IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	AMENDED FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 20050514
Sergeant (E-5) **HASAN K. AKBAR,** United States Army, Appellant	)	USCA Dkt. No. 13-7001/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

The Issues Presented are detailed in the index.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(c), UCMJ. This Court has jurisdiction to review this case under Article 67(a)(1), UCMJ.

Statement of the Case

On March 9, May 10 and 24, August 2 and 24, December 2, 2004, and January 31, March 4, and April 1, 6-8, 11-14, 18-22, and 25-28, 2005, an enlisted panel convicted Sergeant (SGT) Hasan K. Akbar, contrary to his pleas, of attempted murder (three specifications) and murder (two specifications), in violation of Articles 80 and 118, UCMJ, 10 U.S.C. §§ 880, 918 (2000). The members sentenced SGT Akbar to death. The convening authority approved the sentence as adjudged.

On July 13, 2012, in an unpublished opinion, the Army Court

affirmed. (JA 1). On April 24, 2013, the Army Court reconsidered its decision and affirmed, while rejecting the request for en banc consideration non-unanimously. (JA 52-53). On May 7, 2013, the Army Court rejected a second request for reconsideration, again rejecting the request for en banc consideration non-unanimously. (JA 54). SGT Akbar was notified of the Army Court's decision and, in accordance with Rule 23 of this Court's Rules, The Judge Advocate General of the Army filed this case for mandatory review.[1]

Assignment of Error 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.

Statement of Facts

Thirty-eight minutes. Barely a moment to explain thirty-one years of SGT Akbar's life or its value. However, that is how long the defense sentencing case lasted in this capital case. Two soldiers testified they had no reason to question SGT Akbar's mental stability (JA 1412, 1421). One former high school, a "reluctant witness" who "really did not know Akbar all that well," also testified. (JA 1427-30, 2017).

Like the panel, this Court cannot fully understand Hasan

[1] SGT Akbar filed a 516-page brief on Nov. 18, 2013. Pursuant this Court's Feb. 3, 2014, order, counsel herein submit a condensed version of that brief. SGT Akbar does not waive any argument edited from his original brief, nor imply those arguments are less meritorious than those now presented.

Akbar or his actions without first understanding the forces that shaped him: his origin, his family background, his experiences, triumphs, and struggles. As a child, SGT Akbar was bright, gentle, and conscientious. Despite abuse, neglect, and poverty, SGT Akbar more than persevered. A hero to his siblings, he sacrificed his childhood for their care. The pride of his kin, he set the example for his entire extended family both in character and scholastic achievement. Against all odds SGT Akbar seemed fated for success, until mental illness weakened the resolve that for so long repressed years of deprivation. The mind that once promised liberation slowly imprisoned him in paranoia and failure. Finally, on March 23, 2003, with the stress and fear of impending war pressed upon him, something in SGT Akbar shattered. Through the breach poured fourth twenty-nine years of torment and with it his first ever violent acts. This is only a fraction of SGT Akbar's life. The complete narrative of that life can only be told through the voices, faces, and stories of those who lived it with him: family, friends, teachers, religious leaders, and others. Thirty-eight minutes cannot tell this narrative.

Hasan Akbar was born Mark Kools in California in 1971. (JA 2606). His father, John Akbar, was born into dysfunctional family and raised in poverty on a South Carolina farm. (JA 2604, 2829). By age five, both of John's parents abandoned he

and his twin brother and their grandparents were dead. (JA 2829). Forced to raise themselves, John and his brother learned to survive any way they could. *Id.* The only adult influence in their lives was an uncle who occasionally brought them food and beat them. (JA 2829-30). Growing up in a racially divided South John also witnessed horrific events, such as watching four men in white robes and hoods hang a black man. *Id.*

Hasan's mother, Quran Akbar Bilal, was the third of six children born in Louisiana. (JA 2603). Her father raped and beat their mother, raped Quran's sister (who was diagnosed in 2001 with psychotic disorder and schizoaffective disorder bipolar type) and attempted to, and possibly succeeded, in raping Quran. (JA 2603, 2609, 2640). Their father instilled a deep seeded resentment toward Caucasians into his family, routinely recounting stories of their racial hatred and brutality. (JA 2785-86, 2831). He constantly blamed whites for oppressing African-Americans and turning their middle class Baton Rouge neighborhood into a ghetto. (JA 2786). Quran's father warned his children and grandchildren to be wary of the white man's tricks meant to oppress them. *Id.*

Quran escaped to California after high school. She met John, already a father of four, and conceived a child with him. (JA 2605). A reformed criminal, John was excited about the birth of his fifth child, Hasan. John ran a small maintenance company and provided for his family, for a time. *Id.*

John's reformation did not last. By 1973, he was addicted to drugs and convicted of armed robbery. (JA 2606). While John served time in San Quentin penitentiary, his business failed while Quran struggled to care for Hasan. *Id.* Meanwhile, John joined the Black Muslims of America—a prison affiliate of the Nation of Islam. *Id.* The Nation of Islam's core principles and indoctrination methods included racial animosity toward whites.

After John's release, the family lived in a small house in the crime-ridden Watts area of Los Angeles. *Id.* The couple had two more children, Musa and Mashiyat. *Id.* The family changed their names and became heavily involved with the Nation of Islam. In his earliest years, Hasan was indoctrinated in the Nation of Islam's militant teachings.

John became abusive, especially towards Quran. (JA 2867). A young Hasan at one point aimed a gun at his father to stop him from hitting his mother. *Id.* John's gradual rejection of the radical sect of Islam caused further stress in the marriage. Quran remained steadfast in her embrace of radical Islam. (JA 2607, 2830). Quran left John, providing Hasan no explanation. (JA 2607). For the next twenty years John fell into crime, drug addiction, and severe depression. (JA 2829-30).

Quran and her children moved to Louisiana to live with her parents. There Hasan developed a close relationship with his grandfather, David Rankins. (JA 2769, 2785). The transition to

life in Louisiana was particularly difficult for Hasan, who at eight, was very close to his father. For the next fourteen years, the Akbar family drifted from place to place, moving over ten times and often homeless. (JA 2610, 2613). Hasan's mother constantly sought the attention of men, marrying two more and dating countless others.

While in Louisiana, Quran married convicted rapist William Bilal. (JA 2810). Hasan, his mother, and his siblings (including Sultana and Mustafa, fathered by William Bilal) were the victims of physical, emotional, and sexual abuse by William Bilal. (JA 2611-12, 2786-87). William Bilal was particularly violent; beating Quran, physically and sexually abusing Hasan, and threatening to kill Quran and the family. (JA 2612). At age fifteen, Hasan rescued his sisters when he reported William Bilal's sexual abuse of them. (JA 2493, 2611). During the subsequent investigation, a state ordered mental health evaluation determined Hasan required treatment (JA 1594-99) which he never received. (JA 2856). William Bilal's abuse of the family is a taboo topic to many in the family. *Id.*

After the family escaped William Bilal, the chaos in Hasan's life continued. The family struggled in Los Angeles after leaving rural Louisiana. (JA 2873). Though she received government assistance (JA 1603-21) and sold her blood to help feed the family (JA 2868), Quran never provided a stable home. Hasan became the

de facto father figure for his siblings and cousin, CB. (JA 2835, 2856, 2859, 2871). He taught his siblings discipline, the importance of education and hard work, fed and clothed them, and helped them with their homework. (JA 2854, 2856, 2871). The home had no toys. (JA 2785). The children often went hungry and only after Hasan called Aunt Bernita begging for food did he and his siblings receive leftover food from a local pre-school cafeteria. (JA 2835). Rats and roaches infested the home, the furniture consisted of a van's bench seat, and the children slept and did their homework on the floor. *Id.*

Despite these challenges, Hasan was a stellar student. Hasan attended Locke High School, located in an area beset with poverty, gang violence, and drugs. (JA 2873, 2878). Surrounded by fences, the school looked more like a prison. The students underwent routine searches and could not go to the bathroom by themselves for fear of being stabbed. (JA 1629-32, 2879). Even so, Hasan excelled. Hasan graduated at the top of his class while taking all available advance placement classes, working at McDonalds, and participating in the Academic Decathlon, where he achieved one of the highest scores on the team. (JA 1627, 2878).

After high-school, Hasan attended the University of California-Davis, studying aeronautical engineering. Despite high expectations, Hasan struggled. It took Hasan nearly nine years to complete his bachelor's degree, achieving just over a

2.0 grade point average. (JA 1636-38). Hasan failed to fit in on a campus that was much different, both socially and economically, from the environment from which he came. (JA 2032-35). During this time, Hasan battled disturbed and violent thoughts, and sought counseling from university mental health physician Dr. Ruth Sachs. (JA 2800). Hasan understood that his racially-charged thoughts were wrong, and his mental psyche improved with counseling by Dr. Sachs. *Id.*

Despite struggling personally, Hasan retained a desire to help people, especially his family. (JA 2034). At college, Hasan took care of his brothers on several occasions when his mother could no longer handle them. (JA 2541, 2856, 2863). Although struggling to pay his own bills, he sent money to support his mother and younger siblings, especially when they were homeless after an earthquake. (JA 2856, 2859, 2866-67). He often called home to encourage his siblings to attend college and escape Watts. (JA 2859, 2874, 2886). Mashiyat credits Hasan for keeping her out of trouble and finishing school. (JA 2871). His cousin CB credits Hasan "for the good things that I do – he always did the right thing, kept going to school, made good choices, and tried to get me to do what was right." (JA 2883).

After graduating, Hasan moved back home to look for work. Hasan objected to his siblings' inappropriate clothing, behavior, and the loss of religion and morality. (JA 2857, 2859, 2868).

Quran soon asked Hasan to leave. (JA 2857).

Hasan joined the Army in 1998 for want of other employment. (JA 2866-67). He continued supporting his mother. (JA 2835, 2873). When his brother Musa married, Hasan helped the young couple pay their bills. (JA 1623). He also tried to find a former landlord to repay a $300.00 debt. (JA 2881).

During Hasan's time in college and in the Army, things changed for him. He had problems focusing while studying. He began having violent thoughts. (JA 2800). He imagined and recounted scenarios of a rape while he stood by doing nothing, as if they were real. (JA 1650). He slept more during the day than he did at night. Simple leadership tasks became difficult, and he knew he was not doing well as a soldier. He professed Christianity before reverting back to Islam. Lessons of racial hatred he learned in his youth haunted him. All of these thoughts caused an immense internal struggle. This confused thought-process, schizophrenia according to some experts, caused Hasan significant difficulty in the Army. (JA 2835, 2866).

Hasan's background and mental condition also caused him to misperceive soldier comments regarding racial slurs, "raping" Iraqi women, and "pillaging" Iraqi homes. When faced with the stress of war and fighting other Muslims, he broke psychologically before committing violence upon his fellow soldiers.

Following Hasan's crime, John Akbar, now clean and sober,

swore to be a better father. (JA 2829). John feels largely to blame for Hasan's conduct as he abandoned his son after introducing him to ideological hatred at a tender age. (JA 2830-31, 2773). He now recognizes the impact of such radical teachings and realizes the teachings were forced upon Hasan. *Id.* Hasan heard the same radical teachings at home, in church, and his Islamic elementary school. *Id.* John knows the value of redemption and takes partial responsibility for his son's acts.

This narrative stands in stark contrast with the mitigation case presented by SGT Akbar's defense counsel. During his sentencing argument, defense counsel summarized Hasan's life as follows—"SGT Akbar grew up in a very poor family. His home life did not have two loving parents. It was filled with neglect -- you know molestation. You know he grew up in a very religiously intolerant area, and a racially intolerant area." (JA 1494). That is it.

Summary of the Argument

Professional norms of capital litigation required counsel to fully investigate SGT Akbar's life history and discover mitigation evidence which could potentially save his life. This required personal involvement and collaboration with mitigation specialists and other experts to prepare and present a coherent mitigation case through live, lay witnesses and corroborating documentation. That did not happen in this case.

In this case, defense counsel, with no experience in capital litigation, ignored or rebuffed advice from experienced capital litigators and mitigation specialists; took a jaded view towards mitigation evidence and the specialists who collected the evidence; rejected witnesses due to counsel's personal disdain for mitigation specialists; refused to seek additional funding and time for mitigation specialists to complete their review of newly discovered documents, necessary witness interviews and trial preparation; failed to identify, personally interview and prepare significant mitigation witnesses willing to testify; and in turn, presented a deficient, disjointed, and incoherent mitigation case consisting of nearly 500 pages of interview notes and a personal diary that undercut the apparent theory of mitigation and acted as a key piece of aggravation evidence for the government. All of this was done while counsel allowed a biased panel to sit, and ignored improper victim testimony and government argument during the penalty phase. To justify this performance, counsel submitted two affidavits full of *post hoc* rationalizations that directly conflict with other evidence in the record. (*See* AE A.II and App. B).

The panel must negotiate three gates to impose a death sentence. The third gate requires the members' *unanimous* conclusion that the aggravating circumstances outweigh the extenuating and mitigating circumstances. *See* R.C.M.

1004(b)(4)(C). Those instances in which counsel deficiently failed to present available mitigating evidence operate synergistically with those instances in which counsel deficiently failed to exclude inadmissible aggravating evidence. The result is the Gate 3 balancing was badly skewed, with more weight than warranted on the aggravation side of the scale and less weight than there should have been on the mitigation side.

As counsel's failure to present a coherent mitigation case and inaction in allowing the government to admit and argue improper evidence caused this skewed balancing, their deficient performance amounts to ineffective assistance of counsel (IAC) and necessitates a rehearing because this Court cannot be confident in the result when SGT Akbar's story was never told.

Law

This Court reviews IAC claims de novo. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). This Court applies the two-part test for IAC established by *Strickland v. Washington*, 466 U.S. 668 (1984). Appellant must show that counsel's performance was deficient; that is, their conduct was not reasonable under the prevailing professional norms at the time of trial. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Upon a showing of deficient performance, appellant's burden to show prejudice is less than a preponderance of the evidence. *Porter v. McCollum*, 558 U.S. 30, 44 (2009). The question of prejudice

is not addressed on a deficiency-by-deficiency basis, but is rather assessed based on "the totality of the evidence before the . . . jury" and "the totality of the omitted evidence." *Strickland*, 466 U.S. at 695; *Williams v. Taylor*, 529 U.S. 362, 397 (2000). Even so, "[n]ormally, IAC at the sentencing phase is prejudicial and requires a new sentencing hearing . . . ." *United States v. Alves*, 53 M.J. 286, 290 (C.A.A.F. 2000).

This Court must conduct a "probing and fact-specific analysis" in evaluating counsel's performance. *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010). This Court will not give complete discretion to the tactical decisions of counsel in capital cases if the counsels' performance reflects inadequate investigation and preparation, limited capital experience, and does not meet the higher standard of performance expected of counsel in capital litigation. *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). "[C]apital case[s] . . . [are] not 'ordinary,' and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death." *Id.* at 13. This is especially true when "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." *Id.; see also United States v. Curtis*, 48 M.J. 331, 333 (C.A.A.F. 1997)(denying reconsideration

after finding IAC as a result of the "lack[of] necessary training and skills to know how to defend a death-penalty case," which resulted in a death sentence that was "unreliable . . . in military jurisprudence")(Cox, C.J., concurring).

Notwithstanding, counsel who are "learned in the law applicable to capital cases" can be, but are less likely to be, ineffective in a capital case. *Murphy*, 50 M.J. at 8; *see Johnson v. United States*, 860 F. Supp. 2d 663, 687, 818-20 (N.D. Iowa 2012)(finding "exceptionally well-qualified" counsel ineffective). Regardless of the counsel's qualifications, this Court must engage in a probing inquiry into whether trial defense counsel's performance was constitutionally deficient, and must do so employing the standard enunciated in *Strickland*, *Wiggins*, *Sears*, *Williams*, and *Rompilla*.[2]

Argument

A. Counsel's investigation and presentation of the mitigation case amounted to IAC.

"Perhaps the most frequently encountered situation [of IAC] is when counsel either fails to investigate adequately the

[2] SGT Akbar asserts two caveats. (1) Federal and Supreme Court cases cited throughout this brief were often brought through a habeas petition. Unlike the deference this Court gives to SGT Akbar's counsel, in habeas, counsels' performance is given double deference. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1411 (2011); *Evans v. Florida Dep't of Corrections*, 699 F.3d 1249, 1268 (11th Cir. 2012)("Double deference is doubly difficult for a petitioner to overcome . . . ."). (2) Most of these cases were tried in the 1980s or early 1990s. The standard this Court must apply is the professional norms at the time of SGT Akbar's trial—2005. *Pinholster*, 131 S.Ct. at 1427 (citation omitted).

possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation, *or*, having discovered such evidence, neglects to introduce that evidence before the court-martial." *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998), *cited in Alves*, 53 M.J. at 289 (emphasis added). Likewise, "one of the most frequent grounds for setting aside *state* death penalty verdicts is counsel's failure to investigate *and* present available mitigating information."[3] Counsel failed SGT Akbar on both accounts.

This Court's analysis of counsel's performance must be viewed in the light that this is a capital case—"Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp*, 483 U.S. 776, 785 (1987), *quoted in Loving v. United States*, 62 M.J. 235, 238 (C.A.A.F. 2005).[4] This Court must sift through the allegations of ineffectiveness and determine whether or not counsel's conduct was sufficient for capital representation.

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[3] Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Spencer Report), ¶ I.B.3 (May 1998)(second emphasis added).

[4] The Tenth Circuit interprets *Burger* as a directive to appellate courts to give "heightened attention" in appellate capital review. *Smith v. Mullin*, 379 F.3d 919, 938-39 (10th Cir. 2004) ("Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making *extraordinary efforts* on behalf of the accused.")(emphasis added)); *see, e.g., Anderson v. Sirmons*, 476 F.3d 1131, 1142 (10th Cir. 2007).

The Supreme Court reiterated in *Sears* that this Court must not "place[] undue reliance on the assumed reasonableness of counsel's mitigation theory." 130 S.Ct. at 3265. As such, this Court cannot grant them IAC immunity, as the Army Court did,[5] and hold their judgment to be sound without a critical look into their conduct both before and during trial. This look should analyze not only what they did, but what they failed to do.

Presenting "*some* mitigation evidence [does not] foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 130 S.Ct. at 3259; *see Williams*, 529 U.S. at 367-69, 397-98 (finding IAC even though counsel presented some mitigation evidence; rebuking the lower court for not evaluating the "totality of the available mitigation evidence"). Nor is counsel's "invoking the word 'strategy' to explain errors []sufficient since 'particular decisions[s] . . . must be directly assessed for reasonableness in [light of] all the circumstances.'" *United States v. Kreutzer*, 59 M.J. 773, 783 (A. Ct. Crim. App. 2004)(quoting *Strickland*, 466 U.S. at 691) (second and third alterations and omissions in original)), *aff'd,* 61 M.J. 293 (C.A.A.F. 2005). This is especially true when counsel are inexperienced in

[5] "[C]ounsel's duty is not discharged merely by presenting some limited evidence. Rather, a . . . claim depends on the magnitude of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented." *Stankewitz v. Woodford,* 365 F.3d 706, 716 (9th Cir. 2004).

capital litigation. *Murphy*, 50 M.J. at 10.

Thus, this Court must give SGT Akbar's IAC claims a critical analysis for both failure to investigate and failure to adequately present the evidence that counsel actually possessed. Defense counsel failed to adequately investigate before trial, and what they possessed they failed to adequately present at trial. As such, counsel presented a weak but traditional merits-focused strategy, and not a sentence-focused strategy on the merits that seamlessly transitioned and climaxed in the penalty phase. These failures will be discussed below.

1. Counsel failed to deliver a "competent presentation of mitigation evidence" when they presented only two lay witnesses from SGT Akbar's life prior to his military service and failed to integrate any meaningful theme of mitigation throughout the merits and penalty phases of SGT Akbar's trial.

Defense counsel must deliver a "competent presentation of mitigation evidence" as counsel has the primary responsibility to effectively advocate on behalf of SGT Akbar to the members. *United States v. Loving*, 41 M.J. 213, 250 (C.A.A.F. 1994). The "defense counsel's job [in a capital trial] is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005). Competent presentation must mean more than half-hearted direct examinations of a few non-soldier witnesses and a document dump during the penalty phase. *See Lambright v. Schriro*, 490 F.3d 1103, 1120 (9th Cir. 2007)(reversing sentence because "counsel's

duty . . . to provide the sentencing court *with a full presentation of the evidence* that might lead the sentencer to spare his client's life is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a *cursory or 'abbreviated' presentation* of potentially mitigating factors" (emphasis added)). Rather, introducing some of SGT Akbar's social history "in a cursory manner that was not particularly useful or compelling" compels this Court to set aside the sentence. *Douglas v. Woodford*, 316 F.3d 1079, 1087-91 (9th Cir. 2003)(setting aside the sentence even though counsel presented witnesses regarding Douglas's difficult childhood and he was "very poor growing up").

Counsel's merits case focused on negating the premeditation element of the murder and attempted murder charges. The testimony elicited centered on SGT Akbar's strange habits, inability to sleep, and the racial slurs he heard from members in his unit regarding Iraqi Muslims. The members did not accept counsel's theory and convicted SGT Akbar as charged. (JA 2979).

On sentencing, counsel called two soldiers and a former high school teacher as witnesses, whose collective testimony took thirty-eight minutes. In addition, counsel gave each member approximately 500 pages of documents to read at home.

Throughout both phases of the trial, only two live lay witnesses were presented to the members from SGT Akbar's pre-

Army life. The first, Paul Tupaz, met and was truly interviewed for the first time by counsel the night before his testimony. (JA 2852). The second, Dan Duncan, was never interviewed by counsel prior to his testimony and only met counsel a few moments before his testimony. (JA 2850). No family or friends from SGT Akbar's life prior to college were presented, even though many were very willing to testify. (JA 2829-32, 2834-36, 2854-86). Counsel failed to understand that merits phase culpability is different than penalty phase culpability, and it must be presented as such. *See* Stephen P. Garvey, *Aggravation & Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1561-66 (1998). Rather, their only focus was on SGT Akbar's "bizarre behaviors" as reflected in their tunnel-visioned presentation and affidavit. (JA 1960-62).

Contrasting counsel's conduct to the professional standards established by case law and as laid out by capital litigation experts (JA 2405-07, 2548-54, 2692-2756, 2758-93) should lead this Court to no other conclusion than that SGT Akbar did not receive the advocacy the Constitution demands in a capital case. Comparing counsel's paltry sentencing case with SGT Akbar's life story demonstrates the complete lack of a "competent presentation." (*See* JA 2482-2536, 2603-22); *Taylor v. State*, 262 S.W.3d 231, 248-52 (Mo. 2008)(en banc)(reversing sentence because details of childhood admitted through experts and not by

those family members who could provide vivid details).

That story is what counsel was required to tell during the penalty phase. Denny LeBoeuf, a Federal Public Defender, learned counsel for Guantanamo Bay, Cuba, detainees, and a recognized expert in capital representation, emphasizes what is "usual" for a penalty phase presentation:

> [T]he usual penalty phase involves the presentation of . . . lay witnesses, not experts. The witnesses and the documents introduced *with them* would build *a coherent and cohesive story of a life*, including in this case at the very least Sgt Akbar's profoundly disabling mental illness, his difficult childhood, his efforts to overcome his illness, and his profound deterioration.

(JA 2710)(emphasis added).[6]

John Akbar and Bernita Rankins are just two examples of extraordinary lay witnesses not called. Some of John Akbar's remarkable story is contained in his declaration, to include details of SGT Akbar's youth. (JA 2829-32). Ms. Nerad said the team "could not have hoped for a better witness." (JA 2772-73). Another glaring error was failing to call SGT Akbar's maternal aunt. Where Mr. Akbar was the key witness to lay the foundation for SGT Akbar's early childhood, Ms. Rankins was the ideal

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[6] (*See also* JA 2693-94 (learned counsel Tom Dunn)("I emphasized to SGT Akbar's defense team the need to investigate, develop, and present an integrated mitigation defense that began in the merits phase of the case and coherently transitioned *and climaxed* at the penalty phase . . . . I told counsel that such a case would involve *a cohesive story* of SGT Akbar's multi-generational life history told through historical records, lay witnesses, and expert witnesses." (emphasis added)).

witness for the years between early childhood and SGT Akbar's move back to Los Angeles during 11th grade. (JA 2834-35; *see also* JA 2785 (mitigation specialist Rachel Rogers "found Bernita's descriptions of his childhood to be extremely compelling and considered them to be an indispensible component of a proper mitigation presentation at trial. Bernita would have been an outstanding witness . . . ."). Ms. Rankins stated that not only was she willing to testify, but she also called counsel and left messages on multiple occasions prior to trial practically begging to speak on SGT Akbar's behalf. (JA 2834). Counsel never returned her phone calls, and they do not remember her. (JA 2368); *see Williams*, 529 U.S. at 373 (finding deficient performance for failing to return the phone call of a "potentially persuasive character witness").

The manner in which counsel treated Ms. Rankins and her potential testimony is inexcusable not only because of a counsel's duty to investigate and present witnesses to establish a detailed and coherent life story of a capital accused, but because of the wealth of detailed information that the members never heard. Ms. Rankins was the one witness who was least influenced by SGT Akbar's mother, and who was willing to lay out her family's demons for everyone to see.[7] SGT Akbar was denied

[7] Ms. Rankins willingly details the family's mental illness, the generations of sexual abuse, the extreme levels of poverty SGT

this critical witness because counsel either did not know what she could provide or because they refused to go "all-in" and present the coherent life story that capital litigation requires. Either way, their performance was deficient.

Counsel failed to adequately present this life story through witnesses because they (1) failed to fully investigate SGT Akbar's life history; (2) failed to interview potential witnesses; (3) failed to prepare testifying witnesses; (4) presented a mere three witnesses at sentencing before dumping a load of documents on the members that included very damning evidence in aggravation; and (5) then presented an apathetic sentencing argument that barely mentioned the facts supposedly presented in mitigation on the merits. Counsel first turns to what counsel did provide the panel—SGT Akbar's diary.

2. Counsel were ineffective when they submitted the second most aggravating piece of evidence, second only to the crime itself, by submitting SGT Akbar's complete diary without putting it into context or explaining the mitigating value of the diary.

If asked to describe SGT Akbar's diary in one word, that word would be "damning." The defense counsel sealed SGT Akbar's fate when they admitted, after having successfully excluded most of the diary, the complete diary which included rants of hate

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Akbar suffered, SGT Akbar's role in raising his siblings, the abuse Quran Bilal inflicted on SGT Akbar, and Quran Bilal's influences on the rest of the family. (JA 2834-35).

and dreams of jihad.[8] The Army Court turned a jaundiced eye to the aggravating nature of the diary when it dismissed the impact of the diary by simply concluding that "there *may have* been *some* aggravating and prejudicial information in the diary . . . ." (JA 50 (emphasis added)). The Army Court then failed to analyze the decision to admit the complete diary, without any live witness to put the very aggravating entries into perspective, simply deferring "to qualified counsel" and presuming that "their strategic decisions were sound." *Id.*

Counsel's duty during the penalty phase is to present "'all reasonably available mitigating evidence and . . . rebut any aggravating evidence that may be introduced by the prosecutor.'"[9] Not only did counsel do nothing to rebut the aggravating evidence presented by the government, or even attempt through objections to prevent the government from admitting inadmissible aggravating testimony, *see* AE A.III, counsel entered the most aggravating piece of evidence available to the government but precluded from entry by the military judge—SGT Akbar's diary.

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[8] Counsel also admitted two additional documents. First, they admitted the FBI summary of the diary even though it highlighted some of the aggravating evidence (JA 1553-59), and undercut any theme of defense and mitigation: "None of this excuses what Akbar has done. Based on his writings and pleas to Allah, Akbar clearly knew right from wrong." (JA 1559). Second, counsel admitted Ms. Grey's summary of the diary, which highlights the aggravating stories for counsel's use. (JA 1567-93, 2759).

[9] *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, U. Ill. L. Rev. 323, 355-56 (1993)(quoting ABA Guidelines (1989), Guideline 11.4.1(C)).

To say that "there may have been some" prejudicial information in the diary is an amazing understatement. Below are some of the passages that led the judge to properly conclude that admitting the diary would unfairly prejudice SGT Akbar's right to a fair trial (JA 285; *see also* JA 1860-69 (defense motion)):

> Damn! What has happened to the cocky black kid who promised to free his people or destroy their enemy. Now I am living with the so-called enemy.

(Def. Ex. A, at 30, dated May 22, 1991 (written while attending UC-Davis)).

> Hatred has been apart [sic] of my personality *for at least 15 years*. Hatred of what? Well, you should ask hatred of whom. Caucasians, Whites, Honkies, blond hair - blue eyed devils, which ever you prefer. It was thought that the difference between the children of the oppressors and the oppressors had been establish[ed]. But if you hate the Mother and Father what are the chances you will like the child? Particularly if it was drilled it [sic] to your head as a young child. Similar to what the Nation of Islam taught me to hate Caucasians. These are the words of a product of those teachings.
>
> Just as sleep is lost thinking about the oppression of my people and how to stop it, sleep is lost thinking about the *destruction of Caucasians* and how to carry it out. Why such an aversion for the Caucasian race? There are many reasons . . . .

(*Id.* at 38, dated July 19, 1991)(emphasis added).

> . . . I made a promise that if I was not able to achieve success because of some caucasion [sic] I would kill as many of them as possible. . . . *I will kill as many cacasions* [sic] *as possible*. . . . I can say that [I] can kill cacasions [sic] because I have met only a handful that I consider good.

(*Id.* at 56, dated April 9, 1992)(emphasis added).

> . . . I am going to have to suffer in hell fire.

. . . *The only way out is to die a martyr*.

(*Id.* at 101, dated Jan. 22, 1994)(emphasis added).

> . . . [T]he only way to go to paradice [sic] would be to die fighting for the sake of Allah. I made a decision to go to Bosnia for Jihad.

(*Id.* at 112, dated Dec. 11, 1994).

> I was thinking that I would go for Jihad overseas somewhere, but I read . . . [I must] stay and take care of [my] mother. . . . After [I prepare my brothers to care of her], I would go for Jihad in some country and not return until I get shahid (martyred) or the war is over. . . .
>
> . . . [My mother] said that if I speak out and very strongly try to help my own people[,] whitey (European Americans) would kill me. She convinced me to stay . . . . The only reason I did not go for [martyrdom] is because I did not think I had enough strength to do it successfully. Insha'Allah, Allah will make it easy for me.

(*Id.* at 122, dated June 1, 1995).

insha'Allah, *I will go for Jihad and get martyred.*

(*Id.* at 129, dated June 4, 1995)(emphasis added).

> . . . My nature tells me not to make Jihad for Chechynas [sic] or Bosnians but to only make Jihad for African-Americans. But Allah, The Master of the Day of Judgement [sic], says to treat all Muslims as brothers.

(*Id.* at 135-36, dated Oct. 2, 1995).

> . . . *Destroying America* was my plan as a child, jovenile [sic] and freshman in college. Some where [sic] along the way it got side tracked 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.*

(*Id.* at 179, dated March 3, 1996)(emphasis added).

> I told [a fellow female soldier] everything about me. At least I told her how serious I am about Islam.

She doesn't know that I plan to make Jihad.

(*Id.* at 187, dated Aug. 2, 1998).

These passages describe SGT Akbar's dreams of jihad and long-held hatred of America and Caucasians, neither of which the defense contextualized for the panel. The last third of the diary focused on two other aggravating themes: sexual immorality and disdain for the military. The sexual immorality, to include employing prostitutes, undercut any mitigation presented concerning SGT Akbar's faith, as it is beyond the pale to assert piety while practicing licentiousness, or to claim a misguided dedication to faith as a reason for murder when engaging in acts that fly in the face of religious faith. (*Id.* at 269, 286, 296).

SGT Akbar's account of his time in the Army provided no mitigation value, as it is clear that SGT Akbar did not join or remain in the Army because of honor and duty to his country, or the misperception that his military career was a success. Rather, years prior to his enlistment, he made his thoughts on the military clear as he detailed his disappointment in his brother's dreams of being an Air Force pilot: "I do not like to [sic] military. They have too much control over the soldiers lives. I suppose I am just anti-government." (*Id.* at 77, dated July 1, 1993). His diary entries after he enlisted are even more damaging, revealing that years prior to the attack he believed he should not be in the Army. His entries in 1999 and

2000 state: "I feel ashamed of [being in the Army]"; "My feeling is that [being in the Army] is a betrayal of everything that a Muslim is suppose[d] to stand for"; "My mother and sister really fucked me up. . . . My goal is to get the hell out of the military as soon as possible. There is not [sic] doubt that this is not for me"; "Being in the Army makes me responsible for every murder the Army makes." (*Id.* at 207, 252, 254-55, 268). A year prior to the charged incident, while the United States contemplated invading Iraq, SGT Akbar wrote,

> I just hope I don't get deployed to Iraq . . . . I hate the people I work with so much and they hate me[.] I wonder if I would [come] back [a]live or if they will.
>
> . . . .
>
> . . . I am considering staying in the Army. If I have to I believe I will end up in prison. I had a premonition that if I re-enlisted I would find myself in jail. That is probably true because I already want to kill several of them.

(*Id.* at 301-02, dated Jan. 2 and Feb. 23, 2002). He only stayed in the Army because he wanted the money. (*Id.* at 204, 217, 266, 288, 302). As the panel would see it, had SGT Akbar simply requested conscientious objector status or gotten out some other way, the murders would have been avoided. Counsel presented otherwise inadmissible evidence that demonstrated *SGT Akbar's choice* to remain in the Army even though he knew over a year prior to his deployment that he might kill his comrades.

Counsel knew early in the investigation that Deborah Grey, an experienced specialist in capital litigation, feared the harm

that would be caused to SGT Akbar's case by admitting the diary. In her transition memorandum, she concluded:

> It remains my belief that the defense team must find a way to contextualize and if possible neutralize the elements of his journal that talk about killing Caucasians, etc. In my contact with the father, it was clear that many of Akbar's stories recounted in his journal came directly from his very early exposure to the Nation of Islam.

(JA 2457).

Counsel initially acknowledged the aggravating nature and "minimal" probative value of the diary when they moved to suppress it. (JA 1860-69). Counsel stated that if the government admitted the diary there would be "a very real chance that the fact finder will have an emotional reaction to the evidence that will distort their ability to properly evaluate the other admissible evidence and reach an appropriate, non-emotional, result." (JA 1864). The military judge agreed (JA 285), and counsel were right (JA 1543).

Then, inexplicably, they reversed course and completely ignored Ms. Grey's advice to contextualize and neutralize the diary *if* admitted by the government. This Court cannot give counsel a pass because they admitted some diary summaries that were not prepared for admission at trial as mitigation nor prepared to provide a psychiatric analysis of the diary. Ms. Grey states that admitting the diary with no explanation was a "horrible mistake" because the diary "is potentially far more

damaging than mitigating." (JA 2759). She definitively declares she would "never" advise such a strategy for either the diary or her summary without providing context through live testimony. (JA 2759, 2762; *see also* JA 2957 (LTC VH told counsel that "Ms. Grey is working on . . . a way to incorporate diary entries with witnesses and other external events to show a correlation and a depression cycle that really came to a head in Kuwait with the added stress and harassment.")).

That context includes the presentation of lay witnesses from throughout SGT Akbar's life to describe his struggles: witnesses such as his father (to describe his early years and immersion into the Nation of Islam), Aunt Rankins (to describe his troubled childhood where he was his siblings caregiver), his siblings and cousins (to describe the destructive family atmosphere and SGT Akbar's redeeming qualities), his friends, acquaintances and family from UC-Davis (to describe his mental health decline and struggle in caring for his two brothers),[10] and Dr. Donna Sachs (to describe his struggle with mental health issues). If this were done, the crushing aspects of the diary would not come in, the good information would come in through

[10] For example, Paul Tupaz testified about some of SGT Akbar's life goals. (JA 770-72). Counsel did not need the diary itself to make that point on sentencing. (*See* JA 1502-03). There are numerous other individuals mentioned in the diary that have never been interviewed, let alone considered as a witness. (*See* JA 2456 (Ms. Grey recommended these individuals be interviewed and assessed for witness suitability)).

other means, and counsel would have had a chance to convince the members to spare SGT Akbar's life. Instead, counsel gave the panel the emotional vehicle needed to deliver a death sentence.

Furthermore, Dr. Woods states that admitting the diary in the manner that counsel did was a "mistake" because it was "damning evidence" and "explosive material" if not "carefully and exhaustively" explained to the members by a mental health practitioner. (JA 2797). Counsel claimed in their first affidavit that Dr. Woods "believed that SGT Akbar's diary documented a progressive deterioration into a psychotic state [and] believed that the entries of the diary read in total proved SGT Akbar had mental illness . . . ." (JA 1969). This takes Dr. Woods' testimony out of context (JA 916), and counsel never claimed they spoke with Dr. Woods about admitting the diary or that he recommended directly to them that they should admit the diary in this manner. In their second affidavit, counsel add no more than a cursory explanation that they decided to admit the diary "based upon our discussions with Dr. Woods and our belief that the diary presented mitigation evidence in an effective manner for SGT Akbar." (JA 2363). Again, counsel did not claim to have spoken to Dr. Woods about how to best introduce the diary or state that he recommended that course of action. This omission is consistent with Dr. Woods' statement that he "never advised or would have advised trial defense

counsel to admit the diary as they did." (JA 2797).

The Army Court found Dr. Woods' statements at trial that the diary should be considered "as a whole" somehow validated counsel's decision to admit the diary without explanation or analysis. (JA 50). Dr. Woods' statement must be viewed with the caveat that a mental health professional could see its mitigating or diagnostic value, but that does not mean that a panel of laymen could understand its value merely by reading it and conducting their own individual ad-hoc analysis. Rather, a layman would likely not see a schizophrenic, but merely a hate-filled, evil man. Dr. Woods made it clear the Army Court misused his statements, and that counsel's action in admitting the diary without "exhaustive[]" explanation to the members was a mistake. (JA 2797). Admitting the diary, especially without seeking the advice of other defense team members with experience in capital litigation, amounts to deficient performance.

Counsel also claim that the government "already admitted the most damaging aspects of SGT Akbar's diary." (JA 1969). This may be correct when considering guilt or innocence, but it is incomprehensible how counsel could believe this statement true for the penalty phase. This statement is either a *post hoc* rationalization, or it displays a complete inability to analyze evidence and the repercussions of admitting that evidence. *See Lipham*, 510 S.E.2d at 41 ("The jury, left unguided to comb

through voluminous records, was just as likely to encounter aggravating information as mitigating information . . . ."); *see also Wiggins*, 539 U.S. at 526-27 (describing the "strategic decisions" that counsel invoked for limiting their pursuit of mitigation evidence as "a *post hoc* rationalization").

Prior to counsel's admission of the diary, the members did not know that as early as 1991, twelve years before the charged incident, SGT Akbar acknowledged an extreme hatred for "[c]aucasians, [w]hites, [h]onkies, blond hair – blue eyed devils" that he had held *since he was five years-old*. They did not know that early in college he lost sleep, not because of sleep apnea as the defense presented, but because he was "thinking about the destruction of Caucasians." The members did not know that in 1992 SGT Akbar vowed to "kill as many cacasions [sic] as possible" if he was denied success. Prior to the defense's admission of the diary, the members did not know that in 1996 SGT Akbar held aspirations to destroy the very thing that every member was willing to lay their own life on the line to protect—"Destroying America was my plan as a child, juvenile and freshman in college. . . . My life will not be complete if America is not destroyed. It is my biggest goal." The members did not know that SGT Akbar held a disdain for the military dating back to at least 1993. They did not know that within months of joining the Army, SGT Akbar wrote, "I do not believe a

Muslim should fight in the US Army . . . ." (*Compare* JA 1547, *with* Def. Ex. A. at 301, 305). They did not know that over a year prior to his crimes SGT Akbar self-identified murder as a possible result of remaining in the Army and he did nothing about it. They did not know that jokes about raping and pillaging, the center-piece of the defense case, potentially had nothing to do with SGT Akbar's acts. *See Hooks v. Workman*, 689 F.3d 1148, 1202-07 (10th Cir. 2012)(reversing death sentence because defense expert's testimony "served to vilify" Hooks).

Any reasonable counsel would know that this type of information would inflame a senior military panel, most whom had combat experience. At least one member during the government's merits case made it clear that he wanted to know if SGT Akbar's beliefs were tied to the terrorist attacks of 9-11. (JA 1895). Another member stated during voir dire that danger to society was a key factor in determining whether death was the appropriate punishment. (JA 440). Until counsel admitted the diary, panel did not know SGT Akbar held extremist views and dreams of jihad decades before 9-11 and the 2003 Kuwait attacks.

To believe adding this fuel to the government's fire was somehow going to be outweighed by the mitigating evidence each panel member was expected to glean for themselves in a 313-page document is absurd. The aggravating nature of the diary was certainly not lost on trial counsel. As stated in the

government's sentencing argument, none of which the government could have argued without counsel's admission of the diary,

> *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 SGT Akbar's own words, dated years before he even joined the Army,* back before there was any mention of soldier talk. 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 antigovernment." 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. 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 SGT Akbar's own words on certain incidents *the defense has brought before your attention*.[11] . . . *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.

(JA 1472-74 (emphasis added); *see* JA 1917-21 (argument slides)).

Thus, the defense case focused on mental health in the few years preceding the attack was destroyed by counsel's acts that

[11] The government continued, citing passages from the diary, to undercut the theory of defense from the merits (which counsel now calls mitigation) to show that SGT Akbar knew his unit was not uncaring and that he was not performing to standard.

depicted their client as a life-long traitor. Their only retort was to ask the panel to ignore the "emotion" they created by deferring to "logic and reason." (JA 1485).

The government counsel certainly recognized the damaging aspects of the diary, as did Ms. Grey (JA 2759, 2761), Ms. Nerad (JA 2777-78), Dr. Woods (JA 2797), and the military judge (JA 285). LTC VH (SGT Akbar's original lead counsel) recognized the same aggravating nature of the diary, and told both military defense counsel that he and Ms. Grey were "working on . . . a way to incorporate diary entries with witnesses . . . ." (JA 2957). Even counsel who tried the case identified the aggravating nature of the dairy, but they failed to address the diary through lay witnesses as Ms. Grey, LTC VH, and CPT JT envisioned. (JA 2276, 2957, 2973-74). Rather, they devised an unreasonable and ill prepared plan to present the mitigating aspects of the diary through government expert witnesses.

Counsel planned to use government expert witnesses, Dr. Diebold and Dr. Southwell, who conducted the R.C.M. 706 board, to discuss portions of the diary that indicated "depression, internal conflicts, and poor thought process." (JA 2973-74). As of early March 2005, counsel believed that presenting these two doctors, who found SGT Akbar was not suffering a severe mental disease or defect, constituted the "best chance" and "best hope" of saving his life. (JA 3033, 3039). The most

unbelievable part of this plan is that counsel did not meet with either expert witness until April 16, 2005—*after trial began*. (JA 2292, 3029, 3033). Upon meeting with these witnesses, it became apparent that they could not assist the defense as counsel had hoped. Dr. Southwell remembers that counsel become "clearly . . . frustrated and unhappy." (JA 3029). Thus, after Dr. Woods' merits testimony fell flat, counsel were left with e-mailing a defense consultant three days before their sentencing case began because they now "need[ed] some help" and "wonder[ed] what [he] might be able to say in the form of a report or a letter to be provided to the panel." (JA 2979).

As no report or letter was admitted at trial, evidently he could not be of any help either. Because counsel failed to prepare a sentencing case prior to trial, when their plan fell apart, they decided to admit the diary wholesale. This reeks of laziness or ineptitude, especially since counsel saw the testimony of these experts as "our best chance to convince a panel to not give the death penalty . . . ." (JA 2271).

Admission of the otherwise inadmissible diary, unfiltered and unexplained,[12] was deficient performance. SGT Akbar was

[12] "Only expert testimony could offer an interpretive framework for understanding mitigating evidence." (JA 2738 (citing Kevin McNally, *Death Is Different: Your Approach to Capital Cases Must Be Different Too*, THE CHAMPION at 12-13 (March 1984)). "Panel members . . . can not be expected to find the mitigating needle in the documentary haystack without guidance." (JA 2751).

prejudiced by the admission of the diary because it gave the government the argument that it always wanted—SGT Akbar is evil, he has always been evil as he planned this incident decades prior, and the defense's notion that it was all a result of racial slurs and sleep apnea is farcical. (*See* JA 2281 (counsel acknowledged that their merit's defense "could lose a lot of credibility" if the diary was admitted)).

Much like in *Rompilla*, 545 U.S. at 387, and *Wiggins*, 539 U.S. at 533, counsel in this case did not do the requisite investigation to fully understand how to deal with SGT Akbar's diary or compile witnesses from throughout his life who could testify to the substance in the diary that counsel felt were mitigating—substance which counsel never did lay out for the panel. Much like *Murphy*, the lack of any substantive training or experience in capital litigation, coupled with minimal assistance from mitigation experts and lack of preparation prior to trial, led to the indefensible decision to introduce SGT Akbar's diary without explanation, analysis, or filter and should lead this Court to conclude that in this area "there are no tactical decisions to second-guess." *Murphy*, 50 M.J. at 13.

As it only takes one member to vote for life, and it appears that there was an initial vote for life (*see* JA 1538-40), had these damning facts not been admitted by SGT Akbar's own counsel, there is a reasonable probability of a different

result. Had the mitigating evidence been developed and presented, that probability increases exponentially.

3. Counsel failed to act in accordance with professional norms when they failed to conduct pretrial interviews, failed to visit the sites of SGT Akbar's troubled youth, and failed to use mitigation specialists to help develop mitigation themes before and during trial.

Approximately a year prior to trial, counsel asked the first of six mitigation experts, Deborah Grey, to withdraw because SGT Akbar's mother did not like her. (JA 2357). As she was departing, Ms. Grey left mitigation leads and evidence for counsel. One memo described possible mitigation themes. Ms. Grey identified those themes as (1) upbringing in the Nation of Islam, (2) overcoming disadvantage, (3) love of and support given to his family, and (4) long history of mental illness. (JA 2456). With no explanation, counsel fully abandoned and failed to further develop the first three themes.[13]

[13] While mental illness is certainly one of the most persuasive mitigating factors, mitigating factors are not mutually exclusive. *See Wiggins*, 539 U.S. at 535 (stating that presenting evidence of a disadvantaged background and evidence regarding direct responsibility for the murders are not necessarily mutually exclusive sentencing strategies); *Williams*, 529 U.S. at 372-73, 396 (finding deficient performance for failing to admit five categories of mitigation evidence even though some evidence had been admitted and counsel had a different theory of mitigation). The most basic of research conducted prior to the 2005 court-martial would show counsel that detailed evidence of actual extreme poverty has mitigating significance to 31.6% of jurors. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. at 1565. In addition, 48.2% of jurors find significant mitigation in serious child abuse. *Id.* at 1559. In this case, these factors were given nothing more than a perfunctory

Instead, they presented a hodgepodge of ideas meant to show SGT Akbar suffered from a diminished mental capacity that purportedly prevented him from having the ability to premeditate. This evidence can be summarized by the presentation of a sub-par NCO who paces a lot, has sleep apnea, and dislikes racial slurs. Much of this evidence was directly contradicted by counsel's own admission of SGT Akbar's diary. (*See*, *supra*, Section A.2). With the meager effort to show how these facts, and others, were actually mitigating, it is no surprise that the members did not see the mitigating aspects of these oddities before delivering a death sentence.

Detailed evidence of SGT Akbar's life history to support mitigation themes were not presented during the merits, and certainly not during the sentencing phase, because counsel failed to conduct basic tasks required of any advocate. SGT Akbar's life history is of particular value because the crime stemmed from the abuse, neglect, extremism, and prejudice that he experienced throughout his life. SGT Akbar's case was a perfect storm of mental illness and stress on the eve of battle.

a. Failed to interview potential witnesses and discover true extent of the conditions under which SGT Akbar was raised.

It is well established that it is the duty of counsel to

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acknowledgment through admission of conclusory statements even though counsel had, or should have had, available significant evidence presented by witnesses to support both factors. (*See* JA 2829-32, 2834-36, 2854-79, 2883-84).

seek out, interview, and evaluate potential witnesses. *See, e.g., Kreutzer*, 59 M.J. at 783; *United States v. Weathersby*, 48 M.J. 668, 673 (A. Ct. Crim. App. 1998). While counsel may certainly, and even should, use mitigation specialists to find potential witnesses, it is counsel's responsibility to ultimately evaluate those witnesses and use the available evidence in a way to effectively present evidence for the accused. *Rompilla*, 545 U.S. at 387. "Interviewing the family members is hardly an onerous requirement, rather, it is the starting point for most investigation[s]." *Wilson v. Sirmons*, 536 F.3d 1064, 1088 (10th Cir. 2008)(citing *Rompilla*, 545 U.S. at 381-82 (counsel at least interviewed, developed relationships with, and presented family members)). The credibility of a witness cannot be determined without face-to-face interaction. *Cf. United States v. Dawson*, 857 F.3d 923, 930 (3rd Cir. 1988).

As the Ninth Circuit stated,

> where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their *articulateness and demeanor*—factors we are not in a position to second-guess.

Lord v. Wood, 184 F.3d 1083, 1095 n.8 (9th Cir. 1999)(emphasis added). Similarly, as a district court put it, counsel

> made that decision without even interviewing any of the character witnesses himself, to assess their demeanor and how they would have held up on cross-examination. . . . [I]t was objectively unreasonable . . . to make the decision not to call the character

> witnesses without interviewing them. Put another way, [counsel's] decision not to call the character witnesses cannot be deemed a fully informed one.

Barco v. Tilton, 694 F. Supp. 2d 1122, 1145-46 (C.D. Cal. 2010) (citing *Riley v. Payne*, 352 F.3d 1313, 1319 (9th Cir. 2003)). Here, counsel made the same error.[14]

In their initial affidavit, counsel did not detail what they did to evaluate and prepare their mitigation case before trial. In their second affidavit, they broadly proclaim that every civilian witness identified refused to be helpful or could not be trusted to stay within bounds set by counsel. (JA 2350 (excepting Mr. Duncan)). This assessment must have been made purely by analysis of the mitigation specialists' notes or unspecified phone interviews as counsel account for no face-to-face interviews of civilian mitigation witnesses from LTC VH's departure in early January 2004 through trial.[15] (*See* JA 2773 (Ms. Nerad stated that, to her knowledge, MAJ DC and MAJ DB only met with SGT Akbar's parents)). This type of assessment process

[14] Simply deferring to counsel's judgment without analyzing their conduct is inappropriate in any criminal case, let alone a capital case. Even counsel who has mental health expert(s), an investigator who interviews dozens of witnesses, and presents family members at the penalty phase can be ineffective. *See Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011).

[15] Incredibly, the only external proof that MAJ DB and MAJ DC provide to document any interviews conducted is an e-mail that indicates that Paul Tupaz was called telephonically to verify the information he gave to a mitigation specialist. (JA 2377). Otherwise, counsel claim that they "do not have records regarding the exact times and locations of these interviews" and "do not have notes regarding the additional witnesses that refused to testify." (JA 2370).

is a violation of professional norms, especially when the client is facing death. As one state supreme court judge said,

> Even if [the potential witness] was uninformative over the telephone, counsel foreclosed any possibility of finding out further information when he limited himself to the telephone conversation. Any experienced lawyer knows that witnesses who are tight-lipped when interviewed casually or by telephone sometimes open up in a face-to-face interview with a skilled interviewer.

State v. Twenter, 818 S.W.2d 628, 647 (Mo. 1991)(Blackmar, J., concurring in part).

This same sentiment was echoed by this Court in *Murphy*, 50 M.J. at 12-13. This Court criticized counsel because they failed to conduct face-to-face interviews with Murphy's character witnesses. *Id.* It then found counsel to be ineffective at the sentencing phase because of information not uncovered or presented, even though counsel presented seven mitigation witnesses and seven additional stipulations of expected testimony from Murphy's relatives and friends. *Id.*; *id.* at 34 (Crawford, J., dissenting). SGT Akbar's inexperienced counsel made the same mistakes even with the directive from *Murphy*, but presented an even more anemic case in mitigation.

What is evident from their affidavit is that counsel visited with more family members of SGT Akbar's *victims* (JA 1936) than they did with their own client's family. (*See* JA 1953 (stating only LTC VH personally interviewed people); JA 2834, 2850, 2854, 2859, 2871, 2873, 2876, 2878, 2883, 2886

(family members who were never visited)). Appellate defense counsel has presented to this Court significant evidence that counsel did very little outside of what they were comfortable with from their normal trial experience—working with fellow soldiers. Appellate counsel does not doubt that counsel interviewed these service member witnesses, as they were the same witnesses who testified at the Article 32 hearing. In fact, it appears that counsel's efforts in developing their plan to present lay witnesses at trial underwent little change after July 2004, nearly a year before trial. (*See* JA 2056 (counsel's July 8, 2004, draft examinations of military witnesses)).

Further evidence of an undeveloped case frozen in time is that counsel who tried the case never interviewed potential civilian witnesses before trial. LTC VH is the only counsel who made any effort to personally observe and interview witnesses when he and Ms. Grey went to Los Angeles early in the investigation process. (JA 2044-45).[16] This failure is also evident from the mitigation specialist's declarations. (JA 2546-54, 2758-92). Declarations submitted by the civilian witnesses tell the same story. (JA 2829-32, 2859-86).

1. Those called to testify.

[16] In their initial affidavit, counsel provided no excuse for disregarding LTC VH's advice as to which civilian witnesses to call. Of the thirteen witnesses listed on LTC VH's e-mail to MAJ DB, only one of them is called—Dan Duncan—who received one of LTC VH's lowest ratings for potential witnesses. (JA 2045).

Paul Tupaz testified on the merits for the defense. He does not remember being interviewed prior to arriving for trial. (JA 2852). Counsel chose not to fully interview him until the night before trial, and, as a result, missed a significant piece of evidence to support the supposed merits defense theory—Mr. Tupaz was the lone person presented at trial who actually knew SGT Akbar and believes that racial slurs towards Muslims is something that SGT Akbar would take very literally. (*Id.*; *see* JA 3248 (member's question showing concern about whether raping and pillaging comments were serious or sarcastic)).[17]

Dan Duncan, the second of two non-soldier lay witness to testify at trial, testified during the presentencing phase for the defense. He was never interviewed by counsel prior to trial. In Mr. Duncan's case, the violation of professional norms is even worse—he was never interviewed by counsel before being placed on the witness stand. (JA 2850).[18] This error is

[17] Counsel presented an e-mail which states that Mr. Tupaz was called in order to "confirm" the notes taken by Rachel Rogers. (JA 2377; *cf.* JA 2878 (Ms. Avina's account of a telephonic interview that was solely directed at confirming the mitigation specialist's work as opposed to an attempt to learn new information or judge her suitability as a witness)).

[18] Counsel vaguely asserts that "we" interviewed a multitude of potential witnesses either face-to-face or via telephone, to include Dan Duncan. (JA 2347-48). However, while counsel provided some corroborating evidence that they spoke to Mr. Tupaz telephonically in March 2005, counsel provided no notes, e-mails, or other documentary evidence to demonstrate that they ever spoke to Mr. Duncan. (JA 2363-64). Additionally, counsel were unable to recall any interview or witness preparation with

corroborated by the anemic testimony elicited concerning SGT Akbar, which should have been expected as Ms. Grey told defense counsel that Mr. Duncan seemed like a "reluctant witness" who "really did not know Akbar all that well," (JA 1427-30, 2017), and LTC VH twice told defense counsel not to call him (JA 2045, 2960). Thus, the two people who interviewed Mr. Duncan face-to-face recommended against calling him as a witness, but he became the defense's primary penalty phase witness without ever being interviewed by the counsel who tried the case. *See Lord*, 184 F.3d at 1095 n.8 ("[a] lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor").

2. Family and friends not called to testify.

Family members of a capital accused are particularly significant sentencing witnesses. As the ABA observed, family members and friends can "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 . . . ." American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* [ABA Guidelines], Guideline 10.1, Commentary, 31 Hofstra L. Rev. 913 (2003). Such testimony shows "that the person who committed the

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Mr. Duncan (JA 2364), which is consistent with Mr. Duncan's claim (JA 2850). Considering counsel only presented three sentencing witnesses, it would be surprising they forgot trial preparation with one of them had it actually occurred.

crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future." *Id.* Further, "[w]itnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones" are critical to a capital penalty phase. ABA Guideline 10.11.F.4.

Counsel in this case violated professional norms when they called no family members to testify. *Taylor*, 262 S.W.3d at 248-52 (reversing sentence because details of childhood admitted through experts and not family members). No witness testified about the immense struggles SGT Akbar experienced throughout his life, the positive impact he had on those around him to include practically raising his siblings, and the adverse impact a death sentence would have on his immediate family. *See Boyde v. California*, 494 U.S. 370, 382 (1990)("[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, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" (internal quotes and citation omitted)), *quoted in Loving v. United States*, 68 M.J. 1, 15 (C.A.A.F. 2009)(citing *Wiggins,* 539 U.S. at 535 ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral

culpability.")). As these potential witnesses existed, were willing to testify, and there was no reasonable tactical decision for not calling at least some of them, counsel's performance was deficient.

As with the two civilian witnesses that counsel did call, declarations from family and friends demonstrate that counsel who tried the case never conducted face-to-face interviews with the individuals most suitable for this critical category of lay testimony. John Akbar states that he was never interviewed even though he met counsel. (JA 2829; *see also* JA 2773 (Ms. Nerad states the team "could not have hoped for a better witness"). This was a major error because Mr. Akbar could have offered a detailed account of his own upbringing which shaped him as a father to young Hasan, of SGT Akbar's early childhood, and the prejudices the Nation of Islam instilled in him. (JA 2829-32).

Shockingly, counsel never personally contacted SGT Akbar's siblings before trial—Musa, Mashiyat, and Sultana.[19] (JA 2854-

[19] Counsel asserts these individuals were contacted, but they provide no details as to who contacted them, how they were contacted, when they were contacted, what information they provided, what demeanor and attributes were observed that would make them a good or poor witness, etc. (JA 2347-48). The use of the term "we" (JA 2347) appears to be all inclusive of the various members of the defense team to include LTC VH and Ms. Grey, both who were fired more than a year prior to trial. (*See* JA 2350-51). In addition, counsel provided no notes from the purported interviews, e-mails discussing the interviews, travel records indicating counsel visited the witness's homes, etc. Thus, this assertion should be rejected. *See United States v.*

71). Counsel eventually contacted Musa, but that contact was sometime in early to mid-April 2005. (JA 2854). Musa ultimately did not testify even though he requested to because counsel chose not to call him. *Id.* Musa's wife delivered a baby on April 23, 2005, but he was available to testify before or after the birth. *Id.* Counsel could have called Musa on the merits, April 18-19, or during the sentencing phase, April 26-27. At worst, they could have presented his testimony via video teleconference, video deposition, or by phone. Instead, when their plan encountered the slightest bump, they resorted to the path of least resistance—and effort—admitting a short synopsis of Musa's testimony (JA 1622) instead of putting on a witness who could humanize SGT Akbar, tell the story of a loving, father-figure brother, and explain the effect a death sentence would have on Musa and his family (JA 2036-38, 2854-57).

No witnesses were better situated than SGT Akbar's siblings to testify to SGT Akbar's abusive and poverty-stricken youth, his assumption of the father-figure role in the house when he was about seven years-old through high school and college, saving his sisters from further sexual abuse because he reported the abuse, and the effect SGT Akbar continues to have on their lives. *See Lewis v. Dretke*, 355 F.3d 364, 367-69 (5th Cir.

Ginn, 47 M.J. 236, 248 (C.A.A.F. 1997)("if the affidavit does not set forth specific facts but consists instead of speculative or conclusory observations, the claim may be rejected").

2003)(remanding for new sentencing hearing because conclusory testimony of grandmother regarding child abuse was not sufficient when counsel could have called appellant's siblings to provide details of the abuse). This account was critical to the presentation of a coherent life story, the value of SGT Akbar as a person, and the nature of a young boy before he started suffering from the downward slide into mental illness. As mitigation specialist Lori James-Townes said, "[t]he absence of family member[s] as eyewitnesses to the unspeakable issues in SGT Akbar's background speaks volumes to a panel member who had to decide the life and death of SGT Akbar with absence of vital family witnesses." (JA 2622). Failure to present family members to describe how his loss would affect them and to tell his comprehensive life-story was deficient performance.

Not only should Musa have testified, so should SGT Akbar's sisters. Sultana, who stated counsel never contacted her, could have testified about Hasan's tumultuous childhood where they all went to bed hungry, he was treated poorly by his step-father, he watched his father and step-father abuse his mother, and as a child he felt compelled to pull a gun on his father to get him to stop beating his mother. (JA 2867). Sultana could also have testified concerning SGT Akbar's redeeming qualities, to include his sending money home when he was working in college, his mother sending his brother Mustafa to live with him in college,

and his status as role model of the family as he encouraged them to better themselves educationally, financially, religiously, and morally. (JA 2859-69). None of this was presented.

Additionally, his sister Mashiyat was willing to testify, but counsel never spoke with her. (JA 2871). She could have told the panel how SGT Akbar "took on 95% of the responsibility of raising me, my brother, and my sisters." *Id.* She could have testified how she was sexually abused by her step-father, how Hasan reported the abuse, and how he and the family dealt with the abuse. (*See* JA 2790-91). Hasan filled a role not intended for him—the role of a father who ensured his siblings "went to school, had food and clothing, and that we did our homework." *Id.* These redeeming qualities, the good times in SGT Akbar's life, might have swayed at least one member to vote for life.

The list of people in SGT Akbar's life not contacted and/or interviewed by counsel is much longer.[20] It includes, among others, Starr Wilson, SGT Akbar's cousin who was interviewed for the first time in 2010, who could have talked about growing up surrounded by gangs, SGT Akbar's family struggles with adapting to life in Los Angeles after moving there from Louisiana, and how responsible he was as a teenager. (JA 2873-74). Kimberly

[20] Counsel admit being unaware of the potential testimony Kimberly Vines, Jill Brown, Marianne Springer, and Bernita Rankins had to offer. (JA 2369). Counsel provided no facts or documents corroborating any memory of interviewing Starr Wilson, CB, or Regina Weatherford.

Vines, another cousin who was interviewed for the first time in 2010, could have described the rough conditions of the neighborhood and high school, SGT Akbar's character growing up, and the effects of SGT Akbar's crime on his own family. (JA 2876). CB, a "sister" never interviewed by counsel, could have testified to a thirteen year-old Hasan filling the male role of the house as the family had no men in their lives, and how "Hasan gets all the credit for the good things that I do . . . ." (JA 2883).[21] Ruthie Avina, Hasan's high school friend, could have testified about SGT Akbar's academic achievements, his participation in the Academic Decathlon, and the difficulties of achieving and getting out of that environment so riddled with violence and drugs.[22] (JA 2878-79). Marianne Springer, SGT Akbar's former landlord, who was only interviewed by the FBI before trial, could have provided a humanizing anecdote of him calling her years after moving out of her house, seeking to pay her $300 that he still owed her but that she did not expect to

[21] SGT Akbar's diary details a childhood incestuous relationship with CB. (Def. Ex. A at 127). As the mitigation specialists lacked funding and counsel never spoke to CB, the necessary trust was never established with her to determine if these events happened, and, if they did, how they affected SGT Akbar. (*See* JA 2790). This is a significant area of possible mitigation that has never been adequately explored.

[22] Counsel contacted Ms. Avina, however, the phone call was not an interview to determine her potential value as a witness, but an inquisition to question the work of Ms. Nerad. (JA 2878). Counsel marked Ms. Nerad's interview notes of Ms. Avina as an exhibit, but unexplainably did not admit them. (JA 1633-35).

be re-paid. (JA 2881). The panel heard none of this testimony.[23]

This failure to personally interview the key people in SGT Akbar's life, to analyze their demeanor and viability as witnesses, is a violation of the professional norms of defending any case, let alone a capital case. Relying only on the reports of mitigation specialists is not sufficient. *Cf. Stanley v. Bartley*, 465 F.3d 810, 813-14 (7th Cir. 2006)(finding deficient performance for relying on statements given to police). That is especially true when counsel doubts the veracity or utility of their mitigation specialists. *See United States v. Witt*, 72 M.J. 727, 760 (A.F. Ct. Crim. App. 2013)(pending recon.); (JA 2939 ("I don't think anything that we have received from Scarlet has been accurate.")). Here, even though there appears to have been a major rift between counsel and the mitigation team in the months leading up to trial, counsel did little to prepare a mitigation case outside of presenting Dr. Woods and Dr. Tuton.

"[W]hile we do not require counsel to interview every single extended family member, . . . it is incomprehensible that counsel can be effective in a case where life is at stake without interviewing *any* family members--particularly those in

[23] Appellate counsel believes this list is much longer, but because SGT Akbar was denied additional funding for the post-trial mitigation specialist, these are all the declarations that counsel could obtain after brief telephonic interviews. (*See* JA 2602 (mitigation specialist's identification of thirty-eight witnesses of whom about half have either never been interviewed or appellate counsel has no record of the interview)).

the immediate family." *Wilson*, 536 F.3d at 1088. "Without their testimony, the jury was left with no alternative but to believe that [SGT Akbar's] own relatives were not supportive enough of him to plead for his life during the proceedings." *Johnson v. Mitchell*, 585 F.3d 923, 942-43 (6th Cir. 2009) (finding IAC for not interviewing or presenting family members). As a result, counsel failed to develop a comprehensive set of mitigation themes and instead presented an incomplete and fragmented case directed solely at the premeditation element, which they now want to call mitigation. In capital cases, this is insufficient to meet Sixth and Eighth Amendment requirements.

b. Failed to visit the sites of SGT Akbar's troubled youth, Baton Rouge and Los Angeles, to facilitate interviews and better understand the environment in which SGT Akbar was raised.

LTC VH was the one counsel who understood the value of interviewing potential witnesses in person and in the places where SGT Akbar grew up. He, and apparently he alone, was the only counsel to travel to conduct face-to-face interviews with potential witnesses, but he left the case approximately fifteen months prior to trial. (JA 2044-45, 2350-51). This Court need not decide that in every case counsel must travel to visit key places where the client was raised. However, in this capital case, there were at least two critical reasons for doing so.

First, personal interviews on the home turf of often reluctant witnesses can assist counsel in gaining trust and

confidence from those witnesses, offer the witness a location which most easily reminds them of the defendant, and assists the witness to recall key facts in the defendant's life. Russell Stetler, the National Mitigation Coordinator for the Federal Death Penalty Resource Counsel Project, states that life-history witnesses should be interviewed "in the setting which is most likely to evoke memories of the client . . ." to obtain full disclosure from the witness. (JA 2748-49). Full disclosure is crucial not only to building the life-history investigation, but to present a complete and coherent life story to the members.

Second, counsel must visit the places where a capital client grew-up in order (1) to truly understand the culture of their client's family, friends, and other life influencing forces, (2) to understand fully the responses received by potential witnesses, and (3) to be able to put all these factors together and present a vivid picture to the members. *Id.* This is especially true in a military capital case because a capital accused is rarely tried in his hometown by hometown counsel.

It is one thing to hear the words "poor" or "poverty." It is quite another to see it. For example, when seeking information about Locke High School in the late 1980's, a potential witness who grew up in the area might find Locke High School completely normal. A panel member from a farm in Iowa may not. If counsel experienced the school and surrounding

neighborhood themselves, it would assist them in understanding why a witness thought the school was normal. In addition, it would allow counsel to form appropriate questions to elicit a more accurate picture of the school, which one spurned witness described as a prison where students did not go to the bathroom alone for fear of being robbed or stabbed. (*See* JA 2878-79).

"Counsel's obligation [in mitigation] is to present to the court *all* factors and circumstances necessary to ensure the proper functioning of the adversarial process." *Weathersby*, 48 M.J. at 673. That responsibility is never clearer than in a capital case. *Kruetzer*, 59 M.J. at 783.

One of the reasons that the presentation in this capital case was so lacking in quality and effectiveness is counsel's "ordinary" approach to mitigation. *See Murphy*, 50 M.J. at 13 ("a capital case . . . is not 'ordinary,' and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death"). They simply treated this capital case just like any other case, most likely because they had no training or experience that taught them any differently. They confirm this in their second affidavit when they state that they did not travel to meet any potential witnesses because the mitigation specialist did not advise them to. (JA 2351). Instead, the process they purportedly used to

identify and prepare witnesses was "similar to that used by MAJ DC and MAJ DB in other cases where an out-of-town witness's testimony is developed first by a phone interview and then through in-person preparation prior to in-court testimony." (JA 2347).[24] This statement acknowledges that counsel believed face-to-face interviews after trial had begun were sufficient as long as the interviews occurred prior to the witness testifying. This misunderstanding of adequate representation in a capital case explains counsel's failure to conduct in-person interviews prior to trial, but it does not account for the dearth of live evidence presented by counsel during the penalty phase.

A phone call[25] is not sufficient to determine whether a person would be a good mitigation witness during the penalty phase or to build the relationships required to develop useful testimony from reluctant witnesses. *Murphy*, 50 M.J. at 12-13; *Lord*, 184 F.3d at 1095 n.8. That approach, the common one taken in the average larceny case in which these counsel had experience, is no more evident than in counsel's failure to visit Baton Rouge and Los Angeles and failure to conduct

[24] On at least two occasions in 2004, e-mails from MAJ DB reveal that he intended to conduct in-person interviews prior to the start of trial. (JA 2058, 2959). What is not clear is why counsel neglected to follow through with this course of action or why counsel now state that they would have traveled if only Ms. Nerad had advised them to. (JA 2351).

[25] Trial defense counsel's notes do not indicate pretrial phone conversations with prospective witnesses, unless those calls were conducted to verify the mitigation specialist's reports.

personal face-to-face interviews of SGT Akbar's family, friends, and others, especially when a mitigation specialist encouraged them to do so. (JA 2768-71). This failure included the refusal to conduct a taped interview or deposition of SGT Akbar's grandfather who was on his deathbed and now deceased. (JA 2604, 2769-70). These facts indicate a simple decision to abstain from personally investigating SGT Akbar's mitigation case and to inappropriately delegate the responsibility of diligent investigation to their mitigation specialists. This is unacceptable and violates the professional norms of practice.

It does not take special training to know that people do not offer tragic and humiliating facts about their family over the phone to strangers. It appears counsel never fully appreciated the dynamics of the capital penalty phase. When counsel failed to arm themselves with that knowledge, it was impossible for them to present a "vivid mitigation narrative" to the members in a constitutionally sufficient effort to save SGT Akbar's life. As such, their performance was deficient.

c. Failed to interview a former treating psychologist who could have provided the panel and the defense expert psychiatrist "powerful mitigation evidence" concerning SGT Akbar's deteriorating mental health during college.

Dr. Donna Sachs was a psychologist at UC-Davis from 1967-2002. (JA 2800). She remembers seeing SGT Akbar about five times. Although, because of university record retention policy, she no longer possessed his records, she remembered SGT Akbar

because he was "very disturbed," he needed help suppressing violent thoughts based on race, and he took the unusual step of seeking help. (*Id.*; *see also* JA 1639-42 (Roberta Osborne's notes also indicate Dr. Sachs treated SGT Akbar). She was pleased that he responded well to counseling and began to control his anger and suppress his violent thoughts.

Counsel knew of Dr. Sachs because she spoke with Ms. Nerad. (JA 2766-68). Ms. Nerad recalls Dr. Sachs' memory of SGT Akbar as "excellent," and describes her reaction as "visibly shaken when she learned what had become of" him. (JA 2767). Ms. Nerad called Dr. Sachs' testimony "crucial" and "powerful." *Id.*

MAJ DB's handling of Dr. Sachs is troubling and inexplicable. In the second declaration, counsel attached an e-mail from March 2005 where MAJ DB described Dr. Sachs as being coached by Ms. Nerad. He further states, "I swear it sounds like those cases where a social worker coaches a child into having false memories. It is a complete load of crap that I would never bring into court." (JA 2381). MAJ DB not only displayed the mindset of a prosecutor who was seeking justice and unassailable evidence, he incredibly equated this professional psychiatrist with thirty-five years of experience to an easily manipulated "child." Counsel further stated that she was not considered as a witness because the government might cross-examine her and "undercut the value" of her testimony,

merely because she no longer possessed her treatment records. (JA 2365-66). This prosecutorial mindset with an adverse view toward any testimony that might undergo cross-examination and a clear disdain for Ms. Nerad's work clouded MAJ DB's judgment, to SGT Akbar's detriment. Hardly any witness leaves the stand unscathed, and refusal to present testimony on this ground violates the norms of professional practice.

Dr. Sachs' account of her interaction with Ms. Nerad and MAJ DB corroborates Ms. Nerad's declaration and is in direct conflict with the defense counsel's second affidavit. Dr. Sachs states that she remembers SGT Akbar not because of Ms. Nerad, but "because he was so disturbed" and sought help. (JA 2801). Counsel's indignation is inexplicable. It was counsel's duty to prepare witnesses to testify, and Ms. Nerad's conduct appears to be completely normal witness evaluation and preparation. *See generally* ABA Guidelines 1.1, 4.1, 5.1, 10.7, 10.11. Dr. Sachs remembers that MAJ DB's sole concern was that she no longer possessed treatment records, and he did not interview her to develop what she could independently recall to provide as testimony. (JA 2801). The failure to develop Dr. Sachs as a fact witness, and to give Dr. Woods the information provided by her, were unreasonable professional decisions because it hindered Dr. Woods' evaluation and it deprived the panel of significant mitigation evidence. *See State v. Duncan*, 894 So.

2d 817, 825-26 (Fla. 2004)(reversing the sentence for failing to call a known mental health physician). Dr. Woods states that Dr. Sachs' testimony is "extremely significant" because it is "powerful mitigation evidence" developed in the early stages of his schizophrenia, it supported the diagnosis of schizophrenia, and it demonstrates the unlikelihood of malingering. (JA 2797-98). However, he was unaware of this information, and could not use it in furtherance of his diagnosis or testimony. *See id.*

Not only was the panel deprived of hearing this critical mitigation evidence, they were affirmatively told that it did not exist. A member asked Dr. Woods the following: "If SGT Akbar had psychological problems did he ever seek help other than the visit to the school Dr. for stress . . . problems." (JA 1897, 2381). After clarifying that the question accounted for "the school Dr." SGT Akbar saw on April 2, 1992, Dr. Ibarra, Dr. Woods responded, "No." (*Compare* JA 941, *with* JA 812-14). This statement, while not the fault of Dr. Woods, is inaccurate as SGT Akbar had seen Dr. Sachs approximately five times. The panel never heard, even though a member asked, that SGT Akbar sought out treatment during what would be the early stages of schizophrenia because his counsel did not share it with Dr. Woods and refused to present Dr. Sachs.

This failure to present information not only hampered Dr. Woods' diagnosis, but it also deprived SGT Akbar of the

testimony of a treating psychologist who could corroborate Dr. Woods' findings by providing specific instances of serious psychological issues. *See Kruetzer*, 59 M.J. at 783-84. Refusal to develop and present this significant evidence regarding SGT Akbar's mental health during his early adult years amounts to deficient performance by counsel, especially since a member asked for the information and was provided a false response. Because SGT Akbar needed only one member to find him not guilty of premeditating murder, or one member to vote in favor of life, there is a reasonable probability that SGT Akbar suffered prejudice because of counsel's deficient performance.

d. Failed to interview an expert consultant who could have validated the defense theory that the racial slurs had an atypical impact on SGT Akbar.

The theme for the defense on the merits that can be gleaned from the record is that SGT Akbar's acts were the result of racial slurs uttered by members of SGT Akbar's unit. The defense stated in their closing argument,

> Every person from that unit who got up here testified to either saying, or hearing, these derogatory terms -- raghead, towelhead, camel jockey -- whatever they were. They either testified to hearing them, or saying them themselves. NCOs where saying the same terms. You had a platoon [SGT] who uses the term raghead right to SGT Akbar's face . . . . You have a platoon leader who just tolerates these terms going on around him. SGT Akbar, in his mental state, is not someone who can process these. He's extremely paranoid, and he takes them out of context. He can't see them for what they are, just saber rattling. He views them as a threat. Then there's these other sick jokes about rape and pillage, rape and plunder,

sexually assaulting Iraqi women.

(JA 1033).

However, besides gutting this mitigation by presenting SGT Akbar's diary, the defense presented only the bare bones of the evidence, failing to uncover and present what was the heart of the beast that infected SGT Akbar's mental subconscious. At best, the evidence counsel did present came off as nothing other than a lame excuse made to hardened panel members who have heard similar offensive comments during their careers, but had no thoughts of ever killing anyone over them. At worst, the defense presented the motive for the killings.

The panel did not appreciate, because they were not informed, that in SGT Akbar's life, beatings followed threats. The panel did not know SGT Akbar's mental state caused him to exaggerate the significance of hateful words because he viscerally understood what it was to be hated. The panel did not grasp that, since his earliest years, the shame of being helpless to stop the rape of his sisters and the savage beatings of his mother tormented SGT Akbar. Nor did the panel understand SGT Akbar was born into a cult of racism from within and without. Without comprehending SGT Akbar's perspective, and how forces beyond his control formed it, the panel could not understand why he committed these heinous acts. Counsel's failure is obvious. They knew a clinical psychologist whose expertise was working

with African-American combat soldiers, Dr. Will Miles, was working on the case with civilian counsel, Mr. Wazir Al-Haqq. (JA 1962, 2128-29, 2133, 2378-79). They also believed their appointed clinical psychologist, Dr. Clement, "was not considered a strong witness for the defense . . . ." (JA 1965-66). Due Dr. Clement's lack of expertise with African-American soldiers and the cultural dynamic critical to SGT Akbar's psyche, Mr. Al-Haqq sought advice from military counsel on using this distinguishing factor as grounds for additional funding for Dr. Miles, or in the alternative, replacing Dr. Clement with Dr. Miles. (JA 2378-79). Knowing a mental health professional with expertise in treating African-American soldiers had reviewed SGT Akbar's mental health records and other documents, they made the conscious decision to never ask Dr. Miles about his opinions on SGT Akbar's mental state, let alone seek additional funding for his assistance. (JA 1962-63, 2365-66; *see also* JA 2128-29 (without knowing what Dr. Miles could offer, MAJ DB decided not to request funding for Dr. Miles' evaluation)). They made this decision even though he was at one point listed on a draft witness list to testify regarding lack of premeditation—the sole defense theory ultimately presented. (JA 2066-67).

Dr. Miles was the witness who could put the meat on the bones of the racial slur "defense" (JA 2803-05), while complementing Dr. Woods' simple conclusion that mental illness

makes a person "much more vulnerable to misinterpreting the environment." (JA 943). Dr. Miles has extensive experience in psychology, PTSD, racial discrimination, and African-American studies. During his review of SGT Akbar's records, Dr. Miles immediately saw signs that "suggested possible psychotic issues, probable 'thought disorder,' and possibly early childhood trauma that continues to affect his mental health into adulthood."[26] (JA 2803). The records included indications that SGT Akbar's early childhood development in a racially hostile environment together with mental illness may have caused him to view "inappropriate banter" as "fighting words and serious threats." (JA 2804).

Most importantly, Dr. Miles could have explained the psychological impact of these slurs on SGT Akbar as they relate to his upbringing in the Nation of Islam[27] and the historical

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[26] Dr. Miles believes that SGT Akbar "may have a thought disorder or psychotic cognitive processes that possibly could be caused by or associated with PTSD, Schizophrenia, Major Depression, or even a Borderline Personality Disorder, etc." (JA 2803). Dr. Miles cannot offer a definitive diagnosis because counsel failed to seek the necessary funding to complete the evaluation. Had competent counsel interviewed Dr. Miles, competent counsel would have seen the value of his testimony and sought appropriate funding. Even without funding for testing and evaluation, Dr. Miles could have provided expert testimony based on the documents he reviewed and the testimony presented at trial.

[27] Counsel summarily rejected one expert on Islam recommended by the mitigation experts, Professor Aminah McCloud, because of her affiliation with the Nation of Islam decades prior. (JA 2372-73). There is no indication that counsel sought an alternate even though their mitigation specialist told them that it was required to develop SGT Akbar's life history. (JA 2770). The defense team already had a person familiar with the case who

context of growing up in a racially divided South with grandparents who experienced and recounted violent racial oppression. (*See, e.g.,* Def. Ex. A at 38-39, 100; JA 2785-87 (insight from Ms. Rogers interviews of SGT Akbar's family)). Without describing for the panel how SGT Akbar's background and mental illness could cause him to feel seriously threatened by racial slurs towards Muslims, "his collective family," it is nearly impossible to expect the members to understand how this inappropriate banter would mitigate his conduct. To the contrary, Dr. Miles would have testified that these comments in a stressful environment could have "seriously affected his frame of mind at the time of the incident."[28] (JA 2805). These affects could have been so serious as to wholly undermine his ability to premeditate, and, at the very least, provide significant mitigation evidence that was never presented. *Id.*

Corroborating evidence to support Dr. Miles' testimony existed. (*See generally* JA 2808-27 (Ms. Grey's Mitigation Facts Report)). Counsel could have called SGT Akbar's father to describe the racial hatred taught to his son. (JA 2829-32). The Nation of Islam taught whites were devils that always abused

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could have testified concerning Islam, Dr. Miles, but counsel did not know this fact because they never spoke with him.

[28] *See also* Garvey, *Aggravation and Mitigation in Capital Cases*, 98 Colum. L. Rev. 1538 at Table 2 (finding 54.6% of jurors are less likely to vote for death if the "killing was committed under influence of extreme mental or emotional disturbance").

African-Americans and black Americans could never be friends with the white man. (JA 2831). John Akbar could have told the members about the stories of racial violence and discrimination told to SGT Akbar when he was young by teachers at the Sister Clara Mohammed FOI school, his mother, his grandfather, his uncle, and Mr. Akbar himself. This testimony would emphasize that SGT Akbar was not entirely responsible for his skewed view of life as he was indoctrinated with hate at an early age.

Counsel could have also admitted evidence gathered by Rachel Rogers. (JA 2785-87). Ms. Rogers interviewed several family members in Louisiana, and she accounts for the family's "obsession with race issues." Stories of racial discrimination, oppression, and brutal violence were told and retold by SGT Akbar's grandfather (whose grandparents were slaves) and uncles. The mitigation team, without the knowledge of Dr. Miles, "felt that the multi-generational intense paranoia about race and deep suspicion of white people could potentially mitigate Hasan's racially volatile diaries and explain how he perceived racial slurs towards Muslims." (JA 2786). The mitigation team also saw this "anti-white philosophy" as "indicative of the onset of schizophrenia." *Id.* However, while Ms. Rogers sent her reports to counsel, inexplicably they never contacted her to discuss her experiences, findings, or opinions. (JA 2787).

Counsel should have also called Dr. Sachs, discussed in

more detail *supra* in Section A.3.c. Dr. Sachs counseled SGT Akbar because he was experiencing racially violent thoughts and anger, and he needed counseling to learn to control these thoughts. (JA 2881). Dr. Sachs' testimony would be consistent with the testimony that Dr. Miles could have provided regarding the racial hostility displayed in SGT Akbar's diary during this same time frame. (*See, e.g.,* Def. Ex. A at 38-39, 176-77). However, like nearly every potential witness, counsel never fully interviewed Dr. Sachs about these facts. (JA 2801).

Counsel cannot make the tactical decision not to present Dr. Miles and this extensive theory of defense and mitigation without first conducting a reasonable investigation—interviewing Dr. Miles, Dr. Sachs and the other witnesses necessary to present this evidence. *Alves*, 53 M.J. at 286. It is evident that counsel were altogether unaware of it because they never spoke with Dr. Miles even though they knew his role in SGT Akbar's case. (JA 1962-63); *see Wiggins*, 539 U.S. at 525 (requiring counsel to "discover *all reasonably available* mitigating evidence")(citing ABA Guidelines). "[T]heir incomplete investigation was the result of inattention, not reasoned strategic judgment." *Id.* at 534. Counsel's failure to investigate reasonably available evidence alone supports a finding of IAC for both phases of SGT Akbar's trial.

Thus, the findings, or at least the sentence, should be

vacated and this case remanded for a rehearing. *Kreutzer*, 59 M.J. at 784 (stating counsel was ignorant of facts because of "counsel's failure to become fully informed" rather than a tactical decision to not present matters in mitigation).

e. Failed to seek guidance from mitigation specialists on which witnesses to present, the manner in which they should be presented, and the themes available to support mitigation evidence with a view toward avoiding a death verdict.

Mitigation specialists are utilized to assist in capital cases because they have specialized skills in interviewing witnesses, in identifying mental illness, and in compiling vast amount of data to identify themes of mitigation. *Kreutzer*, 61 M.J. at 298 n.7, 302-03 (recognizing the mitigation specialist as "the most experienced member" and a "core member" of a military capital defense team, especially one with counsel who has little training or experience in capital litigation); *see also* ABA Guideline 4.1, Commentary § B; (JA 2718-21, 2747). Their life work is in defending capital clients. Even with experienced counsel, they are a crucial member of the team. Not only do they assist in putting together the case and formulate trial strategy, they perform critical tasks leading up to and throughout the trial. (JA 2759-60). Mitigation specialists have the experience to guide inexperienced counsel through a trial; a trial unlike one they have ever encountered before.

Mitigation specialists have special training and experience in identifying witnesses to tell the client's life story in a

coherent and comprehensive way. That story must be "'portrayed through narrative, incident, scene, memory, language, style, and even a whole array of intangibles like eye contact, body movement, patterns of speech—things that to a jury convey as much information, if not more, as any set of facts.'" (JA 2737 (citation omitted)). Only a trained mitigation specialist can play that vital role on the team. *Id.*

The first mitigation specialist, Ms. Grey, treated presence at the trial as an obvious matter in her transition memo to counsel. (JA 2455 (para. 13)). Those views are consistent with ABA Guideline 4.1B that directs a mitigation specialist to be part of the defense team "at every stage of the proceedings." However, defense counsel in this case did not even make an attempt to have their mitigation specialists present, and made no apparent attempt to use the mitigation specialists to prepare their case in the month leading up to trial.

In their first affidavit, counsel correctly stated the role of the mitigation specialist—"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 . . . ." (JA 1953). However, counsel did not explain how they used their mitigation specialists for these critical purposes. That is because they

did not—"[MAJ DB] never requested any assistance on mitigation strategy and presentation of that strategy, which is one of our most valuable services that we can provide counsel, even experienced counsel." (JA 2768; *see also* JA 2787 (counsel never contacted Rachel Rogers to discuss her significant findings; JA 2791 (counsel resisted discussions with Laura Rogers on ideas for further investigation). This is unacceptable in any case, let alone a capital case, as "the mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable." *Richey v. Bradshaw*, 498 F.3d 344, 366 (6th Cir. 2007).

Even without the additional declarations from the various mitigation specialists involved in this case, it is obvious that a mitigation specialist was not involved in the presentation of SGT Akbar's case because the "story" presented at trial was vague and disjointed while lacking any semblance of coherency, completeness, or any first-hand accounts of the circumstances of SGT Akbar's life. When this Court analyzes why that is the case, it can quickly see that it is a result of dysfunction and apathy on the part of the defense team.

First, the dysfunction.[29] In March 2004, Skip Gant of the Federal Public Defender's office in Nashville, Tennessee, was introduced to counsel to provide assistance to the floundering

[29] A list of the fluctuating defense teams is located at App. C.

ship. He wrote to counsel that "I get the sense that there's 'trouble in Paradise' [sic] amongst the defense team." (JA 2092). He then advised MAJ DC that "only strong defense teams win difficult cases. You have a difficult case[;] 'yo' team's gotta-b solidified. Do what you have to do to accomplish that; otherwise, Akbar don't stan' a chance . . . ." *Id.*

In April 2004, Deborah Grey was trying to find a way to keep the defense team together as she describes it as "split" and having a "deep . . . divide." (JA 2006; *see also* JA 2758 ("I have never been a part of a team that was as battered and fragmented as the Akbar team.")). She withdrew soon after and was followed by Scharlette Holdman. Due to ill health, Ms. Holdman did not stay on the case. Scarlet Nerad replaced Ms. Holdman in September 2004 (JA 2174), and by early November 2004, Ms. Nerad e-mailed counsel because there was "almost no communication," counsel were non-responsive, and she had little "assistance, guidance, and participation" from counsel. (JA 2445; *see also* JA 2785 (Rachel Rogers detailing investigation in Louisiana done with "no guidance" from counsel)).

This problem was not fixed as trial approached. (*See* JA 2213 (on March 10, 2005, Ms. Nerad sent an e-mail to counsel indicating exclusion from mitigation coordination and witness preparation); JA 2931, 2933 (Dr. Woods' advice to add more lay and expert witnesses was scoffed at and ignored)). As James

Lohman, Laura Rogers and Ms. Nerad recount, their mitigation efforts were thwarted by counsel's desires to please SGT Akbar's mother. (JA 2553-54, 2772, 2791-92 (detailing counsel's attempt to fire Laura Rogers at the behest of SGT Akbar's mother because Ms. Rogers was uncovering incidents of sexual molestation within the family)).[30] But SGT Akbar's mother was not the client and should not have been allowed to direct or limit mitigation efforts. There is no evidence this dysfunction was rectified, dooming SGT Akbar before the first panel member sat.

Apathy quickly followed dysfunction.[31] By February 11, 2005, Ms. Nerad informed counsel the mitigation specialists were financially "broke." (JA 2205). On March 1, 2005, Ms. Nerad informed MAJ DB of the hours needed to complete the investigation. (JA 2208). While counsel asked Ms. Nerad for a declaration (*Id.*), he did not seek further funds nor did the tenor of his e-mails reflect his belief more time or funds were necessary. (JA 2935-39). Rather, he told Ms. Nerad additional funds were denied though no request was made. (JA 2768). The last known e-mail communication provided between counsel and the mitigation specialists occurred on March 10, 2005—about a month before trial. (JA 2213). Counsel made no request for additional funds

[30] *See* AE A.VI, Sections A and B.
[31] Attorney James Lohman describes their conduct as "defeatist" with an appearance of loyalty to the military institutions while remaining indifferent to SGT Akbar's life story. (JA 2552).

so Ms. Nerad could support the defense team leading up to and during trial, though counsel professed in their affidavit they knew this was the role of a mitigation specialist. (JA 1953). Instead, counsel chose to try their first capital case without the help of the team's most experienced capital specialists.

As of February 2005, the defense team consisted of four mitigation specialists. Each of them provided declarations describing the dysfunction and apathy of counsel in the months leading up to trial. (JA 2548-54, 2764-93). It is also clear counsel were not wanting for advice from experts in mitigation presentation. For example, Tom Dunn told counsel that they "must involve witnesses from every period of the SGT Akbar's life." (JA 2694; *see also* JA 2759-60, 2775-77 (Ms. Grey and Ms. Nerad concurring); JA 2931 (Dr. Woods' requesting more lay and expert witnesses)). But counsel, who had no capital experience and never personally spoke to almost all of the potential mitigation witnesses, decided not to follow the expert advice.

Instead, defense counsel viewed the expertise of others with disdain. In an e-mail dated January 27, 2005, MAJ DC told MAJ DB that he has "a growing dislike for mitigation experts." (JA 2970). This negative attitude continued to fester to the detriment of SGT Akbar as the contact with Ms. Nerad became more hostile before being cut off altogether. When Dr. Woods demonstrated a legitimate concern for the defense presentation

plan, counsel immediately blamed Ms. Nerad for putting ideas in Dr. Woods' head. (JA 2933). In response to the last discussions between counsel and Ms. Nerad, MAJ DB sent MAJ DC an e-mail detailing a conversation with Ms. Nerad where she told him they had insufficient time left to do a "competent investigation." (JA 2938). MAJ DB then mockingly minimized the utility of SGT Akbar's mitigation team, and the advice they provided, by writing, "I'm guessing that in the next week or so we will get a call from one of their cohorts, probably an 'expirienced' [sic] death penalty lawyer, who will tell us we are going about this all wrong and we need to do things their way." *Id.*

This attitude reflects a refusal to listen to guidance from specialists with actual capital litigation experience, in a case where counsel had none. *See Kreutzer*, 61 M.J. at 298 n.7 ("[B]ecause there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation."). If problems arise between counsel and mitigation experts, counsel is not presented with a Hobson's Choice, but must ensure that steps are taken to solve the problems so that the client is represented effectively. *Cf. Witt*, 72 M.J. at 760 (faulting counsel for not reevaluating their plan when a defense expert lost credibility). Here, counsel never complained to the judge or the convening authority that their experts were

inadequate or unacceptable, and they never asked for more time to complete the tasks normally performed by these specialists.

Other than the unexplained disdain for SGT Akbar's mitigation experts, and learned counsel who offered free help, it is unclear from the record and counsel's affidavits why they ignored the advice they were given or refused to seek advice from their mitigation experts—*people who had actually spoken to potential witnesses in person*.[32] It appears MAJ DB locked in on the mental health defense as early as the summer of 2004, and was disinterested in exploring other avenues of mitigation.[33] This is unacceptable in a capital case where the mitigation investigation is substantially incomplete. Counsel's tunnel vision and contempt for mitigation specialists and learned counsel deprived not only the members of powerful mitigation evidence, but they also deprived SGT Akbar of effective counsel.

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[32] The mitigation specialists all detail their inability to get counsel to hold team meetings to discuss mitigation theories and presentation. (JA 2546-55, 1764-93).

[33] *Compare* JA 2056 (July 8, 2004, draft examinations of only military witnesses), *with* JA 2085 (September 17, 2004, e-mail stating that they already had all the witnesses that they wanted even though multiple crucial interviews were not yet conducted), *with* JA 2693 (Tom Dunn's analysis that as of November 2004 "the defense team had not developed any semblance of a coherent integrated mitigation defense"), *with* JA 2196 (January 2005 request to a mitigation specialist to focus her interview summaries on "supporting the mental responsibility defense"), *with* JA 2933 (in early March 2005, counsel stated Dr. Woods was their entire defense), *with* JA 2768-71, 2775 (Ms. Nerad recounting counsel's apathy towards suggestions), *with* JA 62 (listing only two lay civilian witnesses who testified).

What is clear is no mitigation specialist assisted counsel in formulating themes of mitigation or were present at trial to support the defense team in preparing and presenting witnesses and in responding to the government's evidence in aggravation.[34] The professional norms of capital litigation in 2005 required that, in most cases, counsel, especially inexperienced counsel, employ an integrated team consisting of mitigation specialists and other experts in order to present a cohesive mitigation theory in a no-holds barred effort to avoid a capital sentence. *Kruetzer*, 61 M.J. at 302-05; *see also* Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 Geo. Mason U. Civ. Rts. L.J. 199, 199-200 (2002)("working together [with a mitigation specialist] is necessary for success; . . . . though those who fail to heed [this advice] risk not their own lives, but their clients");[35] ABA Guideline 4.1, Commentary § B. It is obvious that this team was never formed, and advice given was ignored, from the record of trial where barely a semblance of SGT Akbar's story was told, and a mere thirty-eight minutes and a document dump accounted for the sum total of the sentencing case that should have been an all out effort to save a life.

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[34] *See also* JA 2590-2624, 2690-2762 (affidavits of attorneys and mitigation specialists detailing professional norms of capital litigation as of 2005 and the plethora of ways in which those norms were violated by counsel in this case).

[35] Provided to the defense team in April 2003. (JA 2954).

Merely checking the *Kreutzer* block by hiring a mitigation specialist is not sufficient; counsel must use the specialist as intended, or if that is not possible, seek a new mitigation specialist who can provide the services required. Dismissing their experts and going solo just because counsel feel their few years of criminal law experience is sufficient demonstrates how little about capital litigation that counsel understood. Thus, they provided deficient performance to SGT Akbar's detriment.

4. Counsel were ineffective when they neglected to present a coherent case in mitigation because they failed to call willing witnesses to tell that story and instead relied on an incomplete but voluminous document dump.

"Trial defense counsel's efforts *during sentencing* . . . must be commensurate with the potential sentence and its collateral consequences." *Weathersby*, 48 M.J. at 672 (emphasis added). "Because of the unique nature of capital sentencing -- both the stakes and the character of the evidence to be presented -- capital defense counsel have a heightened duty to present mitigation evidence to the jury." *Taylor*, 262 S.W.3d at 249. A death sentence is the ultimate sentence with a finality that can never be revoked. Thirty-eight minutes and a document dump is hardly an effort commensurate with this ultimate punishment. *See Smith*, 379 F.3d at 939 (citing the heightened demands on counsel that requires extraordinary efforts).

The Army Court erroneously found that counsel's mitigation case went "far beyond" a thirty-eight minute presentation. (JA

40). That "far beyond" consisted of a document dump totaling nearly 500 pages of a diary filled with prejudicial information, two summaries of the diary highlighting the prejudicial information and undercutting the theory of defense, and several documents containing interview notes taken over a year prior to court-martial by a mitigation specialist no longer on the defense team who did not prepare the notes for court use. Even though counsel did not address their reasons for forgoing live witnesses, and instead submitted a large stack of documents, the Army Court blessed their decision as strategically sound. In the process of reconsidering its decision, while the Army Court required counsel to answer additional questions via a sworn declaration, the Army Court again gave counsel a pass by affirming its prior ruling even though counsel's responses were vague and generally unresponsive to the Army Court's Order.

a. Failure to call witnesses.

SGT Akbar had the right to have witnesses presented on his behalf to tell his life story and to present a competent and coherent mitigation case. R.C.M. 703(b)(2); 1001(e); 1004(b)(3). As Ms. Grey declared, "[J]urors are much more responsive to lay witnesses than they are to expert witnesses." (JA 2761). Mitigation specialist and attorney Tom Dunn told counsel that lay witnesses from throughout SGT Akbar's life were critical to this task. (JA 2694). Lay witnesses are critical

because they humanize the accused, they give corroborating support to expert witnesses, and they provide first-hand, vivid accounts of the mitigating events in the accused's life. (JA 2749 (Mr. Stetler's declaration), JA 2776-77, 2779 (Ms. Nerad's declaration)); *Taylor*, 262 S.W.3d at 252-53 (reversing sentence even when counsel presented five expert witnesses, at least one of which gave some details of appellant's childhood, because counsel did not present family members to give "vivid" accounts of appellant's childhood adversity); *Marquez-Burrola v. State*, 157 P.3d 749, 766-67 (Okla. 2007)(reversing sentence even though counsel presented parents and sister because counsel failed to humanize appellant through use of other lay witnesses).

Instead, SGT Akbar received a feeble effort by counsel, who presented nearly no mitigation through lay witnesses. Their effort included a few soldiers[36] who disliked SGT Akbar, a former roommate who was inadequately prepared, and a former teacher who was reluctant to testify, who stated that he did not really know SGT Akbar all that well, who was not prepared at all to testify, and who LTC VH (the counsel who interviewed him face-to-face) twice recommended that he not be called to testify. This is insufficient in a larceny case, let alone a capital case.

[36] Most of the evidence admitted through the soldier witnesses was not mitigation evidence. It was evidence to support the defense of diminished capacity. Once rejected, counsel failed to incorporate the themes of what they had presented on the merits by presenting a comprehensive life story in the penalty phase.

Counsel's indifferent attitude toward live testimony is no more evident than in Musa Akbar's declaration. (JA 2854). Musa appears to have been contacted by counsel after the trial started.[37] This alone is unacceptable. Musa told defense counsel that he wanted to testify on his brother's behalf. SGT Akbar is a father-figure to Musa because SGT Akbar basically raised Musa and his other siblings. SGT Akbar means so much to Musa that he named his son "Hasan." *Id.* When counsel was confronted with the difficulty of maneuvering around the pending birth of Musa's child, counsel took the path of lassitude, and merely added additional paper for the members to read, drafting a question and answer document for Musa to sign. (JA 1622). Counsel apparently never considered telephonic testimony, video teleconference testimony, a recorded deposition, or live testimony after the birth of Musa's child. In addition, even though Musa told counsel that he would come after the birth of his child, counsel still chose to present the members a much less compelling form of evidence—a signed question and answer document that failed to adequately convey Musa's potential testimony. Musa's child was born four days prior to SGT Akbar's thirty-eight minute presentencing hearing. Where Musa stood

[37] This is consistent with how counsel treated the rest of their witness preparation. Dan Duncan was never interviewed prior to trial (JA 2850), and anticipated witnesses Dr. Diebold and Dr. Southwell were not personally interviewed, and subsequently eliminated, until after trial began. (JA 2292, 3029, 3033).

ready and able to come and present his brother's life story of poverty, abuse, and stepping up to lead a near parentless home, his counsel instead inexcusably presented a few pages of typed questions and answers to the members.

Counsel's failure to plan their presentation is also evident by the way counsel treated Regina Weatherford's potential testimony. (JA 2888-89). Ms. Weatherford only spoke face-to-face with LTC VH and Ms. Grey sometime in 2003. (*Id.*; JA 2018-19). Then, almost two years later, she received a call from somebody she did not know telling her that she needed to testify. Not understanding the relevance of her testimony, she initially balked at the demand. If counsel[38] made a composed effort to persuade her to testify, it fell flat because counsel had no relationship with Ms. Weatherford—she did not even know who the counsel was. Because she did not like counsel's attitude, the conversation eroded into counsel yelling at her and telling her to get her "butt on the plane." (JA 2888-89).

Counsel actually had the court recess early on April 27, 2005, due to defense "witness travel" issues, with the stated intent of calling two or three unnamed witnesses on April 28. (JA 1433, 1446). However, the next day, they decided not to call any additional sentencing witnesses, and instead introduced

[38] It is not clear whether the counsel she spoke with represented the government or SGT Akbar.

documents containing some of what Ms. Weatherford and Musa Akbar could have testified to. (JA 1449-50). Because counsel waited until the last minute before deciding not to call these witnesses, their explanation to the military judge that these witnesses were not called because of "tactical reasons" (JA 1450) must either be (1) false, or (2) an outright admission to ineffective assistance for failing to learn that the witnesses would not be helpful or available until the day they were supposed to testify—a fundamental failure in preparation. Thus, during the penalty phase of his trial, SGT Akbar lost at least one additional potential witness due to counsel's improper preparation and handling of Ms. Weatherford, not because of a sound tactical decision by defense counsel.[39]

The six mitigation specialists who worked on the case provided counsel with numerous interview summaries chronicling a life history full of immense struggle. (*See, e.g.,* JA 2017-38). These summaries included family members from Louisiana and California, and teachers, mentors, and friends from high school and college. Rather than using this information to build and

[39] The judge asked counsel if he had a tactical reason for not calling Ms. Weatherford. (JA 1450). Counsel responded in the affirmative. Counsel's last minute call to a witness that resulted in her refusal to appear because she did not understand her role is hardly a tactical reason for not calling a witness. (*See* JA 2551 (attorney and mitigation specialist James Lohman states that counsel were not receptive to "the need to subpoena witnesses for trial")).

present an integrated and compelling mitigation case to humanize SGT Akbar, counsel chose for some unknown reason to give interview notes to the panel.[40] Counsel's *post hoc* rationalizations are inadequate and unconvincing, and as this Court has repeatedly stated counsel's performance is deficient when they neglect to introduce mitigating evidence in their possession, their presentation is deficient performance. *See Boone*, 49 M.J. at 196; *Alves*, 53 M.J. at 289.

One excuse counsel offer is "it seemed that the consensus of capital litigators was that the evidence collected by the mitigation specialist was most persuasively presented through the testimony of a mental health expert such as a forensic psychiatrist." (JA 1954. *But see* JA 2555-56 (e-mail from MAJ DB indicating a plan to "put forth a defense that hinges more on the lay witness testimony than on experts")). Counsel provided no details identifying these "capital litigators." Appellate defense counsel found *no* capital litigators who so believe, let alone those in this case. (JA 2760 (Ms. Grey states "no mitigation specialist would advise presentation of evidence through an expert alone"), JA 2776 (Ms. Nerad states "that is patently untrue"); *see generally* JA 2716-17, 2724-25 (learned counsel Denise LeBoeuf), 2740-42, 2750 (learned counsel Russell

[40] As one example, SGT Akbar's former teacher John Mandell could have provided significantly more detailed oral testimony than the teacher counsel chose, Mr. Duncan. (JA 1627-28, 2045).

Stetler)); *Parker v. State*, 3 So. 3d 974, 985 (Fla. 2009) (reversing sentence because, *inter alia*, information regarding appellant's childhood and background were admitted as hearsay through investigators instead of first-hand sources).[41] Tom Dunn made clear he stressed the life story should not be told "solely or primarily by experts." (JA 2694). Ms. Grey's interview summaries make clear her interviews were with an eye towards *witness presentation*, not the positives and negatives of an expert reviewing her interview notes, or the positives and negatives of presenting those notes to members. (*See* JA 2017-19; JA 2760 (Ms. Grey states lay witnesses are critical to lay out the "dots" then experts may be called to connect the dots; "lay witness[es are] always the preferred way to present life history testimony")). Ms. Nerad's additional funding request sought information to support "testifying family members." (JA 2175).

Counsel claims that LTC VH supported this approach. (JA 1954). This cannot be true. LTC VH specifically sent two e-mails detailing mitigation lay witnesses to call at trial and a third exhorting counsel to present the evidence Ms. Grey obtained in "a coherent manner." (JA 2045, 2960-61, 2966). For unknown reasons, his advice was ignored. In reviewing LTC VH's affidavit, it is also clear that he understood that mitigation

[41] *See also* ABA Guideline 10.11, Commentary ("Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions.").

needed to be comprehensive and needed to "tell the same story as many different times and in as many different ways" as possible. (JA 2684). LTC VH also made it clear that "Ms. Grey and I had discovered several *character witnesses* for SGT Akbar . . . ." (JA 2687)(emphasis added). All of these facts undercut counsel's claim that LTC VH supported an anemic lay witness presentation, followed by document dump, approach to mitigation.

In their second affidavit, counsel made additional attempts to rationalize their apathetic approach to mitigation through vague and broad assertions made without providing any support. They first insinuate that they had a comprehensive mitigation plan for the penalty phase prior to SGT Akbar's alleged stabbing of a guard on March 30, 2005. (JA 2349-50). Yet, their witness lists on March 15, March 29, and March 31, 2005, underwent only a few minor changes—a far cry from the "devastating impact" that they now allege. (*Compare* JA 2910-23, *with* JA 2349).

They also claim that after that incident they "re-interviewed each of [their] civilian mitigation witnesses" (JA 2350), but they do not detail who was interviewed, who conducted the interview, how the interview was conducted, or what specifically was learned from each interviewed potential witness. From those alleged interviews, they claim that

> the defense chose to call Mr. Duncan as opposed to any of the other witnesses due either 1) the witness indicating they no longer were willing to voluntarily

> testify on SGT Akbar's behalf; 2) the inability of the witness to limit their testimony in order to avoid opening the door to the 30 March 2005 incident on rebuttal; or 3) our determination that the witness could only offer testimony regarding future dangerousness or the fact the alleged incidents in Iraq were not within SGT Akbar's character.

Id.

These assertions are provided with no detail, explanation or support (JA 2370 (counsel claim to have no records or notes regarding these crucial interviews allegedly conducted in the days after the stabbing incident)), are contradicted by evidence in the record,[42] and should be given no weight as a result. First, the defense witness lists reveals only one witness dropped from the list that might fit these version of events—Mr. Bowen, social worker at the Fort Knox confinement facility.[43] (*Compare* JA 2910-13, *with* JA 2914-18). He is the only civilian listed on the March 29 and 31, 2005, witness lists that logically could fall into counsel's first category of witness who no longer wished to testify. Other than Mr. Bowen, both of these lists contain only six other civilian sentencing witnesses, of which only Mr. Duncan was called. The defense's

[42] The record demonstrates that minimal efforts were made by counsel to contact non-soldier witnesses. As of December 2, 2004, the government could not contact most of the non-military witnesses on the initial defense witness lists because defense counsel provided incorrect or incomplete contact information. (JA 1836-38). As of March 3, 2005, the government's attempts at contacting witnesses had borne meager fruit. (JA 1875-78).

[43] MSG Riveria-Camacho was the only other witness dropped, and his proffered testimony regarded derogatory comments made to SGT Akbar as he was being detained in Kuwait. (JA 2916).

failure to call Ms. Weatherford and SGT Akbar's brother were discussed above, and SGT Akbar's alleged assault on a guard does not appear to place either of these individuals into the three categories now relied upon by counsel as excuses for failing to present mitigation witnesses. (*See* JA 2854, 2888-89).

Additionally, counsel has never explained why the other three listed witnesses, SGT Akbar's father, mother, and college roommate Ronald Hubbard,[44] were not called. At least as of April 22, 2005, counsel stated an intent to call SGT Akbar's father. (JA 1074). Contrary to what counsel now claim, Ms. Nerad states, "[w]e could not have hoped for a better witness." (JA 2773). This is supported by the efforts Mr. Akbar went through to counter SGT Akbar's mother's push to scuttle any plea deal—Mr. Akbar was willing to do whatever it took to save his son's life. (JA 2004; *see also* JA 2829). Thus, even if this Court were to make an assumption that counsel was referencing John Akbar in this explanation, it is not supported by the record. (*Cf.* JA 3062-67 (clemency matters submitted by John Akbar)).

The remainder of counsel's assertions are also not supported by the record. Not only did counsel fail to delineate

[44] As of March 3, 2005, the government was unable to make contact with Mr. Hubbard, partially because counsel provided a phone number to an employer who had never heard of Mr. Hubbard. (JA 1876). Government counsel notified counsel of this same defect as early as Oct. 17, 2004. (JA 2969). This demonstrates that counsel did not have communications with Mr. Hubbard, and he was not being prepared to assist with the mitigation case.

who specifically they spoke with and what steps they took to ensure a witness would not discuss future dangerousness or that SGT Akbar's conduct was not within his character, thus opening the door to the March 30, 2005, incident, counsel's own actions of presenting Dan Duncan and submitting documents to the members during the penalty phase belie their claim that they did not present witnesses because of this purported fear. Counsel's final question to Mr. Duncan specifically addressed character regarding violence—"I think because it was just something I never would have expected. You know, some students you sort of expect to see that kind of thing in the future, but that was so out of character from the person that I'd known." (JA 1430). Then, in a question and answer form document, which appears to have been drafted by counsel, Regina Weatherford's last statement is that "[*i*]*t just didn't seem like something he would do. It was not part of his character*." (JA 1602). Likewise, SGT Akbar's former teacher, Ronda Cox, said that she was "shocked" that he committed this crime (JA 1626), and another former teacher, John Mandell, said that he never saw any evidence of violence in SGT Akbar, that he was "shocked" when he heard the news, and "he never saw anything that would have led him to predict that Akbar would be capable of such an act." (JA 1628). SGT Akbar's childhood Imam, Abdul Karim Hasan, also addressed the uncharacteristic nature of the violent attack—

"that doesn't compute. Nothing in my seeing how he grew up that would lead me to see him doing something like that." (JA 1645).

When coupled with counsel's decision to leave *ten members* on the panel who knew of the uncharged incident (*see* AE A.IV), counsel's post-trial attempt to displace blame for their incredibly weak mitigation presentation onto SGT Akbar's alleged pretrial misconduct fails in the face of the record. Counsel were required to either (1) admit all available mitigation to overcome the preconceived notions possessed by a panel tainted with knowledge of the uncharged violent attack, or (2) move to strike those members with this knowledge. Choosing neither is not a reasonable tactical decision and deficient on its face.

Ultimately, what the witness lists demonstrate, as compared to the trial presentation, is counsel never had a comprehensive plan to present a cohesive life story of SGT Akbar through lay witnesses, and, if they did, they completely failed to take appropriate steps to work with witnesses to focus their testimony, or substitute witnesses who became reluctant to testify.[45] (*See* JA 2079-80, 2602, 2891-92 (showing long lists of potential witnesses who could have testified)). Without any

[45] This *post hoc* rationalization for not calling witnesses, to the extent it is true, is partly based on counsel dismissing their mitigation specialists prior to trial. *See*, *infra*, Section A.6. As Deborah Grey stated, a key task for mitigation specialists is helping with "witnesses who have mixed emotions in testifying in a capital case . . . ." (JA 2760).

other explanation, this Court is left with defense appellate exhibits establishing numerous family and friends who were willing to testify. (JA 2829-32, 2834-36, 2854-86). These declarations are supported by personal letters written by SGT Akbar's father, mother, four siblings, Aunt Rankins, grandfather, childhood imam, and childhood friend who petitioned the convening authority for mercy in SGT Akbar's R.C.M. 1105 matters. (JA 3048-67). SGT Akbar's counsel for post-trial matters, in just over a month, obtained and presented more mitigation evidence from SGT Akbar's family than his trial defense counsel did.[46] The lack trial preparation is glaring. One is left to ponder what counsel did in the months prior to trial.

These declarations, interview summaries, and clemency matters speak for themselves. This Court cannot ignore evidence not presented when faced with overwhelming evidence counsel failed to use because they had no plan to present a mitigation case, let alone a comprehensive story of SGT Akbar's life.

b. Mitigation by document dump.

Counsel did not realize the sentencing hearing is the "most critical phase" of a capital trial. *Smith v. Mullin*, 379 F.3d 919, 939 (10th Cir. 2004); *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001). They should not have relegated their role to dumping a stack of documents on the members with a homework

[46] *See* ABA Guideline 10.11, Commentary (emphasizing the critical nature of presenting family members to the panel).

assignment to read (or not read) them at their leisure. As the Army Court stated in *United States v. Young*, 50 M.J. 717, 728 (A. Ct. Crim. App. 1999), documents are "a poor substitute for . . . witnesses that can document a soldier's contributions." Yet, SGT Akbar got little more than documents, though facing death.

Appellate counsel need not detail the basic worth of live witnesses versus asking laymen to digest 500 pages of documents. Russell Stetler asserts that a penalty phase presentation should be humanizing through "dynamic and alive" testimony. (JA 2750-51). Tom Dunn emphasized the use of lay witnesses from SGT Akbar's entire life to tell his mitigation story. (JA 2694). "[A] vivid description of [the appellant's] poverty stricken childhood, particularly the physical abuse, . . . may have influenced the jury's assessment of his moral culpability." *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002)(citing *Taylor*, 529 U.S. at 397 (citing lack of "graphic description")). Presenting "lifeless paper documenting interviews" is hardly the effort the military community expects in a capital case.

Counsel should have known that this presentation was inadequate. *See Turpin v. Lipham*, 510 S.E.2d 32, 41 (Ga. 1998) ("[T]rial counsel's performance in the penalty phase was deficient because no reasonable lawyer would have based the penalty phase defense on giving 2,500 pages of raw institutional documents to the jury and asking them, without any guidance, to

read through the stack of papers for mitigation evidence."); *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008)("[I]t hardly constitutes a reasonable investigation and mitigation strategy simply to obtain [records], then dump the whole file in front of the jury without . . . *explaining to the jury how or why they are relevant*." (emphasis added)).

No mitigation specialist blessed counsel's approach. First, if asked, Ms. Grey, would have definitively recommended against such a strategy as her notes were not prepared for trial and lay witnesses are always more compelling. (JA 2759, 2762). Ms. Grey, referring to her summaries admitted at trial, states, "I cannot think of an instance where I would recommend the introduction of an interview summary in isolation to a jury." (JA 2762). However, with no consultation, counsel did so.

Second, Tom Dunn specifically told counsel to use lay witnesses to tell SGT Akbar's story. (JA 2694). Third, Ms. Grey's short-term replacement, Ms. Holdman, specifically told counsel not to rely on her reports because they "contain preliminary impressions, may be inaccurate, [and] are not written for lay audiences . . . ." (JA 2152). She said, "My reports are intended for defense attorney use only, should not be published, and should not be relied upon by counsel or any testifying witness." *Id.* Lastly, if asked, Ms. Nerad and would have told could not to submit those documents. (JA 2779). Yet,

SGT Akbar's capitally inexperienced counsel decided to use Ms. Grey's old material without any *personal* investigation to determine the witness's suitability for trial presentation. The Army Court, with no evidence presented by counsel as to their decision-making process,[47] summarily classified this decision as strategically sound and the sole basis for not finding the thirty-eight minute presentation deficient performance.

SGT Akbar had the right to present witnesses to tell a coherent and comprehensive life story that would evoke empathy and compassion from the panel. Instead, for reasons still not fully explained, counsel dumped a pile of lifeless paper on the panel. According to the Army Court, these exhibits were compellingly presented to the members in striking detail. They were not. The paper evoked no emotion favorable to SGT Akbar. Counsel failed to present witnesses to tell gripping accounts of SGT Akbar's life. This document dump does not meet professional norms for presenting mitigation evidence in state and federal courts. The military should adopt no lesser standard.

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[47] The closest counsel come to addressing their thinking is in the two-sentence paragraph 53 of their affidavit. (JA 1944). There, they allegedly "turned to the documentary evidence collected during the mitigation investigation," reflecting a complete misunderstanding of mitigation specialists' role and use of the information collected. The second affidavit simply blamed SGT Akbar because he stabbed a guard. (JA 2349, 2361). As discussed in Section A.4.b, *supra*, the documents admitted addressed the same damning topics counsel allegedly feared. (*See* JA 1602, 1626, 1628, 1645). It is unimaginable counsel could not prepare witnesses in a manner to avoid government rebuttal.

c. Failure to develop and present a unified and integrated case in mitigation.

A mitigation presentation in a capital case must be developed as a "unified defense strategy" spanning both the merits and presentencing phases of the trial. (JA 2710, 2735). Its purpose is to "provide[] evidence of a disability, condition, or set of life experiences that inspire compassion, empathy, mercy and understanding." (JA 2715). Mitigation evidence is not developed to support a defense to the alleged crime. *Id.* Presented in such a manner, "mitigation evidence can, quite literally, make the difference between life and death in a capital case." *Marquez-Burrola*, 157 P.3d at 764. Counsel should have known these basic principles of mitigation as Tom Dunn explained it to them. (JA 2693-94).

Even so, counsel demonstrated their inability to understand the magnitude of mitigation in a capital case. Almost all of the limited witnesses the defense did call focused on events a year or two prior to SGT Akbar's criminal act, and nearly all the evidence presented was focused on SGT Akbar's diminished capacity because of mental illness. Capital litigation experts have reviewed this presentation and profoundly declared it not a mitigation presentation. (JA 2694-95 (learned counsel Tom Dunn), JA 2723-26 (learned counsel Denise LeBoeuf), JA 2698-2700 (mitigation specialist Lori James-Townes, 2750-52 (learned counsel Russell Stetler)). Counsel's own guidance to mitigation

specialists emphasized focus on the mental responsibility defense, not the mitigation evidence they were collecting. (JA 2196). Only now do counsel claim this was their mitigation case.

The Army Court ignored expert's analysis of the woeful inadequacy of counsel's presentation in SGT Akbar's case. *Id.* Tom Dunn emphasized to counsel *before trial* their mitigation case must consist of a "cohesive story of SGT Akbar's multigenerational life history told through historical records, lay witnesses, and expert witnesses" that climaxes at the sentencing phase to show why SGT Akbar deserves mercy. (JA 2693-95). It is impossible for this Court to find Tom Dunn's guidance was followed. First, counsel's affidavit makes clear that their focus was solely on mental illness as told by soldiers and Dr. Woods, even though no one gave counsel the diagnoses that they wanted or needed for it to work. They appeared to consider no other evidence as mitigating or otherwise helping to explain SGT Akbar's conduct. (*See* JA 2766-75, 2777-80, 2933 (MAJ DC wrote that Dr. Woods "is it for our defense")). Learned counsel Denny LeBoeuf assessed their presentation and their focus—

> It is apparent from a bare reading of the record that during the penalty phase defense was woefully inadequate under any reading of the prevailing standards of practice governing preparation and defense of a capital case. The defense apparently relied upon one diagnosis of possible schizophreniaas [sic] testified to by one witness, with almost no

> corroborating or contextualizing information provided to the jury whatsoever.

(JA 2723).

Second, to call the presentation at sentencing anemic is to give it too much credit. Counsel did no more than call two soldiers to testify that they did not think SGT Akbar should have deployed *although he had no mental stability issues*,[48] call a former teacher who gave three pages of testimony about SGT Akbar's participation in one class during high school, and dump nearly 500 pages of documents for the members to read at their leisure. The testimony of the two soldiers and admission of the diary completely undercut any "unified defense strategy," as this evidence emasculated the evidence presented during the merits regarding a mental illness sufficient to diminish SGT Akbar's culpability. *See Hooks*, 689 F.3d at 1203-04 (reversing sentence because of counsel's perfunctory presentation of Hook's sister and mother and failure to tell his life story).

Third, counsel's sentencing argument did not provide a comprehensive overview of even the minimal evidence supposedly submitted as mitigation during the merits phase as it asked the members to ignore emotion in lieu of logic instead of making a plea for mercy based on a synthesized and compelling compilation

[48] CPT Storch testified that SGT Akbar was proficient in his MOS and displayed no issues with mental stability; he just lacked leadership and development to make him a good team leader. (JA 1398, 1412). SFC Kumm testified that he never questioned SGT Akbar's mental stability. (JA 1416, 1421).

of the humanizing evidence presented through the documents. This short sentencing hearing and inadequate argument is not a climax of an integrated mitigation case that detailed a coherent case for life. Instead, it was impotent.

In this case, counsel simply failed to admit the abundant humanizing testimony available to them to demonstrate that SGT Akbar's life was worth saving—"nothing about his background, impairments, mental state functioning, deterioration, history of worthy behaviors or efforts to overcome his difficulties. There was virtually nothing, in short, that was recognizable as evidence introduced to mitigate the sentence of death." (JA 2723). Presenting this evidence is the sole function of counsel at the most important phase of a capital trial. Here, where counsel "missed the opportunity to 'humanize and explain,' to 'individualize,' [SGT Akbar] to the jury," their conduct was deficient and it prejudiced SGT Akbar because his story was never told to the members, even though numerous family members and friends were willing to testify, to elicit empathy and compassion for a deeply troubled man. *Hooks*, 689 F.3d at 1207.

5. Counsel were ineffective when they failed to request additional funding for their mitigation specialists, failed to request additional time for the mitigation specialists to review materials obtained, and failed to request additional time to prepare a case in mitigation after the guard stabbing incident.

a. Failure to seek time and funds to analyze documents and prepare witness testimony.

On February 11, 2005, Ms. Nerad informed counsel that the

mitigation specialists were "flat broke." (JA 2205). Two weeks later, on February 24, 2005, lead counsel Mr. Wazir Al-Haqq informed military counsel that he was withdrawing from the case. (JA 2359; JA 1879-80 (SGT Akbar's mother personally asked for a delay of three months the following day)). On March 1, 2005, Ms. Nerad informed MAJ DB, now lead counsel, that she had "over 2000 pages of documents regarding family genetics and dynamics" that required analysis.[49] (JA 2208). To conduct that analysis and follow-up interviews, Ms. Nerad estimated the need for another 160 hours of funding. *Id.* MAJ DB directed Ms. Nerad to send him the records so that he could conduct his own analysis without the help of the mitigation specialists. (JA 2210-12). Ms. Nerad again stressed the need for more funding to review the records and complete witness interviews on March 9, 2005, when she told counsel and Dr. Woods that without more funding she could not assist in a team meeting to prepare Dr. Woods' testimony. (JA 2934; *accord* JA 2179 (Ms. Nerad's September 2004 funding request stated that time and additional funds would be needed after the records were acquired to "prepare witnesses . . . for trial")). On March 10, 2005, Ms. Nerad told counsel that "they can[not] do a competent investigation in the little time we have left." (JA 2938). Counsel mocked her advice. *Id.*

[49] The content of these records is not known as they were not contained in the counsel's files disclosed to appellate counsel.

During this same timeframe, Dr. Woods notified counsel he was concerned about being asked to testify without more lay and expert witness testimony. (JA 2931). Although with no evidence to support them, both counsel concluded that Ms. Nerad probably caused this apprehension in Dr. Woods. (JA 2933); *see*, *supra*, Section A.4.a (discussing the professional standard in capital litigation that expert testimony be supported by lay witnesses). Instead of trying to accommodate Dr. Woods' request, MAJ DC stated they needed to "[t]ell Woods he brought this on himself. If he didn't want to dance he should have kept his mouth shut. Now that he is it for our defense, he needs to testify." (JA 2933). This statement was made one month prior to trial.

From early on counsel did not understand the complexity of the mitigation specialist's role and their use to the defense team. Ms. Nerad told counsel that she needed until June 2005 to obtain the documents, and, presumably, conduct the appropriate follow-up investigation and preparation. (JA 247-48; *cf.* JA 2179). On December 2, 2004, when asking for a trial delay at her request, counsel completely focused on the need to get documents to provide Dr. Woods. (JA 250-51). At an Article 39(a) session, counsel asserted they needed only two weeks prior to trial to review the documents, submit them to Dr. Woods, and for the government to interview Dr. Woods, and thus assented to an early April 2005 trial date. (JA 261-62). There was no

discussion regarding lay witness preparation or the need to find and interview additional witnesses identified by the mitigation specialists from the additional documents obtained.

Upon receipt of the documents in early March 2005, counsel disregarded the advice to conduct a professional review of the "over 2000 pages of documents" and to complete the interviews[50] still required to provide SGT Akbar with "competent" representation. (JA 2208; *see also* JA 2551 (James Lohman stated that "Sgt. Akbar's attorneys were not receptive to the suggestions and opinions of those of us with a great deal of experiences in capital representation. These suggestions included: the need to request additional funding for mitigation . . . ; the need to request extensions of time in order to prepare adequately for a capital trial . . . .")). That request was supported by Dr. Woods' concern that the defense team had not accumulated the cast of witnesses needed to support the case in defense and mitigation. Instead, counsel solely focused on the documents as a tool to assist Dr. Woods' diagnosis, merely "pick[ing] out the information that appeared useful for Dr.

[50] A trained mitigation specialist understands that to provide competent representation, extensive and repeated interviews must be done to prepare witnesses to testify about embarrassing, traumatic, and likely suppressed memories of events such as the family effects of being raped by your step-father, watching your mother beaten with an electric cord, suffering and watching others suffer from mental illness, the enduring effects of learned and experienced racism, and the effects of poverty and homelessness. (*See, e.g.*, JA 2721, 2790-91).

Woods." (JA 2941). A week later, counsel submitted a witness request with significantly fewer witnesses than those requested in September 2004. (*Compare* JA 2919-23, *with* JA 2924-29).

Post-trial mitigation expert Ms. James-Townes confirms that the mitigation investigation prior to trial was constitutionally deficient. (*See, e.g.*, JA 2592). While counsel will not rehash all of the deficiencies that she identified, there are major issues from SGT Akbar's background that were never investigated, to include but not limited to the following: the nature and extent of possible sexual abuse suffered by SGT Akbar; the child abuse suffered by SGT Akbar to include verbal, physical and emotional abuse by his step-father and mother; the acts committed by SGT Akbar's step-father that caused SGT Akbar to want to kill him (Def. Ex. A at 87); whether or not SGT Akbar's diary account of having sex with his cousin actually occurred and the implications of those events being truth or delusion; the curriculum and environment SGT Akbar encountered at the Sister Clara Mohammed FOI school; the mental health issues suffered by SGT Akbar's mother; the mental health issues suffered by SGT Akbar's father (JA 2951 (Ms. Nerad told counsel that Dr. Woods needed to evaluate John Akbar, an evaluation that apparently never occurred)); and the social and mental health history of John Akbar's family (*see, e.g.*, JA 1562 (family tree lists no members of his family), JA 2829-32 (his declaration)).

Initially, MAJ DC recommended asking the court for additional funding because it would be "easier than asking for additional time." (JA 2936). MAJ DB responded that he did not want to even request more funding because Ms. Nerad had "not produced too much of use"[51] and they had done enough to "protect[] the record" from an IAC claim.[52] (JA 2935). Counsel's attitude is astonishing. They appear to be more concerned with protecting themselves from a future IAC claim rather than ensuring they presented the absolute best and most thorough mitigation case possible in an effort to save SGT Akbar's life.[53]

Knowing Ms. Nerad believed more interviews of witnesses necessary, Dr. Woods wanted more witnesses to support his

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[51] This statement indicates that counsel did not appreciate the mitigating value of all the evidence collected by Ms. Nerad and her team: they obtained the bulk of the information that counsel possessed concerning SGT Akbar's family in Louisiana and Los Angeles as Ms. Grey had limited access; they built relationships with SGT Akbar's family that counsel never attempted to establish; and they discovered that SGT Akbar sought out mental health treatment in college from Dr. Sachs for the very issues that led him to commit the attacks. (*See, e.g.*, JA 2167, 2785-87). In addition, Ms. Nerad and her team discovered the bulk of the information that the defense ended up using at trial: Dr. Tuton, the child protective services records of SGT Akbar's sister's sexual abuse, and Paul Tupaz. (JA 2191-94, 2196).

[52] MAJ DC responded that they should write a memorandum for record (MFR) to show their decision to ignore their expert's advice was a tactical decision. (JA 2935). Appellate counsel has seen no such MFR in trial defense counsel's file disclosure.

[53] "Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review." ABA Guideline 10.4.D.

testimony, and the mitigation specialist was supposed to support and advise counsel up to and through trial, counsel refused to ask for more time or funding. It is not apparent from the e-mails why they made this decision, except possibly contempt for Ms. Nerad and her team or fear of drawing the ire of the military judge. Indeed, it appears that counsel just wanted to get the trial over with. (*See* JA 2967 (in August 2004 MAJ DC e-mailed government counsel expressing his desire to oppose the defense delay requested on SGT Akbar's behalf)). Either way, SGT Akbar's counsel failed to fight for the resources necessary to present an adequate and "competent" defense. Instead, they conducted a few *ad hoc* phone interviews and presented a stack of documents from Ms. Grey's stale mitigation investigation.

b. Failure to seek time to reconstitute the mitigation case after counsel's purported planned presentation was "devastate[ed]" by SGT Akbar's alleged stabbing of a guard.

If counsel was not ineffective for not asking for more time and money before March 30, 2005, they certainly were after that date. According to counsel, "the alleged incident of 30 March 2005 (scissor attack) had a devastating impact on the defense's sentencing case." (JA 2349). That attack occurred on a Wednesday. By Friday, counsel participated in a court session discussing SGT Akbar's competence, judicial rulings, and some other minor matters. (JA 279). By the following Wednesday morning, counsel told the judge that they were "prepared" to

proceed and the court began member selection. (JA 291, 293-94).

As already established, counsel had a duty to bring all mitigating factors before the panel. Counsel stated the attack had a "devastating impact" on their presentation plan, yet counsel fully agreed to begin trial the following week. Nothing in the record indicates what counsel did that week to reformulate a mitigation case. It appears they did very little.

Counsel did not reestablish communications with mitigation specialists to seek advice on how to proceed with this new hindrance. Counsel did not ask the mitigation specialists, the only people who formed any type of relationship with potential civilian witnesses, to assist them with unnamed witnesses who would "no longer" voluntarily testify or had an "inability" to limit their testimony to prevent opening the door to the March 30, 2005, incident. (JA 2350). Counsel did not personally go to Louisiana or Los Angeles to work with allegedly reluctant or difficult witnesses to ensure they provided only tailored mitigating evidence. There is simply no evidence counsel did anything to "repair" their penalty phase presentation.

If this major event one week before trial "devastat[ed]" their planned mitigation case, counsel had a duty to request a tactical pause in the court-martial to revise their mitigation case. Four more weeks, perhaps along with additional funding for Ms. Nerad and her team, would have provided counsel the

means necessary to reevaluate evidence and rebuild a coherent mitigation case without risking the government withdrawing charges, preferring new charges, undergoing a new Article 32 hearing, devising a new panel, possibly changing venue, and all the pretrial motions to follow.[54] In truth, the presentation planned by counsel underwent only de minimus changes between March 29 and March 31, 2005. (*Compare* JA 2914-18, *with* JA 2910-13). Either way, counsel was deficient for not requesting delay when voir dire began a mere five business days after the alleged attack and counsel possessed no money for the mitigation team to assist in reworking the mitigation themes and presentation.

6. Counsel were ineffective when they failed to present all known records and information to Dr. Woods, limiting his evaluation, diagnosis, and testimony, and failed to conduct additional mental health testing as requested by Dr. Woods and Dr. Clement.

Dr. Woods had only a fraction of the contact with counsel and mitigation experts he ordinarily has in capital cases. (JA 2466, 2600). Due the insufficient mitigation investigation, Dr. Woods was unaware of important evidence including an incident when SGT Akbar ate his own vomit, extensive mental health disease on both sides of SGT Akbar's family, sexual and physical

[54] The government repeatedly fought delays. That the government would delay trial months for an aggravated assault charge is ludicrous considering the aggravated nature of charges already referred, pretrial confinement was already over two-years, and officers would be reassigned that summer. Counsel's stated fear that requesting more time or a change of venue "may" prompt preferral of additional charges is an unpersuasive "*post hoc* rationalization." (*See* JA 1968); *Wiggins*, 539 U.S. at 526-27.

abuse of SGT Akbar by his step-father, and evidence SGT Akbar self-identified his mental health issues and sought treatment from Dr. Sachs during college. (JA 2466-67, 2797-98, 2830; *see also* JA 2640 (an example of family mental health medical records not seen by Dr. Woods include records indicating SGT Akbar's maternal aunt was diagnosed with psychotic disorder and schizoaffective disorder bipolar type)). In Dr. Woods opinion, this evidence was collectively so powerful that it would have been more than enough to solidify his forensic diagnosis of paranoid schizophrenia and would have led to an additional diagnosis of post-traumatic stress disorder. (JA 2467-70). Both these diagnoses, and facts underlying them, consist of additional mitigation evidence not presented to the members.

Dr. Woods repeatedly asked counsel to request additional expert assistance, particularly a forensic psychologist. (JA 2468). Dr. Woods, a clinical psychiatrist, was retained to do neuropsychiatric testing but not to do some of the psychological testing professionally reserved for psychologists. (JA 883). Counsel continually replied Dr. Woods and mitigation expert requests were pointless because the government would never agree to the funds. (JA 2468, 2550-52). Yet, counsel could not know this because they never made the requests.

Dr. Woods' post-trial assertions that he requested more testing to assist in his evaluation and diagnosis of SGT Akbar

(JA 2384, 2387, 2468) is supported by e-mail communications recently, and belatedly, disclosed to appellate counsel. Dr. Woods informed counsel of the need for additional "neuropsychological testing" as early as January 13, 2005. (JA 2222). Again on February 15, 2005, Dr. Woods requested via e-mail that counsel obtain "specialized neuropsychological testing, including prepulse inhibition, habituation, and multiple tests of attention as well as distraction . . . ." (JA 2972). On February 25, 2005, Dr. Woods provided a seven-page memorandum detailing the tests that needed to be conducted—"It is my professional opinion that there is no . . . acceptable way to conclude a clinically effective evaluation and treatment of Sgt. Akbar's arousal condition by April 5, 2005." (JA 2395). After the attack on the guard, Dr. Woods once more reiterated the "need to get [SGT Akbar] tested as soon as possible." (JA 2280). MAJ DB acknowledged the request (JA 2281), but he requested no additional time for any of this testing. Other than a competency hearing after the incident, there is no evidence that any additional testing was ever conducted.

Dr. Clement, the defense neuropsychologist, also informed counsel that additional neuropsychological testing was needed. (JA 2245). There is no evidence in the record that counsel ever attempted to obtain this testing, and this testing still needs to be completed in order for appellate counsel to adequately

represent SGT Akbar and this Court to evaluate prejudice.

Additionally, a thorough mitigation investigation has never been completed for this case. (JA 2592, 2596-99). While the mitigation specialists found and conducted initial interviews of many of SGT Akbar's friends, associates, and maternal family members, this portion of the investigation was not complete. (JA 2596, 2767-70, 2778). Further, there is no evidence that any mitigation investigation was done for SGT Akbar's paternal family except for interviews of SGT Akbar's father. In January 2005, Ms. Nerad told counsel that Dr. Woods needed more money to evaluate John Akbar, but there is no evidence that that evaluation ever occurred. (JA 2951). Thus, without a complete mitigation investigation, Dr. Woods could not accurately diagnose SGT Akbar or provide comprehensive testimony.

As this testing has never been done, it is difficult for appellate counsel to fully demonstrate prejudice regarding the resolution of the mental health issues in this case. (*See* AE A.XI). However, what is clear is that counsel's failure to fully inform Dr. Woods of SGT Akbar's complete social history and to conduct necessary psychological testing amounts to deficient performance. *See*, *e.g.*, *Wiggins*, 539 U.S. at 524; *Johnson*, 860 F. Supp. 2d at 885 ("the hired experts' own advice called for further development of mental health evidence to support their opinions, suggesting that the limited bases for

and scope of their opinions developed so far rendered those opinions inadequate"). This deficient performance clearly affected the mitigation presentation and likely the defense that SGT Akbar was incapable of premeditating his acts.

7. Counsel were ineffective when they inexplicably withdrew their request for a special instruction regarding the deprivation of SGT Akbar's ability to plead guilty and to select court-martial by military judge, thereby allowing members to be dismissive of mitigation evidence presented during the merits phase because the members may have believed the evidence only applied to a meritless defense relating to the premeditation element of Article 118(1), UCMJ, or, even worse, the members believed SGT Akbar was unrepentant and wasted their time by contesting the charged offenses. *See* AE A.IX; ABA Guideline 10.11.K ("Trial counsel should request jury instructions and verdict forms that ensure jurors will be able to consider and give effect to all relevant mitigating evidence.").

8. Defense counsel were ineffective for drafting convoluted mitigating factors to be read to the panel where many of the factors where unexplained, confusing as they were internally inconsistent, and disjointed, denying SGT Akbar's panel members the ability to give each and every mitigation circumstance meaningful consideration. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Johnson*, 860 F. Supp. 2d at 873-76; Def. App. Ex. QQ at paras. 36-39 (JA 2752-55). *Compare Loving v. United States*, 68 M.J. 1, 9 (C.A.A.F. 2009)(simple mitigating factors presented), *with* (JA 1513-19).

9. Prejudice.

Counsel's deficient performance resulted in prejudice to SGT Akbar because of the evidence that the members did not hear. The declarations and interview notes of John Akbar, Bernita Rankins, Musa Akbar and his sisters, and SGT Akbar's other family and friends, establish why this presentation was so inadequate. *See Lewis*, 355 F.3d at 367-69 (remanding for new sentencing hearing because conclusory testimony of grandmother

regarding child abuse was not sufficient when counsel could have called appellant's siblings to provide details of the abuse). In this case, there were lay and additional expert witnesses that could have flushed out SGT Akbar's story—Dr. Sachs and Dr. Miles. There is little to no evidence that counsel ever interviewed most of the potential lay witnesses, Dr. Miles was not interviewed by counsel, and incredibly Dr. Sachs was summarily rejected. Counsel simply made little to no attempt at providing the panel with a comprehensive mitigation story.

The intent of sentencing presentation in a capital case is to help the members understand why the accused committed his acts, describe factors outside the accused's control that led to the awful event, and appeal to the member's emotions to gain empathy and compassion. (JA 2715-16, 2728, 2734-35). Sympathetic emotion for the accused is key. *Id.* As counsel presented no testimony to evoke these critical emotions, and in fact admitted aggravation evidence through the diary, counsel was left in the untenable position of begging the members to disregard emotion in favor of "logic." (JA 1484-86). At that point, the government won; not because it's evidence was superior to SGT Akbar's potential mitigation, but because counsel never brought the ample available evidence they had to the member's attention.

Congress expects a high level of performance in federal district courts and in the military commission cases out of

Guantanamo Bay, Cuba, and this Court should accept nothing less for our soldiers. *See* 10 U.S.C. § 949a(b)(2)(c)(ii); 18 U.S.C.A. § 3005. As a result of these failures, counsel's performance was deficient and prejudicial. *See Turner v. Wong*, 641 F. Supp. 2d 1010 (E.D. Cal. 2009)(reversing sentence even after five witnesses testified at sentencing because testimony was general and superficial, omitting available information).

Counsel's failure to investigate, failure to interview, failure to prepare witnesses, failure to devise a theory of mitigation outside their theory of defense, failure to use their mitigation specialists to formulate their mitigation presentation, and failure to reconstitute a case in mitigation after the scissors incident, resulted in a bland and disjointed presentation of cursory mitigating facts. *See Johnson*, 544 F.3d at 602 (reversing in habeas the sentence because, although most of the mitigating evidence was admitted through testimony or documents, the testimony only scratched the surface and the jurors could not be expected to glean the mitigating evidence from the documents submitted). Had counsel done these basic tasks, as established by both the prevailing professional norms in criminal trials and for capital trials, a significantly different picture of SGT Akbar would have been presented to the panel and "a reasonable finder of fact, armed with this evidence . . . ," that is at least one member, may have come to a

different conclusion. *Murphy*, 50 M.J. at 14 (citation omitted); *Porter*, 558 U.S. at 44 (holding that the prejudice standard is less than a preponderance of the evidence).

Anemic as the defense presentation was, the panel struggled deciding upon an appropriate sentence. That is evident in the members request for a revote. (JA 1538-40); *see Stankewitz v. Wong*, 698 F.3d 1163, 1174-75 (9th Cir. 2012)(finding prejudice for counsel's anemic presentation of appellant's traumatic childhood when jury had a "difficult time" reaching a unanimous verdict). When reviewing the instruction that the judge gave to the members to allow them to revote and their subsequent decision to give death, only one logical conclusion can be made—SGT Akbar had received an initial vote *for life*.

Counsel's deficiency in failing to present available mitigating evidence operated synergistically with those instances in which counsel deficiently failed to exclude inadmissible aggravating evidence. The result is that the Gate 3 balancing was badly skewed, with inadmissible weight on the aggravation side of the scale and minimal though abundantly available weight on the mitigation side. Reviewing all the deficiencies of counsel's representation compared to the presentation that any competent counsel would have put forth, this Court cannot be confident in the outcome because there is a "reasonable possibility" that at least one member would have

voted for life in one of the four votes that each of the fifteen members cast.[55] *Kreutzer*, 61 M.J. at 301. Thus, SGT Akbar requests that this Court grant him a sentence rehearing.

B. Counsel provided IAC during the penalty phase when they sat idly by as the government elicited improper and inadmissible testimony in aggravation from thirteen witnesses that inflamed the panel's preconceived notions against SGT Akbar and then presented inflammatory argument urging the panel to make impermissible value determinations. *See* AE A.III.

C. Counsel provided IAC by conducting a woeful voir dire and failing to challenge biased members, or in the alternative, seeking a change of venue. *See* AEs A.IV and A.V.

"Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense." *Miller v. Webb*, 385 F.3d 666, 672 (6th Cir. 2004). For all the reasons established in AE A.IV, SGT Akbar received IAC when his counsel failed to challenge members for demonstrated bias and failed to conduct an aggressive voir dire to expose bias and mitigation impairment.[56] Rather, counsel entered voir dire with an unreasonable strategy to sit members regardless of their prior knowledge of the case which eviscerated the theories of defense and mitigation, their visceral feelings towards SGT Akbar at the

[55] "[T]he presence of significant aggravation does not foreclose the prejudice inquiry. There is no crime that, by virtue of its aggravated nature standing alone, automatically warrants a punishment of death." *Taylor*, 262 S.W.3d at 252.

[56] The ABA Guidelines establish some of the professional norms dealing with voir dire. *See* Guidelines 1.1, Commentary; 10.10.2.

time of the charged incident, their previously formed opinions of guilt, their relationships with other trial participants and victims, or indicators of mitigation impairment. Their failure to adequately voir dire the members and make appropriate challenges for cause amounts to IAC and resulted in the impaneling of biased members. *Hughes v. United States*, 285 F.3d 453, 463 (6th Cir. 2001)("The question of whether to seat a biased juror is not a discretionary or strategic decision."). Thus, this Court should set aside the findings and the sentence.

D. Counsel provided IAC during the merits phase of the trial.

For the same reasons as set forth in Section A, *supra*, SGT Akbar's counsel provided deficient performance and he suffered similar prejudice as it would take only one member to vote not guilty of premeditated murder in order to make SGT Akbar ineligible for death. The most egregious error by counsel was the failure to further investigate the mental health defense and present the witnesses to support the defense. Counsel essentially rested their entire case on the testimony of Dr. Woods when there was a plethora of other witnesses who could have been called to support the defense. (*See* JA 2933 (counsel stated that Dr. Woods was their only defense)).

1. Failure to interview and present Dr. Miles and Dr. Sachs.

The argument presented *supra* in Sections A.3.c and A.3.d likewise applies to the deficient merits presentation.

2. Failure to present all known evidence to Dr. Woods and conduct additional mental health testing as requested by Dr. Woods and Dr. Clement.

The argument presented *supra* in Section A.6 likewise applies to the deficient merits presentation.

3. Conceded guilt.

SGT Akbar's trial defense counsel were ineffective when, during argument and in the presentation of evidence, they conceded guilt to all the elements of a capital offense. *See* Article 45(b), UCMJ, 2000. Furthermore, though a plea of not guilty on its face may not appear to constitute a guilty plea to a capital offense, the underlying intent or spirit of Article 45(b), can be violated when the sum of an accused's pleas of guilty amount to a plea of guilty to a capital offense. *United States v. McFarlane*, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957); *see also United States v. Dock*, 26 M.J. 620, 622 (A.C.M.R. 1988).

First, defense counsel conceded guilt during opening statements when he said that "[t]he defense isn't here to contest what happened." (JA 688-89, 697). More critically, he made no real attempt to link SGT Akbar's mental illness with the ability to premeditate—just that he has "trouble thinking." (JA 695). As mental illness alone does not deprive a person of the ability to premeditate, he conceded guilt from the get-go.

Second, counsel presented witnesses who declared SGT Akbar could plan. Dr. Tuton testified SGT Akbar had "average . . .

planning ability" with "good judgment and reasoning skills." (JA 724). Counsel specifically asked Paul Tupaz if SGT Akbar could make "plans for near and short-term objectives," to which Mr. Tupaz detailed SGT Akbar's planning ability. (JA 770-72). Counsel then presented Dr. Woods who could only say SGT Akbar's mental illness prevented him from thinking clearly. (JA 852).

Third, counsel called a witness who wholly undercut any theory of inability to premeditate and sealed SGT Akbar's fate. Though counsel called several witnesses to talk about SGT Akbar laughing at inappropriate times, with SPC Rice, counsel asked for a specific instance occurring a few days before the attacks. (JA 790-91). Counsel asked SPC Rice to recount the viewing of *Apocalypse Now* in which he saw SGT Akbar inappropriately laugh:

> There were injured U.S. soldiers that were being MEDEVAC'd onto a bird at the time. As they are being loaded on, there was a female that moved toward the bird, tossed in a grenade. The bird explodes; and, just right about that time, laughter came from the rear of the room.

(JA 791).

Case closed. The defense had just proven premeditation for the government. Replace the word "bird" with "tent" and SGT Akbar was laughing at the exact scenario that played out just a few days later. *See People v. Orta*, 836 N.E.2d 811, 813 (Ill. App. Ct. 2005)("A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusation."). As during sentencing,

government counsel immediately capitalized on the error in their closing argument. (JA 1017; *see also* JA 1896 (member's question to another witness about their reaction to SGT Akbar's laughter to American soldiers being killed in the movie)).

Lastly, in closing argument defense counsel argued that SGT Akbar planned and did deliberate acts, albeit poorly. (JA 1037-38, 1049). This further conceded his guilt, not only to the premeditated murders, but the aggravating factor as well.

Counsel's elicitation of testimony regarding SGT Akbar's ability to plan directly undercut any diminished capacity defense and these statements proved the government's case. When coupled with the failure to interview and present crucial witnesses to support the defense of diminished capacity, and the refusal to seek more funding for the mitigation specialists in March and again in early April 2005, counsel presented a half-hearted defense that was destined to fail from the beginning. (*See* JA 2477 ("Premeditation — It most likely will not work")). As a result, counsel were ineffective for admitting SGT Akbar's guilt, and the findings must be remanded for a rehearing.

E. Even if this Court finds that the individual allegations of IAC are insufficient to merit relief, together the cumulative errors in counsel's representation of SGT Akbar denied him a fair trial and call into question the reliability of the result of the trial, thereby warranting a rehearing.

This Court "can order a rehearing based on the accumulation of errors not reversible individually." *United States v.*

Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996). As set forth in *Dollente*, the cumulative-error doctrine requires:

> Consider[ing] each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy—or lack of efficacy—of any remedial efforts); and the strength of the government's case.

Id. (quotation marks and citation omitted). "[W]hen assessing the record under the cumulative-error doctrine, courts must review all errors preserved for appeal and all plain errors." *Id.* (internal quotation marks and citation omitted).

Applying the cumulative error doctrine in SGT Akbar's case necessitates a new trial, or at least a sentence rehearing. Counsel deficient performance infected the entire case, from pretrial investigation, motions, coordination with and presentation of defense experts and witnesses, voir dire, findings, and presentencing. No portion of the court-martial process was left unmarred by counsels' inexperience and deficient performance. Counsel completely disregarded both mitigating and extenuating evidence during their investigation; failed to adequately voir dire or to challenge members; in essence pled SGT Akbar guilty; woefully prepared and presented mitigation evidence; and failed to prevent improper and inflammatory testimony from being presented and argued.

The adversarial process failed in this case. Counsel did

not aggressively seek expert assistance or mitigation evidence, did not effectively present what information they had, and made no attempt to shape the panel in a manner favorable to SGT Akbar. When, as in this case, counsel exhibits such deficient performance at all stages, the process is no longer effectively adversarial. *See Cronic,* 466 U.S. at 656-57. "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-63.

Even if each allegation of deficient performance by itself does not rise to the necessary level of prejudice to meet the standard laid out in *Strickland,* the collective nature of these errors constitute the deficiency and prejudice envisioned by *Strickland*. 466 U.S. at 695; *see also Williams*, 529 U.S. at 397 (emphasizing a "totality" review). As the overall effect of counsel's combined shortcomings is necessarily greater than any single deficiency, collectively the errors effectively left SGT Akbar standing at his capital court-martial without counsel.

Had counsel complied with the applicable standards in a capital case, there is a reasonable likelihood that the outcome would have been different. Counsel's grossly deficient performance on sentencing alone merits setting aside the sentence. Coupled with the other cumulative errors, counsel's performance certainly leaves no doubt that the system failed and that SGT Akbar was deprived of competent counsel and thus a fair

trial. *Dollente*, 45 M.J. at 236. SGT Akbar's case is even more aggravated than *Dollente*, and the repercussions are hardly comparable.[57] Not only did numerous errors effect the investigation, merits, and sentencing phases of SGT Akbar's court-martial, even if SGT Akbar's counsel presented a competent case in mitigation, the panel was so infected with bias that a fair trial was impossible. Additionally, as SGT Akbar's case is a capital case, this Court is required to give these errors even greater scrutiny to ensure "reliability of result." *Murphy*, 50 M.J. at 14. Thus, this Court must conclude that SGT Akbar was not afforded a fundamentally fair court-martial, and a rehearing on findings and sentence must be granted.

F. But for the deficient performance of SGT Akbar's counsel, there is a reasonable probability that at least one member would have voted for life.

The Supreme Court has required that capital appellate review "aspire to a heightened standard of reliability . . . . This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright*, 477

[57] While the strength of the government's case in *Dollente* was admittedly weaker than that against SGT Akbar, that distinction does not shift the cumulative errors in SGT Akbar's case outside the realm of fundamental unfairness. While it may be said that the "strength of the government's case" factor weighed more in Dollente's favor than it does for SGT Akbar, the nature of the errors, the number of errors, the inability of the judge to correct many of those errors, and the capital nature of this case, warrant finding SGT Akbar was denied a fair trial.

U.S. 399, 412 (1986). The prejudice prong of the IAC test asks only whether counsel's collective deficiencies undermine confidence in the outcome. *Porter*, 558 U.S. at 43-44. They do.

As detailed in the sections above, counsel's poor performance is more than sufficient to undermine confidence in the death sentence, a standard that is less than preponderance of the evidence. *Porter*, 558 U.S. at 44. As only one of the fifteen votes on any of the four gates would have resulted in a life sentence, eliminating any one of these deficiencies could easily have changed the outcome of this case from a death sentence to a sentence of life without eligibility for parole. The collective and synergistic effect of these errors virtually foreclosed any outcome other than a death sentence.

Had SGT Akbar been represented competently, a death sentence was far from inevitable. Through the effective presentation of mitigating evidence and effective exclusion of inadmissible aggravating evidence and argument, counsel could have obtained the one vote necessary to prevent death from being adjudged. "[A] juror, when given the appropriate latitude to consider . . . mitigating evidence, may decline to impose the death penalty even for crimes that are 'especially heinous, atrocious, or cruel.'" *Allen v. Lee*, 366 F.3d 319, 348 n.7 (4th Cir. 2004)(citation omitted)(collecting cases). Thus, any attempt by the government to say the crimes are so egregious

that these errors are harmless, ignores the voluminous amount of evidence that effective representation, limitation of aggravation evidence, and a coherent presentation of mitigation evidence, matters even in the worst of crimes. *See, e.g.*, Lois Romano, *Nichols Is Spared Death Penalty Again*, Wash. Post, June 12, 2004, at 2004 WLNR 23767866 (Nichols was spared the death penalty in both a federal and state trial for the bombing of the Oklahoma City Federal Building that killed 168 people).

Additionally, there is a case-specific basis to believe a death sentence was not inevitable in this particular case. The length of time the members deliberated—over six and a half hours—to include a request to revote on the sentence, provides significant circumstantial evidence the members had difficulty reaching the unanimity required for a death sentence. This suggests the one vote necessary to prevent a life sentence may have been obtained with only a subtle diminution in the evidence on the aggravation side of the scale or a small increase in the evidence on the mitigation side of the scale. The combined effect had SGT Akbar's defense team performed at an objectively reasonable level could have easily resulted in at least one member exercising his or her discretion to vote for life without parole rather than death. Counsel's deficient performance undermines confidence in this case's outcome. *See Porter*, 558 U.S. at 43-44. It therefore constitutes reversible IAC.

Conclusion

SGT Akbar has presented abundant evidence demonstrating his inexperienced counsel's ineffectiveness at every stage of his trial, resulting in prejudice. As such, this Court should dismiss the findings and/or sentence and authorize a rehearing. In the alternative, this Court should order a *DuBay* hearing so that a military judge can make findings of fact regarding the numerous material conflicts between the declarations of counsel and the declarations submitted by the specialists, experts, and witnesses who were involved in this case. (*See* AE A.II).

Assignment of Error 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.

Statement of Facts

This argument adopts the facts and arguments in AE A.I along with those described below. The table at Appendix B also summarizes relevant conflicts between trial defense affidavits, the record of trial, and defense appellate exhibits.

Standard of Review and Law

This Court reviews the need of a fact-finding hearing de novo. *See United States v. Ginn*, 47 M.J. 236, 238 (C.A.A.F. 1997). Unlike federal courts, military law provides no "procedures for collateral, post-conviction attacks on guilty verdicts." *Murphy*, 50 M.J. at 5 (citations omitted). However, this Court relies on

comparable post-conviction procedures. *Id.* (citing *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

In contested cases alleging IAC on appeal, a *DuBay* hearing is required *unless*: 1) the facts alleged by appellant would not result in relief if resolved in his favor, 2) the alleged facts are speculative or conclusory, 3) the facts alleged are uncontested, or 4) the record as a whole does not "'compellingly demonstrate' the improbability of those facts . . . ." *Ginn*, 47 M.J. at 248. "The clear purpose of *Ginn* was to stop the service courts from resolving disputed factual issues on the basis of extra-record affidavits, without a trial-level hearing, except in certain, specified instances." *United States v. Singleton*, 60 M.J. 409, 413 (C.A.A.F. 2005) (citation omitted).

The Eighth Amendment requires effective pretrial investigations in capital cases. *Loving v. United States*, 64 M.J. 132, 151-52 (C.A.A.F. 2006)(citations omitted). The Court's "evaluation of an [IAC] claim in a capital case must focus on the defense investigation to determine if it was reasonable." *Id.* at 147-48 (citation omitted). A *DuBay* hearing "rather than an appellate court is 'best suited to developing the facts necessary to determining the adequacy of representation during an entire trial.'" *Id.* at 149 (citation omitted). When assessing whether a *DuBay* hearing is necessary, this Court considers "a most important fact that this is a capital case." *Id.* at 150.

Argument

The record as a whole, including appellate exhibits, sufficiently establishes the IAC claims detailed in AE A.I. However, at a minimum, a *DuBay* hearing is required. Appendix B and the exhibits themselves reveal significant factual conflicts in this case. (*Compare* JA 1922-2381, *with* JA 2382-3041). Specific to this argument, factual conflicts remain regarding whether counsel: performed an adequate pretrial investigation; relied on the advice of capital defense professionals; personally interviewed and prepared potential witnesses for trial; failed to call relevant, available witnesses; or provided relevant support to SGT Akbar's mental health expert. (*See* AE A.I).

Contrary to counsel's assertions (JA 1930, 1952), it was not the consensus of capital litigators that mitigation evidence is best presented on the merits through expert witnesses (JA 2361-62, 2364-65). Before trial, counsel consulted with capital defense attorney Mr. Dunn. (JA 2692-94). Mr. Dunn asserts he "emphasized to SGT Akbar's defense team the need to investigate, develop, and present an integrated mitigation defense that began in the merits phase of the case and coherently transitioned and climaxed at the penalty phase of SGT Akbar's trial." *Id.* Mr. Dunn also "emphasized that this story must be told with the assistance of experts, but must not be told solely or primarily by experts." (JA 2694). Declarations from numerous other

capital litigation professionals agree that presenting social history through expert testimony in lieu of lay witnesses fell below the prevailing standard of care during SGT Akbar's trial. (JA 2700-01, 2721-22, 2725, 2728-29, 2750, 2760, 2776-77).

Contrary to counsel's assertions, they did not conduct an adequate pre-trial investigation (JA 1937, 1939, 1942, 2350-57), and mitigation specialist, Ms. Nerad, and her team never completed their work (JA 2358-59). Ms. Nerad asserts funding problems, government interference, and counsel indifference, significantly delayed her mitigation investigation from outset.[58] (JA 2765-66; *see also* JA 2169, 2180-81, 2183-86). As of December 1, 2004, Ms. Nerad said she could not complete a competent mitigation investigation "before June of 2005." (JA 1844-45). From January to March 2005, Ms. Nerad repeatedly asked counsel to request additional time and funds sufficient to complete her work. (JA 2766-69). On March 10, 2005, Ms. Nerad again said she could not complete "competent investigation in the little time we have left." (JA 2938). Counsel responded by

[58] Counsel acknowledge that as of March 2004, the mitigation investigation was "completely lacking" when their initial mitigation specialist withdrew from the case. (JA 1931; *see also* JA 2687-88; 2759). The government did not approve the contract for new mitigation specialist, Ms. Holdman, until August 4, 2004, (JA 1807). Ms. Holdman estimated her investigation "will require a minimum of nine months to conduct." (JA 1826). In September 2004, Ms. Holdman left due to illness and counsel identified her colleague, Ms. Nerad, to replace her. (JA 1937). However, Ms. Nerad did not immediately pick up where Ms. Holdman left off, as counsel assert. (JA 1937).

directing Ms. Nerad to forward them everything collected to that point, and then cut off all contact with her thereafter. (JA 2766-69, 2775-76, 2931-41). Ms. Nerad pointedly refutes counsel's insinuation she "was asking for more funding for the sake of asking for funding in order to create an appellate issue that did not exist otherwise . . . ." (*Compare* JA 2780-81, *with* JA 1941-42, *and* JA 2359). All of SGT Akbar's mitigation specialists agree his mitigation investigation was incomplete. (JA 2550-51, 2759, 2766-68, 2787, 2790-92; *accord* JA 2592-93).

Ms. Nerad also refutes counsel's claim of working cohesively with mitigation specialists to develop SGT Akbar's mitigation case. (*Compare* JA 2764-81, *with* JA 1937-38, *and* JA 2347-48, 2353-54). In fact, Ms. Nerad, and the three other mitigation specialists who assisted her, agree counsel were not receptive to their advice. (JA 2549-51, 2768-71, 2787, 2791-92).

Contrary to counsel's assertions, they did not employ reasonable procedures to identify and prepare witnesses. (JA 1953-54, 2346-48, 2350, 2354-56, 2359, 2361, 2363-64, 2369-70). Counsel *assumed* Dr. Diebold and Dr. Southwell would be "our best chance to convince a panel to not give the death penalty" (JA 3033), only to find them poor witnesses upon their first in-person meeting *one week after trial started*. (JA 2292, 3029, 3033). At least three people interviewed by mitigation specialists, including two of SGT Akbar's sisters and a cousin,

were never named on a defense witness list and never spoke with counsel. (JA 2859, 2871, 2883; *accord* JA 2910-29). At least three witnesses who counsel removed from the defense witness list before trial assert they never spoke to counsel. (JA 2834, 2873, 2881; *accord* JA 2914-29). SGT Akbar's brother was willing and able to testify, but counsel asked him to submit a letter rather than work with his schedule or use telephonic testimony. (JA 2854). SGT Akbar's father asserts counsel never prepared him to testify and decided not to call him during trial citing security concerns. (JA 2829). Mr. Duncan, the only civilian defense witnesses called at sentencing, asserts counsel never interviewed or prepared him before his testimony. (JA 2850).

Also, counsel apparently made no effort to personally interview, verify the contact information of, or even determine the availability of potential witnesses before requesting them. (JA 2924-29, 2969). Throughout the four months before trial, the government repeatedly warned counsel of its inability to contact defense witnesses using the contact information counsel provided. (JA 267-70, 1836-38, 1875-78, 3249-50). On March 4, 2005, the military judge ordered counsel to submit their final witness lists "with correct names and addresses not later than 23 March." (JA 275). Counsel subsequently submitted a new witness list on March 15, 2005, removing twelve previously identified civilian witnesses, including seven witnesses denied

by the government on March 3, 2005, for inadequate contact information.[59] (JA 1875-78, 2919-29).

Contrary to counsel's statements, they did not provide Dr. Woods, SGT Akbar's mental health expert, what he needed to adequately assess SGT Akbar's condition. (JA 1959-61, 2368; *see also* AE A.I, Sec. A.7). Counsel never informed Dr. Woods of relevant observations made by psychologists Dr. Miles and Dr. Sachs, who also assessed SGT Akbar's mental health. (JA 2797-98, 2801, 2803). Counsel did not provide Dr. Woods the comprehensive social history he requested. (JA 2384, 2699-2700, 2465-67, 2767-68, 2796). Counsel did not request the additional testing Dr. Woods repeatedly requested. (JA 2384, 2387, 2468-69, 2796).[60] Counsel also ignored Dr. Woods' recommendation to support his testimony with additional experts and lay witnesses. (JA 1961-62, 2254-56, 2796). Counsel's claims of not calling Dr. Clement because her conclusions conflicted with those of Dr. Woods are objectively unreasonable (JA 1961, 2368) as both experts agreed that, while not legally insane, SGT Akbar displayed symptoms of schizophrenia. (JA 2796, 2423-24).

Counsel also could have supported Dr. Woods' testimony by calling psychologist Dr. Sachs. (JA 2797-98). Dr. Sachs

[59] Ten of these twelve also included witnesses reported as non-responsive on December 2, 2004. (JA 1836-38, 2919-23).
[60] Dr. Woods asserts his testimony and ultimate conclusions were severely hampered as a result of these omissions. (JA 2384-85, 2387, 2465-69, 2796-98).

remembered performing at least five counseling sessions with SGT Akbar while he attended college in the 1990's and found him "very disturbed," but responsive to treatment. (JA 2800). Dr. Sachs related her independent memory of SGT Akbar to mitigation specialist Ms. Nerad. (JA 2767, 2800-01). Counsel decided not to request Dr. Sachs after dismissing her recall of SGT Akbar as nothing more than "false memories" and "a complete load of crap." (JA 2380-81). Dr. Sachs refutes this version of events asserting counsel ended their brief discussion upon learning she no longer had SGT Akbar's counseling records.[61] (JA 2801).

Counsel assert SGT Akbar's alleged stabbing of a guard on March 30, 2005, "had a devastating impact on the defense's sentencing case." (JA 1942-44, 2348-50, 2361). These assertions are false. Defense witness lists reveal *before* March 30, 2005, counsel removed thirteen civilian sentencing witnesses from consideration. (JA 2910-29). By March 29, 2005, the day *before* the alleged incident, only seven civilian sentencing witnesses remained on the defense witness list. (JA 2914-18). On March 31, 2005, *one day after* the alleged incident, counsel removed only two witnesses from their final witness list: Mr. Bowen and SFC Riveria-Camacho. (JA 2910-18). The synopses for each witness

[61] Oddly, eight months before this conversation, counsel received medical records from Ms. Grey referencing the approximate dates and reasons for SGT Akbar's therapy with Dr. Sachs. (JA 2020, 2033). Thus, counsel's fear Dr. Sachs' testimony could be discredited as contrived is difficult to fathom. (JA 2366-67).

show only the removal of confinement facility social worker, Mr. Bowen, reasonably related to the stabbing. (JA 2914-18).

Counsel claim they "re-interviewed each of our civilian mitigation witnesses . . . ." after the March 30, 2005, incident. (JA 2349-50). Based on those re-interviews they determined Mr. Duncan was the only civilian witness still willing to testify, able to limit his testimony without "opening the door to the 30 March 2005 incident . . . ." and able to offer facts unrelated to "future dangerousness or the fact the alleged incidents in Iraq were not within SGT Akbar's character."[62] (JA 2350). "Dubious" describes this statement generously. First, Ms. Bilal, Mr. John Akbar, Ms. Weatherford, and Mr. Hubbard, were not among those determined to be unsuitable witnesses after the incident or counsel would not have requested their production or delayed trial for that purpose. (JA 1433, 1449-50, 2910-13). Second, even if counsel did determine these witnesses unfit, they did so nearly *a month after the incident* and *less than twenty-four hours before they were scheduled to testify*. (JA 1449-50). Third, counsel assert the confinement facility warden, "Ms. Gail Garrett, Mrs. Doris Davenport, Ms. Roberta Osborne, Ms. Rhonda Sparks-Cox and Ms. Regina Weatherford . . . ." no longer wished to testify for SGT Akbar due to the March 30, 2005, incident.

[62] Mr. Duncan on direct exam: "You know, some students you sort of expect to see that kind of thing in the future, but that was so out of character from the person that I'd known." (JA 1430).

(JA 1942-43, 2370). However, the warden was *never* included on a defense witness list, Ms. Weatherford was removed *the day she was to testify*, and the other four witnesses were removed from the defense witness list on March 15, 2005. (JA 2910-23).

The conflicting facts above represent mere summaries and by no means encompass every relevant disputed fact. As shown in AE A.I and Appendix B, the disputed facts in this case defy brevity.

Conclusion

WHEREFORE, this Court must either grant relief on one of SGT Akbar's dispositive claims, to include IAC, or remand his case to a *DuBay* hearing for further fact-finding.

Assignment of Error 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.

Summary of Argument

A sentence rehearing is warranted because the prosecution's victim impact evidence and argument injected extraneous and arbitrary factors into SGT Akbar's sentencing proceeding, in violation of the Eighth and Fifth Amendments. The military judge committed plain error in not preventing this impermissible presentation, resulting in material prejudice to the substantial rights of SGT Akbar. Alternatively, defense counsel's failure to make a contemporaneous objection to improper victim evidence and argument was objectively unreasonable and prejudicial,

resulting in IAC in violation of the Sixth Amendment.

Statement of Facts

Pretrial proceedings.

Recognizing the necessity of excluding improper victim impact evidence and argument where numerous victim witnesses were expected to testify at sentencing, defense counsel filed pre-trial motions raising that issue.[62] Counsel argued that the military judge should limit the content of victim impact testimony, stating it should be unemotional, that it "should be free of any inflammatory comments or references," and omit "characterizations and opinion about SGT Akbar, the crime, or the appropriate sentence." (JA 1707).

Defense counsel also proposed a limiting instruction on victim-impact evidence and on the number of victim-impact witnesses. (JA 125-27). Trial counsel opposed such limitations, arguing that the military judge should adopt the broadest interpretation of admissible victim impact evidence. (JA 133).

When the military judge denied the first motion for appropriate relief regarding victim impact evidence (JA 140-41), defense counsel moved to reconsider (JA 1797-98), reasserting prior arguments. The military judge again denied the motion. (JA 238-39). A third, pre-sentencing motion requested, in part,

[62] The 2003 ABA Guidelines recognize that minimizing the amount of victim impact evidence and vigorously enforcing limitations on such evidence is one of the most important roles of a defense counsel in a capital case. *See* ABA Guideline 10.11, Commentary.

"that the Government caution its witnesses to refrain from objectionable statements. An example of statements the defense is concerned about are those that equate SGT Akbar to a terrorist or traitor." (JA 1899). In response, the military judge granted six of the seven requests to limit the prosecution witness' testimony. (JA 1072). Thus, the parties understood that trial counsel would "follow the out-of-bounds lines, as established by case law," and not elicit any inadmissible victim impact evidence or offer any improper argument.

Victim impact testimony at sentencing.

Contrary to the trial court's ruling and precedent, at sentencing, trial counsel methodically asked victim witnesses to offer opinions about or characterizations of the offense. By asking victim witnesses, "How did you feel when you found out that it was an American soldier who killed him?," trial counsel deliberately evoked emotional responses that SGT Akbar's crimes of conviction warranted anger, that they were inexplicable having been committed by an American soldier, and were a "betrayal." As explained below, thirteen out of twenty-two victim impact witnesses provided inadmissible testimony.

MAJ Stone's wife testified:

> TC: How did you feel when you found out that it was an American soldier who killed him?
>
> A: *I was angry, livid.* Gregg had worked his whole life to defend our country. And he stood alert during the Cold War. When 9-11 -- the attacks on 9-11

happened, he was in his uniform ready to go before I even got home. . . . *I was so angry* that . . . . [h]e never got to go into country, not even a minute.

(JA 1347)(emphasis added).

CPT Bacon, who was injured, testified:

TC: When did you learn that an American soldier was responsible for the attack?

A: I learned that an American soldier was responsible the next day in the recovery wing of the 47th MASH; I was told that it was one of our comrades that had attacked us.

TC: How'd that make you feel?

A: *Extremely frustrated, angry, just kind of betrayed.* It made me feel like I had a lot more questions than I had answers. I just didn't understand it.

(JA 1208)(emphasis added).

LTC Romaine, who was injured, testified:

TC: How'd that make you feel?

A: At first, it was disbelief, how could that possibly be? . . .
At first, it was sad, to me, that somebody in our unit would do that. Then it was -- *then I got mad.* How could somebody in our unit do that?

(JA 1139-40)(emphasis added).

CPT Amorsolo, another casualty, testified:

TC: When did you learn that Captain Seifert had passed?

A: I learned it in Germany at Landstuhl.

TC: When did you learn that an American soldier had killed him?

A: I learned that when I was at Camp Wolf, Kuwait.

TC: How'd that make you feel?

A: I felt *betrayed*, first of all, because we were part

of the 101st; at that time, we were going to do something historic. *To have one of your buddies from your left or right go out of ranks and stab you in the back like that, I felt pretty betrayed.*

(JA 1200)(emphasis added).

MAJ Hedrick, a fourth injured victim, testified:

TC: You touched on something, sir. How did it make you feel when you found out it was an American soldier who committed the attack?

A: *Disbelief -- utter disbelief.*

(JA 1161)(emphasis added).

CPT Jones, who suffered wounds, testified:

TC: How did that make you feel, learning that news?

A: I was shocked. You expect certain stuff to come out of left field when you go to war, but nothing like this. We had a good unit. Something like this doesn't happen in our unit.

(JA 1193).

CPT McLendon, a witness, testified,

TC: How'd it make you feel to learn that an American soldier did this?

A: *It goes back to that distrust again. How could an American do this, you know?* It was shocking -- it's bothersome.

(JA 1184)(emphasis added).

CPT Roberts, who also sustained injuries, testified:

TC: When did you learn that an American soldier had killed Chris?

A: That night, before we got evac'd out.

TC: How did that affect you?

A: I just -- I couldn't believe it was another American that would do something like this, to a

fellow American, especially a soldier; somebody you depend on, somebody you trust to protect your back, to stand by you. *To find out that it was another American, it pissed me off. I was pissed.*

(JA 1213)(emphasis added).

LTC (Ret.) Wolfenden, CPT Seifert's former instructor, testified:

A: And they said, "Can you believe that he was killed by a U.S. soldier?"

TC: How did you feel about that?

A: *Disbelief, anger.*

(JA 1356)(emphasis added).

CPT Seifert's mother testified,

TC: Ma'am, how did you feel when you realized he had been killed by an American?

A: *Disbelief*; just could not believe it. First of all, Chris loved to be in the military. We knew that his soldiers respected him and loved him very much.
. . . .
And I just could not believe that an American soldier would do this, because we had met so many of Chris' friends. And it's just -- today, I still have a difficult time. It's the hardest part. *It's a betrayal.*

(JA 1374)(emphasis added).

CPT Santos, who was wounded, testified:

TC: What'd [sic] it mean to you when you learned that [an American soldier had killed CPT Seifert]?

A: I was confused. *I did not understand why an American soldier would kill one of his own, why an American soldier would take the lives of a fellow American, when we were there to fight the enemy -- or the enemy that we perceived.*

(JA 1222)(emphasis added).

And CPT Seifert's wife testified,

> TC: How did you feel when you realized it was an American that killed him?
>
> A: *A sacred trust was broken that evening at Camp Pennsylvania.* Chris would have given his life for any member of that unit seconds before it happened and, in fact, even during it. Chris was one of the guys -- I worried about Chris because he was somebody that would have put himself in front of a bullet for somebody else. He would have jumped on a grenade to save his buddies, and *that night that band of brothers was broken.*

(JA 1386)(emphasis added).

In response to another question, SGT Akbar's brigade commander (victim, witness, and friend of the two most senior panel members (JA 369, 372)), compared the crime to Vietnam-era "fraggings" during the Army's "very worst days." (JA 1100).

These angry characterizations effectively called SGT Akbar a terrorist and a traitor. Though no witness said those words, this presentation had the same devastating impact on the panel.

Closing arguments.

Trial counsel's arguments only reinforced the victim witnesses' pejorative characterizations of SGT Akbar's crimes. During summation, arguing that SGT Akbar should be sentenced to death, trial counsel repeatedly told the panel SGT Akbar was the "enemy inside the wire,"[63] who betrayed his "band of brothers."

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[63] *See* JA 1475 ("The enemy within the wire was waiting");JA 1475 ("Ken Romaine faced the enemy at Camp Pennsylvania; he faced the enemy within the wire [pointing at accused]"); JA 1484 ("Let it be a sentence to death, for he was an enemy within the wire"); JA 1481 (arguing the victim was "murdered by the enemy within the wire"); JA 1464 ("He was the enemy within the wire"); JA 1482

Trial counsel urged the panel to impose death to "send a message about the value of life, the value of loyalty -- *the loyalty of one soldier to another*, about the bond between the band of brothers." (JA 1396-97)(emphasis added). The panel's failure to impose death would be disloyal as trial counsel promised "others will talk about what happens in this room." (JA 1396). Trial counsel also told the panel their verdict would reflect the relative worth of the victims' lives "against the evidence that Sergeant Akbar has presented." (JA 1468).

During *voir dire*, several panel members, many of them combat veterans, expressed shock, dismay, and sadness after first hearing about a fratricide in Kuwait; thus trial counsel knew this panel was especially receptive to provocative themes of disloyalty and betrayal. For example, MAJ Seawright recalled being "pretty upset" and "felt" for the victims and their families. (JA 491). He also described being "shocked" when he heard about the crime. (JA 492). COL Quinn stated he felt "[s]hock or disbelief. I could hardly conceive of that." (JA 379). LTC Foye said, "Honestly, I was hurt, and really disappointed, and a little embarrassed." (JA 404). LTC Lizotte said that she "was pretty shocked that someone could do that to their fellow soldiers." (JA 464). CSM Rivera expressed "shock

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("The enemy was in the wire. . . It was SGT Hasan Akbar"); JA 1482 ("Christopher Seifert, murdered by the enemy within the wire").

and disbelief" at the news. (JA 529). It was "a deep stab; primarily when it was announced that it was a Sergeant." *Id.*

Defense counsel did not object to improper victim impact evidence or argument at sentencing. Absent any objection, defense counsel's pretrial concerns about victim impact testimony that would "equate SGT Akbar to a terrorist or traitor" came to fruition. Government arguments cemented the harm by asking the panel to make comparative value judgments.

At closing, defense counsel's belated attempt to mitigate this prosecutorial misconduct only worsened its impact. First, defense counsel urged the panel not to sentence based on the emotional responses trial counsel doggedly mined. (JA 1484-85). Defense counsel then cited the Government's descriptions of SGT Akbar's crimes as a betrayal in a futile attempt to defuse them. In doing so, defense counsel validated the victims' anger:

> We heard testimony from the family members; we heard testimony from soldiers who were wounded. *If that doesn't get you angry, then something is wrong with you. If that doesn't make you upset, then something is wrong with you.* Because it should make you upset; those 2 days were very long days -- very long days for me. *It made me angry, because what I was thinking is that Captain Seifert and Major Stone should not be dead.* We do have a band of brothers -- I'd include band of sisters. You should be able to trust the person on your right, and the person on your left.

(JA 1492)(emphasis added).

Lastly, defense counsel asked the panel not to make improper comparative judgments:

> I'm going to assume, and I'm going to hope, that your sentence is not viewed as some sort of comment on the lives of Major Stone and Captain Seifert, or the lives of the people injured. Quite frankly, you can't give a sentence that would value their lives. You were asked, what's the value of this, what's the value of that. It's impossible for you to value their lives.
>
> That's not your job; your job is to come up with an appropriate sentence.

(JA 1498).

Instructions to the panel.

Afterwards, the panel received standard instructions on weighing aggravating and mitigating circumstances. But the military judge provided no cautionary instructions about victim impact evidence prior to the panel's sentencing deliberations. (*See* 1454-64, 1508-31). And it is not evident defense counsel requested any. (*See* JA 1081, 1445).

Standard of Review

In the absence of an objection, alleged error is reviewed for plain error. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). Plain error exists when: (1) there was "error"; (2) the error was "plain," that is, "clear" or "obvious"; and (3) the error materially prejudiced substantial rights of the appellant. *Id.* at 462-64. "'Once [SGT Akbar] meets his burden of establishing plain error, the burden shifts to the Government to convince [this Court] that this constitutional error was harmless beyond a reasonable doubt.'" *United States v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009) (citation omitted).

Law and Argument

Under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)(citation omitted); *cf. United States v. Thomas*, 46 M.J. 311, 316-16 (C.A.A.F. 1997)(applying a more favorable plain error standard to the appellant in a capital case).

The prosecution's sentencing case told the panel to do precisely what the Eighth Amendment, as construed by the Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), and *Booth v. Maryland*, 482 U.S. 496 (1987), forbids: to impose a death sentence because the victims were hardworking, praiseworthy members of the military community, and because prosecution witnesses branded him a traitor. The trial counsel argued to the panel that its sentencing decision should factor in a determination of the victims' value to the community. These arguments injected prejudice incompatible with the Eighth Amendment mandate that a capital sentencing decision must be individualized, rendering the trial fundamentally unfair under the Due Process Clause of the Fifth Amendment. *Lockett v. Ohio*, 438 U.S. 586, 601 (1978)(internal quotation and citation omitted).

Booth involved the murder of an elderly couple. The family members' characterization of the defendant and crime in *Booth*

included the son's statement that "he [didn't] think anyone should be able to do something like that and get away with it," *id*. at 508, and the daughter's statement that her parents' murderer could "'never be rehabilitated.'" *id*. at 500. The victim impact statements "provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Booth*, 482 U.S. at 502. Regarding the "second type," concerning family members' opinions and characterizations of the crimes and the defendant, the Court held that "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id*. at 508-09 (citation and quotation omitted).

The Court concluded admitting the victim impact statements violated the Eighth Amendment. *Id*. at 509; *see also South Carolina v. Gathers*, 490 U.S. 805 (1989)(extending *Booth* ruling, in full, to apply to prosecutorial argument and evidence), *overruled in part by Payne*, 501 U.S. at 830 n.2. *Booth*'s outcome was not dependent upon any showing the victim impact evidence actually "influenced" the sentencer. Rather, the Court found the victim impact evidence was inadmissible because it

created "a constitutionally unacceptable risk" the sentencer might arbitrarily impose death. *Booth*, 482 U.S. at 503.

In *Payne*, the Supreme Court overruled *Booth*'s prohibition on the "first type" of victim impact statement describing the personal characteristics of the victims and the emotional impact of the crimes on the family. *Payne*, 501 U.S. at 825. The Court's majority held this "first type" of victim impact evidence "is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Id.* But the "second type" of victim impact evidence was not at issue in *Payne*, and the Court left undisturbed *Booth*'s prohibition against victim impact evidence and argument concerning a victim's family offering its opinion about the crime, the defendant, and the appropriate sentence. *Id.* at 830 n.2; *see also id.* at 833 (O'Connor, J., concurring); *United States v. Brown*, 441 F.3d 1330, 1351 (11th Cir. 2006)(stating *Booth* partially "remains good law"). *Payne* also noted when victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair," the Due Process Clause requires a new sentencing hearing. 501 U.S. at 825.

A. Eliciting opinions from victim witnesses about the offense violated the Eighth Amendment.

As earlier stated, "*Booth* . . . held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne*, 501 U.S. at 830 n.2. As in *Booth*,

trial counsel systematically invited victim witnesses to characterize SGT Akbar's crimes in inflammatory, irrelevant ways to persuade the panel he should be executed to punish his betrayal and to mollify the anger of their survivors. This argument crossed the bright line drawn in *Booth* and *Gathers*, left undisturbed by *Payne*, thus violated the Eighth Amendment.

Other courts have found this type of testimony violates the Eighth Amendment. *See United States v. Johnson*, 713 F. Supp. 2d 595, 622, 622 n.30 (E.D. La. 2010)(citing post-*Payne* cases from seven circuits applying Eighth Amendment claims under *Booth* and *Gathers*). In *United States v. Mitchell*, a federal death penalty case involving a Native American defendant who carjacked and killed other Native American victims on a Navajo reservation, a single victim impact witness testified at the penalty-phase: "It's been really hard . . . to know that someone within our own kind, our own people would be so disrespectful for our own culture and our own belief, our own traditional values, how we teach our young people." 502 F.3d 931, 990 (9th Cir. 2007). The court held that "[t]his was an inadmissible opinion about Mitchell's crime," which was "'irrelevant to a capital sentencing decision.'" *Id.* (quoting *Booth*, 482 U.S. at 502–03, 508–09). The court denied relief, despite finding an Eighth Amendment violation, only because the "brief" comment had a negligible impact on the jury. *Id.; see also Derosa v. Workman*,

679 F.3d 1196, 1240 (10th Cir. 2012)(finding characterization was improperly admitted, in violation of *Payne* and *Booth*, but not prejudicial, in part, because of jury instructions about mitigation and the proper roles of the jury and victim impact evidence); *United States v. Bernard*, 299 F.3d 467, 480 (5th Cir. 2002) (also finding plain error).

SGT Akbar's case warrants a different outcome. The improper victim impact evidence in this case, by comparison, was voluminous and unfiltered by appropriate instructions. Here, four victim impact witnesses testified that the crimes were a betrayal, and just as many strongly implied it citing disbelief and anger. Another victim impact witness, the senior commander of SGT Akbar's unit and friend of the two most senior panel members, equated his crimes to the Army's "very worst days" during Vietnam—evoking an anger against soldiers who committed "fraggings" against senior leaders. Trial counsel exploited these statements at closing, repeatedly arguing SGT Akbar should be sentenced to death because he was the "enemy inside the wire" who betrayed his "band of brothers."[64] *See Gathers*, 490 U.S. at 810-12 (affirming reversal for improper sentencing argument).

The error was plain as the testimony was improper even under a noncapital analysis. *See* R.C.M. 1001(b)(4). A witness' wider perceptions of a crime's social implications are in no way

[64] *See, supra*, note 63.

"directly related" to "evidence of financial, social, psychological, and medical impact . . . ." *Id.* Even if they were, the evidence violates M.R.E. 403 and 404(b) by implicating highly inflammatory notions of assisting the enemy, treason, and mutiny, each of which could be considered uncharged misconduct. Moreover, treason is the worst offense known to the law and public imagination. Here, the government invited the panel to sentence SGT Akbar, not for his crimes, but for treasonous acts.

Any decision to impose the death sentence must "be, and appear to be, based on reason rather than caprice or emotion." *Booth*, 482 U.S. at 508–09 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)); *see also United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). But, "such potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination . . . on the improper basis of inflamed emotion . . . ." *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005). Precedent dictates the victim impact testimony offered in this case violated the Eighth Amendment.

Unlike *Derosa*, no curative instruction negated the prejudice of the victim impact evidence by explaining how the panel should consider it. And, unlike *Mitchell* and *Bernard*, the sheer weight of improper victim impact evidence in SGT Akbar's case overwhelmed mitigating evidence and led the panel to render an emotional, arbitrary sentence. Thus, the question is whether

the Eighth Amendment violation warrants reversal of the sentence, even absent any timely defense objection.

Here, the answer is yes. In *Johnson*, the court reversed the sentence because no curative instruction followed the government's proffer of improper testimony from the victim's widow that a defendant was "'evil,' declaring his life a 'disgrace and referring to all three defendants as 'selfish, greedy criminals,' who 'terrorized innocent bank employees and customers' . . . ." 713 F. Supp. 2d at 622-23 (discussing *Booth*, *Gathers*, and *Payne*). As in *Mitchell*, *Derosa*, *Bernard*, and *Johnson*, admitting the testimony in SGT Akbar's case was plain error. Like *Johnson*, these emotional appeals denied SGT Akbar a fundamentally fair sentencing hearing. *Id.* at 624.

As the government repeatedly admitted improper testimony in over half of their twenty-two sentencing witnesses, exploited that testimony in argument, and the military judge gave no curative instruction, the result is reversible prejudice.

B. Argument that the members should determine the value of the victims' lives was improper under the Eighth Amendment.

The Supreme Court expressly rejected the notion that victim impact evidence and argument can be used to "permit[] a jury to find defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy." *Payne*, 501 U.S. at 823.

Here, the trial counsel's penalty phase arguments exceeded

a description of the character and impact of the lives lost. The trial counsel told the panel that their verdict would reflect the value of the victims' lives to the military community as he exhorted them to show loyalty to their fellow deceased soldiers: "others will talk about what happens in this room . . . . send a message about the value of life, the value of loyalty -- the loyalty of one soldier to another, about the bond between the band of brothers." (JA 1396-97).

These statements directly contravened *United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984), and require reversal of the sentence. "[T]he alleged desires of society or any particular segment of society [cannot] be allowed to interfere with the court's independent function . . . . [and testimony] that the entire unit was hanging on the outcome of the trial, [violated] this fundamental sanctity of the court-martial . . . ." *Id.* This case presents an identical, but even more egregious, problem created by prosecutorial argument.

Also, trial counsel told the panel their verdict would reflect the relative worth of the victims' lives (JA 1468) against SGT Akbar's life and crimes. (JA 1474). Thus, rather than weighing aggravating circumstances against mitigating and extenuating circumstances, the trial counsel told the panel it was their duty to make the value determination *Payne* forbids.

The South Carolina Supreme Court declared the same argument improper in *Hall v. Catoe*, 601 S.E.2d 335, 361-64 (S.C. 2004) (finding IAC for failing to object). There, the prosecutor asked the jury to conduct value determinations—"What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps." *Id.* at 361. Citing *Payne* and *Booth*, the court declared that the state may not "encourage the jury to compare the worth of a defendant's life with that of his victims." *Id.* at 363. Additionally, it held that this weighing formula was fatally defective because it was an "emotionally inflammatory," "material part of the jury's deliberation process," which "unquestionably directed the jurors to conduct an arbitrary balancing of worth," and irrelevant. *Id.* at 364.

The same analysis and result are required here. This exhortation to make a value judgment when determining whether to impose a death sentence immediately followed the trial counsel's explanation of Gate 3 of the capital voting process. (JA 1467-68). Thus, the members were told when weighing the aggravating circumstances of SGT Akbar's crime, to "[w]eigh his life" and to decide "what two lives are worth . . . ." (JA 1468; 1474). As in *Hall*, that improper analysis directly violates *Payne*.

This value judgment incitement also preceded the trial counsel's description of the victim's background and character.

Trial counsel described one victim having "the courage of a lion" (JA 1474), another victim had a "warrior's heart" (JA 1489), another victim was the "heart of his family" and a "talented officer" (JA 1476-77). In contrast, trial counsel told the panel SGT Akbar was a "hate-filled murderer," who lived a life "full of rage" before betraying his fellow soldiers. (JA 1474).

Payne prohibits victim impact evidence and argument "offered to encourage comparative judgments," and specifically condemns argument "that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." 501 U.S. at 823. Because the prosecutor's arguments unquestionably violated *Payne*, they warrant reversal.

C. The trial counsel's argument encouraging the members to draw impermissible conclusions from victim impact evidence also violated due process.

The trial counsel's sentencing phase summation violated both Due Process and the Eighth Amendment. While introduction of some victim impact evidence may be acceptable, such evidence may not be so "unduly prejudicial that it render[s] the trial fundamentally unfair" in violation of due process. *Payne*, 501 U.S. at 825. For the above reasons, trial counsel's argument, alone and together with the entreaty the panel had a duty to impose death, rendered the sentencing proceeding fundamentally unfair. *See*, *e.g.*, *Romano v. Oklahoma*, 512 U.S. 1, 12-13 (1994); *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

D. The military judge committed plain and obvious error materially prejudicing SGT Akbar's substantial rights and denying him a fair and individualized sentencing proceeding.

Before trial, defense counsel alerted the military judge that improper victim impact evidence would make the trial unfair. The military judge validated these concerns by ordering the government to comply with the law. Thus, the military judge erred by allowing the government to repeatedly violate *Booth*, *Gathers,* and his own order. IAC does not excuse the military judge's failure to control the presentation of evidence and argument and "assure that the accused receives a fair trial." *United States v. Graves,* 1 M.J. 50, 53 (C.M.A. 1975).

The court's failures resulted in the unchecked admission of objectionable victim impact evidence and argument which were not harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967). *Chapman* requires the government to demonstrate that the constitutional error did not "contribute" to the sentence obtained. *United States v. Collier*, 67 M.J. 347, 355-56 (C.A.A.F. 2009). "An error has not contributed . . . when it was unimportant in relation to everything else the jury considered on the issue in question . . . ." *Id.* at 356 (internal quotations and citations omitted).

The government cannot meet its burden. In context of the entire proceedings, the trial counsel's emotional appeal was not harmless. Here, the victim impact testimony was extensive,

affording more than "a quick glimpse" of the victims' lives. *Mills v. Maryland*, 486 U.S. 367, 397 (1988). Again, thirteen of twenty-two victim impact witnesses gave inadmissible testimony. The trial counsel's position as government representative makes it more likely its misconduct swayed the panel and prejudiced the proceedings. *Berger v. United States*, 295 U.S. 78, 89 (1935); *see also Strickler v. Greene*, 527 U.S. 263, 281 (1999).

The military judge's instructions directed the panel to consider all evidence produced in the case, listed the R.C.M. 1001(b)(4) aggravating circumstances (specifically including the emotional impact on the families), and how to weigh aggravating circumstances against extenuating/mitigating circumstances. (JA 1511-21); *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("[J]uries are presumed to follow their instructions."). Trial counsel co-opted the court's weighing instruction when he told the panel they "must" weigh the inflammatory evidence and value of his victim's lives against the value of SGT Akbar's life.

With no corrective instruction, a panel would view trial counsel's argument an accurate interpretation of the military judge's weighing instruction. Though not "evidence," it was a misstatement of the law that, left uncorrected, necessarily affected how the panel's understood the court's instructions.

This misstatement not only affected the panel's ultimate individualized selection, but also undermined their distinct

eligibility finding that aggravating circumstances substantially outweighed mitigating/extenuating circumstances. "The third gate is a 'weighing' gate, where the members must all 'concur' that extenuating and 'mitigating circumstances are substantially outweighed by any aggravating circumstances,' including the aggravating factors under RCM 1004(c)." *Loving v. Hart*, 47 M.J. 438, 442 (C.A.A.F. 1998). Here, trial counsel argued, and the military judge instructed, that improper victim impact evidence must be considered as an aggravating circumstance in deciding the appropriateness of the death penalty. But aggravating circumstances not "directly relating to or resulting from the offenses of which the accused has been found guilty" do not constitute proper aggravating evidence. R.C.M. 1001(b)(4). Argument and testimony claiming SGT Akbar was a traitor and the comparative value of his victim's lives fell outside the ambit of the Eighth Amendment and the corollary constraint in R.C.M. 1001(b)(4). As a result, none of the improper argument or evidence should have factored into the panel's weighing process.

Capital courts-martial employ a sentencing process relying, in substantial part, on weighing. In a weighing death penalty jurisdiction, a defendant is deprived of an individualized sentence "when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence." *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Thus,

as the Supreme Court has held, in a "weighing" jurisdiction, the sentencer's consideration of a non-harmless "invalid eligibility factor necessarily skew[s] its balancing of aggravators with mitigators." *Brown v. Sanders,* 546 U.S. 212, 217 (2006).

Here, the panel considered a significant volume of irrelevant, inflammatory, and unconstitutional evidence against SGT Akbar. Thus, it is not evident the panel would have found aggravating circumstances substantially outweighed extenuating and mitigating circumstances but for the improper evidence and argument. *See United States v. Bins,* 43 M.J. 79, 86 (C.A.A.F. 1995). This skewed finding rendered SGT Akbar "death eligible."

The inadmissible victim impact evidence created "a constitutionally unacceptable risk" the panel, already in sympathy with the victims and improperly instructed, arbitrarily imposed the death penalty. *Booth*, 482 U.S. at 503. So inflamed and misinformed, it could not easily disregard this victim impact evidence and argument, which suggested the only appropriate sentence was death. (*See* AE A.I, Sec. C.2, and A.IV). Having acknowledged experiencing personal, visceral reactions to the initial news reports, it is inconceivable any member could set those intense emotions aside when determining an appropriate sentence for SGT Akbar; especially when the prosecution spent the entire sentencing proceeding purposefully reinvigorating these biases and sympathies.

Thus, the military judge committed plain error materially prejudicing SGT Akbar's substantial rights.

E. Alternatively, counsel's failure to object to violations enunciated in *Booth*, *Gathers*, and *Payne*, constituted IAC.

1. Any reasonable defense counsel would attempt to minimize the amount of victim impact evidence presented to the members by making contemporaneous objections to the testimony and argument when it appeared during the sentencing proceeding.

As pre-trial motions demonstrate, counsel anticipated the government's introduction of improper victim impact evidence. (JA 125-27, 1695, 1798). Counsel *specifically* opposed testimony that might "equate SGT Akbar to a terrorist or traitor." (JA 1899). As counsel recognized, this is precisely the kind of testimony *Payne* forbids. 501 U.S. at 830 n.2.

And yet, defense counsel not only failed to prevent the prosecution from offering just such devastating testimony to the members during the presentencing hearing, but also failed to object when government counsel made impermissible argument insisting the panel "must" adjudge death. As a result, in violation of SGT Akbar's Eighth Amendment rights, the prosecution deliberately elicited prejudicial characterizations about SGT Akbar from thirteen victim-witnesses and openly invited the panel to make comparative judgments about the exemplary lives of the victims and the relative worth of those lives versus SGT Akbar's. *Hall*, 601 S.E.2d at 361-64 (citing *Payne*, found IAC and setting aside death sentence because

counsel did not object to prosecutor's argument regarding the value of the lives of the victims and the accused).

Defense counsel's failure to take any step to avert this foreseeable danger was objectively unreasonable. (*See*, *supra*, note 62). Counsel's failure to make contemporaneous objections to apparent inadmissible victim impact evidence and argument lacked any conceivable strategic purpose. As the Fifth Circuit has observed, *Strickland* does not require that a reviewing Court defer to decisions contrary to controlling facts and law. *Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999)(internal citations omitted). Nor does *Strickland* require deference to those decisions which "do not serve any conceivable strategic purpose." *Id.* Here, counsel identified the potential issue pretrial, raised the issue to the military judge, and after the military judge accepted most of the defense's position and government counsel agreed to follow the law, counsel did nothing when the prosecution repeatedly violated SGT Akbar's rights. Counsel's failure to protect SGT Akbar's right to fair sentencing was objectively unreasonable. *See Strickland,* 466 U.S. at 687.

2. SGT Akbar was prejudiced by defense counsel's failure to ensure the exclusion of obviously inadmissible characterizations of the offense and the value of his life.

"[T]he formal presentation of this information by the [prosecution] can serve no other purpose than to inflame the [sentencer] and divert it from deciding the case on the relevant

evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508. As these impermissible arguments had the tendency to render SGT Akbar's sentencing fundamentally unfair, counsel should have objected. *See Payne*, 501 U.S. at 825.

Defense counsel's belated attempt to "un-ring the bell" during sentencing arguments by asking the panel to ignore inadmissible victim evidence and argument did not blunt its overwhelming prejudicial impact. (*See* JA 120 (counsel arguing during pretrial proceedings, after the panel has heard improper victim impact testimony, "[i]t's too late to un-ring the bell at that point"). Nor could mere argument negate this prejudice, especially in light of counsel's ill-conceived presentation of mitigating evidence, deficient instructions, and the panel's sympathetic bias toward the victims.

Because counsel failed to object, the overwhelming weight of the improper victim impact evidence achieved the prosecutor's intended effect—it convinced the panel to sentence SGT Akbar to death. Absent this testimony, there is a reasonable probability that SGT Akbar would have received a life or life without parole sentence, especially since the panel apparently struggled with this decision for over six hours to include requesting reconsideration instructions. (JA 1536, 1537, 1541).

WHEREFORE, this Court should set aside the sentence and order a sentence rehearing.

Assignment of Error A.IV[65]

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, VISCEROL 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.

Standard of Review and Law

The military judge has a *sua sponte* duty to dismiss members exhibiting bias. R.C.M. 912(f)(4); *United States v. Strand*, 59 M.J. 455, 458-59 (C.A.A.F. 2004); *Hughes v. United States*, 258 F.3d 453, 464 (6th Cir. 2001)(stating that counsel and the court "share the *voir dire* responsibility of removing biased venirepersons"). This duty arises because "an accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial trial.'" *Strand*, 59 M.J. at 458. The President ensured the Manual included such an obligation on the military judge due his "concern with avoiding even the perception of bias, predisposition, or partiality." *Id.* (internal quotation marks and citation omitted). Thus, R.C.M. 912(f)(1)(N) provides 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."

[65] This AE is also applicable to AE A.I, Section C.

Because of the military judge's *sua sponte* duty of ensuring an accused receives a fair trial free of any perception of "bias, predisposition, or partiality," this Court reviews his decision to excuse or retain a member for an abuse of discretion. *Strand*, 59 M.J. at 458 (citing, *inter alia*, *United States v. Armstrong*, 54 M.J. 51 (C.A.A.F. 2000)).

The test for actual bias is whether the bias "will not yield to the military judge's instructions and the evidence presented at trial." *United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012). Actual bias is subjective, viewed through the eyes of the judge and the member. *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). "'[J]urors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence.'" *Hughes*, 258 F.3d at 459. As actual bias is largely based on the credibility of the member, the judge is afforded more deference in deciding whether a member is biased. *Nash*, 71 M.J. at 88-89.

Unlike actual bias, implied bias is reviewed under an objective standard, "viewed through the eyes of the public, focusing on the appearance of fairness." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007). Defense counsel's "strategy" is irrelevant to this analysis. *Strand*, 59 M.J. at 459. "Implied bias exists when, 'regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced

[that is, biased].'" *Briggs*, 64 M.J. at 286 (quoting *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)). "[M]ere declarations of impartiality, no matter how sincere, may not be sufficient." *Nash*, 71 M.J. at 89; *cf. United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997)("Once facts are elicited that permit a finding of . . . implied bias, the juror's statements as to his or her ability to be impartial become irrelevant.").

The military judge is responsible for establishing sufficient facts on the record to dispel any appearance of bias. *United States v. Richardson*, 61 M.J. 113, 119-20 (C.A.A.F. 2005); *see also Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."). Military judges receive less deference in an implied bias case than in a case where actual bias is present because implied bias is "viewed through the eyes of the public." *Id.* at 286-87. This standard of review is "'less deferential than abuse of discretion but more deferential than de novo.'" *Strand*, 59 M.J. at 458 (quoting *United States v. Miles*, 58 M.J. 192, 195 (C.A.A.F. 2003)). "However, deference is warranted only when the military judge indicates on the record an accurate understanding of the law and its application to the relevant

facts." *Briggs*, 64 M.J. at 287 (citation omitted).[66]

Once a biased member is seated, appellant need not show prejudice. *Hughes*, 258 F.3d at 463. The impaneling of a biased juror is structural in nature, and must result in appellant receiving a new trial. *Id.*[67] "Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself." *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992).

Argument

Fourteen of the fifteen members who tried SGT Akbar expressed statements indicating actual or implied bias. The military judge conducted little of his own individual voir dire, and created "no record that [he] considered implied bias . . . ." *Clay*, 65 M.J. at 278. Rather, he indicated he could only remove a member if a party requested it and the defense did not

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[66] "This Court has stated that in the absence of actual bias, 'implied bias should be invoked rarely.'" *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

> Th[at] statement, however, is not a reflection of a legal doctrine expressing judicial reticence or disdain from the finding of implied bias. Instead, the statement reflects that where actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established.

Id.; *see also United States v. Lavender*, 46 M.J. 485, 489 (C.A.A.F. 1997)(Effron, J., concurring)(disagreeing that the doctrine of implied bias should be "rarely applied").

[67] Cases presuming prejudice. *See, e.g., Nash*, 71 M.J. at 88-89; *Briggs*, 64 M.J. at 287-88; *Clay*, 64 M.J. at 278.

object. (JA 658-73). Without a factual record demonstrating to an objective observer SGT Akbar received a fair trial composed of fifteen impartial and non-biased members, where no level of rehabilitation would be sufficient for several members, this Court should set aside the findings and authorize a rehearing.

COL George Quinn and COL Paul Meredith

COL Quinn, panel president, and COL Meredith, the only other colonel on the panel, maintained personal relationships with COL Hodges, a victim and key government sentencing witness. COL Hodges was SGT Akbar's brigade commander and received minor wounds during the attack. (JA 1087, 1100). A brigade commander holds a unique role as he is responsible for everything that goes wrong under his command. (JA 1096, 1099-1100).

COL Quinn, who knew of SGT Akbar's "scuffle" with the military policeman (MP) as he saw the patrol cars respond to the courthouse, was friends with COL Hodges. (JA 366, 369). They lived on the same street on Fort Bragg where their children played together. (JA 357). COL Quinn and COL Hodges served as fellow primary staff officers. *Id.* That is, they each held an equivalent level staff position supporting the XVIII Airborne Corps commander, the convening authority in this case. *Id.*

COL Meredith felt "shock or disbelief" at the news of SGT Akbar's actions and both heard and read of the account of SGT Akbar stabbing a MP with scissors. (JA 377-79). COL Meredith

knew COL Hodges for approximately fourteen years and they attended the nearly year-long Command and General Staff College together. (JA 370, 372). At this school, they played basketball together several times per week. (JA 370). COL Meredith described his relationship with COL Hodges at Fort Bragg as a "professional." *Id.* While COL Meredith claimed his relationship with COL Hodges was "not particularly close," he was not asked to further describe their relationship. (JA 370, 372). When asked if his friendship with COL Hodges and his prior knowledge of SGT Akbar's uncharged acts would affect his decision-making at trial, he responded equivocally that he "think[s]" it would not. (JA 372, 378). The military judge did not individually question COL Meredith or ask him to further explain this response. Further, COL Meredith was the supervisor of two junior members, LTC Foye and LTC Lizotte. (JA 309).

Such relationships on the panel create a public perception of stacking the deck against SGT Akbar. *See United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982)(finding "an appearance of evil" because the president of the panel rated other members and worked with the victims, though the president declared he would be impartial). "The intent of the drafters of the UCMJ was to 'prevent courts martial from being an instrumentality and agency to express the will of the commander,' or to *appear to be* such an instrumentality." *Briggs*, 64 M.J. at 287 (emphasis added).

The convening authority chose to appoint one of his primary staff officers, whom he undoubtedly knew had a relationship with a victim also serving on his staff. It was incumbent on the military judge to rid the panel of the biased relationships that created an appearance of unfairness.

No objective member of the public would find the panel appointment of two of a victim's friends as fair. This is especially true when both friends were also colonels who would more easily understand and commiserate with COL Hodges and the impact the attack had on him as a brigade commander. Not finding SGT Akbar guilty of the charged offenses or delivering less than the maximum punishment would be seen as letting down colleague and friend. This could affect both their professional and personal relationships with COL Hodges, and possibly their families' relationships with each other. *See Fisher v. State*, 481 So.2d 203, 222 (Miss. 1985)(stating that a fair trial means jurors who do not have to fear "the later silent condemnation of their fellow citizens"). These unspoken but real influences are too great for this Court to be convinced that a fallible human being can completely put those thoughts and feelings aside.

The government put the military judge on notice that even mere acquaintances between a member and a victim necessitated excusal. (JA 119). The government asserted if the members "know any of the victims, *certainly*, that would be a ground for

challenge for cause . . . ." *Id.* (emphasis added). The government further commented this relationship "would be *the most obvious* [basis for challenge] to the government." *Id.* (emphasis added).

Despite the objective implied bias concern, which the government identified, the military judge made no independent effort to ensure a fair and impartial trial for SGT Akbar as he asked no questions of COL Meredith and only a few questions of COL Quinn that only emphasized his friendship with COL Hodges. (JA 359, 369). The military judge did not follow up on mere member acquiescence to counsel's leading questions regarding impartiality and fairness. From COL Meredith, even acquiescence was equivocal, as he twice used the word "think" to describe his ability to put aside preconceived notions. Most professional officers and soldiers would adamantly assert their impartiality as to do otherwise could undermine their integrity.

The military judge should have known human nature is such that disclaimers alone are often insufficient to dissipate the perception of a military panel stacked against an accused. *Miller*, 385 F.3d at 676-77 ("'The Sixth Amendment guarantees . . . the right to a jury that will hear his case impartially, not one that tentatively promises to try.'" (citation omitted)). Even if unintentionally, subordinates follow superior officers; friends protect their friendships; siblings are mindful how their decisions will be received by fellow siblings; and extrajudicial

knowledge creeps into the decision making process. *See generally Wiesen*, 56 M.J. at 176. The military judge's inaction in allowing these ranking members to remain is disconcerting. *See Strand*, 59 M.J. at 459 ("'implied bias exists when, regardless of an individual member's disclaimer of bias, 'most people in the same position would be prejudiced [i.e. biased]'" (citation omitted)). SGT Akbar did not receive the fair and impartial panel he was entitled as a result of these biased members.

LTC William Turner

SGT Akbar was charged with attacking a brigade tactical operation center (TOC) of the 101st Airborne Division, based at Fort Campbell, Kentucky. (JA 55). The case was transferred to Fort Bragg to the 101st Airborne Division's higher headquarters—the XVIII Airborne Corps. LTC Turner was the younger brother of the then commander of the 101st Airborne Division. (JA 408).

Additionally, LTC Turner knew one of the victims in this case, MAJ Kiernan. (JA 407, 414-15). While he could not recall exactly where he knew MAJ Kiernan from, he knew that MAJ Kiernan was a fellow field artilleryman. (JA 415). At the time of trial, MAJ Kiernan worked with LTC Turner's other older brother at FORSCOM, also located on Fort Bragg. (JA 414). That brother was the Executive Officer for the FORSCOM commander, who is the senior commander of the convening authority in this case. *Id.*

LTC Turner said he did not talk with his brothers about SGT

Akbar's case or feel pressured by his familial relationship. (JA 408, 415). However, a member of the public would be highly concerned LTC Turner's relationship with both of his brothers, and in particular his concern for the men and women under his oldest brother's command, the unit which SGT Akbar attacked, would influence his verdicts on both findings and sentence. For members of the public already skeptical of the unique manner convening authorities hand-select members, the appointment of LTC Turner to this panel looks like nepotism.

The President enacted R.C.M. 912(f)(1)(N)to avoid this exact scenario. *Briggs*, 64 M.J. at 287 ("The intent of the drafters of the UCMJ was to 'prevent courts martial from being an instrumentality and agency to express the will of the commander,' or to *appear to be* such an instrumentality." (citation omitted and emphasis added)). LTC Turner's presence created a perception the convening authority stacked the panel against SGT Akbar to deliver a pre-ordained result. *See Strand*, 59 M.J. at 458. This is the type of case where a "perfunctory disclaimer of personal interest or his assertion of impartiality" is insufficient. *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985); *cf. Harris*, 13 M.J. at 292 (finding declaration of impartiality did not dissipate "an appearance of evil").

Both government counsel and the military judge recognized the appearance problem, yet the judge did not question or

personally LTC Turner. (JA 681-82; *see also* JA 119). The judge apparently did not understand his ability and obligation to remove members for implied bias as he told SGT Akbar to discuss this issue with his counsel and return to him with a decision whether LTC Turner should be removed. (JA 682). As the judge apparently did not understand his personal responsibility and put no legal analysis on the record, his decision gets no deference from this Court. *Briggs*, 64 M.J. at 287.

This Court recognized in *Wiesen* unique aspects of military life affect public perception of military justice. 56 M.J. 172. This Court has refused to allow "*a risk* that the public will perceive that the accused received something less than a jury of [fifteen] equal members . . . ." *Id.* at 176 (emphasis added). That concern is never more critical than in a capital trial where a single vote means the difference between life and death.

Here, the military judge should have been very concerned that all fifteen members were not "equal." The two senior members had a *personal* relationship, not merely an acquaintance, with a crucial government sentencing witness—SGT Akbar's former brigade commander and victim of his crime. Both COL Quinn and COL Meredith knew details of an uncharged attack on a MP a week before voir dire. *Cf. United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). COL Meredith directly supervised two lieutenant colonels on the panel. Additionally, LTC Turner, another senior

ranking member, knew a second victim who one of his brothers worked with at the time of trial, and his other brother commanded the unit SGT Akbar impaired on the eve of battle by his attack from within. *Cf. Briggs*, 64 M.J. at 287 (reversing conviction because spouse of Briggs' commander sat as a member). This type of atmosphere could quickly create an environment, intentional or not, that acquiesced to higher authority, even if subconsciously, to advance a guilty verdict and death sentence.

In particular, LTC Turner's relationship with his two older brothers and a victim listed on the charge sheet created an unacceptable strain on the perception of fairness. The military judge abused his discretion by not *sua sponte* removing LTC Turner.

Sergeant First Class (SFC) Kenneth Davis

Early in individual voir dire, SFC Davis indicated a predisposition to adjudge the death penalty:

> TC: Could you give us your views on the death penalty?
>
> SFC D: Like, if the person did the crime, they should pay. And--but, like, they need the due process to find out exactly -- to find out that the person did do it.
>
> TC: Okay. So you want some assurance that the person for which the death penalty is adjudged is, in fact, the right person?
>
> SFC D: Right.

(JA 622).

Government counsel then asked if the death penalty was a deterrent. SFC Davis answered "[n]o, sir" because if a member

of his own family was a victim of murder, "I'd probably seek revenge or something and wouldn't care about the consequences." (JA 623). Neither counsel nor the military judge sought to clarify these statements in a substantive way to ensure SFC Davis could truly consider punishments less than death.

Government counsel then asked SFC Davis about terrorist bomber Timothy McVeigh, a reference only reasonably intended to infer SGT Akbar was in the same class of murderer as this home-grown terrorist. SFC Davis again indicated his predisposition towards adjudging the death penalty when he insisted death was insufficient punishment for McVeigh—"it was too soon for him. He should have paid some before he went -- before they put him to death." (JA 624). The military judge never questioned SFC Davis on these extreme statements except to ask generally whether he could follow instructions. (JA 633-34).

SFC Davis then indicated that he was mitigation-impaired, as he had no interest in SGT Akbar's life prior to the offenses:

> DC: Would you have any interest in facts regarding their life, and how that person got to that point, factors that might have influenced their decision? Do you think those things would be important?
>
> SFC D: No, sir. Because, if they took a life, it wouldn't be important.
>
> . . . .
>
> DC: So, in a case where you've got the person, you're convinced that the person committed a murder, you're 100 percent sure of that, and life without parole is also a possible punishment, meaning that person will never get out of jail, would you consider that?

SFC D: Yes. I'd consider it.

DC: What sort of factors would influence your decision . . . ?

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

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

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

(JA 632-33).

This member did not simply give low weight to mitigating evidence. SFC Davis never changed his position or indicate he would consider events and influences in SGT Akbar's life. SFC Davis was clear he would give no weight to SGT Akbar's life before the offenses because he took a life.

The judge later tried to rehabilitate SFC Davis. (JA 634). Though the judge asked if SFC Davis could consider the range of appropriate punishments, he failed to inquire whether he could give *meaningful* consideration to those punishments while accounting for the full range of mitigation and extenuation evidence needed to determine the appropriate punishment. *See Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992). Clarifying SFC Davis' ability to consider a full range of punishments did not address his statement mitigation was unimportant. SFC Davis never expressed an ability to yield to evidence or the judge's mitigation instructions; rather, his view on the death penalty

was "if the person did the crime, they should pay." (JA 622).

SFC Davis also misunderstood rehabilitation. *See* R.C.M. 1001(b)(5). To SFC Davis, rehabilitation apparently means LWOP. SFC Davis only mentioned provocation and mental condition as two possible factors he would consider in the context of LWOP. SFC Davis' severely limited understanding of the concept of rehabilitation was never addressed during voir dire. This, combined with his assertion that events in SGT Akbar's life leading up to the offenses were not important, demonstrated SFC Davis' inelastic disposition toward sentencing. A member who considers SGT Akbar's past "unimportant" for sentencing purposes and believes that "if the person did the crime, they should pay," is not a member that would be seen as "keep[ing] an open mind and decid[ing] the case based on evidence presented in court and the law as announced by the military judge." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987).

Despite counsel's failure to challenge SFC Davis, the military judge abused his discretion by not *sua sponte* conducting a thorough voir dire and an actual and implied bias analysis. As the record fails to establish SFC Davis' impartiality, failing to excuse him from the panel constitutes an abuse of discretion.

MAJ Dover Seawright

MAJ Seawright's sentencing "formula" was simple: "[I]f one person dies, then that means that that person should die also."

(JA 489). MAJ Seawright's inelastic sentencing formula in a capital trial should have raised alarm bells with the military judge. MAJ Seawright never described mitigating or extenuating circumstances that might transform a death case to a life case. Rather, MAJ Seawright was focused solely on the aggravating factor applicable to this case, as his only concern was whether more than one person was killed—an appropriate aggravating factor, but not the only factor a member must consider in adjudging the sentence in a capital case. (JA 485-87).

Because the judge failed to inquire further, this Court is left with the plain meaning of MAJ Seawright's words—a life for a life. MAJ Seawright's inelastic attitude was wholly improper for a capital court-martial. *See Morgan*, 504 U.S. 728-29. When asked if he could be fair and impartial, all he said was, "I think I could." (JA 491-92). That equivocal response does not dissipate the perception of a partial member in a capital case.

Actual bias aside, a member of the public observing SGT Akbar's court-martial and hearing MAJ Seawright's formula would view MAJ Seawright's vote for death as preordained. That is especially true considering MAJ Seawright's level of emotion and knowledge of the case: "I felt pretty upset over what happened. *I felt for the family members and soldiers that were over there.* . . . And it was *depressing*." (JA 491 (emphasis added)). He further described his reaction—"I was just shocked." (JA 492).

The military judge failed to inquire into the "depressing" nature of the event for MAJ Seawright, nor did he ask about MAJ Seawright's level of knowledge about the case. That inquiry was especially critical as MAJ Seawright emphasized his heartache "for the family members and soldiers" that suffered because of SGT Akbar. The public would presume that MAJ Seawright had a personal emotional connection with the case, as he had not only been momentarily disturbed by SGT Akbar's acts but actually "depressed" by it. Thus, the public would presume that he formed an opinion regarding the case. According to MAJ Seawright, "if one person dies, then that the means that that person should die also." Therefore, based on the record that the military judge did not further develop, the judge abused his discretion by allowing MAJ Seawright to sit on the panel.

LTC Tim Gardipee

LTC Gardipee demonstrated a troubling view of Islam.

> DC: Sir, on your questionnaire, you indicated a view regarding the Muslim religion. Can you explain . . . ?
>
> LTC G: Well, some things I agree with it and some things I don't agree with it. . . . I think I mentioned it's a passionate religion. And with a passionate religion, sometimes you can't think clearly and you take certain views that are selfish -- for your own selfish pleasures, self-desire instead of the good of the man. . . . They interpret it the way they want to interpret certain things for their own self-interests.

(JA 442-43).

In sum, LTC Gardipee views SGT Akbar's Islamic faith as

"selfish," overly "passionate," and not for "the good of the man." *Id.* LTC Gardipee's questionnaire made similar remarks, calling Muslims "misguided, easily influenced, [and] too rigid." (JA 1856). When counsel asked if his views of Islam would affect his judgment, he equivocally responded: "I shouldn't think so. . . . I consider myself pretty fair-minded." (JA 443).

Members of the public would reasonably find his views on the "selfish" religion of Islam compatible with his self-proclaimed fair-mindedness. These were unqualified views not directed only toward a subset of Muslim radicals. Rather, these were blanket stereotypes of the world's second largest religion. The judge knew SGT Akbar's faith was a central topic of the trial, yet he did nothing to help dispel the perception of bias.

In addition, LTC Gardipee clearly indicated future dangerousness was his primary, if not sole,[68] consideration in determining whether death or LWOP was the appropriate sentence.

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

[68] Neither counsel nor the judge questioned LTC Gardipee to test his views on acceptance of mitigation and extenuation evidence.

(JA 440).

Initially, this statement seems harmless. However, LTC Gardipee also testified he was aware of a "scuffle" involving SGT Akbar after reading a headline in *The Paraglide*. (JA 446). This "scuffle" involved SGT Akbar allegedly stabbing a guard in the neck with scissors one week before trial. (JA 1083, 1891). Though the judge ruled evidence of that event inadmissible, he did not appear to connect the dots between the unfair prejudice of LTC Gardipee knowledge of the incident and his view future dangerousness was the most important factor in deciding if death was the appropriate punishment. LTC Gardipee's sole concern was "whether this person is still a danger even though he may be in prison." (JA 440). He then indicated SGT Akbar was "still a danger even though he may be in prison" when he admitted knowledge of the attack *on a guard* a week before trial. Neither counsel nor the military judge questioned LTC Gardipee about his ability to disregard this extrajudicial information.

No objective member of the public would find LTC Gardipee impartial. The military judge abused his discretion by not inquiring further, and allowing LTC Gardipee to sit after expressing intolerant views of Islam, extrajudicial knowledge of uncharged misconduct (without even an agreement not use that information), and his focus on future dangerousness which dovetailed with the uncharged misconduct.

SFC Joseph Cascasan

SFC Cascasan indicated both during group and individual voir dire that he previously expressed an opinion on SGT Akbar's guilt: "When it was in the news and first came out . . . . As weeks went by, from what we've known out of the news, I had said, '*It sounds like guilty.*'" (JA 636 (emphasis added)).

The military judge attempted to rehabilitate SFC Cascasan:

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

(JA 637 (emphasis added)).

However, trial defense counsel's further inquiry called into question SFC Cascasan's ability to put his opinion aside:

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

(JA 655-56 (emphasis added); *see* JA 3142-3236 (news articles)).

SFC Cascasan did not indicate a changed opinion, only that

he would get "the facts," to reinforce his opinion or not at trial. SGT Akbar had *a right* to members who did not follow the case since 2003 sufficient come to a conclusion about his guilt. (JA 637). This certainly applies if the member with this preconceived notion also knew SGT Akbar "overpowered" an MP (JA 657), even if he distances himself from that conclusion at trial. *Williams v. Commonwealth*, 14 Va. App. 208, 213 (Va. Ct. App. 1992)("If a juror has come to a conclusion and expressed a decided opinion as to the guilt or innocence of the accused, he is incompetent to serve, and it matters not whether the opinion is founded upon mere hearsay or rumor.").

Additionally, SFC Cascasan also appeared to have a preconceived notion of an appropriate sentence in this case.

> SFC C: If he were found guilty, have I ever said what he's going to get? No, sir.
>
> DC: Or what you thought he should get?
>
> SFC C: My belief on that, sir, is it will fit the crime. I've never said to anybody, "This is what's going to happen." No, sir. And I said - that's why I use, "I think"; "If you ask me"; "My personal opinion."

(JA 656).

SFC Cascasan never answered the question asked, and the defense counsel and military judge never forced him to. He merely stated he never expressed his opinion to others, but he apparently formed a "personal," rather than "official" opinion. Only after sentencing would he make the opinion "official."

He further expressed his constrained view on appropriate punishment considerations by repeatedly indicating his only concern was having the government prove it had the right person. (JA 647-51, 654). That factor would be his sole concern when deciding between "death . . . or life without parole"—indicating his refusal to consider a sentence to life. (JA 651). SFC Cascasan's responses show no amount of mitigation or extenuation could sway him against death if guilt was certain.

SFC Cascasan's answers also implicate implied bias. A member of the public would view SFC Cascasan as already deciding SGT Akbar's guilt, unable to completely put aside media accounts forming that belief, mitigation impaired, and unable to seriously consider the full range of punishments. His disclaimer about the accuracy of news reports would not persuade most that SFC Cascasan could completely ignore those reports; merely that he needed more facts to seal his verdict. His claim of only "personally" expressing an opinion about the appropriate sentence would further concern most viewing the trial. Thus, the military judge abused his discretion by seating SFC Cascasan.

Command Sergeant Major (CSM) Marshall Huffman, CSM Richard Cartwright, and Master Sergeant (MSG) Paula Chung

CSM Huffman, who knew from *The Paraglide* SGT Akbar injured himself and a guard when SGT Akbar tried to overtake the guard

(JA 572),[69] completely misunderstood the basic concepts of beyond reasonable doubt and factors to be considered on sentencing. Nonetheless, the military judge let three instances showing this misunderstanding go unrebutted. Responding to trial counsel's question about the death penalty, CSM Huffman responded, "My personal opinion, sir, is that the death penalty is warranted depending on the circumstances . . . I wouldn't say motive, but the findings in that investigation. Then I would say, yes, that it would be warranted if the findings are factual." (JA 563). Then, the following two exchanges occurred:

> TC: How do you feel about life in prison without the possibility of parole as a sentence for an intentional, deliberate, and premeditated murder?
>
> CSM H: As opposed to the death penalty, life without parole, sir, is -- it's warranted if they -- all of the facts aren't there -- if like what was mentioned yesterday, you've got pieces of the puzzle and there's some pieces missing. You know, if you can't place all of the pieces together, then I would look at life without parole -- but you can still see the picture.
> . . . .
> CSM H: My wife is opposed to [the death penalty], and I told her I'm for it in certain circumstances. If all facts are proven, then, yes, that should warrant; if the facts are not proven totally, then it wouldn't warrant the death penalty, sir.

(JA 564-65).

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[69] Government counsel moved to dismiss CSM Huffman for ignoring the judge's order to not read about SGT Akbar's case. (JA 667). Apparently, since CSM Huffman volunteered the information, the judge denied the challenge with no legal analysis. (JA 668, 672). As such, his decision receives no deference. The military judge abused his discretion in not dismissing CSM Huffman for his failure to abide by the court's order and possessing extrajudicial knowledge of uncharged misconduct.

Thus, CSM Huffman believed LWOP appropriate only if the government did not prove "all of the pieces" on the merits, and death appropriate if the "pieces" are proven beyond a reasonable doubt. This is an obviously improper analysis.

Others exhibited the same uncorrected misunderstanding. CSM Cartwright, who was "shocked" an NCO committed this crime, who knew SGT Akbar had an "altercation" with guards "in the courtroom," and whose attorney for unrelated matters was the assistant trial counsel (JA 552, 554-55, 557), said in deciding to adjudge death his only concerned was being "100 percent, absolutely clear" the accused committed the crime. (JA 548). Further, he would consider the "basis of the fact of proof of wanting and willingness to commit the crime." (JA 548, 551). He never expressed willingness to consider mitigation and extenuation; only, if the government proved SGT Akbar willingly committed the crime, death was the appropriate punishment.

Likewise, MSG Chung, who knew SGT Akbar "overpowered a guard" (JA 615), told government counsel that to give death, "You'd have to really show me the facts -- the 'without a reasonable doubt' I guess you'd say." (JA 607; *accord* JA 612). She further wanted "[j]ust the facts" of the crime. (JA 608). No one asked of her willingness to consider facts in mitigation and extenuation when deciding if death was appropriate.

CSM Huffman, CSM Cartwright, and MSG Chung did not

understand the "beyond a reasonable doubt" standard versus weighing evidence to determine SGT Akbar's punishment, or they displayed an unwillingness to accept mitigation and extenuation evidence. Their misunderstanding went unchallenged by the military judge. This was crucial to prevent them from ignoring mitigation admitted during trial. Sentencing instructions could not correct this misunderstanding as they came too late in the proceedings—after the members heard the evidence with their sole focus being on whether the government proved SGT Akbar's guilt.

This incorrect view of the standard for deciding if death was the appropriate punishment could only taint their perception of evidence throughout the case. Capital cases require a high standard of diligence to ensure reliability of result per the Eighth Amendment. The military judge had a duty to further question CSM Huffman, CSM Cartwright, and MSG Chung before empanelling them. No doing so was an abuse of discretion as it denied SGT Akbar a fair trial and created a perception the members sitting in judgment had inelastic views against mitigation due their erroneous view of the law. Whether that inelastic view actually existed will never be known because the military judge never asked the necessary questions.

Multiple Panel Members Were Aware of the Uncharged Misconduct the Military Judge Ordered Not to be Placed Before the Members

Ten members were aware SGT Akbar stabbed a guard. COL Quinn heard of a "scuffle with an MP" and saw the emergency response

to the courthouse. (JA 366). COL Meredith knew an assault occurred with a pair of scissors. (JA 377). LTC Ellis heard of an "altercation." (JA 390). LTC Turner read of a "scuffle." (JA 415). LTC Gardipee heard "there was a scuffle, some other things." (JA 445). CSM Rivera heard there was an incident while SGT Akbar was being moved from "point A to point B" and "one of the guards was stabbed in the neck." (JA 540). CSM Cartwright's wife told him of "some type of fight between SGT Akbar and some guards." (JA 557). CSM Huffman read SGT Akbar "overtook one of the guards and injured himself and one of the guards." (JA 571). MSG Chung heard SGT Akbar "overpowered a guard." (JA 615). Finally, SFC Davis heard on the radio of "an altercation between SGT Akbar and the MPs." (JA 655).

Ten of fifteen members, whether due to pretrial publicity, personal observation, "legal briefs," or gossip, knew of the same uncharged misconduct the military judge ruled inadmissible as unfairly prejudicial to SGT Akbar. After this ruling, it was an abuse of discretion to fill two-thirds of the panel with members having specific, as opposed to "innocuous," knowledge of that excluded uncharged misconduct. *Cf. Napolean*, 46 M.J. 279. It rendered counsel's motion *in limine* ineffectual, allowing the government a panel pre-packaged with knowledge of the attack—an uncensored and unexplained look at SGT Akbar's current and future dangerousness, indicating a sentence less than death was

inappropriate. *See Fisher*, 481 S.2d at 221-22 (finding the judge erred accepting jurors assurances of impartiality after revelation of exposure to pretrial publicity about inadmissible evidence).

Ten panel members were thus actually or impliedly biased on sentencing. Because they knew SGT Akbar attacked a guard, and thus in their minds possessed a high-risk of future dangerousness, the military judge should have conducted more extensive voir dire to ascertain the nature and extent of each member's knowledge of the alleged stabbing. Some levels of knowledge can be so great rehabilitation is impossible as "trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). Rehabilitation was barely attempted, and even then, only with a few members.

Here, the level of knowledge was too great to ensure the "fundamental integrity" the Sixth and Eighth Amendments require. *Id.*; *see also* Garvey, *What Do Jurors Think?*, 98 Colum. L. Rev. at 1559 (finding over 55% of jurors were more likely to impose death with evidence of future dangerousness). Even if rehabilitation was possible, because the judge did not conduct an extensive voir dire to dissipate any taint or improper influence, he was

required to *sua sponte* remove those members to ensure SGT Akbar received a fair panel. Not doing so was an abuse of discretion in violation of R.C.M. 912(f)(1)(N) and the Constitution.

Multiple Panel Members Exhibited Personal Reactions to News of SGT Akbar's Alleged Acts

Seven panel members used intensely emotional terms to describe the effect of SGT Akbar's alleged crime on their psyche. Upon hearing a soldier committed violence on his fellow soldiers, COL Meredith felt "[s]hock or disbelief. I could hardly conceive of that." (JA 379). LTC Foye "was hurt, and really disappointed, and a little embarrassed." (JA 404). LTC Lizotte "was pretty shocked that someone could do that to their fellow soldiers." (JA 464). MAJ Seawright "felt for the family members and soldiers," found the news "depressing," and felt "upset" and "shocked." (JA 491-92). CSM Rivera felt "complete[] shock and disbelief," at news, which was "a deep stab; primarily when it was announced that it was a SGT. My being a Command Sergeant Major, that took quite a deep stab there." (JA 529). CSM Cartwright was "somewhat shocked [as it was] hard to understand," especially since an NCO did it. (JA 552). MSG Chung shook her head in disbelief at the news. (JA 610-11).

Members holding these deeply emotional reactions cannot serve on a capital panel. They clearly internalized the crime's impact on fellow service members. "'[A]ny judge who has sat with juries knows that, in spite of forms, they are extremely

likely to be impregnated by the environing atmosphere.'" *Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971)(citation omitted)). Here, the military judge did not appreciate this fundamental flaw in the panel. The public would not view members with "shocked," "embarrassed," "disappointed," or "stabbed" feelings as fair and dispassionate judges of the attacker. No one viewing the panel would find it one removed of bias or personal connection to the attack. The military judge never addressed this inherent bias.

Conclusion

With a panel so compromised, SGT Akbar could not get a fair trial. In the public eye there is an objective perception of bias, predisposition, and partiality—the exact perceptions the President and this Court's precedent strives to avoid. Even if individual errors in panel selection do not themselves rise to an abuse of discretion, the sum total of actual and implied bias among the members demonstrates the judge's error. *Cf. Dollente*, 45 M.J. at 242 (C.A.A.F. 1996). An appellant facing death must have a panel as free of bias as possible. In this capital case the military judge failed to take the necessary steps, whether through more extensive voir dire or excusals, to dissipate any perception of bias. As SGT Akbar's panel was not thoroughly vetted and free of bias, this Court should remand this case for a new trial, or, at the minimum, a new sentencing hearing.

Assignment of Error A.V

THE MILITARY JUDGED ERRED TO SGT AKBAR'S SUBSTANTIAL PREJUDICE BY DENYING HIS MOTION FOR CHANGE OF VENUE.

A year before trial, amidst fervent media coverage, defense counsel argued pervasive pretrial publicity[70] foreclosed SGT Akbar any chance to receive a fair trial at Fort Bragg. (JA 109-17, 1679). Court-martial location may be changed when necessary to ensure a fair and impartial trial. R.C.M. 906(b)(11). If an accused demonstrates "the court would be adversely influenced by a general atmosphere of hostility or partiality against him, existing at the place of trial, he would be entitled to be tried in some other place." *United States v. Gravitt*, 5 U.S.C.M.A. 249, 256, 17 C.M.R. 249, 256 (1954).

The military judge denied the change of venue motion. (JA 228). Thus, members selected from a community unified by the shared trauma of those victimized by his offenses and subjected to a wave of public passion, tried and sentenced SGT Akbar. *Cf. United States v. McVeigh*, 955 F. Supp. 1281, 1282 (D. Colo. 1997). The Supreme Court "established that a refusal to grant a motion for a change of venue may constitute a violation of due

[70] The defense motion references articles with headlines like: 'Two die-and a [S]oldier stands accused Sergeant's alleged grenade attack shocks 101st' (Army Times April 7, 2003); 'Fragging unheard-of since Vietnam War'(Army Times June 30, 2003); Enemy in the ranks? Court-Martial recommended for sergeant for alleged attacks on his own unit in Kuwait' (Army Times June 30, 2003); 'Will Akbar face death penalty?' (Army Times Sept. 1, 2003); 'Accused fragger faces July trial' (Army Times March 9, 2004

process." *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)(partial juries violate minimal standards of due process)); *see also United States v. Curtis*, 44 M.J. 106, 139 (C.A.A.F. 1996); *Wiesen*, 56 M.J. at 174.

When an accused demonstrates the court would be adversely influenced by an atmosphere of hostility or partiality against him at the place of trial, he is entitled to a venue change. *United States v. Loving*, 34 M.J. 956, 964 (A.C.M.R. 1992). The military is "a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). Since the case involved soldier on soldier crimes in a combat area, most soldiers at Ft. Bragg were no doubt aware of this case.

A change of venue was imperative in this case—if not for justice itself, then at least to preserve its appearance.

Assignment of Error 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.

Law and Argument

The Sixth Amendment right to effective assistance of counsel contains two components: competence and conflict-free representation. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). As *Strickland* acknowledged, when "burdened by an actual conflict of interest . . . counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." 466 U.S. at 692.

In conflict of interest cases, prejudice is presumed "if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 466 U.S. 335, 350, 348 (1980)). An adverse effect exists when "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) (citation and internal quotation marks omitted).

The Army Rules of Professional Conduct for Lawyers further addresses conflicts of interest:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's *own interests*, unless; (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

Army Reg. 27-26, Rules of Professional Conduct for Lawyers, Appendix B, Rule 1.7(b) (1 May 1992)(emphasis added).

Under these standards SGT Akbar was denied his right to conflict-free counsel. Both SGT Akbar's military and civilian counsel labored under divided loyalties.

A. Civilian counsel served as the alter ego of SGT Akbar's mother.

SGT Akbar's mother, Ms. Bilal, hired both Mr. Dan-Fodio and

Mr. Al-Haqq to further her own interests. "Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party . . . ." *Wood*, 450 U.S. at 268-69. "One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against . . . or from taking other actions contrary to the [third party's] interest." *Id.* at 269. Here, Ms. Bilal used civilian counsel to represent her personal beliefs and undermine investigation efforts that reflected poorly on her.

Ms. Bilal's interests were not aligned with her son's. In capital cases, evidence of family history of abuse, addiction, and poverty represents powerful sentencing mitigation. *Wiggins*, 539 U.S. at 534-35. While working as his mitigation specialist, Ms. Grey learned SGT Akbar experienced all of these deprivations. (JA 2808-27). Most of his childhood woes involved the adult influences in his life. John Akbar, SGT Akbar's natural father, physically abused Ms. Bilal, spent time in prison, and abandoned the family while addicted to cocaine. (JA 2808-09). Ms. Bilal then married William Bilal, a convicted rapist, who frequently beat her in front of SGT Akbar. (JA 2810). William Bilal often beat SGT Akbar with Ms. Bilal's encouragement. (JA 2611-12, 2810). Ms. Bilal also often beat and berated SGT Akbar. (JA 2809-10). Police became involved when SGT Akbar reported

William Bilal for sexually molesting his sisters. (JA 1594-99).

SGT Akbar grew up impoverished in dangerous neighborhoods. (JA 2609-11, 2811, 2854-57, 2859-69). Having food to eat was a frequent concern for his family. (JA 2809, 2854-57, 2859-69). As the oldest, SGT Akbar served as the primary caretaker for his siblings while his mother struggled to support them. (JA 2811, 2834-35, 2854-57, 2859-69). Despite his good nature, excellent performance in school, and selfless sacrifices for his family, SGT Akbar's mother showed him no affection. (JA 2811-12, 2854-57, 2859-69, 2871). Ms. Bilal's emotional abuse deeply impacted SGT Akbar throughout his life often causing him to mistrust her motives. (JA 2808-27). Understanding these experiences is essential to understanding SGT Akbar and his crimes.

Ms. Bilal had no interest having anyone understand her family history and actively resisted any disclosure of such information from the outset. (JA 2685-87, 2982-98). Sexual abuse, in particular, "is the taboo topic in the family." (JA 2854-57). Soon after involving herself in the case, Ms. Bilal demanded unreasonable defense strategies to deflect blame away from herself. (JA 2685-87, 2982-98). Considering the derogatory information uncovered by Ms. Grey, Ms. Bilal's motive to suppress this information is obvious. (JA 2808-27). Though Ms. Bilal loves her son, her interests and his cannot be aligned.

Civilian counsel improperly represented both SGT Akbar and

his mother. Ms. Bilal retained Mr. Dan-Fodio and Mr. Al-Haqq. (JA 1879-85, 1930, 2834-35, 2999-3001). Mr. Dan-Fodio soon made clear his discontent with Ms. Grey and halted her work. (JA 1931-32, 2685-87). Mr. Dan-Fodio also adopted Ms. Bilal's unreasonable defense strategy, shown by his frivolous motion to transfer SGT Akbar's case to the United Nations Human Rights Commission citing the trial court's "plenary powers" to do justice. (JA 174-91; *see also* JA 1789, 1931). Mr. Al-Haqq showed a similar disdain for Ms. Grey's work. (JA 2758-62). Mr. Al-Haqq replaced Ms. Grey with a mitigation specialist Ms. Bilal selected. (JA 208-09). Alarmed by Ms. Bilal's control over civilian counsel, MAJ DB lectured Mr. Al-Haqq on his ethical obligations to SGT Akbar. (JA 3007-09).

It appears Mr. Dan-Fodio and Mr. Al-Haqq were beholden to their benefactor, Ms. Bilal. Neither counsel could effectively represent SGT Akbar while serving as his mother's alter ego.

B. SGT Akbar's military counsel also allowed his mother to improperly influence their actions.

Though MAJ DB and MAJ DC better understood their obligations to SGT Akbar, they too allowed Ms. Bilal to influence their actions. As Ms. Grey before her, mitigation specialist Ms. Laura Rogers pursued interviews with SGT Akbar's family related to sexual abuse. (JA 2789-92). When Ms. Bilal learned of this she demanded the military counsel fire Ms. Rogers "for being 'nosy.'" (JA 2791-92). Acceding to Ms.

Bilal's demand, MAJ DB and MAJ DC directed Ms. Rodger's supervisor, Ms. Nerad, to remove her from the case. (JA 2772, 2791-92). Without the support of his military counsel, Ms. Rogers and Ms. Nerad went to SGT Akbar directly. *Id.* After speaking with his *mitigation specialists*, SGT Akbar chose to keep Ms. Rogers on the case over his mother's objection. *Id.* While Ms. Bilal never controlled SGT Akbar's military counsel to the same extent as civilian counsel, this incident reflects their preference for appeasement over confrontation when dealing with her. (*See also* JA 3004 (discussing counsel's agreement to request government funds for an unnecessary investigator for the sole purpose of "humoring" Ms. Bilal)).

C. The conflicting interests of military and civilian defense counsel detrimentally affected their performance.

The effect of Ms. Bilal's influence over SGT Akbar's civilian counsel extended beyond their tenure on the case. At Ms. Bilal's behest, civilian counsel were indifferent and, at times, actively opposed to the mitigation specialists' efforts. As a result, the mitigation specialists lost a year of time, money, and effort; never obtaining the complete social history and witness testimony necessary to give SGT Akbar a reasonable defense against death. (*See* JA 2758-59, 2765-73, 2777). Mr. Al-Haqq made no effort to secure the additional time and funding needed to correct the deficiency he and Mr. Dan-Fodio helped create. When Ms. Bilal could not pay him, Mr. Al-Haqq abandoned

SGT Akbar less than six-weeks out from trial. (JA 1939).

MAJ DB and MAJ DC's deference to Ms. Bilal also affected their performance both before and during SGT Akbar's trial. In preparation for trial, counsel showed little interest in meeting with or developing the testimony of SGT Akbar's family members. (JA 2552-55, 2765-73, 2787, 2789-92). Furthermore, counsel expended little, if any, personal effort to develop a complete social history for SGT Akbar. (JA 2552-55, 2765-73, 2777, 2787, 2789-92). At trial, their singular reliance on a flimsy partial mental responsibility defense barely mentioned SGT Akbar's family history. Rather, counsel offered only expert testimony and summaries of family member interviews not intended for trial. (*See* JA 2759-62). During sentencing argument, counsel hardly mentioned SGT Akbar's social history as mitigation. (JA 1494). This sanitized version of SGT Akbar's life objectively confirms counsel avoided any strategy that might antagonize Ms. Bilal.

D. SGT Akbar's military counsel harbored personal conflicts directly contrary to their client's interests.

SGT Akbar's alleged acts emotionally affected his military counsel. MAJ Marton, judge advocate and acquaintance of counsel, was severely injured in the attack. The incident also scarred MAJ DB and MAJ DC. (JA 2552-53, 2789-92). Like MAJ Marton, MAJ DB and MAJ DC were then deployed to Kuwait preparing for the Iraq invasion. As asserted by Mr. Lohman and Ms. Rogers, this incident personally impacted MAJ DB and MAJ DC. (JA 2552-53,

2789-92). Mr. Lohman asserts their personal feelings about the incident made both counsel "openly defeatist about [SGT Akbar's] legal prospects . . . ." and "incapable of mustering any empathy . . . ." for the client. (JA 2552). Ms. Rodgers asserts both counsel "had strong personal feelings about the incident at issue in this case," further complicating her work. (JA 2792).

MAJ DB and MAJ DC saw their relationship with MAJ Marton as a potential conflict of interests. (JA 2447-51). They informed SGT Akbar of their professional relationship with MAJ Marton. (JA 2447-51). MAJ DB and MAJ DC also informed the military judge of this relationship knowing the government would call MAJ Marton as a prosecution witness. (JA 97-105). SGT Akbar waived the potential conflict based upon counsel's assurances that they had no reservations about representing him. (JA 97-105, 2447-51). However, neither counsel informed SGT Akbar of the strong personal feelings his actions inflicted upon them.

Counsels' failure to fully disclose their personal conflict rendered SGT Akbar's waiver invalid. While an accused may waive his right to conflict-free counsel, "waivers must be voluntary, and they must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (citations and internal quotation marks omitted). Here, ignorant his counsel personally identified with alleged victims,

SGT Akbar could not intelligently assess the potential conflict absent the same frankness counsel expressed to others.

E. The professional interests of SGT Akbar's military counsel directly conflicted with those of their client.[71]

The prosecution's manipulation of MAJ DB and MAJ DC's assignments created a conflict of interests. The Army created the Trial Defense Service (TDS): "(1) to improve the efficiency and professionalism of counsel through direct supervision and evaluation within the defense chain; and (2) to eliminate perceptions of soldiers and others that defense counsel have a potential conflict of interest in carrying out their duties." *Fact Sheet: US Army Trial Defense Services*, ARMY LAW., Jan. 1981, 27, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/01-1981.pdf. Ignoring this institutional wall, the prosecution altered the assignments of SGT Akbar's counsel to further *its* interest in avoiding trial delay. (JA 210-11, 213-15).

This is precisely the influence TDS was created to abolish. SGT Akbar opted to accept a TDS offer to assign him new military counsel to avoid any potential conflict of interest arising from MAJ DB and MAJ DC's reassignments. (JA 203). Though the military judge did not believe MAJ DB and MAJ DC's pending assignments created a conflict, the responsibility for resolving this issue lay with SGT Akbar, his counsel, and TDS leadership. No responsible party ever requested prosecution assistance to

[71] *See also* AE A.VII asserting unlawful command influence.

address SGT Akbar's concerns with detailed counsel. Even so, the prosecution made statements in open court that it had more information and control over detailed counsel's assignments than they or their leadership.[72] (JA 210-12). Rather than dissuade the prosecutor from interfering with counsel assignments, the judge encouraged him to obtain more information. (JA 212).

The prosecutor's attempt to avoid further delay created a conflict of interest. On his own authority, without consulting counsel or TDS, the prosecutor changed counsel's assignments. (JA 1973-74). Instead of becoming Chief of Military Justice, MAJ DB became a "special projects officer in Administrative Law." (JA 1973). No one informed MAJ DB his orders were canceled until he moved to Fort Drum. (JA 233-34). Likewise, instead of Deputy Staff Judge Advocate, MAJ DC was assigned as Senior Defense Counsel for the third time. *Id*. Thus, the government unnecessarily forced SGT Akbar's counsel to forgo favorable assignments to avoid trial delay.

Counsels' new assignments confined them to a state of professional purgatory. "Professional development of the [Army Judge Advocate] is accomplished by progressively more challenging assignments to organizations in the field and at higher

[72] The lead prosecutor was MAJ DC's former "Assignment Officer" (JA 210-11) and maintained the ability to change judge advocate assignments by calling the Chief of the Personnel, Plans, & Training Office directly. (JA 212).

headquarters, along with opportunities for schooling." (JA 3019). The Judge Advocate General's goal is "to develop every officer professionally, ensure diversity of assignments, and provide opportunities for management, leadership, and education." *Id.* Here, though counsel claim the new assignments provided them more time to work on SGT Akbar's case, this also prevented them from obtaining the diversity of experience and advancement enjoyed by their peers. (JA 1973-74, 3005-06).

The government required both counsel to remain in *ad hoc* duty positions pending the completion of SGT Akbar's case. That counsel and their supervisors understood the negative implications of this is clear. (JA 3005-06). To mitigate the impact on MAJ DC, his leadership invented "the duty title of Senior Capital Defense Counsel . . . to allow the position to be viewed as a promotion instead of a lateral position that he had already served in . . . ." *Id.* MAJ DB's Staff Judge Advocate promised "he would have the opportunity to eventually serve as the Chief of Justice and then deploy in 2006 with the Division as the Deputy Staff Judge Advocate." *Id.* Such arrangements minimized the immediate effects of professional stagnation, but were not long-term solutions. (JA 3002-03, 3005-06).

Both counsel now claim satisfaction with their alternate assignments. At the time, however, MAJ DB commented on his new assignment, "[n]othing like being the SPO. So far I've created

a really neat poster about drunk driving and helped convince the Garrison commander that it would be a bad idea to bar all Credit Union employees from post. Other than that, I'm looking forward to getting done with Akbar and moving over to justice." (JA 3005-06). Similarly, in an e-mail to trial counsel, MAJ DC wrote: "I'm looking forward to your response to our continuance motion. I had planned to file an amicus brief under a pseudonym opposing the delay, but was afraid oral argument would be required by [the military judge] then my actions would be exposed." (JA 3002-03).

These arrangements explain counsel's reluctance to seek additional time and funding as repeatedly requested by their mitigation specialist. (*See* AE A.I, Sec. A.6). It also explains why counsel did not conduct an aggressive voir dire or move to change of venue on learning ten members knew SGT Akbar stabbed an MP a week before trial in that courthouse. (*See* AEs A.I, Sec. C; A.IV; and A.V). Thus the conflict created by the prosecutor, together with other personal conflicts, affected counsel's performance by causing them to avoid plausible alternative defense strategies that would result in further trial delay.

Conclusion

WHEREFORE, this Court should dismiss the findings and the sentence and remand this case to a rehearing.

Assignment of Error 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* AE 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?

WHEREFORE, this Court should dismiss the findings and sentence and order a rehearing.

Assignment of Error 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."

Introduction

As discussed by *amicus curaie*, Congress, the Judicial Conference of the United States, and the American Bar Association (ABA) make clear capital cases require heightened skills and performance on the part of defense counsel. These heightened expectations are reflected in the ABA Guidelines, Congressional mandates, and proposed Department of Justice regulations. This Court should use these standards in

evaluating the performance of SGT Akbar's trial defense counsel, and in evaluating the Army Court's determination counsel were "well-qualified" to defend a capital case—the predicate determination made to affirm the findings and the sentence.[73]

A. Defense counsel lacked the training and experience necessary to effectively defense SGT Akbar.

SGT Akbar's defense counsel, in both training and experience, did not satisfy the minimum requirements recognized by the ABA standards, Congress, or the Judicial Conference of the United States. At the first Article 39(a), UCMJ, session, the military judge requested defense counsel put their qualifications "for handling a case that has been referred as a capital court-martial" on the record. (JA 96, 102-08). MAJ DB acted as the lead defense counsel at trial and MAJ DC as the assistant trial defense counsel. *Id.* Neither counsel had experience defending capital cases. MAJ DC attended a capital defense litigation course in mid-2003, while MAJ DB never attended a capital defense training course.[74] *Id.* The only familiarity with capital cases between the two counsel was MAJ DB's experience as Government Appellate Division supervisor, not action counsel, where he "participated in strategy sessions for

[73] SGT Akbar agrees with *amicus*, the National Association of Criminal Defense Lawyers, that, as a matter of policy, the Guidelines should apply to courts-martial.

[74] Major DB could not find the time to attend capital defense training, but managed to attend a two-week long Air Assault School during his representation of SGT Akbar. (JA 2945).

United States v. Murphy" and "reviewed and edited a number of issues raised" in *United States v. Kreutzer*. (JA 105-06).

B. The Army Court erred in failing to apply the ABA Guidelines as norms in evaluating counsel's performance.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms" at the time of trial. *Strickland*, 466 U.S. at 688. The prevailing professional norms for a capital courts-martial occurring in 2005 are found in case law, the ABA Guidelines (2003), scholarly articles, and other like materials.

The Army Court erred in failing to rely upon the Guidelines as "professional norms" in evaluating counsel's performance. The Army Court referenced the guidelines on one occasion—rejecting their applicability to courts-martial and noting this Court's, pre—*Wiggins,* determination that the Guidelines were merely instructive. (JA 18 (quoting *Murphy*, 50 M.J. at 9-10)). Recent Supreme Court capital cases require a more rigorous and complete investigation, guided by the standards in the ABA Guidelines.

In *Williams v. Taylor,* 529 U.S. 362 (2000), the Supreme Court, for the first time under *Strickland's* two-part test, reversed a death sentence based on an IAC claim. The Court focused on the adequacy of trial counsel's preparation for the mitigation phase of the trial. *Id.* at 396. In evaluating whether counsel's preparation was reasonable, the Court looked to the standards for adequate investigation found in the ABA

Standards for Criminal Justice. *Id.* (citing 1 ABA Standards for Criminal Justice 4-4.1, cmt., p. 4-55 (2d ed. 1980)).

Similarly, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court again stressed counsel must pursue all reasonable leads during capital case investigations. Again, relying on ABA Standards, the Court found the trial preparation deficient even though counsel employed a psychologist, used social services records, and read the presentence investigation report to prepare for the mitigation phase. *Id.* at 523-24. The Court found this investigation unreasonable because counsel did not prepare a forensic social history report as recommended by the ABA, and failed to pursue leads his client suffered from a history of abuse and neglect. *Id.* at 524.

Again, in *Rompilla v. Beard*, 545 U.S. 374 (2005), the Court reaffirmed that an unreasonably limited investigation could not withstand *Strickland's* analysis. Rompilla's counsel conducted a more thorough investigation than those in *Williams* or *Wiggins*, as they employed three experts who examined the defendant's mental health at the time of the offense and spoke with five family members. *Id.* at 381-82. The Court also noted Rompilla himself was unhelpful as he sent counsel on false leads. *Id.* at 381. Nevertheless, the Court found counsel ineffective, again relying on the ABA Standards that counsel must investigate everything relevant to the penalty phase. *Id.* at 387 (citing 1

ABA Standards for Criminal Justice 4-4.1 (2d. ed. 1982 Supp.)).

Thus, since *Murphy*, the Supreme Court has found the ABA Guidelines applicable in determining reasonable performance. *Wiggins*, 539 U.S. at 524. As noted in *Wiggins*, capital litigation involves not only extensive investigation of the facts underlying the alleged crime, but also requires extensive investigation into the defendant's background and preparation of an extensive case in mitigation; both of which are beyond the normal ken of a defense counsel. *Id.* at 524-26. *Wiggins* "now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms'" for representation and IAC in death penalty cases. *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003); *see also* (Appendix D).

While the ABA Guidelines are not "inexorable commands," they do serve as guides to what "reasonableness means." *Bobby v. Van Hook*, 558 U.S. 4, 8-9 (2009). As the Supreme Court reiterated,

> We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . . Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Padilla v. Kentucky, 559 U.S. 356, 366-67 (2010)(citations omitted); *see also Rompilla*, 545 U.S. at 387; *Williams*, 529 U.S.

at 396. Additionally, most federal circuit courts use the Guidelines in evaluating attorney performance in capital cases.[75] Further, most states with capital punishment generally use the Guidelines in evaluating attorney performance.[76]

Additionally, current ABA policy states the 2003 Guidelines specifically apply to courts-martial. ABA Guideline 1.1, Commentary. The purpose of the Guidelines is to "set forth a national standard for the defense of capital cases."

While noting the Guidelines "are 'instructive,'" the Army Court did not cite to the ABA Guidelines in its abbreviated analysis of counsel' performance, nor did the Court indicate it recognized the ABA Guidelines as prevailing professional norms in evaluating counsel's performance. Although the Army Court cited *Strickland*, the Army Court failed to "correctly conceptualize how that standard applies to the circumstances of this case." *Sears v. Upton*, 130 S.Ct. 3259, 3264 (2010).

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[75] *See, e.g., Gray v. Branker*, 529 F.3d 220, 229 (4th Cir. 2008); *Johnson v. Bagley*, 544 F.3d 592, 599 (6th Cir. 2008); *Stevens v. McBride*, 489 F.3d 883, 895 (7th Cir. 2007)(en banc); *Ortiz v. United States*, 664 F.3d 1151, 1170 (8th Cir. 2011); *Anderson v. Sirmons*, 476 F.3d 1131, 1144 (10th Cir. 2007); *Williams v. Allen* 542 F.3d 1326, 1339 (11th Cir. 2008).

[76] *See, e.g., Ex parte Van Alstyne*, 239 S.W.2d 815, 823 n.22 (Tex. Crim. App. 2007); *Perkins v. Hall*, 708 S.E.2d 335, 341 (Ga. 2011); *State v. Gamble*, 63 So.3d 707, 716 (Ala. Crim. App. 2010); *Council v. State*, 670 S.E.2d 356, 362-63 (S.C. 2008); *Menzies v. Galetka*, 150 P.3d 480, 512 (Utah 2006); *People v. Ray*, 252 P.3d 1042, 1049 (Colo. 2011); *Jackson v. State*, __So.3d__, 2013 WL 5269865, at *10-11 (Fla. 2013); *Wilson v. State*, 81 So.2d 1067, 1092 (Miss. 2012); *Ward v. State*, 969 N.E.2d 46, 56 (Ind. 2012); *State v. Hauser*, 280 P.3d 604, 630 (Ariz. 2012).

Though SGT Akbar's counsel may be fine officers and Judge Advocates, and have experience trying "run of the mill" cases familiar to all military justice practitioners, they were not "well-qualified" to try a capital case. The Army Court erred finding counsel "qualified," let alone "well-qualified." *Sears*, 130 S.Ct. at 3267 (failure to analyze ineffective claims under *Strickland* standard in a capital case resulted in reversal of lower court's opinion); *United States v. Dooley*, 61 M.J. 258, 261 (C.A.A.F. 2005)(applying wrong standard required reversal).

This determination would only be a question of semantics if the Army Court did not further err by assuming "well-qualified" counsel were incapable of error and giving SGT Akbar's counsel undue deference as such. (JA 50-51). The Army Court refused to analyze the pretrial investigation stating, "we defer to qualified counsel to make reasonable decisions as to when to terminate the investigation and in how their case is presented." (JA 26). After providing a nearly twenty-five page long synopsis of SGT Akbar's trial, the Army Court again reiterated its refusal to analyze SGT Akbar's claims when it stated, "[a]gain 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." (JA 50-51). In doing so, the Army Court failed to

analyze SGT Akbar's claims in accordance with the standards enunciated in *Strickland* and *Wiggins*, depriving SGT Akbar of his statutorily required Article 66, UCMJ, review.

First, as this Court stated in *Murphy*, appellate courts cannot give complete discretion to the tactical decisions of counsel in capital cases if counsels' performance reflects inadequate investigation and preparation, limited capital experience, and does not meet the higher standard of performance expected of counsel in capital litigation. 50 M.J. 4. This Court recognized that "capital case[s] . . . [are] not 'ordinary,' and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death." *Id.* at 13. This is especially true when "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." *Id.; see also United States v. Curtis*, 48 M.J. 331, 333 (C.A.A.F. 1997) (denying petition for reconsideration after finding counsel ineffective as a result of the "lack[of] necessary training and skills to know how to defend a death-penalty case," which resulted in a sentence of death that was "unreliable . . . in military jurisprudence")(Cox, C.J., concurring).

In those few instances a court has found capital counsel

"well-qualified," counsel had substantial capital trial experience. Appellant's counsel, with a smattering of criminal trial experience, none of it capital, were not "well-qualified." For example, *United States v. Wilson*, 354 F. Supp. 2d 246 (E.D. N.Y. 2005), discusses "well-qualified" counsel. In *Wilson*, the district court examined whether two state public defenders had the requisite qualifications to serve as "learned counsel" in a federal capital trial. *Id.* at 247-48. The district court noted representing a capital defendant was "an extraordinary undertaking" and was "[u]nlike a typical criminal case." *Id.* at 248. "Because of the stakes involved and the unique procedural aspects of a capital proceeding, representing a capital defendant requires a great deal of technical expertise specific to capital cases that can only be gained through firsthand experience." *Id.* at 248-49.

The district court used the term "well-qualified" to describe the associate learned counsel. *Id.* at 251. That counsel had represented defendants in 34 death-eligible cases, consulted on 95 other cases, and tried 1 capital case and 2 noncapital murder cases to verdict. *Id.* The district court found learned counsel in *Wilson* had "substantial capital trial experience and an obvious commitment to the work." *Id.* at 250. Learned counsel was lead counsel in 27 death-eligible cases, and had tried 2 capital cases to verdict. *Id.* at 251. Thus, the

district court found counsel in *Wilson* to be well-qualified.

Similarly, a district court judge found counsel well qualified in *Turner v. Williams*, 812 F. Supp. 1400 (E.D. Va. 1993). In that case, both counsel had extensive criminal trial experience. The district court described lead counsel as "one of the most experienced criminal lawyers in Virginia. In addition, he has handled more death penalty litigation than any other private attorney in Virginia. He is noted as one of the experts in the field of capital cases." *Id.* at 1408 n.4. Turner's other counsel was also a highly experienced criminal lawyer with eighteen years of criminal law experience. *Id.* The judge considered this counsel to be "undoubtedly one of the most effective criminal lawyers in Eastern Virginia." *Id.* Counsel in this case do not meet the qualification of "well qualified" as enunciated in *Wilson* and *Turner*.

Second, qualified counsel can be ineffective. *Murphy*, 50 M.J. at 8-10. In *Johnson v. United States*, 860 F. Supp. 2d 663, 687 (N.D. Iowa 2012), the district court found "exceptionally well-qualified" counsel ineffective. Defense counsel failed to present evidence Johnson suffered from battered women's syndrome, and the district court had "no hesitation" in finding this deficient performance, even though trial defense counsel was "exceptionally well-qualified." *Id.* at 820.

SGT Akbar's trial defense counsel were not "well-qualified"

counsel, and cannot be afforded the deference in decision-making of qualified, learned counsel. The errors counsel made at SGT Akbar's court-martial are attributable to their inexperience in defending capital cases, particularly their delegation and non-involvement in preparation of the mitigation case. This lack of understanding as to what it takes to defend a capital client is evident in counsel's disdain for the assistance of experienced mitigation specialists and refusal to attend additional capital training seminars. (JA 2407, 2938). Even a vastly experienced Judge Advocate is unequipped to understand the nuances of presenting a mitigation case without training and the hands-on assistance of a trained mitigation specialist. SGT Akbar's defense counsel did not have that training, assistance, or personal willingness to accept these differences in trial defense preparation, strategy, and presentation.

As a result of "the lack of well-trained and experienced defense counsel in [this] capital proceeding," the result of SGT Akbar's death sentence is "unreliable in military Jurisprudence." *See Curtis*, 48 M.J. at 333 (Petition for Reconsideration Denied) (Cox, C.J., concurring). Here, counsel were not capitally qualified, let alone well-qualified. The Army Court erred finding them qualified and further erred deferring, without analysis, to counsel's decisions.

WHEREFORE, this Court should remand this case to the Army

Court to apply the correct analysis and afford SGT Akbar a complete Article 66 review. Alternatively, this Court must utilize the ABA Guidelines in evaluating counsel's qualifications and performance as they represent the professional norms that counsel were required to follow. In doing so, this Court should find SGT Akbar received IAC. (*See* AE A.I).

Assignment of Error A.IX

DENYING SGT AKBAR THE RIGHT TO PLEAD GUILTY UNCONSTITUTIONALY 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 IAC AS OMISSION OF THE INSTRUCTION DENIED SGT AKBAR MITIGATION EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT.

Statement of Facts

Counsel requested a proposed instruction explaining that SGT Akbar was prohibited from pleading guilty. (JA 1684-86). Counsel later withdrew the motion without explanation. (JA 139).

Law and Argument

It is a fundamental due process right of an accused to present evidence in mitigation. *Kansas v. Marsh*, 548 U.S. 163, 175 (2006); *United States v. Kreutzer*, 61 M.J. 293, 298 (C.A.A.F. 2005). When mitigation factors are withheld from the sentencing authority, "a remand for resentencing [is required] so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). "[A] plea of guilty

is a mitigating factor." R.C.M. 1001(f)(1).

SGT Akbar's death sentence should be vacated and remanded for a new sentencing hearing because the panel's consideration of mitigating evidence was unconstitutionally limited by Article 45(b). Sentencing authorities must be allowed to consider all relevant mitigating evidence when deciding whether or not to impose a sentence of death. *E.g.*, *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990)(vacating the death sentence because a statute limited the jury's consideration of mitigating evidence by requiring unanimous agreement that a mitigating factor existed before it could be considered); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). Relevant mitigating evidence is any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death. *Blystone v. Pennsylvania*, 494 U.S. 299, 304-05 (1990). Taking responsibility is a significant matter in mitigation. *See, e.g.,* R.C.M. 1001(f)(1); *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004) ("A guilty plea demonstrates a defendant's acceptance of responsibility for the crime . . . . [and he] deserves to have mitigating weight extended to the guilty plea in return.").

SGT Akbar was forced by law to a merits phase where thirty percent of jurors prematurely decide to adjudge death,[77] he was

[77] William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and*

deprived of the right for *all* members to give meaningful consideration to all mitigating factors presented during the penalty phase and to affirmatively present mitigation by admitting his guilt. As Article 45(b) required SGT Akbar to deny responsibility for the charged offenses, like the statute in *McKoy*, it violates the Eighth Amendment.

Permitting capital guilty pleas is constitutional.[78] Twenty-nine of thirty-two state death penalty jurisdictions, and federal courts, permit a guilty plea.[79] While capital cases

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Premature Decision Making, 83 Cornell L. Rev. 1476, 1487-90 (1998); *see generally* Ursula Bentele et al., *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 Brook. L. Rev. 1011 (2001) (stating guilt tends to dominate sentencing deliberations).

[78] The framers of the Constitution explicitly provided that a defendant could be convicted of a capital offense, treason, by pleading guilty. *See* U.S. CONST. art. III, § 3, cl. 2; *see also Ex Parte Garland*, 71 U.S. 333, 340 (1866).

[79] *See* 18 U.S.C. 3593 (2002); Ala. Code 13A-5-42, -43, -45 (1994); Ariz. Rev. Stat. 13-703(B) (2001); Cal. Penal Code 190.4 (1999); Colo. Rev. Stat. 18-1.3-1201(1)(a) (2012); Del. Code Ann. tit. 11, 4209 (1995); Fla. Stat. Ann. 921.141 (2001); Ga. Code Ann. 17-10-32 (1997); Idaho Code Ann. § 19-2515 (1997); Ind. Code Ann. 35-50-2-9(d) (1998); Kan. Stat. Ann. 22-3210(a) (Supp. 2000); Ky. Rev. Stat. Ann. 532.025(1)(a) (1999); La. Code Crim. Proc. Ann. Art. 905 (2012); Miss. Code Ann. 99-19-101 (1999); Mo. Ann. Stat. 565.006 (1999); Mont. Code Ann. 46-18-301 (1999); Neb. Rev. Stat. 29-2520 (1995); Nev. Rev. Stat. Ann 175.552 (2001); N.H. Rev. Stat. Ann. 630:5 (1996); N.C. Gen. Stat. 15A-2000 (1999); Ohio Rev. Code Ann. 2929.02 (1996); Okla. Stat. Ann. tit. 21, 701.10 (1983); Or. Rev. Stat. 163.150 (1999); 42 Pa. Cons. Stat. Ann. 9711(b) (1998); S.C. Code Ann. 16-3-20 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 23A-27A-4 (1998); Tenn. Code Ann. 39-13-205 (1997); Tex. Crim. Proc. Code Ann. 1.13-1.15 (2001); Utah Code Ann. 76-3-207 (1999); Va. Code Ann. 19.2-257, 19.2-264.4 (2000); Wash. Rev. Code Ann. 10.95.050 (1990); Wyo. Stat. Ann. 6-2-102 (2001).

receive special treatment, the notion pleading guilty in a capital case is judicial suicide has been generally discarded. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002). Thus, any apprehension about allowing service members to plead guilty in capital courts-martial should abate.

A capital accused must focus the panel on mitigation throughout the case. Article 45(b) forced SGT Akbar to present a findings defense, no matter its merits, placing him at an immediate disadvantage in presenting mitigation. Without at least an instruction, a new sentence hearing is required.

If this Court finds Article 45(b) constitutional, his counsel were ineffective for withdrawing their motion requesting a proposed instruction. Counsel's performance was deficient because their primary responsibility was saving SGT Akbar's life. As such, professional norms dictate counsel do everything they can to ensure the panel understands the mitigating evidence while limiting aggravation evidence. As statute prevented SGT Akbar from presenting one type of mitigation evidence, and forced him into an aggravating course of action, there is no explanation for counsel to withdraw an instruction informing the panel SGT Akbar was prevented from pleading guilty and accepting his sentence from a judge. Without this, the panel likely discounted or did not understand the mitigation evidence presented during merits, finding the paltry defense ridiculous,

a waste of time, and an attempt to shirk responsibility. *See* Bentele, ***How Jurors Decide on Death***, ***supra***, at 1019-32, 1041-53.

A simple instruction would solve this problem and prevent the unacceptable risk of SGT Akbar being executed. Because the law forced SGT Akbar to contest his case before members, it should not in any way be held against him. Positive rejection by counsel of this instruction meant to assist the mitigation case is simply incomprehensible.

WHEREFORE, this Court should set aside the sentence and remand for a new sentencing hearing.

Assignment of Error 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.

Standard of Review and Law

Portions of Army Regulation 27-10, Military Justice, Chapter 7 (hereinafter AR 27-10), violated Article 25, UCMJ. ***United States v. Bartlett,*** 66 M.J. 426, 429 (C.A.A.F. 2008).

Pursuant AR 27-10, the convening authority excluded Medical, Dental, Veterinary, Army Nurse, Army Medical Specialty, Chaplain, and Inspector General's Corps members when selecting SGT Akbar's panel. (JA 2299). The convening authority also excluded Judge Advocates and Military Police Corps members performing law enforcement duties. ***Id.*** In ***Bartlett***, this Court held the exclusionary guidance in AR 27-10 violated Congress' "clearly

expressed" intent in Article 25, UCMJ. 66 M.J. at 428-29.

This error is structural as it violated SGT Akbar's Sixth Amendment right to a panel drawn from a fair cross-section of the military community, *Cf. Taylor V. Louisiana*, 419 U.S. 522, 538 (1975), and materially undermined his Eighth Amendment right to enhanced reliability of result. Alternatively, the government cannot show this constitutional error harmless beyond a reasonable doubt. *See* U.S. Const., Amend. VIII. Even under the harmless standard, prejudice still exists. Bartlett pled guilty, submitting only the sentencing decision to a panel. *Id.* at 429. This case differs from *Bartlett* in at least two key ways: (1) it was a contested case (2) referred capital. Capital trials place much more emphasis on individual characteristics of at least twelve panel members, requiring four separate unanimous votes to reach a sentence of death. Unlike other courts-martial, the decision of any one member in a capital trial can save an accused's life. Therefore, a panel composed of a broad cross-section of the military community is essential.

The special skills of wrongly excluded members would have had a significant impact on SGT Akbar's panel. First, under the circumstances, non-combat arms branch members would be less emotionally impacted than combat arms and combat support branch members. (*See* AEs A.I, Sec. C.2, and A.IV (discussing panel members expressing "shock," "disbelief," and "depress[ion]")).

Second, to the limited extent any mitigation was presented to the panel, it touched on SGT Akbar's mental health and his struggle with religious identity. Presumably, soldiers in the medical and chaplain branches have more experience in this area making them more receptive to mitigation relevant to SGT Akbar.

Members of the medical corps would likely be much more receptive to mitigation evidence regarding SGT Akbar's psychological condition and social history. Further, members of the medical community could counter views of members with preconceived or skeptical notions about mental illness. During deliberations the input of people with actual medical training during could have changed the outcome of SGT Akbar's case.

The special training of chaplains could have had much the same effect. Generally, chaplains have a specialized knowledge of all major religions, including Islam, and must be able to service the spiritual needs of soldiers from every religious background. Chaplains would empathize with mitigation themes of forgiveness, redemption, and rehabilitation. Inclusion of chaplains could have changed the outcome of SGT Akbar's trial, particularly when one vote controlled his fate.

The exclusion of nine occupational branches substantially limited the panel's diversity of experience. Specifically, the method used to select SGT Akbar's panel excluded those members most likely to accept the mitigation he offered while increasing

the number of members most likely affected by the government's aggravation. As a result, SGT Akbar suffered prejudice because it "created the 'risk [of] erroneous imposition of the death sentence' . . . ." *United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997)(citation omitted)(alteration in original).

WHEREFORE, this Court should set aside the findings and sentence.

Assignment of Error 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.

Statement of Facts

Appellate defense counsel repeatedly requested the appointment of forensic psychiatrist, Dr. Richard G. Dudley, Jr., and a forensic psychologist, Dr. Janice E. Stevenson, before submitting SGT Akbar's initial brief to the Army Court. The Army Court and the convening authority denied these requests. (JA 2435, 3077-81). The Army Court did not order the provision of adequate substitute experts to assist SGT Akbar.

Standard of Review and Law

The standard of review for determining whether appellant should receive expert assistance on appeal is de novo. *See* R.C.M. 703(d). To establish the necessity of expert assistance

the defense must show: "(1) Why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused and; (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *see also United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005).

Argument

Before his trial, SGT Akbar received a sanity board evaluation. (JA 279, 956). At trial, the defense raised a partial mental responsibility defense. (JA 851-52). While not every expert who assessed SGT Akbar entirely agreed on his diagnosis, all agreed he suffered from some form of psychological condition. (*See* JA 958, 2413, 2800-01, 2803-05).

Appellate defense counsel also recognized mental illness as an issue during interactions with the client. Further investigation only increased this concern. (JA 2245, 2383-87, 2466-71, 2697-2701, 2796-98). Post-trial mitigation specialist, Ms. James-Townes, indicated she could not provide a complete mitigation report to appellate counsel without additional testing. (JA 2624). She recommended Dr. Stevenson and Dr. Dudley who each provided declarations explaining why further evaluation is needed. (JA 2411, 2437-39, 2441-43).

On November 21, 2012, current appellate defense counsel received a declaration from clinical psychologist Dr. Wilbert

Miles. (JA 2803-05). Mr. al-Haqq, SGT Akbar's former civilian defense counsel, consulted with Dr. Miles before trial. However, SGT Akbar's military defense counsel did not request funding for Dr. Miles as Mr. al-Haqq desired. (*See* AE A.I., Sec. A.3.d). Even so, Dr. Miles could have provided favorable testimony or assistance had military defense counsel asked him. (JA 1962-63, 2803). Appellate counsel cannot complete a full prejudice analysis without Dr. Miles' assistance. He can provide that assistance now if funded. (JA 2805).

Counsel require expert assistance to: (1) assess counsel's deficient performance; (2) assess available evidence not presented to the panel; (3) confirm SGT Akbar's competency at trial; and (4) assess the need for an additional R.C.M. 706 sanity board on appeal. *See McFarland v. Scott*, 512 U.S. 849, 855-58 (1994)(stating, in reference to habeas, that the right to counsel includes the right to have counsel meaningfully research claims and obtain expert assistance).

WHEREFORE, SGT Akbar requests that this Court order the government to fund the appointment of Dr. Dudley, Dr. Stevenson, and Dr. Miles, to assist SGT Akbar in preparing his appeal.

Assignment of Error 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.

Statement of Facts

During sentencing deliberations, the panel requested reconsideration instructions. (JA 1538). The military judge's reconsideration instructions did not inform the panel death was no longer an option if it initially voted for life. (JA 1538-40). The instructions also did not require the panel to revote on the aggravating factor and weighing determination as required under R.C.M. 1004 before revoting on the sentence. *Id.* Following its reconsideration deliberations, the panel announced its decision to sentence SGT Akbar to death. (JA 1543).

Law and Argument

The appropriateness of sentencing instructions is tested for plain error absent a timely objection. *United States v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998). In capital cases, the sentence must be set aside if plain error in sentencing instructions created a "'risk [of] erroneous imposition of the death sentence,' [and this Court cannot] 'rule out the substantial possibility' that such a mistake . . . occurred." *United States v. Thomas*, 46 M.J. 311, 315 (C.A.A.F. 1997) (quoting *Mills v. Maryland*, 486 U.S. 367, 377 (1988)).

R.C.M. 1004 establishes "four gates" a court-martial must pass to sentence an individual to death. *Simoy*, 50 M.J. at 2. "If at any step along the way, there is not a unanimous finding, this eliminates the death penalty as an option." *Id.; see also*

R.C.M. 922 ("A nonunanimous finding of guilty as to a capital offense may be reconsidered, but not for the purpose of rendering a unanimous verdict in order to authorize a capital sentencing proceeding"); Military Judge's Benchbook, DA PAM 27-9, para. 2-7-18 (15 Sep. 2002)("hung jury" instruction providing, "[i]n capital cases, only one vote on the death penalty may be taken").

R.C.M. 1009 does not authorize a panel to reconsider its sentencing determination with a view toward increasing a sentence to death. "If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply." R.C.M. 1009(e)(4). In noncapital cases, R.C.M. 1009's reconsideration procedure is straightforward. However, in capital cases, panels may not consider death an available punishment under R.C.M. 1006 without first meeting the requirements of R.C.M. 1004. Nothing in the R.C.M. allows panels to reconsider prior votes on R.C.M. 1004 aggravating factors or weighing determination. As death may not be adjudged under R.C.M. 1006 without these preliminary findings, R.C.M. 1009 does not allow a reconsideration of a lesser sentence with a view toward imposing death.

Here, the reconsideration instructions provided were erroneous. The instructions did not inform the panel death was no longer an option if it originally adopted a lesser sentence. Nothing in the record indicates what sentence the panel originally voted to impose. Absent facts to the contrary, it is

as likely as not that the panel originally voted for life.

If a sentence theoretically can be reconsidered under these circumstances, the instructions remain erroneous. In capital cases, R.C.M. 1004's preliminary findings are not severable from the R.C.M. 1006 sentencing determination. Here, the military judge did not instruct the panel to revote the required findings under R.C.M. 1004 before reconsidering the sentence. The record does not indicate the panel followed the R.C.M. 1004 procedures anew before reconsidering SGT Akbar's sentence. Therefore, the instructions were erroneous even if sentence reconsideration was potentially possible in this case.

This Court considers panel instructions under the "heightened need for reliability in capital cases." *Loving*, 41 M.J. at 277-78. Here, the panel potentially sentenced SGT Akbar to death improperly after first adopting a lesser sentence. Even if the original vote was death, the instructions discarded the R.C.M. 1004 deliberative process deemed indispensible under the Eighth Amendment by both this Court and the Supreme Court. Thus, the improper instructions "create an intolerable risk" death was erroneously imposed. *Thomas*, 46 M.J. at 316 (citation omitted).

WHEREFORE, this Court should set aside the sentence of death and affirm a sentence of LWOP.

Assignment of Error 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.

Statement of Facts

On March 22, 2003, brigade commander, COL Hodges, informed MAJ Warren the attacker "may have been one of their own" and SGT Akbar was missing. (JA 3285-86). Identifying SGT Akbar, MAJ Warren tackled and secured him face-down, spread-eagle on the ground, at gunpoint, and told him "not to fucking move." (JA 3295-96). MAJ Warren knelt down and asked, "[D]id you do this? Did you bomb the tent?" SGT Akbar replied "yes." (JA 3297).

SFC Butler also pointed his weapon at SGT Akbar and heard MAJ Warren ask SGT Akbar, "you can make this process easy on yourself. Did you commit this act?" SGT Akbar responded, "Roger that Sir, I did." (JA 3140). MAJ Warren asked no questions concerning possible accomplices or co-conspirators. MAJ Warren then told SGT Akbar, "[D]o not move. If you move, he will shoot you in the head." (JA 157). MAJ Warren did not read SGT Akbar his Article 31(b) or *Miranda* rights. *Id.*

Law and Argument

MAJ Warren considered SGT Akbar a suspect. COL Hodges informed him SGT Akbar was the only soldier unaccounted for and the attacker "may have been one of their own." (JA 3285-86).

MAJ Warren immediately tackled SGT Akbar because he was the only suspect. The question, "Did you do this?" inevitably calls for an incriminating response. MAJ Warren acted in his official capacity and there was nothing casual about his conversation with SGT Akbar. This, and the custodial nature of the questioning, triggered the rights-warning requirement.

Counsel moved to suppress SGT Akbar's response "yes" to MAJ Warren's questions, along with statements made to two other soldiers. (JA 142, 1750). The military judge erroneously admitted the statements under the public safety exception. (JA 242-43, 1790). As the public safety exception did not apply, SGT Akbar's response to MAJ Warren was involuntary and inadmissible. Article 31(b); *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981); *see United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009). This error was not harmless beyond a reasonable doubt.

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

Assignment of Error 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.

Statement of Facts

At trial, SGT Akbar moved to dismiss his capital referral asserting the President exceeded his constitutional authority by promulgating R.C.M. 1004(c). (JA 244, 1796, 3127).

Law and Argument

"The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996)(citation omitted). "'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.'" *United States v. Castellano*, 72 M.J. 217, 221 (C.A.A.F. 2013) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)). Offense elements "must be set forth by Congress and cannot be prescribed by the President." *United States v. Curtis*, 32 M.J. 252, 260 (C.M.A. 1991)(citation omitted).

Aggravating factors must be found beyond a reasonable doubt by a jury. *Ring*, 536 U.S. at 609 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 541 (2000)). "[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Alleyne v. United States*, 133 S.Ct. 2151, 2158 (2013).

Recent Supreme Court decisions call into question the constitutionality of R.C.M. 1004 and continued vitality of its decision in *Loving*. *Loving* upheld the President's authority to specify capital aggravating factors as an exercise of his broad discretion to establish maximum sentences and court-martial

procedures. 517 U.S. at 769-70. Thus, consistent with precedent in 1996, *Loving* implicitly held capital aggravating factors were procedural matters rather than actual elements of capital murder.

The Supreme Court's decision in *Ring* overruled *Loving sub silentio* finding factors identical to those in R.C.M. 1004(c) to be "the functional equivalent of an element." *Ring*, 536 U.S. at 608-09 (citation omitted). The Court's recent decision in *Alleyne* clarified such sentencing factors are true elements of a distinct aggravated offense. 133 S.Ct. at 2158, 2163-64. Since *Loving*, this Court also reiterated only Congress can define offense elements. *Castellano*, 72 M.J. at 221 (citation omitted). These decisions demonstrate capital aggravating factors are no longer considered procedural matters. Thus, when the President enacted R.C.M. 1004(c) he exceeded his authority to prescribe military sentencing procedures by creating elements defining the distinct offense of capital murder. Moreover, if Congress intended the President to specify capital murder elements it unconstitutionally delegated a strictly legislative function.

WHEREFORE, this Court should set aside the sentence of death and affirm a sentence of LWOP.

Assignment of Error 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?

Statement of Facts

No R.C.M. 1004(c) aggravating factors on or accompanying the charge sheet indicated the charges preferred against SGT Akbar alleged capital murder. (JA 55-57). The Article 32, UCMJ, (Article 32) investigating officer (IO) refused to make findings regarding the existence of any R.C.M. 1004 factor despite SGT Akbar's request. (JA 1779-81). The IO also refused to recommend whether his case should be referred capital. *Id*.

The convening authority memorialized the capital referral by accepting and signing the SJA's Pretrial Advice, listing two R.C.M. 1004(c) capital aggravating factors. (JA 55-57, 1786-87). SGT Akbar first received notice of these at arraignment. (JA 1781, 1786-87). The convening authority denied his request to reopen the Article 32. (JA 1781, 1788). Thereafter, SGT Akbar made an unsuccessful trial motion requesting an order to re-open the Article 32 asserting Supreme Court precedent recognizing capital murder as an aggravated form of murder not previously preferred or investigated. (JA 244, 1781-83).

Law and Argument

Facts increasing the penalty of an offense "conclusively indicates that the fact is an element of a distinct and aggravated crime." *Alleyne*, 133 S.Ct. at 2163. "This reality demonstrates that the core crime and the fact triggering the . . . sentence together constitute a new, aggravated crime, each

element of which must be submitted to the jury." *Id.* at 2161.

An accuser must prefer charges swearing he investigated the allegations which are true "to the best of his knowledge and belief." Article 30(a), UCMJ. Charges cannot "be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made." Article 32(a), UCMJ (emphasis added). Investigating officers must recommend "as to the disposition which should be made of the case in the interest of justice and discipline." *Id.* An accused must receive notice of any charged or uncharged offense under investigation and have the opportunity to present any matters desired on his behalf. Article 32(b), (d), UCMJ.

If a convening authority "is an accuser, the court shall be convened by superior competent authority . . . ." Article 22(b), UCMJ. An accuser is "a person who signs and swears to charges, . . . directs that charges nominally be signed and sworn to by another, [or has] . . . other than an official interest in the prosecution of the accused." Article 1(9), UCMJ.

Congress is "'subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.'" *United States v. Vazquez*, 72 M.J. 13, 18 (C.A.A.F. 2013)(quoting *Weiss v. United States*, 510 U.S. 163, 176-77 (1994)). When "determining what process is due, courts 'must

give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8.'" *Id.* (citation omitted). Military pretrial procedures fulfill constitutional due process requirements satisfied by the indictment and grand jury in the federal civilian system. *Cf. United States v. Nickerson*, 27 M.J. 30, 31-32 (C.M.A. 1988)(citation omitted). Despite the President's broad power to promulgate procedural rules, such rules "may not be contrary to or inconsistent with [the UCMJ]." Article 36, UCMJ.

Under R.C.M. 1004(b)(1) the government may improperly amend and aggravate an offense at referral without complying with the UCMJ's pretrial procedural protections. Courts-martial may not impose death unless an aggravating factor is found beyond a reasonable doubt and aggravating circumstances substantially outweigh mitigating and extenuating circumstances. R.C.M. 1004(b)(4). Because the R.C.M. 1004(b)(4) findings increase an accused's maximum sentence, these findings are elements of a greater offense subject to the same due process protections as all other offenses. The government denied SGT Akbar his right to due process by failing to prefer or submit capital murder elements to an Article 32. Instead the government requested and allowed the convening authority to act as accuser by personally appending aggravating elements to the offenses at referral.

The denial of SGT Akbar's pretrial due process rights was

not harmless beyond a reasonable doubt. The pretrial procedures employed deprived SGT Akbar of opportunities to avoid death at the outset through the decisions of persons independent of the convening authority. Had the IO recommended against capital referral, the convening authority reasonably could have accepted his advice. Moreover, it is not obvious SGT Akbar's accuser believed his actions constituted capital murder because he made no comment regarding aggravating factors or circumstances supporting a capital murder allegation. (JA 55-57).

WHEREFORE, this Court should set aside the sentence of death and affirm a sentence of LWOP.

Assignment of Error 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 *APPRENDI*, 530 U.S. 466 AND *RING*, 536 U.S. 584. (JA 159-73, 229-32, 888-89, 1148, 1761). 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? (JA 1511-19).

Assignment of Error 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.A § 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.

Assignment of Error 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.

WHEREFORE, as to AEs A.XVI, A.XVII, and A.XVIII, this Court should set aside the sentence and affirm a sentence of LWOP.

Assignment of Error 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 (JA 1870, 1901).

WHEREFORE, this Court should set aside the findings and sentence, or, in the alternative, set aside the sentence of death and approve a sentence of LWOP.

Assignment of Error 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)(JA 1658); *SEE* R.C.M. 912(B), DISCUSSION.

WHEREFORE, this Court should set aside the findings and the sentence and remand this case for a rehearing.

Assignment of Error 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. (JA 658-63, 669-70, 675 (CHALLENGE OF LTC VANHEUSEN)). *BUT SEE UNITED STATES V. CURTIS*, 44 M.J. 106, 131-33 (C.A.A.F. 1996); *UNITED STATES V. LOVING*, 41 M.J. 213, 294-95 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside SGT Akbar's findings and sentence and remand this case for a rehearing.

Assignment of Error 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)(JA 1687).

WHEREFORE, this Court should set aside the sentence of death and affirm a sentence of LWOP.

PART B

Assignment of Error 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.

Statement of Facts

The Army Court's decision states, "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." (JA 51).

Law and Argument

Article 66(c), UCMJ, requires CCAs to conduct a sentence proportionality review in capital cases. *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991). Under, Article 67, UCMJ, this Court must ensure CCAs perform proportionality reviews properly. *Id.* This Court's prior decisions provide the minimum standard for capital case proportionality reviews. *United States v.* Gray, 51 M.J. 1, 62-63 (C.A.A.F. 1999). Proportionality reviews must examine multiple cases reviewed by the Supreme Court and determine if the sentence is generally proportional to that imposed in similar cases by other jurisdictions. *Loving*, 41 M.J. at 290-91 (citation omitted).

The Army Court considered only the "entire record" before affirming SGT Akbar's sentence. *Compare* (JA 51), *with United States v. Thomas*, 43 M.J. 550, 589-90 (N.M. Ct. Crim. App. 1995), *and United States v. Gray*, 37 M.J. 730, 749 (A.C.M.R. 1992), *and United States v. Loving*, 34 M.J. 956, 969-70 (A.C.M.R. 1992).[80] Because the Army Court did not review similar cases *outside the record*, it's proportionality review was

[80] Of the service members currently pending a sentence to death post-CCA review—Akbar, Gray, and Loving—SGT Akbar is the only one whose CCA opinion does not detail a proportionality review.

incomplete. This failure requires remand to ensure the Army Court met its Article 66, UCMJ, mandate and allow this Court to conduct its Article 67, UCMJ, review. *Id.*

WHEREFORE, this Court should remand SGT Akbar's case to the Army Court for a proper proportionality review as mandated by Article 66(c), UCMJ, and *Curtis*, 33 M.J. at 109.

Assignment of Error B.II

THE ARMY COURT'S REFUSAL TO ACCEPT SGT AKBAR'S EVIDENCE IN REBUTAL 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.

Statement of Facts

On November 26, 2012, SGT Akbar filed twenty-five defense appellate exhibits and requested the Army Court reconsider its decision as related to IAC. On April 2, 2013, the government responded, submitting a second declaration from defense counsel marked Gov't App. Ex. 13. On April 17, 2013, government counsel filed an answer to the reconsideration motion. The new evidence from defense counsel in these two government filings made apparent to appellate defense counsel they did not receive complete discovery as the Army Court ordered on July 3, 2008, and reiterated on February 8, 2011 (JA 3073-76).

On April 18, 2013, appellate counsel requested to file a

reply, and on April 22, 2013, requested (1) the court order MAJ DC to produce previously ordered discovery, and (2) order the government to produce documents within its possession, so appellate counsel could adequately respond to GAE 13. (JA 3093-3116) On April 24, 2013, the Army Court summarily denied all three requests and re-affirmed its earlier decision. (JA 52-53, 3097, 3107, 3111). On April 26, 2013, appellate counsel requested the Army Court reconsider its decision, citing *Murphy*, 50 M.J. at 13, 16, and *DuBay*, 37 C.M.R. 411 (JA 3117-23), and requested to admit two defense appellate exhibits obtained to rebut GAE 13—DAE QQQ (declaration of Mr. Gant, signed April 23, 2013) and DAE RRR (declaration of Dr. Sachs, signed April 25, 2013) (JA 3124-25 (declarations located at JA 2900-08)). On May 7, 2013, the Army Court denied these requests. (JA 54, 3122, 3125).

Law and Argument

This Court made clear in *Murphy* it is not a fact-finding court. 50 M.J. at 13. Appellate counsel obtained two new declarations directly refuting claims in defense counsel's affidavit. (JA 2900-08, 3124-25). Appellate counsel received both within eight days of the government's answer to SGT Akbar's reconsideration request. Additionally, appellate counsel requested the Army Court order trial defense counsel and the government to disclose specific matters so SGT Akbar could receive adequate representation and consideration of his appeal.

The Army Court denied these requests.[81]

Within a month of the Army Court denying SGT Akbar's request to consider evidence obtained in response to GAE 13, appellate counsel possessed nearly all the new evidence submitted to this Court for consideration. These matters substantially conflict with GAEs 1, 13. (*See* AE A.II; App. B). The Army Court abused its discretion by not considering the documents or allowing minimal time to obtain discovery not disclosed five years ago as ordered. These decisions denied SGT Akbar due process and a complete Article 66, review.

WHEREFORE, this Court should remand this case to the Army Court to conduct a complete Article 66, UCMJ, review of the IAC claims with evidence obtained to rebut GAE 13, and decide if a *DuBay* hearing is required under *Ginn*, 47 M.J. at 248.

Assignment of Error 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 PREJUDICALY DENIED THE DUE PROCESS OF LAW GUARANTEED UNDER THE FIFTH AMENDMENT.

Statement of Facts

SGT Akbar's court-martial adjourned April 28, 2005. (JA 1544). Seven years, two months, and fifteen days later, the Army Court issued its opinion affirming SGT Akbar's sentence.

[81] On May 30, 2013, after undersigned counsel requested this Court order production, the government provided the witness lists the Army Court refused to order produced. (*See* JA 2910-29).

(JA 3). During that time, SGT Akbar had eleven different counsel assigned to his appeal. (JA 1).[82]

Law and Argument

Due process includes the right to timely appellate review. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). If this Court finds the appellate delay facially unreasonable, it should remand SGT Akbar's case to the Army Court for a complete analysis under *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *United States v. Toohey*, 60 M.J. 100, 103 (C.A.A.F. 2004).

The 2,633 day delay is facially unreasonable. This delay prejudiced SGT Akbar by denying him continuity of counsel. During the delay, SGT Akbar fell victim to "the ungoverned revolving door of defense counsel." *Loving*, 41 M.J. at 326-30 (Wiss, J., dissenting). Judge Wiss's concerns that the military system of appointing capital defense counsel leads to unnecessary delays and unprepared counsel is as much a problem now as it was nineteen years ago. *See id.* The government has taken no steps to rectify this circumstance.

WHEREFORE, this Court should remand SGT Akbar's case to the Army Court to perform the *Barker* analysis for appellate delay.

[82] SGT Akbar's first two counsel are not listed in the Army Court's opinion as they left the Defense Appellate Division before SGT Akbar's brief was filed with the Army Court.

Assignment of Error 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. *SEE* (JA 3088-92).

WHEREFORE, if this Court does not rule in SGT Akbar's favor on evidence already submitted to this Court, *see* AE A.I, or some other dispositive issue, this Court should order a *DuBay* hearing to provide SGT Akbar a fair opportunity to obtain complete responses to the Army Court's January 16, 2013, order to defense counsel to respond to specified questions (JA 3082-88), and obtain a military judge's findings of fact based on the independent recollections of each counsel. (*See also* AE A.II).

Assignment of Error 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). (JA 1543, 1653). 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?

WHEREFORE, this Court should set aside SGT Akbar's sentence of death and remand his case for a sentence rehearing.

Assignment of Error B.VI

THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS AND SENTENCE.[83]

Even if this Court concludes no single error raised in SGT Akbar's brief compels reversal of the findings or sentence, the cumulative effect of those errors does. "It is well-established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually." *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). "[I]n assessing whether a conviction should be upheld despite the presence of error, a court is required to assess the harm done by the errors considered in the aggregate." *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). Indeed, "the cumulative effect of trial errors may deprive a defendant of his constitutional right to a fair trial." *Id.* (citation omitted). In capital cases, cumulative error deprives an accused of both Due Process and Eighth Amendment right to heightened reliability.

This Court "cannot say with any certainty that the cumulative effect of [the] errors did not affect the outcome of this case." *Dollente*, 45 M.J. at 243. Therefore, the findings, or at least the sentence,[84] must be set aside.

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[83] This argument incorporates the more detailed discussion involving cumulative error presented in AE A.I, Sec. E.

[84] This Court has said it is "far less likely to find cumulative error . . . when a record contains overwhelming evidence of a defendant's guilt." *Dollente*, 45 M.J. at 242. However,

Assignment of Error 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).

Assignment of Error 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)(JA 1623); *IRVIN V. DOWD*, 366 U.S. 717, 722 (1961).

Assignment of Error 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)(JA 1623); *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)(JA 1740); *IRVIN V. DOWD*, 366 U.S. 717, 722 (1961).

WHEREFORE, as to AEs B.VII, B.VIII, and B.IX, this Court should set aside the sentence and approve a sentence of LWOP.

Assignment of Error 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))(JA 1693).

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evidence of guilt carries little weight when considering cumulative error regarding reliability in the sentence.

WHEREFORE, this Court should set aside SGT Akbar's findings and sentence of death and remand his case for a rehearing.

Assignment of Error 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.

PART C

Assignment of Error 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)(JA 1663).

WHEREFORE, this Court should set aside SGT Akbar's findings and sentence of death and remand his case for a rehearing.

Assignment of Error 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.

WHEREFORE, this Court should set aside the sentence of death and approve a sentence of LWOP.

Assignment of Error 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).

Assignment of Error 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)(JA 1663).

Assignment of Error 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)(JA 1672).

Assignment of Error 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)(JA 1675).

WHEREFORE, as to AEs C.III, C.IV, C.V, and C.VI, this Court should set aside the findings and remand the case for a rehearing.

Assignment of Error 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)(JA 1668).

Assignment of Error 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)(JA 1709).

WHEREFORE, as to AEs C.VII and C.VIII, this Court should set aside the sentence of death and approve a sentence of LWOP.

Assignment of Error 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)(JA 1722).

Assignment of Error 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)(MARSHAL J., DISSENTING). *BUT SEE UNITED STATES V. CURTIS,* 44 M.J. 106, 132 (C.A.A.F. 1996).

WHEREFORE, as to AEs C.IX AND C.X, this Court should set aside the findings and the sentence.

Assignment of Error 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)(JA 1655). *BUT SEE UNITED STATES V. LOVING*, 41 M.J. 213, 295 (C.A.A.F. 1994).

WHEREFORE, this Court should set aside findings and sentence and remand this case for a rehearing.

Assignment of Error 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*, 520 U.S. 651 (1997).

WHEREFORE, this Court should return this case to the Army Court for review by presidentially appointed principal officers.

Assignment of Error 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.

Assignment of Error 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).

WHEREFORE, as to AEs C.XIII and C.XIV, this Court should remand this case to an Article III court for direct review.

Assignment of Error C.XV

SERGEANT AKBAR IS DENIED EQUAL PROTECTION OF LAW UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IAW 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).

WHEREFORE, this Court should order the Army Clemency and Parole Board to review SGT Akbar's case.

Assignment of Error 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)(JA 1713).

Assignment of Error 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.

Assignment of Error 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)(JA 1718).

Assignment of Error 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)(JA 1655).

Assignment of Error C.XX

DUE 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)(JA 1725).

Assignment of Error 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).

Assignment of Error C.XXII

R.C.M. 1209 AND THE MILITARY DEATH PENALTY SYSTEM DENIES DUE PROCESS AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND IS TANTAMOUNT TO FORESEEABLE, STATE-SPONSORED EXECUTION OF INNOCENT HUMAN BEINGS BECAUSE THERE IS NO EXCEPTION FOR ACTUAL INNOCENCE TO THE FINALITY OF COURTS-MARTIAL REVIEW. *CF. TRIESTMAN V. UNITED STATES,* 124 F.3D 361, 378-79 (2D CIR. 1997).

Assignment of Error 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 AMENDMENT. *SEE* APP. EX. LV (DEFENSE MOTION FOR APPROPRIATE RELIEF – TO LIMIT ADMISSIBLITY OF VICTIM'S CHARACTER AND IMPACT ON FAMILY FROM VICTIM'S DEATH)(JA 1695); *SEE ALSO* APP. EX. 296 (MOTION FOR APPROPRIATE RELIEF - LIMIT VICTIM IMPACT AND GOVERNMENT ARGUMENT)(JA 1898).

Assignment of Error 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 ADMISSIBLITY OF VICTIM'S CHARACTER AND IMPACT ON FAMILY FROM VICTIM'S DEATH)(JA 1695).

Assignment of Error 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 ADMISSIBLITY OF VICTIM'S CHARACTER AND IMPACT ON FAMILY FROM VICTIM'S DEATH)(JA 1695).

Assignment of Error 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)(JA 1728).

WHEREFORE, as to AEs C.XVI, C.XVII, C.XVIII, C.XIX, C.XX, C.XXI, C.XXII, C.XXIII, C.XXIV, C.XXV, and C.XXVI, this Court should set aside the sentence and affirm a sentence of LWOP.

Conclusion

WHEREFORE, SGT Hasan K. Akbar humbly requests that this Court set aside the findings of guilty and the sentence, or, in the alternative, set aside the sentence and affirm a sentence to life without parole or remand for a sentence rehearing.

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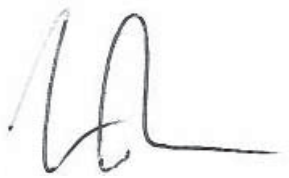
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Akbar, Crim. App. Dkt. No. 20050514, Dkt. No. 13-7001/AR, was delivered to the Court and Government Appellate Division on February 28, 2014.



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APPENDIX A

Index of Assignment of Error A.I

APPENDIX B

October 29, 2010 Trial Defense Counsel Affidavit (Gov't App. Ex. 1)

Question A. In response to appellant's claim that counsel were ineffective at "every stage of his court-martial," what was the overall defense strategy and approach to appellant's case with respect to both the merits and sentencing?	
Counsel Response(s)	**Contrary Evidence**
11. The overall defense strategy during the June through September timeframe of 2003 was focused on developing consistency between the merits and the sentencing case and finding ways to place as much mitigation evidence as possible before the panel during the merits. This approach was consistent with the recommendations of numerous experienced capital litigators. Through our discussions with other capital defense experts and based upon the literature that we read on trying capital cases (discussed more fully in Question B below), this was an accepted and suggested method of putting mitigation evidence in front of the panel. To effectuate this strategy, the defense focused its case on attacking the premeditation element of the murder specifications. The goal of the defense was to frontload much of the mental health and mitigation evidence into the merits case. It was our shared belief that in the event that the panel still found SGT Akbar guilty of premeditated murder, this approach would allow the defense to easily transition into a sentencing case without having alienating the panel members.	a. In a May 26, 2004, email to MAJ DB, Mr. Gant wrote: "One more suggestion. It's important to not pursue mental health issues until the social history is complete. I would suggest stopping everything the mental health experts are doing until the new mitigation specialist is allowed to conduct a more thorough investigation, and until you speak to George more about what types of experts and tests are likely needed." (JA 2096). b. Experienced capital defense attorney Mr. Dunn asserts that he never advised counsel to "'frontload mitigation evidence into the merits case,'" nor would I ever advocate a defense which "frontloaded" the mitigation case in the merits phase of a capital trial." Instead, Mr. Dunn "emphasized to SGT Akbar's defense team the need to investigate, develop, and present an integrated mitigation defense that began in the merits phase of the case and coherently transitioned and climaxed at the penalty phase." (JA 2693).
34. Ms. Nerad ensured that the mitigation collection did not miss a beat. She continued working on the case but now as the mitigation expert for the defense. Along with Dr. Woods, she interviewed SGT Akbar and other key witnesses from his family (missing from Ms. Grey's mitigation investigation). Specifically, she was given access to interview SGT Akbar's father, mother, sisters, brother, paternal half brother, maternal grandfather, and other aunts, uncles, and cousins in early September of 2004.	a. On Sep. 17, 2004, the government instructed Ms. Nerad to cease her mitigation investigation because no funds were specifically authorized for her. (JA 2378). b. Funding problems significantly impeded Ms. Nerad's investigation throughout Sep. 2004. (JA 2180, 2181, 2183, 2184-86). c. On Nov. 5, 2004, Ms. Nerad informed counsel that persistent government interference and lack of defense counsel assistance remained a significant impediment to her investigation efforts. (JA 2188). d. Ms. Nerad's Dec. 1, 2004, declaration asserts that repeated government interference had significantly impeded her investigation efforts. (JA 1844). e. Ms. Nerad asserts that government interference at the outset delayed her investigation by four weeks. Continued government interference and defense counsel disinterest resulted in further impediments and ultimately an incomplete mitigation investigation. (JA 2766-69).

	f. Mr. Lohman, who assisted Ms. Nerad, asserts that significant aspects of the mitigation investigation were left "severely lacking." (JA 2550). g. Ms. Laura Rodgers was unable to complete important aspects of the mitigation investigation due to lack of funds and counsel never asked her to inform them of her findings. (JA 2789-92). h. Ms. Rachel Rodgers was unable to complete important aspects of the mitigation investigation due to lack of funds and counsel never asked her to inform them of her findings. (JA 2785-87). i. Dr. Woods asserts that "[t]he social history investigation in this case was a mere fraction of what I ordinarily am used to seeing in capital cases." (JA 2466).
36. At this point other members of the CCA to include Mr. James Lohman and Ms. Rachel Rogers took on a supporting role to Ms. Nerad and her investigation. The defense had limited email and telephone contact with Mr. Lohman and Ms. Rogers. Mr. Lohman offered some assistance on a motion and he also tried to find some proof concerning whether malaria pills, larium, could have induced a psychotic episode in SGT Akbar. At no time did Mr. Lohman assume a position where he was included on discussions concerning the merits case, the sentencing case, or trial strategy or tactics. His contact with defense counsel primarily centered on informing us that he thought we were doing a good job and to wish us good luck. He did help arrange for a meeting with Mr. Tom Dunn, a capital defense counsel from Atlanta who had served as a Judge Advocate (discussed more fully in Section B, below). He even emailed us on 23 June 2005 to say he was saddened by the outcome" and that "it was a privilege to assist [us] you with this case . . . ."	a. Mr. Lohman asserts that he "reported his observations, opinions and recommendations to Sgt. Akbar's military lawyers in person and in writing." Mr. Lohman also "explained to counsel that the preliminary investigated [sic] we conducted was not adequate for trial presentation and required sustained and informed follow up investigation." However, "Sgt. Akbar's attorneys were not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." (JA 2549-51). b. MAJ DC e-mailed MAJ DB, stating in reference to Mr. Lohman, "I have a growing dislike for mitigation experts." (JA 2970). c. Ms. Nerad asserts that Mr. Lohman set up the meeting with Mr. Dunn to provide guidance in response to counsel's lack of leadership. Thereafter, MAJ DB cancelled his appearance at meeting and instead called in on mobile telephone with intermittent reception. (JA 2770-71). d. Ms. R. Rogers asserts that she and Mr. Lohman tried to develop a social history of the Louisiana family on their own, but counsel provided no guidance and never contacted them regarding the information collected. (JA 2787).
37. The one individual the defense did have frequent contact with was Ms. Nerad. Over the next few months, Ms. Nerad seemed to work seamlessly with Dr. Woods and the defense (including Mr. Al-Haqq). She regularly gave reports of her activities to the defense. The information	a. On Nov. 5, 2004, Ms. Nerad expressed her exasperation with both Mr. Al-Haqq and SGT Akbar's military counsel for their lack of communication and leadership. According to Ms. Nerad, their lack of interest was a substantial impediment to her investigation efforts. (JA 2188).

she was uncovering, while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. Grey.	b. Mr. Al-Haqq confirmed that Ms. Nerad related her concerns to him as well and made clear that they applied to "all of the defense team." (JA 3007-08). c. As of Nov. 9, 2004, MAJ DB told Mr. Al-Haqq that they had not "heard from you for quite some time, so I do not know how frequently you are in contact with [the mitigation specialists]." (JA 3007). d. Ms. Nerad asserts that she experienced difficulty having meaningful communication with counsel throughout her tenure on the case. After Mar. 14, 2005, counsel stopped communicating with her altogether. (JA 2772-91). e. Ms. Nerad's team provided counsel the names of Dr. Sachs, Dr. Tuton, Paul Tupaz, and social services records related to the sexual abuse of SGT Akbar's sisters by his step-father. (JA 2191-94, 2196). f. Ms. Nerad's team conducted interviews of SGT Akbar's family, interviews that Ms. Grey was prohibited from conducting. (JA 2167, 2175). g. Counsel apparently did find "evidentiary value" in Ms. Nerad's work since they ultimately used the social services records and Dr. Tuton and Mr. Tupaz were two of the four civilian witnesses called to testify at trial. (JA 2389-95).
38. On 5 November 2004, the defense received an unexpected and troubling email from Ms. Nerad. In her email, she stated that she was having difficulties in speaking with the defense team and was concerned over the focus of the mitigation case. [See attached Scarlet Nerad and CCA email messages]. LTC [DB] responded to this email on the next duty day and pointed had provided her with an in depth overview of the defense's view of the mitigation case and the areas in which we needed her assistance which she earlier had described as an "excellent roadmap." [Id.]. 39. After the above unexpected email from Ms. Nerad, she seemed to retract from her concerns and renew her focus on completing her mitigation investigation. On 20 December 2004, Ms. Nerad uncovered perhaps the most significant piece of evidence from her and Ms. Holdman's mitigation investigation. She found evidence of an earlier analysis of SGT Akbar when he was a child by Dr. Fred Tuton. This	a. Multiple emails disclosed by counsel show that Ms. Nerad's concerns regarding their interest in developing SGT Akbar's mitigation case continued after Nov. 5, 2004. (JA 2202-03, 2205, 2208-10, 2213, 2380-81, 2938, 2950). b. Ms. Nerad asserts that her concerns with counsel's interest in investigating and developing SGT Akbar's case continued throughout her tenure. Ms. Nerad continually attempted to meet with counsel to review her findings and develop a trial plan without success. However, "[n]either MAJ [DB] nor [DC] ever requested a team meeting, and I was never able to successfully schedule a full in-person or telephonic team meeting." Moreover, from Jan. to Mar. 2005, Ms. Nerad repeatedly warned counsel that she needed additional time and funds. (JA 2205, 2208-09, 2766-68, 2771, 2934-38).

investigation was given to Dr. Woods and formed a significant basis for his ultimate opinion and was of enormous value to the defense.	c. Ms. R. Rogers asserts that she and Mr. Lohman received no guidance from defense counsel, thus they attempted to develop a social history of the family in Louisiana on their own. Counsel never contacted her regarding the information that she collected. (JA 2787).
40. On 22 February 2005, the defense received a call from Mr. Al-Haqq. He informed the defense that he would be seeking to withdraw from the case due to his not getting paid. MAJ(P) [DC] and LTC [DB] were not surprised by Mr. Al-Haqq's statement. We had seen the possibility of his withdrawal and were planning on such a contingency. As such, the defense team had not only prepared the case as a full insanity plea, as desired by Mr. Al-Haqq, but also as a diminished capacity case as dictated by the evidence and our best professional judgment. Thus, the defense did not need any additional time to prepare the case due to the withdrawal of Mr. Al- Haqq. On 4 March 2005, Mr. Al-Haqq was officially removed as counsel for SGT Akbar. [ROT 768-70].	a. Emails provided by counsel show that Dr. Woods had not reviewed large volumes of SGT Akbar's medical and social history sufficient to render a definitive opinion regarding SGT Akbar's mental health as of Feb. 22, 2005. (JA 2245-46, 2248, 2263-67, 2208, 2210, 2224-42). b. Dr. Woods emailed counsel on March 7, 2005, expressing his apprehension in being asked to testify as his "testimony won't be imbedded in persons that can supply the foundation for the conclusions I'm coming to." (JA 2931). Defense counsel responded amongst themselves that this apprehension was the product of Ms. Nerad and Dr. Woods "should have kept his mouth shut." (JA 2933). c. Ms. Nerad, asserts that from Jan. to Mar. 2005, she repeatedly warned counsel that she needed additional time and funds to complete her investigation, review the information, develop a mitigation plan for trial, and prepare witnesses. (JA 2205, 2208-09, 2766-68, 2771, 2934-38).
41. As was discussed in the preceding paragraphs, the affiants judged that the best defense would be to focus on SGT Akbar's mental illness as it related to his ability to premeditate. Our selection of this approach was based on a variety of factors. First, through the Fall of 2004 and into early 2005, Dr. Woods had still not reached a diagnosis of SGT Akbar. We understood Dr. Woods' need to develop his diagnosis within the standards of his profession, nonetheless, the absence of a diagnosis made planning difficult. Secondly, much of the literature of capital defense indicated that mental responsibility defenses had a low success rate and had the potential to undermine other mitigation evidence. Third, we were concerned about the government's ability to effectively counter an insanity defense should we ultimately have the appropriate diagnosis and supporting evidence.	a. In a May 26, 2004, email to MAJ DB, Mr. Gant wrote: "One more suggestion. It's important to not pursue mental health issues until the social history is complete. I would suggest stopping everything the mental health experts are doing until the new mitigation specialist is allowed to conduct a more thorough investigation, and until you speak to George more about what types of experts and tests are likely needed." (JA 2096). b. Responses 41 and 45 confirm that counsel made the decision to "focus" upon a partial lack of mental responsibility defense before Dr. Woods rendered any definitive conclusions and before Ms. Nerad completed her mitigation investigation. c. In Jan. 2005, MAJ DB told a mitigation specialist to focus him on information relating to the "mental responsibility defense." (JA 2196).
45. On 1 March 2005, Ms. Nerad informed the defense that she was still looking through over 2000 pages of documents regarding family genetics and dynamics and that she would need additional time to go through these records for	On Feb. 11, 2005, Ms. Nerad informed military defense counsel that the mitigation specialists were "flat broke." (JA 2205).

content and the leads the documents may produce in order to find new records. She estimated that an additional 340 hours would be need to review these and other documents and interview SGT Akbar. It is also around this time that Ms. Nerad informed the defense team that she had also exhausted the $56,700.00 given to her in September of 2004.	
46. The defense responded to Ms. Nerad by asking her to complete two separate declarations, one for funding and one for additional time. We instructed Ms. Nerad that if she got us her declarations, we would file them with the court. We told her that this would likely require her to testify in support of the declaration given her earlier declaration that indicated she would be completed by March of 2005. Additionally, we also requested her to get all of her current information to LTC [DB] so that he could review it and then provide it to Dr. Woods.	a. On Mar. 4, 2005, MAJ DB informs the military judge that defense has the witnesses and documents it needs to start trial on Apr., 6, 2005. Counsel made no mention of the concerns Ms. Nerad expressed three days earlier or that she may submit a declaration explaining the need for additional time and funds. (JA 274). b. Counsel never intended to ask for additional time or money, regardless of Ms. Nerad's advice, or advice she might elicit from "'expirienced'" [sic] death penalty lawyer[s] . . . ." (JA 2935-39). c. Ms. Nerad's earlier declaration estimated that she could not complete the mitigation investigation before Jun. 2005. (JA 1839-1846).
47. Despite requesting the declarations, Ms. Nerad did not provide them to the defense. Instead, during a telephone conversation on [sic] with LTC [DB], she stated that a mitigation investigation was effectively endless and that it was her practice to always request more time and more funding until the state - government relented on pursuing the death penalty. If the government did not relent, then, according to Mrs. Nerad, there would be a built in appellate issue. LTC [DB] emphasized that regardless of appellate issues, we had to go to trial. LTC [DB] stressed that we had a realistic chance of beating the death penalty, but we would need her cooperation and the information she already had compiled. She then agreed to provide the materials she had already assembled which were eventually delivered to the defense and ultimately Dr. Woods.	a. Emails provided by counsel show that as of Mar. 9, 2005, counsel had no real interest in requesting more time or funds for Ms. Nerad, and simply asked her to provide a declaration as a formality, and constructive criticism by Dr. Woods on the defense plan was summarily rejected as the workings of a marginalized Ms. Nerad. (JA 2931, 2933, 2935-39). b. Ms. Nerad asserts that she did send a draft funding declaration to counsel on Mar. 10, 2005. According to Ms. Nerad, MAJ [DB] "called to inform me that his request for funds had been denied . . . and that he did not believe he could further litigate the decision." Ms. Nerad specifically asserts that para. 47 of Gov't App. Ex. 1 is not true. She would not request additional funding just for the sake of asking for additional funding; she was trying to convey the need to keep developing mitigation until the end of trial. (JA 2780).
48. The defense then turned its focus on finalizing the testimony of Dr. Woods and securing the testimony all of possible mitigation witnesses. LTC [DB] had frequent email and telephone contact with Dr. Woods. Additionally, on 16 March 2005, Dr. Woods and LTC [DB] met to go through his entire testimony. Over the course of the next couple of weeks, the defense worked feverously with Dr. Woods and our other mental health experts to develop the strongest mental health testimony possible.	a. According to Dr. Woods, his trial testimony diagnosis was "severely limited." His testimony was not the strongest mental health testimony possible because, only after trial, he learned of Akbar's family members who suffered from mental health disorder, incidents of physical and possibly sexual abuse of Akbar, and the additional observation of psychotic behavior by Akbar such as eating his own vomit. This incident happened before trial, but was not recorded in RCF documents, which were provided to

	him. Dr. Woods was severely hampered by not having SGT Akbar's complete social history. Furthermore, Dr. Woods was "extremely willing to testify on sentencing, the subject of either I or any of the mitigation experts ever testifying on sentencing was never broached between myself . . . and the defense attorneys." (JA 2383-85, 2470). b. Ms. Nerad recommended that SGT Akbar be medicated and that his father, John Akbar, be evaluated by Dr. Woods to help further the social history and diagnosis of SGT Akbar. (JA 2951). Neither appears to have been done. c. Dr. Woods expressed apprehension to counsel on March 7, 2005, for being asked to testify as his "testimony won't be imbedded in persons that can supply the foundation for the conclusions I'm coming to. (JA 2931). Defense counsel responded amongst themselves that this angst was the product of Ms. Nerad's meddling and that Dr. Woods "should have kept his mouth shut." (JA 2933). d. Dr. Woods asked counsel to request additional expert assistance, particularly a forensic psychologist. (JA 2468). Defense counsel continually replied that Dr. Woods and the mitigation experts' requests were pointless because the government would never agree to pay the expenditures. (JA 2468, 2550-52). e. Dr. Woods informed counsel of the need for additional "neuropsychological testing" as early as January 13, 2005. (JA 2222). Again on February 15, 2005, Dr. Woods requested via e-mail that counsel obtain "specialized neuropsychological testing, including prepulse inhibition, habituation, and multiple tests of attention as well as distraction . . . ." (JA 2972). On February 25, 2005, Dr. Woods provided a seven-page memorandum detailing the tests that needed to be conducted—"It is my professional opinion that there is no . . . acceptable way to conclude a clinically effective evaluation and treatment of Sgt. Akbar's arousal condition by April 5, 2005." (JA 2395). After the attack on the guard, Dr. Woods once more reiterated the "need to get [SGT Akbar] tested as soon as possible." (JA 2280). There is no evidence that counsel ever obtained this testing. f. Dr. Clement, the defense neuropsychologist, also informed counsel that additional neuropsychological testing was needed. (JA 2245).

52. The alleged [stabbing] incident of 30 March 2005 had a devastating impact on the defense's sentencing case. Although 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. [ROT at 785]. The defense interpreted this ruling as giving us the keys to the door for this evidence. If we opened the door by referencing future dangerousness or that the alleged incidents were not within the character of SGT Akbar, we would effectively open the door to this evidence on rebuttal. Additionally, due to this alleged incident, several defense sentencing witnesses, specifically the Warden of the RCF, who learned of it through official channels indicated that they no longer wished to testify on SGT Akbar's behalf. Even without opening the door, the government attempted to argue that the evidence was proper aggravation under R.C.M. 1001(b)(4). [See AE 297 and at ROT 2657-2662 and 2683-2685].	a. Of the eighteen civilian sentencing witnesses counsel requested between Sep. 8, 2004, and March 15, 2005, all but six were removed on or before Mar. 29, 2005. (JA 2910-29). b. After Mar. 30, 2005, counsel removed only two witnesses from their witness list. Of these, only the removal of confinement facility social worker, Steve Bowen, reasonably related to the stabbing incident. (JA 2910-18). c. The "Warden of the RCF" was never listed as a defense witness before or after Mar. 30, 2005. (JA 2910-29). d. After Mar. 30, 2005, the only non-expert civilian defense witnesses remaining were: Ms. Bilal, John Akbar, Musa Akbar, Mr. Duncan, Ms. Weatherford, Mr. Hubbard and Mr. Tupaz. Of these, only Mr. Duncan and Mr. Tupaz testified. On Apr. 28, 2005, counsel informed the military judge of his "tactical" decision not to call any of the remaining civilian witnesses on the day they were scheduled to testify. (JA 1433, 1449-50). e. Mr. Duncan testified: "Well, I think because it was just something I never would have expected. You know, some students you sort of expect to see that kind of thing in the future, but that was so out of character from the person that I'd known." (JA 1430). f. Counsel admitted several statements from family and friends either describing SGT Akbar as peaceful or his offenses out of character. (JA 1391, 1449, 1602, 1626, 1628, 1645). g. All mitigation specialists who participated in SGT Akbar's case agree they play an important role in preparing witnesses to testify, but counsel never requested their assistance in this regard. (JA 2554-55, 2768, 2787, 2792). h. Ten of the fifteen panel members knew of the stabbing incident through extrajudicial means. *See* Assignments of Error A.I, section C, and A.IV.
53. Ultimately, the defense was left with attempting to frontload as much mitigation as possible during the merits stage of the trial. After the merits, the defense turned to the documentary evidence collected during the mitigation investigation and the remaining witnesses that could offer testimony that supported the evidence elicited during the merits and the testimony of Dr. Woods.	a. Based on the defense witness lists, counsel apparently "turned to documentary evidence" over live testimony well before the Mar. 30, 2005 incident. (JA 2910-29). b. Counsel planned to call Dr. Diebold and/or Dr. Southwell at sentencing. However, since they did not interview either of them in person until after trial started, it was too late to adjust their plan when it turned out that the doctors could not provide the testimony that counsel had hoped. (JA 3029, 3033, 3038-39).

Question B. Did the trial defense team utilize any outside resources, classes, training, or capital litigation consultants in preparation for appellant's trial?

Counsel Response(s)	Contrary Evidence
1. d. i. COL Robert D. Teetsel, Chief, Defense Appellate Division and LTC E. Allen Chandler Jr., Deputy Chief, Defense Appellate Division. On 15 April 2003 the defense team called COL Teetsel to discuss death penalty issues....	This call was made two years before trial by LTC VH who left the defense team approximately fifteen months before trial, not the counsel who tried the case. (JA 2953).
1. d. iv. Tom Dunn, Georgia Resource Center, Atlanta, Georgia. Mr. Dunn was a former Judge Advocate who later became the director of the Georgia Resource Center, a nonprofit organization that represents capital defendants. At the time, Mr. Dunn had more than fifteen years experience in capital litigation. Both Mr. Gant and Mr. Lohman, knew Mr. Dunn and arranged a meeting to discuss the Akbar case in November of 2004. LTC DB attended the meeting, which took place in Mr. Dunn's offices in Atlanta, Georgia. LTC DB discussed the case with Mr. Dunn and went over possible strategies. Mr. Dunn was particularly helpful because of his military background. He understood the R.C.M 706 process and also how funding of experts works in the military, things which the civilian mitigation experts were unfamiliar with. Mr. Dunn also emphasized the need to frontload mitigation evidence into the merits case and to support mental illness with independent evidence and observations. Finally, Mr. Dunn was instrumental in obtaining funding, through his organization to fly SGT Akbar's father from Seattle, Washington to Fort Knox in order for him [to] participate in a meeting designed to again try to convince SGT Akbar to offer a plea in exchange for a non-capital referral.	a. Mr. Dunn asserts that he never advised counsel to "'frontload mitigation evidence into the merits case,' nor would I ever advocate a defense which 'frontloaded' the mitigation case in the merits phase of a capital trial." Instead, Mr. Dunn "emphasized to SGT Akbar's defense team the need to investigate, develop, and present an integrated mitigation defense that began in the merits phase of the case and coherently transitioned and climaxed at the penalty phase." (JA 2693-94). This advice was ignored. b. Ms. Nerad asserts that Mr. Lohman set up a team meeting with Mr. Dunn due to the mitigation specialists' concerns with counsel's leadership. "Mr. Dunn agreed to sit in on the team meeting and provide guidance. MAJ DB cancelled his appearance at the team meeting, and instead called in to provide a partial summary of the charged offenses, which he gave as a percipient witness to the events. Because MAJ DB was traveling through a mountainous area, his mobile telephone did not have consistent reception, which made coherent communication difficult to impossible." (JA 2770-71).

Question C. Did the defense team use "mitigation expert[s]," and if so, how were they used? Did the defense team consider calling any "mitigation experts" as a witness? What factors were considered with respect to that decision?

Counsel Response(s)	Contrary Evidence
1. The defense immediately recognized the importance of retaining a mitigation expert. As discussed above in Question A, the defense made multiple requests for the assistance of a mitigation expert. It was not until 28 August 2003, that the government granted a defense request to appoint Ms. Deborah T. Grey as the defense mitigation specialist in the case. The defense perceived the role of the mitigation specialist as assisting us by conducting a thorough social history 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. Ms. Nerad asserts that counsel "never requested any assistance on mitigation strategy and presentation of that strategy, which is one of our most valuable services that we can provide counsel, even experienced counsel." After funding was exhausted, "[a]lthough CCA staff and I continued to pass along information and messages to MAJs DB and DC, they never again contacted us with any questions about the case." (JA 2768). b. Mr. Lohman asserts that counsel were "not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." "In virtually all instances counsel's response was, 'that's not possible,' 'that won't work,' and 'that's not the way it's done in the military.'" After funding was exhausted Mr. Lohman was not "contacted and asked about my knowledge of any facts in the case, about my direct knowledge of any of the mitigation witnesses of my experiences with them of my insights into their suitability as trial witnesses." (JA 2551-52, 2554). c. Ms. Laura Rodgers was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." (JA 2792). d. Ms. Rachel Rodgers also asserts that she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds and counsel never gave any guidance on what investigation to conduct or asked her to discuss her findings. (JA 2785-87). f. Ms. Grey asserts that the products she created while serving as SGT Akbar's mitigation specialist were not intended for trial use and she would not have recommended that they be used in lieu of live testimony. (JA 2759).
3. As Ms. Grey was collecting her mitigation evidence, there was discussion of whether she would eventually be a witness in the sentencing phase of the court-martial. Ms. Grey informed the defense that although a mitigation specialist could obviously testify during the sentencing	a. In an email provided by counsel dated Mar. 10, 2005, MAJ DB writes: "[Ms. Nerad] said she doesn't see how they can do a competent investigation in the little time we have left. I [sic] we'll do fine as long as they get us the documents that they have already collected. She promised

phase, she believed her best role as the mitigation specialist was to collect all the data pertinent to SGT Akbar's background and present that in a report for use by the defense's mental health experts. In researching this question, it seemed that the consensus of capital litigators was that the evidence collected by the mitigation specialist was most persuasively presented through the testimony of a mental health expert such as a forensic psychiatrist. Based upon these factors, the defense initially determined that we would most likely use the evidence collected by Ms. Grey with our then mental health experts of Dr. Walker and Dr. Clement. LTC VH supported this approach because he had earlier represented the Government in a capital *Dubay* hearing and had great success in cross-examining the mitigation specialist who testified in that case. Obviously, the defense wanted to avoid having the mitigation expert become the focus for the panel rather than the evidence she collected.	to fed ex them next week. She left me with a deep sigh and a half-hearted ok. I'm guessing that in the next week or so we will get a call from one of their cohorts, probably an 'experienced' death penalty lawyer, who will tell us we are going about this all wrong and we need to do things their way". (JA 2938). b. In a May 26, 2004, email to MAJ DB, Mr. Gant wrote: "One more suggestion. It's important to not pursue mental health issues until the social history is complete. I would suggest stopping everything the mental health experts are doing until the new mitigation specialist is allowed to conduct a more thorough investigation, and until you speak to George more about what types of experts and tests are likely needed." (JA 2096). c. Ms. Grey asserts that "[t]o the best of my knowledge, absent some compelling factors to the contrary, no mitigation specialist would advise presentation of evidence through an expert alone, but would advise the use of lay witnesses to tell the client's life story." (JA 2760). d. LTC VH asserts that the defense team knew early on that "mitigation evidence would be very important and should be a comprehensive aspect of SGT Akbar's case, both at the findings phase and at the sentencing phase . . . ." This mitigation evidence would include "SGT Akbar's mental health, his family history, his religious affiliation, and his exposure to abuse throughout his childhood as well as any other relevant avenues that emerged from our pretrial investigation." Though "frontloading" was part of this strategy they "determined that the mitigation evidence needed to be presented throughout trial and at sentencing." Based on LTC VH's review of the evidence, he believed "that raising an effective and credible defense based on lack of mental responsibility would be challenging [though they] continued to pursue that possibility as well." (JA 2682). e. Mr. Dunn asserts that he told counsel to present a coherent mitigation defense which "would involve a cohesive story of SGT Akbar's multigenerational life history told through historical records, lay witnesses, and expert witnesses." Mr. Dunn "emphasized that this story must be told with the assistance of experts, but must not be told solely or primarily by experts." He "advocated that a successful integrated defense must involve witnesses from every period of the [sic] SGT Akbar's life." (JA 2964).

	f. Ms. Nerad "did not suggest that the information collected during the mitigation investigation was only for use by expert witnesses. While it is acceptable to present a mitigation specialist, mental health professionals, historians, and other experts to contextualize testimony and records, it is unacceptable to substitute lay witnesses." (JA 2779). g. Experienced capital defense attorney Mr. Stetler asserts that, in a capital case, presenting social history through expert testimony without the use of lay witnesses fell below the professional norms prevailing at the time of SGT Akbar's trial. (JA 2728-30, 2746, 2750). h. Experienced capital defense attorney Ms. LeBoeuf asserts that, in a capital case presenting social history through expert testimony without the use of lay witnesses fell below the professional norms prevailing at the time of SGT Akbar's trial. Counsel "failed to prepare at all for the eventuality that the mental state defenses they raised in the merits phase would not prevail. This is, frankly, astonishing." (JA 2723-26). i. Ms. James-Townes asserts that counsel's decision to rely primarily upon Dr. Woods' testimony to establish SGT Akbar's social history fell below accepted professional standards in a capital case. (JA 2699). j. Counsel provided a "Strategy Memorandum" outlining a defense theory based upon "a study by Lawrence T. White conducted in 1987." According to the memorandum, the study found that a conceptual argument against the death penalty based upon moral principles was the most effective. However, the study found that mental illness arguments were the least effective—even more so than no sentencing case at all. Based upon this study, counsel believed "a hybrid defense that concentrates on the mental illness and the inappropriateness of the death penalty in cases where the accused is not absolutely responsible is the best approach." (JA 2311). k. The study relied upon by counsel actually determined that the least effective defense strategy was essentially the same as the so-called "hybrid defense" they selected. Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 L. & Hum. Beh. 113, 118 (1987).

6. On 23 June 2004 the defense requested the assistance of Mrs. Scharlette Holdman from the Center for Capital Assistance (CCA). On 1 July 2004, the defense request was granted by the government. Although Mrs. Holdman estimated that 1000 hours were needed at an expense of $100.00 an hour to complete the mitigation report, she was only authorized $10,000.00 by the government for the purpose of interviewing Ms. Bilal and SGT Akbar's immediate family.	Ms. Holdman's Aug. 3, 2004, declaration asserted that the mitigation investigation would "require a minimum of nine months to conduct" placing the earliest date of completion in May 2005. Ms. Holdman also estimated the total man hours remaining at 1,600 hours at a total cost of $121,500. (JA 1811).
8. In addition to requesting Ms. Nerad's assistance, the defense also requested additional funding for her efforts. The government authorized Ms. Nerad to perform 368 hours as a defense mitigation specialist and 198 hours as an investigator. Her expenses were capped at $56,700.00. On 16 December 2004 the defense received an additional authorization for the appointment of any employee within the CCA to assist Mr. Nerad. The defense received this authorization based upon Ms. Nerad's representations that with the assistance of her team she could complete the mitigation investigation by March of 2005.	Ms. Nerad's Dec. 1, 2004, declaration said that she could not complete her mitigation investigation until Jun. 2005. This estimate employed the previous nine month forecast made by Ms. Nerad's colleague, Ms. Holdman offset by delays caused by government interference. (JA 1839-46).

Question D. What mental health experts (listing by name) did the defense team use to obtain and present mental health information at trial? In what manner were these experts employed? Was there a consensus among the experts in appellant's mental health diagnosis? What was the frequency of contact between defense counsel and the experts before, during, and after trial?

Counsel Response(s)	Contrary Evidence
1.h. The defense team always provided all available and pertinent information to Dr. Woods whenever he requested it. This information included the RCF records discussed above; a redacted version of the R.C.M. 706 proceedings for purposes of assisting defense in cross examination; SGT Akbar's diary; SGT Akbar's medical records; a report on a visits [sic] SGT Akbar had with a mental health professionals as a child and while in college; an FBI report of an interview with Mustafa Bilal, SGT Akbar's half-brother, in which Mustafa exhibited strange and paranoid behavior; medical and mental health records for SGT Akbar's father, John Akbar; military records for SGT Akbar's uncle Tyrone Rankins; conviction and parole records for William Bilal; and summaries of interviews conducted by the mitigation specialists with other members of SGT Akbar's extended family. [See attached Defense Discovery responses dated 25 March 2005 and 10 April 2005, and preparation document entitled Information to be Considered by Dr. Woods. See also e-mail communication from LTC [DB] dated 8 March 2005].	a. Dr. Woods' Aug. 4, 2004, declaration asserts a complete social history is the foundation of his conclusions and he would first need this before he could testify. (JA 1829). b. Ms. Holdman's Aug. 3, 2004, declaration asserted the mitigation investigation would "require a minimum of nine months to conduct" placing the earliest date of completion in May 2005. Ms. Holdman also estimated the total man hours remaining at 1,600 hours at a total cost of $121,500. (JA 1825-26). c. In a May 26, 2004, email to MAJ DB, Mr. Gant wrote: "One more suggestion. It's important to not pursue mental health issues until the social history is complete. I would suggest stopping everything the mental health experts are doing until the new mitigation specialist is allowed to conduct a more thorough investigation, and until you speak to George more about what types of experts and tests are likely needed." (JA 2096). d. Counsel dismissed Dr. Wood's concern that his testimony would not be effective without the supporting testimony of additional experts and lay witnesses. (JA 2245-56).

	e. Counsel did not inform Dr. Woods of the observations of psychologist, Dr. Sachs, who performed five counseling sessions with SGT Akbar in the 1990's. (JA 941, 2380, 2767, 2778, 2797). Dr. Sachs found SGT Akbar "very disturbed," but responsive to treatment. (JA 2800-01). According to Dr. Woods, "Dr. Sachs could have been used to develop the longstanding mental illness Hasan was suffering [which] would have added credibility to his diagnosis, laying the foundation for a better understanding of his actions." (JA 2795-98). f. Dr. Woods' asserts that "[t]he social history investigation in this case was a mere fraction of what I ordinarily am used to seeing in capital cases." He spent "very few hours" on social history investigation evidence compiled by the mitigation team. Dr. Woods was severely hampered by not having SGT Akbar's complete social history. His testimony was not the strongest mental health testimony possible because, only after trial, he learned of Akbar's family members who suffered from mental health disorder, incidents of physical and possibly sexual abuse of Akbar, and the additional observation of psychotic behavior by Akbar such as eating his own vomit. This incident happened before trial, but was not recorded in RCF documents, which were provided to him. Dr. Woods was insistent that counsel request more funding for testing and experts to show that his diagnosis was the correct one and not the diagnosis of the RCF experts. Counsel negatively responded to Dr. Woods request for additional funding. According to Dr. Woods his trial testimony diagnosis was "severely limited." Also, Dr. Woods was "extremely willing to testify on sentencing, the subject of either I or any of the mitigation experts ever testifying on sentencing was never broached between myself . . . and the defense attorneys." (JA 2384, 2466, 2795-98). g. Ms. Nerad asserts she was never able to complete her mitigation investigation. After funding was exhausted, though "CCA staff and I continued to pass along information and messages to MAJs DB and DC, they never again contacted us with any questions about the case." (JA 2768). h. Ms. Laura Rodgers asserts that she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." (JA 2792).

	i. Ms. Rachel Rodgers also asserts that she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds and counsel never asked her to inform them of her findings. (JA 2785-87). j. Ms. Nerad recommended that SGT Akbar be medicated and that his father, John Akbar, be evaluated by Dr. Woods to help further the social history and diagnosis of SGT Akbar. (JA 2951). Neither appears to have occurred. k. Forensic psychologist Dr. Cooley asserts that SGT Akbar did not receive a comprehensive psychological evaluation. Dr. Cooley also believes that Akbar is Schizophrenic and clinically depressed, maybe a comprehensive psychological evaluation would have revealed the same diagnosis as Dr. Cooley. (JA 2459-62).
1.m. Based upon the information assembled, Dr. Woods ultimately concluded that SGT Akbar suffered from schizophrenia, however, he was not 100% certain of his diagnosis and felt there were secondary possibilities. Like other defense experts, Dr. Woods also concluded that in his professional judgment, SGT Akbar was not insane by the legal definition at the time of the charged offenses. Accordingly, Dr. Woods worked with the defense in to [sic] find the best approach to use SGT Akbar's obvious mental illness to the best effect before the panel.	Dr. Woods informed counsel of the need for additional "neuropsychological testing" as early as Jan. 13, 2005. (JA 2222). Again on Feb. 15, 2005, Dr. Woods requested via e-mail that counsel obtain "specialized neuropsychological testing, including prepulse inhibition, habituation, and multiple tests of attention as well as distraction . . . ." (JA 2972). On Feb. 25, 2005, Dr. Woods provided a seven-page memorandum detailing the tests that needed to be conducted—"It is my professional opinion that there is no . . . acceptable way to conclude a clinically effective evaluation and treatment of Sgt. Akbar's arousal condition by Apr. 5, 2005." (JA 2395). After the attack on the guard, Dr. Woods once more reiterated the "need to get [SGT Akbar] tested as soon as possible." (JA 2280). There is no evidence counsel ever obtained this testing.
1.n. Dr. Woods was aware that the other members of the mental health team did not support his diagnosis. As discussed below, Dr. Clement's testing reflected schizophrenia, however she believed SGT Akbar was able to appreciate the nature and quality or wrongfulness of his actions at the time of the charged misconduct. Accordingly, she was not viewed as a strong witness and it was determined it was best to simply let her testing shape Dr. Woods' diagnosis	a. Responses 1.m. and 1.n. are inconstant. Both Dr. Woods and Dr. Clement agreed that SGT Akbar showed symptoms of schizophrenia, but was mentally responsible for his actions under the legal definition. Dr. Woods also testified that SGT Akbar was not insane and understood the natural consequences of his actions. (JA 0873, 0909, 0911). Therefore, counsel's assertion that Dr. Clement's testimony might be harmful simply because she believed that SGT Akbar could appreciate the nature and quality of his actions is demonstrably unreasonable especially when considering the mitigation value of the testimony. b. In a Mar. 7, 2005, email, Dr. Woods' notified counsel of his concern that his testimony would not be sufficiently supported by military experts and lay witnesses. (JA 2254-56).

	c. Dr. Woods asserts that he does "not understand trial defense counsel's assertion that Dr. Clement did not agree with my diagnosis . . . . We both believed Hasan was schizophrenic, and both believed at that time Hasan was legally mentally responsible." (JA 2795-98).

Question E. With respect to voir dire and panel member selection, including the use of challenges, what was the defense strategy?

Counsel Response(s)	Contrary Evidence
3. In addition to the use of this evidence to show future dangerousness, the defense was concerned that if we pushed hard to challenge anyone that may have heard about the incident, that it would result in either a change of venue or a delay to identify a potential panel without any exposure. It was the defense's belief that any delay could result in the government simply choosing to charge the alleged assault. While this would have likely required reopening the Article 32, we believed the government may determine that such an expense of time was worth it.	a. This response ignores that the convening authority had already detailed alternate members and a plan to replace members if the panel failed to meet quorum. (JA 3245-46). b. Nothing in the record indicates the government would retaliate by withdrawing and referring additional charges if counsel attempted to conduct an effective voir dire due to member bias. c. "After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused." R.C.M. 602(e)(2). d. "Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason." R.C.M. 604(b). e. "Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional rights or rights provided under the code, or with the impartiality of a court-martial." R.C.M. 604(b) (Discussion). f. The "members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court." Art. 41(a)(1), UCMJ. g. "'Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'" *Morford v. United States*, 339 U.S. 258 (1950) (quoting *Dennis v. United States*, 339 U.S. 162, 171-72 (1950)).

Question F. What was the decision-making process in admitting appellant's diary, in its entirety, into evidence?

Counsel Response(s)	Contrary Evidence
1. The government had, in its merits case, already admitted the most damaging aspects of SGT Akbar's diary. The government introduced Prosecution Exhibit 176a into evidence. Although we were able, under the rule of completeness, to force the government to induce the other	a. Counsel's pretrial strategy memorandum shows they were considering offering SGT Akbar's diary as sentencing evidence independent of the government's use of it on the merits. (JA 2316-17).

entries from the diary, the government successfully focused the members on the most damaging aspects of the diary by displaying to the members Prosecution Exhibits 176b, 176c, 176d, and 176e.	b. Counsel identified two pages of damaging portions of the diary that the government was prohibited from admitting. (JA 3038-39). Counsel planned to explain away these portions of the diary through the expert testimony of Dr. Southwell or Dr. Diebold. *Id*. However, counsel did not interview these experts face-to-face until after the trial had started and determined too late that they could not be helpful in presenting the diary. (JA 3029, 3033). c. Ms. Nerad asserts that "[w]hether the diary should be admitted was an ongoing discussion." She did not recommend offering the diary absent additional evidence and experts placing into context, but she was not able to sway MAJ DB. (JA 2777-78). d. *See* Assignment of Error A.I, section A.2, for a detailed listing of damaging aspects of SGT Akbar's diary not introduced by the government, many of which the government used during its sentencing argument.
4. It was Dr. Wood's assessment along with Defense Exhibits B and C along with the fact the government had already introduced the most damaging aspects of SGT Akbar's diary that persuaded the defense to decide to admit SGT Akbar's complete diary into evidence. It was our belief that once the panel members read the diary, they would conclude that SGT Akbar did indeed have mental health issues. Perhaps the most persuasive aspect of the diary was the fact it was written before the alleged events and covered a significant time period from 1990 to early 2003.	a. Dr. Woods asserts that counsel's decision to admit the diary "was a mistake, and I never advised or would have advised trial defense counsel to admit the diary as they did." According to Dr. Woods, if counsel wanted to admit the diary they should have done so cautiously through his testimony. (JA 2797). b. Dr. Woods asserts though he was "extremely willing to testify on sentencing, the subject of either I or any of the mitigation experts ever testifying on sentencing was never broached between myself . . . and the defense attorneys." (JA 2470). c. Before referral, Ms. Grey's Apr. 15, 2004, notes inform counsel that in her view mitigation is needed to "explain and contextualize the journal which the GOVT will enter into evidence." (JA 2008). d. Ms. Grey states that her summary admitted at trial "was not created . . . for court use and was not created to stand in isolation. If asked, I would not have recommended that the diary or the interview summaries be used in a court presentation . . . ." (JA 2761).

April 2, 2013 Trial Defense Counsel Affidavit (Gov't App. Ex. 13)

Question A. Respond to appellate counsel's assertion that Majors DB and DC did not conduct face-to-face interviews with potential civilian mitigation witnesses.

Counsel Response(s)	Contrary Evidence
1. We conducted face-to-face interviews with a number of the civilian mitigation witnesses. For those that we did not, it was due to the fact that a face-to-face interview was previously conducted by a member of the defense team, and we only needed to conduct a telephonic follow-up interview of the witness for trial preparation.	a. Counsel who tried the case provide no evidence that they interviewed any witness who was not at trial. Counsel do not say specifically who they interviewed face-to-face. b. Family members, friends and associates who provided declarations regarding their potential testimony all state they were not interviewed face to face by counsel. (JA 2829, 2834, 2850, 2854, 2859, 2871, 2873, 2876, 2878, 2881, 2883, 2886).
2. The mitigation specialists were hired because of their expertise in gathering mitigation evidence in capital cases. Their experience and input was critical in developing our approach to identifying mitigation witnesses and gathering mitigation evidence. In consultation with the mitigation experts, both Ms. Deborah Grey and Mrs. Scharlotte Holdman, we developed a process for identifying and preparing witnesses. When a potential witness was identified, the mitigation experts would typically travel to meet with the witness. Using their experience and expertise, they would interview the witness to discern potential mitigation testimony. The information they obtained was presented to defense counsel, usually in the form of a written summary of their interview of the witness. Upon the submission of such summaries, we would collectively discuss the potential witnesses to get a greater sense of what they could offer and what other leads the witnesses might have suggested. If the witness seemed promising, then one of the defense counsel would contact the witness via phone and conduct a phone interview. Based on the phone interview and the detailed input provided by the mitigation expert, potential trial witnesses were selected and others were eliminated. Every witness who testified was interviewed face-to-face and the testimony was rehearsed prior to trial. This process is similar to that used by LTC DC and COL DB in other cases where an out-of-town witness's testimony is developed first by a phone interview and then through in-person preparation prior to in-court testimony.	a. Email provided by counsel shows they were dismissive of Ms. Nerad's recommendation to use Dr. Sachs as a witness. Following a telephone interview with Dr. Sachs, MAJ DB accused Ms. Nerad of coaching the witness and referred to her potential testimony as "a complete load of crap that I would never bring into court." (JA 2381). b. Dr. Sachs asserts she performed five counseling sessions with SGT Akbar in the 1990's and found him "very disturbed," but responsive to treatment. Dr. Sachs "remembered Hasan because he was so disturbed but did seek help, something many psychologically damaged people find very difficult to do if indeed they do it at all." After speaking with Ms. Nerad about SGT Akbar, an Army Major called Dr. Sachs. "He told me that without any written records, he would not be able to use any information from me. He did not interview me or ask me any questions about Hasan." (JA 2800-01). c. Ms. Nerad asserts her concerns with counsel's interest in investigating and developing SGT Akbar's case continued throughout her tenure. She continually tried to meet with counsel to review her findings and develop a trial plan without success. However, "[n]either MAJ DB nor DC ever requested a team meeting, and I was never able to successfully schedule a full in-person or telephonic team meeting." Counsel "never requested any assistance on mitigation strategy and presentation of that strategy, which is one of our most valuable services that we can provide counsel, even experienced counsel." After funding was exhausted, "[a]lthough CCA staff and I continued to pass along information and messages to MAJs DB and DC, they never again contacted us with any questions about the case." (JA 2768).

	d. Ms. Laura Rodgers was unable to complete important witness interviews with SGT Akbar's extended family for lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." (JA 2792). e. Ms. Rachel Rodgers also was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds and counsel never asked her to inform them of her findings. (JA 2785-87). f. Mr. Lohman "reported [his] observations, opinions and recommendations to Sgt. Akbar's military lawyers in person and in writing." Mr. Lohman also "explained to counsel that the preliminary investigated [sic] we conducted was not adequate for trial presentation and required sustained and informed follow up investigation." However, "Sgt. Akbar's attorneys were not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." (JA 2549-51). g. Mr. Duncan asserts that before trial he only received phone calls informing him when he would testify and providing travel information. Mr. Duncan further asserts that his "testimony was not rehearsed in any way, and if I even discussed the content of my testimony with Hasan's attorneys, it was not substantial enough for me to remember." The morning Mr. Duncan testified "was the first time [he] met the attorneys who were representing Hasan at his court-martial." (JA 2850). h. Emails from Ms. Grey, and a separate email from LTC VH, both indicate that Dan Duncan was not a strong mitigation witness and that John Mandell would be a better witness than Dan Duncan. (JA 2017-18, 2045, 2960). i. Mr. John Akbar (father) asserts that though he spoke with SGT Akbar's counsel before trial, "they never really interviewed me. The conversations were mostly about what the courts were going to do and how it worked." (JA 2829). j. Ms. Bernita Rankins (maternal aunt) asserts that she spoke to SGT Akbar's counsel only once in 2004 before being interviewed by the mitigation specialists. (JA 2834). k. Ms. Catherine Brown (cousin) asserts that she spoke with a "Caucasian woman" in 2004, but never spoke with SGT Akbar's counsel. (JA 2883).

	l. Ms. Sultana Bilal (sister) asserts that before SGT Akbar's trial she spoke with a woman named "Laura," but never spoke with his counsel. (JA 2859). m. Ms. Mashiyat Akbar (sister) asserts that before SGT Akbar's trial she was interviewed by a "Caucasian woman," but never spoke with his counsel. (JA 2871). n. Ms. Starr Wilson (cousin) asserts that she was interviewed "by two federal agents," but she never spoke with SGT Akbar's counsel. (JA 2873). o. Ms. Ruthie Avina (friend) asserts that she was interviewed by a woman named "Scarlett." Thereafter, a man called to verify "her information because he believed her notes had been embellished . . . . He didn't ask any open-ended questions. The conversation lasted 15 minutes. (JA 2878). p. Ms. Springer (former landlord) asserts that she spoke with a man over the phone in late 2003 or early 2004." Though the man said that he planned on traveling to California to interview people about SGT Akbar, she never heard from him again. (JA 2881).
3. During our pretrial preparation we conducted a face-to-face or telephonic interview, and in some cases both, of the following civilian mitigation witnesses: Mr. John Akbar (SGT Akbar's father); Mr. Musa Akbar (SGT Akbar's brother); Mr. Mustafa Bilal (SGT Akbar's brother); Ms. Mashiyat Akbar (SGT Akbar's sister); Ms. Sultana Bilal (SGT Akbar's sister); Mrs. Quaran Bilal (SGT Akbar's mother); Imam Abdul Karim Hasan (former Imam for SGT Akbar's family when he was a child); Ms. Gail Garrett (classmate of SGT Akbar); Mr. Dan Duncan (high school teacher of SGT Akbar); Mr. John Mandell (Pre college counselor of SGT Akbar); Mrs. Doris Davenport (school guidance counselor of SGT Akbar); Ms. Roberta Osborne (undergraduate curriculum advisor to SGT Akbar); Ms. Rhonda Sparks-Cox (high-school counselor of SGT Akbar); Mr. Ron Hubbard (former college roommate of SGT Akbar) Mr. Kamal Lemseffer (college friend); Ms. Starr Wilson (SGT Akbar's cousin); Mr. William Bilal (SGT Akbar's step-father); Ms. Zineb Lemseffer (the former wife of SGT Akbar from an arranged marriage); Ms. Connie Dickenson (high school counselor of SGT Akbar); and Ms. Regina Weatherford (Fellow student with SGT Akbar). In addition to these witnesses, the defense team had interviewed several other potential civilian mitigation witnesses. However, these other potential witnesses were eliminated either	a. Mr. John Akbar asserts though he spoke with SGT Akbar's counsel before trial, "they never really interviewed me. Most of the conversations were only about what the courts were going to do and how it worked." (JA 2829). b. Ms. Sultana Bilal asserts that before SGT Akbar's trial she spoke with a woman named "Laura," but never spoke with his counsel. (JA 2859). c. Ms. Mashiyat Akbar asserts that before SGT Akbar's trial she was interviewed by a "Caucasian woman," but never spoke with his counsel. (JA 2871). d. Mr. Duncan asserts that before trial he only received phone calls informing him when he would testify and providing travel information. Mr. Duncan further asserts that his "testimony was not rehearsed in any way, and if I even discussed the content of my testimony with Hasan's attorneys, it was not substantial enough for me to remember." The morning Mr. Duncan testified "was the first time [he] met the attorneys who were representing Hasan at his court-martial." (JA 2850). e. Ms. Starr Wilson asserts that she recalls speaking with "two federal agents," but she never spoke with SGT Akbar's counsel. (JA 2873).

because they had no recollection of SGT Akbar, or their potential testimony would not be favorable to him.	f. Counsel's Sept. 8, 2004, witness list included Imam Hasan, Mr. Mandell, Ms. Davenport, Ms. Garrett, Ms. Sparks-Cox, Ms. Osborne, Mr. Hubbard, Mr. Lemseffer, and Ms. Star Wilson. (JA 2927-29). g. On Dec. 2, 2004, government notified the defense and military judge that they have not been able to contact, after repeated attempts, Imam Hasan (incorrect contact information), Mr. Mandell (no response), Ms. Davenport (no response), Ms. Garrett (no response), Ms. Sparks-Cox (no response), Ms. Osborne (incorrect contact information), Mr. Lemseffer (no response), Mr. Hubbard (incorrect contact information), or Ms. Star Wilson (incorrect contact information). (JA 1836; *see also* JA 267). h. On Mar. 3, 2005, government denied production of the following defense witnesses because they could not be contacted: Imam Hasan (no response), Ms. Garrett (no response), Ms. Sparks-Cox (no response), Ms. Osborne (no response), Mr. Lemseffer (incorrect contact information), Mr. Hubbard (incorrect contact information), and Ms. Starr Wilson (incorrect contact information). (JA 1875). i. Government withdrew its witness denial based on defense counsel's provision of updated contact information and decision not to call some of the witnesses that were denied. (JA 268-69). j. On Mar. 15, 2005, counsel removed the following persons from the defense witness list: Imam Hasan, Ms. Garrett, Ms. Sparks-Cox, Ms. Osborne, Ms. Davenport, Mr. Lemseffer, and Ms. Starr Wilson. (JA 2921-23). k. Though counsel provided updated contact information for Mr. Hubbard on Mar. 15, 2005, Mr. Hubbard was not called to testify on SGT Akbar's behalf at trial. (JA 2910-23). l. Counsel provided no specificity, notes or emails regarding how, when, and who conducted the interviews of any of these potential witnesses.

Question B. When LTC [VH] ceased his representation, he identified thirteen witnesses that he recommended be contacted. (Gov. App. Ex. 5, at 4 [E-mail from LTC [VH] to LTC DB, 6 February 2004]). Describe which witnesses were contacted by the defense team, and why any witnesses were not contacted, if applicable. Other than Mr. Dan Duncan, why were none of these witnesses utilized in appellant's court-martial?

Counsel Response(s)	Contrary Evidence
1. The e-mail from LTC [VH] on 6 February 2004 listed witnesses that he had interviewed along with our former mitigation expert Ms. Grey. The list provided by LTC [VH] was not intended to be a list of witnesses that he recommended we contact. Instead, the list was intended to provide us with his perspective on a scale of 1-4 regarding the potential usefulness of the previously interviewed witnesses. Using the process discussed above, in preparation for SGT Akbar's trial, we contacted each of the listed witnesses with the exception of Ms. Barbie Goodin, Professor Havez, and Professor Charttot. We did not contact these witnesses because they had previously indicated to the defense team they had no recollection of SGT Akbar.	a. Email in question lists: Imam, Musa Akbar, Mr. Duncan, Mr. Mandell, Ms. Davenport, Ms. Garrett, Ms. Sparks, Ms. Osborne, John Akbar, and Prof. VanDam as witnesses with recollection of SGT Akbar. (JA 2045). b. Counsel's Sept. 8, 2004, witness list includes Imam Hasan, Musa Akbar, Mr. Duncan, Mr. Mandell, Ms. Davenport, Ms. Garrett, Ms. Sparks-Cox, Ms. Osborne, and John Akbar. (JA 2927-29). c. Email from LTC VH on Mar. 4, 2004, reiterated his opinion that the defense should not call Mr. Duncan and Ms. Davenport. (JA 2960).
2. As discussed in our previous affidavit, the alleged incident of 30 March 2005 (scissor attack) had a devastating impact on the defense's sentencing case. Although we were successful in precluding the government from referencing the incident during the trial, the military judge indicated that his ruling was made without prejudice for the government to revisit the decision at a later date. [ROT at 785]. The defense interpreted this ruling as allowing us to control whether the information was ultimately admissible during the sentencing stage of the trial. We believed that if we opened the door to this evidence by referencing future dangerousness or that the alleged incidents in Iraq were not within the character of SGT Akbar, we would open the door to the 30 March 2005 incident on rebuttal.	a. In an email from MAJ DB to Dr. Walker, MAJ DB discusses the Mar. 30, 2005, incident, and writes "[i]n terms of the trial, the impact will be limited." (JA 2287). b. Of the eighteen civilian sentencing witnesses counsel requested between Sept. 8, 2004, and Mar. 15, 2005, all but six were removed on or before Mar. 29, 2005. (JA 2910-29). c. After Mar. 30, 2005, the defense removed only two witnesses from their witness list: Mr. Bowen and SFC Riveria-Camacho. Of these, only the removal of confinement facility social worker, Mr. Bowen, could be reasonably related to the stabbing incident based upon their expected testimony. (JA 2910-18). d. After Mar. 30, 2005, the only non-expert, civilian defense witnesses remaining were: Ms. Bilal, John Akbar, Musa Akbar, Mr. Duncan, Ms. Weatherford, Mr. Hubbard and Mr. Tupaz. Of these, only Mr. Duncan and Mr. Tupaz testified. (JA 1433, 1449-50, 2912-13). e. On Apr. 22, 2005, the government moved the military judge to reconsider his decision to exclude evidence of the Mar. 30, 2005, incident. Defense counsel maintained their original opposition to the motion and agreed that if the incident "became an issue at all, it would be in a rebuttal case." Defense counsel also agreed that the rebuttal issue was one they could "address after the close of the defense

	sentencing case." The defense counsel voiced no concern that any testimony they planned to offer on SGT Akbar's behalf could potentially "open the door" to the Mar. 30, 2005, incident or seek reasonable parameters from the military judge on this issue to ensure otherwise innocuous witness statements would not justify the government's use of the uncharged misconduct. (JA 1072). f. On Apr. 25, 2005, the military judge again denied the government's request finding that "the stabbing is not directly related to, or resulting from, the offenses of which the accused has now been found guilty. Regardless, even assuming such a connection, I find the marginal probative value of such evidence, offered in a capital sentencing case, is substantially outweighed by the danger of unfair prejudice." (JA 1082). g. On Apr. 27, 2005, Mr. Duncan testified: "Well, I think because it was just something I never would have expected. You know, some students you sort of expect to see that kind of thing in the future, but that was so out of character from the person that I'd known." (JA 1430). h. On Apr. 26 and 28, 2005, counsel admitted several statements from family and friends either describing SGT Akbar as peaceful or his offenses out of character based on their interactions with him. Nothing contained in these statements indicates that the witnesses would have provided testimony more likely to "open the door" to rebuttal than the evidence counsel actually offered. (JA 1391, 1449, 1602, 1626, 1628, 1645). i. Under M.R.E. 405(c), if the defense offers written statements concerning the character of the accused, "the prosecution may, in rebuttal, also introduce affidavits of other written statements regarding the character of the accused." Even so, the record demonstrates counsel had no concerns about potentially "opening the door" with documentary evidence. j. On Apr. 28, 2005, counsel informed the military judge of his "tactical" decision not to call any of the remaining civilian witnesses on the day they were scheduled to testify. (JA 1433, 1449-50). k. Ten of the fifteen panel members knew of the stabbing incident through extrajudicial means. *See* Assignments of Error A.I, section C, and A.IV.

3. After SGT Akbar's alleged conduct on 30 March 2005, the defense was left with attempting to frontload as much mitigation as possible during the merits stage of the trial. After the merits, the defense turned to the documentary evidence collected during the mitigation investigation, the remaining witnesses that could offer testimony that supported the evidence elicited during the merits, and the testimony of Dr. Woods.	Based on witness lists, counsel apparently "turned to documentary evidence" over live testimony well before the Mar. 30, 2005 incident. (JA 2910-29).
4. We re-interviewed each of our civilian mitigation witnesses. During our re-interview, we explained the nature of the military judge's ruling regarding the 30 March 2005 incident and the importance not to offer any testimony regarding future dangerousness or that the alleged incidents in Iraq were not within the character of SGT Akbar. Ultimately, the defense chose to call Mr. Duncan as opposed to any of the other witnesses due either 1) the witness indicating they no longer were willing to voluntarily testify on SGT Akbar's behalf; 2) the inability of the witness to limit their testimony in order to avoid opening the door to the 30 March 2005 incident on rebuttal; or 3) our determination that the witness could only offer testimony regarding future dangerousness or the fact the alleged incidents in Iraq were not within SGT Akbar's character.	a. Defense counsel never identifies who was "re-interviewed" or which witness fell into which of the three purported reasons for not calling the unnamed witnesses. b. As of Mar. 15, 2005, the only remaining non-expert, civilian witnesses on the defense witness list were: Ms. Bilal, John Akbar, Musa Akbar, Mr. Duncan, Ms. Weatherford, Mr. Hubbard (who was likely never contacted), Mr. Tupaz, and Mr. Bowen. (JA 2914-23). c. After Mar. 30, 2005, the defense removed only two witnesses from their witness list: Mr. Bowen and SFC Riveria-Camacho. Of these, only the removal of confinement facility social worker, Mr. Bowen, could be reasonably related to the stabbing incident based upon their expected testimony. (JA 2910-18). d. Mr. John Akbar asserts though he spoke with SGT Akbar's counsel before trial, "they never really interviewed me. Most of the conversations were only about what the courts were going to do and how it worked." Mr. Akbar attended the trial expecting to testify. "However, the lawyers wouldn't let me or Quran testify. Attorney DC said that he was afraid that harm would come to us. I believe that Attorney DC told Hasan that, and Attorney DC said that Hasan agreed with that and did not want us to testify so that we would be safe. I never heard of any threats, but he indicated that maybe someone would try to assassinate us. I did not care. I wanted to testify on behalf of my son, and told Attorney DC I wanted to testify." (JA 2829). e. Mr. Duncan asserts that before trial he only received phone calls informing him when he would testify and providing travel information. Mr. Duncan further asserts that his "testimony was not rehearsed in any way, and if I even discussed the content of my testimony with Hasan's attorneys, it was not substantial enough for me to remember." The morning Mr. Duncan testified "was the first time [he] met the attorneys who were representing Hasan at his court-martial." (JA 2850).

	f. On Apr. 26 and 28, 2005, counsel admitted several statements from family and friends either describing SGT Akbar as peaceful or his offenses out of character based on their interactions with him. Nothing contained in these statements indicates that the witnesses would have provided testimony more likely to "open the door" to rebuttal than the evidence counsel actually offered. (JA 1391, 1449, 1602, 1626, 1628, 1645). g. On Apr. 27, 2005, Mr. Duncan testified: "Well, I think because it was just something I never would have expected. You know, some students you sort of expect to see that kind of thing in the future, but that was so out of character from the person that I'd known." (JA 1430). h. The four mitigation specialists who last participated in SGT Akbar's case agree that they play an important role in preparing witnesses to testify, but counsel never requested their assistance in this regard. (JA 2554-55, 2768, 2787, 2792).

Question C. Respond to Ms. Nerad's assertion that she advised you to travel to California and Louisiana. If the decision was made to not travel to these locations, why did the defense team decide not to travel to California and Louisiana to meet personally with people who knew appellant and were potential mitigation witnesses?

Counsel Response(s)	Contrary Evidence
1. While it is possible Ms. Nerad made such a request, we do not have any recollection of Ms. Nerad advising us to travel to California or Louisiana on any specific occasion to interview any specific witness. Likewise, we have no notes or email traffic indicating that she made such a request. There were two civilian counsels who were lead counsel for extended periods of time. During the times the civilian counsel were on the case, both required that all such requests be made through them. As such, it is possible Ms. Nerad made such a request to one of the civilian defense counsel and it was not relayed to the undersigned. Members of the defense, including the undersigned, did travel to interview witnesses. LTC [VH] did make a trip with Ms. Grey to California and possibly Louisiana as well. He was able to provide the rest of the defense team with his insight on those locations as well as some pictures. As such, the objective of having a member of the defense team travel to those locations was in fact met, although LTC [VH] was later fired by SGT Akbar. Had Ms. Nerad advised the undersigned to travel to California, Louisiana, or any other location, in order to interview a specific witness, we would have either done so, or completed the	a. Ms. Nerad asserts: "Despite my repeated requests, both [counsel] failed to travel to California and Louisiana, to survey the community where SGT Akbar was raised, to meet with contacted community leaders and educators, to meet with members of SGT Akbar's family, or to hold team meetings." (JA 2770). b. In March 2004, MAJ DB told Ms. Grey that he would "like to . . . meet with Akbar's sisters." (JA 2959). He never visited them or called them on the phone. (JA 2859, 2871). c. In July 2004, MAJ DB told MAJ DC that they needed to "determine who we want to meet with in person before the trial." (JA 2058). d. LTC VH's e-mail discussing his impressions of the potential witnesses that he interviewed (JA 2045) "was not intended to be a list of witnesses that he recommended we contact." (JA 2348).

interview telephonically depending on the nature of the potential testimony.	

Question D. Respond to Ms. Nerad's assertion that she advised you to request a cultural expert. If the defense team did not request a cultural expert, why not?

Counsel Response(s)	Contrary Evidence
1. The undersigned do not recall any specific discussion of a cultural expert with Mrs. Nerad. However, COL DB has one email that indicates that someone from the mitigation team suggested a professor who was an expert on Islam. It is possible that this is the witness to which Mrs. Nerad is referring. The email suggests speaking with Mrs. Aniah McCloud, from DePaul University. COL DB recalls speaking with Mrs. McCloud on the phone on one occasion. He also researched her background and learned of some long-standing connections to the Nation of Islam (Enclosure 1). Whether the information was accurate or not, it presented an avenue of cross-examination that, in our opinion, would have undercut the value of that witness and could have also damaged our case. We did not want to give the government an avenue through which to introduce the links between SGT Akbar's family and the more militant brand of Islam that was likely to carry strong negative connotations with the panel members. We do not recall if any other alternatives were pursued and if they were not, why they were not pursued.	a. Ms. Nerad asserts that counsel "refused to request resources for or contact a cultural expert despite my insistence that case law required it and that it would be an essential part of developing SGT Akbar's social history." (JA 2770). b. Counsel's asserted concern with the Nation of Islam is inconsistent with their decision to submit SGT Akbar's complete, unvarnished, diary expressing violent Islamic extremism throughout based on the teachings of the Nation of Islam. (Def. Ex. A (sealed exhibit)).

Question E. Describe what independent mitigation investigation and witness interviews the defense team conducted on their own separate and apart from the mitigation specialists.

Counsel Response(s)	Contrary Evidence
1. The defense team conducted independent interviews of the members of SGT Akbar's unit, witnesses to the charged conduct, other military members who had past contact with SGT Akbar, family members of the victims, family members of SGT Akbar, and friends and former teachers of SGT Akbar. This question is answered in more detail in Question I below and in Question A of the 29 October 2010 affidavit.	Defense counsel's answer is not fully responsive to the Army Court's directive to "describe." *See* responses and contrary evidence for Question I of the Apr. 2, 2013, affidavit below and Question A of October 29, 2010, affidavit above.

Question G. Describe the relationship between the defense team and each of the mitigation specialists assigned to the case. Respond to each of the mitigation specialists' assertions concerning lack of contact with the defense team.

Counsel Response(s)	Contrary Evidence
2. The defense team had a good relationship with all of the mitigation specialists in the case. Prior to the allegations referenced in our previous affidavit, the only assertion concerning a lack of contact with the defense team came from Ms. Nerad. As previously mentioned, the defense received an email from Ms. Nerad on 5 November 2004. In her email, Ms. Nerad stated that she was having difficulties in speaking with the defense team and was concerned over the focus of the mitigation case. [See attached Scarlet Nerad and CCA email messages from 29 October 2010 affidavit]. COL DB responded to this email on the next duty day and pointed out that we had been in frequent communication with her, were accessible to her at any time, and had provided her with an in depth overview of the defense's view of the mitigation case and the areas in which we needed her assistance which she earlier had described as an "excellent roadmap." [Id.]. After this point, Ms. Nerad seemed to retract from her concerns, and renewed her focus on completing her mitigation investigation.	a. Multiple emails disclosed by counsel show that Ms. Nerad's concerns regarding their interest in developing SGT Akbar's mitigation case continued after Nov. 5, 2004. (JA 2202-03, 2205, 2208-10, 2213, 2380-81, 2938, 2950). b. Ms. Nerad asserts that her concerns with counsel's interest in investigating and developing SGT Akbar's case continued throughout her tenure. Ms. Nerad continually attempted to meet with counsel to review her findings and develop a trial plan without success. However, "[n]either MAJ DB nor DC ever requested a team meeting, and I was never able to successfully schedule a full in-person or telephonic team meeting." Moreover, from Jan. to Mar. 2005, Ms. Nerad repeatedly warned counsel that she needed additional time and funds. (JA 2205, 2208-09, 2766-68, 2771, 2934-38). c. Ms. Laura Rodgers she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." At one point, counsel fired Ms. Rodgers at the request of SGT Akbar's mother. The client, himself, reinstated Ms. Rodgers. (JA 2792). d. Ms. Rachel Rodgers also was never given guidance from counsel as to how to conduct the investigation and she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Additionally, counsel never asked her to discuss her findings. (JA 2785-87). e. Mr. Lohman "reported his observations, opinions and recommendations to Sgt. Akbar's military lawyers in person and in writing." Mr. Lohman also "explained to counsel that the preliminary investigated [sic] we conducted was not adequate for trial presentation and required sustained and informed follow up investigation." However, "Sgt. Akbar's attorneys were not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." (JA 2549-51).

Question H. What specific guidance or instructions did the defense team provide to the mitigation specialists as to how to conduct their investigation? Describe in detail the "excellent roadmap" reference in paragraph thirty-eight of Gov. App. Ex. 1.

Counsel Response(s)	Contrary Evidence
2. The purpose of coordinating the mitigation effort was in order for us to identify the best mitigation evidence available and the best witnesses to present that information. We informed Ms. Nerad we needed her to conduct an honest evaluation of our potential mitigation. We also told her that we needed her to be realistic when evaluating our mitigation evidence and witnesses in order to ensure that we were presenting information in a manner that maintained our credibility with the panel.	a. Ms. Nerad asserts that counsel "never requested any assistance on mitigation strategy and presentation of that strategy, which is one of our most valuable services that we can provide counsel, even experienced counsel." After funding was exhausted, "[a]lthough CCA staff and I continued to pass along information and messages to MAJs DB and DC, they never again contacted us with any questions about the case." (JA 2768). b. Mr. Lohman asserts that counsel were "not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." "In virtually all instances counsel's response was, 'that's not possible,' 'that won't work,' and 'that's not the way it's done in the military.'" After funding was exhausted, Mr. Lohman was not "contacted and asked about my knowledge of any facts in the case, about my direct knowledge of any of the mitigation witnesses of my experiences with them of my insights into their suitability as trial witnesses." (JA 2551-52, 2554). c. Ms. Laura Rodgers was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." (JA 2792). d. Ms. Rachel Rodgers also was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds and counsel never asked her to inform them of her findings. (JA 2785-87). e. Ms. Grey asserts that the products she created while serving as SGT Akbar's mitigation specialist were not intended for trial use and she would not have recommended that they be used in lieu of live testimony. (JA 2759). f. After acknowledging that admission of the diary would cause the loss in credibility (JA 2281), counsel admitted the damning diary in total without explanation. *See* Assignment of Error A.I, Section A.2.

3. We informed Ms. Nerad that given the amount of work remaining, we needed her to push hard to complete the mitigation report. Specifically, we told Ms. Nerad that she should view her job as a triage doctor; where she focused on information that was the most likely to be helpful to the defense. We also informed her that she needed to focus on viable mitigation information and in locating evidence that would assist Dr. Woods and the defense in presenting the best mitigation case. Additionally, we informed her that if something was not going to further our defense or our theory of the case, then she needed to move on to the next objective without wasting any time. Finally, we informed Ms. Nerad that she was a part of the defense team, and could contact COL DB or LTC DC at anytime.	a. In a May 26, 2004, email to MAJ DB, Mr. Gant wrote: "One more suggestion. It's important to not pursue mental health issues until the social history is complete. I would suggest stopping everything the mental health experts are doing until the new mitigation specialist is allowed to conduct a more thorough investigation, and until you speak to George more about what types of experts and tests are likely needed." (JA 2096). b. This response is inconsistent with counsel's response in Question A, para. 2 of the Apr. 2, 2013, affidavit. Directing Ms. Nerad to disregard anything not directly supportive of counsel's preconceived defense theory is inapposite with the collective, deliberative selection process previously described. (*See* JA 2196 (email from MAJ DB to a mitigation specialist telling her to focus him on information relating to the mental responsibility defense, omitting any mention of mitigation evidence)). This response further shows that counsel determined their trial strategy based upon an incomplete pretrial investigation.

Question I. Describe the defense team's involvement in the process of interviewing witnesses during the mitigation investigation. Did the defense team direct the mitigation specialists to particular witnesses? Did the defense team participate in any of the interviews of witnesses? Did the defense team conduct follow-on interviews of witnesses identified by the mitigation specialists?

Counsel Response(s)	Contrary Evidence
1. As discussed in response to question A above, the Defense team followed a relatively standardized procedure to interviewed witnesses along with our initial mitigation expert Ms. Grey. The majority of these witnesses were family, friends, former teachers, and former coworkers of SGT Akbar. The coordination and execution of these interviews was conducted in cooperation with Ms. Grey. In addition to interviewing certain mitigation witnesses along with Ms. Grey, the defense team also interviewed unit mitigation witnesses separately both in person and telephonically. Whenever any of this information was deemed relevant to Ms. Grey's report, we would forward a copy of the interview notes to her for her incorporation.	*See* responses and contrary evidence for Questions A and H of the Apr. 2, 2013, affidavit above.
9. Over the next few months, Ms. Nerad worked with Dr. Woods to complete the social history of SGT Akbar. She provided regularly [sic] reports of her activities to the defense. Mr. Al-Haqq would take the lead on responding to Ms. Nerad after soliciting opinions from COL DB and LTC DC.	As of Nov. 9, 2004, MAJ DB told Mr. Al-Haqq that they had not "heard from you for quite some time, so I do not know how frequently you are in contact with [the mitigation specialists]." (JA 3007).

10. On 22 February 2005, the defense received a call from Mr. Al-Haqq. He informed the defense that he would be seeking to withdraw from the case due to his not getting paid. On 4 March 2005, Mr. Al Haqq was officially removed as counsel for SGT Akbar. [ROT 768-70]. With the removal of Mr. Al-Haqq, COL DB took the lead of coordinating with Ms. Nerad. At this point, all of the relevant witness interviews had been completed. The focus of Ms. Nerad and her team was on collecting documentary evidence of SGT Akbar's social history and in potentially identifying additional witnesses.	a. On Aug. 3, 2004, Ms. Holdman estimated the mitigation investigation would "require a minimum of nine months to conduct," with completion in May 2005. (JA 1826). b. Ms. Nerad's Sep. 2004, declaration estimated the time and cost "for the second phase of investigation" not to "complete the mitigation investigation." The declaration specified that "in addition to this effort, additional funds will likely be needed to fully analyze the information received in document and from witnesses, to communicate with counsel and with appropriate mental health professionals, and to prepare witnesses and documents for trial. At that time, I will submit and [sic] additional request for funds." (JA 2174-79). c. Ms. Nerad's Dec. 1, 2004, declaration estimated she could not complete her mitigation investigation until June 2005. This estimate adopted Ms. Holdman's initial nine month estimate adjusted by time lost due to government interference. (JA 1844). d. Ms. Nerad asserts she repeatedly informed counsel she could not complete the investigation, review information collected, or complete trial preparations within the time and funding parameters provided by the Sep. 2004 authorization and never indicated otherwise. (JA 2766-68). These assertions are supported by emails sent to counsel in February 2005 where Ms. Nerad emphasizes the necessity to conduct additional interviews. (*See* JA 2205, 2208-09). e. Mr. Lohman asserts counsel were "not receptive to the suggestions and opinions of those of us with a great deal of experience in capital representation." "In virtually all instances counsel's response was, 'that's not possible,' 'that won't work,' and 'that's not the way it's done in the military.'" After funding was exhausted Mr. Lohman was not "contacted and asked about my knowledge of any facts in the case, about my direct knowledge of any of the mitigation witnesses of my experiences with them of my insights into their suitability as trial witnesses." (JA 2551-52, 2554). f. Ms. Laura Rodgers asserts that she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds. Counsel "did not inquire about the witnesses I had begun to establish a relationship with or how to use the information I had gather [sic] to further the mitigation investigation or mitigation themes." (JA 2792).

	g. Ms. Rachel Rodgers also asserts that she was unable to complete important witness interviews with SGT Akbar's extended family due to lack of funds and counsel never asked her to inform them of her findings. (JA 2785-87). h. There is no evidence that anyone other than SGT Akbar's father was interviewed on SGT Akbar's paternal side of the family by the mitigation specialists, indicating that the mitigation investigation was, at most, half complete.
11. As previously discussed, Ms. Nerad indicated that she wanted the defense to request for additional time and additional funding in order for her to review the documents that she and her team had received regarding SGT Akbar. Despite making this request, it appeared that Ms. Nerad did not really need the additional time or funding. Instead, she simply wanted to submit an additional request in order to attempt to protract the case in the hopes that the government would reconsider pursuing the death penalty and also to create a possible appellate issue if the Government denied the additional funding. *See* paragraphs 45 through 47 in Question A of the 29 October 2010 affidavit.	a. Ms. Nerad specifically asserts that para. 47 of Gov't App. Ex. 1 is not true. She would not request additional funding just for the sake of asking for additional funding; she was trying to convey the need to keep developing mitigation until the end of trial. (JA 2780). b. Ms. Nerad emailed counsel on February 11, 2005, letting counsel know that her team was out of money. (JA 2205). On Mar. 1, 2005, she emailed counsel indicating that she just received over 2000 pages of documents that required analysis and follow-up interviews. (JA 2208). In Sep. 2004, Ms. Nerad stated in her declaration that time and funding would be necessary to analyze documents and prepare witnesses after these records were received. (JA 2179). Counsel's assertion that she "did not really need the additional time or funding" is not supported by the record. *See* Assignment of Error A.I, Section A.6.a. *See also* responses and contrary evidence for para. 45 through 47 of Question A of the Oct. 29, 2010, affidavit above.

Question J. Ms. Nerad asserts that she advised the defense team to seek additional funding to complete the mitigation investigation on or about January/February 2005. Did the defense team request additional funding? If not, why not?

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained in paragraphs 45 through 47 in Question A of the 29 October 2010 affidavit.	*See* responses and contrary evidence for para. 45 through 47 of Question A of the Oct. 29, 2010, affidavit above.

Question K. Describe the involvement of all mitigation specialists in the formulation of the defense team's trial strategy. Explain in detail how their opinions factored into the defense team's formulation of a trial strategy. Respond to the mitigation specialists' assertions that the defense team ignored their tactical advice.

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained in Question C of the 29 October 2010 affidavit.	Defense counsel's answer is non-responsive to the Army Court's question. *See* responses and contrary evidence for Question C of the October, 29, 2010, affidavit above.

Question L. The mitigation investigators assert that they had no further contact with the defense team in the months leading up to the trial. Describe the level of contact between the defense and the mitigation specialists throughout the course of your representation, particularly in the months leading up to the trial.

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained paragraphs 34 through 39 and paragraphs 45 through 48 in Question A of the 29 October 2010 affidavit.	*See* responses and contrary evidence for para. 34 through 39 and para. 45 through 48 of Question A of the October, 29, 2010, affidavit above.

Question M. Describe the level of involvement, or lack thereof, of the mitigation specialists during the actual trial. If they were not utilized during the trial, explain why.

Counsel Response(s)	Contrary Evidence
1. The mitigation specialists were not used during the actual trial. The basis for this decision is provided in paragraphs 41 through 53 in Question A and in Question C of the 29 October 2010 affidavit.	Defense counsel's answer is non-responsive to the Army Court's question as to *why* mitigation specialists "were not utilized during the trial," despite their recognition that mitigation specialists do not simply testify during trial.

Question N. When deciding to present documentary evidence created by Deborah Grey in lieu of live testimony, did you ever discuss with Ms. Grey the wisdom of this tactic? If so, what was her advice and why did you decide to follow or not follow it? If this discussion never occurred, why not?

Counsel Response(s)	Contrary Evidence
1. Although we do not recall the specifics of the discussion, LTC DC does recall speaking with Ms. Grey regarding our decision to submit the documentary evidence in lieu of her live testimony. LTC DC does not recall Ms. Grey having any strong opinions regarding "the wisdom of this tactic." However, as discussed in paragraph 3 in Question C of the 29 October 2010 affidavit, Ms. Grey supported the use of an expert witness to introduce the documentary evidence.	a. Ms. Grey asserts the products she created while serving as SGT Akbar's mitigation specialist were not intended for trial use and she would not have recommended they be used in lieu of live testimony. Furthermore, according to Ms. Grey, "absent some compelling factors to the contrary, no mitigation specialist would advise presentation of evidence through an expert alone, but would advise the use of lay witnesses to tell the client's life story." (JA 2759-60). b. Ms. Grey's first replacement, Ms. Holdman, specifically told counsel not to rely on her reports because mitigation specialist reports "contain preliminary impressions, may be inaccurate, [and] are not written for lay audiences . . . ." She also wrote, "My reports are intended for defense attorney use only, should not be published, and should not be relied upon by counsel or any testifying witness." (JA 2152).

2. Given the events of 30 March 2005, it appeared to the defense that the safest course of presenting this information was in documentary form and through Dr. Woods. It was our belief, that this provided us with the best opportunity to present favorable information and yet not open the door to rebuttal by the government.	*See* responses and contrary evidence provided in Question B of the Apr. 2, 2013, affidavit above.

Question O. Why was the decision made to not present a "humanity' defense on sentencing? Why was a complete and detailed social background for appellant, including family history, not presented to the panel for consideration during sentencing? Respond to Mr. Tom Dunn's assertion that he advised the defense team to "involve witnesses from every period of SGT Akbar's life," and that "SGT Akbar's life must include both the nature and nurture aspects of his life which make him truly unique and provide a means of understanding his actions on the day of the crimes." Explain how this strategy either was or was not implemented.

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained in paragraphs 50 through 53 of Question A and paragraph 1 of Question D of the 29 October 2010 affidavit. The response can also be found in paragraphs 2 through 4 of Question B and in Question N above.	Defense counsel's answer is non-responsive to the Army Court's question regarding Mr. Dunn's advice. *See* responses and contrary evidence for para. 50 through 53 of Question A and para. 1 of Question D of the October, 29, 2010, affidavit above.

Question P. Describe in detail the decision to present documentary evidence over live witness testimony? In particular, why were interview summaries provided to the panel in lieu of live witness testimony?

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained in paragraphs 50 through 53 of Question A and paragraph 1 of Question D of the 29 October 2010 affidavit. The response can also be found in paragraphs 2 through 4 of Question B and in Question N above.	*See* responses and contrary evidence for para. 50 through 53 of Question A, para. 2 through 4 of Question B, para. 1 of Question D, and Question N of the October, 29, 2010, affidavit above.

Question Q. Why were no family members or friends from his life prior to college called to testify?

Counsel Response(s)	Contrary Evidence
1. The response to this question is contained in paragraphs 50 through 53 of Question A and paragraph 1 of Question D of the 29 October 2010 affidavit. The response can also be found in paragraphs 2 through 4 of Question B and in Question N above.	*See* responses and contrary evidence for para. 50 through 53 of Question A, para. 2 through 4 of Question B, para. 1 of Question D, and Question N of the October, 29, 2010, affidavit above.

Question R. Ms. Nerad claims she advised you to not admit appellant's diary in the manner it was admitted. Why was the decision made to admit the diary as you did? Why did the defense team not call an expert or other witness to explain the content and relevance of the diary? Did the defense team discuss the decision to admit the diary with any of the consultants or appellant?

Counsel Response(s)	Contrary Evidence
1. Neither of the undersigned have any recollection of Ms. Nerad advising the defense to admit or not admit SGT Akbar's diary, nor do we have any emails or notes on that subject. If she did make such a recommendation, we certainly would have considered her input and weighed it	a. Defense counsel's answer is non-responsive to the Army Court's questions except for responding to the claim by Ms. Nerad.

against factors that we believed favored admitted the diary. Ultimately, we chose to present the diary in the manner that we did based upon our discussions with Dr. Woods and our belief that the diary presented mitigation evidence in an effective manner for SGT Akbar.	b. Defense counsel omits from their answer that they had planned to call Dr. Southwell and/or Dr. Diebold at sentencing to discuss the diary as counsel viewed these doctors as SGT Akbar's "best hope" to avoid the death penalty. (JA 3038-39). However, counsel did not interview these experts face-to-face until after the trial had started and determined too late that they could not be helpful in contextualizing the diary. (JA 3029, 3033, 3038-39). c. Ms. Nerad asserts that whether or not to admit the diary was "an ongoing discussion" and that she did not believe this decision could be made without additional information to determine if SGT Akbar's statements were "delusion or real." (JA 2777-78). d. Dr. Woods asserts that counsel's decision to admit the diary "was a mistake, and I never would have advised or would have advised trial defense counsel to admit the diary as they did." According to Dr. Woods, if counsel wanted to admit the diary they should have done so cautiously through his testimony. (JA 2797).
2. The thought process behind our decision to admit SGT Akbar's diary can be found in Question F of the 29 October 2010 affidavit.	*See* responses and contrary evidence for Question F of the October, 29, 2010, affidavit above.

Question S. Describe in detail how Mr. Tupaz and Mr. Duncan were prepared to testify? When were they interviewed and by whom?

Counsel Response(s)	Contrary Evidence
1. COL DB personally spoke with Mr. Tupaz on the phone prior to trial (Enclosure 2). Initially, they simply talked about Mr. Tupaz's recollections of and interactions with SGT Akbar. Prior to trial, COL DB went through draft questions similar to those that would be asked at trial. The defense team arranged for Mr. Tupaz to arrive several days prior to trial. At that time, the defense counsel met with Mr. Tupaz at the Fort Bragg office and went through his testimony again. We also took him into the courtroom so he could see the layout and understand where he would sit and where the panel would be located. Although neither of the undersigned recalls the exact process conducted with Mr. Duncan, we would have most likely prepared him to testify in the same manner as Mr. Tupaz.	a. MAJ DB sent an email to Dr. Clement regarding Laura Rogers interview of Mr. Tupaz. MAJ DB wrote, "I called the roommate my self [sic] to confirm the information." MAJ DB provided no additional information not gathered by Ms. Rogers. (JA 2377). b. Mr. Duncan asserts that before trial he only received phone calls informing him when he would testify and providing travel information. Mr. Duncan further asserts that his "testimony was not rehearsed in any way, and if I even discussed the content of my testimony with Hasan's attorneys, it was not substantial enough for me to remember." The morning Mr. Duncan testified "was the first time [he] met the attorneys who were representing Hasan at his court-martial." (JA 2850).

Question T. Ms. Nerad and others assert that mitigation evidence is not best presented through expert testimony. Identify in particular where the defense team derived the theory that mitigation evidence is best presented through expert testimony, as opposed to lay witnesses? Explain your tactical decision in choosing to present mitigation evidence through an expert versus a lay witness.

Counsel Response(s)	Contrary Evidence
1. Dr. Woods was the only expert used to introduce mitigation evidence. Dr. Woods' primary purpose as a witness was to describe SGT Akbar's mental illness in the form of a diagnosis. We did not believe it very likely that mental illness would prevail on the merits. Nonetheless, the clear pattern of mental health issues throughout SGT Akbar's life was very strong mitigation evidence which could be frontloaded into the merits case. As such, the Dr. Woods' diagnosis itself was mitigation evidence. Moreover, in establishing the foundation for his diagnosis, Dr. Woods was able to introduce other valuable mitigating evidence such as SGT Akbar's background, his family history of mental illness, and prior life experiences such as the sexual victimization of his sisters. Dr. Woods was able to introduce that evidence in an organized way that avoided unnecessary delay, objections on the grounds of relevance, and confusion or dilution of key evidence that might have occurred if witnesses testified as to the same facts and were subject to cross-examination and/or rebuttal. Not every fact or aspect of SGT Akbar's life was relevant to the diagnosis, but a significant amount of valuable information was available for introduction to support Dr. Woods' diagnosis.	a. Defense counsel's answer is largely non-responsive to the Army Court's question. b. *See* responses and contrary evidence for para. 11 of Question A and para. 3 of Question C of the October 29, 2010, affidavit above.
2. Of course, there were live witnesses who testified as to facts which supported Dr. Woods' diagnosis and also served as mitigation evidence. These would include the members of SGT Akbar's unit who witnessed his strange behaviors or commented on his incompetence despite having college degree; his college roommate who was familiar with SGT Akbar as a hardworking college student and who witnessed some of SGT Akbar's bizarre behaviors; and Dr. Tuton, who diagnosed SGT Akbar as a young man and had insight into his abusive family life as a child.	a. Counsel's response here and above appears to concede that they never attempted to develop a sentencing case more expansive than the mental health based merits defense they knew would fail. Moreover, counsel developed this strategy based upon a preliminary mitigation investigation and independent of Dr. Woods' eventual diagnosis. b. A Jul. 9, 2004, email from MAJ DC to MAJ DB shows they chose their mental health-based trial strategy before Dr. Woods even joined the defense team. MAJ DC writes: "I looked at everything you sent yesterday. It looks good. I made some changes to the closing statement. Some of it was written as if you were giving it as opposed to Wazir. I think your directs can be shortened for the merits (just concentrating on the odd behavior) then the remaining amount can be used for our direct in sentencing (concentrating on the poor duty performance and the unit's failure to take any real action)." (JA 2059; *see also* JA 2064-67).

	c. Counsel did not request the appointment of Dr. Woods or Ms. Holdman (the mitigation specialist identified to replace Ms. Grey) until Aug. 4, 2004. (JA 1800). d. In January 2005, MAJ DB emailed mitigation specialist Laura Rogers and told her to focus her interview summaries on "supporting the mental responsibility defense." (JA 2196).
3. Paragraph 3 in Question C of the 29 October 2010 affidavit also provides some additional insight on this question.	*See* responses and contrary evidence for para. 3 of Question C of the October, 29, 2010, affidavit above.

Question U. Did the defense team ever interview or discuss appellant's case with Dr. Will Miles? Was the defense team aware of the substance of Dr. Miles' expected testimony? Why was the decision made to not utilize Dr. Miles?

Counsel Response(s)	Contrary Evidence
1. The interactions of the defense team with Dr. Miles are discussed in GAE 1. The undersigned had at best one phone call with Dr. Miles. We were provided with only a general outline of what his testimony might entail. The attached emails indicate that we repeatedly asked for more specific information to justify Dr. Miles as a defense expert (Enclosure 3). That information was never provided to the undersigned. As such, we are unaware of what Dr. Miles' diagnosis would have been or what he would have brought to the case that was not already covered by one of the other defense mental health experts.	a. This response confirms that counsel never attempted to contact Dr. Miles independently to obtain additional details regarding his observations and conclusions. b. Multiple emails provided by counsel confirm that they possessed Dr. Miles' contact information, provided him numerous medical documents to review, and expected him to provide testimony supportive of Dr. Woods' conclusions as early as Jun. 5, 2004. (JA 2104-06, 2109-10, 2112, 2117-24, 2128-29, 2132-33, 2064-67). c. In an Aug, 9, 2004, email MAJ DB specifically wrote: "Based upon his specialized expertise, Dr. Woods identified some potential diagnosis which had been previously overlooked. His findings were consistent with the opinions of another expert, Dr. Miles, with whom Mr. Al-Haqq had consulted." (JA 2071). d. Counsel never attempted to obtain the appointment of Dr. Miles as a defense expert assistant. (JA 1800). e. Dr. Miles asserts that he has specialized expertise in multicultural studies and post-traumatic stress disorder as it relates to African-American both in a civil and military context. Dr. Miles did not recall speaking with SGT Akbar's military counsel and if he spoke with Dr. Woods it was only briefly. According to Dr. Miles, "unless [Dr. Woods had some unusual and additional formal training, he was not qualified to administer, analyze or testify regarding psychological testing." Dr. Miles was unable to complete his evaluation of SGT Akbar due to lack of funding. However, he "immediately recognized abnormalities which suggested possible psychotic issues, probable

	'thought disorder,' and possible early childhood trauma that continues to affect his mental health into adulthood." Dr. Miles saw a possible link between SGT Akbar's mental health problems and "the alleged racial and cultural hostile environment that surrounded him." His initial assessment was that SGT Akbar's condition "could be caused by or associated with PTSD, Schizophrenia, Major Depression, or even Borderline Personality Disorder." Dr. Miles believed that SGT Akbar "may have lapses in impulse control and lacked the ability to form rational judgment, and took action because of thoughts that he may have believed originated from God, that that he himself was in imminent danger." These mental health issues were likely exacerbated by SGT Akbar's religious and socioeconomic background. Dr. Miles informed SGT Akbar's counsel, Mr. Al-Haqq, that he believed he "could greatly assist the defense in Sergeant Akbar's case and to contact me if they could obtain funding." (JA 2803-05).

Question V. Was the defense team aware of the substance of Dr. Donna Sachs's expected testimony? Did the defense team ever personally interview Dr. Sachs? Why did the defense team decide not to call Dr. Sachs as a witness?

Counsel Response(s)	Contrary Evidence
1. Dr. Sachs was presented as a possible witness either through the mitigation experts, through SGT Akbar's diary, or through discussions between the defense counsel. In any event, it was known that SGT Akbar had seen a mental health provider while in college. The mitigation experts were able to contact Dr. Sachs based on the information in the diary or otherwise provided by SGT Akbar. The mitigation experts also provided a summary of their interview with Dr. Sachs. Obviously, we were very interested in any information that could support a history of mental health issues experienced by SGT Akbar. 2. COL DB contacted Dr. Sachs and discovered that she had no records of her meetings with SGT Akbar, and no independent recollection of her sessions with him. Her memory had been "refreshed" by the mitigation expert that interviewed her based on documents and information possessed by the mitigation experts (Enclosure 4). COL DB did not feel that she would make a good witness because she did not have any independent recollection of SGT Akbar nor did she have any notes regarding their sessions. COL DB was also concerned that cross-examinations might reveal the methods of the mitigation investigators and it might also suggest that those methods were questionable in nature. That sort of cross-examination might be damaging	a. Dr. Sachs asserts that she performed five counseling sessions with SGT Akbar in the 1990's and found him "very disturbed," but responsive to treatment. Dr. Sachs "remembered Hasan because he was so disturbed but did seek help, something many psychologically damaged people find very difficult to do if indeed they do it at all." After speaking with Ms. Nerad about SGT Akbar, an Army Major called Dr. Sachs. "He told me that without any written records, he would not be able to use any information from me. He did not interview me or ask me any questions about Hasan." (JA 2800-01). b. Counsel did possess medical records referencing SGT Akbar's therapy with Dr. Sachs. (JA 2033). c. Dr. Woods asserts he was not aware of the substance of Dr. Sachs' testimony until notified of it by appellate defense counsel. According to Dr. Woods, "Dr. Sachs could have been used to develop the longstanding mental illness Hasan was suffering [which] would have added credibility to his diagnosis, laying the foundation for a better understanding of his actions." (JA 2797-98; *see also* JA 941 (Dr. Woods answered a panel member's question by stating SGT Akbar had not sought psychological treatment while in college other than one instance with Dr. Ibarra)).

to Dr. Sachs as a witness and it might also create doubt across a whole range of other witnesses and the information developed by the mitigation team. Based on LTC VH's experiences with mitigation experts, we were concerned that the government counsel would portray the mitigation team as using suggestive measures to obtain information and that the information developed by the mitigation experts was exaggerated. Based on that input and some information we had about Government counsel's research, it seemed likely that the government could develop a line of questioning that would undercut the value of Dr. Sachs and the mitigation work in general. Accordingly, Dr. Sachs was not considered as a witness. The information related to her interactions with SGT Akbar was provided to Dr. Woods.	d. At trial, Dr. Woods answered a panel member's question by stating SGT Akbar had not sought psychological treatment while in college other than one instance with Dr. Ibarra. (JA 941).

Question W. Explain in detail all documents, evidence, and additional testing requested by Dr. George Woods. If any requested items were not provided, explain why the decision was made to not provide those to him. Provide a comprehensive list of all documents and other evidence provided to Dr. Woods for his review. (*See* Gov. App. Ex. 3). Identify each document by Exhibit Number. If the document was not attached to the record of trial, provide a copy of the document with your affidavit. Gov. App. Ex. 1 explained that the defense strategy was to introduce mitigation evidence through expert testimony. Describe the decision to limit Dr. Woods' testimony concerning appellant's social history to what he testified to. Why was Dr. Woods, or any other expert, not asked to testify concerning the full breadth of the social history of SGT Akbar compiled by the mitigation specialists? Describe all discussions with Dr. Woods concerning the amount of information he had available for his review? Did Dr. Woods ever indicate that he did not have sufficient information to assist in appellant's case? Explain the defense team's understanding of how the three mental health experts (Dr. Woods, Dr. Clement, and Dr. Walker) diagnoses were either consistent or inconsistent.

Counsel Response(s)	Contrary Evidence
1. The portion of this question regarding the information provided to Dr. Woods was answered in our previous affidavit. *See* paragraph 48 of Question A, and the response to Question D of the 29 October 2010 affidavit. Dr. Woods testified as a mental health expert on the merits. As an experienced expert who had testified in many criminal cases, Dr. Woods was the primary driver of what information he needed to develop his expert opinion in support of the merits defense. Dr. Woods also exercised his expert judgment as to what social history and related information he needed to discuss with the panel in order to support his diagnosis in court. Defense enabled Dr. Woods by working with Dr. Woods to develop appropriate questions that were organized to present facts in a clear and logical manner so that they would best resonate with the panel. Accordingly, the scope of social, medical, and mental health history information utilized by Dr. Woods was limited only by Dr. Woods' experience and professional judgment. As detailed in GAE 1, defense counsel provided Dr. Woods with all available information to support his	Defense counsel's answer is non-responsive to the Army Court's questions. *See* responses and contrary evidence for para. 48 of Question A and Question D of the October, 29, 2010, affidavit above.

diagnosis and sought out any other information he requested. Defense counsel has no record of Dr. Woods requesting any background or family history information in addition to what was provided. Because SGT Akbar's family history was important to Dr. Woods' diagnosis, as well as the overall strategy of the case, any such information of which any member of the defense team was aware was collected and provided to Dr. Woods. Ultimately, the information introduced through Dr. Woods was that which was relevant and necessary to his diagnosis based on his experience and judgment. As discussed in GAE 1, Dr. Woods was comfortable with both his diagnosis and his testimony.	
2. The difference between the diagnosis of the three defense mental health experts as well as the strategic consideration regarding their testimony is addressed Question D of the 29 October 2010 affidavit.	*See* responses and contrary evidence for Question D of the October, 29, 2010, affidavit above.

Question Y. The questions below apply to each of the following: Musa Akbar, Mashiyat Akbar, Sultana Bilal, Mustafa Akbar, Starr C. Wilson, Merthine Kimberly Vines, Jill Brown, Catherine Brown, Regina Weatherford, Ruthie Avina, Marianne Springer, John Akbar, Bernita Rankins, Imam Hasan, and John Mandell:

Counsel Response(s)	Contrary Evidence
i. Was the defense team aware of the substance of their expected testimony? If yes, how was the defense team made aware of their expected testimony?	
1. The defense team was aware of the substance of the expected testimony for each of the above witnesses with the exception of Merthine Kimberly Vines, Jill Brown, Marianne Springer, and Bernita Rankins.	a. Ms. Rankins asserts that she spoke to SGT Akbar's counsel only once in 2004 before being interviewed by Ms. Rachel Rodgers and Mr. Lohman. Ms. Rankins further asserts that she very much wanted to testify on SGT Akbar's behalf and left several messages with his counsel to this affect in the weeks preceding his trial. However, SGT Akbar's counsel never returned Ms. Rankins' calls. She vaguely remembers SGT Akbar's mother telling her that the counsel did not need her. (JA 2834). b. Counsel added Ms. Rankins to the defense witness list on Mar. 15, 2005, then removed her on the next list submitted on Mar. 29, 2005. (JA 2914-23).
2. The remaining witnesses the defense team had either interviewed personally or telephonically and thus was aware of the substance of their expected testimony.	a. Mr. John Akbar asserts that though he spoke with SGT Akbar's counsel before trial, "they never really interviewed me. Most of the conversations were only about what the courts were going to do and how it worked." (JA 2829). b. Ms. Catherine Brown asserts that she spoke with a "Caucasian woman" in 2004, but never spoke with SGT Akbar's counsel. (JA 2883).

	c. Ms. Sultana Bilal asserts that before SGT Akbar's trial she spoke with a woman named "Laura," but never spoke with his counsel. (JA 2859). d. Ms. Mashiyat Akbar asserts that before SGT Akbar's trial she was interviewed by a "Caucasian woman," but never spoke with his counsel. (JA 2871). e. Ms. Starr Wilson asserts that she was interviewed "by two federal agents," but she never spoke with SGT Akbar's counsel or mitigation specialists until the post-trial mitigation specialist interviewed her in 2010. (JA 2873). f. Ms. Ruthie Avina asserts that she was interviewed by a woman named "Scarlett." Thereafter, a man called to "verify[] her information because he believed her notes had been embellished. . . . He didn't ask any open-ended questions. The conversation lasted 15 minutes." (JA 2878). g. Counsel's Sept. 8, 2004, witness list included Mr. Mustafa Akbar, Imam Hasan, Mr. Mandell, Ms. Davenport, Ms. Garrett, Ms. Sparks-Cox, Ms. Osborne, Mr. Hubbard, Mr. Lemseffer, and Ms. Starr Wilson. (JA 2927-29). h. On Dec. 2, 2004, government notified the defense and military judge that they have not been able to contact, after repeated attempts, Mr. Mustafa Akbar (no response), Imam Hasan (incorrect contact information), Mr. Mandell (no response), Ms. Davenport (no response), Ms. Garrett (no response), Ms. Sparks-Cox (no response), Ms. Osborne (incorrect contact information), Mr. Lemseffer (no response), Mr. Hubbard (incorrect contact information), or Ms. Starr Wilson (incorrect contact information). (JA 1836; *see also* JA 267). i. On Mar. 3, 2005, government denied production of the following defense witnesses because they could not be contacted: Imam Hasan (no response), Ms. Garrett (no response), Ms. Sparks-Cox (no response), Ms. Osborne (no response), Mr. Lemseffer (incorrect contact information), Mr. Hubbard (incorrect contact information), and Ms. Starr Wilson (incorrect contact information). (JA 1875). j. Government withdrew its witness denial based on defense counsel's provision of updated contact information and decision not to call some of the witnesses that were denied. (JA 268-69).

	k. On Mar. 15, 2005, counsel removed the following persons from the defense witness list: Imam Hasan, Ms. Garrett, Ms. Sparks-Cox, Ms. Osborne, Mr. Lemseffer, and Ms. Star Wilson. (JA 2921-23). l. Though counsel provided updated contact information for Mr. Hubbard on Mar. 15, 2005, Mr. Hubbard was not called to testify on SGT Akbar's behalf at trial. (JA 2910-23).
ii. Did the defense team personally interview the witnesses prior to trial? If yes, how many times, when, and where? If not, why not?	
1. The defense team personally interviewed each of the witnesses prior to trial. In most cases, the defense team interviewed the witnesses several times in order to develop their potential testimony.	a. Defense counsel's answer is vague in that it is not clear what witnesses were interviewed or who conducted the interviews. The identity of the interviewer is important because counsel's answer leaves the distinct possibility that counsel who tried the case never conducted these interviews as many members of the defense team were not with the team at trial (*see* Appendix C). Counsel only provides proof that they spoke with Paul Tupaz prior to trial. (JA 2377). b. Mr. John Akbar asserts that though he spoke with SGT Akbar's counsel before trial, "they never really interviewed me. Most of the conversations were only about what the courts were going to do and how it worked." Mr. Akbar attended the trial expecting to testify. "However, the lawyers wouldn't let me or Quran testify. Attorney DC said that he was afraid that harm would come to us. I believe that Attorney DC told Hasan that, and Attorney DC said that Hasan agreed with that and did not want us to testify so that we would be safe. I never heard of any threats, but he indicated that maybe someone would try to assassinate us. I did not care. I wanted to testify on behalf of my son, and told Attorney DC I wanted to testify." (JA 2829). c. Mr. Duncan asserts that before trial he only received phone calls informing him when he would testify and providing travel information. Mr. Duncan further asserts that his "testimony was not rehearsed in any way, and if I even discussed the content of my testimony with Hasan's attorneys, it was not substantial enough for me to remember." The morning Mr. Duncan testified "was the first time [he] met the attorneys who were representing Hasan at his court-martial." (JA 2850).

2. Additionally, after the incident on 30 March 2005, the defense team re-interviewed its mitigation witnesses. We do not have records regarding the exact times and locations of these interviews.	a. Defense counsel's answer is vague in that it does not identify which witnesses were "re-interviewed." b. On Apr. 27, 2005, during the defense sentencing case, the military judge recessed the court at 9:58 A.M. "because of some witness travel schedules . . . ." The military judge expected two to three additional witnesses to testify the following morning. (JA 1433). c. On Apr. 28, 2005, counsel informed the military judge of his "tactical" decision not to call Ms. Weatherford or SGT Akbar's parents on the day they were scheduled to testify. Following SGT Akbar's unsworn statement, the defense rested. (JA 1449-50, 1452, 3074). d. Based on trial transcript date/time groups, if counsel ever interviewed Ms. Bilal, Mr. John Akbar, or Ms. Weatherford regarding the Mar. 30, 2005, incident, these interviews took place between "1114, 27 April 2005" and "0858, 28 April 2005," at or near Fort Bragg, NC (or telephonically from there). (JA 1448-49). *See also* responses and contrary evidence for Question B of the Apr. 2, 2013, affidavit above.
iii. Why was the decision made to not call these witnesses to testify during appellant's trial?	
1. This question is answered in paragraphs 2 through 4 of Question B above.	Defense counsel's answer is vague, providing no specificity as to which witnesses were not called for which reason. *See* responses and contrary evidence for paragraphs 2 through 4 of Question B of the April 2, 2013, affidavit above.
iv. Identify specifically all sentencing witnesses who refused to testify based on the stabbing incident (other than the warden).	
1. We do not have notes regarding the additional witnesses that refused to testify. However, based upon our memory, Ms. Gail Garrett, Mrs. Doris Davenport, Ms. Roberta Osborne, Ms. Rhonda Sparks-Cox and Ms. Regina Weatherford indicated that they no longer felt comfortable testifying for SGT Akbar. Additionally, the defense believed that the subject matter of each of these witnesses' testimony would have opened the door on rebuttal to 30 March 2005 incident.	a. On Mar. 15, 2005, fifteen days before the stabbing incident, counsel removed Ms. Garrett, Ms. Davenport, Ms. Osborne, and Ms. Sparks-Cox from the defense witness list. (JA 2921-23, 2927-29). b. Ms. Weatherford informed appellate defense counsel that she did not wish to testify because she did not understand the purpose of her testimony the and military attorney she communicated with was rude. (JA 2888-89). c. Counsel expected Ms. Weatherford to testify as of Apr. 27, 2005. (JA 1433). On Apr. 28, 2005, counsel announced their "tactical" decision not to call Ms. Weatherford and submitted what appears to be the direct examination

	questions they prepared for her instead. (JA 1449-50, 1600). These facts indicate that something other than the Mar. 30, 2005, incident prompted counsel's decision not to call Ms. Weatherford. d. Ms. Grey's notes state that Ms. Weatherford "did not care for [SGT Akbar] very much and that comes across . . . ." (JA 2018). These notes indicate that Ms. Weatherford was never comfortable with testifying for SGT Akbar regardless of the Mar. 30, 2005 incident.

APPENDIX C

Sergeant Akbar's Trial Teams

April 2003 – Dec 2003
Lead Counsel: LTC VH (Ft. Meade)
Ass. DC: MAJ DB (Iraq/Ft. Campbell)
Ass. DC: CPT DC (Kuwait/Ft. Eustis)
Ass. DC: CPT JT (Ft. Campbell)
Mit. Specialist: Deborah Grey (NC)
Forensic Psychiatrist: Dr. Walker (GA)
Neuropsychologist: Dr. Clement (TX)
Accused: SGT Akbar (Ft. Knox)

Jan 2004 - May 2004
Lead Counsel: Mr. M. Dan-Fodio (GA)
Ass. DC: MAJ DB (Ft. Campbell)
Ass. DC: CPT DC (Ft. Eustis)
Mit. Specialist: Deborah Grey (NC)
Forensic Psychiatrist: Dr. Walker (GA)
Neuropsychologist: Dr. Clement (TX)
Learned Counsel Advisor: Mr. Gant (TN)
Accused: SGT Akbar (Ft. Knox)

June 2004 – Aug 2004
Lead Counsel: Mr. W. Al-Haqq (CO)
Ass. DC: MAJ DB (Ft. Drum)
Ass. DC: CPT DC (Ft. Eustis)
Mit. Specialist: S. Holdman (CA)
Neuropsychiatrist: Dr. G. Woods (CA)
Forensic Psychiatrist: Dr. Walker (GA)
Neuropsychologist: Dr. Clement (TX)
Accused: SGT Akbar (Ft. Knox)

Sept 2004 – Feb 2004
Lead Counsel: Mr. W. Al-Haqq (CO)
Ass. DC: MAJ DB (Ft. Drum)
Ass. DC: CPT DC (Ft. Eustis)
Mit. Specialist: Scarlet Nerad (CA)
Mit. Specialist: James Lohman (TX)
Mit. Specialist: Laura Rogers (CA)
Mit. Specialist: Rachel Rogers (TX)
Neuropsychiatrist: Dr. G. Woods (CA)
Forensic Psychiatrist: Dr. Walker (GA)
Neuropsychologist: Dr. Clement (TX)
Accused: SGT Akbar (Ft. Knox)

Sept 2004 – Feb 2005
Lead Counsel: Mr. W. Al-Haqq (CO)
Ass. DC: MAJ DB (Ft. Drum)
Ass. DC: CPT DC (Ft. Eustis)
Mit. Specialist: Scarlet Nerad (CA)
Mit. Specialist: James Lohman (TX)
Mit. Specialist: Laura Rogers (CA)
Mit. Specialist: Rachel Rogers (TX)
Neuropsychiatrist: Dr. G. Woods (CA)
Forensic Psychiatrist: Dr. Walker (GA)
Neuropsychologist: Dr. Clement (TX)
Accused: SGT Akbar (Ft. Knox)

Mar 2005 – Apr 2005
Lead Counsel: MAJ DB (Ft. Drum)
Ass. DC: CPT DC (Ft. Eustis)
Neuropsychiatrist: Dr. G. Woods (CA)
Accused: SGT Akbar (Ft. Knox)

- Not at trial:
Forensic Psychiatrist: Dr. Walker
Neuropsychologist: Dr. Clement
Any former mitigation specialist team member

*This appendix depicts SGT Akbar's defense team throughout pretrial preparation and at trial. For simplicity, a member may have joined or left the team shortly before or after the stated timeframe, or moved locations shortly before or after the stated timeframe.

APPENDIX D

Appendix

State-by-State listing of Standards for Appointment of Qualified Counsel

Alabama—Alabama Code §13A-5-54 requires that counsel have no less than five years' experience. **Arizona**—Arizona Revised Statutes §13-4041B allows for the appointment of one counsel at the post-conviction or appellate stage. **Arkansas**—Arkansas Public Defender Commission requires two qualified counsel. **California**—California Rules of Criminal Procedure 4.117 requires the appointment of a learned counsel, but allows for the appointment of a co-counsel. **Colorado**—Colorado Revised Statutes 16-12-205 allows for one or more counsel at post-conviction review. **Connecticut**—The Connecticut Public Defender Services Commission sets out standards for qualified counsel. **Florida**—Florida Rule for Criminal Procedure 3.112 requires one learned counsel. **Georgia**—The Supreme Court of Georgia Rules requires the appointment of at least two qualified counsel. **Idaho**—Idaho Criminal Rule 44.3 requires at least two qualified counsel, unless the judge deems otherwise. **Illinois**—Illinois Supreme Court Rule 714 requires the appointment of a learned counsel. **Indiana**—Indiana Criminal Procedure Rule 24 requires the appointment of two qualified counsel. **Kansas**—Kansas Statutes Annotated, Chapter 22-4505, requires the appointment of one or more counsel to represent the defendant on appeal. **Louisiana**—Louisiana Supreme Court Rule XXXI requires the appointment of two qualified counsel. **Missouri**—Missouri Supreme Court Rules 24.036(a) and 29.16(a) requires the appointment of two counsel when the defendant files a motion to set aside his death sentence. **Montana**—Under the Montana Code, Title 46, the Office of the Chief Public Defender is responsible for establishing procedures for assigning learned counsel to capital cases. **Nebraska**—The Nebraska Committee on Public Advocacy was created by statute to assist Nebraska counties with providing indigent defense services. The NCPA has set standards for appointment of learned counsel and requires that two qualified counsel be assigned at the trial and appellate level. **Nevada**—Nevada Supreme Court Rule 250(V)2 requires that lead counsel in a capital case have been an attorney for three years, tried five felony cases and have been counsel in one death case. **North Carolina**—Capital counsel standards are set by the Office of Indigent Defense Services. **Ohio**—Rule 20 of the Rules of Superintendence for the Courts require two qualified counsel. **Oklahoma**—Oklahoma Indigent Defense System provides qualified capital counsel to seventy-five counties in Oklahoma. This office has adopted the ABA Guidelines. **Oregon**—The Oregon Public Defense Service Commission Qualification Standards for Court-Appointed Counsel establishes standards for both lead and assistant defense counsel. **South Carolina**—South Carolina Code, Title 16-3-26, requires the appointment of two counsel to represent a defendant facing the death penalty for the offense of murder. **Tennessee**—Tennessee Supreme Court Rule 13-3 requires at least two attorneys. **Texas**—Texas Code of Criminal Procedure, Article 26.052, sets out the standards for learned counsel in both capital trials and appeals. **Utah**—Utah Criminal Procedure Rule 8 requires at least two attorneys. **Virginia**—Virginia Code §19.2-163.7 requires the appointment of two qualified counsel. **Washington**—Superior Court Special Proceeding Rules SPRC 2 allows for the appointment of two qualified counsel at the trial and on direct appeal.