IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S Appellee	SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT
v.	
	Docket No. ARMY 20050514
Sergeant (E-5) HASAN K. AKBAR United States Army Appellant	Tried at Fort Knox, Kentucky, and Fort Bragg, North Carolina, 9 March, 10, 24 May, 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

Statement of the Case

For a detailed Statement of the Case, please see Appellant's original brief before this Court.

Supplemental Statement of the Facts

Those facts necessary for resolution of the supplemental assignments of error can be found in the arguments below.

Supplemental Assignment of Error I

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN DURING SENTENCING HE FAILED TO INSTRUCT THE PANEL THAT IN CONDUCTING A VOTE FOR RECONSIDERATION, DEATH WAS NO LONGER A PERMISSIBLE PUNISHMENT.

INTRODUCTION:

"If at any step along the way, there is not a unanimous finding, this eliminates the death penalty as an option." *United States v. Simoy*, 50 M.J. 1, 2 (1998).

The steps necessary before the death penalty may be imposed as a lawful sentence at court-martial are clear and outlined in Rules for Court-Martial (R.C.M.) 1003 - 1009. Rule 1006(d)(3)(A) requires all members vote on each sentence in its entirety, "beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule." That provision of the rule requires a unanimous vote by all members in order to impose death. In Appellant's case, the military judge instructed the panel as to those two requirements. *See* (R. at 3148-50.) What he failed to do, however, was inform the panel, upon its request for reconsideration, that death was no longer a permissible punishment.

STANDARD OF REVIEW:

When an instruction is correct, was not already covered,

and is necessary to ensure fairness and integrity in the proceedings, that instruction is required. *See United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993); *United States v. Thomas*, 46 M.J. 311, 314 (C.A.A.F. 1997).

The question of whether a panel was properly instructed is a question of law, reviewed *de novo*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). When constitutional issues are implicated in instructional errors, appellants' claims are ordinarily tested "under the standard of harmless beyond a reasonable doubt." *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is 'whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence.'" *Id.* (quoting *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003)).

Under some circumstances, instructional error, where there is no objection by defense counsel, is reviewed for plain error. *See generally United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1980); *Thomas*, 46 M.J. 311.

Death however, as the Supreme Court has noted, is different.

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials

> are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. **The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.**

Mills v. Maryland, 486 U.S. 367, 383-84 (1988) (emphasis added). As such, the question does not turn on who did or did not object, but instead whether the sentencing instruction created the "risk [of] erroneous imposition of the death sentence." *Id.* If the reviewing court cannot rule out the possibility that a mistake occurred, the sentence must be overturned. *Id.* at 377; *Thomas*, 46 M.J. at 345.

FACTS AND ARGUMENT:

During the pretrial motions phase of Appellant's court-martial, defense counsel requested that the military judge, in the event a reconsideration vote was requested at sentencing, instruct the panel that they "can not reconsider a nonunanimous sentence of death." (AE 37.) More specifically, Appellant proposed the following instruction be read to the panel upon the request for a vote for reconsideration:

> If a request for reconsideration is made, the military judge must determine whether the members considered the punishment of death. If the answer to this question is "yes" then the military judge must determine if the initial vote on death was unanimous. If the response from the President is "no" the military judge must instruct the panel

that they may reconsider their vote but the maximum punishment is now life without the possibility of parole. Only one vote on death is permitted.

(AE 33.) However, during sentencing, when the President of the panel requested a reconsideration vote, the following colloquy ensued:

MJ: Colonel [redacted] the bailiff gave me what appears to be a question from the court, "Sir, reconsideration has been proposed." Is that the court's question?

PRES: Yes, sir.

MJ: Before answering, let me ask you two questions. Has the court followed my instructions? [1]

PRES: Yes, sir.

MJ: Has the court reached a sentence with the required concurrence?

PRES: Yes, sir.

MJ: Let me answer your question as follows.

Reconsideration is a process wherein you are allowed to revote on a sentence, after you have reached a sentence. The process for reconsideration is different, depending on whether the proposal to reconsider relates to increasing or decreasing the sentence.

After reaching a sentence by the required concurrence, any member may propose that the sentence be reconsidered. When this is done, the first step is to vote on the issue of whether to reconsider and revote on the sentence. In order for you to reconsider

[1] Neither the government nor defense counsel objected to the military judge's proposed questions. (R. at 3173.)

> and revote on the sentence, the following rules apply.
>
> If the proposal to reconsider is with a view to increasing the sentence, then a majority of the members must vote by secret, written ballot in favor of reconsideration. Since we have 15 members, at least eight members must vote in favor of reconsideration with a view to increase the sentence.
>
> If the proposal to reconsider is with a view to decrease a sentence which includes either life, or life without eligibility for parole, then more than one-fourth of the members -- or at least four members -- must vote by secret, written ballot in favor of reconsideration with a view to decrease the sentence.
>
> If the sentence you have reached is death, then a proposal by any member for reconsideration requires you to reconsider.
>
> If you do not receive the required concurrence in favor of reconsideration, that ends the issue, and you should open the court to announce the sentence as originally voted. If you do receive the required concurrence in favor of reconsideration, then you must adhere to all my original instructions for proposing and determining an appropriate sentence, to include the three-fourths or unanimous concurrence required for the sentence.

(R. at 3175-77.)

This instruction was improper. The moment the president of the panel requested reconsideration, the military judge was obligated to inquire in a manner consistent with trial defense counsel's proposed instructions. Without such inquiry, too much

ambiguity as to the panel's vote remained such that the military judge did not know if death remained a permissible punishment. This because "under military law, a death sentence requires a unanimous vote." Article 52(b)(1), UCMJ, 10 U.S.C. § 852(b)(1); RCM 1006(d)(4)(A). The president's requesting reconsideration after voting is certainly evidence that the panel did not unanimously vote for death.

Because a polling of the panel did not occur, it is impossible to know with any certainty the results of the panel's initial vote. However, several possibilities exist based upon the answers the president gave to the military judge during their colloquy. First, if proposed, the panel would have had to have first voted on sentences lesser than death. R.C.M. 1006(d)(3)(A); (R. at 3150); *Simoy*, 50 M.J. at 2. If the panel voted on life with parole, the least severe sentence available to Appellant, they would have needed to do so with at least twelve members.[2] R.C.M. 1006(d)(4); (R. at 3150). If that occurred, that is at least one member not voting for death and death is off the table.

If, instead, the panel voted for life without the possibility of parole, they would have again needed to do so with a concurrence of at least twelve members. If that

[2] The panel was seated with 15 members who were present during sentencing. (R. at 3150.)

occurred, that again indicates at least one member voted "no" to death and therefore the death penalty is off the table.

A third possibility, which would have been explored further had the military judge asked the questions proposed by Appellant *See* (AE 33), is that the panel's initial vote was death. If one person moved for reconsideration of that sentence, it is reasonable to question whether at least one person did not want death, taking death off the table on a revote. Because the panel ultimately came back with death, it is reasonable to assume that the third possibility was not the cause for the request for reconsideration simply because it seems unlikely that a person would ask to reconsider a final vote for death only to come back and vote death again.

The result of the panel's initial vote during sentencing deliberations was unknown to the military judge at Appellant's trial and is far from clear now. What **is** clear: the military judge improperly instructed the panel such that they seemingly could have taken as many **final** votes as was necessary to return a sentence of death - a proposition which runs afoul of "if at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option." [3] *Simoy*, 50 M.J. at 2.

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[3] Further emphasizing the underlying intent of R.C.M. 922(b) and its interplay with capital sentencing, Instruction 2-7-18 of the

It is noteworthy that during findings, the military judge instructed the panel on straw polling. Specifically, the military judge explained to the panel the uses and procedures for conducting straw polls. (R. at 2630.) However, during sentencing and upon agreement by both defense counsel and the government, the military judge instructed the panel, "while the law does not prohibit the use of straw polls, I would not encourage you to use them in determining a sentence." (R. at 3164.) Any argument that the initial vote, or any vote, for that matter, which the panel then reconsidered was actually just a straw poll and not a "final vote," is certainly contrary to the military judge's encouragements and does not comport with the procedure the military judge established for straw polling during findings. *See generally* (R. at 2631.)

Rule for Court-Martial 922(b)'s "Discussion" section provides, "[a] nonunanimous finding of guilty as to a capital offense may be reconsidered, but not for the purpose of rendering a unanimous verdict in order to authorize a capital sentencing proceeding." This rule clearly recognizes the panel has but one bite at the apple, so to speak, to sentence an accused to death.

Military Judge's Benchbook specifically states, "In capital cases, only **one** vote on the death penalty may be taken." DA PAM 27-9, 15 September 2002 (Changes 1 and 2 Incorporated) (emphasis added).

If a panel may not reconsider its unanimity at findings for purposes of imposing a capital sentence, why then would we allow unfettered discretion on the part of a panel president during the sentencing portion of a court-martial to call as many reconsideration votes as necessary to sentence an accused to death? This would certainly yield the most absurd of results.

In accordance with the Supreme Court's decision in *Mills v. Maryland*, and CAAF's decisions in *United States v. Thomas* and *United States v. Simoy*, this Court must set aside Appellant's death sentence and order a rehearing on sentence.

Therefore, Appellant respectfully requests this Court set aside his sentence.

Supplemental Assignment of Error II

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN, DURING SENTENCING, THE PANEL FAILED TO APPLY THE LAW OF THE CASE IN DETERMINING APPELLANT'S DEATH SENTENCE AND THE MILITARY JUDGE FAILED TO INQUIRE AND CORRECT THE PANEL'S MISAPPLICATION OF THE LAW.

INTRODUCTION:

After deliberating on the appropriate sentence for Appellant, the panel announced that the aggravating factors in this case outweighed "any extenuating *or* mitigating circumstances," thus warranting the death sentence. (R. at 3181) (emphasis added).[4] In so doing, however, the panel revealed that

[4] The full announcement of the panel president reads,

it had failed to apply the law of the case as instructed by the military judge. This misapplication of the law by the panel ultimately ensured that Appellant received the most severe punishment mankind may adjudge.

FACTS:

The record in this case shows a facial distinction between the standard the court used in sentencing Appellant to death and the standard the court was instructed to use. As the sentencing case drew to a close, the military judge began to instruct the panel that in determining a death sentence "**any extenuating *and* mitigating circumstances**" must be outweighed by the aggravating factors of the case. (R. at 3137) (emphasis added). Later during the proceedings, the judge also instructed the court that the "**extenuating *or* mitigating circumstances**" must be outweighed by the aggravating factors. (R. at 3139) (emphasis added). Upon realizing the written instructions contained the disjunctive formulation, the military judge issued a corrective

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> Sergeant Hasan K. Akbar, it is my duty as president of this court-martial to inform you that having considered all matters in mitigation and extenuation, and all matters in aggravation, this court-martial, in closed session, and upon secret, written ballot, unanimously finds that any extenuating or mitigating circumstances are substantially outweighed by the aggravating circumstances, including the aggravating factor specifically found by the court and listed above.

(R. at 3181.)

instruction clarifying for the panel that in his view the conjunctive formulation, that "**extenuating *and* mitigating circumstances**" must be outweighed, was the correct one. (R. at 3162) (emphasis added). When the panel was instructed accordingly, the conjunctive formulation became the law of the case and was agreed upon by both counsel without objection. (R. at 3162.)

When the panel returned with its sentence, it announced for the record that it had used the disjunctive formulation of the test in determining Appellant's sentence. (R. at 3181.) This formulation was clearly contrary to the military judge's instruction. (R. at 3181.) Notwithstanding, no corrective action was taken by the military judge, government counsel, or defense counsel despite the error being both announced in open court and memorialized in the sentence worksheet. (AE 307.)

LAW AND ARGUMENT:

A question of whether a panel relied on an incorrect understanding of the law is an instructional question and thus a question of law reviewed de novo. *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)). It is a longstanding tenet of Supreme Court jurisprudence that once a judge announces a final instruction, that instruction becomes the "law of the case." *See Christianson v. Colt Industries Operating Corp.*, 486 U.S.

800 (1988); *Arizona v. California*, 460 U.S. 605 (1983); *Sparf v. United States*, 156 U.S. 51 (1895). Military courts have applied this doctrine to mean panels are bound to follow the law of the case in reaching their verdicts, notwithstanding the erroneous nature of any point or points of law. *United States v. Ruppel*, 49 M.J. 247 (C.A.A.F. 1998); *United States v. Chaney*, 35 C.M.R. 692 (C.G.B.R. 1965); *United States v. Hall*, 30 C.M.R. 550 (A.B.R. 1961); *United States v. Anders*, 23 C.M.R. 448 (A.B.R. 1957).[5] [6]

A panel is presumed to follow the instructions of the military judge unless demonstrated otherwise by competent evidence to the contrary. *United States v. Loving*, 41 M.J. 213, 235 (C.A.A.F. 1994). History has shown this presumption to be

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[5] The fact that the law officer's corrected instruction did not comport with the language of R.C.M. 1004(b)(4)(c), whereas the announcement of the panel did, is, accordingly, irrelevant under the "law of the case" doctrine. *See United States v. Hall*, 30 C.M.R. 550, 552-3 (A.B.R. 1961) ("Whether the instruction correctly states the law is not a matter for the court members' consideration and a finding . . . returned in disregard of instructions must be set aside").

[6] In *Ruppel*, the CAAF held that a ruling during a previous sentencing hearing was not final for the law of the case to apply to the hearing in question. *Ruppel*, 49 M.J. at 253. The Coast Guard Court held in *Chaney* that erroneous instructions on evidentiary matters, once accepted, became the law of the case and were binding upon the court. *Chaney*, 35 C.M.R. at 694-5. This Court held in *Hall* and *Anders* that even when a military judge removes an element or specification from the panel's consideration erroneously, it may not disregard his instructions during findings. *Hall*, 30 C.M.R. at 552-3; *Anders*, 23 C.M.R. at 451-2.

strong due in large part to R.C.M. 606, which bans inquiry into the panel's deliberative process with few, narrow exceptions. R.C.M. 606, however, is only relevant in those cases in which outside influences cast doubt on a panel's adherence to the law of the case in deliberation. The vast majority of cases challenging the presumption are denied relief because they are based on specious post-trial affidavits and conversations with panel members. *See Loving*, 41 M.J. at 235; *United States v. Tyndale*, 56 M.J. 209 (C.A.A.F. 2001); *United States v. Mahler*, 49 M.J. 558 (N.M.C.C.A 1998); *United States v. Thomas*, 39 M.J. 626 (N.M.C.C.A. 1988).

Appellant's case is different. The competent evidence necessary to rebut the presumption is clear because the erroneous statements were made in open court and are reflected in the record. Although the service courts have, at times, limited the types of on-record statements that can provide the rebuttal required by R.C.M. 606, the facts in this case fall well within the bounds set by prior jurisprudence.[7]

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[7] *See United States v. Taylor,* 53 M.J. 195 (C.A.A.F. 2000) (holding that questions posed by the panel members to a witness in contravention of curative instructions are insufficient to show a disregard of the judge's instructions because the defect must be shown to have occurred during deliberations); *United States v. Pittman*, 3 M.J. 902 (A.C.M.R. 1977) (finding that a failure to announce that a sentence was not determined by the concurrence of two-thirds of the panel is not error absent an indication that the panel actually applied an incorrect deliberative standard); *but see United States v. Martinez*, 17

This and other service courts also faced similar issues during bench trials. In *United States v. Shirey*, this Court held that where there was evidence on the record that the fact-finder considered previously stricken and impermissible acts of misconduct in determining the sentence, the sentence had to be set aside for re-hearing. 42 C.M.R. 687 (A.C.M.R. 1970). In *United States v. McLaurin*, the Air Force court held that the presumption that a military judge has applied the correct law in determining a finding or sentence is rebutted when he states improper law or considerations on the record as a means of determining a finding or sentence. 9 M.J. 855, 859 (A.F.C.M.R. 1980) (citing *United States v. Mandurano*, 1 M.J. 728 (A.F.C.M.R. 1975)).

Surely due process requires that fact-finders, whether judge or panel, must be held to consistent standards. If specific evidence is sufficient to impeach a judge's deliberative process when performing the fact-finder role, that same evidence must also be sufficient to impeach a panel's.

As the Supreme Court held, when a jury comes back with a finding that could have been based on the wrong law in a death

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M.J. 916 (N.M.C.M.R. 1984) (determining that relief was warranted where the panel president failed to announce that findings were determined by secret written ballot and two-thirds concurrence, and improper deliberation could be shown from the record). The facts of this case are closest to those of *Martinez;* the panel did not merely commit a sin of omission, but stated openly that an incorrect procedure had been followed.

penalty case, courts cannot speculate on what *could* have happened in the deliberation room. *Mills v. Maryland*, 486 U.S. 367 (1988). The *Mills* court presumed prejudice in such circumstances, determining setting aside the sentence and ordering a rehearing to be the appropriate remedy. *Id.* at 384.

Although it was within the military judge's power to correct the erroneous findings, in Appellant's case such a correction must have taken place before the adjournment of his court-martial and the authentication of the record. R.C.M. 922(d); *Ruppel*, 49 M.J. at 253. Any proceedings in revision under R.C.M. 1102 are inappropriate because they would require precisely the sort of speculation that the *Mills* Court held improper.

Appellant must receive the benefit of the error recorded in the record. *See United States v. Baker*, 32 M.J. 290 (C.M.A. 1991); *United States v. Smith*, 43 C.M.R. 660 (A.C.M.R. 1971). The only appropriate remedy for Appellant in this case is to set aside his death sentence and order a rehearing on sentencing. *Martinez, supra* note 4; *Shirey*, 42 C.M.R. 687; *Hall*, 30 C.M.R. 550; *Anders*, 23 C.M.R. 448.

The distinction between the disjunctive standard used by the panel and the conjunctive standard it was instructed to use is substantial. The disjunctive test allows the panel to consider the full weight of the aggravating evidence against

evidence of extenuation separately from evidence of mitigation. Not only does this reduce the weight of the evidence that the panel is required to bring to bear against the circumstances in aggravation, it also permits a scenario wherein a death sentence could be adjudged where the aggravating circumstances outweigh the mitigating circumstances but do not outweigh the extenuating circumstances and vice versa. Such a scenario where the death sentence could be adjudged despite mitigating or extenuating circumstances is explicitly foreclosed by the conjunctive standard of sentence determination. Clearly this distinction is far from trivial; the military judge thought it sufficiently important enough to require sua sponte clarification on the record so that the panel was clear that the conjunctive standard be applied.

By requiring the aggravating factors to outweigh all extenuating *and* mitigating circumstances (emphasis added), the military judge, with the express agreement of both government and defense counsel, mandated the only way a panel could return a sentence of death was if it found that the aggravating circumstances substantially outweighed both all of the mitigating and all of the extenuating circumstances. Whether the judge's instruction was in error is insignificant - the instruction became the law of the case. It is unnecessary to look beyond the record for clear and competent evidence that the

panel did not follow this instruction in deliberating on sentence, because the panel clearly and unambiguously announced it on the record.

The error is clear: the panel violated the law of the case resulting in Appellant being sentenced to death in a manner that robbed him of a substantial procedural right. As such, Appellant's death sentence cannot stand.

Therefore, Appellant respectfully requests this Court set aside his sentence.

Supplemental Assignment of Error III:

ARTICLE 36, UCMJ, REQUIRES THAT THE PRESIDENT PROSCRIBE THAT THE R.C.M. 1004 CAPITAL AGGRAVATING FACTORS BE BOTH SPECIFIED IN THE CHARGE SHEET AND INVESTIGATED AT AN ARTICLE 32 INVESTIGATION

INTRODUCTION:

Investigating capital aggravating factors at a pretrial proceeding is a generally recognized principle of law in United States district courts. Under, Article 36, the President of the Untied States must afford military accused the same rules and procedures afforded federal civilian defendants, if those rules are practicable. Because the pretrial investigation of capital aggravating factors is practicable in the military justice system, the President violated the congressional intent of Article 36 when he failed to promulgate a rule reflecting this principle of law.

LAW AND ARGUMENT:

Article 36, UCMJ, authorizes the President to promulgate rules for military courts which, if practicable, are consistent with rules recognized in the federal district courts. Article 36 provides, "pretrial, trial and post-trial procedures . . . may be prescribed by the president by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ."

> The implication is that Congress intended that, to the extent practicable, trial by court-martial should resemble a criminal trial in a federal district court. Even though Article 36 is principally concerned with procedures and rules of evidence, it can be inferred that, unless there is a reason not to do so, an interpretation of a provision of the Uniform Code should follow a well-established interpretation of a federal criminal statute concerning the same subject.

United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000).

In promulgating Article 36, Congress recognized that having the courts-martial process approximate the federal criminal process is an important government interest. *Valigura*, 54 M.J. at 191 (explaining that "[t]he implication is that Congress intended that, to the extent practicable, trial by court-martial should resemble a criminal trial in a federal district court"). As such, Congress set out a rigorous test – if the principle of

law *can* be applied in courts-martial, then it *must* be applied. *Id.*

Furthermore, CAAF has construed Article 36 to mean that district court rules will apply unless contrary to the UCMJ. In *United States v. Loving*, CAAF held, "[W]e comply with the congressional mandate that **courts-martial** 'apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ].'" 64 M.J. 132, 140 (C.A.A.F. 2006) (emphasis added); *see also Valigura*, 54 M.J. at 191.

Investigating capital aggravating factors at a pretrial proceeding is a generally recognized principle of law in the United States district courts. Following the holdings in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), federal courts recognize that in death penalty cases aggravating factors should be presented to a grand jury. Federal courts recognize this principle of law notwithstanding not being codified in the Federal Death Penalty Act (FDPA), 18 U.S.C. §§ 3591-3598. *See United States v. Sampson*, 245 F.Supp. 2d 327 (D.C. Mass. 2003); *United States v. Johnson*, 239 F. Supp. 2d 897 (N.D. Iowa 2002); *United States v. Church*, 218 F. Supp. 2d 813, 814 (W.D. Va. 2002) (all requiring aggravating factors be pled

in the indictment); *see also* Major Mark A. Visger, *The Impact of* Ring v. Arizona *on Military Capital Sentencing*, Army Law., Sept. 2005, at 84.

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

In fact, a majority of federal circuits have reversed increased sentences where aggravating factors were not included in the indictment and submitted to the grand jury. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002) ("The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondent's enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*"); *see also United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001); *United States v. Stewart*, 306 F.3d 295, 320-23 (6th Cir. 2002). Indeed, a majority of circuits require

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

This concept is also incorporated into the United States Attorneys' Manual, Title 9-10.060 (Special Findings in Indictments).

> For all charged offenses subject to the provisions of this Chapter, regardless of whether the United States Attorney ultimately recommends that the Attorney General authorize seeking the death penalty for the charged offense, the indictment shall allege as special findings: (1) that the defendant is over the age of 18; (2) the existence of the threshold intent factors specified in 18 U.S.C. § 3591(a)(2); and (3) the existence of the statutory aggravating factors specified in, as relevant, 18 U.S.C. §§ 3592(b), (c), or (d).

It further states:

> The indictment shall allege threshold intent and statutory aggravating factors that meet the criteria for commencing prosecution as set forth in USAM §§ 9-27.200, 9-27.220. Prosecuting Assistant United States Attorneys are encouraged to consult with the Capital Case Unit regarding the inclusion of special findings in the indictment.

Because investigating capital aggravating factors at a pretrial proceeding is a generally recognized principle of law in the United States district courts, the President must, upon deciding to promulgate rules for capital aggravating factors in the military, promulgate rules to reflect this principle of law, if the principle is practicable. Investigation of capital

aggravating factors *can* be applied in courts-martial, therefore it *must* be applied to the military system. See *Valigura*, 54 M.J. at 191.

In R.C.M. 1004, the President promulgated rules for capital aggravating factors. R.C.M. 1004 describes the precise procedures by which capital cases are adjudicated and outlines the aggravating factors which must be proven beyond a reasonable doubt before a sentence of death may be adjudged. However, R.C.M. 1004, as written, fails to provide for the pretrial investigation of those aggravating factors. It merely requires that an accused be provided with notice of the aggravating factors prior to arraignment. R.C.M. 1004(b)(1)(B). Further, R.C.M. 1004 fails to provide a reason for deviating from the generally recognized principal of investigating the aggravating factors at a pretrial proceeding. More importantly, nothing is set forth to indicate this principal is impracticable in the military system.

Investigating capital aggravating factors, prior to referral, is certainly practicable in the military justice system. The system already requires every specification be fully investigated prior to referral. The only additional requirement for the government to meet this principle of law would be to provide notice of the aggravating factors on the charge sheet rather than at a later point in time. See Article

32, UCMJ. Precisely pleading those factors on the charge sheet and subsequently investigating those charges in their entirety during the Article 32 investigation fulfills this principal and places no additional burden on the government. It further enables military defendants the opportunity to fully investigate capital aggravating factors at a pretrial proceeding thereby providing substantially the same protections as those provided to federal civilian defendants.

The charge sheet and the Article 32 hearing fulfill the constitutional requirements of an indictment and grand jury. CAAF has noted, "though the absolute requirement of a grand jury indictment in courts-martial has been rejected by the Supreme Court, Article 32, UCMJ, . . . grants rights to the accused greater than he or she would have at a civilian grand jury." *United States v. Curtis*, 44 M.J. 106, 130 (C.A.A.F. 1996). It defies logic to argue those protections are greater for military defendants for lesser crimes, but not for crimes which expose defendants to death.

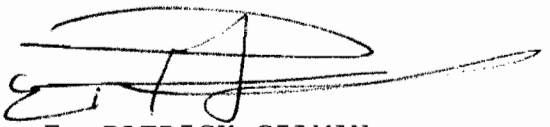
In this case, Appellant was prejudiced by the lack of a pretrial investigation into the aggravating factors. As defense counsel provided in their motion to the trial court, "[Appellant] was not put on notice at the Article 32 hearing of which aggravating factors the government intended to prove at trial. Thus, [Appellant] appeared at his Article 32 hearing

without knowledge of the elements that he had to defend against." (AE XC.) Additionally, the lack of notice substantially impeded Appellant's ability to develop and present appropriate mitigation evidence to argue for a non-capital referral.

Simply noting that the military is different from the civilian sector is not enough to overcome Article 36. The burden rests with the government to produce some evidence that the President has actually considered this issue and made a declaration that the military is incapable of investigating the aggravating factors at an Article 32 investigation. Inaction or inattention is not consideration. The President needs a specific reason to break from the federal court practice as, "unless there is a reason not to do so, an interpretation of a provision of the Uniform Code should follow a well-established interpretation of a federal criminal statute concerning the same subject." *Valigura*, 54 M.J. at 191. Because it is practicable to investigate capital aggravating factors at an Article 32 investigation, Article 36 demands that those factors be pled in the charge sheet and subsequently investigated at the Article 32, proceeding.

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

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



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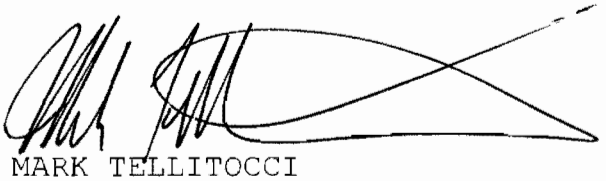

MARK TELLITOCCI
COL, JA
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CERTIFICATE OF SERVICE

UNITED STATES v. Akbar

Army Docket No. 20020574

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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