IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

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

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

REPLY ISSUES

ISSUE I[1]

SERGEANT AKBAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS AND ARTICLE 36, UCMJ, WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO SEEK THE APPOINTMENT OF QUALIFIED COUNSEL TO REPRESENT SERGEANT AKBAR IN HIS CAPITAL COURT-MARTIAL.

ISSUE II[2]

SERGEANT AKBAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS, DURING THE MERITS AND THROUGHOUT THE

[1] Issue I corresponds to Assignment of Error (AE) I.A. of Appellant's Brief to this Court.
[2] Issue II corresponds to AE I. B, E, and F of Appellant's Brief to this Court.

SENTENCING PHASE OF HIS CAPITAL COURT-MARTIAL WHEN TRIAL DEFENSE COUNSEL FAILED TO INVESTIGATE, PREPARE, AND/OR PRESENT ANY MITIGATION EVIDENCE ON BEHALF OF SGT AKBAR.

ISSUE III[3]

APPELLANT'S DEATH SENTENCE WAS ADJUDGED UNCONSTITUTIONALLY WHERE R.C.M. 1004(c)'s PROVISIONS WERE NOT (1) EXPRESSLY ALLEGED IN THE CHARGES PREFERRED AGAINST HIM; (2) EXPRESSLY INVESTIGATED PURSUANT TO R.C.M. 405 AND ARTICLE 32, UCMJ; AND, (3) EXPRESSLY REFERRED TO HIS COURT-MARTIAL BY THE CONVENING AUTHORITY.

ISSUE IV[4]

RING v. ARIZONA REQUIRES THE PANEL MEMBERS TO FIND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH ALL MITIGATING AND EXTENUATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT,

ISSUE V[5]

THE PROSECUTION'S MANIPULATION OF TRIAL DEFENSE COUNSEL DURING APPELLANT'S COURT-MARTIAL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE WHICH IMPACTED THIS CAPITAL CASE SUCH THAT DEFENSE COUNSEL SHOULD HAVE WITHDRAWN FROM REPRESENTING APPELLANT AND FAILURE TO DO SO WAS INEFFECTIVE.

ISSUE VI[6]

DENYING APPELANT 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.

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[3] Issue III corresponds to AE III.A of Appellant's Brief to this Court.

[4] Issue IV corresponds to AE III.C of Appellant's Brief to this Court.

[5] Issue V corresponds to AE VIII of Appellant's Brief to this Court

[6] Issue VI corresponds to AE XIV of Appellant's Brief to this Court

ARGUMENT

ISSUE I

SERGEANT AKBAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS AND ARTICLE 36, UCMJ, WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO SEEK THE APPOINTMENT OF QUALIFIED COUNSEL TO REPRESENT SERGEANT AKBAR IN HIS CAPITAL COURT-MARTIAL.

Contrary to the government's claims, Appellant is not seeking from this Court the adoption of some new standard or even a hybrid of what constitutes ineffective assistance of counsel. On the contrary, Appellant relies on the two-part test developed by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny to support his claim that his trial defense counsel were indeed ineffective when they failed to seek the appointment of qualified counsel to represent him at court-martial.

In its brief, the government spends four pages attempting to discount the notion that Appellant was deserving of counsel who, at a minimum, possessed the knowledge and experience necessary to litigate a capital proceeding without offending those provisions of the Constitution guaranteeing defendants a right to effective assistance of counsel. In doing so, the government relies on four basic premises: (1) 18 U.S.C. § 3599 was not yet enacted when Appellant went to court martial; (2) 18 U.S.C. § 3005 does not apply to the military; (3) The American

Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases has no authority over the qualifications of military attorneys practicing before courts-martial; and, (4) defense counsel did a great job defending Appellant as evidenced by their pretrial motions practice. (GB at 19-22.)

Put simply, the government would have this Court believe that trial defense counsel were neither deficient in their performance, and even if they were, Appellant is so evil, he would have been sentenced to death anyway, so why worry about whether there should be a minimum standard of experience/ competence for defense counsel when defending capital cases notwithstanding the Sixth Amendment's demands.

To suggest for a moment that 18 U.S.C. §§ 3005 and 3599[7] have no direct import on this case denies common sense and is contrary to the controlling law on the subject. The fact that military attorneys are not bound by these statutes merely removes failure to comply from the realm of *per se* deficient performance and instead makes them persuasive authority and instructive as to the proper standard for evaluating the competency of attorneys to practice before capital courts-

[7] Appellate did not assert throughout his original brief, nor does he now assert 18 U.S.C. § 3599 is binding on the military and recognizes that provision of the federal code was not enacted until March 9, 2006; after Appellant was sentenced to death.

martial. *United States v. Murphy*, 50 M.J. 4, 9-10 (C.A.A.F. 1998). The question remains, was counsel's performance reasonable? Appellant has established it was not.

The Court of Appeals for the Armed Forces' (CAAF) failure to mandate the adoption of the ABA Guidelines or the provisions of the federal code is far from surprising. As CAAF expressed in *United States v. Loving*, its job is not to interfere with the personnel management system of the military. 41 M.J. 213, 300 (C.A.A.F. 1994).[8] That does not mean, however, that the concerns underlying the federal code and the ABA Guidelines do not exist in the military. Those provisions are prophylactic. They seek to remedy systemic problems existing within the capital litigation landscape throughout the United States. These same problems persist in military courts-martial and existed throughout the entirety of Appellant's representation.

In the military, as in civilian federal courts, an accused should be entitled to "learned" counsel. Under 18 U.S.C. § 3005, "learned" means "distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals, or post-conviction review, that in

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[8] Notwithstanding CAAF's seeming unwillingness to involve itself in a purely legislative/administrative function, the 2003 edition to the ABA Guidelines specifically states its guidance should apply to the military. AMERICAN BAR ASS'N GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003) note 19, at 1.

combination with co-counsel, will assure high-quality representation." GUIDE TO JUDICIARY POLICY, app. 6A, 1(b) (2010). In addition, the federal code entitles capital defendants at least two counsel at the outset of a capital case - upon indictment, and outlines minimum levels of experience to qualify as "learned" counsel. 18 U.S.C. § 3005 (1994).

This heightened standard of training and experience exists because it is necessary to ensure representation is commensurate with the complexity and the high stakes of capital litigation. JOHN B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST, QUALITY, AND AVAILABILITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (2010) at 91. Distinguished prior experience contemplates excellence in the area of capital litigation, not simply prior experience or excellence in general criminal defense practice. Nothing less will suffice because "the preparation of a death penalty case requires knowledge, skills, abilities which even the most seasoned lawyers will not possess if they lack capital experience." *Id.* at 92.

A standard of capital proficiency exists, whether adopted by the military or not. And not just in the federal system, but throughout the states as well. Thirty-five states authorize the

death penalty.[9] Of those states, no less than twenty-seven have promulgated specific qualifications for counsel handling capital cases at the trial, appellate, or post-conviction stages. Most focus on quantity of experience ranging from 3 to 10 years of practice, coupled with having tried a minimum number of complex felony trials. Many also include a qualitative component as well as requiring a certain level of experience with expert witnesses and forensic evidence. Finally, three states require a minimum number of hours of advanced capital litigation training.[10]

These standards are not limited to states with robust death row populations. Seven of the twenty-seven states have a death row population of eleven or fewer. DEBORAH FINS, DEATH ROW U.S.A.: A QUARTERLY REPORT BY THE CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. 35-36 (WINTER 2010).[11] These states have a death row population similar in size to that of the military's and each has, since 1984, prosecuted capital cases comparable to the approximately fifty capital courts-martial prosecuted by the military during that time frame.

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[9] Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebrasksa, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

[10] California, Texas, and Florida.

[11] Colorado (3), Connecticut (10), Kansas (10), Montana (2), Nebraska (11), Utah (10), and Washington (9).

If questions persist as to whether such a requirement is feasible in the military justice system, one need look no further than the Military Commissions Act. 10 U.S.C. § 949. Under that act, suspected terrorists facing capital punishment for crimes against the United States have the right to obtain defense counsel "learned" in capital law:

> When any of the charges preferred against the accused are capital, to be represented before a military commission . . . to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.

10 U.S.C. § 949a(b)(2)(c)(ii) (2006).[12] Of note, this right attaches at preferral of charges and the government is responsible for funding "learned" counsel. If such a right exists for those suspected of plotting to destroy our country, why then does the same right not exist for United States citizen-Soldiers? It is certainly feasible; let us not ignore necessary. It is necessary in the interest of justice and judicial economy to conduct a court-martial correctly the first time through - though that seemingly does not happen very often based in large part on the rarity with which cases are referred capital in the military.

[12] The "learned" counsel provision of 10 U.S.C. § 949 was intended, by Congress, to have the same meaning as the "learned" counsel provision within 18 U.S.C. § 3005. H.R. REP. No. 111-288, AT 863 (2009) (Conf. Rep.).

Ten capital cases in which the death sentence was approved by the convening authority have gone through direct appellate review. Of those ten cases, eight have been reversed on appeal. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004); *United States v. Dock*, 35 M.J. 627 (A.C.M.R. 1992); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005). Three of them, *Kreutzer,* 59 M.J. 773; *Curtis,* 46 M.J. 106; and, *Murphy,* 50 M.J. 4, were reversed due to ineffective assistance of counsel. In each of these cases, defense counsel were experienced litigators, but had no capital litigation experience. Moreover, counsel's deficiency in *Kreutzer* and *Curtis* stemmed from their lack of investigation and handling of mitigation evidence. *See Kreutzer*, 59 M.J. 773 at 808-16, and *Curtis*, 48 M.J. at 331.

Notwithstanding the government's assertion, the cumulative capital experience of Appellant's trial defense counsel was zero. (GAE 1.) LTC [redacted] while having exposure to capital cases during his prior assignments at the Government Appellate Division and the Trial Counsel Assistance Program, never performed any substantive work for those cases. Nor did he have

any capital trial experience. (R. at 12-15.) MAJ [redacted] had even less experience than LTC [redacted] in the field of capital litigation, although he too had significant litigation experience. (R. at 15-16.) Collectively, they should have known that based on the overwhelming amount of information available to them, they did not have the knowledge or experience necessary to mount a capital defense without having a more seasoned, experienced, attorney on record with them.

Military capital defendants are *per se* deprived of the effective assistance of counsel because the military justice system allows for inexperienced attorneys to defend capital cases. Until this Court requires a minimum standard for "learned" capital attorneys, similar to those articulated by 18 U.S.C. § 3005 and the ABA Guidelines, attorneys' performances will continue to be deficient and therefore prejudicial to their clients.

Furthermore, Article 36(a), UCMJ requires Service members facing capital charges be guaranteed "learned" counsel. Undoubtedly Congress intended courts-martial to resemble federal district court trials.

> . . . Congress intended that, to the extent "practicable," trial by court-martial should resemble a criminal trial in a federal district court. Even though Article 36 is principally concerned with 'procedures' and "rules of evidence," it can be inferred that, unless there is a reason not to do so, an interpretation of a provision of the

> Uniform Code should follow a well-established interpretation of a federal criminal statue concerning the same subject.

United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000). Unless there is a specific reason to deny Soldiers representation by "learned" counsel, the President must put the protections afforded by the federal code into practice in the military system.

The government has not provided any reason why it is not "practicable" to ensure that American Soldiers receive "learned" counsel at capital courts-martial. Soldiers deserve nothing less than the very best representation. Ensuring Soldiers have capitally qualified representation serves, at a minimum, three absolutely necessary aims: 1) it gives an accused the greatest chance at life; 2) it places Soldiers on an equal footing with their civilian counterparts; and, 3) it assists fixing a military capital justice system riddled with reversals. *See supra*.

Even if this Court does not feel it necessary to go so far as to create a *per se* rule defining "learned counsel," *quite* plainly, Appellant's attorneys' performance was deficient.[13] A minimum standard exists, whether formally adopted by the military courts or not, and they failed to meet that standard. Capital litigation is too complex and ever-evolving such that

[13] See Appellant's Brief (AB) before this Court, Assignments of Error I, II, and XVII.

requiring anyone less than an attorney experienced in capital litigation to defend such cases serves an injustice to the defendant and the Army, and runs afoul of the Due Process and Equal Protection clauses of the Constitution.

Appellant was deprived of effective assistance of counsel and sentenced to death. His attorneys failed either to recognize or articulate that they were inexperienced and not qualified to represent Appellant. But for their failure - had Appellant been adequately represented by experienced, learned counsel - there is a reasonable probability Appellant's sentence would have been different.

Therefore, Appellant requests this court set aside his findings and sentence.

ISSUE II

SERGEANT AKBAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS, DURING THE MERITS AND THROUGHOUT THE SENTENCING PHASE OF HIS CAPITAL COURT-MARTIAL WHEN TRIAL DEFENSE COUNSEL FAILED TO INVESTIGATE, PREPARE, AND/OR PRESENT ANY MITIGATION CASE ON BEHALF OF SGT AKBAR.

APPELLANT'S SOCIAL HISTORY [14]

SGT Hasan Akbar was born Mark Kools in California on 21 April 1971. His story, however, a story which shaped his life, a story that converted a lovable, caring, poor black kid growing

[14] The facts asserted within this section of Issue II can all be found throughout DAEs EE and LL previously attached by motion.

up in the worst streets in urban America who dreamt of flying to the moon to a troubled, sick adult who ultimately turned to murder, began long before April 21, 1971. This Court cannot fully understand Hasan Akbar without first understanding where he comes from, his family, where his father and mother come from; without fully understanding his story, a story that begins with his family, a story that went untold throughout his court-martial, and a story that ends with that same caring boy crossing over to a darker side, a side wracked with mental illness, a side from which he would never return.

This story begins with the birth of Hasan's father and uncle in Detroit in 1943 to promiscuous parents who were both unwilling and unable to love each other, much less two twin sons. Shortly after their birth, their father disappeared and their mother, unprepared to raise two children, took Lincoln and Abraham Chisholm (now John Akbar and Abraham Henryman, respectively) to live with their grandparents on their farm in South Carolina.

They had no formal education; the products of a farming family, learning to garden and tend to the livestock, but they were happy, they were safe - until the boys turned eight. By the time of their eighth birthdays, both their grandmother and grandfather had died, orphaning the boys, leaving them to tend to the farm alone, without any supervision. But at least they

had each other. For the next four years they survived, relying on each other for care and support.

After four years of living on their own, having only each other to lean on, to rely on, the boys' aunt came and took Abraham back to Detroit with her, leaving John completely and totally alone. At twelve years old, John had already experienced the hardship of a father who did not love him, a mother who abandoned him, two grand-parents who died, and a brother taken from him. At twelve years old, a terrified John was left alone in rural South Carolina. It was not until several months later that John's uncle moved John to Detroit, where he stayed until moving to Miami with his mother at sixteen years of age.

Less than a year after reuniting with his estranged mother, John, not particularly caring for the revolving door of would-be suitors patronizing their home, left for Los Angeles, once again on his own. This time, however, not having any education or skill marketable in a large, metropolitan city, John turned to criminal enterprise.

At twenty-six years-old, John, already a father of four, met, fell in love with, and impregnated nineteen year-old Quran Bilal (then Patsy Rankins). Quran's story is much like John's.

Quran Akbar Bilal, born Patsy Rankins on 6 October 1950, was the third of six children born to David and Rosa Lee Rankins

in Louisiana. Her father, a preacher, and mother, a beauty shop owner, appeared to have the perfect family, but the family was far from perfect - the family had a secret. What only the children knew was that their father raped and beat their mother, raped Quran's sister, and attempted to, and indeed may have succeeded, in raping Quran. When Quran graduated from high school, she could not wait to get away. She packed her bags and moved to California. What she did not know - what few people ever do - no matter where you run, your problems are sure to follow, and follow her they did.

Shortly after moving to Los Angeles, she met, was impregnated by, and married John Akbar. John, now a reformed criminal, was on the straight and narrow. Excited about the birth of his fifth child (by five different women), he seemed to turn over a new leaf. He was running a small maintenance company and he was providing for his family. The family was happy and beautiful. But when the demons came, John answered the call.

Once again, John began running with a bad crowd. He was taking drugs, gambling, and engaging in other criminal enterprises. In 1973, John was arrested, charged, and convicted of armed robbery - robbery of a hotel. He was sentenced and served thirteen months in San Quentin prison - one of the most dangerous prisons in the United States.

While John was in prison, Quran could not take care of her son Hasan (Mark Kools), their business, and their home, so she did what any good mother would do - she gave up the only home the children knew and their business. Meanwhile, John was trying to survive in San Quentin. In an effort to do that, he joined the first gang that came calling: the Black Muslims of America - a prison affiliate of Louis Farrakhan's Nation of Islam. Nearing the end of his sentence, John was transferred to Chino, a prison closer to Los Angeles where Quran and Hasan would visit weekly.

After John's release, the family formally converted to Islam and changed their names. They lived in a small house in the Watts area of Los Angeles, where John started a masonry company and the couple welcomed their second child, Musa Akbar. The family was happy and healthy. They were heavily involved with the Nation of Islam and enjoyed the feeling of community - a feeling which would not last long.

The Nation of Islam's founder, Elijah Mohammed, taught his followers to hate the white man. In 1976, the Nation split to those who were going to continue to follow a new emerging leader, Louis Farrakhan, whose theological preaching continued along the lines of Elijah Muhammed, or those who were going to follow Elijah Muhammad's son, who was preaching that everything Elijah Muhammed said was a lie. This shift in ideology proved

too much for John Akbar: it created a crisis of faith causing him to return to the life he had lived prior to his conversion.

In 1980, as John rejected Islam, Quran and their three children did not. As John transitioned into a life that for the next twenty years would be filled with drug addiction and crime, Quran and her children transitioned into life in Louisiana with her second husband, William Muhammad Bilal,[15] whom she married later that year. While in Louisiana, Quran and her family lived with her parents. This transition was particularly difficult for Hasan, who at eight, loved and had a very close relationship with his natural father.

For the next fourteen years, the Akbar family drifted from place to place. They traveled from California to Louisiana, then back to California. Hasan's mother, much like John's mother, was constantly seeking the attention of men, marrying two more and dating countless others. Hasan, his mother, and his siblings were the victims of physical, emotional, and sexual abuse at the hands of at his step-father William Muhammad Bilal.

Hasan's family was homeless for long periods of time in both Baton Rouge and Los Angeles. Although she received government assistance, Quran could never quite pull it together enough to provide a stable home. Her children watched as she

[15] William Muhammad Bilal was Quran's second of four husbands. After John and William, who she divorced in 1985, Quran married and divorced Sadiq Mumin and Wylee Shakur.

refused to shift her ideology from radical Islam, blaming the white man for all that had gone wrong. One day, however, while living in Baton Rouge, Quran decided not to hate the white man any longer; a proposition that both confused and angered Hasan - a reaction not necessarily born of a predilection for hating white people. On the contrary, this was the fault-line between father and mother. This was the ideological shift that resulted in divorce, his father turning back to crime, turning to drugs, ultimately becoming addicted to marijuana, PCP, and crack cocaine. This was the ideological shift triggering his father's severe depression and mental illness. This was the shift that contributed to his father engaging in behavior that would leave him inflicted with Herpes and HIV.

This was Hasan's reality, this is what Hasan learned and dealt with as he matured watching his mother degenerate into a shell of a woman filled with hate, filled with sorrow and confusion, wrought with mental illness. These were the pictures tattooed into Hasan's mind. These are the illnesses he inherited and developed from years of abuse and neglect. These ideas - this confusion, is what he carried with him every day during his four years of high school. These are the emotions which manifested into mental illness resulting in bizarre thoughts which went unaddressed during his nine years of college. This, the root of his psychosis, a psychosis he

brought with him to the Army, a psychosis that manifested into something else - something dark; a darkness which became clear that horrible morning on 23 March 2003.

Was the panel informed about Hasan's past? Were they informed that his family had a history of mental illness, that he was often homeless, that abusive men had always been part of his life, or any of the other suffering Hasan experienced growing up? The simple answer is no, because trial defense counsel failed to present a coherent sentencing/mitigation case.

PROECEDINGS AT TRIAL AND SENTENCING

In its Response to Appellant's Brief, the government maintains that trial defense counsel were not ineffective in representing appellant because, in accordance with American Bar Association Guidelines for Capital Cases, trial defense counsel established a theme during findings, and followed that theme through sentencing. (*See generally* GB at 45-80.) To evaluate the government's defense of counsel, it is vital to outline exactly what defense counsel did present during both the merits and sentencing phases of Appellant's court-martial before discussing any further defense counsel's so called "strategy." In doing so, Appellant will establish that trial defense counsel failed to develop a sentencing strategy at trial, and alternatively, if they actually had a strategy, they completely failed to implement that strategy.

On 11 April 2005, defense counsel presented an opening statement in Appellant's court-martial. (R. at 1211-1220.) It was during that opening that defense outlined their strategy - what they intended to present before the panel during the findings phase of Appellant's court-martial. Defense counsel, in no uncertain terms, told the panel Appellant did not intend to contest what happened on 23 March of 2003 (R. at 1211), but instead intended to explain that Appellant could not be guilty of premeditated murder because Appellant was not capable of premeditation (R. at 1212.) In an effort to prove this, defense was going to introduce evidence explaining why Appellant did what he did: Appellant was mentally ill. (R. at 1212-18.) In sum, defense counsel's entire merits case rested on the proposition Appellant "acted out of "desperation, fear, and confusion . . . born of a damaged mind . . . not premeditation." (R. at 1219.)

Dr. Fred Tuton was Appellant's first witness. Dr. Tuton was the clinical psychologist who evaluated Appellant for four hours (R. at 2020) nineteen years earlier (R. at 2018) on a referral from the Child Protection Center in response to an allegation of abuse involving Appellant's step-father and sister. (R. at 2017.) Dr. Tuton's testimony was not rendered through memory, but instead he relied totally on the report he

generated for the Child Protection Center. (R. at 2018, DE D and QQ.)

Dr. Tuton testified that while Appellant was not a victim of the abuse (R. at 2019), it was clear that Appellant was repressing feelings (R. at 2025), couldn't attach to people (R. at 2025), specifically his parents (R. at 2025), had a "flattened affect" (R. at 2026), was having problems sleeping (R. at 2028), didn't trust anyone (R. at 2029), was angry at his mother for not protecting his sister (R. at 2028), and was suffering from a learning disability (R. at 2035.) The problems he was suffering from were "moderate . . . [and] not moving into serious." (R. at 2037.) Interestingly Dr. Tuton noted Appellant was suffering from "adjustment disorder with depressed mood associated with a mixed specific developmental disorder;" an Axis I diagnosis (R. at 2034.) His diagnosis was based, in part, on the fact that Appellant, who was almost 15 years-old and in the 10th grade at the time he met with Dr. Tuton (R. at 2017), was reading at a 5th grade level, spelling at a 7th grade level, and able to do arithmetic at a 8th grade level. (R. at 2024.) Although Dr. Tuton believed that Appellant required therapy, he never saw nor heard from Appellant again. (*See generally* R. at 2040-41.)

The next witness the panel heard from was Paul Tupaz, Appellant's college roommate of two years of the nine years

Appellant spent in college. (R. at 2090.) Mr. Tupaz had not spoken to Appellant since 1994 (R. at 2071), and was not aware Appellant received a degree from the University of California, Davis Campus. (R. at 2071.) What he did offer was that Appellant, when he knew him, paced a lot, had difficulty sleeping, and was not a particularly social person. (R. at 2074-76.)

The next six witnesses,[16] SPC Charles Seitzinger (R. at 2091), SPC Joshua D. Rice (R. at 2107), SFC(R) Timothy Meavis (R. at 2151), SSG Scott M. Brandt (R. at 2168), SFC Billy G. Rogers (R. at 2185) and CPT John Evangelista (R. at 2389), all testified to essentially the same things. Each of them knew and worked with Appellant. Each described him to varying degree as a substandard non-commissioned officer who had problems staying awake, was detached, seemed depressed, did not have any friends, and took things too literally. (R. at 2108, 2110, 2153, 2170, 2190, and 2395.) Things Appellant took too literally: the use of derogatory terms for Muslims such as "skinny," "raghead," and "towelhead" used throughout the unit and "jody" calls during unit runs referencing killing Muslims. (R. at 2171, 2191, and 2396-97.)

Finally, trial defense counsel presented their primary witness: Dr. George W. Woods, Jr. (*See supra* n. 16.) Dr. Woods

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[16] Chronologically, Dr. Woods was called to testify before the Defense called CPT Evangelista to the stand.

was the defense team's "expert" psychiatrist. Dr. Woods testified that he met Appellant in late October 2004, and spent a period of eight hours over three days conducting forensic interviews of Appellant. (R. at 2234, 2236.)

In preparing to testify and also present a diagnosis of Appellant, Dr. Woods considered the following: "some family history," some academic records, medical records from the military, Appellant's journal, psychological testing, the military records of Appellant's uncle, the documents associated with Appellant's Article 32 hearing, the forensic interviews with Appellant, some records indicating Appellant was homeless for a period, and Paul Tupaz's declaration. (R. at 2235-36 and 2316.)

Throughout his testimony, Dr. Woods stressed three crucial data sets necessary to diagnose Appellant: one, his familial history (R. at 2236); two, the environment where Appellant grew up including his family life, his academic career, and his professional career (R. at 2238); and, three, Appellant's objective medical and/or psychological information. (R. at 2239.)

To this end, Dr. Woods relied on the limited information he was given about Appellant's family; i.e. Appellant's maternal uncle's possible psychiatric problems (R. at 2239-40), the Federal Bureau of Investigation's (FBI) interview report

pertaining to Mustafa Bilal, Appellant's half-brother (R. at 2241), and Appellant's father's struggles with depression (R. at 2242.) However, most relevant, and made clear by even a cursory review of the record; Dr. Woods' reliance on Appellant's background is rooted almost entirely in Appellant's journal because, absent a few miscellaneous documents and his own interviews with Appellant, that is all that was made available to Dr. Woods. (GAE 3.)

Second, Dr. Woods discussed his diagnosis of Appellant emphasizing Appellant's symptoms were more important than an actual diagnosis (R. at 2283, 2292 and 2348-49.) (This is crucial because it is clear from the record Dr. Woods, at the time of trial, believed Appellant to be suffering from paranoid schizophrenia.) (R. at 228-90, 2231, and 2349.)) Throughout his testimony he described the elevation of Appellant's depression and paranoia levels. (R. at 2280.) He commented on the elevated level of Appellant's unusual and bizarre thinking (R. at 2280) and developed a differential diagnosis of three possible disorders within the Schizophreniform Spectrum - meaning Appellant was unable to perceive reality accurately (R. at 2287) - to include Schizotypal Disorder, Schizoaffective Disorder, and Paranoid Schizophrenia. (R. at 2287-2290.) Interestingly, Dr. Woods, notwithstanding Appellant's testing indicating high functioning paranoid schizophrenia - extreme

elevations in schizophrenia and paranoia resulting from Appellant's psychological testing, testified that he ruled out paranoid schizophrenia (R. at 2289.)[17]

Finally, and notwithstanding the government's claims to the contrary, the record is clear that Dr. Woods did not have all the necessary information he required to properly diagnose Appellant. On page 70 of its brief, the government quotes Dr. Woods from page 2319 of the Record of Trial stating: "Dr. Woods testified that he had 'everything that he needed.'" In fact, when asked during cross-examination about the information he had Dr. Woods actually said, "I thought that the information that I had, including the psychological testing and the finding, was part of those interviews. So **I thought that I had everything that I needed.**" (R. at 2319)(emphasis added). Despite the government's misrepresentation of the record, the choice of what to consider was not made by Dr. Woods. (R. at 2318.) He only reviewed what was provided to him by defense counsel. (R. at 2318.) What is also clear is that information was withheld from Dr. Woods (GAE 1, 3, and 10; DAE AA) and virtually none of the information generated by the three mitigation experts seems to

[17] What is clear, however, is that Dr. Woods' diagnosis was based on incomplete information provided by defense counsel. (GAE 1,3, and 10; DAE C and AA.) Had Dr. Woods had Appellant's complete social history, he would have diagnosed Appellant with Paranoid Schizophrenia. (DAE AA.)

have made its way into Dr. Woods' hands. (GAE 1, 3, and 10; DAE AA; R. at 2235-36, 2239-42, 2316.)

The government proclaims, almost with adulation, that trial defense counsel's strategy in defending Appellant was to frontload the mitigation throughout the findings portion of his trial and that strategy was both brilliant and well executed. (GB at 47-50.) On the contrary, defense counsels' entire theory as represented by its presentation was to convince the panel Appellant could not premeditate as evidenced not only by the live testimony, but by the documentary evidence admitted. [18] Mitigation and lack of premeditation are not synonymous.

Defense counsel, during closing argument, said he was going to spend the next twenty-five minutes explaining why Appellant could not premeditate. (R. at 2596.) That is exactly what he did. Defense counsel repeatedly discussed Appellant's mental illness, his paranoia, and his brother's paranoia. (R. at 2599-

[18] In fact, the only documentary evidence offered by trial defense counsel during the findings phase of Appellant's court-martial were Defense Exhibits D, R, Z, AA, BB, CC, DD, EE, FF, GG, II, JJ, KK, LL, NN, PP, and RR (1986 Mental Examination and CPS Records, UC David Transcript, five diary excerpts, Appellant's birth certificates, Appellant's medical records from Fort Knox, Appellant's medical records from UC Davis, the curricula vitae of Dr. Tuton and Dr. Woods, a Stipulation of Expected Testimony from FBI Special Agent [redacted] a Stipulation of Expected Testimony of Specialist Smith-Foulks, name change documents, definitions of relevant Islamic terms, National Archive and Records Administration documents pertaining to Tyrone Rankins, records pertaining to Appellant's sleep apnea, a photograph of a generator, Appellant's Non-Commissioned Officer Evaluation Report, and the MMPI2 results, respectively).

2600.) He discussed how Appellant did well in high school, but when he got to college he spiraled out of control, taking nine years to graduate. (R. at 2600-05.) He discussed the use of derogatory terms for Muslims used by Soldiers in Appellant's unit and the impact that had on Appellant (R. at 2605) and then rehashed those Soldiers' testimony before the court. (R. at 2608-16.) Finally, defense counsel discussed the diary passages and unsuccessfully attempted to explain the context in which they were written. (R. at 2618.)

Appellant's sentencing case is encapsulated in approximately 38 pages of the record of trial and approximately the same number of minutes. Three witnesses testified for Appellant; CPT Storch (R. at 3015), SFC Daniel Kumm (R. at 3034), and Mr. Daniel Duncan (R. at 3043.) The first two witnesses suggested that the unit knew Appellant was troubled and did nothing about it (R. at 3015-23 and 3034-38), and Appellant was essentially passed from platoon to platoon instead of getting him the help he needed.

Mr. Duncan, on the other hand, was the only witness who knew Appellant as a teenager, though he has not had contact with Appellant since 1990-1991. (R. at 3050.) Mr. Duncan, as Appellant's high school physics teacher, spoke of Appellant's aptitude as a student, but very little about Appellant's environment growing up. (R. at 3046-48.)

During sentencing, trial defense counsel admitted Defense Exhibits A-C, F-I, K, L, N-P, T-W, and HH. The these exhibits consisted of Appellant's 193 page diary, an 8 page review of the diary created by the Federal Bureau of Investigation, a family tree and a 27 page summary of Appellant's diary created for review by defense counsel by Ms. Deborah Grey - Appellant's first mitigation expert who was subsequently fired because of conflicts between herself and Appellant's mother (GAE 1), sleep studies, an arrest record of William Bilal, stipulations of expected testimony from FBI Special Agent Dan Fontenot and Specialist Jeanette Smith Foulks and short statements by: (1) Ms. Regina Weatherford, a high school classmate who has not seen or spoken to Appellant since high school; (2) Musa John Akbar, Appellant's younger brother; (3) Dorris Davenport, Appellant's high school guidance counselor; (4) Ronda Cox, one of Appellant's high school teachers; (5) John Mendell, one of Appellant's counselors in high school; (6) Christine Irion, ex-wife of Appellant's college roommate; (7) SSG Charles Cordell, a Soldier who served with Appellant; (8) SFC Patricia Lewis, the Equal Opportunity Advisor for 1st Brigade, 101st Air Borne Division (Air Assault); and, (9) Imam Abdul Karim Hasan, Appellant's Imam as a child. Of those that provided statements, six had not heard from or spoken to

Appellant in years,[19] two did not really know Appellant at all,[20] and Musa, Appellant's brother, did not discuss his relationship or his family's relationship with Appellant in any detail. (DE H.)

Nor did defense counsel attempt to guide the panel by closing the gaping hole they left by admitting the journal. Appellant required witnesses to testify on his behalf to the content of the journal. He needed a person or persons to explain its intricacies, to explain what Appellant was going through when writing and what drove him to that point. Instead, they left the panel to its own devices to interpret what they could have only believed to be the ramblings of a cold-blooded killer and continued to argue a theory the panel clearly rejected the first time it was presented; the journal on its face proves Appellant's mental illness.

This is the information the panel had before it when the members sentenced Appellant to die. Simply claiming intent to "frontload" mitigation evidence (GAE 1) is not enough.[21] Trial Defense Counsel either had to in fact frontload the mitigation evidence, or present a mitigation and extenuation case at

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[19] Regina Weatherford, Doris Davenport, Ronda Cox, John Mandell, Christine Irion, Imam Abdul Karim Hasan.
[20] Doris Davenport and SFC Patricia A. Lewis.
[21] Interestingly, what trial defense counsel seemingly failed to recognize was the importance of a fully integrated mitigation case. Their emphasis towards "frontloading" mitigation evidence completely ignores planning for sentencing proceedings.

sentencing. They did neither and violated Appellant's Sixth Amendment right to effective assistance of counsel.

LAW

Capital cases are extraordinary. *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F. 1998). Put another way, death is different. To suggest otherwise, as the government does, is simply wrong. Appellant recognizes that ineffective assistance of counsel claims on sentencing are mixed questions of law and fact. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). But the ultimate determination rests with a de novo review by this Court. In reviewing Appellant's claim here, Appellant is once again not asking this Court to ignore the well settled two-prong test established by the Supreme Court in *Strickland v. Washington.* 466 U.S. 668 (1984). On the contrary, it merely asks this Court to find what it already knows to be true: trial defense counsel fell well below an objective standard of reasonableness such that their performance was deficient and that deficient performance deprived Appellant of a fair trial with a reliable result. *Id.* at 687-88. Ultimately, Appellant is asking this Court to find that absent counsel's deficient performance, "there is a reasonable probability that . . . the result of the proceedings would have been different." *Id.* at 687.

That reasonable probability exists if this Court determines counsel's deficient performance impacted the panel's decision to impose death. *Strickland*, 466 U.S. at 687.

Appellant further recognizes much deference is given to the decision making, more specifically, the "strategic decision making," of defense counsel at the time of trial. *See generally Strickland,* 466 U.S. at 690; *United States* v. *Gibson*, 51 M.J. 198 (C.A.A.F. 1999). However, defense counsel merely invoking the word "strategy," as they have done in Appellant's case, to explain errors "is insufficient since 'particular decision[s] . . . must be directly assessed for reasonableness in [light of] all the circumstances.'" *United States v. Kreutzer*, 59 M.J. 773 (Army Ct. Crim. App. 2004) (citing *Strickland*, 466 U.S. at 691).

Death being different imposes upon a defense counsel a "greater burden to discover, investigate, analyze, evaluate, **and present** extenuating and mitigating evidence on behalf of a client. *Kreutzer*, 59 M.J. at 783 (emphasis added). When defense counsel fail in their duty, and the panel's ignorance is a direct consequence of that failure, prejudice to Appellant exists to the "reasonable probability of a different result on sentencing." *Id.* at 784.

ARGUMENT

> It is very clear from the Record of Trial that much of the evidence presented on the merits by the defense to counter the premeditation elements was equally applicable to sentencing.

GB at 48.

This oversimplified statement is the government's reply to Appellant's assertion of ineffective assistance of counsel at sentencing. Without a doubt, it is based entirely on trial defense counsel's affidavit answering what, if any strategy they had at trial, and how it was implemented. However, the government's reply and trial defense counsel's affidavit suffer from the same shortcoming: they are wholly unsupported by the record of trial.

Based upon the record of trial, it is clear defense counsel failed. At issue is why they failed: was it a lack of strategy, a failure to execute that strategy, or both? Both Appellant and the government in their briefing to this Court spend significant time laying out the applicable law as promulgated by the Supreme Court in *Strickland and Wiggins,* the Court of Appeals for the Armed Forces in *Loving* and *Murphy,* and the Army Court of Criminal Appeals in *Kreutzer* - among others. The government relies on the language throughout those cases to declare to this Court that not only did defense counsel have a strategy at the time of trial, but they implemented that strategy by "front-

loading" the mitigation evidence throughout the merits phase in an effort to not alienate the panel at sentencing (("trial defense counsel **planned** from the very beginning to begin presenting their mitigation evidence during the merits portion.") (GB. at 47) (emphasis added); (GAE 1 and 10 at 83.)) This assertion too is unsupported by the record.

Again, based entirely on the record of trial, it is clear defense counsel is guilty of one of two things. They either did not have a sentencing strategy at all, or they failed to implement that strategy. Either way, their performance was deficient. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland*, 466 U.S. 688; *United States v. Loving*, 68 M.J. 1 (C.A.A.F. 2009); *Murphy*, 50 M.J. 4; *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *Kreutzer*, 59 M.J. 773.

Appellant has outlined for this Court exactly what was presented on his behalf by defense counsel during both the merits and sentencing phases of his court-martial. He asks this Court to recognize that none of what the government claims to be "mitigation evidence" was in fact either particularly mitigating or, more importantly, for the purpose of mitigation. On the contrary, the entire merits phase of Appellant's court-martial was spent by the defense team attempting to negate the *mens rea* requirement for premeditated murder. Had the panel agreed that

Appellant was unable to premeditate murder, it would not have been mitigating, it would have been exculpatory, resulting in acquittal for premeditated murder.

Instead, what would have been mitigating, to start, would have been a detailed explanation of the information relied on by witnesses like Dr. Tuton or Dr. Woods. Admittedly, Dr. Tuton did not know much about Appellant. After all, he interviewed Appellant when Appellant was fourteen years-old for a total of four (4) hours and has not heard from or spoken to Appellant since. (R. at 2040-41.)

Dr. Woods was employed by the defense team[22] to diagnose Appellant's mental illness and provide a comprehensive understanding of Appellant's psyche. Dr. Woods' differential diagnosis of possible mental illnesses was not mitigating. However, the information he relied on to inform his incomplete diagnosis; and the information which was withheld from him (*Compare* R. at 2235-36 and 2316 with DAE AA and GAE 3) would have certainly, if relayed to the panel, been mitigating. However, that mitigating information was not relayed to the panel. Dr. Woods barely mentioned Appellant's family history. He barely mentioned Appellant's uncle and half-brother. (*See* R. at 2239 and 2241) ("It concerned his maternal uncle . . . Tyrone

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[22] It is important to note that Appellant also had, at one time or another, two civilian defense attorneys: Mr. [redacted] and Mr. [redacted] who were also a part of the "strategic" decision making process.

Rankins who was discharged from the Marines in 1968 for what appears to be psychiatric problems.") and ("well, there was an interview by the FBI that was conducted with Mustafa Bilial . . . Sergeant Akbar's half-brother . . . and, in that interview . . . Mr. Bilal noted that he believed there were helicopters . . . that were surrounding his home . . . [and that] his phones had been tapped"). He did not discuss, in any detail, Appellant's father's history of depression other than to say "SGT Akbar's father has a significant history of depression." (R. at 2242.)

Dr Woods did not mention the depths to which Appellant experienced poverty, nor did he mention the depths to which Appellant was abused by his father and step-father; emotionally and physically. (*See* R. at 2246) (("Sergeant Akbar was born into an extremely poverty-stricken home -- oh, I'm sorry. His family was very poor.") and ("His mother married a man that was extraordinarily abusive. At a very young age, Sergeant Akbar's stepfather kicked him in the nose and broke his nose. It was physically abusive as well as sexually abusive. By the time Sergeant Akbar was 12 or 13, it was found that his stepfather had been molesting his younger sisters and had been molesting them for a significant period of time")). All of this information is **basic** mitigation, none of which was presented to the panel in any detail.

Appellant does not now suggest the entirety of the mitigation case could have or should have rested on the shoulders of Dr. Woods alone. On the contrary, for defense counsel to introduce all available mitigation evidence through Dr. Woods would have been a bad "strategic decision." This because if the panel came back with a guilty verdict (as it did), Dr. Woods' credibility and his theories about premeditation were obviously discounted or not believed by the panel - regardless of the reason, and they, along with all of his supporting testimony, go right out the window. Appellant makes mention of the depths to which Dr. Woods could have testified only to begin to illustrate the wealth of mitigation available and to counter the government's claim that mitigation was frontloaded during the merits portion of the trial. The only testifying witness who could have presented mitigation was Dr. Woods, who, as evidenced throughout, did not.

Having had their theory regarding premeditation rebuffed by the panel, it was incumbent upon trial defense counsel to present mitigation evidence during sentencing. But the defense case at sentencing was nearly non-existent. Defense counsel did not call a single witness who truly knew Appellant. They did not call a single witness to ask the panel for mercy. They did not call a single witness to testify that they loved Appellant. There was no one to explain the complicated, sad, abject life

Appellant lived, and to differentiate Appellant's fantasy from his reality. (R. at 2254-55.)

Instead, defense counsel admitted the FBI report discussing Appellant's journal (DE B) prepared by the FBI for investigative purposes by law enforcement agencies, and a terminated mitigation expert's preliminary, incomplete mitigation outline referencing Appellant's journal (DE C) which was prepared for the purpose of informing the attorneys, certainly not for publication to the panel. And finally: Appellant's journal. Instead of witnesses and mitigation evidence, trial defense counsel relied upon hundreds of pages of the incoherent ramblings of a psychologically troubled, perhaps paranoid schizophrenic (R. at 2280-90, 2231, 2349 and DAE AA), individual who memorialized for the panel his plan to kill American Soldiers. (DE A.) All this with no context, no explanation or discussion given to it by a mitigation or psychiatric professional. Simply the journal uncut, uncensored, and unexplained for the panel to take home and read at their leisure. (R. at 3004-05.)

A wealth of mitigation evidence was available, if trial defense counsel had known how to find or use it. At the time of trial, defense counsel knew, or should have known that Appellant's maternal grandfather was abusive, regularly beating

his wife. (DAE LL.)[23] They also knew or should have known that Appellant's maternal grandfather attempted to rape his mother, Quran and Quran's sister Tanya Rankin. (DAE LL.) This testimony could have been elicited by any number of people to include Appellant's mother, father, or aunt.

Defense counsel could have introduced impact evidence resulting from Appellant's mother's abusive childhood, her marriages to Appellant's father, John Akbar, Appellant's step-father, William Muhammad Bilal, and her other husbands Sadiq Mumin and Wylee Shakur. (DAE LL.)

Defense counsel could have retained and/or called a sleep expert. That expert could have testified to the effects of Appellant's problems with sleeping over a long period of time and the effect that had on Appellant's perception of reality and what, if any, impact that had on Appellant's perceived paranoia.

Defense counsel, upon deciding to admit Appellant's journal, notwithstanding arguing and successfully excluding significant portions of the journal during pretrial motions on the grounds they are misleading (R. at 782-83), could have

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[23] Defense Appellate Exhibit LL: Mitigation Report by Lori James-Townes, dtd 28 January 2010, incorporates by reference throughout both Defense Appellate Exhibits EE and FF: Note to File from Deborah Grey dtd 17 August 2005 and Note to File from Debora Grey. The vast majority of the information contained in DAE LL was initially obtained by Ms. Deborah Grey and is contained throughout DAEs EE and FF and is further corroborated by the independent investigation of Lori James-Townes as memorialized within DAE LL.

called someone or a series of persons to testify to the content of the journal thereby creating context for the panel. Instead, defense left laypersons to their own devices to interpret what appears on its face to be the single most aggravating - aside from the actual acts themselves - and misleading piece of evidence before the panel.

Defense counsel should have known of and had available to them Appellant's mother, Quran Bilal, his father, John Akbar, his sisters, Mashiyat Akbar and Sultana Bilal, his brothers, Mustaffa Bilal and Musa Akbar, his aunts Jan Wilson and Bernita Rankins, his uncles, Abraham Henryhand and Jerome Rankins, his half-brother Antonio Akbar, his step-father William Mohammad Bilal, and his Imam, Imam Abdul Hasan. (DAE LL.) None of these people were called to testify on behalf of their loved one.

Had these relatives been called to testify, the panel would have learned Appellant's father was raised by his grandparents because his mother was single and too young to take care of him and his brother when they were born. (DAE LL.) The members would have learned that Appellant's father and uncle were orphaned when they were eight years-old and forced to tend to their dead grandparents' farm alone until they turned twelve years-old. (DAE LL.) When they turned twelve, their aunt, only having enough money to care for one of the boys, took John's (Appellant's father) brother to live in Detroit leaving twelve

year-old John alone on the farm in rural South Carolina. (DAE LL.)

It was not until John's uncle came and rescued the malnourished, illiterate child that he moved to Detroit until finding his promiscuous mother and going to live with her in Miami when he was sixteen years-old. (DAE LL.) They would have learned that John left Miami for Los Angeles where he turned immediately to a life of crime and philandering. (DAE LL.) That is, until he met, a month later impregnated, and ultimately married Patsy Rankins (Appellant's mother, now known as Quran Bilal). (DAE LL.) By the time Appellant was born, his father had five sons with five different women. (DAE LL.)

In 1973, after involving himself in robberies, partying throughout the day and night, and taking drugs, John was sent to prison at San Quentin, one of the most dangerous prisons in the country. It was there he was first diagnosed with depression, treated for marijuana and cocaine addictions, and involved himself with the Nation of Islam. (DAE LL.)

During the two years he was incarcerated, Quran brought Appellant to the prison to visit with his father. Having difficulty supporting Appellant while his father was in prison, she was forced to sell their apartment building. (DAE LL.) Upon his release from prison, Appellant's mother and father changed their names and Appellant's to reflect their new

religion and had two more children, Musha and Mashiyat Akbar. (DAE LL.)

Though he was out of jail, Appellant's father continued to get into trouble. He was arrested for theft, fraud, and possession of marijuana. (DAE LL.) During the Nation of Islam's turmoil, John's addiction to drugs worsened deepening the impact on Appellant and his family. (DAE LL.)

Shortly thereafter, Quran left John and moved with her three children to Louisiana resulting in John's condition worsening. His depression increased as did his addiction to drugs adding a new one to the arsenal; PCP. (DAE LL.) His life turned to that of a drifter moving from town to town starting business after business. His depression growing exponentially, now with HIV and Herpes II, John eventually turned to crack cocaine. (DAE LL.) John's depression evolved into Anxiety Disorder. (DAE LL.) He attempted suicide three times. (DAE LL.) At the time he discovered Appellant was going to stand trial for the charged offenses, he was homeless in Seattle and struggling to maintain his sobriety. (DAE LL.) None of this information made it to the panel.

The panel was never informed of the impact Appellant's father's background had on Appellant's mental health. They were never informed whether his father's mental illness, along with the rampant familial history of mental illness could have had on

Appellant and to what extent that mental illness was hereditary. Dr. Woods, while testifying during the merits, testified that genetic history is important (R. at 2236) yet noone explained the familial history and its potential impact on Appellant.

The panel did not know that Quran Bilal had paranoid tendencies, was hyperactive, was herself a trauma survivor, and was sexually abused. (DAE LL.) The members did not know that Abraham Henryhand (Appellant's uncle) was physically abused, neglected, and abandoned. (DAE LL.) They did not know the extent to which Mashiyat Akbar was sexually abused, experienced and survived trauma, had a mood disorder, and functioned at a low level intellectually. (DAE LL.) They did not know that Bernita Rankins (Appellant's aunt) was the victim of physical, emotional, and sexual abuse. (DAE LL.) They did not know that Tanya Rankins (Appellant's aunt) had mental health disorders including depression, was bi-polar, was a drug addict, and was physically abused. (DAE LL.) They did not know that her son, too, was charged with murder. (DAE LL.) They did not know that Rosa Lee Wilson (Rankins) (Appellant's grandmother) was a victim of domestic violence and had a mood disorder. (DAE LL.) They did not know that Appellant's grandfather, David Rankins, was physically, emotionally, and sexually abusive. (DAE LL.) They did not know the extent to which William Bilal was abusive, both

physically and sexually, to all of his children, including Appellant. (DAE LL.)

Again, the panel was not told the effect of the family's dynamic on a person's, more specifically, Appellant's psychological state. They were not informed of the hereditary nature of mental illness and Appellant's family's past effect on his future. (DAE LL.)

The panel was not apprised of the nature of Appellant's poverty. They were not told Appellant's level of poverty was comparable to that of a post Hurricane Katrina New Orleans survivor without the possibility of assistance on the horizon. Appellant's mother for years received welfare and experienced intermittent periods of homelessness. (DAE LL.) When they were not homeless, they occupied space in buildings which should have been condemned. (DAE LL.) While in high school, Appellant and his family lived in a one room dwelling with no furniture or beds. (DAE LL.) Everyone slept on the floor. (DAE LL.) Appellant remembers a period he was forced to sit on piled up laundry in the bathroom to do his homework. (DAE LL.)

After the 1994 Los Angeles earthquake - while Appellant was home from college on winter leave, Appellant and his family roamed the streets of Los Angeles, refugees in their own city, finally finding a temporary shelter. (DAE LL.) This information too was kept from the panel.

The panel was not informed of the extent to which Appellant was exposed to gangs and drugs other than by passing references made by Dr. Woods and Daniel Duncan. (R. at 2247 and 3044.) The panel was not informed that Appellant and his siblings were exposed regularly to gang activity and gunfire on the streets. (DAE LL.) The members were not told that Appellant often went hungry. (DAE LL.) That he was forced to share each of his ten homes in eighteen years with rats and cockroaches, wherever that home may have been. (DAE LL.)

The panel was not informed that Appellant was present when his step-father swung and broke a rifle on his mother's back. (DAE LL.) He was present when his step-father beat his mother, choked his mother, and threatened her life with a pistol cocked and pointed at her. (DAE LL.) The panel was not sufficiently informed that Appellant suffered a broken nose at the backhand of his step-father while Appellant was practicing his trumpet. *Compare* (R. at 2246 with DAE LL.)

The panel's ignorance to the possibility that Appellant may have been forced to perform oral sex on his step-father and suffered further sexual abuse from a cousin (DAE LL) is simply because defense counsel chose to keep that from them.

As outlined throughout Lori James-Townes' post trial Mitigation Report of Appellant (DAE LL), any number of experts including psychologists, psychiatrists, sociologists, trauma

experts, sleep experts, religiosity experts, among others, could have been employed to evaluate Appellant's social history and called to testify to explain the impact of that social history on Appellant's life and actions. Much mention was made of the conflict between Appellant's intellectual aptitude during testing (*See generally* the testimony of Drs. Tuton and Dr. Woods (R. at 2023-24, 2247-50, and 2258)) and his scholastic achievement. Yet, not a single person was called to testify to explain this conflict to the panel. The panel never learned that perhaps the reason Appellant appeared to do so well in high school was because so little was expected of him due to the quality of his high school - one of the worst inner city schools in Los Angeles (*See generally* R. at 2058 and 3045) - a quality which was not replicated at the University of California - Davis, where it took Appellant nine years to graduate. (R. at 2600.)

Not a single person testified to the impact of Appellant's nuclear family's conversion to Islam and Appellant's personal turmoil when trying to comprehend how Islam fit into Appellant's life.

None of this was introduced, yet all of this information, with the slightest bit of effort, was available to defense counsel. Defense counsel either ignored it or failed to

properly investigate. Either way their performance was deficient. Either way, they were ineffective.

Proceeding the way they did, counsel deprived Appellant of his right to a fair trial with a reliable result. Had all of this information been introduced to the panel; had the panel had an opportunity to learn about Appellant's life, about his family's life and how that impacted Appellant, there is a reasonable probability the panel would not have sentenced him to death. This probability is enough for this Court to set aside Appellant's sentence and order a rehearing on sentence.

Therefore, Appellant requests this court set aside his sentence.

ISSUE III

APPELLANT'S DEATH SENTENCE WAS UNCONSTITUTIONALLY ADJUDGED WHERE R.C.M. 1004(c)'s PROVISIONS WERE NOT (1) EXPRESSLY ALLEGED IN THE CHARGES PREFERRED AGAINST HIM; (2) EXPRESSLY INVESTIGATED PURSUANT TO R.C.M. 405 AND ARTICLE 32, UCMJ; AND, (3) EXPRESSLY REFERRED TO HIS COURT-MARTIAL BY THE CONVENING AUTHORITY.

Although the military is perhaps exempt from the requirement of an indictment by grand jury, due process still requires a military accused to be on notice of the crime to be defended against at trial. CAAF's decision in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), makes it abundantly clear that a military accused has a fundamental right to fair and adequate notice under the due process clause. As CAAF

specifically stated, "fair notice and due process mandates that an accused has a right to know what offense and under what legal theory he must defend against." *Jones*, 68 M.J. at 468 (*citing United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2009)).

The Constitution requires that an accused be on notice as to the offense that must be defended against. *See Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); *See also In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than . . . notice of the *specific charge*, and a chance to be heard in a trial of the issues raised by *that charge* . . ."); *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009). In the military justice system, this constitutional requirement is achieved through the precise pleading of all elements of an offense, on the charge sheet. While people are presumed to know the law (*See Atkins v. Parker*, 472 U.S. 115, 130 (1985)), they can hardly be presumed to know that which is a moving target and dependent on the facts of a particular case. *Jones*, 68 M.J. at 468.

Although addressing separate and distinct constitutional entitlements, the holdings in *Ring* and *Apprendi* establish that the "aggravating factors" set forth in R.C.M. 1004 are the functional equivalent of elements. Citing *Apprendi,* the Supreme Court in *Ring* determined that when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey,* 530 U.S. 466, 495 (2000) ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); *See also Apprendi*, at 501 (THOMAS, J., concurring) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.); *Ring*, 536 U.S. at 605.

When the "aggravating factors," set forth in R.C.M. 1004, are added to the offense of murder, a new and more egregious

offense is created, murder plus an aggravating factor or "capital murder." The offense of murder is a distinct, lesser-included offense of murder plus an aggravating factor. This distinction takes on the greatest of importance in appellant's case given that the former exposed appellant to a maximum punishment of life imprisonment without the possibility of parole, while the latter increased the maximum sentence to death. *See Satttazahn v. Pennsylvania*, 537 U.S. 101 (2003). Relying on its holding in *Apprendi*, the Court in *Satttazahn* stated, "put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact - no matter how the state labels it - constitutes an element . . . ." *Id.* at 111.

In this case, the government failed to meet the constitutional requirement of providing adequate notice because the additional elements or "aggravating factors" were not expressly set forth in the charge sheet. In fact, appellant was not put on notice of the actual offense he would be required to defend against at trial, capital murder, until immediately prior to his arraignment. (R. at AE XC.) Thus, the defense was forced to maneuver through the pretrial stages of the trial without a firm grasp of the actual offense for which their client was charged. As CAAF made clear in *Jones*, the charge

sheet, itself, provides the required notice of what an accused must defend against. *See Jones*, 68 M.J. at 472.

Providing notice of a new, more egregious offense months after the preferral of charges completely negated the ability of Appellant's counsel to effectively negotiate for a non-capital referral or adequately prepare for a complex capital trial. The government's proposition that defense counsel were on notice of the aggravating factor prior to arraignment is simply incorrect. At the time of the Article 32 investigation, Appellant's counsel were unaware of the precise aggravating factor they would be required to defend against at trial or if the case would be referred as a capital offense. (R. at AE XC.) Contrary to the government's proposition, Appellant's counsel were unable to determine the actual charge to be defended against merely by looking to the charge sheet. *Id.*

Trial counsel's late-in-the-game notice was the functional equivalent of no notice. Although the military justice system is exempt from a right to a grand jury, we are not exempt from fair notice under the Due Process Clause. Appellant was deprived of his constitutional right to due process when the government failed to plead the additional elements in the charge sheet.

APPELLANT WAS NOT AFFORDED A FULL OPPORTUNITY TO INVESTIGATE THE FACTS SURROUNDING THE BASIS FOR THE AGGRAVATING FACTOR IN HIS CASE.

Merely looking to the plain language of Article 32, UCMJ, it is clear that Appellant was denied a thorough and complete investigation into the charges for which he was ultimately required to defend against at trial. Article 32 mandates that no specification may be referred to court-martial without a "thorough and impartial investigation of all matters set forth therein." Additionally, as the discussion in R.C.M. 405 expressly sets forth: if at any time after an investigation is conducted under article 32, charges are changed to allege a more serious offense, further investigation should be directed.

Article 32 makes clear that all elements and charges must be investigated prior to going to trial. This requirement, in turn, ensures the military preferral and referral process have sufficient safeguards to protect an accused's constitutional right to due process. See *Loving*, 41 M.J. at 296-7. Although Article 32 is statutorily based, this fact does not diminish the central importance of the Article 32 investigation, as the protections afforded an accused stem from the due process clause of the Constitution. "Article 32 . . . was intended to provide a substitute for the grand jury." *United States v. Bell*, 44 M.J. 403, 406 (C.A.A.F. 1996). "Article 32 . . . grants rights to the accused greater than he or she would have at a civilian

grand jury." *United States v. Curtis*, 44 M.J. 106, 130 (C.A.A.F. 1996).

Appellant was deprived of his rights under Article 32 because he was unable to investigate the actual charge for which he was tried - capital premeditated murder. As *Apprendi* and *Ring* make clear, capital aggravating factors are elements of a greater offense: capital premeditated murder or murder-plus. *See Sattazahn,* 537 U.S. at 111. The mere addition of the "aggravating factor" created an entirely new and more egregious offense. As such, Appellant was entitled to investigate that new offense at an Article 32 investigation. The fact that the military judge noted in his findings that the defense could not proffer any additional evidence it would have presented is irrelevant. Appellant has an express right to investigate all charges against him at an Article 32 investigation. As defense counsel provided in their motion to the trial court, "SGT Akbar was not put on notice at the Article 32 hearing of which aggravating factors the government intended to prove at trial. Thus SGT Akbar appeared at his Article 32 hearing without knowledge of the elements that he had to defend." (AE XC.)

Additionally, the lack of notice substantially impeded the ability of the defense to develop and present appropriate evidence in mitigation at the Article 32 proceeding. Article 32 provides that "at [the] investigation full opportunity shall be

given to the accused to cross-examine witnesses against him . . . and to present anything he may desire in his own behalf, either in defense or mitigation." This becomes extremely important with a death-eligible offense as the presentation of mitigation evidence could result in the recommendation for a non-capital referral to the convening authority. Appellant was deprived of this ability because he was not even aware that he was charged with "capital murder" at the Article 32 proceeding. Absent this notice, Appellant's counsel was unable to supply the appropriate mitigation evidence to allow them to argue for a recommendation of a non-capital referral.

Because the addition of an "aggravating factor" creates a new and more egregious offense, there is both a constitutional and statutory requirement to include the "factor" in the charge sheet. Due process requires that an accused be on notice of every offense for which he will have to defend against at trial, and Article 32 requires that every charged offense be investigated prior to referral. Appellant was not afforded these rights.

Therefore, Appellant requests this court set aside his findings and sentence.

ISSUE IV

RING v. ARIZONA REQUIRES THE PANEL MEMBERS TO FIND THAT AGGRAVATING FACTORS SUBSTANTIALLY OUTWEIGH ALL MITIGATING AND EXTENUATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT

Despite the Government's concession to the current capital sentencing landscape established by *Ring* and *Apprendi*, it has completely disregarded the underlying interpretation: that any fact, irrespective of its label, necessary to increase the penalty proscribed to an accused upon a finding of guilty must be found to exist by a jury beyond a reasonable doubt. The Government asserts that the U.S. Constitution does not call for such a stringent standard to be applied to the balancing test between the aggravating and mitigating circumstances; however, this assertion is an attempt to obviate the constitutional due process rights afforded service members under the Fifth and Sixth Amendments.

Within the bifurcated hearing process of the military justice system, upon unanimously finding an accused guilty of a capital offense the members must make "two necessary findings" at the sentencing stage to impose death. *See* R.C.M. 1004(b)(4); *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998). First, the members must find the existence of at least one enumerated aggravating factor beyond a reasonable doubt. *See* R.C.M. 1004(b)(4). Second, they must find "that any extenuating or mitigating circumstances are substantially outweighed by any

aggravating circumstances." *See Id.* Only after of both these findings are made affirmatively will an accused become eligible to receive a sentence of death. *See Loving v. Hart*, 47 M.J. at 442. Absent just one of these "eligibility" findings, the maximum punishment is confinement for life without eligibility for parole. *See* Art. 118, UCMJ; *see also Loving v. Hart*, 47 M.J. at 442.

Eligibility findings are findings that increase the maximum punishment to death, versus selection findings that are the basis for the individualized determination of the sentence to be imposed. *Tuilaepa v. California*, 512 U.S. 967, 972-73 (1994). The Court of Appeals for the Armed Forces has specifically stated that the weighing determination was an "eligibility" finding. *See generally Loving v. Hart*, 47 M.J. at 442. This Court is bound by that construction; therefore, the weighing determination of R.C.M. 1004 is an eligibility determination of fact.

Moreover, the issue here is that the military scheme requires (after the members find guilt beyond a reasonable doubt and find at least one enumerated aggravating factor beyond a reasonable doubt) that the members find that any mitigating circumstances are "substantially outweighed" by the aggravating factors and circumstances. After *United States v. Gaudin*, 515 U.S. 506 (1995), *Apprendi,* and *Ring*, it is clear that the

members' weighing of the aggravating and mitigating circumstances present in a particular case is a factual "finding" required to be made before an accused is eligible for a death sentence. *Loving v. Hart*, 47 M.J. at 442.

Under *Ring*, "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishments." *Ring*, 536 U.S. at 589. Under *Apprendi*, "the relevant inquiry" in this context "is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi, 530* U.S. at 494. *See also United States v. Booker*, 543 U.S. 220, 232 (2005) (the defendant has a "right to have the jury find the existence of 'any particular fact' that *the law makes essential to his punishment*")(emphasis added); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("the relevant 'statutory maximum' is not the maximum sentence a [jury] may impose after finding additional facts, but the maximum [it] may impose *without* any additional findings"). And, under *Gaudin*, even where a question might superficially be only a "legal question," if the question is one that requires factual findings and is one that is an "element" of the offense, the Fifth Amendment right to due process and the Sixth Amendment right to trial by jury require that the element

be submitted to the jury for a determination beyond a reasonable doubt.

In *Gaudin*, the defendant was convicted of making a false material statement to a government agency. The question presented to the Court was whether it was constitutionally permissible for the trial judge to determine that the statement was "material" and to instruct the jury of the determination. *Gaudin,* 515 U.S. at 507. The Government argued that the judge had committed no error because the question of "materiality" was "as a matter of logic or history," that it was only a "legal question," and that only "factual components of the essential elements" must be submitted to the jury. *Id.* at 511. The Court rejected this argument, in essence, because: (1) the Fifth Amendment right to due process and the Sixth Amendment right to trial by jury require that all elements of the offense be submitted to the jury; and (2) the determination was not, as the Government argued, a purely legal determination.

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts.

Id. at 512.

Here, the "substantially outweighed" determination is not a purely legal determination. Contending otherwise would run afoul of *Gaudin*, *Apprendi*, and *Ring*. Using the step-by-step analysis of *Gaudin*, in order to make the required determination the panel must, at a minimum, make the following factual determinations:

1) What extenuating and mitigating circumstances are present?

2) What aggravating circumstances are present under R.C.M. 1001(b)(4)?

3) What enumerated aggravating factors are present under R.C.M. 1004(c)?

4) Are the extenuating and mitigating circumstances substantially outweighed by the aggravating circumstances under R.C.M. 1001(b)(4) and aggravating factors under R.C.M. 1004(c)?

See R.C.M. 1004(b)(4)(C).

Thus, the required finding under R.C.M. 1004(b)(4)(C) is, at least in part, a "factual" determination. Under *Apprendi*, this "required" factual determination "does . . . expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi,* 530 U.S. at 494. This is so because the panel is not even authorized to consider death as an available punishment unless the panel makes the finding that the mitigation is substantially outweighed by the aggravation. *Loving v. Hart*, 47 M.J. at 442 (only after this finding "does an accused become 'death eligible'"). And, as the Court held in

Apprendi, any finding, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and found beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490. Finally, under *Ring*, the provisions of *Apprendi* are applicable in capital sentencing proceedings. Thus, the "weighing" required by the members must be accomplished using a beyond a reasonable doubt standard.

Assuming *arguendo* that this Court agrees with the Government's assertion that the balancing test is a moral judgment not a finding of fact it should still apply a "beyond a reasonable doubt standard," notwithstanding its designation, to uphold the moral certainty of a sentence of death. (GB at 100) (citing *Fields v. United States*, 483 F.3d 313 (5th Cir. 2007), *cert. denied*, 552 U.S. 1144 (2008)). The "dispositive question . . . 'is one not of form, but of effect'" meaning the heart of the matter is how the aggravating factors impact the accused regardless of how they are labeled. *Ring* at 602 (quoting *Apprendi* at 494). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83).

The balancing test between aggravating and mitigating circumstances is an additional finding that enables an increase in punishment to death; therefore, irrespective of a characterization as a "moral judgment," "sentencing factor," or "functional element," to satisfy the protections afforded an accused under *Ring* and *Apprendi* the jury must apply a reasonable doubt standard to this determination. *See generally Apprendi,* 530 U.S. at 484 (Due process protections "extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'").

Additionally, the Government's desire for a moral judgment is satisfied by an application of "beyond a reasonable doubt" standard to the balancing test because this higher standard increases the moral certainty that an accused's death sentence has been made with the utmost confidence. *See In re Winship,* 397 U.S. 358, 364 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

As such, a higher degree of certainty in capital cases is a fundamental tenet of an accused's due process rights. Because the weighing determination is a prerequisite to establishing death as an authorized sentence and the "substantially outweigh" standard does not provide a substitute for the moral certainty

of the "beyond a reasonable doubt" standard, R.C.M. 1004(b)(4)(C) must be decided beyond a reasonable doubt.

Therefore, Appellant requests this court set aside his sentence.

ISSUE V

THE PROSECUTION'S MANIPULATION OF TRIAL DEFENSE COUNSEL DURING APPELANT'S COURT-MARTIAL AMOUNTED TO UNLAWFUL COMMAND INFLUENCE WHICH IMPACTED THIS CAPITAL CASE SUCH THAT DEFENSE COUNSEL SHOULD HAVE WITHDRAWN FROM REPRESENTING APPELLANT AND FAILURE TO DO SO WAS INEFFECTIVE

FACTS

In his original brief to this Court, Appellant raised, as an assignment of error, the issue of unlawful command influence. The following statements by the Trial Counsel served as the basis for Appellant's assignment of error:

> 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.

(R. at 444.)

After the government counsel took a break to call defense counsel's assignment officer, he came back on the record and said with finality:

> 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 ████ will remain on this case. He will not get orders until this case is finished . . . .

(R. at 444-447.) Expressing his concern with the government's remarks, the military judge replied:

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

(R. at 444-447.) However, the military judge failed to inquire any further into the matter.

In response to Appellant's claim that the government exerted unlawful command influence over Appellant's court-martial, Appellant's defense counsel, in their joint affidavit to this Court, provided the following:

> Initially, we were both shocked that a senior judge advocate would take such action much less discuss it openly on the record. At the very least, we felt it created a very damaging appearance issue with regards to fairness of the military justice system. There was also some initial concern about

> the ease with which the trial counsel could manipulate our careers.

(GAE 1.)

Appellant's defense counsel went on to state that any tampering with their careers, by the government, was only alleviated through the actions of the leadership at their subsequent assignments.[24] *Id.*

LAW AND ARGUMENT

In response to Appellant's assignment of error, the government argues that Appellant can point to no "actual" harm in his case, and even if there was harm, there was no prejudicial effect. What the government seems to ignore in its argument is that the appearance of unlawful command influence can be just as devastating to the military justice system as the actual manipulation of any given trial. *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002). Unlawful command influence is not the "mortal enemy" of the military justice system because of the number of cases in which such influence is at issue, but rather because of the exceptional harm it causes to the fairness and **public perception** of military justice when it does arise. See *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2009).

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[24] Defense counsel stated, "having worked with LTC Garrett in the past, LTC [redacted] trusted him and he was confident that he could successfully deflect any further attempts by LTC [redacted] to manipulate his career." (R. at GAE 1.)

Thus, "disposition of an issue of unlawful command influence falls short if it fails to take into consideration . . . the appearance of unlawful command influence at courts-martial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). The issue in this case does not turn on the actual harm to Appellant, but instead on whether the influence of command placed an intolerable strain on public perception of the military justice system. *Stoneman*, 57 M.J. at 42-43. The question whether there is an appearance of unlawful command influence is judged objectively, through the eyes of the community. *Id.*

In this case, the government created an appearance of unlawful command influence when the lead trial counsel, openly and on the record, manipulated the assignments of defense counsel to prevent any further continuances in Appellant's case. While defense counsels' careers may not have been ultimately affected, those members of the public sitting in the gallery could only be left with the impression that the prosecution controlled Appellant's counsel and thereby controlled Appellant's ability to receive effective representation. Thus, the disinterested public would not believe Appellant received a trial free from the effects of unlawful command influence.

This appearance of unlawful command influence is evidenced by defense counsels' sworn affidavit to this Honorable Court.

In their affidavit, defense counsel repeatedly express their own concern and shock at the government's ability to openly manipulate their careers. They stated, " . . . there was initial concern about the ease with which the trial counsel could manipulate our careers." (R. at GAE 1). Additionally, they felt it created a very damaging appearance issue with regards to the fairness of the military justice system. *Id.* It is therefore a reasonable assumption that members of the public would feel the same shock and concern over the issue.

Throughout its brief, the government argues that the trial counsel took the appropriate actions during Appellant's trial. The government writes, "LTC [redacted] as a representative of the government, contacted the appropriate assignments authority to ensure that the assignments process did not interfere with Appellant's right to effective representation of counsel." Yet, the government completely overlooks the glaring conflict of interest created as a direct result of these actions - a conflict apparent to members of the public sitting in the gallery. By demonstrating his power to alter the careers of defense counsel, the trial counsel assured that Appellant would be represented only to the extent that defense counsel's own careers would not be affected.[25]

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[25] *See* Appellant's original brief at AE II, where Appellant addresses the creation of a conflict of interest through the

To make matters worse, the military judge, who clearly expressed his own concern over the issue, failed to inquire into the matter or clear up any appearance of undue influence. The trial counsel's actions, coupled with the military judge's complicity undoubtedly sent a message to the members of the public that the prosecution controlled the actions of defense counsel. Had the military judge followed the dictate of *Stoneman*, perhaps the public's perception of unfairness could have been alleviated. In *Stoneman* CAAF recognized, "it [is] incumbent on the military judge to act in the spirit of the code by avoiding even the appearance of evil in the courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." *Stoneman*, 57 M.J. at 42-43.

The government's comments and the military judge's failure to reign in those comments, created an appearance of unlawful command influence. To find that the appearance was harmless beyond a reasonable doubt, "the Government must convince [this Court] that the disinterested public would believe [Appellant] received a trial free from the effects of unlawful command influence." *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). While defense counsel ultimately did not have to choose between their own career interests and Appellant's interest in

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actions of trial counsel. *See also* the numerous assignments of error involving ineffective assistance of counsel.

being zealously advocated for, neither they, nor the public knew this at the time of Appellant's trial.

Defense counsel's reflections, in their affidavit, clearly establish that an appearance of unlawful command influence was created by the government's actions. It is fair to assume that if defense counsel themselves believed the government's actions "created a very damaging appearance," that an unbiased member of the public would likewise question the ability of Appellant to receive a trial free from the manipulation of the government.

Therefore, dismissal of charges in this case "is an appropriate remedy where the error cannot be rendered harmless" and no alternative remedy is available which would "eradicate the unlawful command influence and ensure the public perception of fairness in the military justice system." *Lewis*, 63 M.J. at 416; *see also United States v. Gore*, 60 M.J. 178, 189 (C.A.A.F. 2004).

Therefore, Appellant requests this court set aside his findings and sentence.

ISSUE VI

DENYING APPELANT 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.

The government bases its conclusion that Appellant should have no right to present a guilty plea as mitigation evidence in his capital trial simply on its view that Appellant was not

remorseful. (GB at 172.)[26] The government focuses primarily on the fact that Appellant did not offer a plea of guilty, Appellant did not concede guilt during the merits portion of the trial he was forced to undergo, and on its own interpretation of Appellant's unsworn statement. (GB at 172-74.) In so doing, the government tacitly demonstrates precisely the importance that the availability of a guilty plea plays in mitigation.

The Supreme Court has acknowledged that a guilty plea is important evidence in a defendant's mitigation case. *See Bradshaw v. Stumpf,* 545 U.S. 175, 186 (2005)(determining that a guilty plea was knowing and voluntary in part because a defendant had planned to rely on it as part of his mitigation presentation); Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty,* 65 Alb. L. Rev. 181, 200-201 (2001)(noting the many benefits of pleading guilty for murder defendants)(citing *United States v. Jackson,* 390 U.S. 570, 583 (1965)). This principle has similarly been enshrined in the Rules for Courts-Martial, specifically in R.C.M. 1002(f)(1). This Court has stressed the importance of mitigation evidence, particularly in the death penalty context. *United States v. Matthews*, 13 M.J. 501, 527 (A.C.M.R. 1982)(describing an accused's broad latitude to submit

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[26] Government opens its assignment of error by stating: "Appellant never offered a plea of guilty. In fact, appellant is still claiming that he's not guilty of the offense." (GB at 172.)

mitigating evidence as giving him "virtual *carte blanche* to present whatever he desires in extenuation and mitigation").

It is in all defiance of logic, therefore, that only when facing the most extreme punishment does our criminal system deny Appellant access to a mitigating factor that, when wielded properly, has been noted to be extremely effective. *See generally Scheckel v. State,* 655 N.E.2d 506 (Ind. 1995); *United States v. Playarentas,* 2002 WL 31371956 (N.M.Ct.Crim.App. Nov. 5, 2002) (Appendix).[27]

Although courts have long entertained, to varying degrees, the legal fiction the government relies on: that jurors and the public interpret a defendant's pleas in a rigidly technical manner, the weight of statistical and anecdotal evidence suggests precisely the opposite. *See* (GB at 173, FN 806);[28] *but see* Robert F. Cochran, Jr., *"How Do You Plead, Guilty or Not Guilty?": Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 Cardozo L. Rev. 1409, (2005)(discussing the

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[27] In *Scheckel*, the Indiana Supreme Court held that a sentence of 60 years for murder was unreasonable in light of mitigating evidence, especially the defendant's guilty plea which demonstrated his "acceptance of responsibility" while sparing the state and the victim's family the time and expense of a full-blown trial. *Scheckel v. State,* 655 N.E.2d 506, 511 (Ind. 1995). The Navy Court expressed the view in *Playarentas* that a defendant's guilty plea entitled him to a lesser sentence than that of his co-conspirators. *United States v. Playarentas,* 2002 WL 31371956 at 4 (N.M.Ct.Crim.App. Nov. 5, 2002).

[28] "'Innocence' is not the same as being 'not guilty;' a distinction that is important in American judicial jurisprudence." (GB at 173).

negative effects of functionally mandated "not guilty" pleas on the criminal justice system, the public, and the rehabilitation of criminal defendants).[29]

This means that while practitioners treat a "not guilty" plea as meaning a defendant may be exercising his or her right to have the prosecution prove its case or relying on a legal defense such as lack of mens rea, a juror is far more likely to view the plea in its literal sense. That is a defendant is claiming he did not commit the crime he is accused of. Although our criminal justice system is based on the presumption that jurors understand the legal distinctions required of them, empirical studies have consistently shown startlingly low rates of juror comprehension. *See* Cochran, Jr., 26 Cardozo L. Rev. at 1444-45 (discussing in detail the results of one study measuring comprehension of the "not guilty" plea by jurors); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187,

[29] Professor Cochran opens his note with an anecdote perfectly illustrating the average response to a "not guilty" plea, a letter to the editor from a member of the public regarding a local murder trial: "How can that slime ball Daniel Wingard plead not guilty? Who else killed Mike Altieri? . . . Everyone should be responsible for their actions." Cochran, Jr., 26 Cardozo L. Rev. at 1409. Another letter from the same case reads, "[Wingard's] not-guilty plea is outrageous! Whose blood were you covered in Mr. Wingard? Save the community and the Altieri family the grief, money and time of a trial and confess your sins." *Id.* at 1438.

1202-08 (2002)(summarizing the results of 8 major studies on juror comprehension).

In addition to studies, at least one court, the United States Court of Appeals for the District of Columbia, has acknowledged that jurors consider the literal, rather than technical meanings of pleas. *Wood v. United States*, 128 F.2d 265, 276 (D.C. Cir. 1942)(noting that jurors often interpret a plea "to mean what it says," rather than the meaning the law attempts to impart on it). Depriving Appellant of the ability to plead guilty ensured that a picture was painted for not only the panel, but the victims, their families, and indeed society at large that Appellant is a cold-blooded monster who lied and failed to take responsibility for the harms he caused.[30]

Victims, jurors, and the public are not the only ones who might be mislead as to the true meaning of a not guilty plea; it ultimately forces defendants to defend against a lie. Cochran, Jr., 26 Cardozo L. Rev. at 1441-42. The forced "not guilty" plea starts a defendant "down the long road of denial." *Id.* at 1442. By the time a defendant does have the opportunity to take responsibility it seems a disingenuous attempt to compensate for

[30] Professor Robert F. Cochran, Jr. concludes in his analysis of the plea inquiry system that for victims, their families, jurors, and the public a "not guilty" plea paints the defendant as an "evil person," someone who has not only caused them some harm but who has lied and failed to take responsibility for that harm. Cochran, Jr., 26 Cardozo L. Rev. at 1439.

the failure of his case at best, and a cynical, self-serving attempt at manipulating the panel's sympathies at worst.

The government focuses on Appellant's failure to offer a plea of guilty and the fact that he contests his conviction in an attempt to argue that Appellant did not take the opportunities for mitigation that were presented to him. (GB at 172.) By simply making this argument the government implicitly concedes exactly what Appellant argues: had Appellant offered a plea of guilty, waiving his right to trial, this would have had a mitigating effect and his failure to do so made any later acceptance of responsibility seem like mere self-serving manipulation to the panel. The fact that Appellant was forced to litigate a contested trial and must now proceed through the appellate process as a result of that trial has no bearing on whether he was deprived of an opportunity to mitigate except to provide ample illustration of the prejudice that resulted from the loss of that opportunity.

The government's solution to the problem of mitigating evidence unavailable to Appellant is to offer that Appellant should have "thrown the trial;" namely stipulating to the government's evidence and admitting to everything on the stand. (GB at 173-4.)[31] It suggests that Appellant should have taken

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[31] "Nothing in Article 45, UCMJ, prohibits an accused from accepting responsibility for his actions; from testifying on

these acts without the formal protections provided by a guilty plea. Such a course of action would constitute precisely the "judicial suicide" that the ban on capital guilty pleas was intended to prevent.[32] Despite the alternatives proposed by the government, Appellant was procedurally barred from taking responsibility for his actions in any meaningful way.

Finally, the government acts as finder of fact and questions the credibility of Appellant's unsworn testimony in a further attempt to belittle this issue and convince this Court to dismiss it outright. (GB at 174.) Again, the government's argument is not only irrelevant to whether Appellant was or was not deprived of his rights, it illustrates how Appellant would have benefited from the availability of a guilty plea.

Appellant suffers from mental illness. (R. at 2287.)[33] The record clearly demonstrates his mental and emotional incapacity,

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his own behalf at findings while expressing remorse; or from stipulating to the Government's evidence." (GB at 173-4.)

[32] Such a course of action on the part of counsel would also likely result in a finding of ineffective assistance of counsel. Under *Strickland*, an accused must show first that a counsel made errors so serious that they were not functioning as counsel within the ambit of the Sixth Amendment; and second, that the errors were sufficiently prejudicial as to deny Appellant a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In this context, no greater error or prejudice is possible than a defense counsel clearly and intentionally making the government's case for it during a contested capital court-martial.

[33] Although the full extent of Appellant's mental illness remains a matter of contention, the government's own expert witness testified that Appellant suffers from Dysthymic Disorder. (R. at 2493.)

and a marked and prolonged inability to express himself in social and public environments. *See generally* (R. at 2226-2294.) This inability almost certainly prevented Appellant from presenting a meaningful unsworn statement: one that may have been convincing to the panel. A guilty plea would have allowed Appellant, in lieu of a traditional tearful colloquy that he was seemingly incapable of, to take responsibility for his actions in a formal and universally recognized manner. It would have provided the expression of remorse and acceptance of responsibility that Appellant could not.

The government rests its legal argument entirely on C.A.A.F.'s prior decisions in *United States v. Gray,* 51 M.J. 1 (C.A.A.F. 1999); *Loving,* 41 M.J. 213; and *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983). (GB at 173).[34] It fails to note, however, that the legal landscape has changed. In 2003,

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[34] The government also correctly notes that the military is not the only jurisdiction to ban guilty pleas in death penalty cases. (GB at 173, FN 804.) However, the government fails to note that Arkansas and Louisiana are the *only* other jurisdictions with such a ban (the government's assertion that Alabama also bans guilty pleas for the death penalty appears to be a typographical error). *See* Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 Alb. L. Rev. 181, 193-194 (2001). New Jersey was one of the few other jurisdictions that had such a provision, but it was repealed there in 1978. *Id.* Similarly, when New York reinstated the death penalty in 1995, it, too, banned guilty pleas in capital cases. *Id.* at 181. However, by 2003, it, too, had repealed the provision in response to mounting criticism. *See generally* Russell Stetler, *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 Hofstra L. Rev. 1157 (2003).

the American Bar Association (ABA) revised its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases for the first time since 1989. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003). In this revision, the ABA added for the first time a guideline creating an affirmative obligation for counsel to seek a negotiated plea agreement at every stage of a capital case. American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1 (2003).[35]

Although C.A.A.F. has declined to explicitly mandate that the ABA Guidelines apply to the military, it has found them to be "instructive" on multiple occasions. *See Murphy,* 50 M.J. at 9 (citing *Loving,* 41 M.J. at 300). History has shown that CAAF is certainly persuaded by such ABA recommendations. *See Loving,* 41 M.J. at 300 (holding that failure to seek a mitigation specialist is not reversible error); *but see United States v.*

[35] The commentaries to the rule acknowledge the reasons behind adding this sort of affirmative obligation: "'Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible'; as a result, plea bargains in capital cases are not usually 'offered' but instead must be 'pursued and won.'" American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (2003)(quoting Kevin McNally, *Death is Different: your Approach to a Capital Case Must be Different, Too,* The Champion at 8, 15 (Mar. 1984)).

Kreutzer, 61 M.J. 293 (C.A.A.F. 2005)(holding that failure to appoint a mitigation specialist was reversible error and that as per the Guidelines, a mitigation specialist is an "indispensable part" of the defense team). Appellant asks that in this case the Court merely take the same step and bring military death penalty practice up to the standard set by the ABA.

The Supreme Court has held that a defendant does not have a constitutional right to have a guilty plea *accepted*. *United States v. Alford,* 400 U.S. 25, 38 (1970). However, the Supreme Court has also held that not only does a defendant in a death penalty case have a constitutional right to have significant mitigating evidence investigated and presented by counsel, merely presenting *some* mitigating evidence does not always meet the requirements of the Constitution. *See Sears v. Upton,* 130 S.Ct. 3259 (2010)(holding that the lower court applied an improper standard when it relied on evidence of "some mitigation" to rebut prejudice to the appellant).

To assess whether a mitigation presentation was prejudicial for the purposes of an ineffective assistance of counsel analysis, the Court looks to a totality of mitigating factors analysis and re-weighs it against the aggravating factors. *Williams v. Taylor,* 529 U.S. 362, 397-98 (2000). This totality of the circumstances weighing is used to determine whether, but

for the deficient performance of counsel, the result would have been different. *Porter v. McCollum,* 130 S.Ct. 447, 453 (2009).

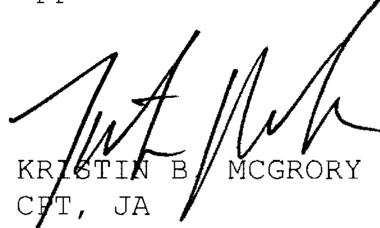
Although the Supreme Court has not addressed the question specifically, such an analysis, if appropriate to determine whether counsel's performance on mitigation passed constitutional muster, should also be appropriate to determine whether the mitigation options available to a defendant overcome that same constitutional hurdle. In looking at the totality of the mitigation in this case balanced against the weight of the aggravating factors and the strength of the case against Appellant, there is a reasonable probability that but for Appellant's inability to plead guilty and present that plea as mitigation evidence, the result upon sentencing would have been different. Appellant does not ask for a radical change in the law, he simply requests that this Court apply mitigation standards consistently.

In being denied his right to plead guilty, Appellant was denied his due process right to present powerful mitigation evidence in his defense - evidence that could have, with reasonable probability, resulted in a different sentence. Accordingly, Appellant deserves to have his sentence of death reversed.

Therefore, Appellant requests this court set aside his sentence.

WHEREFORE Appellant preys that this Court set aside his findings and sentence.

E. PATRICK GILMAN
CPT, JA
Appellate Defense Counsel



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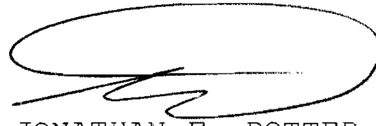
Appellate Division



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COL, JA
Chief, Defense Appellate
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APPENDIX

Westlaw.

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Only the Westlaw citation is currently available.

U.S. Navy–Marine Corps Court of Criminal Appeals.
UNITED STATES
v.
Angelica M. PLAYARENTAS, Mess Management Specialist Third Class (E–4), U.S. Navy.

No. NMCM 200000908.
Sentence adjudged 5 Nov. 1999.
Decided 18 Oct. 2002.

Military Judge: R.K. Fricke. Review pursuant to Article 66(c), UCMJ, of General Court–Martial convened by Commander, Navy Region Hawaii, Pearl Harbor, HI.
CDR MICHAELJ. WENTWORTH, JAGC, USNR, Appellate Defense Counsel

LT JASON A. LIEN, JAGC, USNR, Appellate Government Counsel

Before C.A. PRICE, C.L. CARVER, K.R. BRYANT.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.
CARVER, Judge:

*1 A military judge, sitting as a general court-martial, convicted the appellant, contrary to her pleas, of conspiracy to distribute lysergic acid diethylamide (LSD), conspiracy to distribute LSD and methylenedioxy methamphetamine (MDMA or Ecstasy), wrongful distribution of LSD, wrongful distribution of LSD and Ecstasy, wrongful use of LSD and wrongful use of Ecstasy, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to a dishonorable discharge, confinement for 24 months, total forfeiture of pay and allowances, and reduction to pay grade E–1. The convening authority approved the sentence as adjudged.

The appellant claims that the two conspiracy specifications are multiplicious for sentencing or, alternatively, an unreasonable multiplication of charges and that the sentence is inappropriately and disparately severe in comparison to the sentence of the co-actor.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

After a positive urinalysis for a controlled substance, Mess Management Specialist Third Class (MS3) Licon met with special agents of the Naval Criminal Investigative Service (NCIS) and agreed to act as a cooperating witness to attempt the purchase of illegal drugs from suspected drug dealers. He advised NCIS agents that he suspected that the appellant and other named individuals would likely sell him drugs. MS3 Licon claimed that NCIS did not offer him any incentive for his cooperation, but he thought that if he helped the NCIS agents, then they would help him.

MS3 Licon knew the appellant from a military working relationship. He testified that, during previous conversations at work, the appellant had admitted her prior use of illegal drugs and had advised him that if he wanted, she could get Ecstasy for him.

At the request of agents of NCIS, MS3 Licon contacted the appellant on or about 8 March 1999 and asked to purchase LSD and Ecstacy. She gave MS3 Licon her home and cell phone numbers. During one of the conversations on the phone or at

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work, the appellant said that, in order to get the drugs, she would have to contact her boyfriend Mess Management Specialist Seaman (MSSN) Richard Jones.

On 15 March, the appellant told MS3 Licon that she could obtain drugs for him, but that she would have to wait until MSSN Jones returned from his deployment. After MSSN Jones returned, MS3 Licon contacted the appellant and set up a drug sale of LSD, but not Ecstacy, for 19 March in the parking lot of the Navy Exchange at Naval Station, Pearl Harbor, Hawaii. During the transaction, MS3 Licon was wearing a concealed recording device while agents of NCIS videotaped the transaction. MSSN Jones drove the appellant's car to the Exchange parking lot. The appellant was in the front passenger seat. MS3 Licon handed the money to MSSN Jones who gave the LSD to MS3 Licon. MS3 Licon had never previously met MSSN Jones.

After this transaction, MS3 Licon testified that his controlling NCIS agent wanted him to see if he could purchase Ecstasy from the appellant. MS3 Licon then contacted the appellant again and requested to buy LSD and Ecstasy. However, despite several conversations between the two, no agreement was reached until the appellant called MS3 Licon back on 23 March 1999 and agreed to make the sale. Later that evening, MS3 Licon met with the appellant and MSSN Jones. MS3 Licon gave money to MSSN Jones and they agreed to meet a few minutes later at an off base convenience store to complete the transaction. About 20 minutes later, MSSN Jones drove up to the store in the appellant's car and gave MS3 Licon the LSD and Ecstasy. The appellant was a passenger in her car. As before, MS3 Licon wore an NCIS recording device and the transaction was also videotaped.

***2** In a subsequent confession to NCIS agents, the appellant admitted her participation in the two drug transactions. She also admitted that she had accompanied MSSN Jones when he purchased the drugs for later distribution to MS3 Licon. Further, she admitted prior use of Ecstasy and LSD. Prosecution Exhibit 4. At trial, the appellant did not contest her role in the two drug transactions.[FN1] Instead, the appellant claimed that she was entrapped by persistent requests from MS3 Licon on behalf of the Government. She further claimed that MS3 Licon was untruthful, including his assertions that she had previously offered to sell him Ecstasy.

FN1. The appellant did not testify at trial.

Multiplicity

The appellant asserts that the two specifications of conspiracy to distribute illegal substances are either multiplicious for sentencing or, alternatively, constitute an unreasonable multiplication of charges. We disagree.

Originally, the appellant was charged with three conspiracy specifications: conspiracy to distribute LSD on 15-19 March 1999, conspiracy to distribute LSD on 23 March 1999, and conspiracy to distribute Ecstasy on 23 March 1999. The trial defense counsel (TDC) successfully moved to consolidate the latter two specifications into one specification. But the TDC did not move to consolidate the remaining two conspiracies into one specification.

On appeal, the appellant now asserts that we should consolidate the two remaining conspiracy specifications. However, such claims are forfeited by failure to make a timely motion to dismiss, unless they rise to the level of plain error. *United States v. Barner,* 56 M.J. 131, 137 (2001); *United States v. Heryford,* 52 M.J. 265, 266 (2000). The appellant has the burden of persuading us that there was plain error. *United States v. Powell,* 49 M.J. 460, 464-65 (1998).

The appellant may show plain error and overcome forfeiture by showing that the specifications are facially duplicative. *Heryford,* 51 M.J. at 266. Whether specifications are facially duplicative is determined by reviewing the language of the specifications and the "facts apparent on the face of the record." *Id.* (citing *United States v. Harwood,* 46

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M.J. 26, 28–29 (1997); *United States v. Lloyd*, 46 M.J. 19, 24 (1997)).

The allegations essentially charge the same misconduct, differing only in the date and the type of illegal drugs. The first specification alleges that the appellant conspired to distribute LSD between 15 and 19 March 1999. The second specification alleges that the appellant conspired to distribute LSD and Ecstasy on 23 March 1999.

***3** The appellant claims that the two offenses arose out of the same agreement to purchase drugs from the appellant and MSSN Jones. Appellant's Brief of 28 Feb 2002 at 6. But, we find that the two conspiracies were distinct and separate. The conspiracy to distribute LSD from 15 to 19 March 1999 was completed when the transaction occurred on 19 March. After that transaction, NCIS agents encouraged MS3 Licon to try to purchase Ecstasy from the appellant. Despite several subsequent conversations between MS3 Licon and the appellant, the agreement to sell Ecstasy was not confirmed until the appellant contacted MS3 Licon on 23 March 1999 and agreed to make the sale. We therefore hold that the offenses are not facially duplicative and that there is no plain error.

In addition, under the circumstances of this case, where the specifications were aimed at distinctly separate criminal acts, the separate specifications do not misrepresent or exaggerate the appellant's criminality, and, where no suggestion exists of prosecutorial overreaching, we find no unreasonable multiplication of charges. *See United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App.2002); *accord Quiroz*, 55 M.J. 334, 339 (2001) ("this approach is well within the discretion of [this court] to determine how it will exercise its Article 66(c) powers.").

Sentence Comparison

The appellant next asserts that her sentence is too severe, especially in comparison to that of the co-actor, MSSN Jones. She requests that we reduce her sentence to the same sentence that the convening authority approved for MSSN Jones. We decline to do so.

At a general court-martial convened by the same convening authority for the appellant, MSSN Jones pled guilty to the same conspiracy offenses and related distribution offenses of which the appellant was found guilty.[FN2] Like the appellant, MSSN Jones also pled guilty to use of LSD and use of Ecstasy. In addition, MSSN Jones pled guilty to attempted distribution of marijuana, conspiracy to distribute marijuana, possession of marijuana, and introduction of LSD. He was sentenced to a bad-conduct discharge, confinement for 19 months, forfeiture of $800.00 pay per month for 19 months, and reduction to pay grade E–1. Pursuant to a pretrial agreement, the convening authority suspended confinement over 18 months. As noted above, the appellant's sentence was more severe, in that she was sentenced to a dishonorable discharge and confinement for 24 months.

FN2. As requested by the appellant, we have considered the record of trial and allied papers in the case of the co-conspirator MSSN Richard L. Jones.

MSSN Jones' pretrial agreement also required that he cooperate fully with various military and civilian law enforcement agencies regarding six identified Sailors, including the appellant, and to testify truthfully in any proceeding involving them. In a post-trial clemency petition to the convening authority, MSSN Jones' trial defense counsel asserted that he was cooperating fully with law enforcement agencies, that he had already testified truthfully against the appellant, and that he was being held for future criminal prosecutions.

"The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88

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(1999). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

*4 We find that the appellant and MSSN Jones' cases are closely related. Although MSSN Jones was convicted of more offenses than was the appellant, they were co-conspirators on the principal charges.

However, we do not find that the sentences are highly disparate. "The test in such a case is not limited to a narrow comparison of the relative numerical values of the sentences at issue, but also may include consideration of the disparity in relation to the potential maximum punishment." *Id.* at 289. The sentences of confinement for 24 months and a dishonorable discharge for the appellant and confinement for 19 months and a bad-conduct discharge for MSSN Jones are relatively short compared to the maximum confinement of 70 years that the appellant faced [FN3] and the maximum confinement of 120 years [FN4] that MSSN Jones faced. Further, although the dishonorable discharge awarded to the appellant is more serious than the bad-conduct discharge awarded to MSSN Jones, the difference in the adjudged confinement is relatively insignificant.

FN3. Record at 357.

FN4. MSSN Jones' Record at 95.

However, assuming *arguendo* that the sentences are highly disparate, there is nonetheless a clear rational basis for the discrepancy. MSSN Jones pled guilty at his trial and cooperated in the prosecution of related cases, including testifying against the appellant. His guilty pleas and cooperation are strong factors in mitigation, which explain the lighter sentence that he received.

Accordingly, the findings of guilty and sentence, as approved on review below, are affirmed.

Senior Judge PRICE and Judge BRYANT concur.

N.M.Ct.Crim.App.,2002.
U.S. v. Playarentas
Not Reported in M.J., 2002 WL 31371956 (N.M.Ct.Crim.App.)

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CERTIFICATE OF SERVICE

UNITED STATES v. Akbar

Army Docket No. 20050274

Brief on Behalf of Appellant ________

Motion ________

Other ✓

I certify that a copy of the foregoing was delivered to the Court and the Government Appellate Division on 8 April, 11.

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