rule for Courts-Martial (R.C.M.) 703 and applicable case law lay out the factual predicate an accused must establish before expert assistance is required.[756] A

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[755] *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).
[756] *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).

service court's decision on whether to grant funding for expert assistance is reviewed for an abuse of discretion.[757]

To be entitled to expert assistance at government expense, appellant is required to show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the defense; and (3) why defense counsel are unable to gather and present the information that the expert assistance would be able to develop.[758] This same standard applies to both capital and non-capital cases.[759] In denying appellant's earlier motion, this court cited the three-pronged standard.[760] Appellant's assignment of error is nothing more than a belated motion for reconsideration, where appellant attempts to fill the myriad holes in the arguments and evidence he presented to this Court and CAAF the first time he attempted to litigate this issue. However, appellant is as unsuccessful now as he was then in establishing the necessity for additional experts and testing.

Appellant relies on both *United States v. Murphy*[761] and *United States v. Kreutzer*.[762] However, these cases do not address the issue before this Court. First, as appellant acknowledges,[763] in *Murphy* and *Kreutzer*, the Government provided

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[757] *Gray*, 51, M.J. at 20 (citations omitted).
[758] *Gonzalez*, 39 M.J. at 461.
[759] *Gray*, 51 M.J. at 20 (citing *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985)); *Kreutzer*, 59 M.J. at 776 (citing *Gonzalez*, 39 M.J. at 461).
[760] *See* Order, dtd 20 February 2009.
[761] 50 M.J. 4 (C.A.A.F. 1998).
[762] 61 M.J. 293 (C.A.A.F. 2005).
[763] AB at 415-16.

expert assistance; therefore, the legal issue of whether the defense met their burden in those cases was never litigated. Second, in *Murphy* no mental health evidence was presented during trial,[764] and in *Kreutzer* the record only contained the testimony of the sanity board doctor (who happened to be Dr. Diebold),[765] without additional evidence from the defense's own mental health experts.[766]

Appellant's attempt to distinguish *United States v. Gray*, which is directly on point with this issue, fails.[767] In *Gray*, this Court denied a request for additional psychiatric experts.[768] CAAF then denied two petitions for extraordinary relief aimed at compelling this Court to provide the experts.[769] On direct review under Article 67, UCMJ, CAAF upheld this Court's decision in *Gray*, laying out the proper standard and scope of review.[770] In *Gray*, CAAF held that because this Court "had a sufficient basis in the record for considering the mental-state issues before it," additional defense expenditures were not reasonably necessary.[771] Similarly, there is more than sufficient evidence in appellant's record of trial for all parties to adequately address appellant's claims regarding his

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[764] *Murphy*, 50 M.J. at 9-10.
[765] *Kreutzer*, 59 M.J at 776, 781-82.
[766] *Id.* at 783-84.
[767] AB at 420-23.
[768] *Gray*, 51 M.J. at 20.
[769] *Id.* (citing 34 M.J. 164 (1991) and 40 M.J. 25 (1994)).
[770] *Id.* at 20-21.
[771] *Gray*, 51 M.J. at 21 (citations omitted).

mental health. From the date of his murders, appellant was repeatedly examined by psychiatrists, psychologists, neuropsychologists, neuropsychiatrists, and social workers.

Appellant mischaracterizes the testimony and post-trial declarations of Dr. Woods, attempting ad hoc rationalizations of Dr. Woods' dubious claims that he was hamstrung by trial defense counsel.[772] When Dr. Woods testified that he had "everything" he needed, he was not simply referring to what was in the sanity board, as appellant claims.[773] The trial counsel went through an exhaustive list of the items Dr. Woods had before testifying.[774]

Missing from appellant's argument (again) is any mention of Dr. David Walker, who was assigned to the trial defense team and assisted the defense throughout the trial. Appellant fails to acknowledge that Dr. Walker was present during and consulted with the sanity board, and concurred with their diagnosis of appellant.[775]

Appellant's own records establish that he underwent a battery of neuropsychological tests between May 27-29, 2003, and that these tests were reviewed by Dr. Clement in March of 2005, in consultation with Dr. Woods.[776] These tests included:

1. Clinical Interviews
2. Wechsler Adult-Intelligence Scale III

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[772] AB at 407-08.
[773] AB at 407 n.71.
[774] R. 2313-16.
[775] DAE BB (DA 238); GAE 1 at 19.
[776] DAE M (DA 60-63); (DA 249-53).

3. Halstead-Reitan Battery
   a) Category Test
   b) Tactual Performance test
   c) Seashore Rhythm test
   d) Speech Sounds perception test
   e) Manual finger tapping test
   f) Trail making test A and B
4. Wisconsin Card Sorting Test
5. California Verbal Learning Test
6. Wechsler Memory Scale III, Logical Memory I and II and Visual Reproduction I and II.
7. Selective Reminding Test
8. Rey-Osterrieth Complex Figure
9. Portland Digit Recognition Test
10. MMPI-2
11. Beck Depression Inventory-2 (BDI-2).[777]

Dr. Diebold discussed this "battery of psychiatric tests" during his testimony.[778] Dr. Woods concluded at trial that, of these numerous tests, the MMPI was the "most important."[779] Finally, when MAJ [redacted] specifically asked Dr. Woods what additional testing he wanted on 30 March 2005 (twenty days before he testified),[780] Dr. Woods mentioned only an "MMPI-II and a Personality Assessment Inventory."[781]

Appellant's reliance on his own mitigation specialist, as well as arguing that the 482-page brief he submitted to this Court is deficient because he didn't have psychiatric experts,[782] is a self-serving endorsement. Appellant's argument is predicated on his conclusory assertion that he received

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[777] *Id.*
[778] R. 2510-11.
[779] R. 2264.
[780] GAE 10 at 122.
[781] GAE 10 at 123.
[782] AB at 406-411.

ineffective assistance of counsel at trial;[783] an argument that is contradicted by the record. Appellant does not want or need experts to understand the record or to assess the performance of trial defense counsel; appellant has already made clear his claims. Appellant's goal is to manufacture new mental health evidence, through his own hand-picked experts, that he believes will be more favorable for his appeal than the voluminous mental health evidence in the record of trial.

However, the appellate courts "do not welcome descent into the 'psycholegal' quagmire of battling psychiatrists and psychiatric opinions, especially when one side wages this war against its own experts by means of post-trial affidavits."[784] Appellant was examined by at least eight different psychiatrists and psychologists during the pendency of his trial, three of whom were working directly for the defense,[785] which included an entire battery of neuropsycholgical testing and even a "brain

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[783] AB at 407.

[784] *Gray*, 51 M.J. at 17 (citation omitted).

[785] Dr. [redacted] (neuropsychologist) and Dr. [redacted] (forensic psychiatrist) served on the first sanity board (DAE BB). Dr. [redacted] (forensic psychiatrist) conducted a second sanity board after appellant stabbed SPC [redacted] (AE 184). Dr. Walker (forensic psychologist), Dr. Woods (forensic neuropsychiatrist), Dr. Clement (neuropsychologist), and Dr. Tuton (appellant's childhood psychologist) were all assigned as experts for the defense. Dr. Walting was a neurologist who examined appellant in June of 2004 and again in 2005 due to his "arousal" problems (i.e. "excessive sleepiness") (DAE D (DA 8-12); DE LL). Furthermore, appellant received psychiatric examinations by Dr. (COL) Randy Dymond, and Dr. (COL) John Richmond while he was in the Regional Confinement Facility at Ft. Knox (GAE 3 at 6-16). One cannot imagine how many more doctors could possibly examine appellant.

scan."[786] The fact that appellant can hire new doctors that might diagnose him differently does not mean that appellant's mental health examinations were inadequate or that he is entitled to new experts. "We initially note that divergence of opinion among psychiatrists is not novel and does not provide a legal basis for concluding that one or the other is performing inappropriate tests or examinations. In *Ake*, the Supreme Court said: 'Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on care and treatment, and on likelihood of future dangerousness.'"[787]

The issue and exploration of petitioner's mental health is not a new subject in this case, but was heavily litigated at the trial court below.[788] There is simply no right to continue testing appellant until the defense gets the diagnosis they desire.

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[786] DAE BB at 12 (DA 249).
[787] 51 M.J. at 17 (quoting *Ake*, 470 U.S. at 81).
[788] R. 2013-65 (Testimony of Dr. Tuton); R. 2226-2421 (Testimony of Dr. Woods); R. 2596-2622 (Defense argument for findings where mental illness is discussed); R. 3112-3134 (Defense argument for sentencing where mental illness is discussed); DEs C, D, BB, CC, DD, EE, and RR (exhibits all relating to mental health); DAE M (Dr. Clement's report); DAE BB (first R.C.M. 706 report); GAE 3 (documents considered by Dr. Woods and psychiatric assessments of appellant while in pretrial confinement); and GAE 10 (e-mails between trial defense counsel and mental health experts).

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.

Law and Argument

First, appellant is not entitled to a *DuBay* hearing to assess his competency at the time of trial. Both sanity boards, Dr. Walker, Dr. Clement, and even Dr. Woods acknowledged that, at the time of the offense and the time of trial, appellant was mentally responsible and competent. None of the lawyers, mental health professionals, or "mitigation specialists" present at trial claimed that appellant did not understand the nature of his trial or that he was unable to assist his defense during his trial due to a mental illness. There is no factual dispute that needs be resolved by a *DuBay* hearing.

Second, a *DuBay* hearing is not the appropriate vehicle for a competency determination on appeal. Pursuant to Rule for Courts-Martial (R.C.M.) 1203(c)(5), an appellant is presumed to be competent, absent "substantial evidence to the contrary."[789] If a "substantial question" is raised regarding an appellant's mental health status at the time of appeal, a Service Court may order an inquiry into his competency, in accordance with R.C.M.

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[789] R.C.M. 1203(c)(5).

706, though the inquiry "may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings."[790]

Appellate defense counsel fail to establish a "substantial basis" for questioning the presumption of appellant's competence at trial or appeal. After being challenged by the Government to provide some evidence to support their claims,[791] appellate defense counsel filed an affidavit with this court that is wholly inadequate to support a claim of incompetence.[792] Appellate defense counsel provide a list of unverified and undocumented instances of appellant acting "strangely."[793] The fact that appellant, while serving as a death sentenced inmate, is not the model prisoner is neither surprising nor significant. Also, appellant's documented instances of feigning and exaggerating mental health symptoms call into question the legitimacy of relying on his "strange behavior" as a barometer for his actual mental competency.[794] Appellant has been in custody at the USDB for over five years, yet appellate defense counsel have not provided this court a single document that

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[790] *Id.*
[791] See *Akbar v. United States*, Misc. Nos. 09-8025/AR and 09-8026 (C.A.A.F. 2009), *Respondent's Consolidated Response . . . .*, dtd 9 July 2009, pages 35-36, FN 202.
[792] DAE II (DA 376-79).
[793] *Id.*
[794] See GAE 3 at 6-16.

might call the numerous mental health evaluations he received at the time of trial into question.

When the two appellate defense counsel who signed the affidavit filed motions with this Court on 9 July 2010 to be released from representation, both counsel claimed that they informed appellant, but made no mention that appellant lacked an understanding of their release.[795] When civilian defense counsel withdrew from the case on 29 December 2009 he stated that appellant explicitly told him he was fired.[796] The fact that appellant may not like or be very interested in his lawyers does not mean that he is incompetent. The standard is that appellant is unable to understand the nature of the appellate proceedings or is unable to assist in his appeal.[797] Appellant's ability to assist in his appeal must be viewed in context; a murderer sitting at the USDB awaiting execution. There is no evidence that appellant is unaware of the consequences of his court-martial, sentence, or appeal.

Appellant has shown that he is capable of understanding the post-trial process. Appellant submitted two letters to the convening authority as part of his R.C.M. 1105/1106 matters.[798] Both letters are written in a clear and lucid manner, and

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[795] See *Motions of Major Timothy Thomas and Captain Shay Stanford To Withdraw as Counsel of Record*, dtd 9 July 2010.
[796] See *Motion of Louis P. Font to Withdraw*, dtd 28 December 2009.
[797] R.C.M. 1203(c)(5).
[798] Allied Papers (ROT Vol. I), 39-Page Clemency Submission, Including Letters to Convening Authority From Appellant.

demonstrate an understanding of the post-trial process. Appellant wrote that he understood the Convening Authority had the power to take action on the findings and sentence of his case, that he lied when he confessed to the murders, that he was not really guilty of the murders, that he worked hard to make a better life for himself and go to college, and that he would like to return home to his family.[799]

All of the evidence before this Court demonstrates that appellant is well aware of the nature of his appeal and is participating as he sees fit. Appellate defense counsel fail to present substantial evidence to call the presumption of appellant's competence into question. There is no need for a *DuBay* hearing, or a third sanity board, in order for this court to complete appellate review.

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.

Law and Argument

Appellant never offered a plea of guilty. In fact, appellant is still claiming that he's not guilty of the offense.[800] However, even assuming appellant wanted to plead guilty, this claim was rejected by CAAF in 1983 in *United States*

[799] *Id.* at 1-2. The fact that appellant lied in his post-trial letters does not mean he is incompetent; sane people lie every day.
[800] *Id.*

v. Matthews,[801] in 1994 in *United States v. Loving*,[802] and again in 1999 in *United States v. Gray*.[803] Appellant tacitly acknowledges that he has no constitutional right to plead guilty,[804] but instead argues that the policy behind Article 45's prohibition against pleading guilty in a capital court-martial is unsound. However, this is not a court of public policy.

Furthermore, appellant was not forced to "assert his innocence."[805] "Innocence" is not the same as being "not guilty;" a distinction that is important in American judicial jurisprudence.[806] It is not the plea itself that is mitigating, but the acceptance of responsibility. Nothing in Article 45, UCMJ, prohibits an accused from accepting responsibility for his actions; from testifying on his own behalf at findings while expressing remorse; or from stipulating to the Government's

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[801] 16 M.J. 354, 362-3 (C.M.A. 1983).
[802] 41 M.J. 213, 292 (C.A.A.F. 1994).
[803] 51 M.J. 1, 49 (C.A.A.F. 1999).
[804] Appellant is correct that many states have adopted a policy of allowing guilty pleas in capital cases. AB at 434 n.83. However, the military justice system does not stand alone as the only jurisdiction that prohibits guilty pleas in capital cases. In Alabama an accused may only plead guilty to a capital offense if the prosecutor firsts waives the death penalty. A.C.A. § 5-4-608 (1977); see *Hayes v. State*, 660 S.W.2d 648, 654 (Ark. 1983), *cert. denied*, 465 U.S. 1051 (1984). ("There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate [] the procedures governing jury trials for persons charged with capital murder."). Louisiana has a similar provision, allowing a plea of guilty to a capital offense only if the accused stipulates to a sentence, sans sentencing hearing, of life without parole. LSA-C.Cr.P. Art. 557 (1995).
[805] AB at 439.
[806] "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof." *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999).

evidence. Trial defense counsel embraced this fact in his opening statement:

> The defense isn't here to contest what happened. Yes. The facts will show that Sergeant Akbar threw those grenades. Yes. The facts will show 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.[807]

This simple statement demonstrates that a defense counsel does not need to make a "novel" argument to the panel during findings just because it is a contested court-martial.[808]

Appellant was not denied a "meaningful-opportunity-to-be-heard."[809] When appellant took the stand to speak to the panel, he simply stated, "I want to apologize for the attack that occurred. I felt that my life was in jeopardy, and I had no other options. I also want to ask you to forgive me."[810] Appellant could have taken the stand at any time he chose and given a detailed description of his attack, expressed remorse for the murder and mayhem he inflicted, and accepted responsibility for his actions. It is clear from his unsworn testimony that appellant did not believe those things.

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[807] R. 1211-12.
[808] AB at 438.
[809] *Id.*
[810] R. 3074.

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.

Law and Argument

The foundation of appellant's argument is the flawed premise that Due Process and Equal Protection require that the decision to pursue a death penalty case within the military justice system must be the same as the one followed by the Department of Justice, pursuant to the United States Attorney's Manual (USAM).[811] However, the foundation of an Equal Protection Claim is that rights conferred upon one group of people must be extended to others in a similar situation. The problem with appellant's argument is that the federal courts have consistently held that the procedures found within the USAM do not confer any substantive or procedural rights upon those accused of capital crimes. "That the Department of Justice has developed an internal protocol for exercising discretion and channeling prosecutorial resources does not provide license for courts to police compliance with that protocol, and it is well established that the *Petite* policy and other internal

[811] AB at 440-56.

prosecutorial protocols do not vest defendants with any personal rights."[812]

In *United States v. Lopez-Matias*, the U.S. Court of Appeals for the First Circuit agreed that the USAM does not create any personal rights,[813] finding that even if the Department of Justice failed to comply with its own USAM, that would not create a right to relief.[814] "We are reluctant to interfere with internal prosecutorial measures by elevating internal guidelines to the level of a guarantee to defendants."[815] Article 36(a), UCMJ, authorizes the President to promulgate "pretrial, trial, and post-trial procedures . . . 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."[816] The USAM is neither a principle of law nor rule recognized by the United States District Courts. The provisions of the USAM offer no legal

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[812] *United States v. Jackson*, 327 F.3d. 273, 295 (4th Cir. 2003), *cert. denied*, 540 U.S. 1019 (2003).
[813] 522 F. 3d 150, 155-56 (1st Cir. 2008) (citing *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990); *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001) (United States Attorneys' Manual not enforceable by individuals); *Nichols v. Reno*, 124 F.3d 1376, 1376 (10th Cir. 1997) (defendant has no "protectable interest" in enforcement of death penalty protocols); *United States v. Myers*, 123 F.3d 350, 355-56 (6th Cir. 1997) ("[A] violation by the government of its internal operating procedures, on its own, does not create a basis for suppressing ... grand jury testimony."); *United States v. Gillespie*, 974 F.2d 796, 800-02 (7th Cir. 1992); *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987)).
[814] *Lopez-Matias*, 522 F. 3d at 156.
[815] *Id.*
[816] UCMJ art. 36(a).

protections to any accused within the civilian federal system. Appellant cannot be denied legal protections that do not exist.

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

Article 25, UCMJ, sets forth the eligibility of military personnel to serve on courts-martial and instructs the convening authority to detail as members of a court-martial those who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[817] In 2008, CAAF held in *United States v. Bartlett* that a convening authority may not restrict panel membership according to the guidance published in 2005 by the Secretary of the Army in Army Regulation (AR) 27-10.[818]

If the Court determines that the convening authority erred in his selection of panel members, the burden of demonstrating material prejudice to appellant's substantial rights, or the lack thereof, "depends on the manner in which the error

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[817] UCMJ art. 25. *See also* R.C.M. 502(a).

[818] *United States v. Bartlett*, 66 M.J. 426, 427 (C.A.A.F. 2008) (holding that AR 27-10 ch. 7 impermissibly contravened provisions of Art. 25); U.S. Dep't of Army, Reg. 27-10, *Legal Services: Military Justice*, ch. 7 (6 September 2002). Appellant's case was tried before CAAF's decision.

occurred."[819] Where the error resulted from unlawful command influence, the Government must establish that the error was harmless beyond a reasonable doubt.[820] If the convening authority erred in his attempt to comply with the requirements of Article 25, UCMJ, it is the Government's burden "to demonstrate lack of harm."[821] Where there is a simple administrative error, appellant must show prejudice in order to receive relief.[822]

Argument

Appellant claims that the convening authority impermissibly applied AR 27-10 in making his selections, based solely on the existence of the regulation.[823] However, appellant's failure to raise and litigate this issue at trial puts him on different evidentiary level as the accused in *Bartlett*. "[F]ailure to raise the issue of a systemic exclusion of a group is waived if the issue is not raised when it is discovered."[824] The military

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[819] *Bartlett*, 66 M.J. at 430.
[820] *Id.*
[821] *Id.*
[822] *Id.*
[823] AB at 463. Appellant's court-martial was convened by Commander, Headquarters, XVIII Airborne Corps and Fort Bragg pursuant to Court-Martial Convening Order No. 2, dtd 19 February 2004; superseded by Court-Martial Convening Order No. 1, same Headquarters, dtd 20 January 2005; amended by Court-Martial Convening Order No. 3, same Headquarters, dtd 1 March 2005; amended by Court-Martial Convening Order No. 5, same Headquarters, dtd 4 March 2005; amended by Court-Martial Convening Order No. 8, same Headquarters, dtd 4 April 2005. R. 1, 670, 699-700; AE 175.
[824] *Curtis*, 44 M.J. at 132-33 (citing R.C.M. 912(b)(3), *People v. Blackwell*, 646 N.E.2d 610 (Ill. 1995) and Fed.R.Crim.P. 12(b)). In *Curtis*, CAAF found that allegations of the convening authority violated Article 25, UCMJ, by systematically excluding enlisted members and women from the panel were waived. "If the defense wanted to explore the convening authority's role and

judge specifically asked if there was any objection to the manner in which Lieutenant General (LTG) Vines or Major General (MG) Packett personally selected and detailed the members of the panel, and the defense responded there was not.[825] This followed a prior motion by the defense challenging the court-martial composition on separate grounds.[826]

By contrast, in *Bartlett*, the accused specifically requested a new panel on the grounds that the Secretary of the Army impermissibly limited the pool of eligible officers available in Chapter 7 of AR 27-10.[827] The accused in *Bartlett* established that the convening authority acted in accordance with those limitations and the parties stipulated that eleven officers within that particular GCMCA were available for panel duty but fell into one of the excluded categories.[828] No such evidence or findings were adduced during appellant's trial.

Beyond citation to the regulation itself, appellant fails to address his evidentiary burden in establishing a *prima facie* case that the convening authority *in his case* impermissibly limited his choices in selecting panel members within the confines of Article 25, UCMJ. The record does contain LTG

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knowledge, they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived." *Id.* at 133.

[825] R. 785.

[826] AE XIII. Appellant moved to dismiss the panel on the grounds that allowing the convening authority to select the panel members violated his right to due process. *Id.* There was no challenge to the convening authority's actual selection of the panel members.

[827] *Bartlett*, 66 M.J. at 427.

[828] *Id.*

Vine's December 2003 solicitation for nominees used in the initial selection of the court-martial panel used in appellant's case.[829] The memorandum references the provisions in AR 27-10, Chapter 7 that were found improper in *Bartlett*.[830] When a new panel was selected in January of 2004 because appellant's continuances necessitated replacing the existing members, the SJA's advice also references the limitations in AR 27-10.[831]

However, had appellant raised the issue at trial, the Government would have pointed to additional evidence that shows that all members of the convening authority's command were considered during the selection process.[832] Eight days after the new court-martial panel was selected by LTG Vines, MG Packett took over XVIII Airborne Corps as the Acting Commander and convening authority.[833] In advising MG Packett on his adoption of the court-martial panel, the Acting SJA advised on the criteria set forth in Article 25, UCMJ, without any reference to the limitations of AR 27-10, and further advised that "You may adopt the current panel members, select anyone who was nominated but not selected, or choose *anyone* in your court-martial jurisdiction for service as a court member provided they meet

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[829] AE 78.
[830] *Id.*
[831] GAE 11 at 2. LTG Vines' selection of the new panel members was not included as an appellate exhibit, though MG Packett's adoption of the panel and the special instructions for appellant's court-martial were included (AEs 164 and 166). The Government submitted the additional selection documents as GAE 11.
[832] AE 166.
[833] AE 165.

the Article 25 criteria listed above."[834] Therefore, even if there was error in originally advising on the restrictions in AR 27-10, the error was not plain and obvious given that trial defense counsel told the military judge they had no objection to the final selection the panel,[835] and the military judge had before him documentation that the new convening authority was advised that he could select anyone in his command.

Even assuming that the convening authority did err in selecting the panel, and that such error was plain and obvious,[836] any such error was demonstrably harmless.[837] In *Bartlett*, CAAF found that excluding the branches designated in AR 27-10 did not constitute structural error and examined six factors to determine whether the Government had demonstrated

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[834] AE 166 (emphasis in original).

[835] R. 785. Appellant may attempt to add trial defense counsel's decision not to raise the issue to his laundry list of ineffective assistance of counsel claims. However, appellant's trial was in 2005, three years before CAAF issued its *Bartlett* decision. Prior to *Bartlett*, there was no precedent to support AR 27-10, chp. 7 was invalid. In fact, even this Court held in its review of *Bartlett* in 2007 that the provisions did not violate Article 25, UCMJ. *United States v. Bartlett*, 64 M.J. 641, 644-48 (Army Ct. Crim. App. 2007). Therefore, trial defense counsel's waiver of the issue could not be said to fall "measurably below" the standards of effective representation.

[836] At the time of appellant's trial, the propriety of AR 27-10, ch. 7 was an unsettled question of law. Because it was unsettled at the time of the court-martial, this court considers whether the error was plain and obvious at the time of trial, and not at the time of appeal. *United States v. Harcrow*, 66 M.J. 154, 161-63 (C.A.A.F. 2008) (Ryan, J. concurring; Effron, C.J. and Stucky, J. concurring separately in the result). *See also United States v. Mouling*, 557 F.3d 658, 663-65 (D.C. Cir. 2009) (holding that where the law is unsettled and subsequently becomes settled, the law at the time of trial should be applied), *cert. denied*, 130 S.Ct. 795 (Dec. 7, 2009).

[837] Assuming error, this Court applies the intermediate level of review set forth in *Bartlett*, where an intentional exclusions of certain Soldiers by the convening authority that were done in an attempt to comply with Article 25, UCMJ. 66 M.J. at 430. In such cases, the Government must demonstrate lack of harm. *Id.*

harmlessness.[838] Applying the *Bartlett* factors to this case, appellant's claim of prejudice fails.

First, as in *Bartlett*, there is no evidence that the Secretary of the Army enacted AR 27-10 with an improper motive.[839] Second, there is no evidence that the convening authority's motivation in detailing members to appellant's court-martial was anything other than a desire to comply with a facially valid regulation.[840] Third, the convening authority that referred appellant's case to trial was authorized to convene a general court-martial. Fourth, appellant was sentenced by court-martial members personally chosen by the convening authority from a pool of eligible officers.[841] Fifth, the court members all met the criteria set forth in Article 25, UCMJ.[842]

Sixth, the panel hearing appellant's case was "well-balanced across gender, racial, staff, command, and branch lines."[843] The panel that sat for appellant's case started with twenty members, twelve officers and eight enlisted members.[844] After *voir dire* and the exercise of challenges, there were

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[838] *Id.*
[839] *Id.*
[840] *Id.* In ruling on defense's other challenge, the military judge found that there was no "nefarious purpose" in the convening authority's selection of panel members. R. 196.
[841] AE 175; GAE 11.
[842] AE 149.
[843] *Bartlett*, 66 M.J. at 430 (internal quotation marks omitted); R. 932.
[844] AE 175; R. 796.

fifteen members, nine officers and six enlisted.[845] The panel included Caucasians, African-Americans, Hispanics, women, and varied job backgrounds to include aviation, ordnance, field artillery, signal, logistics, military police, pharmacy, mechanics, and petroleum supply.[846] Several panel members had taken educational classes in biology, psychology, sociology, psychiatry and philosophy.[847]

Appellant's argument is that "[m]embers 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 . . . at trial. Furthermore, members of the medical community could have countered the views and input of panel members with preconceived notions about mental illness[,]" and the "specialized knowledge" of Islam by chaplains could have altered the outcome of his trial.[848] Such an argument is entirely speculative and is based on impermissible grounds on which to select a panel.

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[845] The Government and defense agreed on the removal of Major [redacted] Sergeant Major [redacted] and First Sergeant [redacted] (R. 1171), and the defense's unopposed challenge to Major [redacted] was granted (R. 1174-75).
[846] R. 932; AE 149; GAE 11 at 13-39. The final panel had five African Americans (LTC [redacted] MAJ [redacted], CSM [redacted], MSG [redacted] and SFC [redacted], two women (LTC [redacted] and MSG [redacted] and one Hispanic (CSM [redacted] (R. 932; GAE 11 at 13-29). LTC [redacted] was identified as "AI" (GAE 11 at 19), which the Government cannot identify.
[847] AE 149.
[848] AB at 464.

First, panel members are supposed to bring their generalized knowledge and experience, but that does not require some panel members have specialized skills in which to consider evidence or to influence other members of the panel.[849] Second, all members of the panel, including LTC Armsworth,[850] expressed that mental health evidence was important and that they would consider it in its proper context.[851] Third, there was nothing in the trial that required a "specialized knowledge" of Islam.[852] Appellant's religion was only discussed in the context of his alienation within the unit, and no argument was ever made that Islam as a religion forced appellant to commit murder. In fact, the panel certified that appellant's religion did not influence their decision in rendering a verdict or sentence.[853]

Appellant's argument that his case is different than *Bartlett* because *Bartlett* was a guilty plea and because it only

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[849] *See United States v. Straight*, 42 M.J. 244, 250 (C.A.A.F. 1995).
[850] Appellant signals out LTC [redacted] claiming that he "expressed skepticism regarding the fields of psychology and psychiatry." (AB at 464 citing R. 971). However, if the Court looks at all of the *voir dire* examination, it will see that LTC [redacted] father was a practicing psychotherapist and social worker, and LTC [redacted] agreed that mental illness impacts a sentencing decision because "sometimes when events start going down a certain path, that train just keeps building and building. And really it has -- they have no control over events that follow." R. 975-76, 978-79.
[851] R. 837-40, 847-50, 899-900, 921-23, 936-37, 952-54, 962-65, 975-76, 978-79, 985-86, 992-93, 1027-28, 1048, 1073-74, 1106, 1122-24, 1135, 1145-48.
[852] Appellant's description of [redacted] opinion on Islam as "skeptical and misinformed," is inaccurate (AB at 464). LTC [redacted] was asked his opinion, and he gave his honest impressions (R. 944-45). He went on to that his views on Islam would not affect his ability to be impartial because he was committed to fairness (R. 945-47).
[853] AE 307 at 4.

takes "one vote" in appellant's case is meritless.[854] First, while the accused in *Bartlett* pled guilty for purposes of findings, a panel sat on his case and determined his sentence, which included twenty-five years of confinement.[855] Second, appellant's argument that "one vote" controls an accused's fate in capital cases but not in non-capital cases, while superficially appealing, is incorrect. "One vote" matters in every case. For example, in *Bartlett*, the accused received twenty-five years of confinement, which required a concurrence of three-fourths of the panel.[856] If there had been twelve panel members in *Bartlett*, and only nine voted for his sentence, than the change in a single panel member's vote might have changed the outcome of his sentencing. Appellant's "single vote" argument is nothing more than an attempt to bypass the prejudice analysis required by *Bartlett*, and substitute it with the structural error analysis CAAF rejected.

The panel members that sat for his court-martial were all qualified under Article 25, UCMJ, and were properly balanced so that appellant's case was heard fairly and impartially.[857] Consideration of each *Bartlett* factor - particularly the actual

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[854] AB 464-65.
[855] *Bartlett*, 66 M.J. at 430
[856] UCMJ art. 52(b)(2).
[857] The lack of certain branches does not mean appellant did not receive a fair trial. Both the Sixth Amendment and Article 25 work toward the same purpose; not to secure a "representative" panel but an impartial one. *See Holland v. Illinois*, 493 U.S. 474, 480 (1990); and *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citations omitted), *cert. denied*, 543 U.S. 1188 (2005).

composition of the panel – reveals that any alleged error in the convening authority's selection process was harmless.

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.

Law and Argument

On 30 March 2004, trial defense counsel filed a motion requesting an instruction on the inability for appellant to plead guilty or to request a judge-alone trial.[858] The Government filed a response in opposition on 29 April 2004.[859] The defense withdrew their request for that instruction on 10 May 2004.[860] Appellant had previously submitted an offer to plead in exchange for a non-capital referral.[861] Appellant withdrew this pretrial offer to plead guilty before it was considered by the convening authority.[862] Therefore, because appellant never offered to plead guilty, his defense counsel could not insist on an instruction that would lead one to believe he wanted to plead guilty. Furthermore, an accused does

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[858] AE 35.
[859] AE 36.
[860] R. 139, 633.
[861] *Allied Papers* (ROT Vol. I), *Memorandum for Record, Re: U.S. v. Akbar Offer to Pled Guilty*, dtd 1 April 2005 and *Offer to Plead Guilty*, dtd 20 June 2003.
[862] *Id.*

not have the right to present a willingness to plead guilty as evidence in mitigation.[863]

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).

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.

Law and Argument

Similar to the accused in *United States v. Loving*, appellant "makes a broad-based attack on virtually every aspect

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[863] *Owens v. Guida*, 549 F.3d 399, 418-22 (6th Cir. 2008), *cert. denied*, 130 S.Ct. 281 (2009) (citations omitted).

of the convening authority's role without briefing the issue."[864] CAAF systematically rejected every one of these claims in 1994 and appellant offers no new legal authority or argument in support of these claims.[865]

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.

Law and Argument

"The policy concern for a random selection and a fair cross section essential in selecting a civilian jury is not applicable in the military justice system."[866]

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.

Law and Argument

Appellant provides no evidence or argument in support of this claim. He fails to demonstrate that the convening authority was not aware of his options under Article 25, UCMJ

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[864] *Loving*, 41 M.J. at 296. In fact, appellant copies the issue from *Loving* nearly word-for-word into his Assignment of Error XVIII.
[865] *Id.*
[866] *United States v. Dowty*, 60 M.J. 163, 173 (C.A.A.F. 2004) (citing *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997)).

for selection of the panel. Wherefore, appellant's *pro forma* claim should be summarily rejected.

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).

Law and Argument

Appellant claims, with no support, that the prohibition against reconsideration of *findings* for the purpose of making the death penalty eligible should be extended to reconsideration on sentence. Appellant's citation to *Bullington v. Missouri* is inapposite, as *Bullington* did not deal with a jury reconsidering its own vote on sentencing, but with the ability to seek a death sentence on retrial when the original jury rejected the death sentence.[867] This is not the case here. Appellant cannot cite

[867] 451 U.S. 430 (1981).

to a single case precedent that supports the contention that a jury or panel in a capital case is not allowed to reconsider its sentence determination.

Furthermore, appellant's headnote pleading is based on the unsupported premise that the request for reconsideration in his case was to change a non-unanimous vote of death to a unanimous vote. However, this assumption is based on nothing but speculation and conjecture. The panel did not reveal the basis for its request for reconsideration, simply stating that "reconsideration has been proposed."[868] It is just as likely that the panel unanimously voted to sentence appellant to death, that one or more of the panel members requested reconsideration to further discuss the matter, and then after that discussion maintained the unanimous vote for death. Appellant is not permitted to pierce the veil of the panel's deliberations with guess-work and supposition.[869]

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[868] R. 3172; AE 314.
[869] *See* Mil. R. Evid. 509 and 606(b).

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.

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving* and again in 1999 in *United States v. Gray*.[870] Appellant offers no new argument or analysis.

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).

Law and Argument

Appellant provides no legal support for the proposition that he is entitled to a random selection of panel members, in contravention of Article 25, UCMJ. Given CAAF expressly rejected this nearly verbatim claim in *United States v. Curtis*,[871] appellant's *pro forma* claim has no merit.

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[870] *Loving*, 41 M.J. at 297; *Gray*, 51 M.J. at 60.
[871] 44 M.J. at 130-32.

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.

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving* and again in 1996 in *United States v. Curtis*.[872] Appellant offers no new argument or analysis.

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).

Law and Argument

The authority for the Government's preemptory challenge did not come from the President pursuant to his authority under Article 36, UCMJ. In Article 41, UCMJ, Congress stated "[e]ach accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court."[873] Therefore, the President could not have exceeded his authority.

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[872] *Loving*, 41 M.J. at 296-97; *Curtis*, 44 M.J. at 132.
[873] UCMJ, art. 41.

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).

Law and Argument

CAAF rejected this argument in 1994 in *United States v. Loving*,[874] in 1996 in *United States v. Curtis*,[875] and again in 1999 in *United States v. Gray*.[876] Appellant offers no legal authority or factual matter to distinguish his case.

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[874] *Loving*, 41 M.J. at 294-95 (citing *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986); and *Curtis*, 33 M.J. at 107 (internal citations omitted).
[875] *Curtis*, 33 M.J. at 131-33.
[876] *Gray*, 51 M.J. at 33.

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)

Law and Argument

CAAF rejected this claim in 1996 in *United States v. Curtis*,[877] and again in 1999 in *United States v. Gray*.[878] Appellant offers no legal authority or factual matter to distinguish his case.

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).

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*,[879] and again in 1999 in *United States v. Gray*.[880] Appellant offers no legal authority or factual matter to distinguish his case.

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[877] *Curtis*, 33 M.J. at 150.
[878] *Gray*, 51 M.J. at 57-58.
[879] *Loving*, 41 M.J. at 296 (citing R.C.M. 922(e) and 1007(c)).
[880] *Gray*, 51 M.J. at 60-61.

XXX.

THE MEMBERS ERRED BY RECONSIDERING THEIR SENTENCE, A VOTE NOT SUSCEPTIBLE TO RECONSIDERATION.

Law and Argument

As stated in the answer to Assignment of Error XXII, the Rule for Courts-Martial specifically authorize the panel to reconsider their sentence and there is no contrary legal authority.

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).

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*,[881] and again in 1999 in *United States v. Gray*.[882] Appellant offers no legal authority or factual matter to distinguish his case.

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[881] *Loving*, 41 M.J. at 279-80 (citations omitted).
[882] *Gray*, 51 M.J. at 56.

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).

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*, in 1996 in *United States v. Curtis*, and again in 1999 in *United States v. Gray*.[883] "The Fifth Amendment expressly excludes 'cases arising in the land or naval forces' from the requirement for indictment by grand jury."[884] Appellant cites no legal or factual authority for overturning the Fifth Amendment to the Constitution of the United States.

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).

Law and Argument

CAAF rejected this claim in 1996 in *United States v. Curtis*, and again in 1999 in *United States v. Gray*.[885] Appellant

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[883] *Loving*, 41 M.J. at 296-97; *Curtis*, 44 M.J. at 130; *Gray*, 51 M.J. at 50.
[884] *Loving*, 41 M.J. at 296. *See* U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .) (emphasis added); *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).
[885] *Curtis*, 44 M.J. at 132; *Gray*, 51 M.J. at 48.

offers no legal authority or factual matter to distinguish his case.

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).

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).

Law and Argument

CAAF rejected these claims in 1994 in *United States v. Loving*.[886] Appellant offers no legal authority or factual matter to distinguish his case.

[886] *Loving*, 41 M.J. at 295 (citing *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *cert. denied*, 510 U.S. 1085 (1994) and *Weiss v. United States*, 510 U.S. 169-171 (1994)).

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).

Law and Argument

The Supreme Court resolved this question in *Weiss v. United States*, stating "[i]t is quite clear that Congress has not required a separate appointment to the position of military judge, and we believe it equally clear that the Appointments Clause by its own force does not require a second appointment before military officers may discharge the duties of such a judge."[887]

[887] *Weiss*, 510 U.S. at 176.

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.

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*, and again in 1999 in *United States v. Gray*.[888] Appellant offers no legal authority or factual matter to distinguish his case.

[888] *Loving*, 41 M.J. at 296 (citing *Matthews*, 16 M.J. at 364-68; *Gray*, 51 M.J. at 55.

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).

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*, and again in 1999 in *United States v. Gray*.[889] Appellant offers no legal authority or factual matter to distinguish his case. Furthermore, the claim is not accurate. All capital cases in the military are eligible for discretionary review by the Supreme Court of the United States, *the* Article III Court.[890]

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[889] *Loving*, 41 M.J. at 295-96; *Gray*, 51 M.J. at 55.
[890] UCMJ art. 67a(a); 28 U.S.C. § 1259(1); U.S. Const. art. III, § 1.

XXXXIX.

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).

Law and Argument

An accused's right to present mitigation evidence is not unlimited.[891] There is no requirement that an accused be permitted to submit anything he wishes during his presentencing case, without regard for Rules of Evidence and procedure. Appellant appears to argue in his headnote pleading that the rules of evidence should not apply to him but should apply to the Government's evidence. However, the opportunity to relax the Rules of Evidence under R.C.M. 1001(c)(3) and (d) does not make a sentencing hearing an open forum with no restrictions on what evidence is presented. "This relaxation of evidentiary rules 'goes more to the question of whether the evidence is

[891] *Owens*, 549 F.3d at 419 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978); *Oregon v. Guzek*, 546 U.S. 517, 523-24 (2006); and *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005)).

authentic and reliable' and 'otherwise inadmissible evidence still is not admitted at sentencing.'"[892]

Furthermore, appellant was permitted to submit voluminous evidence during presentencing that would never be permitted under a strict reading of the Rules of Evidence. Clearly the Rules of Evidence were relaxed for appellant, and the Government presented no rebuttal evidence during presentencing. Therefore, appellant fails to demonstrate how he was prevented from presenting mitigation evidence due to R.C.M. 1001(d).

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).

Law and Argument

Article 74(a), UCMJ, gives the Service Secretaries statutory authority to remit or suspend sentences other than those reserved to the President. The Army Clemency and Parole Board was created to advise and assist the Secretary of the Army in reviewing and considering those cases within his statutory

[892] *United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004) (quoting *United States v. Boone*, 49 M.J. 187, 198 n.14 (C.A.A.F. 1998) (internal citations and quotations marks omitted)).

authority that he may consider for clemency and/or parole.[893] The ACPB does not have an independent grant of authority and it does not confer rights upon those court-martialed.[894] It simply exists to serve the Secretary of the Army in his statutory role. The ACPB does not have the independent authority to grant clemency, but does so only when acting as a Secretary of the Army's designee.

Congress reserved the ability to commute or remit a death sentence to the President.[895] Because appellant was sentenced to death, he is eligible to receive clemency from the President rather than the Secretary of Army. Appellant fails to explain how such a statutory scheme denies him equal protection of the law.

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[893] U.S. Dep't Army Reg. 15-130, *Army Clemency and Parole Board* (23 October 1998) [AR 15-130], paras. 1-1 and 1-4.
[894] AR 15-130, para. 1-1.
[895] UCMJ art. 71(a).

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.

Law and Argument

CAAF specifically rejected this argument in 1994 in *United States v. Loving.*[896] In *United States v. Curtis I*, CAAF held that "In sum, as we construe RCM 1004, it not only complies with due process requirements but also probably goes further than most state statutes in providing safe-guards for the accused."[897]

[896] 41 M.J. at 293-94.
[897] 32 M.J. at 269.

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.

Law

CAAF rejected this claim in 1994 in *United States v. Loving*.[898] The Eighth Amendment does not transform an otherwise meritless Tenth Amendment claim into a meritorious argument. Appellant offers no argument or legal authority for such a proposition.

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.

Law and Argument

There is nothing in the plain language or Article 55, UCMJ, that requires a showing that any court-martial punishment must

[898] *Loving*, 41 M.J. at 295-96.

enhance good order and discipline in order to be valid. Congress placed no limitations on the President in establishing maximum penalties for offenses under Article 56, UCMJ. Appellant fails to provide this court any legal support for his proposition.

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).

Law and Argument

CAAF rejected this claim in 1994 in *United States v. Loving*, and again in 1999 in *United States v. Gray*.[899] Appellant offers no legal authority or factual matter to distinguish his case.

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.).

Law Argument

CAAF and the Supreme Court have both upheld the death penalty procedures within the military justice system. "In sum, as we construe R.C.M. 1004, it not only complies with due

[899] *Loving*, 41 M.J. at 297; *Gray*, 51 M.J. at 61.

process requirements but also probably goes further than most state statutes in providing safeguards for the accused."[900]

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*).

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).

Law and Argument

The Supreme Court reaffirmed in 2008 that capital punishment does not violate the Eighth Amendment to the U.S. Constitution.[901] Appellant cites no authority for overturning this settled principle of law.

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[900] *Curtis*, 32 M.J. at 269.

[901] *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 1529 (2008) (citing *Gregg*, 428 U.S. at 177) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.").

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).

Law and Argument

The term "actual innocence" is used as a basis for allowing Federal Habeas review of a death sentenced inmate's case despite a procedural default of a defendant's state court claims.[902] Under the UCMJ, a capital case is not "final" until the case is reviewed by the Service Court, CAAF, and, if *certiorari* is granted, the United States Supreme Court, and the President approves the death sentence.[903] Prior to finality under Article 76, UCMJ, CAAF has held that an accused may seek collateral habeas review within the military justice system.[904] Even after finality under Article 76, UCMJ, the accused may seek collateral habeas review with the Article III courts.[905] There is no legal requirement for an appellate system to have an exception to the

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[902] House v. Bell, 547 U.S. 518, 522 (2006) (citing *Schlup v. Delo*, 513 U.S. 298, 319-322 (1995)).
[903] UCMJ art. 66(b)(1), 67(a)(1), 67a, 71(c) and 76; *Loving v. United States*, 62 M.J. 235, 240-46 (C.A.A.F. 2005).
[904] *Loving*, 62 M.J. at 240-46.
[905] Loving, 68 M.J. at 23-24 (Ryan, J. dissenting) (describing authority of Article III Courts to consider collateral writs of habeas corpus in Article III Courts); *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 810-11 (10th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1993) (citing *Burns v. Wilson*, 346 U.S. 137 (1953).

finality of direct appellate review for claims of "actual innocence." Furthermore, appellant makes no claim of "actual innocence" in his case.[906]

XLIX.

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.

Law and Argument

The convening authority also has unlimited discretion to disapprove the death sentence.[907] Appellant offers no legal authority for his proposition.

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.

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

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[906] "'The prisoner must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.'" Sawyer v. Whitley, 505 U.S. 333, 339, FN5 (1992) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 455 FN17 (1986) (internal citations and quotation marks omitted)).

[907] UCMJ art. 60(c).

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).

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).

Law and Argument

Appellant fails to identify which pieces of sentencing evidence were offered at trial that he objects to. Furthermore, appellant's legal premise is fundamentally flawed. In *Payne v. Tennessee*, the Supreme Court noted that the Government "may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. 'The [Government] has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that

just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to *society* and in particular to his family."[908]

The Eighth Amendment does not limit victim impact evidence to "direct family members."[909] In fact, the Supreme Court made specific reference to the loss suffered by society at large, separate-and-apart from the loss to the victim's family. Furthermore, appellant's suggestion that the sentencing evidence must be limited to those harms that an accused can foresee is unsupported by any legal theory. R.C.M. 1001(b)(4) allows for the introduction of evidence in aggravation that is "directly related" to the offenses committed. This is an objective standard focusing on the type of evidence and the strength of its connection to the crime.[910]

Any reasonable person would know that murdering two innocent men, as well as wounding sixteen others with grenades and an assault rifle, could have far-reaching consequences. Appellant's willful blindness to the devastation his crimes caused to both the victims' families and society as a whole cannot serve as a basis to hide that evidence from the panel.

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[908] 501 U.S. 808, 825 (1991) (emphasis added) (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987) (White, J., dissenting)).
[909] *United States v. Whitten*, 610 F.3d 168, 188-89 (2nd Cir. 2010) (citing *United States v. Bolden*, 545 F.3d 609, 626 (8th Cir. 2008); *United States v. Fields*, 516 F.3d 923, 946 (10th Cir. 2008); *United States v. Barrett*, 496 F.3d 1079, 1098-99 (10th Cir. 2007); *United States v. Nelson*, 347 F.3d 701, 712-14 (8th Cir. 2003); *United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002)).
[910] United States v. Hardison, 64 M.J. 279, 281-82 (C.A.A.F. 2007).

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).

Law and Argument

Appellant offers no evidence that the Staff Judge Advocate who advised the Convening Authority regarding post-trial matters had any role in the preparation of the Government's case, or that he was even present at Fort Bragg during appellant's trial.[911] Furthermore, because appellant failed to raise this issue at the time of Action, he forfeited issue.[912] Appellant fails to articulate any plain error, and therefore, his claim is without merit.

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[911] LTC Tyler Harder was the Acting Staff Judge Advocate who provided the Staff Judge Advocate Recommendation on 18 January 2006. COL W. Renn Gade provided the Addendums to the Staff Judge advocate's Advice on 25 September and 16 November 2006. Appellant provides this court no evidence that either of these officers had any role in appellant's prosecution.

[912] UCMJ art. 60((d); R.C.M. 1107(f)(6).

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.

Law and Argument

Appellant fails to state, with any degree of reasonable specificity, to which Prosecution Exhibits he is referring. The Government cannot respond to an argument with such little depth or detail. However, assuming the "scene of the crime" is PAD 7, the Government admitted PEs 1-29, 31-32, and 34, which showed the tents that appellant bombed and the location where he shot CPT Seifert, none of which appellant objected to at trial.[913] Appellant fails to explain what process he was due that he did not receive or how admission of these photos amounts to cruel and unusual punishment.

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.

Law and Argument

Appellant fails to state, with any degree of reasonable specificity, any questions or comments to any member of the panel during *voir dire* that was objectionable. Furthermore, the

[913] R. 1224, 1227-28, 1241, 1277-1282, 1785, 1942, 1355, 1373-74, and 1490.

trial defense team took ample opportunity to *voir dire* the members and also discussed the possible theories of the defense to see if the members were willing to consider them. Appellant's oblique reference to R.C.M. 912(b) does not support any argument that the military judge committed plain error in allowing the parties opportunity for robust group and individual voir dire.[914]

LVI.

THE MILITARY JUDGE FAILED TO ADEQUATELY INSTRUCT THE MEMBERS THAT THE DISCRETION NOT TO IMPOSE THE DEATH PENALTY WAS INDIVIDUAL. RECORD AT 3147.

Law and Argument

Appellant cites to page 3147 of the record in support of this assignment of error. However, the military judge told the panel at 3147-48 that "even if you have found, in accordance with the instructions I have given you, that the aggravating factor exists and that the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances, *each member still has the absolute discretion to not vote for a death sentence. Even if death is a possible sentence, the decision to vote for death is each member's individual decision.*"[915] Given that the military judge gave,

[914] *See United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005).
[915] R. 3147-48 (emphasis added).

verbatim, the instruction appellant claims he did not give, this assignment of error lacks all merit.

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).

Law and Argument

Appellant cites no support for the proposition that at the time of sentencing the Government is required to designate the manner and location of appellant's execution. The Government is no more required to pre-determine the method and location of the execution than it is required to pre-determine the specific prison that an accused facing confinement will reside.

LVIII.

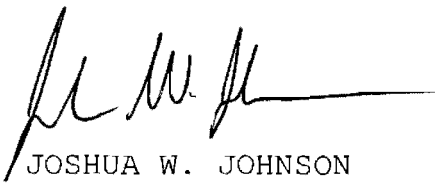
THE PANEL'S RECONSIDERATION OF THE SENTENCE IN APPELLANT'S CASE VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BECAUSE "NO PERSON. . . SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE." *SEE BURLINGTON V. MISSOURI*, 451 U.S. 430 (1981) (APPLYING THE DOUBLE JEOPARDY 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).

Law and Argument

This Assigned Error appears to be a verbatim copy of Assignment of Error XXII. As noted in the answer to Assignment of Error XXII, the law specifically allows for a panel to reconsider its sentence before the sentence is announced.

Conclusion

None of appellant's assignments of error merit relief. The Government respectfully submits that this Honorable Court should affirm the approved findings and sentence.



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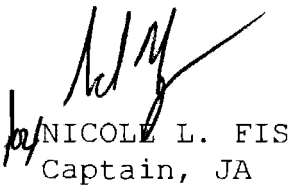

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Certificate of Service and Filing

I hereby certify that I served or caused to be served a copy of the foregoing on this Court and Defense Appellate Division by hand, on 29 November 2010.

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