

No. 15-

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IN THE  
**Supreme Court of the United States**

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HASAN K. AKBAR,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Armed Forces**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

*Ring v. Arizona*, 536 U.S. 584 (2002) held that aggravating factors in capital cases constitute elements of the crime that must be tried to a jury. Does it violate the Constitutional separation-of-powers or exceed statutory authority for the President, rather than Congress, to prescribe the aggravating-factor elements that permit a court-martial to impose a death sentence on a member of the armed forces.

**PARTIES TO THE PROCEEDING AND RULE  
29.6 STATEMENT**

Petitioner is Hasan K. Akbar, appellant below. Respondent is the United States, appellee below. Petitioner is not a corporation.

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## **JURISDICTION**

The United States Court of Appeals for the Armed Forces decided this case on August 19, 2015. That Court denied Akbar’s request for reconsideration on November 18, 2015. On January 15, 2016, the Chief Justice extended the time for filing a petition for a writ of certiorari up to and including April 7, 2015. This Court has jurisdiction under 28 U.S.C. § 1259(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Article I, Section 8 provides, in relevant part, that “[t]he Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const. art. I, § 8.

Article II, Section II provides, in relevant part, that “[t]he President shall be Commander in Chief of the Army and Navy of the United States . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States.” U.S. Const. art. II, § 2.

## **INTRODUCTION**

In capital cases in military courts, the death penalty is available only if the panel finds the existence of one or more aggravating factors. The President, not Congress, promulgated the list of aggravating factors. This case thus presents a crucial question of separation of powers and statutory interpretation that can only be resolved by this Court: whether Congress can and did delegate to the President the power to prescribe the elements of an offense. If not, then capital cases in military courts are currently proceeding—and Akbar was sentenced to death—under an unconstitutional and *ultra vires* regime of Executive-defined crime.



This Court upheld the military aggravating “factors” regime in *Loving v. United States*, on the theory that Congress may delegate to the President the “authority to define criminal punishments.” 517 U.S. 748, 768 (1996). But subsequent decisions of this Court have clarified that aggravating factors are not merely a punishment consideration, but instead are *elements* of a distinct crime. As such, aggravating factors must be found by a jury beyond a reasonable doubt. See *Ring v. Arizona*, 536 U.S. 584 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990)); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

This revolution in the Court’s understanding of aggravating factors has swept away *Loving*’s foundations. This Court must thus reexamine its prior decision in light of the true scope and significance of the purported delegation at issue. See *Hurst v. Florida*, 136 S. Ct. 616, 623–24 (2016) (“[I]n the *Apprendi* context, we have found that ‘*stare decisis* does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” (quoting *Alleyne v. United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring))).

Only this Court can resolve this urgent constitutional and statutory question. The majority in the Court of Appeals for the Armed Forces did not dispute that *Ring* undermined the logic of *Loving*. Pet. App. 81a. But the court of appeals nevertheless considered itself bound by *Loving* until “the Supreme Court decides . . . there is a basis to overrule that precedent.” *Id.*

### STATEMENT OF THE CASE

Sergeant Hasan K. Akbar was assigned to the 326th Engineer Battalion attached to the 101st Airborne Division at Camp Pennsylvania, Kuwait during

his deployment to Iraq. On the night of March 22, 2003, Akbar threw grenades into three tents at the Camp and opened fire with his M-4 rifle, killing two officers and wounding fourteen others.

For his actions, Akbar was charged with three counts of attempted premeditated murder and two counts of premeditated murder. These charges were referred by the convening authority with special instructions to be tried as capital offenses. A fifteen-member military sentencing panel composed of officer and enlisted members, sitting as a general court-martial, convicted Akbar, contrary to his pleas, on all counts. The court-martial then sentenced appellant to be put to death in accordance with Rules for Courts-Martial (R.C.M.) 1004.<sup>1</sup> The convening authority approved the sentence, and the United States Army Court of Criminal Appeals (CCA) affirmed the findings and sentence. Pet. App. 235a-36a.

## **I. PROCEEDINGS IN THE TRIAL COURT.**

Akbar's trial began on April 6, 2005. Pet. App. 12a. The proceedings are conveyed below only in relevant part.

### **A. Voir Dire.**

Defense counsel pursued what they called an “ace of hearts” strategy of objecting to as few potential panel members as possible, in the hope that at least one member of a large panel would vote against a death sentence. Pet. App. 202a-03a. As the court of appeals noted, “[t]his strategy is contrary to prevailing professional norms in civilian courts, but it may make sense in the military context where counsel re-

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<sup>1</sup> The panel was instructed on and found the existence of one aggravating factor: Akbar was guilty of two premeditated murders in the same case. Pet. App. 173a-74a.

ceive only one peremptory challenge.”<sup>2</sup> Pet. App. 126a. Voir dire established that many of the panel members were actually or potentially biased against Akbar. Two panel members knew one of the victims and witnesses. *Id.* at 61a. One panel member had a supervisory relationship over two other panel members. *Id.* at 61a–62a. One member stated his bias against Islam, Akbar’s religion, during voir dire. *Id.* at 63a. Finally, ten of the fifteen panel members had knowledge of a separate uncharged incident in which Akbar assaulted a military police officer with a pair of scissors. *Id.* at 64a–65a.

### **B. Trial And Sentencing.**

In presenting its case, the government offered two entries from Akbar’s diary written close to the time of the attack. Pet. App. 208a. Akbar’s defense counsel successfully argued to keep the remainder of the diary out of evidence, arguing that it was “unfairly prejudicial” and could lead to an emotional reaction from the panel. *Id.* As Akbar’s mental state was in question, at trial, defense counsel called Dr. George Woods, a clinical psychologist, to testify against the government’s theory of premeditation. *Id.* at 215a–17a. In cross-examination, Dr. Woods stated, “I think it is important to look at the diary as a whole.” *Id.* at 218a. However, in post-trial affidavits, both Dr. Woods and Ms. Deborah Grey—Akbar’s mitigation specialist—opposed the notion that Akbar’s entire diary be admitted. *Id.* at 136a–38a.

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<sup>2</sup> In Akbar’s case, the members of the panel were to be selected from a pool of twenty servicemembers. This pool would be replenished only if causal challenges reduced the panel below twelve members, the statutory minimum for capital cases. Article 41, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 841.

During the presentencing phase—despite the aggravating diary entries, including some that cursed the United States—trial defense counsel reversed their position and admitted Akbar’s entire diary into evidence. The government relied extensively on Akbar’s diary as part of their argument advocating for a sentence of death, directly quoting seven passages and urging the panel to read the document in its entirety. Pet. App. 238a–40a (“Look at his diary. It is full of rage, it is full of hate, and it was all there before he was ever notified he was deploying.”). *Id.* at 240a.

Before presenting their mitigation case, defense counsel provided each panel member with a binder of documents, including a complete copy of Akbar’s diary.<sup>3</sup>

Akbar’s capital mitigation case lasted only thirty-eight minutes. The defense called three witnesses. Two of them testified that Akbar performed poorly as a non-commissioned officer (NCO), and the third, Akbar’s high school physics teacher, had had no interaction with Akbar outside of the classroom and no contact with Akbar in the fourteen years prior to testifying. Pet. App. 224a.

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<sup>3</sup> Each panel member was provided: a complete copy of Akbar’s 313-page diary; a law enforcement review of the diary; a forensic social worker’s analysis of the diary; a social history prepared by a mitigation specialist; a search authorization for Akbar’s e-mail account; definitions of relevant Islamic terms taken from “The Oxford Dictionary of Islam”; Akbar’s petition for a change of name; an interview of Akbar’s high school guidance counselor; an interview of one of Akbar’s high school teachers; an interview of Akbar’s college advisor and counselor; an interview of a college acquaintance; memoranda from two soldiers; an interview of Akbar’s childhood Imam; and the criminal records of Akbar’s father. Pet. App. 220a–23a.

At the close of testimony, defense provided two additional exhibits. The first was testimony from a high school classmate who was “not friends” with Akbar. *Id.* The second contained an interview with Akbar’s younger brother. No other family members were called, despite Akbar’s parents being listed on the witness list. *Id.* at 226a. Akbar also gave an unsworn statement to the jury, stating: “I want to apologize for the attack that occurred. I felt that my life was in jeopardy, and I had no other options. I also want to ask you to forgive me.” *Id.* at 227a. The mitigation case never attempted to explain or contextualize Akbar’s diary, which contained numerous inflammatory passages.

After six and a half hours of deliberation, the panel reached a preliminary consensus on Akbar’s sentence. Pet. App. 20a–21a. But at least one member proposed reconsideration of that sentence, and the panel sent a note to the military judge to inform him of the request. The military judge recalled the panel and read to them the instructions for reconsideration procedures outlined in the Military Judges’ Benchbook. Dep’t of the Army, Pamphlet 27-9, Legal Services, Military Judges’ Benchbook, ch 2 § VII, para 2-7-19 (2010).

The panel returned to their deliberations. After reconsideration, the court-martial reconvened and Akbar was sentenced to death. Pet. App. 170a.

The Judge Advocate General of the Army filed the case for mandatory review in the Court of Appeals for the Armed Forces (CAAF).

## II. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES.

A sharply divided court of appeals affirmed Akbar's death sentence by a 3–2 majority.

In reviewing the question of whether R.C.M. 1004(c) constitutes an improper delegation of Congressional power, the majority did not dispute Akbar's claim that the precedent underpinning *Loving v. United States* had been eroded. Pet. App. 81a.<sup>4</sup> However, the majority stated it would “continue to adhere” to *Loving* until “the Supreme Court decides . . . there is a basis to overrule that precedent.” *Id.*

Former-Chief Judge Baker and Chief Judge Erdmann dissented, arguing that Akbar's counsel had been ineffective. The dissent ably laid bare the deficiencies in the majority's approach, noting the majority's conclusion that “if there ever was a case where a military court-martial panel would impose the death penalty, this was it” sets an injudicious standard of prejudice in a case where at least one juror had sought to reconsider the imposition of the death penalty. Pet. App. 113a–14a. After first discussing the lack of guidelines in the military for capital defense counsel, the dissent concluded that two aspects of Akbar's trial counsel's performance amounted to ineffective assistance: the decision to provide panel members Akbar's entire diary without contextual explanation, and the failure to produce a single witness to present humanizing testimony in favor of a life sentence. Pet. App. 112a–13a. The dissent concluded

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<sup>4</sup> Akbar objected to the promulgation of the aggravating factors in R.C.M. 1004 and properly preserved the issue for appeal. Pet. App. 174a.

that these errors, coupled with the panel's request for reconsideration of the sentence, established prejudice under *Strickland*. Pet. App. 114a (“[T]he request for this instruction suggests that at least one juror may have been persuaded to spare [Akbar]’s life with an effective presentation of mitigation evidence.”).

## REASONS FOR GRANTING THE PETITION

### I. THE DECISION BELOW WAS BASED ON PRECEDENT THAT IS NO LONGER VALID IN LIGHT OF *RING* v. *ARIZONA*.

The decision below merits review because it is a relic of this Court’s pre-*Apprendi* decisions, relying on a notion of the President’s authority that cannot survive this Court’s decision in *Ring*. Pursuant to this Court’s reasoning in *Ring*, the President exceeded his statutory and constitutional authority by promulgating elements of a crime in R.C.M. 1004(c).

“[I]n the *Apprendi* context, we have found that ‘*stare decisis* does not compel adherence to a decision whose “underpinnings” have been “eroded” by subsequent developments of constitutional law.’” *Hurst*, 136 S. Ct. at 623–24 (quoting *Alleyne* v. *United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring)); *Ring*, 536 U.S. 584 (overruling *Walton*, 497 U.S. 639); *United States* v. *Gaudin*, 515 U.S. 506, 519–520 (1995) (overruling *Sinclair* v. *United States*, 279 U.S. 263 (1929)). In light of *Apprendi* and *Ring*, reading the statutory authorization to the President to restrict the imposition of the death penalty as allowing him to proscribe the elements of an aggravated criminal offense raises extraordinarily grave constitutional concerns. But such a reading is not necessary, and should be rejected here.

**A. This Court’s Decision In *Loving v. United States* Was Based On The Now-Invalid Premise That R.C.M. 1004 Does Not Set Forth Elements.**

This Court held in *Loving* that Congress could delegate to the President the authority to specify sentencing aggravating factors and that the President properly did exactly that by promulgating R.C.M. 1004. See *Loving*, 517 U.S. at 773–74. This Court noted that it did not decide whether the President had the inherent authority to prescribe sentencing factors in capital cases because Articles 18, 36, and 56 of the UCMJ delegated the power over sentencing factors to him. *Id.* at 770–73.

In *Loving*, this Court relied on the reasoning of *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1990), to find that Congress had delegated to the President the authority to promulgate aggravating factors. See *Loving*, 517 U.S. at 769 (“As the Court of Military Appeals pointed out in *Curtis*, for some decades the President has used his authority under these Articles to increase the penalties for certain noncapital offenses if aggravating circumstances are present. . . . This past practice suggests that Articles 18 and 56 support as well an authority in the President to restrict the death sentence to murders in which certain aggravating circumstances have been established.”).

But this Court’s conclusion that Congress appropriately delegated authority to increase “penalties” relied on the same reasoning the Court of Military Appeals explained in *Curtis*. This conclusion must rely on the holding of *Walton v. Arizona*, in which this Court determined capital aggravating factors to be only sentencing factors in murder cases, not elements of the aggravated crime of capital murder, and, therefore, not covered by the jury trial guarantee of the



Sixth Amendment. See *Walton*, 497 U.S. at 648. *Curtis* left no doubt that “[i]f ‘aggravating factors’ used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President.” *Curtis*, 32 M.J. at 260. Thus, *Curtis* upheld the military aggravating factor regime only because “the Supreme Court ha[d] made clear that ‘aggravating factors’ are not ‘elements’ of a crime.” *Id.* (citing *Walton*, 497 U.S. at 648–49).

Subsequently, of course, *Ring* then overruled *Walton*—and with it, the reasoning of *Curtis*—by holding that “enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense.’” 536 U.S. at 609 (quoting *Apprendi*, 530 U.S., at 494 n.19). The aggravating factor rule in this case, R.C.M. 1004(c), provides that “[d]eath may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors,” and thus clearly places the military’s capital aggravating factors under the *Ring* and *Apprendi* rule. In short, the underpinnings upon which *Loving* was decided have been substantially eroded by subsequent developments in this Court.

**B. Because Only Congress Can Prescribe Elements, The President’s Promulgation Of R.C.M. 1004 Is Beyond The Scope Of His Delegated Authority In Articles 18, 36, And 56, UCMJ.**

“The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute” *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson*, 11 U.S. 32 (1812)). This Court thus has explained that allowing

the President to “provide rules of substantive law as well as procedure” would run afoul of the separation-of-powers. *Reid v. Cover*, 354 U.S. 1, 39 (1957). And there is no doubt that the promulgation of elements qualifies as the provision of substantive law. See *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004) (“A decision that modifies the elements of an offense is normally substantive rather than procedural.”)<sup>5</sup> These basic separation-of-powers principles forbid Congress from delegating to the President the power to promulgate elements, including aggravating factors.

The power to regulate the Armed Forces, like other powers related to the common defense, was given to Congress “without limitation.” *The Federalist*, No. 23 (Alexander Hamilton). But this grant of power to Congress does not include the power to delegate to the President “judgment or discretion that lies beyond the traditional authority of the President.” *Loving*, 517 U.S. at 772. The power to promulgate elements is a non-delegable power. Indeed, the determination of what elements of murder qualify as so egregious as to deserve death is one of the most important functions committed to the legislative branch of government. As Chief Justice Marshall explained in *Wayman v. Southard*, 10 Wheat 1 (1825), “[t]he rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department. Congress could not delegate this power to the judiciary, or to any other department of the gov-

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<sup>5</sup> While *Ring*’s holding that certain facts must be found by a jury in order to impose the death penalty was procedural, the decision to make a particular fact essential to the death penalty is substantive. *Schriro*, 542 U.S. at 354.

ernment.” *Wayman*, 10 Wheat at 16–17 (emphasis added).

The President’s promulgation of R.C.M. 1004 is no longer constitutionally valid after *Ring* because this Court’s understanding of the fundamental nature of the aggravating factors has changed. In the post-*Ring* landscape, the President’s action in promulgating R.C.M. 1004 is an exercise of power beyond his delegated powers over sentencing and punishments. The R.C.M. 1004 factors are nearly identical to the factors at issue in *Ring*. Compare Article 118(1) and (4), UCMJ, 10 U.S.C. §918(1)-(4) and R.C.M. 1004 with *Ring*, 536 U.S. at 608–09 (citing *Apprendi*, 530 U.S. at 494 n.19). Moreover, the “functional element” label affixed to capital sentencing aggravating factors in *Ring* does not turn solely on the Sixth Amendment right to a jury trial,<sup>6</sup> but is based instead on whether the finding increases the defendant’s maximum punishment. See *Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). Such an increase obviously is present here as well because,

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<sup>6</sup> The “functional equivalent of an element” label is affixed to these findings of fact because the Fifth and Sixth Amendment together, and separately, require a defendant have the same rights with regard to this finding of fact as with an element of the crime. It was specifically the fear that the State could subvert the due process protection of proof beyond a reasonable doubt by characterizing a fact as a sentencing factor that led to the *Apprendi* rule. See *Apprendi*, 530 U.S. at 485, 494 n.19. That fear is equally applicable in the military context. See *Weiss v. United States*, 510 U.S. 163, 177–78 (1994); see also *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (notice and due process rights applicable to military accused); *United States v. Czekala*, 42 M.J. 168, 170 (C.A.A.F. 1995) (the “Due Process Clause of the Fifth Amendment . . . requires the Government to prove a defendant’s guilt beyond a reasonable doubt.”).

had the panel found no aggravators under R.C.M. 1004, Akbar could not have been sentenced to death. See *Appendi*, 530 U.S. at 494 (a functional element includes a factor that exposes an accused “to a greater punishment than that authorized by the [panel]’s guilty verdict”).

What the Court in *Loving* viewed as an exercise of the President’s traditional authority to punish and prescribe the procedure for the punishment of service-members must now be viewed as an entirely different act, one that is inherently legislative in nature. The exercise of presidential power in promulgating R.C.M. 1004 went beyond the scope of what Congress may delegate. Post-*Ring*, it is evident that R.C.M. 1004 functionally changed the elements of capital murder. That is something that only Congress can do. This Court should, therefore, take this opportunity to review its holding that Congress, may delegate that power to the President in Articles 18, 36, and 56 of the UCMJ.<sup>7</sup>

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<sup>7</sup> In Article 106a of the UCMJ, Congress authorized the President to promulgate additional capital sentencing aggravating factors for espionage under Article 36. See Article 106a(c)(4), UCMJ, 10 U.S.C. § 908a(c)(4). This Court noted Article 106a in *Loving* but expressed doubt that Article 36 standing alone would serve as source of executive power to promulgate aggravating factors. *Loving*, 517 U.S. at 770. Furthermore, the reasoning of *Loving* referencing Article 106a as a basis to support the promulgation of RCM 1004(c) is no longer valid because of the changed nature of the factors under *Ring*. Articles 18, 36, and 56 do not encompass the nature of the power exercised by the President in promulgating RCM 1004(c) factors. Thus, nothing in 106a requires reading Articles 18, 36, and 56 as delegating to the President the power to promulgate elements of a crime.

**C. This Court Can Avoid The Constitutional Question By Holding That The Uniform Code Of Military Justice Does Not Give The President Power To Promulgate Aggravating Factors.**

In the wake of *Ring* and *Apprendi*, the theory of delegation on which Akbar's sentence relies at least implicates unusually difficult and serious constitutional questions. This Court can and should avoid those constitutional questions by revisiting its interpretation of Articles 18, 36, and 56. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). Here, a reading of the relevant provisions that does not purport to allow the President to proscribe the elements of criminal offenses is not only possible, but necessary.

Articles 18, 36, and 56 plainly contemplate that the President may prescribe “limits,” “restrictions,” and “procedures” governing the death penalty. See Article 18(a), UCMJ, 10 U.S.C. § 818(a) (authorizing general courts-martial to impose the death penalty “under such *limitations* as the President may prescribe”) (emphasis added); Article 36(a), UCMJ, 10 U.S.C. § 836(a) (authorizing the President to prescribe “pre-trial, trial, and post-trial *procedures*”) (emphasis added); Article 56(a), UCMJ, 10 U.S.C. § 856(a) (“The punishment which a court-martial may direct for an offense may not exceed such *limits* as the President may prescribe for that offense.”) (emphasis added). In *Loving*, this Court held that these provisions “together give clear authority to the President for the

promulgation of RCM 1004.” 517 U.S. at 770. The Court recognized that the language of Article 36—which speaks only of the President’s power to promulgate “procedures”—“seems further afield from capital aggravating factors,” but held that promulgation of aggravating factors was included within the President’s power “to restrict the death sentence to murders in which certain aggravating circumstances have been established.” *Id.* at 769–70 (citing Articles 18 and 56).

The Court’s holding that aggravating factors were “limits” or “restrictions” on the death penalty was in accord with *Walton*, which described aggravating factors as akin to “substantive *limitation[s]* on sentencing.” *Walton*, 497 U.S. at 649 (citation omitted) (emphasis added). But *Ring* expressly rejected that view, holding that aggravating factors act as *elements of*, rather than *limitations on*, a death penalty offense. *Ring*, 536 U.S. at 604–05. It is now clear that in R.C.M. 1004 the President did far more than prescribe “limits,” “restrictions,” or “procedures” regarding the death penalty. In light of this Court’s changed view of aggravating factors, it should now hold that the UCMJ does not confer a power to promulgate aggravating factors. See *Curtis*, 32 M.J. at 260 (“If ‘aggravating factors’ . . . were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President.”).

**CONCLUSION**

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 7, 2012

\* Counsel of Record

## **APPENDIX**



**APPENDIX A**

UNITED STATES, Appellee

v.

Hasan K. AKBAR, Sergeant

U.S. Army, Appellant

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No. 13-7001

Crim. App. No. 20050514

United States Court of Appeals for the Armed Forces

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Argued November 18, 2014

Decided August 19, 2015

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OHLSON, J., delivered the opinion of the Court, in which STUCKY and RYAN, JJ., joined. BAKER, J., filed a separate dissenting opinion, in which ERDMANN, C.J., joined.

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Counsel

For Appellant: Lieutenant Colonel Jonathan F. Potter and Major Aaron R. Inkenbrandt (argued); Colonel Kevin Boyle and Major Jacob D. Bashore (on brief).

For Appellee: Major Kenneth W. Borgnino and Captain Janae M. Lepir (argued); Colonel John P. Carrell, Lieutenant Colonel James L. Varley, and Captain Carrie L. Ward (on brief); Captain Chad M. Fisher.

Amicus Curiae for Appellant: Andrea D. Lyon, Esq. --  
for National Association of Criminal Defense Lawyers  
(on brief).

Military Judges: Dan Trimble, Patrick J. Parrish,  
and Stephen R. Henley

This opinion is subject to editorial correction before  
final publication.

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Judge OHLSON delivered the opinion of the Court.

Contrary to his pleas, a panel of officer and enlisted court-martial members convicted Appellant of attempted murder (three specifications) and premeditated murder (two specifications), in violation of Articles 80 and 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 880, 918 (2000). The fifteen-member panel sentenced Appellant to death. The convening authority approved the adjudged sentence, and the United States Army Court of Criminal Appeals (CCA) affirmed the findings and sentence. *United States v. Akbar*, No. ARMY 20050514, 2012 CCA LEXIS 247, at \*102, 2012 WL 2887230, at \*32 (A. Ct. Crim. App. July 13, 2012) (unpublished). Appellant's case is now before us for mandatory review under Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1) (2012).

#### Overview of the Case

The evidence adduced at trial showed that on the night of March 22, 2003, as American armed forces were preparing to launch Operation Iraqi Freedom from their staging area in Kuwait, Appellant threw grenades into three of the tents of his fellow servicemembers and opened fire with his M-4 rifle, killing two military officers and wounding fourteen

others. The ensuing investigation revealed that Appellant previously had written in his diary of his intent to “kill as many of [his fellow servicemembers] as possible” as soon as he arrived in Iraq.

Although Appellant raises a number of issues for review, the gravamen of his appeal focuses on whether his attorneys provided ineffective assistance of counsel. The Supreme Court has set a high bar for an appellant to prevail on such a claim. Specifically, the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984), requires an appellant to show that: (1) his counsel’s performance fell below an objective standard of reasonableness; *and* (2) the counsel’s deficient performance gives rise to a “reasonable probability” that the result of the proceeding would have been different without counsel’s unprofessional errors. *Id.* at 688, 694. Upon analyzing both the law and the facts in this case, we conclude that Appellant has failed to meet either of these requirements established by the Supreme Court.

In regard to the first prong of *Strickland*, we first note that Appellant was represented by two experienced military attorneys who devoted more than two years to preparing and presenting the defense in this case. With the benefit of appellate hindsight, we could dissect every move of these trial defense counsel and then impose our own views on how they could have handled certain matters differently and, perhaps, better. However, that is not the standard of review we are obligated to apply. Rather, based on long-standing precedent from the Supreme Court, we are required to be “highly deferential” in our review of counsel’s performance, and we must presume that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 689, 690. We also are

constrained by the principle that strategic choices made by trial defense counsel are “virtually unchallengeable” after thorough investigation of the law and the facts relevant to the plausible options. *Id.* at 690-91.

Concerning this last point, we are particularly mindful that many of the steps that were taken -- or not taken -- by trial defense counsel in the instant case, and that are now under scrutiny in this appeal, were the result of trial defense counsels’ strategic decision to conduct the case in a manner that avoided introduction of additional damaging information about Appellant. Specifically, trial defense counsel successfully sought to shield from the court-martial panel details about Appellant’s alleged stabbing of a military police officer (MP), just days before Appellant’s court-martial began. We conclude that trial defense counsel reasonably believed that the admission of such evidence would have seriously undermined their ability to convince the panel members during sentencing that Appellant had rehabilitative potential, and thus should not be sentenced to death. For this and other reasons discussed in greater detail below, we conclude that the performance of trial defense counsel was not “measurably below the performance standards ordinarily expected of fallible lawyers.” *United States v. Davis*, 60 M.J. 469, 474 (C.A.A.F. 2005).

In regard to the second prong of the ineffective assistance of counsel test, several reasons convince us that there was no reasonable probability that the panel members would have acquitted Appellant or sentenced Appellant to something less than the death penalty had trial defense counsel presented their case in the manner now urged on appeal. First, Appellant’s murder of Army Captain (CPT) Christopher

Seifert and Air Force Major (MAJ) Gregory L. Stone, and his attempted murder of other officers of the United States armed forces, was premeditated. Second, prior to committing this offense, Appellant had written incriminating passages in his diary, such as: “I may have to make a choice very soon about who to kill. . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies”; and, “I am not going to do anything about it as long as I stay here. But as soon as I am in Iraq I am going to kill as many of [my fellow servicemembers] as possible.” Third, Appellant committed this attack in Kuwait at the start of Operation Iraqi Freedom in an effort to hobble the American military’s ability to prevail in battle. Fourth, Appellant was thirty-one years old at the time he committed the offenses, had served in the United States Army for just under five years, and had attained the rank of sergeant. Fifth, both the sanity board and many of Appellant’s own experts concluded that Appellant was not suffering from a severe mental disease or defect at the time he committed the offense or at the time of testing. Sixth, Appellant was not intellectually deficient, as demonstrated by his engineering degree from a well-known university and his “extremely high, superior IQ.” And finally, even assuming that all of the information now provided by appellate defense counsel is true, we conclude that Appellant’s additional mitigation evidence is not sufficiently compelling to establish a substantial likelihood that the court-martial panel would have imposed a different sentence. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1410 (2011); *see also United States v. Kreutzer*, 61 M.J. 293, 300 (C.A.A.F. 2005) (noting that “overwhelming evidence of guilt may present an insurmountable obstacle to an appellant claiming prejudice from ineffective assistance of counsel”). Based

on these factors and others discussed below, we conclude that if there ever was a case where a military court-martial panel would impose the death penalty, this was it.

Since Appellant can establish neither deficient performance nor prejudice, we conclude that Appellant cannot prevail on his claims of ineffective assistance of counsel. We further conclude that Appellant's other assignments of error are similarly without merit. Accordingly, we affirm the lower court's decision.

## I. Facts

### A. The Offenses

In March 2003, soldiers from the 1st Brigade, 101st Airborne Division, were stationed at Camp Pennsylvania, Kuwait, preparing to begin Operation Iraqi Freedom. On the night of March 22, Appellant was guarding grenades with another soldier. When Appellant was left alone, he stole seven grenades: four M-67 fragmentation grenades and three M-14 incendiary grenades. The brigade was scheduled to cross the border from Kuwait into Iraq in the next few days.

Before movement and while most of the brigade slept, Appellant took a fellow soldier's body armor and then walked to the tents of the brigade officers. He shut off the generator for the outdoor lighting to the tent area, plunging it into darkness. Appellant then threw one incendiary and one fragmentation grenade into Tent 1, where the brigade commander (Colonel (COL) Frederick Hodges), brigade executive officer (MAJ Ken Romaine), and brigade sergeant major (Command Sergeant Major (CSM) Bart Womack) were sleeping. When MAJ Romaine emerged from the tent, Appellant shot him, severely injuring, but not killing, him.

Appellant then moved to Tent 2 where several officers and two interpreters were sleeping and threw two fragmentation grenades into the tent. Many of the officers were injured from the shrapnel, and MAJ Gregory Stone was killed from eighty-three shrapnel wounds.

Appellant finally moved to Tent 3, which housed sixteen officers, and threw a fragmentation grenade into the tent, which injured multiple officers. When CPT Christopher Seifert exited the tent, Appellant shot him in the back at close range, causing CPT Seifert to bleed to death.

In the midst of the military's response to the attacks, the brigade S-2, MAJ Kyle Warren, learned from COL Hodges that Appellant may have attacked Camp Pennsylvania. MAJ Warren found Appellant and tackled him to the ground. When MAJ Warren asked Appellant if he had attacked the tents, Appellant responded, "Yes."

At the time of apprehension, Appellant was in possession of one fragmentation grenade and two incendiary grenades along with three empty incendiary grenade canisters. His weapon, an M-4 rifle, had been recently fired. Ballistics testing matched the bullets from Appellant's firearm with those that had wounded MAJ Romaine and killed CPT Seifert. Appellant also had M-14 and M-67 grenade residue on his uniform and hands. His fingerprints were on the switch to shut off the generator.

#### B. The Trial Defense Team

Following the March 2003 Camp Pennsylvania attack, Appellant was initially represented by MAJ Daniel Brookhart, CPT David Coombs, CPT Jackie Thompson, and Lieutenant Colonel (LTC) Victor Hansen. Of these counsel, LTC Hansen was the most

experienced because he had served as a trial counsel, senior trial counsel, and chief of military justice, as well as a professor of criminal law at what is now known as the Army Judge Advocate General's Legal Center and School (LCS). He also had served as the lead trial counsel for a fact-finding hearing in a capital case, *United States v. Murphy*. Given this experience, LTC Hansen served as lead counsel.

Although LTC Hansen had the most capital experience among the group, the other counsel were also well-qualified judge advocates. Because Appellant's claims of ineffective assistance of counsel mostly concern MAJ Brookhart and CPT Coombs, we describe their qualifications in some detail.

MAJ Brookhart had served as a judge advocate for approximately eleven years before the pretrial hearings began for Appellant's court-martial. He had earned a master of laws in military law from the LCS with a specialty in criminal law. MAJ Brookhart had tried seventy-five cases as trial counsel or senior defense counsel, including fifteen contested trials involving serious offenses. He had dealt with expert witnesses, including mental health experts. He had been a government appellate counsel for a year, during which time he attended the capital litigation course held by the Naval Justice School. He took this course so that he could handle the capital case of *United States v. Kreutzer*. He also had participated in the trial counsel assistance program which provided him with litigation training. Additionally, MAJ Brookhart had served as branch chief at the government appellate division where he participated in strategy sessions for the *Murphy* capital case, and reviewed and edited the brief in the *Kreutzer* capital case. MAJ Brookhart had argued seven cases before this Court and seven cases at the CCA.



CPT Coombs had served as a judge advocate for approximately seven years before his appearance as counsel at Appellant's pretrial hearing. During this time, CPT Coombs had served for more than two years as a trial counsel and for nearly four years as a defense counsel. CPT Coombs had tried seventy-eight cases, fifteen of which were contested. He had worked with expert witnesses, including forensic psychiatrists. CPT Coombs also had attended a week-long death penalty course in September 2003. In preparation for Appellant's case, both counsel consulted capital resources to include motions in other capital cases, law review articles, and materials from a capital litigation course.

In addition to these two attorneys, the trial defense team also included a forensic psychiatrist, Dr. Walker, and a neuropsychologist, Dr. Clement, who both started working on the case in May 2003. Dr. Walker was used to assist the defense in understanding Appellant's mental status at the time of the crime and the trial, to help prepare a sentencing case, and to observe the Rule for Courts-Martial (R.C.M.) 706 board. Dr. Clement conducted neuropsychological tests on Appellant for the benefit of other defense experts. A forensic DNA expert joined the defense team in June 2003 to observe Government testing of key evidence.

Initially the attorney workload was divided as follows. MAJ Brookhart focused on findings issues, CPT Coombs took the lead on motions, CPT Thompson contacted potential witnesses while deployed in Iraq, and LTC Hansen worked mitigation issues. The strategy was to use the services of a mitigation specialist, Ms. Deborah Grey, early in the process in order to uncover and develop information that could be used to avoid a capital referral and to submit an offer

to plead guilty. LTC Hansen advised Appellant that an offer to plead guilty would be the best way to avoid a capital referral. On two occasions, Appellant agreed to this strategy, but he ultimately changed his mind.

In furtherance of the mitigation strategy, Ms. Grey began her work in August 2003 and was authorized to perform 400 hours of mitigation work. LTC Hansen and Ms. Grey traveled to Appellant's childhood neighborhoods where they interviewed friends, family members, and associates, including Appellant's childhood imam, Appellant's brother, high school teachers and administrators, and college professors and administrators. Ms. Grey provided the defense team with detailed written summaries of these interviews and also collected school, medical, employment, military, and other official records.

Appellant's mother, whom counsel described as having an emotional and mental influence over Appellant, did not agree with LTC Hansen's strategies or the mitigation efforts. In December 2003, Appellant's mother sent a letter to MAJ Brookhart, informing him that she had asked her son to fire LTC Hansen and CPT Thompson because she did not trust them, in large part because they were encouraging Appellant to plead guilty. As a result, at his mother's behest, Appellant released LTC Hansen, the defense's most experienced capital litigator, as well as CPT Thompson, in January 2004.

To replace the dismissed military counsel, Appellant, with his mother's encouragement, retained as lead counsel two civilian attorneys, Mr. Musa Dan-Fodio and Mr. Wazir Ali-Muhammad Al-Haqq, at different times in the pretrial proceedings. Neither attorney had capital litigation experience nor military justice experience. As the first civilian lead counsel,

Mr. Dan-Fodio changed trial strategy to try to get Appellant's case transferred to the United Nations Human Rights Commission or another international forum or, alternatively, to focus on self-defense, defense-of-others, duress, and Appellant's innocence.

Mr. Dan-Fodio subsequently withdrew from the case and was replaced by Mr. Al-Haqq in the spring of 2004. This left Appellant with three counsel -- Mr. Al-Haqq, MAJ Brookhart, and CPT Coombs. Mr. Al-Haqq became lead counsel and focused on an insanity defense. For this purpose, in June 2004, the defense team retained Dr. George Woods Jr., a neuropsychiatrist and forensic psychiatry expert. By this point, the defense team also had obtained the assistance of a ballistics and gunshot powder residue expert, a certified latent print examiner, and a pathologist to review physical and scientific evidence.

Around the time Appellant retained Mr. Al-Haqq as lead counsel, Ms. Grey was informed in early May 2004 that her services as a mitigation specialist were no longer needed because Appellant's mother refused to permit Ms. Grey to interview her or anyone else in her family. At the time of her withdrawal, Ms. Grey estimated that approximately 200 hours would be needed to complete the mitigation case.

In August 2004, Mrs. Scharlette Holdman replaced Ms. Grey as the defense team's mitigation specialist, and she was authorized to conduct seventy-five hours of interviews of Appellant's family members. When Mrs. Holdman withdrew for medical reasons, Ms. Scarlet Nerad replaced her in September 2004. The Government authorized Ms. Nerad to conduct 368 hours of mitigation investigation and 198 hours of base-level investigation. Ms. Nerad interviewed Appellant, his father, mother, sisters, brother, half-brother, grandfather, aunts, uncles, and cousins. She

also collected thousands of pages of documents, including court records, medical records of Appellant and his relatives, and education records of Appellant's siblings.

When Mr. Al-Haqq stopped receiving payments from Appellant, he ceased working on the case in August 2004. He informed counsel he was withdrawing in late February 2005, but military counsel had anticipated this announcement and had worked to prepare Appellant's case for trial accordingly. MAJ Brookhart and CPT Coombs were now left as Appellant's trial defense counsel. By the start of the court-martial, the defense team already had managed to file nearly sixty motions on multiple topics, including many of the issues raised in this appeal.

### C. Trial Proceedings

Following numerous continuances, Appellant's trial was scheduled to begin on April 6, 2005, 744 days after Appellant's attack on Camp Pennsylvania. However, on March 30, 2005, Appellant allegedly found a pair of scissors in the office of the staff judge advocate and used them to stab an MP in the neck. Appellant also allegedly tried to seize the MP's firearm before being subdued by another MP.<sup>1</sup> Following the incident, the military judge, upon trial defense counsels' motions, reopened the R.C.M. 706 sanity board and preliminarily prevented the Government from referencing the stabbing incident. The sanity board deemed Appellant competent to stand trial.

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<sup>1</sup> Appellant was not charged in the stabbing incident. Also, as discussed below, Appellant's counsel successfully prevented the panel from considering this incident during the sentencing phase of Appellant's trial.

Following the alleged scissors attack, trial defense counsel did not seek a delay in the start of the trial in a successful effort to preclude the Government from having the opportunity to refer additional charges against Appellant. Thus, trial proceedings began, as scheduled, on April 6, 2005. Twenty members were detailed to the venire pool. Following two days of voir dire, a fifteen-member panel consisting of nine officers and six enlisted soldiers was selected after the defense successfully challenged one member for cause and the Government successfully challenged three members for cause and used one peremptory challenge.

The Government's case on the merits lasted four days and involved forty witnesses who mostly testified about the Camp Pennsylvania attack on March 22, 2003. When witnesses had information about Appellant, trial defense counsel cross-examined them, eliciting information about Appellant's unfocused state in the period leading up to the attack, his daydreaming, his sleep problems and tendency to fall asleep at inappropriate times, his long periods of silence, his laughing and smiling without reason, and his tendencies to pace and talk to himself. Trial defense counsel also elicited through cross-examination that Appellant had heard servicemembers joking about and using derogatory terms for Muslims.

Besides witness testimony, the Government's case involved admission of these entries from Appellant's diary:

I may have not killed any Muslims, but being in the Army is the same thing. I may have to make a choice very soon about who to kill.

I will have to decide if I should kill my Muslim brothers, fighting for Saddam Hussein, or my

battle buddies.

I'm hoping to get into a position so I don't have to take any crap from anyone anymore.

For the defense case on the merits, counsels' strategy was two-fold: (1) to present evidence establishing diminished mental capacity so as to raise doubt about Appellant's ability to premeditate; and (2) to "front-load" mitigation evidence during the merits stage of the trial. As part of this strategy, trial defense counsel elicited testimony from nine defense witnesses.

Dr. Fred Tuton was a clinical psychologist who had examined Appellant at the age of fourteen after allegations surfaced about Appellant's sister being sexually abused by Appellant's stepfather. Dr. Tuton testified that Appellant displayed no normal emotions during the meeting and reported having sleep problems and not being able to trust people. Dr. Tuton diagnosed Appellant with an adjustment disorder with depressed mood associated with a mixed specific developmental disorder.

Mr. Paul Tupaz, Appellant's college roommate, testified about his friendship with Appellant which lasted until 1994. According to Mr. Tupaz, Appellant had difficulty sticking to his plans, was not very social and spent time by himself, "paced a lot," talked to himself, and had difficulty sleeping.

Members of Appellant's unit and unit leadership testified about Appellant's poor work performance, his isolation from others, his pacing and talking to himself, his sleeping difficulties, and his laughing and smiling at inappropriate times. One servicemember testified about military personnel using derogatory names regarding Muslims in Appellant's presence.

The testimony of Dr. Woods, Appellant's expert in forensic psychiatry, revealed a family history of mental illness, particularly a maternal uncle with psychiatric problems, a father with depression, and a half-brother with paranoia. Dr. Woods explained that Appellant had come from an "extremely poverty-stricken home" and had an "extraordinarily abusive" stepfather. Additionally, he noted that Appellant's mother had been homeless. Dr. Woods reported that test scores revealed Appellant to be suffering from depression, paranoia, impulsivity, sleep problems, and bizarre thinking, which Dr. Woods believed was corroborated by Appellant's diary entries and academic history. Dr. Woods further testified that Appellant had difficulty picking up social cues, perceiving situations, and differentiating reality.

Although Dr. Woods could not provide a definitive diagnosis, he provided three "differential"<sup>2</sup> diagnoses: (1) schizotypal disorder; (2) schizophrenia paranoid type; and (3) schizoaffective disorder. Dr. Woods believed that Appellant's symptoms affected him on March 22, 2003, by causing him to be overwhelmed emotionally and preventing him from thinking clearly.

In closing argument, trial defense counsel argued that the evidence showed that Appellant had a mental illness at the time the attack occurred, and that the Government had therefore failed to meet its burden of proving premeditation. Counsel explained that Appellant's mental illness caused him to become emotionally charged, which in turn led Appellant to react out of confusion and fear. Throughout the clos-

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<sup>2</sup> According to Dr. Woods, a differential diagnosis is based upon an individual's symptoms and provides the possible disorders that would be consistent with the symptoms.

ing, counsel argued that Appellant's actions did not represent "good planning," "just confusion."

Despite the defense case and counsel's closing argument, the panel members returned a guilty verdict on the premeditated murder and attempted murder charges. The case then moved to the sentencing phase.

The Government's presentencing case lasted one-and-a-half days and included the testimony of twenty-one witnesses. COL Hodges, the brigade commander, testified about the impact of the attack on the brigade's battle readiness. In response to a question about the psychological impact of Appellant's attack, COL Hodges stated that he "hated" that a "fragging had occurred" in his unit, noting that in reflecting on the "worst days for the United States Army, at the end of Vietnam, the two things that [came] to mind [were] heavy drug use and fraggings."<sup>3</sup>

Other servicemember victims testified about the impact of their injuries, the psychological impact of the attack, the impact on their military careers, their memories of the deceased victims, and their reactions upon learning that the attacks were by a fellow servicemember. As to this last point, the servicemember victims testified about feeling "disbelief," "distrust," "shock[]," "betrayed," "[e]xtremely frustrated, angry," "pissed," and "confused."

Colleagues of the victims also testified about feeling "anger," "disbelief," and "betrayal" upon learning another servicemember was responsible. Finally, the

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<sup>3</sup> A fragging is an incident in which an individual "deliberately injure[s] or kill[s] (one's military leader) by means of a fragmentation grenade." *Merriam-Webster Unabridged Online Dictionary*, <http://unabridged.merriam-webster.com/unabridged/fragging> (last visited Aug. 14, 2015).



deceased victims' family members and friends testified about the impact of losing CPT Seifert and MAJ Stone.

Prior to the start of Appellant's presentencing case, the defense admitted a binder containing fifteen exhibits: (1) Appellant's entire diary (313 pages); (2) the FBI's written synopsis of the diary (nine pages); (3) Ms. Grey's mitigation report showing Appellant's family tree, Appellant's personal history, and a summary of Appellant's diary (thirty-three pages); (4) government records reflecting Appellant's family's use of food stamps from 1986-1994 (nineteen pages); (5) the search and seizure authorization for Appellant's military e-mail account (one page); (6) definitions of relevant Islamic terms (eight pages); (7) Appellant's paperwork for his name change (four pages);<sup>4</sup> (8) Ms. Grey's interview notes from a high school guidance counselor (one page); (9) Ms. Grey's interview notes from a high school teacher (two pages); (10) Ms. Grey's interview notes from the high school college advisor and photographs of the high school (six pages); (11) another mitigation specialist's interview notes with the ex-wife of Appellant's college roommate (two pages); (12) a memorandum from a servicemember in Appellant's platoon (three pages); (13) a memorandum of the equal opportunity advisor for the brigade (four pages); (14) Ms. Grey's interview notes with Appellant's childhood imam and three photographs of Appellant's childhood mosque (six

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<sup>4</sup> Appellant's birth name was Mark Fidel Kools. His parents became members of the Nation of Islam, and Appellant's name was changed to Hasan Karim Akbar when Appellant was eight years old. Appellant enlisted in the Army under his birth name. However, he petitioned to change his name to Hasan Akbar in June 2001, and the Army finalized the name change in September 2001.

pages); and (15) the criminal records for Appellant's stepfather (four pages).

Before providing each member with a binder, the military judge instructed the members that once the trial recessed for the day, they would be provided defense exhibits to read at home or work. The military judge added that the members were not to conduct independent research, discuss the exhibits with anyone, or copy the exhibits.

The following morning, the defense presented its case in mitigation. The defense presented testimony from CPT David Storch (one of Appellant's former platoon leaders), SFC Daniel Kumm (the platoon sergeant for 2nd Platoon), and Mr. Dan Duncan (Appellant's high school physics teacher). CPT Storch testified about Appellant's termination from his platoon and Appellant's problems as a noncommissioned officer (NCO), including difficulties relating well with soldiers, needing detailed guidance to perform tasks, and performing in an increasingly unsatisfactory manner over time. SFC Kumm testified about Appellant being a "below average" NCO, being a soldier he did not want to take to Iraq, and being assigned the task of guarding grenades on March 22, 2003, at Camp Pennsylvania in Kuwait. Mr. Duncan testified about the "very poor, low socioeconomic, high crime," and gang-ridden area where Appellant's high school was located. He described Appellant as an "excellent student" who was memorable for trying to learn material and being in "the top 5 to 10" students whom Mr. Duncan had ever taught at the high school. Mr. Duncan described Appellant as living in "a drab apartment building in a rather depressed area." After Mr. Duncan's testimony, the military judge recessed for the day "because of some witness travel schedules," and for a second day he permitted the

members to take the defense-created binders home with them.

On the final morning of the defense's presentencing case, the defense offered into evidence and distributed to the members copies of two statements: one from Ms. Regina Weatherford, Appellant's former high school classmate, and one from Appellant's brother. Ms. Weatherford's statement described Appellant's academic success in high school and his tendency to sit by himself during high school. The brother's statement described how Appellant helped raise him, how Appellant financially helped the family, and how Appellant had trouble falling in love too quickly with women. Defense counsel agreed with the military judge that they had decided for "sound tactical reasons" not to call Ms. Weatherford or Appellant's parents to testify.

The final piece of Appellant's sentencing case was his unsworn statement before the members of the court-martial panel. Appellant took the stand and explained that he had decided not to read the six-page statement that he previously had prepared because he felt that it sounded "like an excuse." Instead, he said, "I want to apologize for the attack that occurred. I felt that my life was in jeopardy, and I had no other options. I also want to ask you to forgive me."

During trial defense counsel's sentencing argument, counsel emphasized that the Government's argument was "based upon emotion," and that emotion should not be used when deciding whether to impose the death penalty. He argued for life without parole "based upon logic and reason." Counsel cited Appellant's mental illness, noting that the diary provided "a unique look into [Appellant's] mind." Counsel also cited Appellant's sleep problems as negatively affect-

ing his ability to think. Counsel further noted the command's responsibility, as part of a "band of brothers," to ensure poor performers or those with mental illness did not deploy and did not remain as members of the Army. Counsel then cited Appellant's difficult upbringing and school environment. Counsel ultimately returned to and emphasized Appellant's mental illness as the cause of the lethal events at Camp Pennsylvania.

The military judge provided the panel members with instructions on the procedures that must be used during deliberations in capital cases. Specifically, the military judge instructed the members that in order for them to impose the death penalty: (1) they had to unanimously find beyond a reasonable doubt that an aggravating factor existed; (2) they had to unanimously find that the extenuating and mitigating factors were "substantially outweighed" by the aggravating circumstances; and (3) they had to reach the decision to impose death unanimously based on each member's individual decision. The military judge listed thirty-one mitigating factors but explained that they were not the exclusive factors that the members could consider. Trial defense counsel explicitly stated that he did not object to these instructions.

The members then began their deliberations. Approximately six hours later, the military judge held an Article 39(a), UCMJ, 10 U.S.C. § 839 (2012), hearing to discuss this note from the members: "Sir, reconsideration has been proposed." The military judge proposed to the parties that he use reconsideration instruction 2-7-19 from the Military Judges'

Benchbook (Benchbook), and the parties agreed.<sup>5</sup> Appellant never raised an objection to the instruction. Following additional deliberations, the president of the panel announced that the members had unanimously determined that an aggravating factor had been proven beyond a reasonable doubt, and that the matters in mitigation and extenuation were “substantially outweighed” by the aggravating circumstances. The president then announced that the members had voted unanimously that Appellant should be “put to death.”

## II. Analysis

Appellant’s counsel has assigned a total of fifty-nine issues for this Court to consider. Appellant also has personally presented a number of additional matters for us to consider pursuant to *United States v.*

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<sup>5</sup> The reconsideration instruction explained the process for the members to revote after reaching a sentence if a member proposed reconsideration, noting that the process was different depending on whether the proposal to reconsider related to increasing or decreasing the sentence. The instruction outlined the following process for determining whether the panel could reconsider and revote the sentence: (1) if the proposal was to increase the sentence, a majority of members had to vote by secret ballot in favor of reconsideration; (2) if the proposal was to decrease the sentence, one-fourth of the members had to vote in favor of reconsideration with a view to decrease the sentence; and (3) if the sentence reached was death, only one member vote was required to reconsider the sentence. If the required votes were not obtained for reconsideration, the instruction informed the members that they were to announce the original sentence without indicating whether it was the original or reconsidered sentence. But, if a sufficient number of votes were obtained for reconsideration, the instruction required the members to adhere to the military judge’s original instructions for proposing and determining an appropriate sentence.

*Grostefon*, 12 M.J. 431 (C.M.A. 1982).<sup>6</sup> After careful review, we conclude that a majority of the assigned issues and all of the personally asserted issues do not have merit and therefore warrant no additional discussion. However, we deem it appropriate to address below twenty-one assigned matters, starting with Appellant’s ineffective assistance of counsel claims.

#### A. Ineffective Assistance of Counsel

Appellant challenges the effectiveness of trial defense counsels’ performance at all stages of the pre-trial and trial proceedings.<sup>7</sup> We review these ineffective assistance of counsel claims de novo. *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012). To prevail, Appellant “must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). An attorney is deficient when his representation falls “below an objective standard of reasonableness.” *Id.*

We do not measure deficiency based on the success of a trial defense counsel’s strategy, but instead examine “whether counsel made an objectively reasonable choice in strategy” from the available alterna-

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<sup>6</sup> The assigned issues and personally asserted *Grostefon* issues, which we permitted Appellant to submit out of time, *United States v. Akbar*, 73 M.J. 242 (C.A.A.F. 2014) (order), are listed in the Appendix to this decision.

<sup>7</sup> Such challenges have become the norm in death penalty appeals in both the civilian and military criminal justice systems. *See* David D. Velloney, *Balancing the Scales of Justice: Expanding Access to Mitigation Specialists in Military Death Penalty Cases*, 170 Mil. L. Rev. 1, 18 & n.81 (2001). The vast majority of ineffective assistance of counsel claims are unsuccessful. *See* Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1118 (1999).

tives. *United States v. Dewrell*, 55 M.J. 131, 136 (C.A.A.F. 2001) (quoting *United States v. Hughes*, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)). Similarly, we must remain mindful that counsel have “wide latitude . . . in making tactical decisions.” *Pinholster*, 131 S. Ct. at 1406 (quoting *Strickland*, 466 U.S. at 689). Thus, our scrutiny of a trial defense counsel’s performance is “highly deferential,” and we make “every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

An appellant is prejudiced by counsel’s deficient performance where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. In the capital sentencing context, we “reweigh the evidence in aggravation against the totality of available mitigating evidence” to determine if there is a reasonable probability that the panel would have returned a different sentence. *Wiggins*, 539 U.S. at 534.

For ease of analysis, our discussion of Appellant’s ineffective assistance of counsel claims in the instant case is divided into four categories: (1) pretrial preparation; (2) merits phase performance; (3) penalty phase performance; and (4) cumulative error. As we explain in detail below, we conclude that none of these claims merits relief.

1. Pretrial Preparation

- a. Investigation

Trial defense counsel have “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “[S]trategic choices made [by counsel] after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .” *Id.* at 690. In considering whether an investigation was thorough, “[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.” *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 (1984)). The Supreme Court has “rejected the notion that the same [type and breadth of] investigation will be required in every case.” *Pinholster*, 131 S. Ct. at 1406-07 (citing *Strickland*, 466 U.S. at 691).

#### i. Pretrial Interviews

##### A. Testifying Witnesses

Appellant claims that trial defense counsel failed to adequately interview and prepare two witnesses who testified at trial -- Mr. Tupaz, Appellant’s college roommate, who testified during the merits phase, and Mr. Duncan, Appellant’s high school physics teacher, who testified during presentencing. Neither argument is persuasive.

The record reflects that trial defense counsel contacted Mr. Tupaz in the month prior to trial. In a post-trial affidavit, trial defense counsel reported interviewing Mr. Tupaz over the telephone and reviewing draft questions for trial preparation. In his post-trial declaration, Mr. Tupaz did not “remember talking to any defense attorneys prior to showing up” for the trial at which time Mr. Tupaz recalled speaking to trial defense counsel. We conclude that Mr. Tupaz’s inability to remember talking to trial defense



counsel is “too equivocal and ambiguous to overcome the presumption that [Appellant’s] counsel were competent.” *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002). Even assuming trial defense counsel did not interview Mr. Tupaz, counsel’s questioning of Mr. Tupaz during trial demonstrated that counsel was adequately prepared for his testimony. Therefore, it cannot be said that counsels’ performance was deficient in this regard.

Appellant now claims that Mr. Tupaz should have been asked to testify about the likelihood that Appellant took inappropriate comments made by members of the military about Muslims both very literally and personally. However, this proffered testimony was cumulative of Dr. Woods’s testimony on the same topic, and thus it would not have made Mr. Tupaz’s testimony more compelling in scope or degree.

As for Mr. Duncan, we accept Appellant’s claim that he was not interviewed by defense counsel prior to trial. However, we note that trial defense counsel possessed the mitigation specialist’s report about her own interview of Mr. Duncan, which included facts and observations proffered by Mr. Duncan in regard to Appellant’s high school experiences. Further, trial defense counsel were able to elicit testimony from Mr. Duncan that Appellant’s high school was in a poor and dangerous neighborhood, Appellant was “an excellent student,” and Appellant lived in a “depressed area.” Mr. Duncan’s post-trial declaration contains no additional substantive information that he would have provided had counsel interviewed him prior to his testimony. Therefore, Appellant has not established a reasonable probability of a different sentence based on counsels’ failure to interview Mr. Duncan. We therefore reject Appellant’s ineffective assistance

of counsel claims with respect to Mr. Tupaz's and Mr. Duncan's testimony.

#### B. Nontestifying Lay Witnesses

In the course of his ineffective assistance of counsel claims, Appellant complains that counsel failed to personally contact or to adequately interview his father, his brother, his sisters, his cousins, a high school friend, and a former landlady. In analyzing this issue, we first note that counsel must "investigate adequately the possibility of evidence that would be of value to the accused in presenting a case." *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998). Further, generally speaking, "[e]ffective counsel will contact potential witnesses to determine the facts" of the case. *United States v. Fluellen*, 40 M.J. 96, 98 (C.A.A.F. 1994). However, the duty to investigate does not require trial defense counsel to personally interview every potential witness in a case. See *LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir. 1998). For example, "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative" and "distract [counsel] from more important duties." *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009). As a result, the key point in deciding this issue is whether counsel made a good faith and substantive effort to identify those individuals who might be most helpful at trial, and to implement a means for obtaining information about and from these potential witnesses, thereby allowing counsel an opportunity to make an informed decision about their value for Appellant's court-martial. Cf. *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) (noting that trial counsel need not interview a witness if the account is fairly known to counsel).

Trial defense counsel met this standard here. Specifically, counsel developed a strategy whereby a mitigation expert first interviewed potential witnesses and then provided counsel with a summary of their statements. For those family members with relevant information, one defense counsel would then conduct a phone interview to determine whether to select the person as a witness. There is nothing inherently deficient about this strategy.

The parties dispute whether trial defense counsel actually interviewed certain witnesses. For the sake of our analysis, we will assume that trial defense counsel did not personally conduct interviews of any of Appellant's family members and friends. The record nonetheless indisputably reflects that LTC Hansen (when he was part of the defense team) and/or the mitigation specialists did interview those witnesses and then provided the defense team with summaries of those interviews. Those witnesses included Appellant's father, brother, sisters, two cousins,<sup>8</sup> a high school friend, and former landlady. We conclude that these summaries allowed trial defense counsel to make informed decisions about whether to call these potential witnesses to testify at trial. Therefore, we do not find a sufficient basis to conclude that they engaged in ineffective assistance of counsel.

### C. Nontestifying Professional/Expert Witnesses

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<sup>8</sup> Appellant complains about counsels' failure to interview a third cousin, Kimberly Vines, but we agree with the Government that her claim about having no recollection of an interview is simply "too equivocal and ambiguous to overcome the presumption" of counsel's competence. *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002).

Appellant claims that trial defense counsel were ineffective in failing to interview or call to testify Dr. Donna Sachs, Appellant's treating college psychologist, and Dr. Wilbert Miles, a clinical psychologist. At the outset, we note that "[i]t can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts." *Harrington v. Richter*, 562 U.S. 86, 106 (2011). However, that is not the case here.

The record demonstrates that trial defense counsel believed that a mitigation expert had coached or influenced Dr. Sachs' memory of Appellant. Regardless of whether counsels' belief was correct, trial defense counsels' concern was reasonable. Therefore, we will not second guess counsels' tactical decision in declining to rely on Dr. Sachs.

We also conclude that there was no deficiency in trial defense counsels' decision not to rely on Dr. Miles despite his expertise in the special challenges faced by African American soldiers. *See Richter*, 562 U.S. at 107 (noting that counsel can formulate reasonable strategy even if it means ignoring experts "whose insight might possibly have been useful"). We note that trial defense counsel already had the assistance of other mental health professionals, including a neuropsychiatrist, a neuropsychologist, and a forensic psychiatrist. *See United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994). "The mere fact that [trial] defense counsel did not 'shop around' for another more favorable expert [did] not render them ineffective." *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992).

Moreover, even if counsel were deficient in not having Dr. Miles testify at trial, Appellant has not established any prejudice resulting from this assumed deficient performance. First, much of the information

that would have been elicited from Dr. Miles was already obtained from Dr. Woods. Second, we recognize that Dr. Miles, unlike Dr. Woods, could have provided an opinion about “how someone from [Appellant’s] background and culture, presented with distress[ing] life experiences and [a] history of racial oppression, may have [developed] a state of mind that his own life was under imminent risk.” However, Appellant has not demonstrated that this information would have led to a different outcome on the merits or at sentencing. We therefore find no merit to Appellant’s ineffective assistance claims based on counsels’ failure to rely on Dr. Miles or Dr. Sachs.

ii. Site Visits

Appellant asserts that trial defense counsel were deficient because they failed to travel to the locations where Appellant grew up, which he believes hindered them from properly interviewing witnesses and fully understanding Appellant. The premise of Appellant’s argument is flawed because the defense team did conduct site visits. Both LTC Hansen, the first lead counsel in this case, and the mitigation specialists made site visits to Appellant’s high school and his childhood neighborhoods, conducted interviews with Appellant’s acquaintances and family members, and summarized the interviews from these visits in memoranda used by the trial defense counsel. We conclude that trial defense counsel acted reasonably in opting not to repeat site visits performed by others on the defense team.

iii. Use of Mitigation Experts

Appellant next criticizes trial defense counsels’ use of the mitigation specialists in his case, pointing to counsels’ failure to follow all of their advice as well as the purported dysfunction in counsels’ relationship

with them. In examining this issue, we first acknowledge the special importance of mitigation specialists in military justice capital cases. See *Kreutzer*, 61 M.J. at 298 n.7, 302-03, 305. Without a “professional death penalty bar in the military services,” these specialists are likely “the most experienced member[s] of the defense team in capital litigation.” *Id.* at 298 n.7. The mitigation specialists’ role is “to coordinate an investigation of the defendant’s life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review.” *Id.* at 302 (citation and footnote omitted). The specialists are considered “an indispensable member of the defense team throughout all capital proceedings.” *Id.* at 305 (citation omitted). As a result, “mitigation specialists may play a particularly important role in ensuring the fair and full adjudication of military death penalty cases where . . . counsel have little training or experience in capital litigation.” *Id.* at 303.

In the instant case, however, we first conclude there is no basis to find counsel ineffective for failing to always follow the mitigation specialists’ advice. It is counsel, not mitigation specialists, who are entrusted with making strategic litigation decisions in each case. See *Strickland*, 466 U.S. at 689 (noting “the constitutionally protected independence of counsel” and “the wide latitude counsel must have in making tactical decisions”).

Second, for purposes of this appeal we will accept the premise that there was some dysfunction with and antipathy toward the mitigation specialists on the part of the trial defense counsel. But despite these problems, the various mitigation specialists em-

ployed in Appellant's case performed extensive work and gathered significant information about Appellant's background, upbringing, and related issues which the trial defense counsel effectively used in the preparation and presentation of Appellant's case. We particularly note the efforts of Ms. Grey, whose nearly 400 hours of mitigation work resulted in interviews, interview summaries, and thousands of pages of records which were provided to trial defense counsel. When Ms. Grey was fired by Appellant at his mother's behest, Ms. Grey estimated that an additional 150 to 210 hours of work was needed to complete the mitigation investigation. One of her successor mitigation specialists, Ms. Nerad, performed nearly three times this estimate by billing approximately 565 hours of work, which resulted in additional interviews, summaries, and records reviewed by trial defense counsel. Therefore, regardless of whatever dysfunction or antipathy might have existed, the mitigation specialists were able to adequately perform their important role by providing trial defense counsel relevant and useful information in defending Appellant. *See Kreutzer*, 61 M.J. at 302. Trial defense counsel then used this information to defend Appellant both during the merits and penalty phases of the trial in questioning witnesses and presenting evidence.

Finally, trial defense counsel made a reasonable strategic decision not to have a mitigation specialist testify or be physically present at Appellant's trial. Although it may be advantageous to have a mitigation specialist actively participate at a capital trial, it is not required. *See Kreutzer*, 61 M.J. at 305. Moreover, the circumstances of this case demonstrate that counsel acted reasonably in deciding not to employ a mitigation specialist at trial. *See Pinholster*, 131 S.

Ct. at 1406 (“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel . . . .”) (quoting *Strickland*, 466 U.S. at 688-89). The record demonstrates that the appointed mitigation specialist at the time of trial, Ms. Nerad, disagreed with a number of approaches taken by trial defense counsel. Under these circumstances, trial defense counsel could reasonably conclude that the presence and participation of the mitigation specialist at trial would not have been beneficial. *See id.* at 1407 (noting that reviewing court must entertain the range of possible reasons for counsel’s decisions). Therefore, we find no basis to conclude that trial defense counsel were ineffective in the manner in which they used the mitigation specialists.

#### iv. Information to Dr. Woods

Appellant claims that trial defense counsel were ineffective for failing to provide Dr. Woods with certain information, including sufficient mitigation evidence and additional psychological testing data. Appellant asserts that this information would have allowed Dr. Woods to make a forensic diagnosis that Appellant suffered from schizophrenia and post-traumatic stress disorder.

However, even if we assume Dr. Woods received none of this material, we still find no demonstrated prejudice. First, even in the absence of additional information, Dr. Woods was able to provide the panel with “differential diagnoses” of schizotypal personality disorder, high functioning paranoid schizophrenia, and schizoaffective disorder. Dr. Woods opined that on March 22, 2003, Appellant’s symptoms, “played a great role in his mental state at the time of the offense” by “overwhelm[ing Appellant] emotionally and to really not think as clearly, to not really under-



stand.” The post-trial affidavits do not demonstrate that Dr. Woods would have changed this opinion or strengthened it with additional information or testing.

Second, Dr. Woods testified that “it would really require *appropriate treatment* to really determine which of the three [differential diagnoses] would be accurate.” (Emphasis added.) This testimony indicates that Dr. Woods himself recognized that he could not have given a more definitive diagnosis of Appellant, even with more testing and mitigation information.

Third, Dr. Woods downplayed the importance of a precise diagnosis, stating: (1) “The fact that it may not be called schizophrenia or what have you is, in the long run, less important . . .”; and (2) “The fact that it’s not -- it may not be called schizophrenia is not clinically relevant.” As can be seen then, Dr. Woods’s testimony emphasized Appellant’s symptoms and minimized the importance of a precise diagnosis. Under these circumstances, we conclude that Appellant has not demonstrated any likelihood of a different outcome in this case even if trial defense counsel had provided additional information or testing data to Dr. Woods.

#### b. Additional Funding and Continuances

Appellant claims that trial defense counsel were ineffective for failing to request additional funding and for failing to seek a continuance at two separate points before trial -- following the mitigation specialist’s request in early March 2005, and following Appellant’s alleged stabbing of the MP in late March 2005. We first reject this argument because Appellant has not carried “his burden to show that his counsel would have been successful if he had filed . . .

timely motion[s]” for a continuance and additional funding. *United States v. Jameson*, 65 M.J. 160, 164 (C.A.A.F. 2007). Simply stated, there is no “reasonable probability that [the] motion[s for a continuance and additional funding] would have been [deemed] meritorious” by the military judge. *Id.* at 163-64 (quoting *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001)). These motions would have come a few days before and one month before the start of trial, respectively, and after the military judges in this case already had granted three prior continuances in a case that was originally scheduled for trial in July 2004. Given the late requests and this record of delay, which totaled more than 700 days after the Camp Pennsylvania attack, there is an insufficient basis for us to conclude that the military judge likely would have granted additional continuances, *see United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004) (listing factors relevant for continuance), or additional funding, *see United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986) (requiring showing of why request for funds was needed).

We next observe that Appellant has not adequately demonstrated that additional time or funding in early March 2005 would have resulted in a more favorable outcome in the proceedings. Specifically, Appellant has not demonstrated that additional investigation would have resulted in a substantively different or enhanced mitigation posture at trial, particularly where approximately 1,000 hours of investigation already had been devoted to this case. Accordingly, Appellant has not established that counsel were ineffective for failing to request additional funds or a continuance in early March 2005.

In regard to late March 2005, we also conclude that counsel were not ineffective for deciding not to seek a

continuance after the March 30, 2005, stabbing of the MP. The record is clear that trial defense counsel made the strategic calculation that a delay in the court-martial would provide the Government with an opportunity to charge Appellant with the assault on the MP. Evidence admitted at trial in support of this additional specification likely would have greatly undermined the defense position that Appellant's prior violent conduct was aberrational and that Appellant had rehabilitative potential. Therefore, we do not conclude that trial defense counsel were ineffective for deciding not to seek a continuance at that point in the proceedings.

c. Special Instruction Regarding Guilty Pleas

Appellant contends that his trial defense counsel were ineffective for failing to seek a mitigation instruction concerning Appellant's inability to plead guilty.<sup>9</sup> Indeed, we note that before trial began, trial defense counsel withdrew a requested instruction informing the members that because this matter had been referred as a capital case, Article 45, UCMJ, 10 U.S.C. § 845 (2012), required Appellant to plead not guilty and be tried before members. However, the record shows that trial defense counsel acted entirely reasonably in obtaining the withdrawal of this instruction for the simple reason that Appellant had decided not to submit an offer to plead guilty and instead had decided to argue at trial that he had not premeditated the attacks. Therefore, we conclude that trial defense counsel were not ineffective for withdrawing the instruction.

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<sup>9</sup> Article 45, UCMJ, states, "A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged." Article 45(b), UCMJ, 10 U.S.C. § 845(b) (2000).

## d. Voir Dire

Appellant challenges trial defense counsels' use of an "ace of hearts" strategy during the voir dire process.<sup>10</sup> An ace of hearts strategy is predicated on the fact that in order for a panel to impose a death sentence, the members must vote unanimously to impose that sentence. *See* R.C.M. 1006(d)(4). Therefore, the strategy posits that the accused will benefit from having the largest possible number of panel members because that will increase the chances that at least one member of the panel (the so-called "ace of hearts") will vote for a sentence other than the death penalty. In furtherance of this strategy, trial defense counsel in the instant case made the strategic decision to minimize their use of peremptory challenges and challenges for cause.

It may be argued that the ace of hearts strategy ignores panel dynamics whereby vocal and opinionated members hostile to the defense position may disproportionately impact deliberations.<sup>11</sup> However, in light of the fact that trial defense counsel consulted with other experienced attorneys and relied on an appellate military judge's concurring opinion in *United States v. Simoy*, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd in part on other grounds* by 50 M.J. 1 (C.A.A.F. 1998), before deciding to employ this strategy, we conclude that their

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<sup>10</sup> Appellant also claims that counsel were ineffective for failing to seek a change in venue. The record reflects that counsel sought to change venue but failed to convince the military judge of the need to do so. As a result, counsels' attempt to change venue means that they were not ineffective for failing to do so.

<sup>11</sup> *See* Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, 2011 Army Law. 6, 8-10, 13-16 & nn. 28, 46-47 (May 2011).

decision is “virtually unchallengeable.” *United States v. Curtis*, 44 M.J. 106, 119 (C.A.A.F. 1996) (quoting *Strickland*, 466 U.S. at 690).<sup>12</sup> Therefore, we conclude that there was no ineffective assistance of counsel.

## 2. Merits Phase

Appellant claims that trial defense counsel were ineffective for conceding guilt in opening statement, during the defense case on the merits, and in closing argument. However, Appellant’s assertions are misplaced because trial defense counsel never conceded that Appellant was guilty of premeditated murder, only that he had committed certain acts.

To be blunt, there was absolutely overwhelming evidence adduced at trial that Appellant committed the acts that resulted in the deaths of MAJ Stone and CPT Seifert, and the wounding of fourteen other military officers. Therefore, it was not unreasonable for trial defense counsel to forego trying to convince the court-martial panel to the contrary, and to instead focus squarely on trying to persuade the panel members that Appellant’s acts were not premeditated. Accordingly, concessions such as the ones made by trial defense counsel that Appellant “threw those grenades” and “shot and killed Captain Seifert” were not unreasonable because they did not concede Appellant’s guilt to capital murder. Indeed, this type of approach is a well-recognized defense strategy in capital cases. *See Florida v. Nixon*, 543 U.S. 175, 190-91 (2004); *Lingar v. Bowersox*, 176 F.3d 453, 458–59 (8th Cir. 1999) (holding that concession of elements of se-

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<sup>12</sup> As discussed *infra*, we do not find a sufficient basis to conclude that any of the panel members should have been disqualified for cause, so counsel were not ineffective for failing to challenge members for bias.

cond-degree murder to challenge defendant's mens rea for a capital-murder conviction was not constitutionally deficient where overwhelming evidence pointed to defendant as perpetrator). Accordingly, we conclude that trial defense counsel were not ineffective in this regard.

### 3. Penalty Phase

Appellant describes trial defense counsels' presentencing presentation as consisting of "[t]hirty-eight minutes [of testimony and Appellant's unsworn statement] and a document dump." Specifically, he criticizes the performance of trial defense counsel for failing to develop a coherent mitigation theme, submitting his entire diary for the panel's review, and presenting a mitigation case primarily through documents instead of live witness testimony.

In closely analyzing this issue, we acknowledge at the outset that trial defense counsel may well have presented a stronger case in mitigation if they had adopted a different approach and taken different steps during the presentencing phase of this court-martial. However, in determining whether there was ineffective assistance of counsel, we do not assess trial defense counsels' performance through the prism of appellate hindsight and then apply our subjective view of how we think defense counsel should have conducted the trial. Rather, pursuant to Supreme Court precedent, we are obligated to determine whether trial defense counsels' performance fell below an "objective standard of reasonableness" *and*, if so, whether there was a "reasonable probability" that the result of the proceeding would have been different absent counsels' deficient performance. *Strickland*, 466 U.S. at 688, 694. In the instant case, not only do we conclude that trial defense counsels' performance was not "measurably below the performance stand-

ards ordinarily expected of fallible lawyers,” *Davis*, 60 M.J. at 474, we also conclude that even if trial defense counsel had handled the mitigation case precisely as appellate defense counsel now avers they should have, there is no reasonable probability that the court-martial panel would have imposed a lesser sentence. *See Loving v. United States*, 68 M.J. 1, 7 (C.A.A.F. 2009). Accordingly, for the reasons cited in greater detail below, we disagree with Appellant’s assessment of this issue.

a. Mitigation Theme

Appellant argues that trial defense counsel failed to develop a comprehensive and compelling mitigation argument encompassing Appellant’s upbringing in accordance with the tenets of the Nation of Islam, his need to overcome great disadvantages as a youth, and his continued willingness to provide love and support to his family. We recognize that counsel are well advised to adopt a coherent defense theme and strategy throughout a trial. *Curtis*, 44 M.J. at 120. However, there are a number of acceptable ways to establish, develop, and present such a theme in any given case. *See Pinholster*, 131 S. Ct. at 1407.

In the instant case, the record reflects that trial defense counsels’ mitigation strategy was to emphasize Appellant’s mental illness while also pointing out Appellant’s difficult upbringing, his lack of ties to radical Islamic groups, and the Army leadership’s questionable decision to bring Appellant to Kuwait despite signs of mental illness and poor NCO skills. The evidence that supported these arguments was developed during both the merits<sup>13</sup> and penalty

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<sup>13</sup> The “frontloading” of mitigation evidence during the merits phase is reasonable where the same fact-finder (1) considers guilt and penalty evidence and (2) is instructed about the ability

phases of the trial. Because trial defense counsels' decision about how best to handle the sentencing argument followed an extensive mitigation investigation and exploration of other possible approaches, Appellant's criticism amounts to a dispute over counsels' strategy. See *United States v. Gray*, 51 M.J. 1, 19 (C.A.A.F. 1999) (characterizing argument about counsels' failure to present an "adequate sentencing case" as an attack on "strategy and tactics"). Under such circumstances, Appellant has not established that trial defense counsels' selection and presentation of a mitigation theme constituted ineffective assistance of counsel.

b. Submission of the Diary

Appellant argues that trial defense counsel were ineffective for submitting the entirety of Appellant's "damning" diary into evidence at sentencing because it led to the introduction of aggravating evidence, not mitigating evidence. However, upon closely analyzing this issue, we find there is an insufficient basis to

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to consider all evidence for mitigation. See *Pinholster*, 131 S. Ct. at 1408 (citing *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002)); *Bell v. Cone*, 535 U.S. 685, 699 (2002) (rejecting ineffective sentence claim for failure to present testimony of medical experts at penalty phase where "compelling mitigating evidence" admitted during guilt phase); *Curtis*, 44 M.J. at 119 ("Mitigating evidence may . . . be introduced at both the findings and the sentencing stages of a capital trial."); *Eaton v. Wilson*, No. 09-CV-261-J, 2014 U.S. Dist. LEXIS 163567, at \*398-\*99, 2014 WL 6622512, \*149-\*50 (D. Wyo. Nov. 20, 2014) (explaining that "if the jury knows nothing about the defendant other than the facts of the crime when it renders its verdict finding him guilty, the defense bears a very heavy burden to win them over to life in the second stage of trial"). Here, the military judge instructed the panel that it could "consider any matter in extenuation and mitigation, . . . whether it was presented before or after findings." Counsel therefore reasonably adopted a strategy of presenting mitigation evidence during the guilt phase.



conclude that trial defense counsel provided ineffective assistance of counsel.

To be clear, we fully recognize that some of the entries contained in the diary introduced by the defense were, indeed, damning. However, we are also mindful of the fact that when counsel made the decision to introduce the entire diary, the Government already had presented to the panel some of its most damaging portions. For example, the Government introduced the following two passages: “[A]s soon as I am in Iraq I am going to try to kill as many [fellow soldiers] as possible”; and “I may have to make a choice very soon about who to kill. . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies.” These portions, along with others introduced to the panel upon admission of the entire diary, underscored Appellant’s premeditation. However, it is important to note that at the time of the diary’s admission, the members had already found premeditation during the merits phase, and the existence or degree of premeditation was not at issue during sentencing. Therefore, the record indicates not only that trial defense counsel reasonably concluded that additional passages in the diary would not inflict any more damage on the defense than those already selected by the Government, but that they also reasonably concluded that the diary in its entirety would paint a persuasive portrait of a mentally ill man who could not control his thought processes or his actions in the period leading up to the Camp Pennsylvania attack.<sup>14</sup> Therefore, we con-

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<sup>14</sup> For instance, in the diary entries from the two months before Appellant’s attack, Appellant wrote (1) “I am in no condition to take care of a family and when I leave the Army, I may be homeless. I pace, daydream, and talk to myself everyday. And I am alone with very little chance of finding a mate.”; and (2) “I

clude that trial defense counsel were well aware of the inflammatory nature of portions of the diary, yet made a strategic decision to submit the diary in its entirety. In doing so, we note that generally speaking, we “will not second-guess the strategic or tactical decisions made at trial by defense counsel.” *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (quoting *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001)). Indeed, we decline to do so here.

Appellant further claims that even if it was a reasonable strategic decision to admit the diary as a whole, witness testimony was needed to place the diary entries into proper perspective. The record shows, however, that counsel did contextualize the diary through Dr. Woods’s testimony, as well as through the FBI analysis of the diary and Ms. Grey’s analysis of the diary, which were submitted to the panel members as evidence. Also, counsels’ sentencing argument emphasized that the diary provided an important glimpse into Appellant’s mental state and that it showed the facts and effects of Appellant’s difficult upbringing. Moreover, with the diary’s admission, counsel was able to argue at sentencing that despite the conflict between the mental health experts as to a specific diagnosis, the diary showed that Appellant suffered from a profound mental illness when he committed the offenses, which warranted a sentence of life imprisonment rather than the death pen-

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am a loser. That is just the truth. Everything I have tried to work for I don’t have. A wife, good job, Self-respect.” Throughout the thirteen years that Appellant kept the diary, his entries reflected his struggles as demonstrated by his thoughts about suicide, his low self-esteem, his problems staying awake, his isolation or loneliness, his problems having relationships with women, his sexual frustrations, his problematic relationships with his parents, and his problems maintaining employment.

alty. Given these circumstances, we conclude that counsels' performance was not deficient.

c. Mitigation Primarily Through Documents

Appellant claims that trial defense counsel were ineffective because they presented Appellant's mitigation case primarily through documents instead of through live testimony by family and friends. However, we disagree with Appellant's initial premise that the mitigation case consisted only of thirty-eight minutes of testimony and a "document dump." The record shows that trial defense counsel actually began developing the mitigation case during the merits phase of the trial. They did so through the testimony of the expert witnesses, members of Appellant's unit, and Appellant's college roommate. This evidence covered Appellant's troubled upbringing, his strange behavior, his tendency to spend time alone, his poor skills as an NCO, his symptoms of mental illness, and his mental illness diagnoses. Once the merits phase ended, counsel did not ignore this evidence but instead built upon it during the presentencing phase and relied upon it during the sentencing arguments. Therefore, we conclude that trial defense counsel presented a more substantial and thoughtful mitigation case at trial than Appellant now claims on appeal.

We also disagree with Appellant's criticism of trial defense counsels' decision to present mitigation evidence primarily through documents rather than through live testimony. In examining this issue, we view it as an essential fact that trial defense counsels' presentation was greatly affected by Appellant's alleged stabbing of an MP just days before the court-martial began. In light of this incident, trial defense counsel made a strategic decision to be very cautious about taking any steps that could be used by the Government to introduce evidence of this uncharged

misconduct in the course of the trial. Trial defense counsel were successful in this effort, and we deem their approach to be a reasonable and appropriate one. *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) 10.11.G, *reprinted in* 31 Hofstra L. Rev. 913, 1056-57 (2003) (noting that “[i]n determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution’s presentation of otherwise inadmissible aggravating evidence”). Any one of the witnesses who might have been called to testify by the defense could have unintentionally opened the door to evidence about the MP stabbing by, for example, testifying about their belief that Appellant’s actions at Camp Pennsylvania were out of character. Therefore, trial defense counsel reasonably concluded that they should limit the number of defense witnesses both because they posed a danger to Appellant’s case and because, if they did testify, their testimony would be so circumscribed that whatever value they otherwise would have had for the defense would be substantially diminished. *See Cone*, 535 U.S. at 700-01 (finding state court’s application of *Strickland* was not unreasonable with respect to failing to call other witnesses where “counsel feared that the prosecution might elicit information about [the defendant’s] criminal history”); *Burger*, 483 U.S. at 792 (concluding decision not to present character witnesses not unreasonable where prior convictions might have been introduced on cross); *Tinsley v. Million*, 399 F.3d 796, 809-10 (6th Cir. 2005) (noting no testimony may be better than some testimony “given the risk that every positive argument by a defendant potentially opens the door to a more-harmful response”).

We also conclude that trial defense counsel did not merely “dump” a bunch of documents on the panel. Counsel reviewed and selected relevant documents for the members to consider, which were presented to each member in a binder. Among the documents submitted to the members were those that provided important context for, and useful summaries of, Appellant’s diary.

The military judge implicitly instructed the members that they were required to review the documents in the binders. For instance, the military judge instructed the members prior to disseminating the binders as follows:

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

A couple cautionary instructions however. You are only to read the exhibits. Please do not conduct any independent research based on anything you may read. Also, please, do not discuss the exhibit with anyone, to include friends and family members, or yourselves. You can only discuss the exhibits with each other once you begin your formal deliberations, which probably won’t happen until Thursday. Also do not copy the exhibits or let anyone else read them. And please bring them back with you when you re-

turn to court tomorrow morning . . . .

This instruction informed the members of their duty to review the exhibits in two ways. First, the military judge told the members, “rather than *require* you to read [the evidence] *in open court*, which is what would normally happen,” they were being permitted to “read it at home or work.” (Emphasis added.) Second, the military judge told the members they were “only to read the exhibits” instead of discussing them or performing research. (Emphasis added.) These facets of the instruction had the effect of notifying the members that they had to review Appellant’s documentary evidence.

The military judge reiterated the members’ duty to review the defense exhibits when he allowed the members to take the binders home for a second day, stating: “[Y]ou should be able to take them with you for the rest of the day *if you need more time to review the documents.*” (Emphasis added.) By informing the members that they had more time to review the documents, the military judge again signaled to the members that they were expected to review all the evidence.<sup>15</sup> The record does not reveal that the

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<sup>15</sup> Besides these specific instructions, the military judge’s general sentencing instructions apprised the members of their duty to consider all evidence in the case, including that submitted in the binders. For instance, the military judge instructed the members that their deliberations on the aggravating factors “should properly include a full and free discussion on *all of the evidence that has been presented.*” (Emphasis added.) The military judge also instructed the members that they could consider “any matter in extenuation and mitigation, whether pre-offense or post-offense; whether it was presented before or after findings; and whether it was presented by the prosecution or the defense.” These general sentencing instructions informed the members that their sentencing deliberations were to be based on all the evidence, which included the defense sentencing exhibits

members disobeyed the military judge's instructions, so we presume that the members followed them. See *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012). We therefore conclude that the members were aware of their duty to review, and did in fact review, the evidence submitted to them in the binders.

Counsels' sentencing argument then explained the purpose of the diary by asserting that it provided a "unique" look into Appellant's troubled mind. This is hardly a case in which counsel obtained records and "then dump[ed] the whole file in front of the jury without organizing the files, reading them, eliminating irrelevant files or explaining to the jury how or why they are relevant." *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008). Accordingly, we do not see a sufficient basis to conclude that trial defense counsels' method of introducing the documents was deficient.

Appellant insists that the live testimony of family members and friends, not submission of documents, was needed to present all the available mitigation evidence to counter the Government's aggravation evidence. He further argues that trial defense counsels' failure to present this evidence constituted an incomplete and incompetent defense.

To be sure, "evidence about [an accused's] background and character is relevant because of the belief, long held by this society, that [those accused]

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the military judge permitted the members to take home. Finally, the military judge instructed the members of the importance of considering the evidence submitted in the binders when he listed the possible mitigating factors in the case, some of which explicitly referenced the evidence submitted in the binders, including Appellant's diary, Ms. Grey's interviews of individuals, the diary analyses by Ms. Grey and the FBI, and the social service records.

who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than [those] who have no such excuse.” *Loving*, 68 M.J. at 15 (quoting *Boyde v. California*, 494 U.S. 370, 382 (1990)). Here, however, trial defense counsel did not ignore Appellant’s social history. They introduced evidence about Appellant’s abusive stepfather through the testimony of Drs. Tuton and Woods. Further, through testimony, a declaration from Appellant’s brother, and the mitigation specialist’s interview notes, they introduced evidence about Appellant growing up in impoverished circumstances and living and going to school in dangerous neighborhoods. And through Appellant’s diary, trial defense counsel also introduced evidence of Appellant’s adverse upbringing. Finally, the exhibits submitted by trial defense counsel at sentencing contained information that humanized Appellant such as the diary entries that detailed assistance to his family and listed his goals of assisting his family and his community, the interview summaries of Appellant’s teachers that described his work ethic and politeness, the statement from Appellant’s brother that recounted Appellant’s financial support, and the interview summary from Appellant’s childhood imam that described Appellant’s lack of aggression. Therefore, there is an insufficient basis to conclude that trial defense counsel needed additional live testimony in order to present key points of their mitigation case.

The record also reveals that counsel did not act unreasonably in choosing not to present live testimony from Appellant’s father, brother, sisters, cousins, high school friend, and former landlady. A trial defense counsel’s decision on whether to call a witness is a tactical decision. *See United States v. Anderson*,



55 M.J. 198, 202 (C.A.A.F. 2001); Fluellen, 40 M.J. at 98 (noting part of the tactical decision in the case was deciding what witnesses not to call). In this case, trial defense counsel made an informed tactical decision, after a reasonable investigation, when selecting trial witnesses. *See Wiggins*, 539 U.S. at 533-34. Therefore, for this reason and for the additional reasons cited below, we conclude that Appellant has not provided us with a sufficient basis to question trial defense counsels' tactical decisions regarding these witnesses.

First, trial defense counsel had interactions with Appellant's father prior to trial and obtained additional information about his background through the mitigation expert's report. They therefore assessed his likely manner of presentation as a witness, and learned of his significant criminal background, history of drug use, and impaired cognitive abilities. *See Pinholster*, 131 S. Ct. at 1407 (noting that in applying strong presumption of competence, court is required to affirmatively entertain range of possible reasons for counsel's performance). Upon doing so, counsel explicitly informed the military judge that they had made an informed, conscious, and strategic decision not to have Appellant's father testify during sentencing. *See Lord v. Wood*, 184 F.3d 1083, 1095 n.8 (9th Cir. 1999). We see no basis to question this decision.

Appellant claims that his father would have served as a valuable witness to document "the prejudices the Nation of Islam instilled in" Appellant. Indeed, trial defense counsel could have employed this strategy of eliciting testimony on this point. However, they chose a different strategy, one that described Appellant as not being "hate-filled" but "a person with mental illness, who is very sensitive to anything said to him." In fact, trial defense counsels' affidavit ex-

plains that they wanted to downplay Appellant's link to the Nation of Islam because it would "likely . . . carry strong negative connotations with the panel members," which ultimately would harm Appellant's defense. Additionally, counsel chose not to portray Appellant as a hate-filled person since childhood because this approach would have conflicted with their strategy of portraying Appellant's actions on March 22, 2003, as aberrational and not premeditated, and because it would have undermined their position that Appellant had rehabilitative potential. We therefore do not find a basis to question counsels' tactical decision not to call Appellant's father to testify.

Second, we conclude that counsel was not deficient in presenting the declaration of Appellant's brother at trial rather than having the brother testify. Although the brother now claims that he was willing and able to testify at Appellant's trial, the brother's April 26, 2005, trial declaration stated that he could not leave his wife's side due to the birth of a child. Additionally, we conclude there is no additional information in the brother's post-trial one-page declaration that reasonably could be considered powerful mitigation evidence. We do not consider counsels' failure to call Appellant's brother as a witness to be deficient performance under these circumstances.

Third, the record reflects that trial defense counsel had the mitigation specialists' interview summaries for Appellant's sisters, his cousins, a high school friend, and his former landlady. With this information, trial defense counsel made an informed decision not to call these witnesses, and we do not find a sufficient basis to second-guess that decision. *Cf. Lema v. United States*, 987 F.2d 48, 54 (1st Cir. 1993) (noting that "decision whether to call a particular witness is almost always strategic, requiring a bal-

ancing of the benefits and risks of the anticipated testimony”).

We finally conclude that even if trial defense counsels’ mitigation presentation was deficient, Appellant has not established prejudice. This inquiry asks “whether if the members had been able to place the additional evidence ‘on the mitigating side of the scale, there is a reasonable probability that at least one [member] would have struck a different balance.’” *Loving*, 68 M.J. at 7 (quoting *Wiggins*, 539 U.S. at 537). The new mitigating evidence “must differ in a substantial way -- in strength and subject matter -- from the evidence actually presented at sentencing.” *Id.* at 16 (quoting *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005)). Appellant has not met this standard.

The additional post-trial evidence in this case can generally be placed into one of seven categories: Appellant’s parents’ backgrounds, the history of family mental illness, Appellant’s challenging upbringing and his positive qualities as a child, the influence on Appellant of the Nation of Islam, Appellant’s high school experience, Appellant’s attempt to repay a debt, and the impact of Appellant’s execution on his family. Many of these areas were presented at trial, including information about Appellant’s upbringing and positive qualities, his high school experience, and the existence of mental health issues in the family. While some of the post-trial information may be viewed as elaborating on these points, there is not a sufficient basis to conclude that this information was different in quality or substance from what the members actually considered. Therefore, we consider it to be “largely cumulative.” *See Loving*, 68 M.J. at 16.

We recognize that the material submitted by Appellant post-trial includes information in four areas that

were not addressed at the court-martial. However, we conclude that Appellant was not prejudiced by counsels' failure to present this evidence. First, trial defense counsel concluded that the role of the Nation of Islam in Appellant's life represented a "double-edged sword" in that any mitigation effect of this information may have been outweighed by the extent to which it alienated the panel and undermined trial defense counsels' theory that Appellant's attack was due to mental illness and was not the product of hatred and premeditation. *Cf. Wiggins*, 539 U.S. at 535 (noting that limited investigation justified where defendant's history was "double-edged"). Second, Appellant's attempt to repay his landlady long after she expected him to, although a positive story, certainly is not "sufficiently compelling" to establish prejudice given Appellant's crimes and their impact on the victims. *See Loving*, 68 M.J. at 17. Third, although the post-trial evidence demonstrates that Appellant's parents' had challenging upbringings, Appellant does not explain why this information would prove compelling to the panel members as they decided the appropriate sentence to impose on Appellant.

Finally, we recognize the potential mitigating value of Appellant's family members expressing opinions about the impact Appellant's death sentence would have on his family. We do not seek to minimize the importance of such testimony in capital cases. However, in the instant case, there is an insufficient basis to conclude that the panel's knowledge of this information would have changed the result of the proceeding given the aggravating circumstances. Moreover, trial defense counsel had to weigh whether such testimony would have alienated the panel members in light of the fact that Appellant's murderous actions had so tragically and irrevocably affected the families

of the victims of Appellant's attack. Accordingly, we conclude that Appellant has not met his burden of establishing that he was prejudiced by counsels' submission of documents instead of live witness testimony.

#### 4. Cumulative Error

We next consider whether trial defense counsels' conduct, examined in its totality, constituted ineffective assistance of counsel even if individual oversights or missteps did not independently rise to that level. *Loving*, 41 M.J. at 252; *see also United States v. Dado*, 759 F.3d 550, 563 (6th Cir. 2014). As shown above, for the vast majority of Appellant's individual ineffective assistance of counsel claims, there is an insufficient basis to conclude that trial defense counsel acted unreasonably. These claims do not provide a basis for establishing ineffective assistance of counsel based on cumulative error. *See United States v. Hall*, 455 F.3d 508, 520 (5th Cir. 2006) (stating that "ineffective assistance of counsel cannot be created from the accumulation of acceptable decisions and actions"); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004); *Hough v. Anderson*, 272 F.3d 878, 907 n.14 (7th Cir. 2001). In those few instances where we assumed otherwise, we found no prejudice. Even considering these instances of assumed deficient performance in the aggregate, we conclude that they do not establish prejudice at the findings phase or penalty phase of the trial. Therefore, we conclude that Appellant has not provided us with a sufficient basis to apply the cumulative error doctrine to the circumstances of his case, and we decline to find ineffective assistance of counsel on the basis of this doctrine. *See Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009) (noting that even if some aspect of counsel's performance was deficient, prejudice must be

limited to constitutionally defective aspects of representation).

### B. DuBay Hearing

Appellant asserts that, at a minimum, we should order a post-trial fact-finding hearing in this case under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967). Our decision in *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997) sets forth the proper standard to determine whether a *DuBay* hearing is necessary to resolve ineffective assistance of counsel claims. We have considered the five *Ginn* factors<sup>16</sup> and conclude that the issues in this case can be resolved on the record before us and without a *DuBay* hearing.

### C. Victim-Impact Presentation

Appellant challenges two aspects of the Government's victim-impact presentation. First, he contends that presentencing testimony from Government witnesses violated the Eighth Amendment. Second, he challenges the propriety of trial counsels' sentencing argument. In making these claims, Appellant correctly concedes that his trial defense counsel did not raise objections to the witness testimony or to the trial counsels' argument during the court-martial. Therefore, we note that he has "forfeit[ed] appellate review of [these issues] absent plain error." *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011); see also *United States v. Frey*, 73 M.J. 245, 247 n.1 (C.A.A.F. 2014) (sentencing argument); *United*

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<sup>16</sup> These factors are whether: (1) the facts alleged would result in relief; (2) the alleged facts are conclusory or speculative; (3) the parties agree on the facts; (4) the record "compellingly demonstrate[s] the improbability of" the allegations; and (5) Appellant adequately explains why an allegation contradicts a matter within the guilty plea record. *Ginn*, 47 M.J. at 248.

*States v. Holt*, 33 M.J. 400, 408-09 (C.M.A. 1991) (victim-impact testimony). To prevail under the plain error standard, Appellant has the burden of “establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights.” *United States v. Knapp*, 73 M.J. 33, 36, *reconsideration denied*, 73 M.J. 237 (C.A.A.F. 2014).

We conclude that Appellant fails to meet the first prong of the plain error standard. Victim impact testimony is admissible in capital cases to inform the panel about “the specific harm caused by the [accused].” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *United States v. Wilson*, 35 M.J. 473, 476 n.6 (C.M.A. 1992). Trial counsel may elicit evidence about (1) the victim’s personal characteristics or (2) the emotional impact of the murder on the victim’s family. *See Payne*, 501 U.S. at 827. What is not permitted is evidence or argument about the family members’ “opinions and characterizations of the crimes,” the defendant, or the appropriate sentence. *See Booth v. Maryland*, 482 U.S. 496, 508-09 (1987), *overruled on other grounds by Payne*, 501 U.S. at 830 n.2. Examples of this type of impermissible victim-impact evidence include: an opinion from the victim’s family members that the victims were “butchered like animals”; a statement that the witness “doesn’t think anyone should be able to do something like that and get away with it”; and descriptions of the defendant as “vicious,” worse than an animal, and unlikely to be rehabilitated. *Booth*, 482 U.S. at 508.

We conclude that the Government did not violate these proscriptions in the course of eliciting witness testimony in the instant case. Initially, we note that Appellant mischaracterizes the victim testimony as equating Appellant to a terrorist or traitor, or de-

scribing Appellant's conduct as treasonous, mutinous, or assisting the enemy.

During the Government's sentencing case, trial counsel posed questions concerning witnesses' reaction upon learning that a fellow servicemember was the alleged perpetrator of the Camp Pennsylvania attack. Such questions were appropriate because they were designed to elicit testimony about the effect this unique bit of information had on the victims. Moreover, it was not improper for the Government witnesses, many of whom were also victims of the attack, to express human responses, including feeling "betrayed," "disbelief," "livid," "angry," "shocked," and "pissed."<sup>17</sup> This testimony placed Appellant's crime in context by describing how his actions affected the victims of the attacks.

Also, COL Hodges's testimony about "fraggings" during the Vietnam War was made in the context of describing why he, as commander of the battalion, was particularly psychologically shaken by Appellant's particular attack, and we do not deem such testimony to be improper. Similarly, we conclude that

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<sup>17</sup> Appellant supports his challenge to sentencing testimony by citing the testimony of the victims' family members in *United States v. Mitchell*, 502 F.3d 931, 990 (9th Cir. 2007), and *DeRosa v. Workman*, 679 F.3d 1196, 1240 (10th Cir. 2012). We observe that much of the contested testimony in this case was made by the victims who were reporting their own reactions to the crime, so they did not constitute family member testimony about the crime or Appellant. We recognize that trial counsel elicited testimony by civilians about their reactions upon learning that a servicemember was responsible for the attacks. To the extent that this testimony by the civilians was improper, we find no prejudice because it was brief and unlikely had any impact on the panel where the victims properly testified about their reactions upon learning that the perpetrator was a servicemember. See *United States v. Davis*, 609 F.3d 663, 685 (5th Cir. 2010).



COL Hodges's observations about the "very worst days for the United States Army" were not inflammatory in intent or effect. Instead, they reflected COL Hodges's embarrassment and dismay that Appellant's attack occurred in the battalion he was commanding, and COL Hodges's comments were directly responsive to trial counsels' question about how Appellant's attack had affected him.

We also do not consider improper trial counsel's sentencing argument in which he characterized Appellant as "the enemy within the wire" and asked for the imposition of the death penalty in order to send a message about the value of innocent life and the value of loyalty. Trial counsel "may strike hard blows," but "he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). He "may 'argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence.'" *Halpin*, 71 M.J. at 479 (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). This includes arguments in capital cases concerning "the human cost" of an accused's capital crime. *Payne*, 501 U.S. at 827. Under the circumstances of this case, it was not a foul blow to characterize Appellant as the enemy within the wire given his act of tossing grenades and shooting officers within the confines of Camp Pennsylvania at the start of Operation Iraqi Freedom.

Trial counsels' request to send a message about the value of life, loyalty, and the bond among the band of brothers was essentially a general deterrence argument. Trial counsel may make such general deterrence arguments when they are not the Government's only argument and when the military judge properly instructs the members about conducting an individu-

alized consideration of the sentence. See *United States v. Lania*, 9 M.J. 100, 104 (C.M.A. 1980) (stating that “general deterrence is suitable for consideration in sentencing and for instructions”). Trial counsel’s argument was more than one of general deterrence because it focused on Appellant’s motivation, his acts, and their aftermath. Also, the military judge properly instructed the panel as to general deterrence. Therefore, there was nothing improper in asking the members to send a general deterrence message.

Finally, Appellant challenges trial counsel’s two references to “weighing life”:

- “What you must decide is what a life is worth; what two lives are worth; what a military career is worth; what the use of your legs are worth; what a little boy’s life without his father is worth.”
- “Weigh his life -- that is what you’re doing. You’re weighing his life against what he did, what he caused, and what he set in motion forever.”

These comments were made in the specific context of trial counsel’s argument that the aggravating circumstances outweighed the mitigating circumstances. This is “entirely consistent with Payne’s recognition that victim-impact evidence is properly considered to ‘counteract’ the mitigating evidence in helping the [fact-finder] evaluate moral culpability.” *United States v. Lawrence*, 735 F.3d 385, 435 (6th Cir. 2013). Also, we note that other federal courts have held that “to the extent that [Payne] expressed disapproval of comparative worth arguments, it did so only with regard to victim-to-victim comparisons, not victim-to-defendant comparisons.” *United States v. Fields*, 483

F.3d 313, 340–41 (5th Cir. 2007) (citing *Humphries v. Ozmint*, 397 F.3d 206, 224 n.8 (4th Cir. 2005)). Trial counsel in the instant case did not make victim-to-victim characterizations. We therefore find no error in his argument.<sup>18</sup>

Even if we were to assume that trial counsels’ arguments were improper, we conclude that Appellant has demonstrated no prejudice. In the plain error context, we determine whether the cumulative effect of an improper sentencing argument impacted “the accused’s substantial rights and the fairness and integrity of his trial.” *Halpin*, 71 M.J. at 480 (quoting *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007)). This inquiry examines “whether trial counsel’s comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone.” *Id.* (quoting *Erickson*, 65 M.J. at 224) (original alterations and internal punctuation omitted). This case involved many aggravating circumstances, including Appellant’s murder of two military officers, his use of grenades, the extensive injuries to some officers, and the impact of the attack on the unit as it prepared for battle. Also, the fact that trial defense counsel did not see fit to object to the argument is “some measure” that the argument had “minimal impact.” *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)). Accordingly, we do not conclude that trial counsel’s argument warrants reversal.

#### D. Sua Sponte Disqualification of Members

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<sup>18</sup> Since neither the victim testimony nor trial counsels’ sentencing argument was improper, we reject Appellant’s related ineffective assistance of counsel claims.

Appellant challenges the military judge's failure to sua sponte dismiss fourteen of the fifteen panel members on implied and/or actual bias grounds. We note that "[i]t is clear that a military judge may excuse a member sua sponte" under R.C.M. 912(f)(4). *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). That rule permits a military judge to, "in the interest of justice, excuse a member against whom a challenge for cause would lie" even if neither party has raised such a challenge. See R.C.M. 912(f)(4) (2005 ed.). However, in *United States v. McFadden* the majority held that although "[a] military judge has the discretionary authority to sua sponte excuse [a] member, [he] has no duty to do so." 74 M.J. 87, 90 (C.A.A.F. 2015). Moreover, even if the military judge had such a duty, he did not abuse his discretion in failing to sua sponte remove any of the members for the reasons that follow.

First, we are mindful of the essential fact that, as noted above, trial defense counsel were using the ace of hearts strategy during this voir dire process, and we note that the military judge had been placed on notice that Appellant was "seeking to maximize the panel size." Second, the military judge had afforded trial defense counsel great leeway in determining how they would conduct voir dire, thereby obviating the need for the military judge to take a more active role in the process. Third, the military judge could observe that trial defense counsel were not impassive in the voir dire process, as evidenced not only by their questioning of potential panel members but also by the fact that they sought and obtained the removal of a member on implied bias grounds, did not object to the Government's challenge to three other members, and explained their opposition to the Government's challenges to three additional panel members.

In regard to Appellant's challenges to the service on the panel of specific members, we make the following observations. Appellant first states that the military judge should have sua sponte disqualified COL GQ and COL PM because of their friendly relationship with COL Hodges, a victim and witness in Appellant's case. However, it is not an infrequent occurrence in the military for a panel member to know a witness in a court-martial, and without more, we have not found implied bias in such circumstances. *Cf. United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998) (rejecting member challenge on implied bias grounds where member held professional relationship with witness, candidly disclosed the relationship, and unequivocally denied influence).<sup>19</sup> We similarly decline to do so here.

Second, Appellant states that the military judge should have sua sponte dismissed LTC CF and LTC DL because another panel member, COL PM, had a supervisory relationship over them. Once again, it is not an infrequent occurrence in the military to have panel members who have a supervisory relationship with another panel member. And where, as here, all of the panel members state openly that they will not feel constrained in performing their court-martial du-

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<sup>19</sup> Appellant cites *United States v. Harris*, but the member in that case not only knew two victims but also rated the victims, was aware of the crimes, and chaired a committee to reduce the crime in question on base. 13 M.J. 288, 289 (C.M.A. 1982). Neither COL GQ's nor COL PM's relationship with COL Hodges is nearly as close as the member's relationship with the victims in *Harris*. In *United States v. Leonard*, 63 M.J. 398, 403 (C.A.A.F. 2006), we found implied bias where a member had a relationship "of trust" with a victim in a case in which the victim's credibility was an issue. The record does not reflect a similar relationship of trust in this case or that COL Hodges's credibility was at issue.

ties, there is an insufficient basis for the military judge to sua sponte remove them from the panel. *United States v. Castillo*, 74 M.J. 39, 43 (C.A.A.F. 2015) (“[A] senior-subordinate/rating relationship does not *per se* require disqualification of a panel member.”) (quoting *United States v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)).

Third, Appellant argues that the military judge should have sua sponte dismissed LTC WT from the panel because of his relationships with his two older brothers. One brother was the commanding general of the 101st Airborne Division, the unit to which Appellant and some of the victims were assigned. The other brother worked with a victim in this case and served as the executive officer for the senior commanding general of the convening authority in this case. However, LTC WT stated he did not discuss the case with his brothers or feel any pressure to vote in any particular manner in this case. We therefore conclude that LTC WT’s fraternal relationships did not provide a basis for the military judge to sua sponte dismiss LTC WT. *See Strand*, 59 M.J. at 459 (finding military judge did not have a sua sponte duty to dismiss for implied bias a member who was the son of the commander). This is particularly true here because both Appellant and his trial defense counsel specifically stated that they did not want to excuse LTC WT for cause.

Fourth, Appellant generally challenges a number of members -- SFC KD, MAJ DS, LTC TG, SFC JC, CSM MH, CSM RC, and MSG PC -- on the basis that they had an inelastic predisposition to adjudge a particular sentence. We note, of course, that Appellant is “entitled to have his case heard by members who are not predisposed or committed to a particular punishment, or who do not possess an inelastic attitude

toward the punitive outcome.” *United States v. Martinez*, 67 M.J. 59, 61 (C.A.A.F. 2008) (citing *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2004)); see also R.C.M. 912(f)(1)(N) Discussion. However, the record reveals that each of these panel members agreed to follow the military judge’s instructions and to appropriately consider a full range of punishments in this case. Therefore, the voir dire of these individual members disclosed no basis for the military judge to sua sponte disqualify them.

Fifth, we have reviewed LTC TG’s views on Islam<sup>20</sup> and share some of Appellant’s concerns about his comments during voir dire. However, we ultimately conclude that the military judge should not have invoked his authority under R.C.M. 912(f) to dismiss LTC TG sua sponte because LTC TG also expressed positive views of Muslims, describing them as “very nice” and “very friendly people,” and more importantly, because LTC TG stated openly that he would not be influenced in the course of the trial by any of his preconceptions about Muslims generally. See *Elfayoumi*, 66 M.J. at 357 (noting that question of bias is not whether a member has particular views but whether they can put these views aside to evaluate the case on its merits).

Sixth, Appellant avers that the military judge should have sua sponte dismissed SFC JC from the panel because he stated that Appellant sounded guilty. We note that a member “must be excused when he or she [h]as [f]ormed or expressed a definite

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<sup>20</sup> When specifically asked by trial defense counsel about his views on Islam, LTC TG stated that Islam was a “male oriented religion” and a “passionate religion,” by which he meant that “sometimes you can’t think clearly and you take certain views that are selfish -- for your own selfish pleasures, self-desire instead of the good of the man.”

opinion as to the guilt or innocence of the accused as to any offense charged.” *Nash*, 71 M.J. at 88 (quoting R.C.M. 912(f)(1)(M)). However, in the instant case SFC JC’s voir dire responses “dispel[led] the possibility” of bias because he stated that his initial opinion was not definite and that he understood Appellant was presumed innocent. *See id.* at 89; *see also Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Therefore, we conclude that the military judge did not abuse his discretion in failing to sua sponte dismiss SFC JC.

Seventh, Appellant contends that the military judge should have sua sponte excused CSM MH for ignoring the military judge’s order to avoid exposure to any pretrial publicity about Appellant’s case. We find this challenge meritless because trial defense counsel specifically opposed MH’s removal. We also find that although CSM MH admitted to reading about the MP stabbing incident in the newspaper, he stated he could put the event out of his mind. Therefore, the military judge did not err in failing to sua sponte disqualify MH.

Eighth, Appellant challenges ten other panel members because of their knowledge of the March 30 stabbing incident. We note, however, that panel members are not automatically disqualified simply because they have learned facts about an accused from outside sources. *Cf. Murphy v. Florida*, 421 U.S. 794, 799 (1975) (noting that defendant is not presumptively deprived of his due process rights if juror is exposed “to information about a state defendant’s prior convictions or to news accounts of the crime with which he is charged”). These ten challenged panel members, along with SGM MH, generally reported learning something along the lines of Appellant overpowering an MP, scuffling with an MP, or stabbing an MP. However, to the extent that the



members were asked, they uniformly expressed their ability to lay aside their knowledge of these events in rendering a verdict in this case, which vitiates Appellant's claim of actual bias. *Cf. Murphy*, 421 U.S. at 800-01 (noting in finding no due process violation that no jurors "betrayed any belief in the relevance of [the defendant's] past to the present case"); *United States v. McVeigh*, 153 F.3d 1166, 1184 (10th Cir. 1998) (finding no actual bias despite some members learning of appellant's confession from news reports where jurors indicated they could keep an open mind).

In terms of implied bias, we find none in this instance because trial defense counsel made no attempt to have the members excused based on their knowledge of the stabbing incident, trial defense counsel adequately explored their concerns during the voir dire process, and the members stated that they would judge the case on the merits rather than decide the case based on this incident. Therefore, the military judge did not abuse his discretion by declining to sua sponte dismiss these panel members.

Ninth, and finally, Appellant challenges seven members because of their initial negative reactions to Appellant's attack. Specifically, these members expressed "shock" (or a similar emotion) upon first learning about the events at Camp Pennsylvania. However, we note the long-standing principle that a member "is not disqualified just because he has been exposed to pretrial publicity or even has formulated an opinion as to the guilt or innocence of an accused on the basis of his exposure." *United States v. Calley*, 22 C.M.A. 534, 537, 48 C.M.R. 19, 22 (1973); *see also United States v. Barraza*, 576 F.3d 798, 803 (8th Cir. 2009) ("An initial impression about a case does not disqualify a [member] if the [judge] accepts the

[member's] assurances that he or she will set aside any preconceived beliefs and follow the court's instructions."); *United States v. Iribe-Perez*, 129 F.3d 1167, 1171 n.4 (10th Cir. 1997) (noting that although "noteworthy trials" will "pique the interest of the public" and will lead "many potential jurors [to] have formed initial impressions about the case," a juror will not be disqualified unless he cannot set aside the initial impressions).

We find the members' initial reactions to Appellant's crimes to be neither unreasonable nor unexpected. Cf. *Irvin*, 366 U.S. at 722 (noting that an "important case can be expected to arouse the interest of the public" so most jurors will have "formed some impression or opinion as to the merits of the case"). And importantly, the members' voir dire responses indicated that their initial reactions would not impact their view of the case or affect their decisions in the course of the court-martial. Therefore, the members' initial reactions did not provide the military judge with a sua sponte basis to dismiss the challenged members. See *Calley*, 22 C.M.A. at 538, 48 C.M.R. at 23 (holding after careful consideration of voir dire that "none . . . had formed unalterable opinions about [appellant's] guilt from the publicity").

#### E. Venue

Appellant asserts that his trial venue should have been moved because of pervasive pretrial publicity at Fort Bragg. We review this challenge for an abuse of discretion. *Loving*, 41 M.J. at 282. Servicemembers are entitled to have their cases "adjudged by fair and impartial court-martial panels whose evaluation is based solely upon the evidence," not pretrial publicity. *United States v. Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2003). Pretrial publicity by itself is not enough, however, for a change of venue. *Curtis*, 44

M.J. at 124. Instead, an accused is entitled to a change of venue if the “pretrial publicity creates ‘so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial.’” *Loving*, 41 M.J. at 254 (quoting R.C.M. 906(b)(11) Discussion).

Appellant’s change of venue argument is meritless. The convening authority had already moved Appellant’s case to Fort Bragg from Fort Campbell, the headquarters for Appellant’s unit. Further, the military judge determined that the pretrial publicity was not inflammatory and had not saturated the community. In addition, as the above panel bias discussion demonstrates, the voir dire process uncovered no fixed opinions of Appellant’s case that rose to the level of actual prejudice. *See Simpson*, 58 M.J. at 372 (defining actual prejudice). Finally, Appellant’s position that the military community’s knowledge of his notorious crimes, standing alone, served as a basis for a change of venue would, if adopted, essentially have precluded the military from conducting Appellant’s court-martial at any military installation. The military judge therefore did not abuse his discretion in denying Appellant’s request to change venue.

#### F. Conflict of Interest

Appellant raises a number of alleged conflicts of interest in this case, but we find only one merits discussion -- trial defense counsels’ working relationship with one of the victims, CPT Andras Marton, who served with the Army Judge Advocate General’s Corps. At an Article 39(a), UCMJ, hearing, MAJ Brookhart and CPT Coombs informed the military judge about their “strictly professional” relationship with CPT Marton. Counsel explained that they had tried cases against CPT Marton, but did not have further contact with him. Appellant acknowledged that

he was aware of the possible conflict and had the right to be represented by conflict-free counsel, but he expressly wanted MAJ Brookhart and CPT Coombs to continue representing him due to his familiarity with counsel and their familiarity with his case.

An accused has the right to conflict-free legal representation. *See United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008); *United States v. Murphy*, 50 M.J. 4, 10 (C.A.A.F. 1998). However, he may waive this right so long as it is knowing and voluntary. *United States v. Davis*, 3 M.J. 430, 433 n.16 (C.M.A. 1977).

Although trial defense counsels' relationship with a victim raises some obvious concerns, it does not establish reversible error because Appellant knowingly and voluntarily waived the issue. The military judge engaged in an open discussion with Appellant about the potential conflict. Following this discussion, Appellant informed the military judge that he wanted to waive any conflict or potential conflict. The post-trial affidavits alleging a conflict do not outweigh these considerations because the affidavits are conclusory in nature and are contradicted by trial defense counsel's own statements and by the record.

#### G. Trial Defense Counsel Assignments

Appellant complains about unlawful command influence and prosecutorial misconduct stemming from the Government's control of trial defense counsels' assignments. Indeed, the record shows that the lead Government trial counsel arranged for MAJ Brookhart and CPT Coombs to be placed in positions that would not conflict with their roles as Appellant's trial defense counsel. However, because Appellant never objected at trial to trial counsels' role in these assignments, we review the arguments for plain error. *See Halpin*, 71 M.J. at 479-80.

Appellant cites no case law, and we are aware of none, finding prosecutorial misconduct under similar facts. Although this point is not dispositive because this could be an issue of first impression, it does tend to show that trial counsels' input into the trial defense counsels' assignments does not plainly or obviously constitute prosecutorial misconduct. See *United States v. Tarleton*, 47 M.J. 170, 172 (C.A.A.F. 1997) (noting that "the absence of controlling precedent favorable to appellant demonstrates that the error, if any, was not plain error"). But importantly, in reaching our decision on Appellant's prosecutorial misconduct argument and also his unlawful command influence argument, we rely heavily on the fact that Appellant has not demonstrated any unfairness in the proceedings based on defense counsels' assignments. See *Simpson*, 58 M.J. at 373 (noting there is no unlawful command influence claim where there is no evidence of unfairness in the proceedings); *United States v. Meek*, 44 M.J. 1, 6 (C.A.A.F. 1996) (holding that prosecutorial misconduct claim reviewed for prejudice); see also *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (noting that "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial"). Indeed, the record of trial indicates that trial counsels' actions were intended to assist Appellant by ensuring that his counsel remained available to him. We therefore see no basis for concluding there was prosecutorial misconduct and/or unlawful command influence in this case.

#### H. Trial Defense Counsels' Qualifications

Appellant and amicus raise three distinct arguments about trial defense counsels' qualifications, but as demonstrated below, none of them provides a basis for relief. First, Appellant contends that trial defense counsel did not have the training or experience nec-

essary to effectively defend him in this case, and challenges the CCA's conclusions that counsel were "well-qualified." However, after reviewing trial defense counsels' extensive legal experience as summarized at the beginning of this opinion, we reject Appellant's argument outright and agree with the CCA's conclusion that counsel were "well-qualified."

Second, in its brief, amicus curiae advocates that we adopt and apply to the instant case the provisions of Guideline 5.1 of the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. This guideline seeks to establish minimum qualifications for counsel in capital cases. In addressing this issue, we take particular note of the Supreme Court's memorable observation in *Ring v. Arizona*: "[D]eath is different." 536 U.S. 584, 606 (2002). Congress has recognized as much in civilian federal cases by requiring the services of at least one counsel "learned in the law applicable to capital cases." 18 U.S.C. § 3005 (2012). Congress has even extended this requirement of "learned counsel" to alleged terrorists being prosecuted in military commissions. See 10 U.S.C. § 949a(b)(2)(C)(ii) (2012). We further note that even in the absence of congressional action, the judge advocates general could take unilateral steps to improve the process by which trial litigators are selected in capital cases, and to enhance their training and qualifications. Indeed, LTC Hansen, who we pointedly note was summarily dismissed by Appellant, serves as an example of someone who was particularly well qualified to litigate a capital case. However, as an Article I court, we also note that -- absent constitutional implications in a particular case or congressional authorization -- it is beyond our authority to impose the learned counsel qualification advocated by

amicus. Indeed, in the past we have similarly considered and rejected claims that learned counsel must participate in military capital cases. *See, e.g., Gray*, 51 M.J. at 54; *Curtis*, 44 M.J. at 127; *Loving*, 41 M.J. at 300. Nonetheless, “we remain vigilant as to the quality of representation provided servicemembers in capital cases in the military justice system.” *Gray*, 51 M.J. at 54.

Finally, Appellant and amicus argue that we should adopt the ABA Guidelines in analyzing capital defense counsels’ performance. However, we instead adhere to the Supreme Court’s guidance that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 688-89. We therefore do not adopt the ABA Guidelines as the ultimate standard for capital defense representation in the military. *See Pinholster*, 131 S. Ct. at 1407 (“It is ‘[r]are’ that constitutionally competent representation will require ‘any one technique or approach.’”) (quoting *Richter*, 562 U.S. at 89). Instead, we examine whether “counsel [made] objectively reasonable choices” based on all the circumstances of a case. *Van Hook*, 558 U.S. at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

### I. Mitigation Evidence

Appellant contends that the panel’s consideration of mitigation evidence was unconstitutionally limited by the prohibition against guilty pleas in capital cases, which is contained in Article 45(b), UCMJ. This challenge is meritless based on our prior case law. *Gray*, 51 M.J. at 49; *Loving*, 41 M.J. at 292; *United States v. Matthews*, 16 M.J. 354, 362-63 (C.M.A. 1983). It is also meritless under the facts of this case. Appellant

refused to allow his counsel to submit any offers to plead guilty, so this potential mitigation evidence would never have been available for him to present at trial.

#### J. Exclusion of Occupational Branches

Appellant is correct that the exclusion of nine occupational branches from court-martial service in this case pursuant to Army Regulation (AR) 27-10 would have conflicted with the statutorily defined criteria in Article 25, UCMJ, 10 U.S.C. § 825 (2012). *See United States v. Bartlett*, 66 M.J. 426, 429 (C.A.A.F. 2008). We conclude, however, that here there was no impermissible selection of panel members.

It is true that the *initial* convening authority was advised that he had to select the panel in accordance with AR 27-10. However, when the succeeding convening authority made his selections he was informed by the acting staff judge advocate: (1) “[Y]ou must detail those members who, in your opinion, are best qualified for the duty by virtue of their age, education, . . . and judicial temperament”; and (2) “You may . . . choose *anyone* in your general court-martial jurisdiction for service as a court member provided you believe they meet the Article 25 criteria listed above.” We recognize that the succeeding convening authority adopted his predecessor’s panel pool, but the succeeding convening authority did not act pursuant to the improper AR 27-10 instruction, but instead acted based on proper legal advisement in accordance with Article 25, UCMJ, criteria.

Also, even if the panel was impermissibly selected pursuant to AR 27-10, we conclude that the Government has met its burden of showing any error was harmless. As the Government demonstrates, the six circumstances which this Court identified and relied



upon in deciding *Bartlett*, 66 M.J. at 431, as showing harmless error are also present here: (1) there is no evidence that the Secretary of the Army acted with an improper motivation in promulgating AR 27-10; (2) the convening authority followed a facially valid regulation without an improper motive; (3) the convening authority had authority to convene a general-court martial; (4) Appellant was sentenced by members who were selected by the convening authority; (5) Appellant was sentenced by members who met the Article 25, UCMJ, criteria; and (6) the military judge noted that the panel had female and African American representation. We therefore find no reversible error in the convening authority's selection of the panel's venire.

#### K. CCA Ruling on Appellate Experts

Appellant claims that the CCA erred in denying his request for appellate assistance by mental health experts. The CCA concluded that Appellant had failed to sufficiently show that the expert assistance was necessary. We review this decision for an abuse of discretion. *Gray*, 51 M.J. at 20. An abuse of discretion arises if the CCA's factual findings are clearly erroneous or if its decision is based on a misapplication of the law. *See United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997). Neither factor applies in this instance, and we find no abuse of discretion in the CCA's denial of expert assistance.

#### L. Military Judge's Instructions

Appellant challenges two instructions by the military judge: (1) the sentencing instruction relating to weighing mitigating and aggravating factors; and (2) the instruction on reconsidering the sentence. Ordinarily, we review the adequacy of a military judge's instructions de novo. *United States v. MacDonald*, 73

M.J. 426, 434 (C.A.A.F. 2014). However, if an appellant fails to object to the instruction at trial, we review for plain error. *United States v. Thomas*, 46 M.J. 311, 314 (C.A.A.F. 1997); R.C.M. 1005(f).

### 1. Sentencing

The military judge instructed the panel that to impose a death sentence, it had to unanimously determine, in relevant part, (1) “beyond a reasonable doubt, that the aggravating factor existed,” and (2) that “the extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances.” Appellant now argues that the military judge should have instructed the members that they had to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Appellant bases this argument on his reading of the Supreme Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), which stand for the proposition that a jury must find beyond a reasonable doubt aggravating factors that are necessary to impose the death penalty. *See Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 490. However, contrary to Appellant’s assertion, these cases do not require any particular standard of proof with regard to weighing the aggravating and mitigating circumstances. *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (en banc) (joining six other federal circuits in concluding that decision weighing aggravating and mitigating did not have to be proven beyond a reasonable doubt); *Lockett v. Trammel*, 711 F.3d 1218, 1253 (10th Cir. 2013). Indeed, the Supreme Court itself has indicated that the beyond a reasonable doubt standard is unnecessary in weighing aggravating and mitigating factors. *See Kansas v. Marsh*, 548 U.S. 163, 173 (2006) (noting that state could place

burden on defendant to prove mitigating circumstances outweighed aggravating circumstances); *id.* at 174 (noting that states have “a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed”). We therefore find no error in the military judge’s sentencing instruction.

## 2. Reconsideration

After the members requested reconsideration of their sentence, the military judge, without objection and with Appellant’s consent, provided the members with the standard Benchbook reconsideration instruction 2-7-19. Dep’t of the Army, Pam. 27-9, Legal Service, Military Judges Benchbook ch. 2 § VII, para. 2-7-19 (2010). Appellant now claims the military judge should have instructed the members either (1) not to impose death if they had initially voted for life or, alternatively, (2) to follow the R.C.M. 1004 deliberative process during reconsideration.<sup>21</sup> The parties agree that Appellant forfeited this issue by failing to raise it at trial, so we review this claim for plain error. *See Thomas*, 46 M.J. at 314.

We find no plain or obvious error in the military judge’s reconsideration instruction. First, Appellant has cited no case law to support his position that “R.C.M. 1009 does not authorize a panel to reconsider

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<sup>21</sup> Panel members are required to make four unanimous findings before imposing the death penalty: (1) the accused was guilty of an offense that authorized the imposition of the death penalty, R.C.M. 1004(a)(1)-(2); (2) one aggravating factor existed beyond a reasonable doubt, R.C.M. 1004(b)(7); (3) “the extenuating or mitigating circumstances [were] substantially outweighed by any aggravating circumstances,” R.C.M. 1004(b)(4)(C); and (4) the accused should be sentenced to death, R.C.M. 1006(d)(4)(A). *See also United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998).

its sentencing determination with a view toward increasing a sentence to death.” There also is no factual support for Appellant’s position because the record does not indicate whether the panel requested reconsideration in order to increase Appellant’s sentence to death or to decrease his sentence. Second, we are not persuaded that a plain reading of the text of this rule mandates this conclusion. For instance, R.C.M. 1009(e)(3)(A), which identifies the number of votes needed to increase a sentence on reconsideration, does not provide an exception in death penalty cases. The reconsideration provision for decreasing a sentence, on the other hand, does contain a specific provision for death cases. *See* R.C.M. 1009(e)(3)(B)(i). Because R.C.M. 1009 does not explicitly prohibit the panel from reconsidering a sentence in a capital case with a view to increasing the sentence to death, we conclude that the military judge’s reconsideration instruction was not plainly erroneous. Without case law or the text of R.C.M. 1009 clearly supporting Appellant’s claim, we find no plain or obvious error. *See United States v. Nieto*, 66 M.J. 146, 150 (C.A.A.F. 2008) (finding no clear or obvious error where “at the time of trial, the case law from this Court did not preclude trial counsel’s questions, generally applicable federal criminal law did not provide guidance on point, and only a handful of state cases addressed this matter”).

Third, Appellant has not demonstrated that it was plain error for the military judge to authorize a re-vote without repeating the required instructions under R.C.M. 1004(b)(6). In regard to this argument, it is sufficient to note that the military judge read, with Appellant’s express agreement, Benchbook instruction 2-7-19, which specifically instructed the members to “adhere to all my original instructions for pro-

posing and determining an appropriate sentence.” We therefore find no reversible error stemming from the military judge’s reconsideration instruction.

#### M. Motion to Suppress

Appellant argues that the military judge’s decision to admit Appellant’s confession under the public safety exception was error because the confession was obtained in violation of his Article 31(b), UCMJ, 10 U.S.C. § 831(b) (2012), and *Miranda*<sup>22</sup> rights.<sup>23</sup> The following facts serve as the basis for this challenge.

Shortly after Appellant’s attack on the brigade officers at Camp Pennsylvania, COL Hodges informed MAJ Warren, who was coordinating security: “This may be one of our own. 2d Battalion is missing an engineer soldier. His name is Sergeant Akbar. . . . There’s some ammo missing.” Soon after this brief-

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<sup>22</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>23</sup> Because Appellant frames the issue in the context of the public safety exception, we discuss this exception *infra*. We note, however, that other grounds also support the conclusion that MAJ Warren’s brief questioning under the attendant circumstances did not violate Appellant’s Article 31(b), UCMJ, rights. Our case law provides that these warnings are not required when an accused’s questioner is “fulfill[ing] his operational responsibilities” and not attempting “to evade constitutional or codal rights.” *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990). Here, MAJ Warren, who served as an intelligence officer, tasked himself with security following Appellant’s attack. MAJ Warren’s purpose was operational as demonstrated by the obvious safety concerns and his limited questioning of Appellant. MAJ Warren also was not seeking to avoid Appellant’s statutory or constitutional rights. Given the urgency of the threat to Camp Pennsylvania after Appellant’s attack and MAJ Warren’s ad hoc security position, we find that MAJ Warren was acting in an operational capacity and conclude there was no need to provide Appellant with an Article 31(b), UCMJ, warning. *Loukas*, 29 M.J. at 389.

ing, MAJ Warren found Appellant, grabbed him, and forced him to lie face down on the ground. Once Appellant was on the ground, MAJ Warren pointed his firearm at Appellant while holding him down with his left hand. He then told Appellant not to move. After reholstering his firearm as another soldier stood guard, MAJ Warren kneeled down, looked directly at Appellant's face, and asked Appellant, "Did you do this? Did you bomb the tent?" Appellant responded, "Yes." Prior to questioning Appellant, MAJ Warren did not give Appellant any Article 31(b), UCMJ, warnings.

We conclude that the military judge did not abuse his discretion in admitting Appellant's confession. The Supreme Court has recognized a public safety exception to *Miranda* warnings. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). We have extended this exception to Article 31, UCMJ, rights advisements "when life is endangered." *United States v. Jones*, 26 M.J. 353, 357 (C.M.A. 1988); *see also United States v. Morris*, 28 M.J. 8, 14 (C.M.A. 1989). In an instance such as this one, an unwarned statement is inadmissible under Article 31(b), UCMJ, unless (1) the statement falls within the public safety exception and (2) the statement was voluntary. *Jones*, 26 M.J. at 357; *cf. Quarles*, 467 U.S. at 654 (noting that in absence of evidence of compelled confession, Court was only examining whether public safety justified failure to give *Miranda* warning). Appellant challenges only the public safety exception aspect of this test.

We conclude that the public safety exception did apply to Appellant's statement. MAJ Warren conducted his questioning of Appellant in a combat staging area shortly after Appellant's deadly attack on the brigade's officer corps on the eve of battle. At the time MAJ Warren questioned Appellant, the perpe-

trator of the attack remained at large and his identity was unclear. MAJ Warren's questioning ensured that no further life would be endangered by seeking to definitively ascertain the identity of the attacker. Once MAJ Warren obtained the admission, he ceased all questioning, further indicating that the questions were elicited solely to secure the safety of the Camp. *See Quarles*, 467 U.S. at 659 (observing applicability of public safety exception where law enforcement "asked only the question necessary to locate the missing gun before advising respondent of his rights"). Under these circumstances, the military judge did not err in concluding the public safety exception applied.<sup>24</sup>

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<sup>24</sup> We note that whether Appellant's admission was voluntary is a closer question. When evaluating the voluntariness of a statement, we "review the totality of the circumstances to determine whether Appellant's 'will was overborne and his capacity for self-determination was critically impaired.'" *United States v. Chatfield*, 67 M.J. 432, 439 (C.A.A.F. 2009) (quoting *United States v. Bubonics*, 45 M.J. 93, 95 (C.A.A.F. 1996)). This inquiry examines "the accused's age, education, experience and intelligence." *Id.* at 439-40. Certain factors support the position that Appellant's statement was coerced, such as Appellant being physically secured and questioned by a superior commissioned officer. *See United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (noting existence of subtle pressures in military society when questioned by military superior); *United States v. Morris*, 49 M.J. 227, 230 (C.A.A.F. 1998) (examining whether physical abuse was factor in confession). We also recognize that MAJ Warren pointed a weapon at Appellant, but the military judge found that Appellant "never saw the weapon pointed at him." Appellant does not state why this finding is clearly erroneous, so we do not consider MAJ Warren's brandishing the weapon in our analysis. Further, any other coercive factors were minimal, and we therefore find under the totality of the circumstances that Appellant's confession was voluntary given his age, his college education, his rank as an NCO, and his intelligence. *See Morris*, 49 M.J. at 230 (noting accused's age and education as

Even assuming that the admission of Appellant's confession was error, it was harmless beyond a reasonable doubt. The admission of a confession is prejudicial if, after reviewing the entire record of an individual case, "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Mott*, 72 M.J. 319, 332 (C.A.A.F. 2013) (quoting *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007)). Appellant's confession presents no such reasonable possibility because Appellant did not contest his identity as the attacker at the court-martial. Also, there was overwhelming evidence that Appellant was responsible for the attack, including Appellant's fingerprints on the generator switch, the rounds from Appellant's weapon matched the rounds used in the attack, and Appellant's possession of grenades when apprehended. See *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998) (explaining that Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991), found admission of an involuntary confession harmless where there was overwhelming evidence of guilt). This overwhelming evidence directly linked Appellant to the attack, and we find that any error in admitting Appellant's admission was harmless beyond a reasonable doubt.

#### N. Military Capital Case Procedures

Appellant challenges the constitutionality of three aspects of the military capital procedures: (1) the congressional delegation of capital sentencing procedures to the President; (2) R.C.M. 1004's authorization for the convening authority to add aggravating elements at referral; and (3) the lack of a system to

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factors in determining coercive nature of interrogation). *Cf. United States v. Carroll*, 207 F.3d 465, 472 (8th Cir. 2000) (finding use of physical force to subdue defendant resisting arrest did not render confession involuntary).



ensure consistent application of the death penalty in the military. None of these challenges warrants relief.

First, the Supreme Court has already upheld the congressional delegation of the R.C.M. 1004 capital sentencing procedures to the President in *United States v. Loving*, 517 U.S. 748 (1996). Appellant claims that the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. at 608-09, "overruled *Loving* sub silentio." However, the Supreme Court has instructed: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Consistent with this mandate, we will continue to adhere to the holding in *Loving* unless the Supreme Court decides at some point in the future that there is a basis to overrule that precedent. As a result, we reject Appellant's constitutional challenge to R.C.M. 1004 on the basis that it constitutes an improper delegation of power.

Second, Appellant argues that R.C.M. 1004 violates his due process rights by allowing the convening authority to add and amend aggravating factors at the time of referral. The relevant R.C.M. 1004 provision states:

Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional ag-

gravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

R.C.M. 1004(b)(1) (2005 ed.). In this case, the charge sheet omitted the R.C.M. 1004(c) aggravating factors, but it contained special instructions that the court-martial “be tried as a capital case.” In accordance with R.C.M. 1004(b)(1), the Government notified Appellant prior to arraignment of the two aggravating factors it intended to prove.<sup>25</sup>

An aggravating factor that renders an accused eligible for death is “the functional equivalent of an element of a greater offense.” *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). The Supreme Court has determined that the Fifth Amendment’s due process clause and the Sixth Amendment’s notice and jury trial guarantees require any fact “that increases the maximum penalty for a crime [to be] charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). For purposes of this appeal, we assume that the Government must allege in the charge sheet the aggravating factor as a functional equivalent of an element, and we therefore further assume that the Government erred in failing to allege the aggravating factor on the charge sheet in the instant case.

Federal circuit courts have labeled this type of charging error as an “*Apprendi* error.” See, e.g., *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir.

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<sup>25</sup> Following Appellant’s conviction, the Government, without objection from Appellant, withdrew one of the aggravating factors, leaving only one -- that there were multiple convictions of premeditated murder in the case.

2004) (defining “*Apprendi* error” as “the failure of an indictment specifically to charge aggravating factors regarded as elements because they increase the maximum available punishment”). Those circuit courts that have examined the issue have determined such a charging error is subject to harmless error review. *See, e.g., id.* at 286 (concluding that *Apprendi* error is not a structural error and subject to harmless error review); *see also* 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.3, at 265 (3d ed. 2007) (Circuit courts have “almost uniformly held that the failure of the indictment to include the *Apprendi*-element, like the failure to submit that element to the jury, [is] subject to harmless error review.”). Our case law also indicates that this type of *Apprendi* error would be subject to harmless error review. *See United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012) (noting that each case in which an element was not alleged “must be reviewed for harmless error to determine whether the constitutional error was harmless beyond a reasonable doubt”). Because Appellant preserved the charging issue at trial, the Government bears the burden of establishing the error was harmless beyond a reasonable doubt. *See id.* at 213 n.5; *United States v. Savala*, 70 M.J. 70, 77 (C.A.A.F. 2011). A specification’s failure to allege an element is not harmless if this “error frustrated an accused’s right to notice and opportunity to zealously defend himself.” *United States v. Gaskins*, 72 M.J. 225, 233 (C.A.A.F. 2013).

The Government has established that any error in failing to allege the aggravating factor in the charge sheet was harmless. First, the fundamental essence of the aggravating factor ultimately pursued by the Government -- multiple murder (R.C.M. 1004(c)(7)(J)) -- already appeared on the charge sheet as Appellant

was charged in separate specifications with murdering CPT Seifert and MAJ Stone, and the investigating officer recommended that both specifications go forward. *Cf. Robinson*, 367 F.3d at 288-89 (concluding that *Apprendi* error was harmless in part where there was sufficient evidence that grand jury would have indicted had it known the proper elements). Second, the Government has demonstrated that Appellant's trial defense counsel could not articulate how he would have altered his strategy at the Article 32, UCMJ, 10 U.S.C. § 832 (2012), hearing had the charge sheet specifically alleged the aggravating factor. Finally, Appellant received actual notice of the aggravating factors prior to his arraignment pursuant to R.C.M. 1004(c)(1) allowing him ample opportunity to prepare for the aggravating factor. *See Robinson*, 367 F.3d at 287 (finding *Apprendi* error harmless in part where defendant had sufficient notice and opportunity to defend against aggravating factor). We therefore conclude that any error in failing to allege the aggravating factor in the charge sheet was harmless. Because we resolve Appellant's due process argument on harmless error grounds, we do not need to reach the issue of whether R.C.M. 1004 is unconstitutional in the instant case. However, we note that Appellant has raised a viable question as to whether adherence to the provisions of R.C.M. 1004(b)(1) may violate Fifth Amendment due process rights. *See Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6; *United States v. Fosler*, 70 M.J. 225, 229-30, 232 (C.A.A.F. 2011); cf. *United States v. Lawrence*, 735 F.3d 385, 420 (6th Cir. 2013) ("After *Ring*, several courts have held that an indictment charging a death-eligible offense under the [Federal Death Penalty Act] must charge the statutory aggravating factors.").

Third, citing the provisions in the United States Attorneys' Manual that set forth policies and procedures in federal civilian capital cases, Appellant claims the military's failure to create similar procedures violates his Article 36, UCMJ, rights and his Fifth Amendment equal protection rights. Appellant's reliance on Article 36, UCMJ, is unpersuasive because this article does not require the President to prescribe similar policies for military death penalty cases. *See* Article 36(a), UCMJ, 10 U.S.C. 836(a) (2012) (noting that pretrial procedures "may be prescribed by the President, which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts").

Appellant's equal protection argument is equally unpersuasive. Appellant asserts that servicemembers who are death-eligible are treated differently than their similarly situated civilian counterparts because convening authorities do not have to comply with death penalty protocols. "An 'equal protection violation' is discrimination that is so unjustifiable as to violate due process." *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985). However, "equal protection is not denied when there is a reasonable basis for a difference in treatment." *United States v. McGraner*, 13 M.J. 408, 418 (C.M.A. 1982). We do not find any unjustifiable discrimination in the instant case because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant. *See Parker v. Levy*, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society."). We also note that "[t]he policy of the Justice Department is but an internal policy, without the force of law and

subject to change or suspension at any time.” Therefore, it does not serve as the basis for an equal protection violation. See *United States v. Jones*, 527 F.2d 817, 822 (D.C. Cir. 1975); cf. *United States v. Lopez-Matias*, 522 F.3d 150, 156-57 (1st Cir. 2003) (concluding United States Attorneys’ Manual on death penalty protocols did not confer substantive rights).<sup>26</sup> Accordingly, we conclude there was no equal protection violation.

#### O. Constitutionality of Death Sentence

Appellant contends that his death sentence violates (1) his Fifth Amendment rights because he has been denied due process and (2) his Eighth Amendment rights because his mental illness renders the punishment disproportionate to his culpability. We conclude that the claim of a Fifth Amendment due process violation is too vague to merit relief.<sup>27</sup>

Similarly, we are unpersuaded by Appellant’s Eighth Amendment claim. First, courts have uniformly determined that there is no constitutional impediment to imposing a capital sentence where a

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<sup>26</sup> In his reply brief, Appellant notes two other differences between the military and civilian systems: (1) the military system did not allow him to be tried by a military judge alone; and (2) the military system only provided one peremptory challenge instead of the twenty permitted in the civilian system. While we recognize differences exist, we find no unjustifiable differences that rise to the level of an equal protection violation.

<sup>27</sup> We also doubt that we have the authority to hold “capital punishment per se violative of due process.” See *United States v. Sampson*, 486 F.3d 13, 28 (1st Cir. 2007) (citing *Chapman v. United States*, 500 U.S. 453, 465 (1991)); *United States v. Quinones*, 313 F.3d 49, 70 (2d Cir. 2002).

criminal defendant suffers from a mental illness.<sup>28</sup> See, e.g., *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014) (noting that no Supreme Court case has “created a rule of constitutional law making the execution of mentally ill persons unconstitutional”); *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (noting “no authorities have extended [Supreme Court precedent] to prohibit the execution of those with mental illnesses”); *Carroll v. Secretary, DOC*, 574 F.3d 1354, 1369 (11th Cir. 2009); *Baird v. Davis*, 388 F.3d 1110, 1114 (7th Cir. 2004) (noting Supreme Court has not ruled on executions of those “who kill under an irresistible impulse”).

Second, Appellant’s specific mental illness did not make his death sentence highly disproportionate to his culpability. The Eighth Amendment prohibits punishments, including the death penalty, that are greatly disproportionate to the culpability of the accused, and thus “individualized consideration” is constitutionally required in imposing the death sentence. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). The record demonstrates that individualized consideration did occur in the instant case. We first note that most of the mental health experts who examined Appellant concluded that although he suffered from some form of mental illness, he was mentally responsible at the

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<sup>28</sup> The Supreme Court has identified three discrete classes of offenders who are exempt from execution under the Eighth Amendment: (1) those who are insane (and we note that being insane is not the same as having a mental illness), *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); (2) those who suffer from intellectual disability, *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014), *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); and (3) those who were under the age of eighteen when they committed their crimes, *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

time he committed the offenses. Further, the panel members not only determined that Appellant had the requisite mental ability to form the premeditated intent to kill when he committed the offenses, they also determined that he deserved the punishment of death for those offenses. Accordingly, this record does not support the conclusion that Appellant's mental impairments rendered his death sentence highly disproportionate to his culpability.

Third, to the extent Appellant claims that his mental illness presently rises to the level of insanity, once again the record does not support such a conclusion. We recognize that an accused's "earlier competency to be held responsible for committing a crime and to be tried for it" does not foreclose a later determination that he or she is presently insane and cannot be executed. *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). However, prior to and during the court-martial proceedings, mental health experts determined that Appellant was mentally responsible at the time of the offense and mentally competent to stand trial. There is no basis in the record for us to conclude that Appellant is presently insane.<sup>29</sup> Therefore, we reject Appellant's Eighth Amendment challenge premised on a claim of mental illness. See *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

#### P. Crime Scene Photographs

Appellant contends that the admission of the Government's crime scene photographs violated his

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<sup>29</sup> We recognize that appellate defense counsel signed a January 28, 2010, affidavit identifying certain behaviors by Appellant that they believed might call into question Appellant's competency to assist with his appeal. We are unaware, however, of any diagnosis from a mental health professional or any judicial finding that Appellant was or is insane.



Fifth and Eighth Amendment right to due process because they were unduly prejudicial. We reject this challenge. We conclude that “it cannot be seriously argued that [the autopsy and surgical] photographs were admitted only to inflame or shock this court-martial.” *Gray*, 51 M.J. at 35.

#### Q. Voir Dire

Appellant asserts that the Government used voir dire to impermissibly advance the Government’s theory. The Discussion to Rule 912 states that voir dire should not be used “to argue the case.” R.C.M. 912(d) Discussion (2005 ed.). However, Appellant does not cite any instances in the record where this occurred, and our review of the record does not reveal (1) any questions in which the Government impermissibly advanced its theory or (2) any objections by Appellant on this basis. This issue therefore does not provide any basis for reversal.

#### R. Government Peremptory Challenge

Appellant challenges the constitutionality of the Government’s use of peremptory challenges to remove a member whose moral bias against the death penalty does not justify a challenge for cause. As Appellant recognizes, we have previously rejected this argument. *See Loving*, 41 M.J. at 294-95; *see also Gray*, 51 M.J. at 33. He provides no compelling reason for us to reconsider our prior precedent, and we decline to do so.

#### S. Panel Reconsideration

Appellant claims that the panel’s reconsideration of its sentence violated the Fifth Amendment double jeopardy clause. The Supreme Court has held that, under the double jeopardy clause, a defendant cannot be sentenced to death at a retrial if he was sentenced

to life imprisonment following a trial-like capital sentencing proceeding at his first trial. *Caspari v. Bohlen*, 510 U.S. 383, 386 (1994) (citing *Bullington v. Missouri*, 451 U.S. 430, 446 (1981)). However, the circumstances of the instant case are quite different from those in the cases cited above because here the same panel reconsidered its own sentence during its one and only deliberation session. Therefore, this Supreme Court precedent is readily distinguishable.<sup>30</sup> Moreover, we are unaware of any other cases that have applied double jeopardy principles to reconsideration of a death sentence at the same trial and during the course of the same deliberations, and Appellant has cited no such authority. For these reasons, we conclude that there is no double jeopardy violation stemming from the panel’s reconsideration of its sentence in the course of its deliberations, and its ultimate imposition of a death sentence in this case.

#### T. CCA Proportionality Review

Appellant seeks a remand because the CCA failed to engage in a proportionality review. Although not constitutionally required, we have interpreted Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012), as requiring the courts of criminal appeals to perform proportionality reviews of death sentences as part of the sentence appropriateness determination. *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991). Our task is to assure that the lower court’s review was “properly performed.” *Id.* However, we do not require a lower court to “always articulate its reasoning for its deci-

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<sup>30</sup> Even if *Bullington* could be analogized to the circumstances of this case, the record before us does not reveal the circumstances or results of the panel’s first vote. Therefore, there is no evidence upon which to base a conclusion that the panel’s ultimate sentence of death violated any double jeopardy principles.

sions.” *United States v. Wean*, 37 M.J. 286, 287 (C.M.A. 1993) (citing *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992)); see also *United States v. Winckelmann*, 73 M.J. 11, 16 (C.A.A.F. 2013) (stating that CCA was not “obligated” to detail its analysis); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (noting that no provision in the UCMJ or the R.C.M. requires the lower court to address all assignments of error in a written opinion).

Although the CCA did not explicitly include any discussion of a proportionality review in its opinion, we conclude that Appellant received a proper legal review under Article 66(c), UCMJ. We first note that Appellant raised an Article 66(c), UCMJ, proportionality challenge below, so the CCA was fully aware of the need to resolve this issue. We next note that, absent evidence to the contrary, we presume that the judges on the courts of criminal appeals know and properly apply the law. *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009). Given this presumption and these facts, we find that the CCA implicitly performed its Article 66(c), UCMJ, proportionality review when it determined, both initially and on reconsideration, that Appellant’s approved sentence was “correct in law and fact.” *Cf. United States v. Reed*, 54 M.J. 37, 42-43 (C.A.A.F. 2000) (finding “nothing in the opinion that would lead one to conclude that the lower court did not give . . . appellant’s assignment[] of error careful consideration”). Although we emphasize that an explicit discussion by the CCA of its proportionality review would have been far preferable,<sup>31</sup> we do not find a sufficient basis

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<sup>31</sup> *Cf. United States v. Durant*, 55 M.J. 258, 261 (C.A.A.F. 2001) (noting that lower court analysis is “extremely beneficial” in cases involving unique sentencing issues because “[s]ound

to remand this case for the CCA to explicitly articulate its reasoning in the course of performing its proportionality review.<sup>32</sup>

#### U. Joint Affidavits

The courts of criminal appeals are authorized to compel trial defense counsel to submit affidavits. *United States v. Lewis*, 42 M.J. 1, 5 (C.A.A.F. 1995). Here, the CCA authorized trial defense counsel, MAJ Brookhart and CPT Coombs, to submit joint affidavits. Appellant challenges this decision because the joint affidavits prevented him from obtaining the independent recollections of each counsel.

The courts of criminal appeals have “discretion . . . to determine how additional evidence, when required, will be obtained.” *Lewis*, 42 M.J. at 6. They may determine that evidence is required “by affidavit, testimony, stipulation, or a factfinding hearing.” *Boone*, 49 M.J. at 193. “We are reluctant to mandate procedures for the” courts of criminal appeals, but we will do so when appropriate. *Lewis*, 42 M.J. at 6.

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articulation of their rationale . . . avoids speculation and promotes judicial economy”).

<sup>32</sup> Even if the CCA erred by failing to perform a proportionality review, we conclude that any error was harmless. See Article 59(a), UCMJ, 10 U.S.C. § 859(a) (2012). We require the CCA to employ a general offense-oriented proportionality review, *United States v. Gray*, 51 M.J. 1, 63 (C.A.A.F. 1999), meaning that the CCA must consider whether the sentence is appropriate for the crimes of conviction and whether the sentence is generally proportional to those imposed by other jurisdictions under similar situations. *Curtis*, 33 M.J. at 109. To perform this latter function, the service courts may consider military cases, federal district court cases, and Supreme Court decisions on state cases involving circumstances similar to an appellant’s. *Gray*, 51 M.J. at 63; *Curtis*, 33 M.J. at 109. Here, the Government has adequately shown that the capital sentence was both appropriate and proportional for Appellant’s actions.

We conclude that the CCA did not abuse its discretion in permitting trial defense counsel to submit joint affidavits. Appellant has not cited any authorities directly prohibiting the use of joint affidavits, and we have found none.<sup>33</sup> Absent any authority prohibiting the use of joint affidavits, we conclude that the CCA did not abuse its discretion in allowing trial defense counsel to submit one.

Although we conclude that there was no error, we do have reservations about the submission of joint affidavits by trial defense counsel when an appellant alleges ineffective assistance of counsel. Almost by necessity, joint affidavits harmonize the memories and views of each counsel, and they often use the pronoun “we” when explaining the actions or reasoning that only one counsel may have engaged in. Therefore, although “[w]e evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel,” *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004), we conclude that the better practice in future cases is for the courts of criminal appeals to require counsel to submit individual affidavits. Nonetheless, we conclude there was no error in the instant case.

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<sup>33</sup> There is authority that the use of joint affidavits is “undesirable.” *Masiello v. United States*, 304 F.2d 399, 402 (D.C. Cir. 1962) (discussing joint affidavits in warrant applications). As noted *infra*, we agree with this assessment. However, a federal district court also has noted that it was unable to find “any authority for the proposition that the use of a joint affidavit is *per se* improper” and that “numerous courts” in the Second Circuit had referred to or relied on them. *Steward v. Graham*, No. 01-CV-0569, 2007 U.S. Dist. LEXIS 101402, at \*26 n.14 (N.D.N.Y. July 24, 2007), *adopted by* 2008 U.S. Dist. LEXIS 40381, at \*3 (N.D.N.Y. May 19, 2008), 2008 WL 2128172, at \*10 n.14 (N.D.N.Y. May 19, 2008).

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III. Decision

The decision of the United States Army Court of Criminal Appeals is affirmed.

## Appendix

### Issues Presented

#### A.I

Sgt Hasan K. Akbar was denied his right to the effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution, at every critical stage of his court-martial.

#### A.II

This court should order a post-trial evidentiary hearing to resolve disputed factual issues relevant to Sgt Akbar's numerous collateral claims unless this court finds in his favor on another dispositive ground.

#### A.III

Whether the prosecution's victim-impact presentation and argument, and counsel's failure to object, violated Sgt Akbar's Fifth, Sixth, And Eighth Amendment rights.

#### A.IV

The military judge, by failing to sua sponte dismiss fourteen of the fifteen panel members for cause based on actual and implied bias manifested by relationships of the members, a predisposition to adjudge death, an inelastic opinion against considering mitigating evidence on sentencing, visceral reactions to the charged acts, preconceived notions of guilt, and detailed knowledge of uncharged misconduct that had been excluded, denied Sgt Akbar a fair trial.

#### A.V

The military judge erred to Sgt Akbar's substantial prejudice by denying his motion for change of venue.

## A.VI

Sgt Akbar was denied his Sixth and Eighth Amendment right to counsel when his trial defense counsel actively represented conflicting interests which adversely affected their performance.

## A.VII

“Where [unlawful command influence] is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding.” *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006). Prosecutorial misconduct is “action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a manual rule, or an applicable professional ethics canon.” *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). In this case, government counsel manipulated the duty assignments of Sgt Akbar’s trial defense counsel to avoid trial delay and thereby created a conflict of interests. *See* A.E. VI, Sec. E. Did government counsel’s actions amount to unlawful command influence or prosecutorial misconduct in violation of Sgt Akbar’s right to due process?

## A.VIII

Standards applicable to federal and state capital defense counsel have applicability to courts-martial as relevant standards of care and the army court’s analysis of Sgt Akbar’s case was flawed because of its misapplication of the guidelines and its determination counsel were “well-qualified.”

## A.IX

Denying Sgt Akbar the right to plead guilty unconstitutionally limited his right to present mitigation evidence. In the alternative, counsel’s failure to demand



an instruction on this limitation of mitigation presentation amounted to [ineffective assistance of counsel] as omission of the instruction denied Sgt Akbar mitigation evidence in violation of the Eighth Amendment.

#### A.X

The secretary of the army's exemption from court-martial service officers of the special branches named in AR 27-10 violated Article 25(d)(2), UCMJ, prejudicing Sgt Akbar's right to due process and a fair trial.

#### A.XI

As Sgt Akbar's trial defense counsel did not adequately investigate his case, the army court erred denying his request to retain psychiatrist and psychologist Dr. Richard Dudley and Dr. Janice Stevenson, or otherwise, ordering provision of adequate substitutes. Further investigation by appellate defense counsel also reveals the necessity of obtaining the expert assistance of clinical psychologist Dr. Wilbert miles.

#### A.XII

The military judge committed plain error by providing sentencing reconsideration instructions that failed to instruct the panel death was no longer an available punishment if the panel's initial vote did not include death and did not comply with R.C.M. 1004.

#### A.XIII

The military judge erred in not suppressing the statement "yes" by Sgt Akbar to Maj Warren, when that statement was given while Sgt Akbar was at gunpoint, in custody, and before he received rights

warnings under *Miranda v. Arizona* or Article 31(b), UCMJ.

#### A.XIV

Under the supreme court's reasoning in *Ring v. Arizona*, 536 U.S. 584 (2002), congress unconstitutionally delegated to the president the power to enact elements of capital murder, a purely legislative function.

#### A.XV

Did the procedures provided under R.C.M. 1004 violate Sgt Akbar's right to due process by allowing the convening authority to unilaterally append unsworn and uninvestigated aggravating elements to his murder specifications at referral?

#### A.XVI

"When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 133 S. Ct. at 2162. under R.C.M. 1004(b)(4)(c), death cannot be considered absent a preliminary, unanimous finding that aggravating circumstances "substantially outweigh" mitigating and extenuating circumstances. At trial, Sgt Akbar unsuccessfully requested sentencing instructions requiring that aggravating circumstances outweigh mitigating and extenuating circumstances beyond a reasonable doubt pursuant to *Apprendi*, 530 U.S. 466 and *Ring*, 536 U.S. 584. Did the military judge violate Sgt Akbar's right to due process by failing to instruct that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt?

#### A.XVII

The lack of a system to ensure consistent and even-handed application of the death penalty in the military violates both Sgt Akbar's equal protection rights and Article 36, UCMJ. *See* 18 U.S.C. § 2245 and U.S. Dep't of Justice, U.S. Attorney's Manual § 9-10.010 (June 1998) (USAM) and 10 U.S.C. § 949a(b)(2)(c)(ii). in contrast to the USAM, no protocol exists for convening authorities in capital cases, creating an ad hoc system of capital sentencing.

#### A.XVIII

Sgt Akbar's death sentence violates the eighth amendment because appellant's severe mental illness makes such a punishment highly disproportionate to his culpability and violates the Fifth Amendment because it would be a denial of due process to execute him.

#### A.XIX

The military judge erred in admitting the government's crime scene photographs as they unduly prejudiced Sgt Akbar's Fifth and Eighth Amendment right to due process. *See, e.g.*, App. Exs. 157, 299.

#### A.XX

The trial counsel committed reversible error by using the voir dire of the members to impermissibly advance the government's theory of the case. *See* App. Ex. VII (defense motion for appropriate relief for individual sequestration of members during voir dire); *see* R.C.M. 912(d), discussion.

#### A.XXI

The military justice system's peremptory challenge procedure, which allows the government to remove any one member without cause, is an unconstitutional violation of the Fifth and Eighth Amendments to

the U.S. Constitution in capital cases, where the prosecutor is free to remove a member whose moral bias against the death penalty does not justify a challenge for cause. *But see United States v. Curtis*, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *United States v. Loving*, 41 M.J. 213, 294-95 (C.A.A.F. 1994).

#### A.XXII

The panel's reconsideration of the sentence in Sgt Akbar's case violated the Fifth Amendment's double jeopardy clause because "no person . . . shall be subject for the same offense to be twice put in jeopardy of life." *See* App. Ex. XXXVII (defense motion for appropriate relief -- finding and sentencing instructions explaining voting procedure on capital offenses and death).

#### B.I

The army court's failure to do an Article 66(c), UCMJ, proportionality review requires remand for the complete review it was required by law to conduct, and the failure to detail its review in its opinion undermines this court's ability to review the proportionality analysis under Article 67, UCMJ.

#### B.II

The army court's refusal to accept Sgt Akbar's evidence in rebuttal to Gov't App. Ex. 13, a declaration from trial defense counsel, and refusal to grant the few weeks necessary to obtain discovery not provided as ordered in 2008, requires remand for a complete review under Article 66, UCMJ, because (1) the army court was required by law to conduct the review, and (2) this court does not have fact finding ability under Article 67, UCMJ.

#### B.III

The 2,633 day gap between the completion of Sgt Akbar's court-martial and the army court's decision was facially unreasonable and requires remand to determine if Sgt Akbar was prejudicially denied the due process of law guaranteed under the Fifth Amendment.

#### B.IV

The army court erred allowing trial defense counsel to file a joint affidavit over Sgt Akbar's objection, depriving him of the independent recollections of both counsel and delegating the army court's fact finding responsibility to his trial defense team who now stand opposed to Sgt Akbar's interests.

#### B.V

"Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.'" *Arave v. Creech*, 507 U.S. 463, 471 (1993) (citation omitted). in this case, the sole aggravating factor relied upon by the panel to find Sgt Akbar death eligible was that, having been found guilty of premeditated murder, in violation of Article 118(1), UCMJ, the accused was found guilty, in the same case, of another violation of Article 118, UCMJ, pursuant to R.C.M. 1004(c)(7)(j). Is the aggravating factor provided in R.C.M. 1004(c)(7)(j) unconstitutionally vague because it is not directed at a single event and dependant upon the government's decision to prosecute two or more violations of article 118, UCMJ, at a single trial?

#### B.VI

The cumulative errors in this case compel reversal of the findings and sentence.

## B.VII

Rule for courts-martial (R.C.M.) 1004 does not ensure the goals of individual fairness, reasonable consistency, and absence of error necessary to allow this court to affirm appellant's death sentence because R.C.M. 1004 does not ensure the race of the victim or alleged perpetrator is not a factor in the death sentence. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

## B.VIII

The variable size of the court-martial panel constituted an unconstitutional condition on Sergeant Akbar's fundamental right to conduct voir dire and promote an impartial panel. *See* App. Ex. XXIII (defense motion for appropriate relief -- grant of additional peremptory challenges); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

## B.IX

The death sentence in this case violates the Fifth, Sixth, and Eighth Amendments and Article 55, UCMJ, because the military system does not guarantee a fixed number of members. *See* App. Ex. xxiii (defense motion for appropriate relief -- grant of additional peremptory challenges); *see also* App. Ex. LXXXIII (defense motion for appropriate relief to preclude the court-martial from adjudging a sentence of death since the manual for courts-martial fails to mandate a fixed size panel in capital cases); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

## B.X

Discussion of findings and sentencing instructions at R.C.M. 802 conferences denied Sgt Akbar his right to be present at every stage of trial. *See* App. Ex. xlvii (defense motion for appropriate relief -- request that all conferences be held in an article 39(a)).

## B.XI

This court arbitrarily and severely restricted the length of Sgt Akbar's brief, in violation of the equal protection and due process clauses of the Fourteenth Amendment and article 67, when this court ordered Sgt Akbar to file an abbreviated brief, inconsistent with the past practice of this court in capital cases and Article 67, and without good cause shown.

## C.I

The role of the convening authority in the military justice system denied Sgt Akbar a fair and impartial trial in violation of the Fifth, Sixth, and Eighth Amendments and Article 55, UCMJ, by allowing the convening authority to act as a grand jury in referring capital criminal cases to trial, personally appointing members of his choice, rating the members, holding the ultimate law enforcement function within his command, rating his legal advisor, and acting as the first level of appeal, thus creating an appearance of impropriety through a perception that he acts as prosecutor, judge, and jury. *See* App. Ex. XIII (defense motion for appropriate relief to disqualify all members chosen by the convening authority).

## C.II

Article 18, UCMJ, and R.C.M. 201(f)(1)(c), which require trial by members in a capital case, violates the guarantee of due process and a reliable verdict under the Fifth, Sixth, and Eighth Amendments.

## C.III

Sergeant Akbar was denied his right to a trial by an impartial jury composed of a fair cross-section of the community in violation of the Sixth Amendment to the U.S. Constitution. *Duren v. Missouri*, 439 U.S.

357 (1979). *But see United States v. Curtis*, 44 M.J. 106, 130-33 (C.A.A.F. 1996).

#### C.IV

The selection of the panel members by the convening authority in a capital case directly violates Sgt Akbar's rights under the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ, by in effect giving the government unlimited peremptory challenges. *See* App. Ex. XIII (defense motion for appropriate relief to disqualify all members chosen by the convening authority).

#### C.V

The President exceeded his Article 36 powers to establish procedures for courts-martial by granting trial counsel a peremptory challenge and thereby the power to nullify the convening authority's Article 25(d) authority to detail members of the court. *See* App. Ex. XXIII (defense motion for appropriate relief -- grant of additional peremptory challenges).

#### C.VI

The designation of the senior member as presiding officer for deliberations denied Sgt Akbar a fair trial before impartial members in violation of the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ. *See* App. Ex. XXV (defense motion for appropriate relief -- request that the senior member not be made the president of the panel).

#### C.CVII

The denial of the right to poll members regarding their verdict at each stage of trial denied Sergeant Akbar a fair trial before impartial members in violation of the Fifth, Sixth, and Eighth Amendments to



the U.S. Constitution and article 55, UCMJ. *See* App. Ex. XVII (defense motion for appropriate relief -- polling of panel members).

#### C.VIII

There is no meaningful distinction between premeditated and unpremeditated murder allowing differential treatment and sentencing disparity in violation of the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ. *See* App. Ex. LIX (defense motion to dismiss the capital referral due to article 118 of the UCMJ being unconstitutionally vague).

#### C.IX

Sergeant Akbar was denied his constitutional right under the Fifth Amendment to a grand jury presentment or indictment. *See* App. Ex. LXIX (defense motion to dismiss capital referral on the ground that the military capital scheme violates the Fifth Amendment).

#### C.X

Court-martial procedures denied Sgt Akbar his Article III right to a jury trial. *Solorio v. United States*, 103 U.S. 435, 453-54 (1987) (Marshall, J., dissenting). *But see United States v. Curtis*, 44 M.J. 106, 132 (C.A.A.F. 1996).

#### C.XI

Due process requires trial and intermediate appellate judges in military death penalty cases be protected by a fixed term of office, not subject to influence and control by the judge advocate general of the army. *See* App. Ex. V (defense motion for appropriate relief, heightened due process). *But see United States v. Loving*, 41 M.J. 213, 295 (C.A.A.F. 1994).

## C.XII

The army court lacked jurisdiction because the judges are principal officers not presidentially appointed as required by the appointments clause of the constitution. *See* U.S. Const., Art. II, § 2. *But see United States v. Grindstaff*, 45 M.J. 634 (N-M. Ct. Crim. App. 1997); *cf. Edmond v. United States*, 115 U.S. 651 (1997).

## C.XIII

This court lacks the jurisdiction and authority to review the constitutionality of the rules for courts-martial and the UCMJ because this court is an Article I court, not an Article III court with the power to check the legislative executive branches under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See also Cooper v. Aaron*, 358 U.S. 1 (1958) (the power to strike down unconstitutional statutes or executive orders is exclusive to Article III courts). *But see Loving*, 41 M.J. at 296.

## C.XIV

Sergeant Akbar is denied equal protection of law in violation of the Fifth Amendment as all U.S. civilians are afforded the opportunity to have their cases reviewed by an Article III court, but members of the united states military by virtue of their status as service members are not. *But see United States v. Loving*, 41 M.J. 213, 295 (C.A.A.F. 1994).

## C.XV

Sergeant Akbar is denied equal protection of law under the Fifth Amendment to the U.S. Constitution because [in accordance with] army regulation 15-130, para. 3-1(d)(6), his approved death sentence renders him ineligible for clemency by the army clemency and parole board, while all other cases reviewed by this

court are eligible for such consideration. *But see United States v. Thomas*, 43 M.J. 550, 607 (N-M. Ct. Crim. App. 1995).

#### C.XVI

Sergeant Akbar's death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because the capital referral system operates in an arbitrary and capricious manner. *See App. Ex. LXV* (defense motion to set aside capital referral for lack of statutory guidelines).

#### C.XVII

The death penalty provision of article 118, UCMJ, is unconstitutional as it relates to traditional common law crimes that occur in the U.S. *But see United States v. Loving*, 41 M.J. 213, 293 (C.A.A.F. 1994). The court resolved the issue against private loving, adopting the reasoning of the decision of the army court of military review. *See United States v. Loving*, 34 M.J. 956, 967 (A.C.M.R. 1992). However, private loving's argument before the army court relied on the Tenth Amendment and necessary and proper clause of the U.S. Constitution. *Id.* Sergeant Akbar's argument relies on the Eighth Amendment to the U.S. Constitution.

#### C.XVIII

The death sentence in this case violates the Fifth and Eighth Amendments to the U.S. Constitution and Article 55, UCMJ, as the convening authority did not demonstrate how the death penalty would enhance good order and discipline. *See App. Ex. LXVII* (defense motion for appropriate relief to preclude imposition of death as interests of justice will not be served).

#### C.XIX

The military capital sentencing procedure is unconstitutional because military judges do not have the power to adjust or suspend a death sentence improperly imposed. *See* App. Ex. V (defense motion for appropriate relief, heightened due process).

#### C.XX

Due to the military justice system's inherent flaws capital punishment amounts to cruel and unusual punishment under all circumstances. *See* App. Ex. LXXI (defense motion for appropriate relief to preclude the court-martial from adjudging a sentence in violation of Article 55 of the UCMJ).

#### C.XXI

The death penalty cannot be constitutionally implemented under current Eighth Amendment jurisprudence. *See Callins v. Collins*, 510 U.S. 1141, 1143-59 (1994) (Blackmun, J., dissenting) (cert. denied).

#### C.XXII

R.C.M. 1209 and the military death penalty system deny due process and constitute cruel and unusual punishment and are tantamount to foreseeable, state-sponsored execution of innocent human beings because there is no exception for actual innocence to the finality of courts-martial review. *Cf. Triestman v. United States*, 124 F.3d 361, 378-79 (2d Cir. 1997).

#### C.XXIII

R.C.M. 1001(b)(4) is unconstitutionally vague and overbroad as applied to the appellate and capital sentencing proceedings because it permits the introduction of evidence beyond that of direct family members and those present at the scene in violation of the Fifth and Eighth Amendments. *See* App. Ex. LV (defense motion for appropriate relief -- to limit admissi-

bility of victim's character and impact on family from victim's death); *see also* App. Ex. 296 (motion for appropriate relief -- limit victim impact and government argument).

#### C.XXIV

R.C.M. 1001(b)(4) is unconstitutionally vague and overbroad as applied to the appellate and capital sentencing proceedings because it permits the introduction of circumstances which could not reasonably have been known by Sergeant Akbar at the time of the offense in violation of his Fifth and Eighth Amendment rights. *See* App. Ex. LV (defense motion for appropriate relief -- to limit admissibility of victim's character and impact on family from victim's death).

#### C.XXV

The military judge erred in admitting victim-impact evidence regarding the personal characteristics of the victims which could not reasonably have been known by Sergeant Akbar at the time of the offense in violation of his Fifth and Eighth Amendment rights. *See* App. Ex. LV (defense motion for appropriate relief -- to limit admissibility of victim's character and impact on family from victim's death).

#### C.XXVI

The death sentence in this case violates the ex post facto clause, Fifth and Eighth Amendments, separation of powers doctrine, preemption doctrine, and article 55, UCMJ, because when it was adjudged neither congress nor the army specified a means or place of execution. *See* App. Ex. LXXIII (defense motion to dismiss -- military system for administering the death penalty violates the non-delegation doctrine).

Issues Presented Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

I.

Whether there was a fraud on the court where two witnesses testified differently at trial than at their Article 32 hearing and where forensic analysis of the bullets showed they were armor piercing where appellant only was issued standard issue bullets.

II.

Whether appellant was able to assist counsel at trial.

III.

Whether the bullet analysis was a sham.

IV.

Whether the panel and the military judge were biased against appellant.

V.

Whether someone used mind control on appellant to force him to attack.

VI.

Whether trial defense counsel coerced appellant not to testify.

VII.

Whether lead civilian counsel should have acceded to appellant's request to remove military defense counsel.

VIII.

Whether appellant was denied counsel of his choice when trial defense counsel refused to invite Ltc Hansen back and civilian counsel's family was threatened for working on the case.

BAKER, Judge,\* with whom ERDMANN, Chief Judge, joins (dissenting):

Principle is hardest to hold in the face of countervailing virtue. For a judge that moment may arrive when knowing what is just, one must also consider what is fair. This is a case about whether or not the military justice system was fair, not whether it was just.

### INTRODUCTION

Appellant raises fifty-nine issues on appeal. This Court heard oral argument on five issues. However, in my view, there is but one pivotal question: Did defense counsel provide ineffective assistance of counsel in the manner in which they presented Appellant's sentence mitigation case?

To understate, defense counsel had a hard case. Their task was made harder by the absence of guidelines in the military for handling death penalty cases and a requirement to provide counsel "learned in the law applicable to capital cases" in death penalty cases. That meant that defense counsel, appointed from the ranks of judge advocates, were on their own, without clear guidance or expert assistance on the criteria against which to measure the effective assistance of counsel in this death penalty case.

The military has guidelines on the length of hair and mustaches.<sup>1</sup> It has guidelines on how much fat

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\* Former Chief Judge James E. Baker took final action in this case prior to the expiration of his term on July 31, 2015.

is permitted on a cut of meat served in the mess hall,<sup>2</sup> and it has guidelines on the placement of the necktie in relation to one's belt,<sup>3</sup> but it does not have guidelines on how to provide effective assistance of counsel in a death penalty case. This seems to expose counsel unnecessarily to allegations of ineffective assistance of counsel. The absence of counsel "learned in the law applicable to capital cases" who might have helped fill this void compounds the problem.

Guidelines or not, hard case or not, in my view, Appellant's trial defense counsel were ineffective in two respects. First, and foremost, counsel were ineffective for providing to members Appellant's 313-page diary without appropriate contextual explanation. The Government earlier introduced three pages of this diary. However, it was defense counsel who introduced the other 310 pages. These pages included a running diatribe against Caucasians and the United States dating back twelve years, and included repeated references to Appellant's desire to kill American soldiers "for Allah" and for "jihad."

The defense intended the diary to reflect Appellant's descent into mental illness. However, the diary was offered without adequate explanation, expert or otherwise. Until closing arguments, members were left on their own to read and interpret the diary's contents along with the mitigation specialist's notes and an FBI report. In the words of defense counsels'

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<sup>1</sup> See, e.g., Dep't of the Army, Reg. 670-1, Uniform and Insignia, Wear and Appearance of Army Uniforms para. 3-2(a) (Apr. 10, 2015) [hereinafter AR 670-1].

<sup>2</sup> See, e.g., Dep't of the Army Pam. 30-22, Food Program, Operating Procedures for the Army Food Program Table I-1 (Feb. 6, 2007).

<sup>3</sup> See, e.g., AR 670-1, para. 20-18(c)(3)(a).



expert medical witness: it “was a mistake” to admit the diary into evidence. He “never advised or would have advised trial defense counsel to admit the diary as they did” because, “[t]o a lay person the diary is damning evidence, standing alone, . . . and the nature of [Appellant]’s diary contained explosive material.” Appellant’s mitigation specialist stated she “would have never advised introduction of . . . [Appellant]’s diary without providing context through testimony.” No wonder it was Government trial counsel who referenced the diary throughout his closing argument.

Second, counsel were ineffective for failing to produce a single witness, including any family member, to provide humanizing testimony in favor of a life sentence. The message was clear and unmistakable: not even a family member was prepared to say Appellant’s life was worth sparing.

Finding ineffective assistance, this leaves the question of prejudice under *Strickland* prong II. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As the majority suggests, Appellant has a steep cliff to scale. The evidence of guilt was overwhelming, including through defense counsels’ introduction of Appellant’s diary. Moreover, Appellant’s crimes were heinous. Appellant murdered two soldiers and wounded fourteen others. He did so with wanton disregard. He did so on the eve of battle and, in his mind, to aid the enemy. And, he did so with premeditation, as evidenced by the diary. Nonetheless, there are two arguments supporting a finding of prejudice.

First, the members requested an instruction on reconsideration of sentence. That makes this case different from almost every other death penalty case *and* virtually every other ineffective assistance of counsel case. It indicates that at least one member was open to considering an outcome other than death.

In other words, the request for this instruction suggests that at least one juror may have been persuaded to spare Appellant's life with an effective presentation of mitigation evidence.

Second, the standard for prejudice cannot be: "if there ever was a case where a military court-martial panel would impose the death penalty, this was it." *United States v. Akbar*, \_\_ M.J. \_\_, \_\_ (6) (C.A.A.F. 2015). That is the standard adopted by the majority. With a standard like that, if a defendant committed a particularly despicable crime, it would not matter if he received effective assistance of counsel, or for that matter a fair trial, because we could be confident in the outcome. However, the hallmark of American justice is its commitment to procedural justice as well as to substantive justice. How we reach a result can matter as much as what result we reach. That is the essential judicial virtue of a democracy. This case tests that commitment.

Therefore, for the reasons explained below, I respectfully dissent and would remand this case for a new sentence rehearing.

This opinion proceeds in two sections. Section I addresses the applicable standard for ineffective assistance of counsel in death penalty cases. The section highlights the absence of standards and guidelines for defense counsel in death penalty cases in the military and considers the consequences of such an absence. Section II considers the application of *Strickland* in this case. Part A addresses the submission of Appellant's entire diary into evidence without medical context or explanation and explains why, in this case, such a decision amounted to ineffective assistance of counsel. Part B discusses the failure of counsel to offer mitigating evidence in the form of humanizing testimony to spare Appellant's life. Finally,

Part C addresses prejudice and determines that where, as here, the members asked for a sentence reconsideration instruction, there is concrete rather than speculative evidence that an effective presentation on sentencing might have swayed at least one member to vote for life.

## DISCUSSION

### I. Standards for Capital Defense Counsel in the Military

#### A. Absence of Military Guidelines, Standards, and Norms

Evaluation of defense counsels' performance starts with the identification of the prevailing standard or professional norm against which to measure counsels' performance. However, such standard is elusive. There are no guidelines in the military on death penalty defense. The armed services have not adopted the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>4</sup> *American Bar Association Guidelines on Ap-*

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<sup>4</sup> No branch of the armed forces has adopted the ABA Guidelines as the yardstick for measuring defense counsels' performance. The Supreme Court has specifically disavowed adoption of the ABA Guidelines as definitive statements on "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). And this Court has previously rejected arguments by counsel to adopt the ABA guidelines as the comprehensive standard of prevailing professional norms. See *United States v. Loving (Loving I)*, 41 M.J. 213, 300 (1994), *opinion modified on reconsideration*, (C.A.A.F. Feb. 2, 1995), *aff'd*, 517 U.S. 748 (1996) (considering whether due process requires that this Court establish minimum standards for defense counsel in capital cases and concluding that specification of such standards are not constitutionally required); *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998) (noting that "both the ABA Guidelines and federal law are instructive," without finding that ABA Guidelines

*pointment of Counsel in Death Penalty Cases*, reprinted in 31 Hofstra L. Rev. 913, 1061 (2003) [hereinafter *ABA Guidelines*]. And yet, we know that “death is a punishment different from all other sanctions.”<sup>5</sup> It is different in severity; different in finality; and different in what is expected of competent counsel. Guidance is needed.

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are binding on capital military defense counsel). Nevertheless, the ABA Guidelines are helpful for determining prevailing professional norms, and have been used by both the Supreme Court and this Court for this purpose. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (looking to ABA Guidelines to establish appropriate standard of common practice and finding that the State “has come up with no reason to think the [applicable guideline] impertinent here”); *Wiggins v. Smith*, 539 U.S. 510 (2003) (looking to Maryland professional standards and ABA Guidelines to determine the standard of reasonable professional conduct); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)); *Murphy*, 50 M.J. at 9–10 (recognizing that “the ABA Guidelines and federal law are instructive”). Consequently, I also look to these standards for guidance in reviewing counsels’ performance.

<sup>5</sup> *Booth v. Maryland*, 482 U.S. 496, 509 n.12 (1987) overruled on other grounds by *Payne v. Tennessee*, 501 U.S. 808 (1991) (citing *Woodson v. North Carolina*, 428 U.S. 280, 303–304, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (internal quotation marks omitted)); *Loving v. United States (Loving II)*, 62 M.J. 235, 236 (C.A.A.F. 2005) (“‘Death is different’ is a fundamental principle of Eighth Amendment law.”); *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.” (quoting *Furman v. Georgia*, 408 U.S. 238, 306 (1972))); *United States v. Curtis (Curtis I)*, 32 M.J. 252, 255 (C.M.A. 1991) (recognizing that the Supreme Court treats capital and noncapital cases differently); see also Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio State J. Crim. L. 117, 117 n.1 (2004) (collecting Supreme Court concurrences authored by various justices articulating the principle that death is different).

This Court has “decline[d] to mandate minimum standards based on years of practice or number of cases tried” for military capital defense counsel.<sup>6</sup> The Supreme Court has not mandated minimum qualifications or training either. It is not constitutionally required.

In the absence of military norms, guidelines, and standards, *Strickland* becomes the standard. In *Strickland v. Washington*, a capital case, the Supreme Court set forth the familiar two-part test applicable to claims of ineffective assistance of counsel:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687; *see also United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010). With respect to the

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<sup>6</sup> *See Loving I*, 41 M.J. at 300; *Murphy*, 50 M.J. at 10 (explaining that this Court will not “view[] the limited experience of counsel as inherent deficiency,” but will look solely “to the adequacy of counsel’s performance”); *United States v. Gray*, 51 M.J. 1, 54 (C.A.A.F. 1999) (declining to adopt minimum qualifications standards for capital defense counsel); *see also United States v. Curtis (Curtis II)*, 44 M.J. 106, 126 (C.A.A.F. 1996), *on reconsideration, United States v. Curtis (Curtis III)*, 46 M.J. 129 (C.A.A.F. 1997) (this Court has rejected a requirement for appointment of ABA qualified counsel twice in summary dispositions (citing *United States v. Gray*, 34 M.J. 164 (C.M.A. 1991); *Curtis v. Stumbaugh*, 31 M.J. 397 (C.M.A. 1990)); *Loving I*, 41 M.J. at 300)).

first prong, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness,” based on “prevailing professional norms.” *Strickland*, 466 U.S. at 688. This now-axiomatic standard, by design, provides little guidance as to what these “prevailing professional norms” are, or where one can find them. Indeed, the Supreme Court stated in *Strickland* that “[m]ore specific guidelines are not appropriate.” *Id.*; see also *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) (citing *Strickland*, 466 U.S. at 689) (*Strickland* has “reject[ed] mechanistic rules governing what counsel must do.”). “Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides.” *Id.*; see also *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009) (noting that the ABA Guidelines are not “inexorable commands with which all capital defense counsel ‘must fully comply,’” rather, they are “‘only guides’ to what reasonableness means, not its definition”) (internal citations omitted).

What, then, are the key elements of the *Strickland* standard? Objectively reasonable tactical choices based on objectively reasonable investigation informing those choices, both of which are measured by “prevailing professional norms.”

Here is the problem. As *Strickland* itself recognizes, this standard is evolving and changing. Nor is it one that is immediately evident to a practitioner outside the death penalty field. And, even where discernible, prevailing professional civilian norms may not fit with military practice.

Perhaps cognizant of these limitations, the Supreme Court since *Strickland* has endorsed the adop-

tion of more detailed guidance for capital defense counsel as a non-constitutional matter. See *Flores-Ortega*, 528 U.S. at 479; see also *Van Hook*, 558 U.S. at 8-9. As the Supreme Court has recognized, even though “the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices,” state governments and private organizations “are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented.” *Flores-Ortega*, 528 U.S. at 479 (state governments can impose specific rules); *Van Hook*, 558 U.S. at 9 (“What we [the Supreme Court] have said of state requirements is *a fortiori* true of standards set by private organizations.”). For example, a “less categorical use of the [ABA] Guidelines” to evaluate counsel’s performance may be proper to the extent the guidelines “reflect prevailing norms of practice and standard practice and must not be so detailed that they would interfere with the constitutionally protected independence of counsel.” *Van Hook*, 558 U.S. at 8 n.1 (citations omitted) (internal quotation marks omitted).

There is therefore no reason not to promulgate standards for capital defense counsel in the military. Guidelines are useful and necessary if the military is going to have a death penalty. Specialized facets of the military justice system make such guidance invaluable.

#### B. The Utility of Guidelines for Military Capital Defense Counsel

It is self-evident that “[c]ounsel who are ‘learned in the law applicable to capital cases’ are less likely to provide an inadequate or ineffective defense than those ‘not learned’ in the law.” *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998). “[I]nexperience —

even if not a flaw per se -- might well lead to inadequate representation.” *Id.*<sup>7</sup>

First, the military justice system does not have a death penalty qualified bar.<sup>8</sup> In civilian courts, federal capital defense counsel are required by statute to be “learned in the law applicable to capital cases.” 18 U.S.C. § 3005 (1994). Under 18 U.S.C. § 3005, as amended in 1994 through the Federal Death Penalty Act, a capital defendant is entitled to two counsel, “of whom at least 1 shall be learned in the law applicable to capital cases.” Prior to the 1994 amendment, the statute only required that counsel be “learned in the law”; the 1994 amendment added the phrase “applicable to capital cases.” Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3598.<sup>9</sup> At least one federal

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<sup>7</sup> See also *United States v. Curtis*, 48 M.J. 330 (C.A.A.F. 1997) (denial of petition for reconsideration) (“[I]n order to ensure that those few military members sentenced to death have received a fair and impartial trial within the context of the death-penalty doctrine of the Supreme Court, we should expect that: . . . Each military servicemember has available a skilled, trained, and experienced attorney.”).

<sup>8</sup> See Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 Mil. L. Rev. 1, 47-48 (2006) (“The paucity of military death penalty referrals, combined with the diversity of experience that is required of a successful military attorney, leaves the military’s legal corps unable to develop the skills and experience necessary to represent both sides properly.” (citing Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, L. Rev. Mich. St. U.-Detroit. C.L. 57, 110 (2002))).

<sup>9</sup> The Tenth Circuit has interpreted this amendment to be a substantive change, “creating a new requirement which previously had not existed,” namely, that counsel be proficient in trying capital cases, not merely proficient as lawyers writ large. *United States v. McCullah*, 76 F.3d 1087, 1098 (10th Cir. 1996);



circuit court has interpreted this to mean that counsel must have significant experience litigating criminal cases to qualify as “learned counsel” under this statute.<sup>10</sup> Significantly, even persons accused of committing terrorist acts against the United States are entitled, “to the greatest extent practicable,” to at least one “counsel who is learned in applicable law relating to capital cases” under the Military Commissions Act. 10 U.S.C. § 949a(b)(2)(C)(ii)(2012).<sup>11</sup> Yet no similar requirement exists for service members accused of a capital crime. As a result, there is no guarantee that any accused service member will receive counsel who have specialized training or experience defending death penalty cases.

Second, there are an insufficient number of capital cases to effectively train a cadre of military counsel to be well versed in capital litigation. For example, there were forty-seven capital prosecutions between 1984 and 2006, with only fifteen of them resulting in a death sentence. *See Sullivan, supra* note 8, at 17. Moreover, there is little opportunity for counsel to specialize in capital litigation, as counsel are expected to be military law generalists who should be prepared to practice in a number of legal fields, of

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*see also In re Sterling-Suarez*, 323 F.3d 1, 5-6 (1st Cir. 2003) (Torruella, J., dissenting).

<sup>10</sup> *See McCullah*, 76 F.3d at 1098 (finding that experienced public defenders practicing for ten years were learned under the statute); *In re Sterling-Suarez*, 323 F.3d at 4-6 (Torruella, J., dissenting) (noting that counsel must, inter alia, have extensive prior experience litigating a capital case, and be familiar with complex death penalty procedure).

<sup>11</sup> Under the Military Commissions Act, at least one learned counsel shall be provided to the accused, even if this requires hiring civilian capital defense counsel. 10 U.S.C. § 949a(b)(2)(C)(ii)(2012).

which only one is criminal law. As the ABA Guidelines acknowledge, “death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases,” *ABA Guidelines*, Introduction, 31 Hofstra L. Rev. at 923, yet there is little opportunity to develop relevant experience. In addition, military defense counsel are typically transferred to different duty stations over the course of their careers after serving a three-year tour, reducing the amount of time they can spend on protracted capital litigation. See Sullivan, *supra* note 8, at 48 (“Given that judge advocates typically stay in a position for no more than three years, it is unlikely that any participant in a capital court-martial will have experience performing his or her duties in a death penalty case.”). In the context of capital cases, this contributes to uncertainty that counsel “learned in the law applicable to capital cases” will indeed be provided to accused persons at every stage of their case.

In this case, for example, Appellant’s defense counsel had a permanent change of station while they were still representing Appellant. Lieutenant (LTC) Brookhart was reassigned to the 10th Mountain Division. Major (MAJ) Coombs was assigned a new position as senior defense counsel at Fort Eustis and Fort Lee, Virginia. Defense counsel attributed their transfers to Government counsel’s “tampering,” stating in their post-trial affidavit that they “were both shocked that a senior judge advocate would take such action” and believed “it created a very damaging appearance issue with regards to the fairness of the military justice system.” LTC Brookhart, the more experienced of the two attorneys, stated that he was only able to continue working on Appellant’s case because the staff judge advocate, LTC Jim Garrett, “recognized

the seriousness of the situation” and “made arrangements for LTC Brookhart to stay at Fort Drum to work as a special projects officer in Administrative Law,” permitting LTC Brookhart to work on Appellant’s case. As defense counsel have noted, such a structure is problematic, not only because of the public perceptions of fairness.

Third, military lawyers are not specially trained in death penalty voir dire. “The conventional wisdom is that most trials are won or lost in jury selection.” John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209 (2001).<sup>12</sup> Voir dire is, without exaggeration, a

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<sup>12</sup> Citing 45 Am. Jur. *Trials* § 144 (1992) (“Experienced trial lawyers agree that a case can often be won or lost in voir dire.”); V. Hale Starr & Mark McCormick, *Jury Selection: An Attorney’s Guide to Jury Law and Methods* § 3.8 (1985) (“Lawyers apparently do win, as they occasionally boast, some of their cases during, or with the help of voir dire.” (quoting Hans Zeisel, *The American Jury*, Annual Chief Justice Earl Warren Conference on Advocacy in the United States 81-84 (1977))); Jon M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 139 (1977) (“Many attorneys believe that trials are frequently won or lost during [jury selection.]”); Jeffery R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 Law & Psychol. Rev. 163, 176 (1991) (stating that a “case may be [won] or lost at the [jury selection stage]”); Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 St. Mary’s L.J. 575, 575-76 (1984) (arguing that “[e]xperienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost.”); Chris F. Denove & Edward J. Imwinkelried, *Jury Selection: An Empirical Investigation of Demographic Bias*, 19 Am. J. Trial Advoc. 285, 285 (1995) (“[J]ury selection can be the most important phase of a trial. Pick the right jury and the battle is half won. But select the wrong jury, and the case is lost before [the] evidence is even heard.”). *See also Williams v. Bagley*, 380

matter of life and death. As the Supreme Court noted in *Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992):

part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

*Id.* at 729-30 (brackets in original) (citations omitted) (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion)). Yet no resources are provided to equip military defense counsel with the necessary skills to conduct effective voir dire in a capital case.

Lack of specialized training in death penalty voir dire is compounded by the structure of the military justice member selection process. In the instant case, the members that would comprise the panel were to be selected from a pool of twenty servicemembers. This pool would be replenished only if causal challenges reduced the panel below twelve members, the statutory minimum for capital cases. Article 41, UCMJ, 10 U.S.C. § 841 (2012). Presumptively, all twenty members in the initial pool could serve on the

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F.3d 932, 978 (6th Cir. 2004) (Merritt, J., dissenting) (“In such a randomized system, the capital case often is won or lost at voir dire. The voir dire and the method of jury selection become more important than the trial itself. Executions depend on “the line between innocence and guilt [which] is drawn with reference to reasonable doubt” by individual jurors (citing *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

panel if there were no peremptory or causal challenges.<sup>13</sup>

Cognizant of the limitations of panel selection, trial defense counsel in this case deliberately did not challenge any panel members for cause under the theory that the more people that were placed on the panel, the higher the likelihood that there would be an “ace of hearts” who would vote against the death penalty, leading counsel to structure “a *voir dire* with an aim to keep anyone who did not have a clear basis for a challenge for cause.” Defense counsels’ “ace of hearts” strategy has no basis in prevailing professional norms. The strategy was adopted by trial defense counsel based on a comment made in a concurring opinion in a United States Air Force Court of Criminal Appeals case. *See United States v. Simoy*, 46 M.J. 592, 625-26 (A.F.Ct.Crim.App. 1996) (Morgan, J., concurring), *aff’d in part, rev’d in part*, 50 M.J. 1 (C.A.A.F. 1998).<sup>14</sup>

Essentially, all considerations regarding the beliefs, biases, and personalities of the panel members, and

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<sup>13</sup> Defense counsel were only entitled to exercise one peremptory challenge per Rule for Courts-Martial (R.C.M.) 912(g)(1). By contrast in federal civilian capital cases, defense counsel are entitled to exercise twenty peremptory challenges. Fed. R. Crim. P. 24(b)(1).

<sup>14</sup> In *Simoy*, Judge Morgan stated in concurrence:

Little mathematical sophistication is required to appreciate the profound impact in this case of reducing the court-martial panel size. To use a simple metaphor – if appellant’s only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of 52 playing cards, would he prefer to be dealt 13 cards, or 8? . . . Each challenge of an individual ‘spots’ the prosecution a vote, and becomes in essence, a vote for death.

*Simoy*, 46 M.J. at 625-26.

the potential group dynamics that would form with particular combinations of members, were subordinate to the overarching goal of filling the panel.<sup>15</sup> This strategy is contrary to prevailing professional norms in civilian courts, but it may make sense in the military context where counsel receive only one peremptory challenge. R.C.M. 912(g)(1).

In civilian capital cases, by contrast, defense counsel are expected to do a searching inquiry of potential jurors to “life-qualify” a jury, meaning they should “conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, . . . [or] unwilling to consider mitigating evidence” in order to strike them from the panel. *See ABA Guideline 10.10.2*, commentary, 31 Hofstra L. Rev. at 1052-53.<sup>16</sup> Counsel additionally “should also develop a strategy

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<sup>15</sup> *See* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 Mil. L. Rev. 1, 36 (1998) (“A defense counsel who is attempting to obtain a large panel will not engage in voir dire, with the exception of questions designed to rehabilitate any member who appears vulnerable to a challenge for cause by either the government or the defense. After all, it does the defense little good to discover that a member is biased against the accused. An accused whose primary goal is to avoid the death penalty may choose to leave biased members on the panel rather than reduce the panel size by removing them even if only a minuscule chance exists that they could overcome their bias and vote for the defense.”).

<sup>16</sup> “[T]he starkest failures of capital voir dire are the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty, and the failure to uncover jurors who are unable to consider particular mitigating circumstances.” *ABA Guideline 10.10.2*, commentary, 31 Hofstra L. Rev. at 1050.

for rehabilitating those prospective jurors who have indicated opposition to the death penalty.” *Id.*

It is imperative that counsel be trained to identify prospective jurors during voir dire who would automatically impose the death penalty following a murder conviction without meaningfully weighing the aggravating and mitigating evidence as they are required to do. See *ABA Guideline 10.10.2.B.*, 31 Hofstra L. Rev. at 1049.<sup>17</sup> The Supreme Court has recognized the importance of this function of capital voir dire. See *Morgan*, 504 U.S. at 735-36 (“A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under [the] misconception” that a defendant convicted of a capital crime ought to be sentenced to death).<sup>18</sup>

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<sup>17</sup> The ABA Guidelines instruct that counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; and (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence. *ABA Guideline 10.10.2.B.*, 31 Hofstra L. Rev. at 1049.

<sup>18</sup> The *Morgan* Court stated, in full:

A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception [that a person convicted of a death-eligible crime ought to be put to death]. The risk that such jurors may have been empaneled in this case and infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized. Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

*Morgan*, 504 U.S. at 735-36 (brackets in original) (internal quotation marks omitted) (citations omitted).

Quite frankly, the incentives in the civilian and military systems are entirely at odds with respect to capital voir dire. The emphasis in civilian capital cases is to have counsel engage in a searching inquiry to “life-qualify” a jury. In the armed forces and the instant case, the incentive is to conduct a superficial voir dire to avoid elucidating statements that could prompt a causal challenge, in order to have the largest panel possible.<sup>19</sup> This does not afford accused servicemembers the most effective capital defense.

In summary, the armed forces have no guidelines regarding the qualifications, training, or performance required of capital defense counsel. Such omission leaves the standard amorphous and, significantly, deprives capital defense counsel of a standard against which to measure their performance. This opens the door to ineffective assistance of counsel claims, real or perceived. In failing to specify what quality of performance is expected, counsel are gratuitously ex-

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<sup>19</sup> For example, in this case, defense counsels’ strategy prompted them to include in the panel individuals who may have exhibited a bias in Appellant’s case. Defense counsel had the statutory right to have one panel member excused because he had served in the same unit as Appellant. Although the military judge brought this to defense counsels’ attention and informed them of their statutory right of removal, defense counsel demurred and kept this member on the panel. Another panel member expressed views that Muslims are “misguided, easily influenced, [and] too rigid.” On voir dire, when questioned about such views, he stated his belief that Islam is a “passionate religion” and sometimes Muslims can’t “think clearly and . . . take certain views that are selfish . . . . They interpret it the way they want to interpret certain things for their own self interests.” After perfunctory questioning, wherein the member stated that his views of Islam would not impact his impartiality, defense counsel promptly moved to a different topic, and did not raise a causal challenge or use their lone peremptory challenge to strike this member from the panel.



posed to claims of ineffective assistance of counsel. Confidence in the outcome of the trial on guilt or on sentencing may also diminish, as might confidence that the outcome will be upheld on appeal. This is neither good for the accused, counsel, the victims of an offense, the military, or the public credibility of the military justice system.

As is often said, death is different. It is different in kind. It is different in finality. Death is also different because the standard for ineffective assistance of counsel is hardest to find and pinpoint. When we apply the *Strickland* standard to determine what “prevailing professional norms” are in the military, do we look to the professional norms of counsel writ large? Or capital defense counsel specifically? Do we draw our standard for professional norms from military defense counsel? Or civilian? Given the lack of specific “prevailing professional norms,” we are left to evaluate counsels’ performance on the basis of this Court’s at best intermittent case law on the subject, and Supreme Court case law, which is directed towards state law and habeas review. This strikes me as unfair to the accused, unfair to defense counsel, and potentially unfair to the victims and their families who are left in doubt about the ultimate outcome of a case until all appeals are final.

## II. Trial Defense Counsel Were Ineffective in the Penalty Phase of Appellant’s Court-Martial

“[I]ndulg[ing] a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” in my view, trial defense counsels’ performance during the penalty phase of Appellant’s court-martial was not “reasonable[] under prevailing professional norms.” *Strickland*, 466 U.S. at 688-89. As discussed further below, Appellant has identified two “acts or omissions of counsel” that were

not “the result of reasonable professional judgment.” *Id.* at 690. First, defense counsel submitted into evidence the entirety of Appellant’s diary, including particularly damaging passages relaying Appellant’s hatred of Caucasians and the United States, without redactions or sufficient contextualization. Second, defense counsel were deficient in the witness presentation at the penalty phase of Appellant’s court-martial by omitting any testimony that would humanize Appellant and demonstrate that his life has worth.

Counsel are ordinarily afforded great deference when making reasonable tactical decisions. Nevertheless, I conclude, as this Court concluded in *Murphy*, that although “[w]e have no quarrel . . . regarding the obligation of an appellate court not to second-guess tactical judgments[, h]ere, . . . counsels’ lack of training and experience contributed to questionable tactical judgments, leading us to the ultimate conclusion that there are no tactical decisions to second-guess.” *Murphy*, 50 M.J. at 13.

#### A. Appellant’s Diary

##### a. Admission of Appellant’s Entire Diary

During the mitigation phase of Appellant’s court-martial, defense counsel submitted into evidence the entirety of Appellant’s personal diary, dating from March 1990 to March 2003. The diary consists of 313 handwritten pages. The diary was given to the members to take home to read without explanation and with three lines of general instruction from the military judge. Along with the diary, members also received notes by defense counsels’ mitigation specialist, Ms. Deborah Grey, summarizing the diary for defense counsels’ case preparation, and an FBI analysis of the diary.

In their post-appeal affidavit, counsel give two reasons supporting their decision to submit the diary in its entirety: first, their belief that “[t]he government had, in its merits case, already admitted the most damaging aspects of [Sergeant] SGT Akbar’s diary,” so no more harm could be done; and, second, that defense expert Dr. Woods believed that “SGT Akbar’s diary documented a progressive deterioration into a psychotic state,” and the diary “read in total proved SGT Akbar had mental illness.”

Under *Strickland*, appellate courts are obliged to give heavy deference to counsel’s professional judgment because “*Strickland* insulates [tactical decisions] from Monday-morning quarterbacking.” *Hittson v. GDCP Warden*, 759 F.3d 1210, 1248 (11th Cir. 2014) *cert. denied sub nom. Hittson v. Chatman*, 135 S.Ct. 2126 (2015). Nevertheless, “[w]hile the point of the Sixth Amendment is not to allow Monday-morning quarterbacking of defense counsel’s strategic decisions, a lawyer cannot make a protected strategic decision without investigating the potential bases for it.” *Couch v. Booker*, 632 F.3d 241, 246 (6th Cir. 2011). Here, counsel did not reasonably investigate the basis of their decisions, and in the context of this case, introducing a 313-page diary without further investigation cannot be viewed as a reasonable tactical decision.

A review of the diary illustrates why expert consultation was necessary to fully and properly gauge the impact the diary would have on the panel. It also illustrates why counsels’ reasoning that the most damaging aspects of the diary had already been admitted is unreasonable. The Government admitted two diary entries, totaling less than three pages, as Prosecution Exhibit 176a. The most damaging portion of the first entry, from February 2, 2003, states:

I may not have killed any Muslims but being in the Army is the same thing. I may have to make a choice very soon about who to kill. If we go to war with Iraq, . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies.

The second entry, from February 4, 2003, contains the following remarks:

as soon as I am in Iraq I am going to try to kill as many of them as possible. If I am wrong then may Allah, The Great, stop me. I will not be able to live with myself if I go there and help these sick people kill Muslims.

Although these excerpts are damaging to Appellant's case, they are limited temporally, and in subject matter. The entirety of the diary contains many more damaging passages.

For example, the diary is rife with references to Appellant's hatred of Caucasians, extending back over a decade prior to the attack. In an entry from July 19, 1991, Appellant references "what the Nation of Islam taught me: to hate Caucasians . . . sleep is lost thinking about the destruction of Caucasians and how to carry it out." It is troubling that the diary also includes passages that could be interpreted to portend the crimes he committed, including an April 9, 1992, entry where Appellant writes: "I made a promise that if I was not able to achieve success because of some caucasian [sic] I would kill as many of them as possible. . . . if I am denied anything given to me by almighty God, Allah, I will kill as many cacasions [sic] as possible." In another entry, from March 3, 1996, Appellant writes:

Destroying America was my plan as a child, juvenile [sic] and freshman in college. Some

where [sic] along the way it got side tracked [sic] by all of the academic problems that came my way. My life will not be complete if America is not destroyed. It is my biggest goal.

Appellant writes in his final diary entry, dated March 1, 2003, approximately three weeks before the attack, “May Allah, the Often Forgiving, forgive me for what I am about to do.”

The diary also contains passages where Appellant disparages the military, and self-identifies as “anti-government,” including a passage from January 17, 2000, where he writes: “[b]eing in the military . . . is horrible to me. It is as if all of my beliefs mean nothing to me. . . . My feeling is that it is a betrayal of everything that a Muslim is supposed to stand for.” Appellant also references, on multiple occasions, his intent to make “jihad.” He writes in an October 2, 1999, entry: “As far as being in the Army perhaps it will be useful if there is jihad in my future.”

Appellant’s diary also related an incident where Appellant had a dispute with a sergeant:

I went to Grandpa’s Pawn Shop and bought three weapons and enough ammo to reload each of them five times. I came to work that Tuesday, we had Monday off, with all three weapons fully loaded. I had decided to just attack [the sergeant] as soon as I saw him. But he was at sick call. Right after PT formation the 1st Sgt. called me into his office. First he told me that the people at Grandpa’s called CID and said they were worried that I might be a terrorist.

None of these entries were introduced by the Government. Moreover, these passages all preceded the February 2003 entries the Government submitted into evidence.

The admission of these entries is significant for at least four reasons. First, far from showing progressive mental deterioration, the passages show a consistent thread of anti-Caucasian, anti-American, violent tendencies that extend from Appellant's young adulthood to the time of the attack. The passages in the diary indicate that Appellant harbored antipathy towards the United States and the armed forces for years, and may have been planning an attack well in advance of March 23, 2003. Specifically, with no medical context in which to place the final diary entry, it is hard to read this passage as anything other than evidence of premeditation from a depraved man who will kill and kill again if not stopped.<sup>20</sup> Second, they tend to support the view that Appellant's attack was not an anomaly, but the manifestation of years of hatred directed at Caucasians, the military, and, in one instance, a fellow sergeant. Third, quite simply, these passages quell any possible sympathy the members might have garnered for Appellant based on

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<sup>20</sup> I disagree with the majority opinion's contention that premeditation was not at issue in the sentencing phase of Appellant's court-martial as it was already proved beyond a reasonable doubt in the merits phase, *Akbar*, \_\_ M.J. at \_\_ (53). In arriving at a sentence, the members were instructed that they may "consider any matter in extenuation and mitigation" and "may also consider mercy, sympathy, and sentiment in deciding . . . what sentence to impose." Surely, a panel member would be less inclined to feel mercy or sympathy towards Appellant if he or she believed he had premeditated the attack over the span of months or even years, rather than in the days or hours leading up to the attack he ultimately carried out. In addition, evidence of lengthy premeditation would undercut defense counsels' theory that the attack was the result of the onset of mental illness. Consequently, the degree of premeditation Appellant exhibited is of consequence in the sentencing phase of trial, even though this element of the crime was already proved in the merits phase.

his life story. Fourth, submitting the entire diary into evidence gave the Government additional fodder to bolster its case, which trial counsel fully exploited in closing arguments.

All of these points are illustrated with reference to the Government's closing arguments. The Government used specific passages from the diary, on multiple occasions, to argue that Appellant deserved the death penalty. The Government argued that Appellant should be sentenced to death "to protect society from his violence and his hatred," a short time later showing the panel slides with five passages from Appellant's diary. Trial counsel later argued:

The defense introduced [Appellant's] complete diary, several hundred pages filled with repeated threats of violence and murder. When did the thoughts of violence and murder emerge? Is it only in the last four entries? Is it after the Army is being prepared to be sent into harm's way? Was it even after 9/11? No, it's not. These are Sergeant Akbar's own words, dated years before he even joined the Army, back before there was any mention of soldier talk. . . . Look back in his diary, look back at critical dates.

Trial counsel repeated quotations from Appellant's diary, remarking, "Look at his diary. It is full of rage, it is full of hate, and it was all there before he was ever notified he was deploying." What defense counsel introduced as mitigation evidence was successfully converted to powerful aggravating evidence by the Government. For these reasons, defense counsels' judgment that the entirety of Appellant's diary was less damaging to Appellant's mitigation case than the two entries Government trial counsel admitted is unreasonable. It does not account for the impact of a consistent and enduring theme of hatred towards

Caucasians, and, later, towards the United States armed forces. Nor was it tactically reasonable to admit the diary without explanation. This allowed members to set the context themselves, or have the Government do so in closing arguments. A reasonable investigation into the wisdom of submitting the entire diary might well have averted this problem.

b. Absence of Prior Investigation and Consultation Regarding the Diary

As noted above, in their post-trial affidavits, defense counsel defend their decision to submit the diary to the members without medical explanation on two related grounds. First, they argue that Dr. Woods's assessment of the diary was that it "documented a progressive deterioration into psychotic state," which supported their decision to offer the complete diary into evidence. Second, counsel argue that the summary created by their mitigation specialist, Ms. Deborah Grey, and the FBI's analysis of the diary otherwise placed the diary in the intended medical context.

There are a number of problems with this explanation that undercut the decision to admit the diary. The underlying issue is that defense counsels' decision was not supported by a reasonable investigation because they failed to seek advice before submitting the diary into evidence. First, while defense counsel invoke Dr. Woods's expertise in support of offering the diary into evidence, in actuality they did not consult with Dr. Woods before doing so. Dr. Woods states in his post-trial declaration that "[w]hile the diary is powerful evidence of schizophrenia, it is only so when viewed . . . by a trained practitioner." According to Dr. Woods, it "was a mistake" to admit the diary into evidence and he "never advised or would have advised trial defense counsel to admit the diary



as they did” because, “[t]o a lay person the diary is damning evidence, standing alone, . . . and the nature of [Appellant]’s diary contained explosive material.” Ms. Grey similarly opined that submitting into evidence “the diary itself without any context would be a horrible mistake from the standpoint of mitigation strategy. . . . the diary, without context, is potentially far more damaging than mitigating.” She stated that she “would have never advised introduction of . . . [Appellant]’s diary without providing context through testimony.”<sup>21</sup>

Second, defense counsel did not consult any experts to determine whether Ms. Grey’s notes or the FBI analysis sufficiently contextualized Appellant’s diary. Upon my review, these documents do not adequately explain these damning passages. Ms. Grey stated in a post-trial affidavit that the notes she created summarizing the diary’s contents were intended for counsels’ pretrial preparations. She cautioned that these summaries “are helpful in preparing for trial, but they are not a device intended to introduce evidence,” repeating that these notes “were not prepared for trial.” She also believed that although interview summaries might be used “[i]f for some reason a *vital* witness is inappropriate or unavailable to testify,” she “cannot think of an instance where [she] would recommend the introduction of an interview sum-

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<sup>21</sup> Trial defense counsel stated in their post-trial affidavit that they recalled speaking with Ms. Grey regarding admission of documentary evidence she authored “in lieu of her live testimony” and that she did not have “any strong opinions regarding ‘the wisdom of this tactic.’” Defense counsel do not mention informing or consulting Ms. Grey on their decision to admit Appellant’s entire diary into evidence without supporting testimony. As evidenced by the post-trial affidavits, both Dr. Woods and Ms. Grey would have opposed submission of Appellant’s entire diary.

mary in isolation to a jury.” She stated that “presenting [her] summary of the diary . . . would be a horrible mistake.”<sup>22</sup> Ms. Therese Scarlet Nerad, another mitigation specialist employed by defense counsel, echoed this sentiment, opining post-trial that Ms. Grey’s notes were “incomplete work product[s]” and “should never have been admitted in that form” as it “would do serious disservice to a jury.”

Ms. Grey’s work product is not a polished, concise explanation of the implications of Appellant’s diary. Rather, it consists of a factual summary of Appellant’s diary -- not an analysis. In some portions, it is apparent that these notes are in draft form. To illustrate, at one point, Ms. Grey writes in response to a passage, “Again, lack of problem solving . . . ? grandiosity?” In some instances, Ms. Grey’s notes, rather than relating how Appellant’s more hateful passages support a narrative of mental illness, merely draws attention to these passages. For example, the diary contains references to Appellant’s indoctrination in the tenets of the Nation of Islam, which defense counsel allegedly did not wish to introduce to the members. Ms. Grey’s notation next to one such passage reads: “Hatred of Caucasians -- stemming from exposure to Nation of Islam,” with nothing more. Her notes point out in other places, “Childhood goal of de-

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<sup>22</sup> As noted, although defense counsel state in their post-trial affidavit that Ms. Grey did not have “any strong opinions” regarding admitting documentary evidence, it is not clear that they consulted her specifically about presenting her interview notes with the purpose of contextualizing Appellant’s entire diary. As it appears from Ms. Grey’s uncontradicted statement that she was unaware defense counsel intended to submit the diary, she could not have realized that defense counsel intended to use her notes for this purpose. Her post-trial affidavit clarifies that she would not have endorsed use of her notes under these circumstances.

stroying America,” and “Kill as many Caucasians as possible if they block his success in helping his people: prays Allah will stop him if he is wrong.” In short, her notes do not communicate that the diary is indicative of long-standing mental illness.

The FBI analysis, similarly, fails to relate back to defense counsels’ mitigation case theme: that Appellant was mentally ill. The report does not, for example, explain that Appellant’s feelings are symptomatic of mental illness. Nor does it otherwise contextualize the damaging, anti-American, prejudicial passages in the diary. For example, the summary condenses the passages where Appellant’s entries exhibit “anger and . . . increasingly verbalize[] a desire to kill some of his comrades,” without further analysis. Although the report’s concluding paragraphs do state that Appellant’s “diary reflects years of a lonely struggle,” they also relate that: “[a]lthough no mention is made in his diary of a *specific* plan to kill his military ‘buddies,’ given what has been written, his actions come as no surprise.” Significantly, the conclusion ends with this statement: “None of this excuses what Akbar has done. Based on his writings and pleas to Allah, Akbar clearly knew right from wrong. He states, ‘I have nothing left to lose. I don’t even have any pride left.’” Although the FBI assessment presents a more cohesive analysis of the diary than Ms. Grey’s notes, it still does not place damaging diary entries in the larger context of defense counsels’ theme of mental illness. Consequently, these notes did not support defense counsels’ reasoning for submitting the diary in the first place: to illustrate Appellant’s latent and emerging mental illness.

More importantly, submitting these documents along with Appellant’s entire diary does not alleviate defense counsels’ obligation to first consult with ex-

perts before admitting the diary. Defense counsel ought to have sought advice on this issue, not merely inferred that their experts would support their decision.

Defense counsel are not required to consult an expert every time they seek to submit documentary evidence. Such a standard would be absurd. They may generally rely on their own judgment regarding the submission of exhibits. However, *Strickland* presents a fact- and case-specific test. See *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (noting that *Strickland* “of necessity requires a case-by-case examination of the evidence,” as each mitigation case is unique (quoting *Wright v. West*, 505 U.S. 277, 30 (1992)); *Rompilla v. Beard*, 545 U.S. 374, 394 (2005) (O’Connor, J., concurring) (recognizing the Supreme Court’s “longstanding case-by-case approach to determining whether an attorney’s performance was unconstitutionally deficient under *Strickland v. Washington*.”)). And this is no ordinary piece of evidence. The diary was used in support of Appellant’s lack of mental responsibility defense -- a matter that is heavily influenced by the input and advice of experts. Just as competent defense counsel are expected to consult an expert before mounting a mental illness defense,<sup>23</sup> so, too, should they seek expert advice before submitting critical evidence in support of such a defense.<sup>24</sup>

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<sup>23</sup> See, e.g., *Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005) (determining counsel was ineffective for relying on defendant’s own testimony to support “heat of passion or diminished capacity” defense rather than “investigat[ing], discover[ing], and present[ing] mental health evidence”).

<sup>24</sup> See *Duncan v. Ornoski*, 528 F.3d 1222, 1235-36 (9th Cir. 2008) (noting that “[i]t is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field” and holding counsel’s performance deficient

Counsel here were not in a position to assume that their experts would support submission of the entire diary based on general “discussions with Dr. Woods,” rather than meaningful and direct consultation. In a similar case, the United States District Court for the Eastern District of New York concluded that defense counsel was deficient for submitting into evidence “a complete, unredacted” copy of a medical report detailing a child’s account of her sexual abuse by the defendant. *Usher v. Ercole*, 710 F.Supp. 2d 287, 305-06 (E.D.N.Y. 2010). The court found that even if some of the evidence in the report was admissible, defense counsel was not “justified in placing a complete and unredacted copy of the . . . Report before the jury,” calling its contents “highly damaging,” and noting that “[t]he extraneous details in [the report] are disturbing and inflammatory.” *Id.* at 306-07. The court found that “[t]hese and other contextual details . . . [describe a] frankly harrowing narrative of chronic abuse, with a suggestion of continuing danger.” *Id.* at 307. On this basis, the district court concluded that defense counsel’s decision to present the report fell below the standard of reasonable competence expected of counsel. *Id.* at 307-09.

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for failing to consult an expert before trial because counsel “did not have the personal expertise . . . to make strategic decisions about how to handle . . . evidence on his own and he certainly was not qualified to undermine the State’s case by simply cross-examining its experts without obtaining expert assistance himself.”); *Bell v. Miller*, 500 F.3d 149, 156 (2d Cir. 2007) (concluding that counsel’s failure to consult expert before cross-examining sole eyewitness who had suffered from “trauma, blood loss and sedation” was deficient performance under *Strickland*); *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) (holding that counsel was deficient for “fail[ing] to consult or call an expert on the psychology of child sexual abuse, or to educate himself sufficiently on the scientific issues.”).

Similar to *Usher*, here, defense counsels' decision to present the diary to the members, unvarnished and unredacted, was not the result of a reasonable tactical decision. Not only because defense counsel failed to properly investigate the basis of their decision, but also because the decision itself was unreasonable.

The diary is problematic for two reasons. First, Appellant's diary was a key component in the defense's theory of Appellant's mental illness. Second, the diary contained inflammatory entries recounting Appellant's hatred for Caucasians, meaning it was potentially prejudicial to Appellant's case. Cognizant of these factors, defense counsels' lack of investigation into whether, or how, to present the diary was error.

Accordingly, trial defense counsel were deficient in deciding to submit into evidence Appellant's entire diary without adequate investigation.

B. Omitting "Humanizing" Testimony From Appellant's Family and Friends

a. The Importance of "Humanizing" Testimony

Although not required per se, testimony by lay mitigation witnesses humanizing an accused person is significant. In the context of a death penalty case involving a heinous offense, it may be invaluable, as well as a defendant's best hope for life. The Supreme Court, for example, has repeatedly emphasized "the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections." *See Strickland*, 466 U.S. at 718 (Marshall, J., dissenting); *see also Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held

by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable”); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (presentation of a defendant’s life history in a capital case is “part of the process of inflicting the penalty of death” (internal quotation marks omitted)). The Court has noted that a defendant’s “troubled history . . . [is] relevant to assessing a defendant’s moral culpability.” *Porter v. McCollum*, 558 U.S. 30, 41 (2009).

The ABA Guidelines also recognize value in such testimony. Guideline 10.11 states that “it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.” *ABA Guideline* 10.11, commentary, 31 Hofstra L. Rev. at 1061. To that end, the ABA Guidelines encourage counsel to consider presenting, in the penalty phase of the court-martial, “[w]itnesses familiar with and evidence relating to the client’s life and development, from conception to the time of sentencing, that . . . would present positive aspects of the client’s life, or would otherwise support a sentence less than death,” as well as “witnesses who can testify about the adverse impact of the client’s execution on the client’s family and loved ones.” *Id.* at 1055-56. This is so because “[f]amily members and friends can provide vivid first-hand accounts of the poverty and abuse that characterizes the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.” *Id.* at 1062.

Moreover, under the ABA Guidelines, “[a] capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death.” *ABA Guidelines*, Introduction, 31 Hofstra L. Rev. at 927. “This Eighth Amendment right . . . does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those compassionate or mitigating factors stemming from the diverse frailties of humankind.” *Id.* (internal quotation marks omitted) (citation omitted).

b. The Absence of “Humanizing” Testimony in Appellant’s Mitigation Case

Counsel in this case were not oblivious to the value of such humanizing testimony. Multiple mitigation specialists employed by defense counsel emphasized the importance of mounting a detailed social history through lay witnesses in Appellant’s mitigation case.<sup>25</sup> Yet counsel did not call any witnesses that

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<sup>25</sup> See Grey Declaration (mitigation specialist) (“[T]he best way to present mitigation evidence, the evidence of the client’s life history, is through lay witnesses, those individuals who may be family, friends, teachers, and treating professionals.”); Nerad Declaration (mitigation specialist) (advising, in the context of a mitigation presentation, that “it is unacceptable to substitute lay witnesses” with expert witnesses, because expert witnesses “should be used only in conjunction with lay witnesses who lay the foundation with their information.”); Rogers Declaration (mitigation specialist) (“Understanding and appreciating the relevance of Sergeant Akbar’s unusual life and extremely strange upbringing would be nearly impossible without detailed accounts and explanation” from witnesses); Dunn Declaration (experienced capital litigator) (“I instructed counsel that SGT Akbar’s story must include both the ‘nature’ and ‘nurture’ aspects of his life which . . . provide a means of understanding his



humanized Appellant. During the mitigation phase of the court-martial, defense counsel called two servicemembers as well as one civilian mitigation witness: Daniel Duncan, Appellant's high school teacher.<sup>26</sup> However, counsel did not call any member of Appellant's family to request that his life be spared, standing instead on a single familial declaration from Appellant's brother.

In their joint post-trial affidavits, counsel reasoned that they did not wish to call Appellant's family members as witnesses for fear that their testimony could open the door to the "incident of 30 March 2005" where Appellant "allegedly stabbed a military policeman in the neck with a pair of 12-inch-scissors" while in pretrial custody.<sup>27</sup> Defense counsel ex-

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actions on the day of the crimes" and that they should present a "multigenerational life history" of Appellant).

<sup>26</sup> As explained below, Mr. Duncan's testimony did little to humanize Appellant, in part because Mr. Duncan had only a vague recollection of Appellant as a student. And no other live witness testified to facts that would humanize Appellant. During the merits phase of the trial, defense counsel called two experts, Dr. Woods and Dr. Tuton, as well as Appellant's college roommate, Paul Tupaz. As explained further below, *see infra*, Part C, this testimony was clinical and dispassionate and did not humanize Appellant. Certainly, in omitting humanizing testimony from willing family members, counsel did not "at every stage of the case . . . take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." *ABA Guideline* 10.11, 31 *Hofstra L. Rev.* at 1058.

<sup>27</sup> Strikingly, given defense counsel's Herculean efforts to keep out any mention of the "scissor attack" of March 30, 2005, defense counsel did not challenge any of the panel members who had stated on voir dire that they were, in some manner, aware that the attack had occurred. Out of fifteen panel members, ten stated during voir dire that they had heard of such an attack either from the local news, or from workplace chatter. Of these

plained that “[a]lthough the defense motion to preclude the government from referencing the incident during the case was successful, it was a ruling that was made without prejudice for the government to revisit the decision at a later date.” Defense counsel stated that after the alleged attack they “re-interviewed each of [their] civilian mitigation witnesses” and chose not to call any of them because of the “inability of the witness[es] to limit their testimony in order to avoid opening the door to the 30 March 2005 incident on rebuttal.”<sup>28</sup> (JA 2350).

Certainly, as a general matter, defense counsel have discretion on whether or not to call witnesses to testify. That is not the issue. The real issue is that counsels’ reasoning was decided on the basis of insufficient inquiry. “[A] reviewing court must consider

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ten, three were never asked if they could put this incident out of their minds and decide the case solely based on the evidence. Four panel members stated that they were aware from news reports that a “scuffle” had occurred involving Appellant and a military police officer. Another panel member stated he heard that Appellant had “overpowered” a guard. Yet, despite defense counsel’s insistence that this incident never be mentioned during the court-martial, defense counsel did not challenge a single member who had heard of the event, not even the panel member who *both* expressed a slanted view of Muslims and Islam and had heard of the alleged scissor attack.

<sup>28</sup> I note that it is the majority opinion, not defense counsel, which reasons that family members’ testimony on the impact of Appellant’s death would have alienated the members. *Akbar*, \_\_ M.J. at \_\_ (67). Defense counsel did not make this claim in their post-trial affidavits. Indeed, they would not, as up until the night before closing arguments, defense counsel sought to admit the testimony of Appellant’s parents as mitigating evidence. Defense counsel did not believe that testimony from family members would be fruitless or counterproductive of its own accord, only because it may open the door to the March 30, 2005 attack.

the reasonableness of the investigation said to support that strategy.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (citing *Strickland*, 466 U.S. at 691). Having reviewed counsels’ strategy, it is apparent that, similar to the decision to submit Appellant’s diary, counsels’ decision was not sufficiently supported by an adequate investigation, and therefore is not entitled to deference.

We can infer that counsel valued humanizing testimony because defense counsel intended to call Appellant’s family members to testify on his behalf during the mitigation phase of Appellant’s court-martial.<sup>29</sup> Defense counsels’ witness list for the sentencing phase of the court-martial included Appel-

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<sup>29</sup> Further proof that counsel valued humanizing testimony can be gleaned from defense counsels’ correspondences after the merits phase of the court-martial, where counsel seemed to acknowledge the shortcomings of their mental illness defense. In an e-mail to Dr. Walker, an expert whom defense counsel had retained in preparation for trial, LTC Brookhart requested Dr. Walker’s help, explaining that “[o]ur expert in the merits case, Dr. Woods, did ok, but obviously, the panel rejected his theory.” We can deduce from this e-mail that, mid-trial, counsel doubted the value of emphasizing the mental illness theme that Dr. Woods had developed through his differential diagnosis in the merits phase of the trial. This should have prompted a renewed focus on presenting humanizing testimony. Government appellate counsel argued in its brief before this Court that calling family members as mitigation witnesses was unnecessary because none would have contributed to defense counsels’ mental illness theme in both the merits and penalty phase of the trial. This argument is not supported by defense counsels’ post-trial affidavits, nor is it consistent with their actions at trial, wherein they appeared ready to call family members as mitigation witnesses up to the night before closing arguments. Consequently, this belief that defense counsel eschewed humanizing testimony is merely post-hoc argument that should not factor into an objective analysis of the reasonableness of defense counsels’ strategy at the time of trial.

lant's high school classmate, Regina Weatherford; Appellant's brother, Musa John Akbar; and Appellant's parents, Quran Bilal and John Akbar. Indeed, up until the night before closing arguments were scheduled, MAJ Coombs implied that he would be calling one or more of these mitigation witnesses. When the military judge asked MAJ Coombs: "just to get a handle on what we might expect tomorrow; two -- maybe three witnesses, so the defense sentencing case should close by 1000?," MAJ Coombs responded, "I would think so, sir. Yes." Yet, the next day, defense counsel called no additional witnesses, and that morning the parties delivered their closing arguments.<sup>30</sup> Defense counsels' actions demonstrate that despite the complication the alleged scissor attack posed, they nevertheless planned on calling civilian mitigation witnesses for almost four weeks following the incident.

After the alleged attack, counsel had almost a month to, either, prepare their mitigation witnesses to avoid testimony that would "open the door" to the attack, or interview replacement witnesses. It appears that counsel did neither. Rather, counsel stayed the course, representing that they would call Appellant's family as mitigation witnesses until the eleventh hour, even though defense counsel now claim, post-trial, that they did not wish to call these witnesses at all after the alleged scissor attack had occurred.<sup>31</sup>

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<sup>30</sup> When questioned, MAJ Coombs informed the military judge that he had "sound tactical reasons not to" call further witnesses. Of course, this Court should not defer to counsel's own assessment that their tactical reasoning was sound; this Court must undergo this analysis objectively.

<sup>31</sup> Defense counsel did present statements in the mitigation phase of the court-martial from two potential mitigation wit-

More importantly, despite anticipating the limitations of their current mitigation witnesses, defense counsel did not seek out replacement witnesses. Upon determining that several mitigation witnesses scheduled to testify would prove problematic, the reasonable next step would have been for defense counsel to interview additional potential witnesses beyond Appellant's mother, father, brother, and childhood friend. There were other family members known to defense counsel who would have been willing to testify on Appellant's behalf: Appellant's sisters Sultana Bilal, and Mashiyat Akbar; Appellant's aunt, Dyan Rankins; Appellant's cousins, Starr Wilson, Merthine Vines, Catherine Brown, and Jill Brown; Appellant's high school friend, Ruthie Avina; and Appellant's college landlord, Marianne Springer. Yet counsel did not seek out these witnesses to see if they could testify without opening the door to the alleged attack.<sup>32</sup>

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nesses: Appellant's brother, Musa John Akbar, and Appellant's high school classmate Regina Weatherford. These documents were of limited value in humanizing Appellant. For example, Ms. Weatherford's statement, offered into evidence by defense counsel by way of a question-and-answer form, relates that Appellant and Ms. Weatherford were "not really" friends but "acquaintances with a love hate relationship," and implied that Appellant was sexist, writing, "Hasan had very specific viewpoints of what a woman should or should not do. I believe it was part of his religious beliefs." Mr. Musa John Akbar's statement, while more personalized, was also presented in the form of a standardized question-and-answer sheet, and lacked the personal value that live witness testimony would have provided.

<sup>32</sup> Three federal circuits have recognized that counsel are not under an obligation to interview every witness who is willing to testify. *See Magee v. United States*, 277 F. App'x 598, 602 (7th Cir. 2008) (unpublished) ("When counsel already knows what a potential witness is going to say and makes a strategic decision not to pursue the testimony, counsel's performance is not defective."); *Parker v. Woodford*, 168 F. App'x 152, 155 (9th Cir. 2006)

Counsel were reasonably expected to further investigate following the alleged attack, yet did not. See *Williams*, 529 U.S. at 396 (finding that counsel's omissions "clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980))). According to the ABA Guidelines, even when tailoring a mitigation case to avoid bringing in otherwise inadmissible aggravating evidence, "[c]ounsel should pursue all appropriate means . . . to ensure that the defense case concerning penalty is constricted as little as possible by this consideration." *ABA Guideline* 10.11, 31 Hofstra L. Rev. at 1056-57. This was not a case where counsel believed that interviewing additional witnesses would be fruitless, *Wiggins*, 539 U.S. at 525, "that character and psychological evidence would be of little help," *Strickland*, 466 U.S. at 699, or that all the witnesses they had investigated were more harmful than helpful to Appellant's case, *Burger v. Kemp*, 483 U.S. 776,

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(unpublished) ("[C]ounsel of course . . . need not interview every possible witness to have performed proficiently. Interviewing witnesses whose testimony is generally known to counsel, for example, may be unnecessary." (citing *Strickland*, 466 U.S. at 691) (internal quotation marks omitted) (citations omitted)); *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir. 1998) ("The Sixth Amendment, however, does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony.") (collecting cases). Nevertheless, under these circumstances, where counsel were specifically concerned about their ability to control a witness on the stand, defense counsels' failure to interview additional witnesses beyond their original witness list was unreasonable.

794-95 (1987).<sup>33</sup> Counsel simply did not interview any other family members or close friends to determine whether they could replace the mitigation witnesses.

Based on counsels' lack of investigation, their omission of humanizing testimony was not a "virtually unchallengeable" decision made "after thorough investigation of law and facts relevant to plausible options." See *Strickland*, 466 U.S. at 690; *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009). Rather, as the *Wiggins* Court noted, "[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Such a decision was unreasonable, even if "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made." *Rompilla*, 545 U.S. at 381 (citing *Strickland*, 466 U.S. at 689).

Defense counsels' incomplete investigation into whether humanizing witnesses could testify without opening the door to aggravating evidence distinguishes the instant case from past Supreme Court cases with seemingly similar factual predicates.

In *Bell v. Cone*, 535 U.S. 685, 700 (2002), the Supreme Court did not hold defense counsel deficient where counsel neglected to "call[] other witnesses from [the defendant's] childhood or days in the Army" out of "fear[] that the prosecution might elicit information about respondent's criminal history." *Id.*

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<sup>33</sup> It does not appear from the post-trial affidavits that counsel concluded that no further investigation into additional humanizing witnesses was necessary following the alleged attack. See *Strickland*, 466 U.S. at 690.

Nevertheless, that case is distinguishable because the defendant in *Bell* did not allege that counsel had conducted an incomplete investigation into the viability of calling other mitigation witnesses, as Appellant does here.<sup>34</sup> *Id.* Similarly, in *Burger*, 483 U.S. at 792-94, the Supreme Court concluded that defense counsel's decision not to call the defendant's mother to testify was reasonable because counsel reasonably believed her testimony might raise "matters of historical fact that would have harmed his client's chances for a life sentence." *Id.* at 792. Like *Bell*, *Burger* is inapposite because the defendant did not claim that defense counsel had failed to interview additional witnesses.. *Id.*<sup>35</sup>

*Wong v. Belmontes*, 558 U.S. 15 (2009), is distinguishable on separate grounds. In that case, similar to the case at hand, defense counsel "built his mitigation strategy around the overriding need to exclude" evidence that the accused had committed a prior bad act, "tailor[ing] his mitigation case carefully to . . .

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<sup>34</sup> In fact, defense counsel had called the accused's mother to testify in the merits portion of the case, but did not recall her during the sentencing case only because she "had not made a good witness at the guilt stage and should not be subjected to further cross-examination." *Bell*, 535 U.S. at 687. Defense counsel in *Bell* was not alleged to have made this tactical decision without a sufficient investigation.

<sup>35</sup> In *Burger* the accused claimed, without success, that defense counsel had failed to conduct a sufficient investigation into Appellant's background by neglecting to interview all available witnesses. Nevertheless, the basis for this claim is distinguishable from Appellant's because in *Burger* the Court found that defense counsel "did interview all potential witnesses who had been called to his attention," *Burger*, 483 U.S. at 794-95, whereas in the instant case, counsel did not re-interview the mitigation witnesses known to them and could provide no reasonable justification for this omission.



exclud[e]” the prejudicial evidence. *Id.* at 18-19. Yet, ultimately, the Supreme Court did not sanction this strategy, instead resolving the case on *Strickland’s* prejudice prong alone. *Id.* at 19. Significantly, the Supreme Court did not repudiate the circuit court’s conclusion that counsel’s “performance was constitutionally deficient,” even though defense counsel had mounted a lengthy mitigation case over the span of two days, “put[ting] on nine witnesses he thought could advance a case for mitigation,” and presenting detailed personal stories about the defendant’s character and life history. *Id.* *Wong*, therefore, is not an endorsement of counsel’s averred strategy in this case of excluding mitigation witnesses to avoid mention of the March 30, 2005, attack.

Ultimately, counsel missed the forest for the trees. Out of concern that they not open the door to inquiry regarding Appellant’s assault of a guard with a pair of scissors, they chose not to offer what may have been Appellant’s best opportunity to avoid a sentence of death. How could a single member of the panel be expected to argue for mercy if Appellant’s own family was seemingly not prepared to do so? Moreover, to the extent the goal was to avoid opening the door to the scissor incident, and thus Appellant’s violent nature and propensity to commit acts of future violence, Appellant’s diary already arguably opened, closed, and sealed that door.

In summary, counsel were aware of the scissor attack for weeks, and intended to present mitigating witnesses to testify. Under such circumstances, proficient counsel would have undergone additional investigation instead of staying the course in light of changed circumstances. Consequently, counsels’ strategy is not entitled to deference because it was based on an incomplete investigation that was unrea-

sonable under the circumstances. Given that defense counsel did not interview other witnesses, counsels' choice to present no witnesses to humanize Appellant was not sound strategy. In the end, it is hard not to ask the question: If Appellant's own family is not prepared to argue for his life, why should an individual member?

C. Prejudice -- Is There a Reasonable Probability That At Least One Juror Would Have Struck a Different Balance?

The second prong of *Strickland* addresses prejudice. 466 U.S. at 692-96. Under this prong, Appellant is not required to show "that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather . . . establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter*, 558 U.S. at 44 (citing *Strickland*, 466 U.S. at 693-94); see also *Rompilla*, 545 U.S. at 393. When looking at deficient performance during capital sentencing, courts specifically examine whether "there is a reasonable probability that at least one juror would have struck a different balance" in sentencing. *Wiggins*, 539 U.S. at 537. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "[W]e reweigh the evidence in aggravation against the totality of available mitigating evidence." *Loving v. United States (Loving III)*, 68 M.J. 1, 7 (C.A.A.F. 2009) (quoting *Wiggins*, 539 U.S. at 534).

To be sure, counsel did present some mitigating evidence. But solely mounting a mitigation case is not enough. As the Supreme Court noted in *Sears v. Upton*, 561 U.S. 945 (2010), "[W]e also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially

reasonable mitigation theory during the penalty phase.” *Id.* at 954-55 (citing *Williams*, 529 U.S. at 398 (remorse and cooperation with police), *Rompilla*, 545 U.S. at 378 (residual doubt), *Porter*, 558 U.S. at 32 (intoxication)).

Contrary to the majority’s declaration that “if there ever was a case where a military court-martial panel would impose the death penalty, this was it,” *Akbar*, \_\_ M.J. at \_\_ (6), a death sentence was not a foregone conclusion in this case. Indeed, both the Supreme Court and this Court have found prejudice in death penalty cases even when the crimes have been abhorrent. *See Rompilla*, 545 U.S. at 377-80 (concluding there was prejudice notwithstanding evidence that defendant had repeatedly stabbed the victim and set him on fire); *Wiggins*, 539 U.S. at 514-19 (concluding there was prejudice despite the fact that the accused drowned a septuagenarian); *Murphy*, 50 M.J. at 12 (concluding there was prejudice even though the case involved “a gory and inexplicable family homicide” where the accused’s “first wife had been killed by repeated blows to the head by . . . a hammer, and then drowned in her bathtub” and her two young children “had been violently killed”). The question presented is not whether Appellant is guilty, but whether he had fair opportunity, with the effective representation of counsel, to argue for life.

Here, when viewing the totality of the mitigating evidence and weighing the mitigating and aggravating factors, there is a reasonable probability that “at least one [member] would have struck a different balance.” *Loving III*, 68 M.J. at 7 (citing *Wiggins*, 539 U.S. at 537). First, the errors in question were harmful to Appellant’s case. Second, the mitigating evidence the defense introduced did not otherwise compensate for the introduction of the diary and absence

of familial support. Third, and most importantly, the members requested an instruction on reconsideration, indicating that the sentence outcome was not inevitable or certain.

Admission of the diary in its entirety was harmful to Appellant's case. As previously noted, there were damaging passages spanning from Appellant's early twenties to the weeks before the attack, a decade later, which defense counsel introduced into evidence. First, the diary undercut defense counsels' theory that the attack was due to Appellant's mental illness. These passages portrayed Appellant as hateful and resentful of Caucasians and the U.S. government. They demonstrated that this hatred was enduring. This does not suggest a recent worsening of an existing mental illness that drove Appellant to attack his fellow soldiers. Second, the diary undercut the argument that the attack was not premeditated. As the FBI report states, when reading the diary, Appellant's "actions [came] as no surprise." Third, the diary sapped any sympathy the members may have had for Appellant.

Similarly, the absence of live lay witnesses to humanize Appellant was prejudicial. As noted, Supreme Court case law and the ABA Guidelines recognize the value of presenting humanizing witness testimony. *See Penry*, 492 U.S. at 319; *Eddings*, 455 U.S. at 112; *Porter*, 558 U.S. at 41; *ABA Guideline* 10.11, 31 Hofstra L. Rev. at 1061. Such testimony was completely absent in this case. The panel was left with the impression that no one could be bothered to come into court and testify on Appellant's behalf, and that no one would be affected by his death, even his family.

Second, the witnesses that defense counsel did call to testify were unhelpful, and even harmful, to Appel-

lant's mitigation case. The only witnesses who testified in support of Appellant's mitigation case were either dispassionate expert witnesses, servicemembers who demonstrated aversion for Appellant, or civilian lay witnesses who were ambivalent about Appellant.<sup>36</sup>

During the merits phase of the court-martial, defense counsel called three witnesses in support of Appellant's merits and mitigation case. Dr. Woods and Dr. Tuton testified in support of the mental illness defense. These witnesses did not know Appellant personally. Their testimony was intended to support a mental health diagnosis and was, as a result, clinical and impersonal. Dr. Woods testified from a clinician's perspective, providing a dispassionate differential diagnosis based on his post-arrest evaluation of Appellant, and therefore did little to humanize Appellant, other than point out that he likely suffers from a mental illness. Dr. Tuton had limited experience with Appellant, having conducted a mental evaluation of him when he was a teenager after speaking with Appellant for only four hours. Such testimony is no substitute for the live testimony of lay witnesses who had, at one point, a strong affinity for Appellant.

Defense counsel also called a civilian lay witness, Mr. Paul Tupaz, Appellant's former roommate, to testify. Mr. Tupaz's testimony, similar to that of the two experts, focused on symptoms of mental illness, such as Appellant's habit of pacing, his short temper, and his habit of keeping lists. This testimony did not speak to any personal positive attributes of Appel-

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<sup>36</sup> The six witnesses comprise the total number of witnesses called in support of Appellant's mitigation case in both the merits and mitigation phases of the trial.

lant's character, only to manifestations of a potential mental ailment.

During the mitigation phase of the trial, defense counsel called two servicemembers who had served with Appellant to testify regarding behaviors Appellant exhibited that were consistent with the theme of mental illness introduced in the merits stage of the court-martial.<sup>37</sup> Yet the behaviors described by these witnesses did not further establish that Appellant was psychologically ill -- only that he was irresponsible and a "subpar" noncommissioned officer (NCO). For example, Captain Storch testified that Appellant had "deficiencies as a team leader," often "exhibiting poor decision-making skills." He testified that Appellant never improved as a platoon leader. He related an incident where Sergeant Akbar was put in charge of cleaning up a company bunker and, after doing so, dumped all the trash, including "unused M.R.E. heaters, some air conditioning units . . . hazardous material[s]" into a creek, where it was eventually discovered. In addition, Sergeant Kumm testified that Appellant was a "below average" NCO and that "[i]t had been an ongoing issue that [Appellant] was not coming up to par." The testimony presented did not support a cohesive and compelling case for Appellant's mental illness. This testimony illustrated that Appellant was disagreeable, and had squandered his potential.

The third witness defense counsel called during the mitigation phase was similarly unhelpful. Daniel Duncan, Appellant's high school teacher, testified that Appellant "was an excellent student" who "ha[d] an aptitude and showed an interest" in learning. Yet

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<sup>37</sup> The testimony of all three witnesses during Appellant's mitigation case lasted less than one hour total.

he also testified that he did not have many interactions with Appellant personally. Mr. Duncan's unfamiliarity with Appellant and endorsement of his "aptitude" are no replacement for humanizing testimony from Appellant's family and close friends on Appellant's character or worth as a person.

Appellant's mitigation case is insubstantial in contrast with the mitigation presentation in *Loving III*, where this Court found no prejudice. 68 M.J. at 2. In *Loving III*, this Court considered the fact that:

[d]uring the sentencing phase, defense counsel presented the testimony of a number of witnesses to address Loving's family and social background. These included: Joe Loving Sr., Loving's father; Lucille Williams, Loving's mother; Ronald Loving, Loving's brother; Wendolyn Black, Loving's sister; Lord Johnson, Loving's childhood boxing coach; and Detective Verna of the Rochester police department. Stipulated testimony was submitted from Harry Loving, Loving's brother, and Kenneth Wilson, Loving's childhood teacher.

*Id.* at 9-10. Appellant's case is lacking even when compared to *United States v. Curtis (Curtis III)*, 46 M.J. 129, 130 (C.A.A.F. 1997), where this Court *did* hold that the defendant was prejudiced by counsel's deficient performance. This Court concluded that "there is a reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense," 46 M.J. at 130, despite the fact that defense counsel made an "effort to present a picture of appellant not only through his mother's own words but also through the words of over 27 individuals who knew appellant from his community in Wichita," comprising forty pages of the court-martial transcript. *United States*

*v. Curtis (Curtis II)*, 44 M.J. at 123, on reconsideration, 46 M.J. 129 (C.A.A.F. 1997). In contrast to both *Loving* and *Curtis*, in the instant case not only were there far fewer character witnesses, but some of these witnesses painted an unflattering portrait of Appellant. It is therefore unconvincing that defense counsel presented some mitigating evidence. In weighing the aggravating and mitigating evidence, it is clear that Appellant was prejudiced by defense counsels' decisions.

Consequently, even considering the aggravating evidence, I disagree with the majority opinion's contention that testimony on the impact of Appellant's death on family members would have made no difference. *Akbar*, \_\_ M.J. at \_\_ (65-67). In my view, some of the mitigating evidence that defense counsel presented was arguably unhelpful, and even harmful to Appellant's mitigation case.

The third and critical piece to the prejudice analysis is that at least one member waived in their decision, as evidenced by the members' request for an opportunity to reconsider the sentence they had initially reached. This indicates that the members' views were not fixed and could have been swayed by an effective mitigation presentation.

The members deliberated for six hours before indicating to the military judge that reconsideration had been proposed. During deliberations, any member may propose a sentence, and the members vote on a sentence by secret written ballot, starting with the least to the most severe, "until a sentence is adopted by the concurrence of the number of members required." See R.C.M. 1006(c), (d)(2), R.C.M. 1009.<sup>38</sup> If

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<sup>38</sup> The members are required to first vote on whether the prosecution has proved an aggravating factor beyond a reasona-



a consensus is reached on a proposed sentence, the members may not vote again unless they do so under the reconsideration procedures established under R.C.M. 1009. *See* R.C.M. 1006(c), (d)(2), R.C.M. 1009. Any member may propose reconsideration, but the members may only reconsider a sentence if a threshold number of members agree to do so. R.C.M. 1009. The military judge instructed the members on reconsideration after they had indicated that reconsideration had been proposed.

It is not apparent in the record what sentence the members had initially reached, namely, whether it was a death sentence, or life without parole. Indeed, the military judge instructed the members not to disclose whether the announced sentence was identical to the original vote, or had changed upon reconsideration. This detail is immaterial.<sup>39</sup> The request for an instruction on reconsideration itself demonstrates waiver, doubt, and room for persuasion. As this Court noted in *United States v. Wilson*:

[w]ithout enumerating [reasons for recasting a ballot], we may state generally that they relate to the desirability of having the theories for both

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ble doubt. R.C.M. 1004(b)(4)(A). The members must then “concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances” before they may vote on a sentence. R.C.M. 100(b)(4)(C).

<sup>39</sup> Based on the trial record, it is possible that, either, the members reached a sentence of life without parole and reconsidered with a view to increasing the sentence, or voted for death and adhered to this position on a second vote. Had the members voted on the death sentence, at least one person would need to vote for reconsideration in order to compel a second vote. This is nevertheless significant because even if one person had misgivings about a death sentence, that individual could have been persuaded by an effective mitigation case and could have precluded a sentence of death by voting for life imprisonment.

the prosecution and defense weighed and debated thoroughly before final judgment, for it cannot be disputed that justice is more likely to be administered if full and free discussions are not automatically cut off just because a vote has been recorded.

18 M.J. 204, 207 (C.M.A. 1984). There is a reasonable probability that in weighing and debating thoroughly the evidence presented, at least one member was swayed to vote for death by the hate-filled passages in Appellant's diary. Conversely, there is a reasonable probability that at least one member would have voted for life after hearing humanizing testimony from Appellant's family. The prejudice prong requires only a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. This reconsideration request supports a reasonable probability that at least one of the members would have voted for life. This, in my view, undermines confidence in the result which, in turn, establishes prejudice. *See id.* at 526-27.

Accordingly, because I would conclude that counsel was deficient and that Appellant was prejudiced by such deficient representation in the mitigation presentation, I would reverse Appellant's sentence on the basis that he received ineffective assistance of counsel.

#### CONCLUSION

There is no doubt that Appellant is guilty of the offenses for which he was charged and convicted. The verdict is just. As previously stated, the question presented is whether Appellant had a fair opportunity with effective representation to argue for life. In my view, he did not.

Capital defense counsel in the military are at a disadvantage. They are expected to perform effectively in surely the most challenging and long-lasting litigation they will face in their legal careers, without the benefit of the exposure, training, guidelines, or experience in capital litigation that is available to federal civilian lawyers. We do military lawyers, and accused servicemembers, a disservice by putting them in this position.

Without the benefit of guidelines or expertise, counsel made two tactical decisions that fell below the professional norms expected of competent counsel. First, and critically, counsel introduced Appellant's vitriolic and expansive diary without appropriate contextualization, and did so without adequate prior investigation to support this decision. Such investigation would have emphatically demonstrated a need to place the diary in medical context, particularly where it was used in support of the defense's theme of mental illness. Without such context, the diary demonstrated that Appellant remained a threat to society and the soldiers around him.

Second, counsel failed to introduce a single witness in court to humanize Appellant and to argue for life. This was done not because counsel thought such testimony was meritless, but to avoid opening the door to rebuttal testimony regarding Appellant's alleged attack on a guard. Yet counsel reached this decision without first interviewing known family members to see if they could testify on Appellant's behalf without opening the door to this aggravating evidence. Defense counsels' decision, therefore, was not supported by reasonable investigation under the circumstances. Moreover, this water was already under the bridge. Appellant was identified as a violent offender based on overwhelming evidence of guilt. And, as the diary

seemed to indicate, Appellant would offend again. Under such conditions it was not a reasonable tactical decision not to call at least one family member or friend to sincerely argue for life.

Finally, weighing the aggravating and mitigating factors, and considering that the members requested an instruction on reconsidering sentences, there is a reasonable probability that at least one juror may have been influenced by an effective presentation of mitigation evidence.

Accordingly, I respectfully dissent and conclude that Appellant did not receive effective assistance of counsel. I would reverse Appellant's sentence, and remand the case for a new hearing on Appellant's sentence.

**APPENDIX B**

UNITED STATES ARMY COURT OF CRIMINAL  
APPEALS

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Before

SIMS, GALLAGHER , and BURTON  
Appellate Military Judges

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UNITED STATES, Appellee

v.

Sergeant HASAN K. AKBAR United States Army,  
Appellant

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ARMY 20050514

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

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For Appellant: Captain E. Patrick Gilman, JA; Cap-  
tain Kristin B. McGrory, JA (argued); Colonel Mark  
Tellitocci, JA; Lieutenant Colonel Jonathan F. Potter,  
JA; Major Bradley M. Voorhees, JA; Major Timothy  
W. Thomas, JA; Captain Shay Stanford, JA (on brief  
& petition for new trial); Colonel Mark Tellitocci, JA;

Lieutenant Colonel Jonathan F. Potter, JA; Major Laura R. Kesler, JA; Captain E. Patrick Gilman, JA; Captain Kristin B. McGrory, JA (on reply brief & supplemental brief); Mr. Louis P. Font, Esquire.

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

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

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13 July 2012

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MEMORANDUM OPINION  
AND  
ACTION ON PETITION FOR NEW TRIAL

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BURTON, Judge:

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

appellant to be put to death. The convening authority approved the adjudged sentence.

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

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

#### FACTUAL BACKGROUND

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

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

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

Appellant left Pad 4 on foot and travelled to Pad 7 where the brigade headquarters was located. Upon arrival at Pad 7, appellant turned off the stand-alone generator, killing all the exterior lights on Pad 7. Appellant then tossed an incendiary grenade into Tent 1 which was occupied by the brigade commander, brigade Command Sergeant Major, and the brigade executive officer. After the explosion in Tent 1, the brigade executive officer, Major (MAJ) KR, exited the tent and was shot by appellant. Appellant next moved to Tent 2, which was occupied by several staff officers, and pulled the pin from a fragmentation gre-



nade and yelled into the tent, "We're under attack." He then tossed the grenade into the tent. Appellant then went to Tent 3, which was occupied by several Captains on the brigade staff, and threw a fragmentation grenade inside. As Captain (CPT) CS exited Tent 3, appellant shot him in the back. As a result of appellant's actions, MAJ GS and CPT CS were killed and fourteen other soldiers were injured. Some of the soldiers suffered permanent injury. Appellant also injured himself.

As the unit leadership was reacting to the attack, setting up security and conducting an accountability check, appellant was identified as being absent from his unit and grenades were reported as missing from HMMWV-A21. After helping set up a secure perimeter around the Tactical Operations Center (TOC) and placing two Kuwaiti interpreters under guard, MAJ KW, the brigade staff intelligence officer, proceeded to the sleeping area to set up a secure perimeter around the tents. Upon noticing soldiers at a bunker outside of the perimeter, MAJ KW approached them in an effort to identify them and prevent accidental fratricide. As MAJ KW approached the first soldier, he asked "Who do we got out here?" and received the response of "Sergeant Akbar." Recognizing the name as belonging to the unaccounted-for soldier, MAJ KW maintained his composure, asked "who else we got out here?" and then moved to restrain appellant by shoving him to the ground and drawing his sidearm. Major KW then identified himself and ordered a nearby soldier to help guard appellant. Major KW then asked appellant if he bombed the tent and appellant confirmed that he was responsible by saying, "Yes." Major KW then directed two non-commissioned officers (NCOs) to guard appellant and went to seek legal advice on how to proceed.

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

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

## LAW AND DISCUSSION

### I. PRESCRIPTION AND PLEADING OF RCM 1004(c) AGGRAVATING FACTORS<sup>1</sup>

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<sup>1</sup> Appellant's allegations of improper delegation, prescription, pleading, investigation, and referral of the aggravating factors

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the United States Supreme Court held that the aggravating factors in Arizona’s capital punishment scheme were the “functional equivalent” of elements which the Fifth and Sixth Amendments required to be determined by a jury. Appellant seeks to extrapolate from this precedent a precept applicable to the military capital punishment scheme: that aggravating factors must, for all purposes, be treated as elements.

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

#### A. Background

The government preferred, *inter alia*, two specifications of murder against appellant, each alleging violations of Article 118(1), UCMJ.<sup>2</sup> The charges against

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were presented in Assignment of Error III and Supplemental Assignment of Error III.

<sup>2</sup> The specifications of Charge II read:

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

SPECIFICATION 2: In that Sergeant Hasan K. Akbar, U.S. Army, did, at or near Camp Pennsylvania, Kuwait, on or about 22 March 2003, with premeditation, murder Major

appellant were investigated pursuant to Article 32, UCMJ and the investigating officer recommended that the charges against appellant be referred to a general court-martial. (App. Ex. 75, p. 2; App. Ex. 75, Article 32 Tr. at 945).

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

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

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

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[GS] by means of throwing an armed grenade into his sleep tent.

two factors referenced in the SJA's pretrial recommendation. (App. Ex. I).<sup>3</sup>

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

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

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

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

3. The prosecution further intends to prove the aggravating factor cited under R.C.M. 1004(c)(7)(J), to wit: that having been found guilty of premeditated murder, a violation of U.C.M.J. Article 118(1), the accused has been found guilty in the same case of another violation of U.C.M.J. Article 118.

(App. Ex. I).

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

*B. The Military System's Capital  
Aggravating Factors*

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

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

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

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

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

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

In *Loving*, the Supreme Court considered, and rejected, appellant’s claim that the President’s prescription of aggravating factors was “inconsistent with the

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Similarly, the government in this case has not contested the applicability of Supreme Court death-penalty jurisprudence to the military justice system, and we will assume its applicability to the circumstances of this case, although the crime occurred in a foreign country on the eve of battle. *See Loving II*, 517 U.S. 748; *Kennedy v. Louisiana*, 129 S.Ct. 1, 2 (2008).

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

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

Framers' decision to vest in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." *Loving II*, 517 U.S. at 759 (quoting the U.S. Const. art. I, § 8, cl. 14). After considering the history of military capital punishment in both England and in the United States, the Court held that Congress's delegation to the President, through Articles 18, 36, and 56, UCMJ, and the President's subsequent prescription of R.C.M. 1004 was constitutional. *Id.* at 759–70. *See also* U.S. Const. art. II, § 2, cl. 1. "We hold that Articles 18, 36, and 56 together give clear authority to the President for the promulgation of RCM 1004." *Loving II*, 517 U.S. at 770.

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



beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490 (recognizing this right under the Due Process Clause of the Fourteenth Amendment). *Jones*, 526 U.S. at 243 n.6 (recognizing this right under the Fifth and Sixth Amendments).

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

Appellant argues that *Ring*, which was decided six years after *Loving*, changed the legal character of ag-

gravating factors in the capital system, so much so that *Loving* is no longer good law.

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

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

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

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

squarely within the usual definition of an “element” of the offense.

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

### C. Notice of the Aggravating Factors

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

This argument fails for the same reasons cited above. R.C.M. 1004 aggravating factors are not elements or the functional equivalent of elements, so they are not required to be included within the

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

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

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

In *Loving*, the Supreme Court specifically rejected the argument that Article 36, UCMJ,<sup>12</sup> limited the

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

<sup>12</sup> Article 36, UCMJ, states in part:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules

President's discretion to define aggravating factors for capital crimes. *Loving II*, 517 U.S. at 770. Congress delegated the power to prescribe aggravating factors in capital cases to the President, who "acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance." *Id.* at 773.

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

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

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of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

II. SUPPRESSION OF STATEMENT<sup>13</sup>

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

At the time of the unwarned questioning, MAJ KW was a brigade staff officer who was reacting to an attack on his unit and who was “focused solely on the accomplishment of an operational mission,” that being to protect the soldiers in his unit from further attack and to prevent friendly fire casualties in the confusion that ensued following the attack. *United States v. Cohen*, 63 M.J. 45, 50 (citing *United States v. Bradley*, 51 M.J. 437, 441 (C.A.A.F. 1999)). Major KW’s actions in ascertaining appellant’s identity, subduing him, and asking him if he was responsible for the attack were taken pursuant to “unquestionable urgency of the threat” and “limited” in scope to those “required to fulfill his operational responsibilities.” *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990) (citations omitted). Furthermore, his actions taken immediately after ascertaining that appellant was responsible for the attack indicate that MAJ KW was not attempting “to evade [appellant’s] constitutional or codal rights.” *Id.* Instead of trying to elicit more incriminating evidence from appellant, MAJ KW placed him under guard, sought legal advice, and thereafter ensured that appellant was informed of his Article 31(b) rights by a trained interrogator prior to detailed questioning. Accordingly, we

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

find that MAJ KW was neither “acting,” nor “could [he] reasonably be considered to [have been] acting in an official law enforcement or disciplinary capacity,” and therefore, there was no requirement for him to have provided an Article 31(b), UCMJ, rights warning to appellant prior to asking the questions he asked.

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

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

Appellant alleges he received ineffective assistance of counsel at every critical stage of his court-martial, ranging from the appointment of counsel through the presentencing case. We reviewed every aspect of appellant’s claim, including consideration of the training, experience, and abilities of the trial defense counsel; the pretrial proceedings and motions practice; the investigative efforts of the defense team, to

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

include the assistance from mitigation experts; the selection of the court members; the trial strategy; and the performance of counsel throughout the trial and during the presentencing phase. We reject appellant's claim of ineffective representation.

*A. Standard of Review and Applicable Law*

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

This Court applies a three-part test to determine whether the presumption of competence has been overcome:

1. Are the allegations true, and, if so, is there any reasonable explanation for counsel's actions?
2. If the allegations are true, did counsel's performance fall measurably below expected standards?
3. Is there a reasonable probability that, absent



the errors, there would have been a different outcome?

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

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

*Strickland*, 466 U.S. at 689–90.

*B. Procedural Posture*

Assessing the truth of appellant's factual allegations under the first part of the *Polk* test raises an important procedural issue. Where evidence is provided on appeal, as to the competence or ineffectiveness of counsel during the court-martial process, we must first determine whether resort to a post-trial fact-finding hearing is necessary. See *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). As a rule, we cannot decide a disputed question of fact "in a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997). However, in cases where the record of trial compellingly demonstrates the improbability of the facts supporting the appellant's post-trial claim of ineffectiveness, this Court "may discount those factual assertions and decide the legal issue." *Ginn*, 47 M.J. at 248. Additionally, if the factual assertions "allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor," then the conflict may be ignored and the legal issue decided. *Id.*

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

*C. Appellant's Defense Counsel's Qualifications*

Appellant was defended at court-martial by MAJ DB and CPT DC.<sup>15</sup> Appellant first alleges that he was denied due process of law by the absence of formalized standards for assigning counsel to capital cases and that his detailed counsel were unqualified to represent him in a capital case. We disagree.

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

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

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

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

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

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

fields of mental and medical health, forensic psychiatry, and ballistics was also detailed.

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

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

Post-trial affidavits revealed the myriad outside resources and capital litigation consultants<sup>17</sup> to which the defense counsel had access and used prior to trial. Counsel obtained materials from two other death penalty cases to include death penalty motions and case analysis. Additionally they read numerous law review articles in preparation for appellant's case.

Appellant was not denied due process of law due to an absence of formal standards for the representation of soldiers in capital cases, nor by the assignment of MAJ DB and CPT DC to represent him in his capital case. We find MAJ DB and CPT DC were well-qualified to handle a capital case. They had significant trial experience and conducted adequate preparation prior to handling appellant's court-martial. Though neither MAJ DB nor CPT DC had tried a capital case, they were nonetheless qualified to represent appellant with "a degree of competence well above the constitutional minimums at his court-martial." *Loving I*, 41 M.J. at 300.

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

Appellant next alleges that MAJ DB's and CPT DC's performance at trial was hindered due to several conflicts of interest. We find no merit in these al-

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

legations. Appellant's counsel were free from any conflict, perceived or otherwise. Assuming *arguendo* a conflict did exist, appellant knowingly and intelligently waived any such conflict without raising any objections at trial.

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

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

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

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

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

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

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

MAJ AM, who was assigned as the trial counsel for 1st Brigade, 101st Airborne Division (Air Assault),

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



was injured when appellant tossed a grenade into his tent. Before the deployment, MAJ AM was a military prosecutor at Fort Campbell which is also the home station of 1st Brigade. As a result, MAJ AM and MAJ DB possessed an adversarial, professional relationship, working with one another for about a year on various military justice issues. MAJ DB disclosed this relationship to the appellant in writing. MAJ DB further disclosed that he maintained a strictly professional relationship with MAJ AM and that he did not know MAJ AM in any capacity outside of their professional adversarial role. MAJ AM had also worked with CPT DC in an adversarial capacity. CPT DC also advised the appellant in writing of this relationship; specifically, that he, as a defense counsel, had tried a case against MAJ AM in 2002.

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

At the first Article 39(a), UCMJ, session, defense counsel informed the military judge of the foregoing and provided the court with appellant's acknowledgment and desire to continue with his detailed counsel. The military judge discussed with appellant his constitutional right to be represented by counsel who have undivided loyalty to him and his case. Appellant informed the military judge that after discussion with his defense counsel, he decided for himself that he wanted MAJ DB and CPT DC to still represent

him: “Because of my - - my familiarity with MAJ DB and CPT DC over the past year that I’ve had in dealing with them and their familiarity with my case. I think to bring another lawyer on that I’m not familiar with, I would have to basically build up a level of trust with him. I already have that with these two officers, sir.” (R. at 8). The military judge concluded that appellant knowingly and voluntarily waived his right to conflict-free counsel and could be represented by MAJ DB and CPT DC.

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

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

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

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

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

It is clear that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue. . . ." AR 27-26, Rule 3.7(a). One day after the alleged stabbing, counsel filed a motion in limine to preclude use of uncharged mis-

conduct to prove future dangerousness of appellant. The motion was granted without prejudice.<sup>20</sup>

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

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

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

*E. Development of the Mitigation Case*

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

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

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

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

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

[We] perceived the role of mitigation specialist as assisting us by conducting a thorough social his-

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

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

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

Defense requested and received a new mitigation specialist, one with which appellant's mother was

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

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

during trial. In addition, Dr. FT, another clinical psychologist, was called by the defense at trial.

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

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

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

Defense counsel were also not required to call a mitigation specialist in sentencing. “While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an



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

#### *F. Panel Selection*

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

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

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

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

It is important to note that appellant's defense counsel made tactical decisions not to raise any of the

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

### *G. Findings Phase*

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

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

What the government has just given you, their version of the facts, is only half the story. They told you what happened. But what happened really isn’t in dispute. The defense isn’t here to contest what happened. Yes. The facts will

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

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

The elements of premeditated murder are:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the act or omission of the accused;
- (c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

*MCM*, 2002, pt. IV, ¶ 43.b.(1).

Though the defense conceded appellant's identity they challenged the "premeditated design to kill" based on appellant's alleged mental illness, thus not conceding guilt. Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a strategy accepted as reasonable by the Supreme Court. *Florida v. Nixon*, 543 U.S. 175, 191–92 (2004). "In such cases, 'avoiding execution [may be] the best and only realistic result possible.'" *Nixon*, 543 U.S. at 191 (quoting Am. Bar Ass'n, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Sec. 10.9.1 commentary (rev. ed. 2003), reprinted in 31 Hofstra L. Rev 913, 1040). "In this light counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id.* at 191–92 (quoting *Cronic*, 466 U.S. at 656–657 & n.19, and Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev 1557, 1589–1591 (1998)).

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

### 1. *The Government's Case*

As the government presented their case in chief, the majority of the witnesses testified to the events of the evening of 22 March 2003 and their reactions af-

ter they heard the explosion. They also testified to the horrific injuries that many of the soldiers suffered. These matters were not in dispute and these witnesses were not challenged or cross-examined.

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

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

Private First Class CP<sup>21</sup> was a member of appellant's team. He slept next to appellant during the deployment and pulled the first hour of guard duty with appellant on the night of the murders. During

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

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

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

Staff Sergeant EW,<sup>23</sup> a former member of appellant's squad, was called to testify. He pulled guard duty on 22 March 2003 immediately following appellant. On cross-examination he testified that ever since he has known appellant, he thought he was odd

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

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

because appellant would pace a lot. Appellant had difficulty sleeping at night which resulted in him falling asleep in class and limited his effectiveness.

The government also offered two entries from appellant's diary. Appellant maintained a diary from 1992, before joining the military, until 2002. The entries admitted by the government provided some aggravating matters purportedly written close to the time of the attack. The defense counsel successfully argued to keep the remainder of appellant's journal out of evidence, as they argued that the diary was "unfairly prejudicial" and could potentially lead to an emotional reaction to the evidence.

## *2. The Defense Case-in-Chief*

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

### Dr. FT

Dr. FT, an expert in clinical psychology, testified about the start of appellant's mental problems. Dr. FT testified that he treated appellant in 1986 when appellant was fourteen years old, because appellant's sister had been a victim of sexual abuse, and appellant had been in an abusive home situation. Treatment included a battery of tests which indicated that appellant was within the average range for verbal skills and abilities and average in his planning abil-



ity; however, appellant was in the superior range for nonverbal skills. Dr. FT opined that these test results indicated that appellant was having problems which were exhibited in the repression of his verbal responses and that appellant could visually see things well and copy them down, but he lacked visual motor development. This was unexpected because appellant had scored so high on all of the performance and intelligence tests. Appellant's wide range of cognitive functions and discrepancies showed significant lags and suggested a learning disability. Though Dr. FT saw no sign of psychosis, there was a real constriction in appellant's functioning. Dr. FT opined that appellant was repressing his feelings and emotions which normally causes people to lose energy and strength, and leads to depression. Appellant appeared to be depressed at the time and had a lot of unmet dependency needs. Appellant also did not identify with people and had a real lack of attachment to any parent image or to people in general.

According to Dr. FT, further testing revealed that appellant's greatest fear was "being a bum on the street corner" and that he worried "about becoming a nothing." The happiest time of appellant's life was when he was in the country, away from his uncle and step-father.<sup>24</sup> Appellant indicated his desire to go to college and revealed his bad feelings about his treatment of his siblings. On some level, appellant felt responsible for his siblings as he is the oldest child. Appellant informed Dr. FT that he had problems falling asleep because of intrusive or obsessive thoughts and that he was annoyed with his mother for not protecting the children. Additionally, appellant indicated that he does not trust anyone which further em-

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<sup>24</sup> Appellant's step-father abused his sister.

phasized his lack of attachment. Appellant stated he felt like he was losing control and he did not know how to reestablish self-control, he wanted to earn money; when he is alone he cries; and he hates his step-father. Appellant describes himself as being very quiet in school and not interested in dating. The one thing appellant wished for most was to be happy all the time.

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

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

<sup>26</sup> The GAF score gauges an individual's overall level of functioning and his or her ability to carry out activities of daily liv-

appellant since 1986 and did not review any information pertaining to the charges.

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

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

#### Mr. PT

The defense next called Mr. PT as a witness. Mr. PT was a college roommate and good friend to appellant while they studied at the University of California at Davis. Mr. PT testified that appellant talked about his goals but sometimes had problems sticking to them. He observed that appellant was not very social and spent time by himself. Mr. PT often saw appellant pacing, talking to himself, and getting sweaty and clammy. Initially, Mr. PT thought it was normal until these things started happening excessively.

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ing. Scores range from 0 to 100. A score of 1 indicates a persistent danger of severely hurting oneself or others. A score of 100 indicates superior functioning in a wide range of activities. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed., text revision 2000) (DSM-IV-TR).

There were quite a few evenings when appellant would not sleep but instead would be pacing. Mr. PT testified that appellant had strong religious beliefs about taking care of himself; as such, he did not smoke or drink alcohol nor did he curse. During the time they lived together, there was only one time that Mr. PT thought appellant might hit him. Mr. PT returned to the apartment and appellant was very angry over a wrestling incident that had occurred two years prior. Appellant confronted Mr. PT and Mr. PT apologized and appellant seemed okay. The only other time Mr. PT saw appellant in an agitated state was when appellant was telling him about his sister being molested or violated. The two talked about it, and Mr. PT believed the incident had just occurred or that appellant had just found out about it.

On cross-examination by the government, Mr. PT testified that initially appellant was a better student than he was; however, as they continued to live together, appellant seemed to be struggling and did not have the same focus. Based on questions from the panel, Mr. PT testified that appellant had another name but changed his name because he is Muslim. He did not remember why appellant chose "Hasan" or how old he was when he changed his name.

#### Specialist CS

Specialist (SPC) CS was called by the defense and knew appellant when they were both assigned to the 326th Engineers. He believed appellant was a poor NCO who was not able to carry out minor tasks and unable to transfer knowledge to his junior enlisted soldiers. Specialist CS testified that other NCOs viewed appellant as under-qualified, and they did not believe he should be a leader. As far as SPC CS knew, appellant did not have a social life. Prior to the deployment, SPC CS noted that appellant isolat-

ed himself from conversations and would instead pace and talk to himself. Appellant also had difficulty staying awake as he would fall asleep during class. Even after being told to stand up he would fall asleep while standing. Other soldiers would also fall asleep; however, appellant fell asleep more than other soldiers and more than other NCOs. Prior to the deployment, SPC CS heard soldiers using derogatory terms towards Iraqis or Muslims such as “Punjab,” “raghead,” and “camel jockey.” Specialist CS testified that sometimes these terms were used to refer to appellant behind his back but that it was possible appellant overheard some of these conversations. Specialist CS recalls hearing soldiers basically say, “Hey look at that moron; that fricken—one of those ragheads. He is always screwing up.” Specialist CS also testified about a conversation wherein appellant expressed concerns to Sergeant First Class (SFC) TM, appellant’s platoon sergeant, about going to war against other Muslims. Sergeant First Class TM allegedly responded that if appellant did not kill the enemy, SFC TM would kill him.

#### Specialist JR

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

Sergeant First Class TM

Sergeant First Class TM was appellant's platoon sergeant. He testified that appellant's substandard performance did not reflect his education. Sergeant First Class TM confirmed that he had a conversation with the squad leaders about a possible deployment to Afghanistan during which he asked appellant, "[I]f we were to deploy on a mission, and we were approached by an enemy soldier, I said, the word, rag-head, --'Would you engage an enemy soldier?'" Appellant responded that "[i]t depended on the level of jihad the enemy soldier was on." Sergeant First Class TM dismissed appellant and immediately reported the incident to his chain of command. Sergeant First Class TM denied that he ever told appellant he would kill him if he refused to kill enemy soldiers.

Staff Sergeant SB

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

Sergeant First Class BR

Sergeant First Class BR was another one of appellant's platoon sergeants called to testify about appellant's sleep apnea and about the use of hateful statements within the unit. SFC BR first testified that he was aware of appellant's sleep apnea and felt that it impacted his duty performance. He next stated that he overheard other NCOs use derogatory terms for Iraqis and Muslims, and that he may have used derogatory terms himself when he deployed to Iraq. Sergeant First Class BR further testified that appellant called him at home, very early in the morning, to ask if his unit was going to rape and kill women and children. Though SFC BR found this strange, he did

not report the phone call. On cross-examination, SFC BR testified that prior to deployment he asked appellant about fighting other Muslims, and appellant said he was ready to go and looking forward to making a lot of money.

Special Agent DF

The defense offered into evidence a stipulation of expected testimony from FBI Special Agent (SA) DF, who interviewed and investigated appellant's family members. (Def. Ex. FF). SA DF stated that appellant's half-brother, Mr. MB, believes that the CIA, U.S. Army, and FBI are tapping his phone, shooting infrared rays into his home, and spraying chemicals on the trees at his residence. Based upon the interview and his observations, SA DF believed that appellant's half-brother is unstable and out of touch with reality. SA DF also stated that appellant's father was on parole for aggravated rape and subsequently arrested for violating the terms of his parole by possessing firearms. Mr. MB informed SA DF that he had recently been discharged from the United States Air Force and that he was not allowed to pray when he wanted to while in the Air Force. He also believes that Muslims are discriminated against in the United States. Based upon the interview and his observations, SA DF believes that Mr. MB is unstable and out of touch with reality. SA DF found no evidence that indicated appellant or his family members had any links or contacts with any terrorist or extremist organizations.

Dr. GW

Dr. GW, an expert in forensic psychiatry testified. Dr. GW became involved in appellant's case in October 2004. To diagnose appellant he used methodology in three areas: family and genetic information; envi-

ronment and medical; or psychological information. He reviewed appellant's family history, academic records, and military records, to include his medical records and his diary. He conducted three forensic interviews with appellant over an eight-hour period. Additionally, Dr. GW reviewed statements from appellant's roommate, a 1986 psychological evaluation, and records regarding appellant's mother's homelessness. The raw data from psychological tests was also provided to Dr. GW as well as a redacted copy of the 2003 R.C.M. 706 board report and a copy of the Article 32, UCMJ, proceedings.

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

Dr. GW testified that appellant had difficulty picking up social cues, perceiving situations accurately, and differentiating reality from non-reality. He developed profound sleep problems where he was unable to sleep at night and could not stay awake during



the day. He testified that the perception disorder could also be seen in appellant's academic and social deterioration. It took appellant seven years to complete college. Appellant's pacing in college showed that his psycho-motor skills are agitated. Dr. GW testified that there is a parallel between appellant's college behavior and his behavior in the military, in that appellant initially performed well in both. By March 2003, however, appellant was deteriorating. He was pacing, talking to himself, receiving no respect from soldiers and peers, and struggling with basic tasks.

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

ble of understanding the natural consequences of his actions.

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

It is of note that, on cross-examination, Dr. GW testified that he did not review appellant's statements from the R.C.M. 706 board because the copy he received had been redacted to remove several damaging statements made by appellant.<sup>28</sup> He acknowledged

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

<sup>28</sup> In post-trial affidavits, appellant's defense counsel stated that they recognized the incredibly damaging statements appellant made to the sanity board and chose not to make these

that the R.C.M. 706 board was conducted six weeks after the incident; however, he relied on appellant's version of the events during their interviews. Dr. GW opined that all of the test results were valid and showed no signs of the appellant malingering. The R.C.M. 706 board did not find appellant suffering from any of the three diagnoses that Dr. GW found. Although Dr. GW did not make a definitive diagnosis of schizophrenia, he expressed concern that it was nonetheless present.

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

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statements discoverable. (Gov. App. Ex. 1). Dr. GW did not rely on statements appellant made to the R.C.M. 706 board. This issue was litigated during the court-martial. The military judge ruled that the government was not entitled to this portion of the R.C.M. 706 board as they were the ones who elicited testimony from Dr. GW on this issue.

vulnerable to misinterpreting the environment and have fewer coping mechanisms.

In closing argument, the defense counsel continued with the theme that appellant could not have premeditated these murders. Their argument focused on Dr. GW's testimony and the testimony of the various soldiers in reference to appellant's bizarre behavior. The defense strategy was reasonable and the defense counsel's performance in executing this strategy did not "fall measurably below expected standards." *Polk*, 32 M.J. at 153. Accordingly, appellant's allegations that his defense counsel were ineffective during the findings phase of his court-martial are without merit.

#### *H. Presentencing Phase*

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

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

Each member was provided a binder which contained the following defense exhibits: a complete

copy of appellant's diary (Def. Ex. A); a law enforcement review of the diary (Def. Ex. B); a forensic social worker's analysis of appellant's diary (Def. Ex. C); a social history prepared by a mitigation specialist (Def. Ex. C); a search authorization for appellant's email account (Def. Ex. I); definitions of relevant Islamic terms taken from "The Oxford Dictionary of Islam," (Def. Ex. K); appellant's petition for change of name (Def. Ex. L); an interview of appellant's high school guidance counselor (Def. Ex. N);<sup>29</sup> an interview of one of appellant's high school teachers (Def. Ex. O);<sup>30</sup> an interview of appellant's college advisor and counselor (Def. Ex. P);<sup>31</sup> an interview of a college ac-

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

<sup>30</sup> Ms. RC taught leadership to appellant his senior year. Ms. RC was interviewed by appellant's mitigation specialist, Ms. DG. Ms. RC said that appellant always followed through with his commitments and was a high achiever; however he was not socially able to have relationships. Appellant respected men more than women. Ms. RC believed college would have been difficult for appellant because more whites would be at UC Davis than appellant had been previously exposed to and it was located in the country as opposed to the city. She was surprised he joined the Army and believed that appellant's lack of social skills would cause him serious difficulties. She was shocked when she heard appellant was charged with murder.

<sup>31</sup> Mr. JM was interviewed by Ms. DG on November 17, 2003. Mr. JM was appellant's college advisor and counselor. When appellant attended Locke High school, the school was about 90% African-American and 10% other ethnicities, and there were a lot of gangs and gang-related activity. According to Mr. JM, appellant was very serious and studious. Appellant was a member

quaintance (Def. Ex. T);<sup>32</sup> memoranda from two soldiers (Def. Exs. U and V);<sup>33</sup> an interview of appel-

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

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

<sup>33</sup> Staff Sergeant CC was in the same unit as the appellant, and SFC PL was the brigade equal opportunity advisor. Staff Sergeant CC stated appellant was in three to four different platoons. Appellant was moved because he was incompetent and messed up all the time. One platoon sergeant told appellant that he wanted to place appellant in his squad before they deployed, but that he would only accept appellant as an E-4 not as an NCO. He further stated that appellant's duty performance in Kuwait was substandard as usual and that appellant could not be trusted with an important detail. SFC PL stated that she taught classes on how to treat Muslims. She stated that she

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

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

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

A couple cautionary instructions however. You are only to read the exhibits. Please do not conduct any independent research based on any-

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heard several derogatory terms used to describe Iraqis and cautioned soldiers not to use them.

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

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

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

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

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

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



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

When appellant was in college, MA went to live with him for periods of time because his mother was having trouble supporting him. Appellant also sent money to his mother, sometimes going without money himself. When appellant left college he came home to live with his mother until he could find a job; however, appellant was kicked out because their mother was tired of him arguing with her about his sisters' behavior. When appellant left his mother's house, he stayed with MA for a short period of time and then joined the Army. MA had been previously kicked out of his mother's house because he was dating the woman who is now his wife and she is not Muslim. Appellant allowed MA to withdraw money from his account so that MA could take care of his family and he has never asked for the money back. Before appellant deployed, he and MA talked about starting a

video store, once appellant left the Army. MA would be the “people person” while appellant would be responsible for the books because appellant was not good at relating to others and is not outgoing. Appellant was anxious about his deployment but wanted to do his duty. Appellant was also hoping there would not be a war and that he would be home soon.

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

Appellant gave the following unsworn from the witness stand:

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

ACC: Yes, sir.

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

ACC: Yes, sir.

ADC: It added up to about 6 pages?

ACC: Yes, sir.

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

ACC: Yes, sir.

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

ACC: Yes, sir.

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

ACC: Yes, sir.

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

ACC: Yes, sir.

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

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

ADC: Please take your seat.

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

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

Two, the lack of any previous convictions;

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

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

Five, the 768 days of pretrial confinement;

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

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

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

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

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

Eleven, the FBI profile of Sergeant Akbar in which Special Agents [TN] and [ER] opine that Sergeant Akbar's main motivations for keeping his diary were loneliness and a need to convey his inner most thoughts, plans, dreams, and fears; and that Agents [TN] and [ER] believe

that the diary became a substitute confidante because SGT Akbar had nobody with whom to share these thoughts and no one else to communicate with;

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

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

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

Fifteen, the sleep disturbance suffered by Sergeant Akbar before and in the Army, and its effect on his academic achievements and his duty performance, as discussed in Sergeant Akbar's diary, documented in his medical records, and testified to by Sergeant First Class [DK], Ser-

geant First Class (Retired) [TM], Captain [DS], Captain [JE], Staff Sergeant [BR], Specialist [CP], Specialist [CS], Specialist [DR], Staff Sergeant [SB] and [Mr. EW];

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

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

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

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

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

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

during company runs.

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

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

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

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

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

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

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

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

Thirty, that, notwithstanding his belief that Sergeant Akbar may be suicidal, Captain [JE] did not request any mental evaluation or as-

assessment be done, even though services were available in Kuwait; and

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

You are also instructed to consider in extenuation and mitigation any other aspect of Sergeant Akbar's character and background and any other extenuating or mitigating aspect of the offenses you find appropriate. In other words, the list of extenuating and mitigating circumstances I just gave to you is not exclusive.

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

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



racial intolerance, his difficulties with education, and appellant's lack of friends.

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

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

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

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

It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied ad-

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

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

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

Appellant alleges that his diary should not have been submitted in its entirety without any substantive analysis and without appropriate regard for the highly aggravating and prejudicial information it contained. Though the defense counsel successfully kept the diary out during findings, it became relevant during sentencing. Two analyses of appellant’s diary

were submitted in an attempt to explain its contents, particularly those admitted during the government's case. Additionally Dr. GW testified, "I think it is important to look at the diary as a whole." Though there may have been some aggravating and prejudicial information in the diary, there were also mitigating matters in the diary as well as insight into appellant's childhood and family life. Again we defer to qualified counsel to determine what evidence should be presented and presume that because counsel in this case were qualified, their strategic decisions were sound; therefore, appellant did not receive ineffective assistance of counsel.

#### CONCLUSION

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

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

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and hard work, provided appellant with competent representation. Finally, we conclude appellant's remaining assignments of error, as well as the grounds supporting his petition, lack merit.

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

Senior Judge SIMS and Judge GALLAGHER concur.

FOR THE COURT:

/s/ Malcolm H. Squires, Jr.

MALCOLM H. SQUIRES, JR.

Clerk of Court

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**APPENDIX C**

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**RECORD OF TRIAL**

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AKBAR, HASAN, K.  
Sergeant  
Company A, 326<sup>th</sup>  
Engineer Battalion, U.S. Army, Fort Bragg, NC  
101<sup>st</sup> Airborne  
Division (Air Assault), Camp Pennsylvania, Kuwait  
APO AE 09325

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By  
*General* Court-Martial  
Convened by Commanding General  
Headquarters, XVIII Airborne Corps  
and Fort Bragg

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Tried at  
*Fort Knox, KY 40121 and Fort Bragg, NC 28310*  
on  
*9 Mar 04*  
*10 May 04, 24 May 04*  
*2 Aug 04, 24 Aug 04*  
*2 Dec 04, 31 Jan 05*  
*4 Mar 05, 1 Apr 05*  
*6 Apr 05-8 Apr 05*  
*11 Apr 05-14 Apr 05*  
*18 Apr 05-22 Apr 05*  
*25 Apr 05-28 Apr 05*

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Excerpt of Apr. 11, 2005 Trial Transcript

\* \* \*

[Throughout the argument, the Trial Counsel showed a series of slides, marked Appellate Exhibit 312.]

TRIAL COUNSEL: He was the enemy within the wire.

The events at Pad 7 on Camp Pennsylvania, Kuwait, were committed on the eve of battle, in a foreign land, on his own brigade, on innocent men whom he never knew.

By your unanimous, unwavering verdict, you have judged his acts; he can now, and forever, be called a cold-blooded murderer. [3088; JA 1464]

\* \* \*

The defense introduced his complete diary, several hundred pages filled with repeated threats of violence and murder. When did the thoughts of violence and murder emerge? Is it only in the last four entries? Is it after the Army is being prepared to be sent into harm's way? Was it even after 9/11? No, it's not.

These are Sergeant Akbar's own words, dated years before he even joined the Army, back before there was any mention of soldier talk.

[Displaying slides from Appellate Exhibit 312.] In 1992, "I made a promise that if I was not able to achieve success because of some Caucasian, I would kill as many of them as possible." There was no soldier talk in 1992.

In 1993, "I do not like the military. They have too much control over soldier's lives. I suppose I am just anti-government." There was no soldier talk in 1993.

Again in 1993, “A Muslim should see himself as part of a particular nation or people. He should see himself as a Muslim only; his loyalty should be toward Islam only.” There was no soldier talk in 1993. [3096; JA 1472]

In March of 1996, “Anyone who stands in front of me will be considered the enemy, and dealt with accordingly.” There was no soldier talk in 1996.

Again, “Destroying America was my plan as a child, juvenile and freshman in college. My life will not be complete unless America is destroyed. It is my greatest goal.” There was no soldier talk in March of 1996.

Look back. Look back in his diary, look back at critical dates. Look back at Sergeant Akbar’s own words on certain incidents the defense has brought before your attention. Look back to October 22, 2001, when he’s relieved from his duties at JRTC, and I quote, “I just got back from JRTC. Instead of being online with my squad team, I was in the brigade TOC. Sergeant First Class Means fired me from my team leader position. I forgot my meal card, and did not put my name on my duffel bag. I suppose that was enough for him. I have been performing below standard.”

Is that an uncaring unit, or is that a sergeant first class with a duty? His unit was not oppressing him. He acknowledges it in his diary. [3097; JA 1473]

What of Staff Sergeant Rogers, one of the infamous tormentors? He writes about him, “I would love to stop working for the Army. It sucks big time. They put me in another platoon, 2d Platoon. I am the head team leader. Staff Sergeant Rogers is my squad leader. He is a great squad leader. He helps me learn my job a lot. He really seems to love his job.”

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Look back to the incident with Sergeant Burch, and the trash in the back of his truck. What is the accused's reaction? In his own words in his diary, what is his reaction? His reaction is to buy three guns, to load them, and take them to the next formation. He is a hate-filled murderer.

Look at his diary. It is full of rage, it is full of hate, and it was all there before he was ever notified he was deploying.

Weigh his life -- that is what you're doing. You're weighing his life against what he did, what he caused, what he set in motion forever.

Lieutenant Colonel Romaine -- a bullet changed his life. Unscathed by two separate grenades, he came out of Tent 1 to face the enemy, with the courage of a lion, armed only with a handgun. The enemy, who concealed himself in darkness, and [3098, JA 1474] disguised himself in his uniform; the enemy within the wire was waiting.

\* \* \*



**APPENDIX D**

## Federal Statutes

*Article 18, UCMJ, 10 U.S.C. §818*

(a) Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.

(b) A general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

(c) Consistent with sections 819, 820, and 856(b) of this title (articles 19, 20, and 56(b)), only general courts-martial have jurisdiction over an offense specified in section 856(b)(2) of this title (article 56(b)(2)).

*Article 36, UCMJ, 10 U.S.C. §836*

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules

of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.

*Article 41, UCMJ, 10 U.S.C. §841*

(a)(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)(1) Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members re-

quired by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

*Article 56, UCMJ, 10 U.S.C. §856*

(a) The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

(b)(1) While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).

(2) Paragraph (1) applies to the following offenses:

(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

(C) Forcible sodomy under section 925 of this title (article 125).

(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).

*Article 106a, UCMJ, 10 U.S.C. §906a*

(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, anything described in paragraph (3) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is-

(A) a foreign government;

(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless-

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(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out in subsection (c).

(2) Findings under this subsection may be based on-

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (article 36).

*Article 118, UCMJ, 10 U.S.C. §918. Art. 118*

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he-

- (1) has a premeditated design to kill;
- (2) intends to kill or inflict great bodily harm;
- (3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or
- (4) is engaged in the perpetration or attempted perpetration of burglary, forcible sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

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*R.C.M. Rule 1004. Capital cases*

(a) *In general.* Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure.* In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) Notice.

(A) Referral. The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided:

(i) that the convening authority has otherwise complied with the notice requirement of subsection (B); and

(ii) that if the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

(B) *Arraignment.* Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors.* Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

(3) *Evidence in extenuation and mitigation.* The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) *Necessary findings.* Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings.* The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.



(6) *Instructions.* In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting.* In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement.* If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States;  
or

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(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a

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child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States

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or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, “substantial physical harm” means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term “substantial physical harm” does not mean minor injuries, such as a black eye or bloody nose. The term “substantial mental or physical pain or suffering” is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child,

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robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, “national security” means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) *Spying*. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

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(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.