IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	CORRECTED REPLY BRIEF ON ON BEHALF OF APPELLANT
v.	
	Army Misc. Dkt. 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:

Statement of the Case

On February 28, 2014, appellant filed his Amended Final Brief with this Court. The government responded on April 29, 2014. Appellant replies herein.

Argument

Assignment of Error A.I

> SERGEANT HASAN K. AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AT EVERY CRITICAL STAGE OF HIS COURT-MARTIAL.

The Theory of Defense and Witness Preparation

Even assuming the facts are as the government claims, the two defense counsel who actually defended SGT Akbar's capital case only interviewed fifteen civilian lay witnesses, only one of whom was called as a witness, in the 767 days leading up to trial. That is remarkable in and of itself, and hardly a thorough and sufficient investigation to develop and implement a

capital defense. But, as previously established and not refuted by the government, the two counsel who actually defended his case failed to take an active part in pretrial witness identification and preparation, thus in part explaining their anemic 38 minute presentation, and begging the question of what they were actually doing in the 767 days prior to trial. In the end, counsel presented a deficient mitigation case, central to which was a document dump[1] that introduced extremely aggravating evidence previously excluded by the judge.

SGT Akbar does not argue his counsel should have put on a separate mitigation case that the government classifies as a "humanity defense." (Gov't Br. 17, 73-81, 95). Rather, SGT Akbar asserts counsel had a duty to discover *and present* in a reasonable fashion all available, non-cumulative mitigation

[1] The government asserts that nothing would have changed at trial if counsel had used live testimony instead of a mass of documents. (Gov't Br. 111). Even this Court was loathe to accept SGT Akbar's original brief, which was approximately the same number of pages as the documents that counsel dumped on the panel. It is well-settled, and the government cannot rebut, that live testimony is far superior to the mere presentation of documents. *See, e.g.*, (Br. 90-93); *United States v. Inadi*, 475 U.S. 387, 394 (1986)("If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony . . . there is little justification for relying on the weaker version [of hearsay]."); *Coddington v. State*, 142 P.3d 4327, 456-60 (Okla. 2006)(reversing capital sentence because testimony of mother was read into the record rather than played via video); *People v. Thompkins*, 641 N.E.2d 371, 379-80 (Ill. 1994)(granting post-trial hearing when appellate counsel submitted numerous affidavits from family members and claimed IAC when trial counsel produced only Thompkins' wife and fifty-six letters at his capital penalty phase).

evidence necessary "to counter the [government's] evidence of aggravated culpability . . . ." *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005). Here, they failed to do that in favor of an unreasonably narrow partial mental responsibility defense they knew would fail on the merits. (JA 1940, 2255, 2311, 2477). As a result, counsel was unaware of or summarily rejected evidence that was not mutually exclusive but complimented and supported their "theory."

In his opening brief, SGT Akbar presented witnesses the defense could have presented that might have provided a foundation to save SGT Akbar's life. The government's attempt to characterize this testimony as an unreasonable "humanity defense" fails for several reasons. (Gov't Br. 76). First, the omitted evidence would have complimented and substantiated the mental illness theme. Instead of presenting a capital mitigation case, counsel merely called soldier witnesses who barely knew SGT Akbar and only - observed odd behavior and poor leadership. To understand why SGT Akbar misconstrued anti-Muslim/Iraqi slurs, the panel needed to understand SGT Akbar's mental make-up that began forming during his childhood and faltered in his early college years. John Akbar and Rachel Rogers (or the witnesses she identified) could have testified in detail about SGT Akbar's dysfunctional social history and indoctrination at a very young age in the radical teachings of the Nation of Islam

to hate and mistrust white people. (JA 2020-27, 2785-87, 2829-32). This testimony would have linked to Dr. Sachs' testimony that SGT Akbar self-identified and sought help for violent thoughts during the time period in which schizophrenia begins to manifest.[2] (JA 2800). Dr. Miles could then have testified how the racially-charged upbringing mixed with the onset of mental illness ultimately led to SGT Akbar's actions.[3] (JA 2803-05). All of this testimony would have helped the panel "understand" (Gov't Br. 83) why SGT Akbar wrote what he wrote in his diary and why he misconstrued racial slurs as threats. Without this explanation, the panel had every reason to believe the argument the government was able to make after counsel admitted the entire diary without sufficient context: "He is a hate-filled murderer." (JA 1474).

Second, the government's argument is internally

[2] Defense counsel identified a weakness with the mental illness defense was that jurors expect the accused to seek help. (JA 2311). Here, SGT Akbar sought help from Dr. Sachs, and not only was the panel not told about it, Dr. Woods told the panel that other than one appointment with Dr. Ibarra, SGT Akbar never sought help. (*See* Br. 60).

[3] The government's primary defense of counsel's decision not to even contact Dr. Miles centers on counsel not having a duty to "shop around" for a better opinion. (Gov't Br. 98-103). Talking to Dr. Miles was not "shop[ping] around"—Dr. Miles was already on SGT Akbar's team. Here, counsel failed to learn of favorable information readily available to them and different from that which Dr. Woods could provide. (Br. 61-66). If nothing else, speaking with Dr. Miles would have informed counsel of the important impact race can have on the perception of mentally compromised persons. Significantly, counsel never provided the "shopping around" justification for their failure.

inconsistent and contradicts defense counsel's alleged strategy. Defense counsel understood that "mental responsibility defenses ha[ve] a low success rate and ha[ve] the potential to undermine other mitigation evidence." (JA 1940). That "other mitigation evidence" is the humanizing evidence counsel admitted through lifeless paper documenting interviews of SGT Akbar's family and associates, and the minimal snippets of information derived from Dr. Woods' and Dan Duncan's testimony. The government now calls SGT Akbar's claim that this information should have been presented in a coherent manner through live testimony "unreasonable," even though counsel were advised to present live testimony by experienced capital counsel. (Gov't Br. 76, 83; JA 2694). The government's claim that counsel's attempt at mitigation would have been unreasonable unless presented poorly is nonsensical.

Counsel's claimed theory throughout the case was not simply to demonstrate SGT Akbar's mental illness, but also how his mental illness in combination with his social history led him to view the impending war and inappropriate statements of his fellow soldiers as a genuine threat against himself and innocent Muslims. Counsel offered some social history evidence through expert witnesses and in the form of documentary evidence, but that alone is insufficient. *See*, *e.g.*, *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 family members who could provide vivid details). None of the evidence counsel failed to present, to include the testimony of Ms. Rankins, and SGT Akbar's siblings, cousins, and Ms. Springer,[4] "could [have] reasonably alienate[d] the panel" (Gov't Br. 74) and certainly would have alienated the panel much less than the aggravating diary. Presenting those witnesses was central to their declared strategy, yet counsel never developed the witness testimony or relationships to do so.[5] Also the government provides no support for the proposition that "the danger of the 'humanity' defense in this case is that it would have left the panel with the impression that appellant was a horrible, racist, 'hate-filled' individual." (Gov't Br. 77). As the government forcefully and persuasively argued in closing, defense counsel's admission of the diary filled this gap in the government's evidence. (Br. 33-35).

The absent testimony would have described the mitigating facts in the diary without the aggravating facts being admitted. That SGT Akbar's formative years were filled with abuse,

[4] The government claims "defense counsel specifically assert that they did personally interview" Marianne Springer. (Gov't Br. 24). Counsel actually concede the opposite. (JA 2369).
[5] The defense theme for sentencing was supposed to be: "SGT Akbar is mentally disturbed. Friends and acquaintances from his upbringing knew it, teachers and professors in his schools knew it . . . ." (JA 2319). Yet only one of these individuals was called to testify.

neglect, loneliness, and extremist ideology was entirely consistent with the thirty-one extenuating and mitigating factors counsel wanted the panel to consider (JA 1513-19) and counsel's sentencing argument (JA 1484-1508). The issue is not that counsel failed to pursue a "humanity defense," but that the defense they did pursue was unreasonably incomplete and presented incompetently. Because SGT Akbar's mental illness and social history together explained "why" he perpetrated his offenses (Gov't Br. 83), it was objectively unreasonable for counsel to ignore available evidence that would significantly advance both aspects of their theory.

Additionally, the government's current argument that a "humanity defense" would conflict with counsel's defense theory is in direct contradiction with counsel's purported strategy entering trial.[6] MAJ DB's goal was to "have some sympathy built in when it comes time [for the panel] to determine a punishment." (JA 2255). The government now claims that attempting to develop sympathy for SGT Akbar is not only not required, but would be an unreasonable and futile effort. (Gov't Br. 72, 80, 83). This position completely contradicts

[6] As one example, Regina Weatherford was a scheduled "humanity defense" witness scratched on the last day of trial because counsel had never developed a relationship with her that would allow them to convince her to testify.

Supreme Court case law[7] and the reality that murderers who commit crimes more heinous than SGT Akbar's often receive life sentences.[8] What the panel never heard from witnesses who knew and loved SGT Akbar was that he essentially raised his siblings and a cousin under wretched conditions, took in his brothers on multiple occasions even while struggling through college, and sent money home to support his family both while in college and in the Army, all with the goal of making a better life for his family.[9] (Br. 8, 50). Whether the government likes it or not, that "is [some]thing that portrays him as a good person who should be spared a death sentence." (Gov't Br. 80). The

[7] *See, e.g., Rompilla*, 545 U.S. at 383 (finding reasonable probability that jury would have returned LWOP verdict had mitigating evidence been presented despite defendant's "significant history of felony convictions"); *Williams v. Taylor*, 529 U.S. 362, 368 (2000)(finding counsel's deficient penalty phase performance prejudicial despite defendant's prior convictions for armed robbery, burglary and grand larceny).

[8] *See, e.g.*, Steve Visser & Jeffry Scott, *The Brian Nichols Case: No Death Penalty*, Atlanta J-Const., Dec. 13, 2008, at A1 (defendant received LWOP for capital murders of judge, court reporter, and two others committed while on trial for rape); Christopher Goffard, *Prison Gang Leaders Get Life Terms*, L.A. Times, Sept. 16, 2006, at 3 (two kingpins of Aryan Brotherhood prison gang who orchestrated "decades-long reign of murder" from their cellblocks received life sentences for conviction of capital crimes); Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. Times, May 4, 2006, at A1 (9/11 conspirator sentenced to life for capital crime); (Br. at 122).

[9] Without citation, the government argues that this evidence should not have been put on to prevent admittance of uncharged misconduct. (Gov't Br. 82-83). As pointed out in SGT Akbar's original brief, if any evidence of a witness's shock to his crimes could have opened the door, counsel admitted that very type of evidence and the government did not attempt to admit the uncharged misconduct. Thus, this argument fails on its face.

absence of these willing witnesses falsely indicated to the panel that no one cared enough for SGT Akbar to believe he had any redeeming qualities or had done any praiseworthy acts worth mentioning. (Br. 45-53).

Counsel's prophylactic excuse that they could not call *any* family members because they *all* presented control issues is preposterous.[10] (JA 2350). The record demonstrates that counsel who defended the case never established relationships, or even spoke with, most of the family and other potential civilian witnesses. (Br. 45-53). Additionally, if counsel actually had witness control concerns they did not use the mitigation specialists to remedy this problem as they are specifically trained to do.[11] The bottom line is counsel's affidavit is void

[10] The government argues that no family members were called because they were "suffering from some form of mental illness." (Gov't Br. 85 (citing JA 799-802, 2608-09)). This argument should be discarded not only because counsel never make this argument, but the idea that being physically or sexually abused or having a mood disorder or depression makes you a bad witness is patently offensive. The government's point also highlights the paucity of evidence presented regarding the family history of mental illness. (*Compare* JA 799-802, *with* JA 2608-09).

[11] The government's argument that two untrained and inexperienced counsel in capital litigation are more qualified than mitigation specialists whose lives are dedicated to death cases ignores this Court's decision in *United States v. Kreutzer*, 61 M.J. 293, 298 n.7, 301-05 (C.A.A.F. 2005). (Gov't Br. 27-28, 38-39). Likewise, the government ignores that defense counsel rejected and scoffed at receiving advice from capital attorneys (JA 2938), and the only reason that "Appellant points to no witness who would have reacted differently during the court-martial had Ms. Nerad been present" (Gov't Br. 39) is because counsel produced *only one civilian witness* during the penalty phase.

of any detail as to who, when, where, or how MAJ DB or MAJ DC conducted personal interviews with potential witnesses who did not testify. Other than two e-mails discussing calls to Paul Tupaz and Dr. Sachs (JA 2377, 2381), counsel's files lack any such evidence. As counsel were not co-located, one would expect heavy e-mail traffic about witness interviews and preparation, but there is hardly any. Thus, many references in counsel's affidavit to "we" appear to apply to the defense team as a whole to include former counsel and mitigation specialists, some of whom had been off the case for more than a year. This deficiency highlights two of SGT Akbar's arguments the government wholly ignores: Contrary to counsel's post hoc assertion (1) their plan was not altered by the stabbing incident as is indicated by the de minimis change to the witness lists (Br. 85-87, 130-32), and (2) their "plan" was to figure out what evidence to present via witnesses *during the trial*.

Although discussed in SGT Akbar's original brief, the second point in particular requires additional response in light of the government's brief. The government contends, derived mostly from their own analysis as opposed to explanations provided by counsel, that John Akbar, Quran Bilal,[12] Musa Akbar,

[12] Contrary to the government's assertion, SGT Akbar has never asserted counsel should have called his mother to testify. (Gov't Br. 90; Br. 87). SGT Akbar merely asserts that his counsel have never explained why she and others on the witness

and Regina Weatherford would have made extremely poor witnesses. (Gov't Br. 87-96). What is troubling is that even if this were true, why did counsel not determine this in the 767 days before trial? All four of these witnesses remained on the final witness list until the second day of the defense sentencing case at trial. (JA 2912-13, 3052). John Akbar, who LTC VH and Ms. Nerad identified as a must-call witness (JA 2045, 2773; *see also* JA 2062-67), acknowledges being at trial, yet he asserts he was never interviewed by counsel nor prepared to testify. (JA 2829). Based on Musa Akbar's declaration, counsel did not speak with him until after trial began, and was then provided the option of signing a document or providing nothing. (JA 2854). However, the letter counsel mailed to Musa to sign still indicated his baby had yet to be born when he was in-fact available to testify at the time he received it. (JA 2854). Counsel made no effort to produce Musa after the birth of his child or to present his testimony via video teleconference, video deposition, or telephone. With SGT Akbar's life on the line, it was objectively unreasonable to not present Musa or any other family members when so many were willing to testify.

Rather than relying on counsel's affidavits, the government often draws conclusions from its own interpretation of the

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list were scratched *during* the penalty phase or what they did to prepare these witnesses for testimony.

record. As one example, regarding Ronald Hubbard, who SGT Akbar claims was likely never contacted or prepared to testify though on the final witness list (Gov't Br. 98 n.435; Br. 87 n.44; SJA 497; JA 2913), the government asserts counsel surely spoke with him because they summarized his testimony in a trial preparation document. (Gov't Br. 97-98 (citing JA 2322)). However, this summary does not indicate counsel ever talked to Mr. Hubbard.

According to Ms. Grey's June 4, 2004, transition memorandum, she believed Mr. Hubbard may have useful information though the defense had not yet spoken with him. (JA 2454). The only contact information for Mr. Hubbard in the undated defense trial preparation document is a phone number. (JA 2322). On September 8, 2004, counsel submitted their first witness request which provided the same contact number for Mr. Hubbard, no address, and substantially the same synopsis of expected testimony as the trial preparation document. (*Compare* JA 2322 *with* 2928). However, on December 4, 2004, the government notified the defense it could not contact Mr. Hubbard for want of a mailing address and because the contact number counsel provided was incorrect. (JA 1837-38). The government remained unable to contact Mr. Hubbard as of March 3, 2005, even after the defense provided different contact information. (JA 1875). Therefore, it appears counsel drafted the undated trial preparation document at a time when they had no accurate contact

information for Mr. Hubbard. Thus, based on the record, it appears counsel planned to use Mr. Hubbard on the eve of trial despite never having spoken to him. *See also* Br. 35-36 (discussing counsel's decision to interview Drs. Deibold and Southwell for the first time after trial began even though counsel believed they were the "best chance" of saving SGT Akbar's life); Br. 44-45 (discussing counsel's decision not to interview Dan Duncan before putting him on the stand)).

Evidence such as this, the vagueness of counsel's affidavit responses, the dearth of evidence in their files, and affidavits of potential witnesses lead SGT Akbar to conclude that the counsel who actually defended the case did not personally interview the thirteen witnesses the government claims must have been interviewed. (Gov't Br. 19-20). Of those thirteen, seven were only listed on the September 2004 witness list (JA 2927-28), and their summarized testimony was so generic that they likely came from other summaries provided by Ms. Grey (JA 2017-19, 2045). Relying only on interview notes is objectively unreasonable, especially when counsel cite witness control concerns as their reason for not calling them. (Br. 41-43).

While SGT Akbar has not presented affidavits from every potential witness, his inability to find most of these individuals (John Mandell is deceased) should not be held against him when he was denied additional access to a post-trial

mitigation specialist. (JA 2623 (listing "obtaining affidavits from witnesses regarding their lack of involvement" as the first post-trial task that still needs to be completed)). The reality is that SGT Akbar did present numerous affidavits from viable witnesses asserting that counsel never contacted them personally and cited corroborating transcript pages and appellate exhibits in the record demonstrating counsel's lack of contact with witnesses was an ongoing problem that remained uncorrected even during presentencing. (JA 267-70, 275, 1836-38, 1875-78, 2910-29, 3249-50). Furthermore, counsel blame the alleged stabbing incident as their reason for not calling more civilian witnesses when their own witness lists prove this is untrue. When analyzing SGT Akbar's affidavits versus counsel's vague assertions and lack of corroborating evidence in the record, this Court has no reason to credit counsel's excuses.[13] Coupled with the fact that counsel scratched the majority of their remaining penalty phase witnesses after trial began in large part because they were not interviewed or prepared in the 767 days prior to trial, their decision to put on a 38 minute case cannot be deemed a tactical or reasonable one. This amounts to deficient performance in any case and, especially in a capital case, necessitates a new sentencing hearing.

[13] SGT Akbar acknowledges that counsel spoke with, but did not interview for trial preparation purposes, Ruthie Avina, Paul Tupaz, Dr. Sachs, John Akbar, and Quran Bilal prior to trial.

Seating a biased panel.

The government relies solely upon defense counsel's purported "trial strategy" to defend counsel's inaction during voir dire. Counsel's inaction amounts to deficient performance as "there is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury." *Miller v. Webb,* 385 F.3d 666, 676 (6th Cir. 2004). As the Sixth Circuit has reasoned, because counsel cannot waive a client's right to an impartial jury, "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision . . . ." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001).

This Court should follow the Sixth Circuit's logic applied in *Hughes* and *Miller*. To allow counsel's pretrial decision to abrogate "the most essential responsibilit[y] of defense counsel" defies logic, common sense, and the fundamental guarantees in the Constitution. *Miller*, 385 F.3d at 672. This is especially true in military capital trials where replacing *one* biased member with an impartial member could mean the difference between life and death.

Counsel's alleged "strategy" amounts to IAC. In their affidavit counsel attempted to explain their voir dire strategy as following the guidance of Lt. Col. Sullivan and *United States v. Simoy*, 46 M.J. 592 (A.F.C.C.A. 1996)(Morgan, J., concurring),

to put as many members on the panel as possible, in search of an "ace of hearts"—a member who would vote for life. (JA 1966-67). At one point, MAJ DC actually suggested waiving voir dire all together. (JA 2976). Several critical flaws render counsel's voir dire "strategy" unreasonable.

First, this strategy was incompatible with counsel's legitimate fear that SGT Akbar would not receive a fair trial at Fort Bragg. Before trial, counsel requested a change of venue because pretrial publicity tainted potential panel members. (JA 1679). The military judge denied the motion. (JA 228). Voir dire confirmed counsel's fears—pretrial publicity caused intense personal reaction in nearly half the members, one member presumed guilt due to publicity, and *two-thirds* of the members knew the details of an uncharged attack against a military policeman just a week prior. To declare to the judge that SGT Akbar could not receive a fair trial because of a tainted member pool then to do a complete reversal and accept with open arms members actually tainted by pre-trial publicity is objectively unreasonable. Counsel entered voir dire with a strategy set in concrete and failed to adapt it when members gave answers to indicate that they were not the "ace of hearts" counsel sought.

Second, counsel's strategy was completely incompatible with the rest of their trial strategy. At least one member's greatest concern regarding an appropriate punishment was future

dangerousness. (JA 440). According to counsel, the reason for not introducing via witnesses voluminous amounts of mitigation evidence was a fear of "opening the door" to future dangerousness evidence. (JA 1972, 1943, 2349). However, this member and nine others already knew about the attack on the military policeman. To believe that keeping these ten members, rather than getting ten new members with no prior knowledge of the uncharged attack, is irreconcilable with counsel's purported strategy.[14] Likewise, knowing that LTC Gardipee held intolerant views towards Islam (JA 442-43, 1856), and knowing they intended to introduce SGT Akbar's diary containing radical passages couched in terms of Islam, makes it ludicrous to keep him on the panel without at least conducting further questioning to ensure he could realistically vote for life.

Third, the *Simoy* opinion was issued before the 2001 enactment of Article 25a, UCMJ, which provides that "[i]n a case in which the accused may be sentenced to a penalty of death, the number of members *shall be not less than 12* . . . ." (Emphasis added). There was no risk of "going below 12" members at SGT Akbar's court-martial. (JA 1966). Even Judge Morgan acknowledged that challenging a member "may be good enough *where the excused*

[14] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998)(finding over 55% of jurors were more likely to impose death if there was evidence of future dangerousness).

member will be replaced by another, possibly more sympathetic, candidate." *Simoy*, 46 M.J. at 626 (Morgan, J., concurring). In this case, the numerous members viable for challenge would have resulted in additional and "possibly more sympathetic" members being placed on the panel. (*See* JA 3245-46). Additionally, as only six enlisted members sat on the panel, dismissing only two of them would have required new enlisted members to maintain quorum. In that eventuality, the convening authority already decided to replace those members with enough alternates to get to fifteen members. *Id.* Counsel should have used this to their advantage to ensure all enlisted members were capable of being the "ace of hearts" while still having fifteen members.

Counsel do not explain how allowing a panel of mostly biased members would maximize their chances of finding an "ace of hearts" able to resist the immense pressure from fourteen other members to adjudge death. Logically, a panel of even twelve impartial members each openly receptive to all aspects of mitigation would be much more likely to return a life sentence than a panel stacked with biased members. Instead, counsel arbitrarily accepted members who were emotionally affected by SGT Akbar's attacks, who knew about uncharged acts of violence towards a military policeman, who were only concerned with the facts being totally proven to sentence the accused to death, and who believe such mantras as "if the person did the crime, they

should pay" (JA 622) and "my formula is if one person dies, then that means that that person should die also." (JA 489). Any reasonable counsel would know that such members could not be the "ace of hearts." Ignoring the biased responses of panel members based on a pre-trial "strategy" uninformed by voir dire was objectively unreasonable.

Counsel's reliance on a single concurring opinion (seven other judges declined to join) made irrelevant by statute rings hollow. Counsel provided little information indicating this strategy, directed at the most important aspect of SGT Akbar's trial, was fully considered. Did counsel seek advice from learned counsel regarding voir dire? If so, who and what did they say? What studies and articles did they read to compare and contrast their chosen "strategy" with other strategies in light of the passage of Article 25a, UCMJ? Did they speak to other counsel who had used the "ace of hearts" strategy in the manner in which they used it to identify possible pitfalls and nuances to maximize its effectiveness? Did they understand that the convening authority approved a plan to replace members if the panel fell below quorum? The record provides none of this information. Rather, the only evidence of counsel's thought process regarding voir dire is their reliance upon a legal analysis and facts inapplicable to SGT Akbar's case and inappropriate in a modern capital trial. *Cf.* ABA Guidelines

1.1, Commentary, 10.10.2.

"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,* 385 F.3d at 672. Consequently, counsel's professed strategy is irrelevant to this Court's analysis of their performance because counsel cannot waive their client's right to a fair and impartial panel. Even if relevant, this strategy proposing counsel ignore both actual and implied bias was objectively unreasonable and no longer viable at the time of SGT Akbar's trial. The cumulative bias of this panel raises serious doubts about the fairness of SGT Akbar's trial and the reliability of result.

SGT Akbar "was entitled to be tried by [15], not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966). SGT Akbar's counsel denied him this right by failing to thoroughly question[15] and challenge biased members. Further, because SGT Akbar's defense counsel impaneled a biased

[15] *Hughes,* 258 F.3d at 462 (stating that when a person expressly admits bias on *voir dire,* without a court response or follow-up, "for counsel not to respond [to the statement of partiality] in turn is simply a failure 'to exercise the customary skill and diligence that a reasonably competent attorney would provide'") (citation omitted); *accord Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001)("The presence of these jurors and the utter failure by Quintero's trial counsel to contest their presence undermined the entire trial process, such that it lost 'its character as a confrontation between adversaries.'")(citation omitted), *reinstated by* 368 F.3d 892 (6th Cir. 2004).

panel, "prejudice under *Strickland* is presumed, and a new trial is required." *Hughes,* 258 F.3d at 463.

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.

SGT Akbar agrees with the government that "recourse to a post-trial fact-finding hearing is not necessary, as appellant's allegations of ineffective assistance of counsel can be resolved by recourse to the record already established." (Gov't Br. 136). Under *Strickland*, IAC requires reversal of a conviction or death sentence if deficient performance results in prejudice. 466 U.S. 668 (1984). Based on the record and post-conviction evidence currently before this Court, SGT Akbar believes he met this burden. *If this Court agrees*, SGT Akbar asks this Court to accept the government's waiver of any opportunity to develop additional facts supporting its opposition.

If this Court determines it cannot decide SGT Akbar's IAC allegations in his favor based upon the existing record, it should provide him the opportunity to "salt down the facts first . . ." before ruling on his claims. *Loving v. United States*, 64 M.J. 132, 134 (C.A.A.F. 2006). Contrary to the government's unsupported legal conclusion, SGT Akbar's interpretation of *United States v. Dubay* and *United States v. Ginn* is entirely consistent with this Court's precedent. (*See* Gov't Br. 135).

A *Dubay* hearing "is a proceeding 'utilized to gather additional evidence or to resolve conflicting evidence before determining an issue presented to the appellate tribunal.'" *United States v. Roberts*, 18 M.J. 192, 193 (C.M.A. 1984) (citation omitted). This procedure is appropriate when "disputed facts and opinions can better be tested in the crucible of examination at trial." *Id*. at 195 (Everett, C.J., concurring) (citation omitted).

This Court announced the *Ginn* factors not as a means of resolving disputed facts, but for determining when a *Dubay* hearing is required. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). These factors were developed from, and are consistent with, the procedures employed in federal courts when considering habeas petitions under 28 U.S.C. §§ 2254-2255. *Ginn*, 47 M.J. at 243-44; *Loving*, 64 M.J. at 147. In proceedings under 28 U.S.C. § 2255, "[a]n evidentiary hearing is usually required if the motion states a claim based on matters outside the record or events outside the courtroom." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989) (citation and internal quotation marks omitted). When credibility is at issue affidavits may be helpful in determining the need for an evidentiary hearing, but are rarely conclusive. *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977).

Consistent with *Ginn*, under the federal rules, "'the court

must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record.'" *United States v. Booth*, 432 F.3d 542, 545 (3d Cir. 2005) (citation omitted). An evidentiary hearing is required "'unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.'" *Id*. This creates a reasonably low standard for petitioners. *Id*. at 545-46; s*ee also United States v. Fagan*, 59 M.J. 238, 243 (C.A.A.F. 2004) (stating "it is the inapplicability of any of the five *Ginn* factors and the presence of affidavits that raise material fact disputes concerning Fagan's claim that require a *Dubay* hearing").

Also, under the federal rules, courts are not limited to affidavits when considering the need for an evidentiary hearing. Matters initially considered by the courts include the pleadings, "any attached exhibits, and the record of prior proceedings . . . ." Rule 4(b), Rules Governing § 2255 Proceedings for the U.S. District Courts [hereinafter Rules Governing § 2255 Proceedings]. Thereafter, "the judge can direct expansion of the record to include any appropriate materials that 'enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing.'" *Blackledge*, 431 U.S. at 82 (quoting Rule 7, Rules Governing § 2255 Proceedings). Materials judges may use to expand the record include not only affidavits, but also "letters

predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories . . . ." Rule 7(b), Rules Governing § 2255 Proceedings. If the motion cannot be dismissed on its face, "the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Rule 8(a), Rules Governing § 2255 Proceedings; s*ee also* Rule 6 (allowing courts to grant post-conviction discovery requests for good cause).

In *Loving*, this Court recognized the central importance of evidentiary hearings when resolving collateral IAC allegations in capital cases. 64 M.J. at 149-50 (stating "we consider a most important fact that this is a capital case"). As in SGT Akbar's case, Loving "filed a voluminous set of wide ranging affidavits and documentary evidence to establish the factual predicate for his . . ." IAC claims. *Id*. at 150. Despite this, during his direct appeal, this Court denied Loving's IAC claims without ordering an evidentiary hearing. *Id*. at 148. In reviewing Loving's habeas petition, this Court found its earlier consideration of his case flawed because it "did not adequately focus on the reasonableness of the defense investigation . . ." in light of *Wiggins v. Smith*, 539 U.S. 510 (2003) and "did not order an evidentiary hearing on this issue." *Id*. In so doing, this Court likened Loving's writ to a petition for relief

from a state conviction (28 U.S.C. § 2254) wherein petitioner had no previous opportunity to adequately develop a factual predicate for his claims. *Id*. at 147-48. Thus, this Court held:

> The affidavits *and other evidence* presently before this Court relating to ineffective assistance of counsel is the type of information that under *Massaro* and *Wiggins*, must be assessed in a habeas or *DuBay* hearing. The allegation of ineffective assistance of counsel presents mixed questions of fact and law that require assessment by a *DuBay* judge as to the credibility of witnesses, and the validity and accuracy of other factual evidence.

Id. at 152 (citing *Massaro v. United States*, 538 U.S. 500 (2003); *Wiggins*, 539 U.S. 510))(emphasis added).

The government's narrow view that *Ginn* and *Dubay* only apply to "conflicts between post-trial affidavits" ignores the purpose, development, and application of those cases. Also flawed is the government's belief that a *Dubay* hearing is unnecessary unless every discrete fact within an affidavit directly conflicts with a discrete fact within a competing affidavit. *See Ginn*, 47 M.J. at 243 (concluding CCAs may not "decide disputed questions of fact pertaining to a post-trial claim, solely *or in part* on the basis of conflicting affidavits submitted by the parties") (emphasis added)); *see also Thompkins*, 641 N.E.2d at 379-80. The point is, if a declarant's credibility is at issue an appellate court cannot rely upon his or her affidavit to resolve disputed questions of fact. In this case, credibility is an essential issue.

Here, the government predicates its entire argument against SGT Akbar's IAC claims on the assumption that counsel's affidavits are true.[16] On that basis, the government asks this Court to simply dismiss the numerous affidavits and other evidence submitted by SGT Akbar as false or irrelevant. All the while, the government conspicuously avoids any discussion of SGT Akbar's non-affidavit evidence because these are "not a conflict between affidavits." (Gov't Br. App'x 1).

The government's apparent discomfort with the record citations, emails, trial appellate exhibits, and witness lists is understandable. These facts cannot be impeached. More importantly, these facts directly contradict counsel's alleged "tactical" decisions and multiple assertions that they personally interviewed potential witnesses and employed reasonable procedures to select, prepare, and present them at trial. (Br. 127-32; App'x B 7, 19-25, 28, 32, 38-42). Rather, up to one month before trial, it appears counsel simply relied upon the interview summaries provided by the FBI and their mitigation specialists to prepare SGT Akbar's case. (Br. 127-32). Many, if not most, of these summaries were based upon interviews

[16] *See*, *e.g.*, (Gov't Br. 23, 36-37, 85 n.374, 124 (asserting MAJ DB's e-mail as fact that completely trumps affidavits from Dr. Sachs and Ms. Nerad without an evidentiary hearing); Gov't Br. 34-35, 38, 55-56 n.263 (asserting counsel's affidavit regarding statements by Ms. Nerad as fact even though Ms. Nerad's affidavit disputes the alleged statement (JA 2780))).

conducted over a year before trial by Ms. Grey, who left the defense team in May 2004. (JA 1625-26, 1627, 1643-45, 1639-42, 2027-37, 1931, 2496, 2498, 2500). It is not surprising the government had difficulty locating or speaking to most of these witnesses for six months. (Br. 128-29; JA 267-70, 275, 1836-38, 1875-78, 2919-29, 3249-50). It is surprising counsel waited until the eve of trial *in a capital case* to decide which sentencing witnesses to call, prepare them, or even determine if they would be good witnesses. (Br. 127-32, 2910-29). In the end, counsel chose to present SGT Akbar's mitigation case on paper having exerted little, if any effort, to develop one with humans. (Br. 127-32). Considering the record as a whole, counsel's abysmal sentencing case "resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

In particular, based on their own contemporaneous witness lists, counsel's explanation of the March 30, 2005, incident and its ramifications is fantasy. The witness lists demonstrate this incident did not have a "devastating impact on the defense's sentencing case." (*Compare* JA 1943, 2349, *with* JA 2287, 2910-29; *see also* JA 2287 (counsel's email stating "[i]n terms of the trial, the impact will be limited" referencing the March 30, 2005, incident). It was not the reason counsel "frontload[ed]" their mitigation evidence or "turned to the documentary evidence collected during the mitigation investigation . . . ." (*Compare*

JA 2349, *with* JA 2910-23; *see also* JA 2287). And it was not the reason they decided against calling at least thirteen previously identified civilian sentencing witness.[17] (JA 2910-29; *see also* Br. 127-32 and App'x B 7, 19-25, 28, 32, 38-42). Considering this evidence together with the record, it is also highly unlikely the March 30, 2005, incident prompted counsel's decision not to call five of the six remaining civilian sentencing witnesses they requested on March 31, 2005. (Br. 131-32).

In a larger sense, the witness lists reveal an issue more fundamental than specific factual disparities; for time alone cannot account for these. Counsel's descriptions of their actions in response to the March 30, 2005, incident are palpably wrong in virtually every respect. If the combined memories of both counsel are so unreliable and susceptible to confabulation in those responses, the same infirmity reasonably pervades their affidavits generally. Thus, a *Dubay* hearing is necessary not only to de-conflict the mass of contradictions between counsel's affidavits and SGT Akbar's post-conviction evidence and the record of trial, but also to test the reliability of counsel's remaining assertions whose reliability is suspect.

For the foregoing reasons, no *Ginn* factor applies here. This Court must either find in favor of one of SGT Akbar's

[17] Because counsel's explanation for not calling these sentencing witnesses is objectively untrue, SGT Akbar has no idea why they made this decision.

dispositive claims, including ineffective assistance of counsel, or remand his case to a *Dubay* hearing for further factfinding.

Assignment of Error A.III

VIOLATIONS OF SGT AKBAR'S EIGHTH AND FIFTH AMENDMENT RIGHTS WARRANT REVERSAL AS THEY PREJUDICED HIM AND RENDERED HIS SENTENCING FUNDAMENTALLY UNFAIR.

Unquestionably, "admission of a victim's family members' characterizations and opinions about the crime [and] the defendant" violates the Eighth Amendment. *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).[18] A prosecutor's arguments violate Due Process when they contain improper human value comparisons between a defendant and his victims or otherwise when "a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.* at 825.

As SGT Akbar's opening brief explained, the prosecution systematically elicited opinions from thirteen victim witnesses equating SGT Akbar to a terrorist or traitor who killed his fellow American soldiers, and characterized the crime as a "betrayal." (*See* Br. 134-38 (citing JA 1100-1386)).[19] Consistent

[18] *See United States v. Johnson*, 713 F. Supp. 2d 595, 622 (E.D. La. 2010)("Subsequently to *Payne,* several federal courts of appeals, including the Fifth Circuit, have specifically held that the *Booth/Gathers* Eighth Amendment still prohibits victim comment on the crime, the defendant and the penalty sought.").

[19] The government incorrectly asserts that SGT Akbar "concedes . . . no witness actually likened the offense to assisting the enemy, treason, or mutiny, and no witness characterized appellant as a terrorist or traitor." (Gov't Br. 140 n.615). SGT Akbar did no such thing. Rather, he argued: "These angry

with those vitriolic themes, and using "enemy" as a euphemism for traitor, the prosecutor repeatedly derided SGT Akbar as the "enemy inside the wire," made improper human value comparisons between this "enemy" and his victims, and urged the panel to sentence him to death to send a message to the military community about "the value of loyalty." *See, e.g.*, (JA 1396-97). Before trial, recognizing the potential for statements "equat[ing] SGT Akbar to a terrorist or traitor" to prejudice the panel (JA 1899), trial counsel litigated and won a motion to exclude such improper victim impact evidence. (JA 1072). Counsel's inexplicable failure to object contemporaneously either to the introduction of improper evidence, or government arguments exploiting it, was IAC. Also, the military judge, having found the improper victim impact evidence inadmissible, erred by not giving curative instructions to mitigate the effect of these apparent constitutional violations.

Despite this, the government first argues there was no Eighth Amendment violation for counsel to object to because victim impact witnesses offered only permissible expressions about their own feelings—not improper characterizations or opinions—and did not use the words "traitor" or "terrorist." (Gov't Br. 139-40). Second, the government asserts government

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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." (Br. 140).

sentencing arguments were "altogether appropriate," as they did not call SGT Akbar a terrorist or "inappropriately" ask the panel to weigh SGT Akbar's life against the victims' lives. *Id.* at 142-43. But, as explained below, the government's arguments should be rejected because they ignore *Payne*, fail to address persuasive authority interpreting *Payne*, and otherwise ignore the plain meaning and import of the loaded words that victim witnesses and the government did use to inflame the panel.

In arguing that the parade of victim witnesses equating SGT Akbar with a terrorist or traitor was consistent with *Payne*, the government neglects to mention any of the persuasive authority upon which SGT Akbar relies, including *United States v. Mitchell*, 502 F.3d 931, 990 (9th Cir. 2007) and *DeRosa v. Workman,* 679 F.3d 1196, 1239 n.138 (10th Cir. 2012). (*See* Br. 145-46). As these cases reinforce, the Eighth Amendment forbids victim impact evidence not related to the valid purpose of reminding the jury "'that the victim is an individual whose death represents a unique loss to society and in particular to his family.'" *Payne*, 501 U.S. at 825. Thus, even if a victim impact witness couches testimony as a mere expression of his feelings, where review of the testimony demonstrates that it is essentially a characterization of and opinion about the crime and defendant primarily intended to "inflame the [panel],'" it

is inadmissible. *Booth v. Maryland*, 482 U.S. 496, 508 (1987).[20]

In *Mitchell*, the court found the following victim impact witness testimony violated *Payne* as "an inadmissible opinion about Mitchell's crime": "It's been really hard . . . to know someone within our own kind, our own culture and our own belief, our traditional values, how we teach our young people." 502 F.3d at 990. Similarly, in *DeRosa*, where one victim witness testified, among other things, that she "felt horror and *betrayal* from the people that [the victims] knew and trusted," the court found it an improper characterization under *Payne*. 679 F.3d at 1239 n.138 (emphasis added). There, isolated improper comments cured by jury instructions did not warrant relief. *Id.* at 1240.

Here, the taint is greater. Not one, but thirteen, victim witnesses provided improper opinion and characterization testimony mirroring the Eighth Amendment violations identified in *Mitchell* and *DeRosa*. *See, e.g.,* (JA 1200 ("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 1213

[20] Contrary to the government's suggestion, *Payne* did not overrule *Booth* in its entirety. (Gov't Br. 138). Rather, *Payne* left intact the improper victim impact testimony about which SGT Akbar complains. *See Lockett v. Trammel*, 711 F.3d 1218, 1235 (10th Cir. 2013)("The *Payne* Court held that there is no *per se* bar against such victim impact testimony under the Eighth Amendment. *Id.* The *Payne* Court specifically noted, however, that its holding did not affect *Booth*'s rule that 'admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.'").

("I just --- I couldn't believe it was another American that would do something like this, to a fellow American, especially a solider; 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 1374 ("And it's just – today, I still have a difficult time. It's the hardest part. It's a betrayal.")). And in this case, absent defense objection, the court provided no curative instructions. Given the government's failure to reconcile its position to authority refuting it, this Court should remedy the violations of SGT Akbar's Eighth Amendment rights, which counsel and the court left un-redressed at trial.

Contrary to the government's assertion, the absence of the word "treason" is not dispositive, especially when the words "enemy" and "betrayal" carry the same connotation and were used repeatedly to paint SGT Akbar as a traitor. The record makes evident the government's deliberate use of the term "enemy"—a particularly loaded term for servicemembers and even more so in the context of this case.[21] The government clearly developed the

[21] *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 ("The enemy was in the wire . . . . It was SGT Hasan

theme “enemy inside the wire” for the sole purpose of inflaming the unique fears and prejudices of post-9/11 soldiers currently participating in the war on terror.[22] As a result, that no one formally used the word “traitor” means little because the impact of repeatedly telling the panel that SGT Akbar was the “enemy” and that his crime was an anger-inducing act of betrayal by an American soldier against other American soldiers was equivalent to a treason accusation. As a panel of combat veterans surely understood, these descriptions were entirely consistent with common definitions of “traitor.” *See, e.g.*, Black’s Law Dictionary (9th ed. 2009)(defining “treason” as “[t]he offense of attempting to overthrow the government of the state to which one owes allegiance, either by making war against the state or by materially supporting its enemies”; defining “traitor” as “[o]ne who betrays a person, a cause, or an obligation”; and defining “enemy” as, among other things, “[a]n opposing military force”). “The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases.” *Booth,* 482 U.S. at 508-09.

Akbar”); JA 1482 (“Christopher Seifert, murdered by the enemy within the wire”).

[22] *See, e.g.*, *Viereck v. United States*, 318 U.S. 236, 248 (1943) (prosecution’s argument containing irrelevant appeal to passion and prejudice by reference to war, was improper and should have been interrupted by the court *sua sponte*).

Nor does *Payne* permit the prosecutor, as happened in SGT Akbar's case, to offer direct human value comparisons between the defendant and victims. (JA 1467-68). Again, as asserted in the opening brief, the prosecution may not "encourage the jury to compare the worth of a defendant's life with the worth of his victims." (Br. 150 (quoting *Hall v. Catoe*, 601 S.E.2d 335, 361-64 (S.C. 2004)(citing *Payne*))). That is precisely what trial counsel did when he said, after explaining Gate 3, "What you must decide is what a life is worth; what two lives are worth; what a military career is worth; what the use of your legs are worth; what a little boy's life without his father is worth." Trial counsel then said, "You must weigh all of that against the evidence that SGT Akbar has presented." (JA 1468). At another point, shortly after calling SGT Akbar a "hate-filled murderer," trial counsel told the panel: "Weigh his life – that is what you're doing. You're weighing his life against what he did, what he caused, and what he set in motion forever." (JA 1474). And when such comparisons are made, defense counsel has a duty to object. *Hall*, 601 S.E.2d at 364. That clearly did not happen here. While the government asserts no constitutional violation in trial counsel's human worth comparisons, it also fails to discuss relevant case law which has.

In sum, the government's legally un-tethered arguments are wholly inadequate to sustain its burden of showing the Eighth

and Fifth Amendment violations harmless beyond a reasonable doubt.[23] The inadmissible victim impact evidence created a "constitutionally unacceptable risk," that the panel, already in sympathy with the victims and improperly instructed, might arbitrarily impose the death penalty. *Booth*, 482 U.S. at 503. While the government argues any inadmissible victim impact evidence was "brief" (Gov't Br. 143), it was endemic throughout the government's sentencing case. Though the court, prosecutor, and defense counsel all agreed that testimony equating SGT Akbar to a terrorist or traitor would violate his constitutional rights, thirteen witnesses and the prosecutor delivered a barrage of equivalent characterizations and opinions. Moreover, as described in AE A.I, the "effect of the improper victim impact evidence was highlighted by the conspicuous absence of counterbalancing mitigation evidence from the defense." *Cargle v. Mullin*, 317 F.3d 1196, 1224 (10th Cir. 2003). Accordingly, SGT Akbar's case must be remanded for a new sentencing hearing.

Assignment of Error A.IV

> THE MILITARY JUDGE, BY FAILING TO SUA SPONTE DISMISS FOURTEEN OF THE FIFTEEN PANEL MEMBERS FOR CAUSE BASED ON ACTUAL AND IMPLIED BIAS MANIFESTED BY RELATIONSHIPS OF THE MEMBERS, A PREDISPOSITION TO ADJUDGE DEATH, AN INELASTIC OPINION AGAINST CONSIDERING MITIGATING EVIDENCE ON SENTENCING, VISCEROL REACTIONS TO THE

[23] Because SGT Akbar was "denied a federal constitutional right the government has the burden of proving beyond a reasonable doubt that the error did not affect the defendant's substantial rights." *Chapman v. California,* 386 U.S. 18, 24 (1967).

CHARGED ACTS, PRECONCEIVED NOTIONS OF GUILT, AND DETAILED KNOWLEDGE OF UNCHARGED MISCONDUCT THAT HAD BEEN EXCLUDED, DENIED SGT AKBAR A FAIR TRIAL.

The government's response to this assignment of error is little more than a hand-waive. The government ignores or glosses over SGT Akbar's key arguments and cited case law, baldly asserting no reasonable member of the public would question the impartiality of the members even though two-thirds were aware that SGT Akbar allegedly stabbed a military policeman in the neck with scissors the week before trial,[24] nearly half expressed intense reactions to SGT Akbar's crime, the two senior ranking members had personal relationships with the first and senior-most victim on the charge sheet, another senior ranking member's brother commanded the victimized unit at the time of trial,[25] six members demonstrated an unwillingness to consider mitigation evidence to include one senior member holding extremely critical views toward Islam, and one member expressed a predetermined view that SGT Akbar was guilty.

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[24] The government vainly attempts to minimize this point by repeatedly using "only" to describe each member's knowledge of SGT Akbar's attack. (Gov't Br. 149 n.647). In reality, footnote 647 further demonstrates the pervasiveness of this taint by showing the large number of members aware of this uncharged misconduct.

[25] The government asserts that LTC Turner's "brother was not in command at the [victimized unit] before, during *or after* the attacks . . . since General Petraeus transferred the case to Fort Bragg . . . ." (Gov't Br. 159 (emphasis added)). This is inaccurate as LTC Turner confirmed that his brother commanded SGT Akbar's former unit at the time of trial. (JA 408, 682).

The government's defense of this skewed panel predominantly relies on the mass responses to the military judge's general voir dire questions, and some individual voir dire questions, expressing self-perceived fairness and impartiality. (Gov't Br. 149-53, 157-60). Yet the government wholly ignores the well-established principle that assertions of impartiality are irrelevant under an implied bias analysis. *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997).[26] Assertions of fairness are insufficient because the member may not realize the bias exists and how it will affect his decision-making at the end of trial. *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982). Furthermore, even assuming that each member believed they were answering honestly, this Court has held that "[i]mplied bias is not about the members' integrity. . . . [T]he question is would the public nonetheless perceive the trial as being less than fair . . . ." *United States v. Richardson*, 61 M.J. 113, 120 (C.A.A.F. 2005). Here, the answer must be that the public could not perceive a panel so comprised impartial.

The required focus on the perception of impartiality regardless of disclaimers demonstrates the non-responsiveness of the government's argument. For example, the government

[26] *See, e.g., United States v. Nash*, 71 M.J. 83, 88 (C.A.A.F. 2012); *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007); *United States v. Napolitano*, 53 M.J. 162, 167 (C.A.A.F. 2000)); *Fisher v. State*, 481 S.2d 203, 221 (Miss. 1985); *United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982).

completely ignored that the panel president called the senior victim in this case, COL Hodges, his "friend" as evidenced by their family's ongoing relationship—their kids played together as they lived on the same street at the time of trial. (JA 357, 369). The government's superficial defense of this member is understandable since it asserted at trial that if the members "know any of the victims, *certainly*, that would be a ground for challenge for cause . . . ." (JA 119 (emphasis added)). The government's statement should have placed the military judge on notice that members such as COL Quinn could not sit on a capital panel. *See Harris*, 13 M.J. at 292. Considering he was also the leader of this panel, *see id.*, knew SGT Akbar scuffled with a military policeman and saw patrol cars responding to the incident, and served as a fellow staff officer with COL Hodges under the convening authority, COL Quinn is exactly the type of member the President intended to exclude to prevent "even the perception of bias, predisposition, or partiality." *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). It is apparent that "'[m]ost people in [COL Quinn's] position would be prejudiced.'" *Id*. at 459.

Likewise, the government neglects that several members gave equivocal responses to impartiality questions.[27] For example, in

[27] (*See*, *e.g.*, Br. 164, 174, 176 (COL Meredith, LTC Gardipee, and MAJ Seawright)).

its response the government devotes only three lines to LTC Gardipee's troubling view that Muslims are "misguided, easily influenced, [and] too rigid," and Islam is "selfish," overly "passionate," and not for "the good of the man." (JA 442-43, 1856). Not knowing the critical nature of the Islamic faith to SGT Akbar's defense and mitigation case, LTC Gardipee could only muster, "I shouldn't think so. . . . I consider myself pretty fair-minded," when asked if these views would affect his judgment. (JA 443). That response is the only basis the government presents to show the purported impartiality of LTC Gardipee, who also knew of the scuffle *with a guard* and whose primary consideration on sentencing was future dangerousness *in prison* (JA 440, 446). (Gov't Br. 159 n.699). The government's response is wholly inadequate as "'[t]he Sixth Amendment guarantees . . . the right to a jury that will hear his case impartially, not one that tentatively promises to try.'" *Miller v. Webb*, 385 F.3d 666, 676-77 (6th Cir. 2004)(citation omitted); *cf. United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)(citing *Harris*, 13 M.J. at 291). That principle is especially relevant to a member bigoted against the accused's Islamic faith in a case where Islam is a central issue.

The government does not explain how perfunctory member assurances and "I think I can" responses are sufficient under an implied bias analysis. When implied bias exists, the military

judge has a *sua sponte* duty to perform a detailed voir dire to dissipate or further expose the bias. In this case, the military judge did little, if anything, to ensure SGT Akbar's panel was free of "bias, predisposition, or partiality." Absent findings on the record, the military judge's decision to take no action addressing implied bias receives no deference. This Court should reverse the findings and the sentence as even one biased member empanelled by the military judge violated SGT Akbar's constitutional right to a fair trial. *Briggs*, 64 M.J. at 287.

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 SERGEANT AKBAR'S CASE WAS FLAWED BECAUSE OF ITS MISAPPLICATION OF THE GUIDELINES AND ITS DETERMINATION COUNSEL WERE "WELL-QUALIFIED."

The government misstates SGT Akbar argument as "the military must adopt" the ABA's 2003 guidelines (ABA Guidelines), and counsel who do not meet those guidelines "have rendered per se ineffective assistance of counsel." (Gov't Br. 176). SGT Akbar's brief makes no such claims. As the Supreme Court and this Court have recognized, the ABA Guidelines must be used as *norms* in evaluating counsel's performance. SGT Akbar maintains the Army Court failed to do so. Also, because of their lack of capital experience and training, SGT Akbar's counsel should not have received the deference of "well-qualified counsel" the Army Court afforded them in evaluating their performance.

The government's claim the ABA's 2003 Guidelines have no applicability to military capital cases is odd, particularly because the Guidelines have been consistently recognized as defining the prevailing professional norms in capital cases under which IAC claims must be evaluated. In *Williams*, 529 U.S. 362, the Supreme Court looked to the ABA standards for adequate investigation applicable at the time of Williams' trial. *Id.* at 396 (citing 1 ABA Standards for Crim. Justice 4–4.1, cmt., p. 4–55 (2d ed. 1980)). Similarly, in *Wiggins*, the Court recognized that capital litigation requires skills and training not necessarily possessed by conventional criminal defense counsel because capital trials require the preparation of an extensive case in mitigation and in-depth investigation into a client's background and mental health. 539 U.S. at 524-26. In *Rompilla*, 545 U.S. 374, the Court again relied on ABA standards, holding that counsel must investigate everything relevant to the penalty phase, regardless of the accused's admissions or statements. *Id.* at 387 (quoting 1 ABA Standards for Crim. Justice 4–4.1 (2d. ed. 1982 Supp.)). Finally, in *Loving*, 64 M.J. at 152, this Court, in determining an evidentiary hearing appropriate, based its decision upon the Supreme Court's analysis in *Wiggins*.[28]

[28] The government's brief is remarkably lacking in applicable capital case law. For instance, the government cites *Wiggins* only once (Gov't Br. 74), and *Williams, Rompilla* and *Loving* not

Nor does SGT Akbar claim counsel per se ineffective because they lacked capital experience. Instead, viewing the case they tried using the Guidelines as norms, including their paltry sentencing presentation, counsel fell short of what the Guidelines suggest is appropriate in almost all areas. While counsel theoretically had the support of a defense "team" of sorts through stages of trial preparation, the mitigation specialists were jettisoned approximately one month before trial without being consulted about trial strategy, contrary to Guidelines 4.1 and 10.4, which state that counsel should receive support at every stage of the proceedings. Guideline 10.4 contemplates an integrated defense team, which SGT Akbar was never afforded. Indeed, counsel were apparently more concerned the mitigation specialists were providing bona fide product rather than leading a capital defense team. Also, as established in SGT Akbar's opening brief, defense counsel had minimal capital training, contrary to Guideline 8.1, which advocates a "comprehensive training program." MAJ DC attended just one capital defense course, and MAJ DB attended none, opting to attend Air Assault School instead. (JA 2945).

Even giving defense counsel the benefit of doubt (see pg. 1), counsel personally interviewed at most a total of fifteen

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at all. The government apparently avoids such citations since addressing them would give the Guidelines credence.

potential civilian lay witnesses in the 767 days it took them to prepare for trial. Fifteen is a particularly small number of witnesses for a capital case, especially in light of Guideline 10.11, which calls for interviewing witnesses familiar with the client's life from conception onward, witnesses who would present positive aspects of the client's life, expert and lay witnesses to discuss medical, cultural, psychological and other aspects of the client's life, and witnesses who could discuss the adverse impact the client's execution would have on the client's family. The paucity of witnesses begs the question: What was counsel doing during trial preparation?

In evaluating counsel's performance with the Guidelines as professional norms, their performance fell short of that ordinarily expected of capital counsel. Counsel were short on training and experience, failed to identify, prepare, and present witnesses, and failed to engage a team approach. Using the Guidelines as a barometer, counsel failed to provide the quality of representation professional norms require.

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.

The government asserts this assignment of error, and the

correlating sub-issue raised in AE A.I, lack merit because the requested instruction at findings would effectively constitute a plea of guilty. (Gov't Br. 64 n.295, 180-81). SGT Akbar did not assert the *mitigation* instruction should have been given prior to findings. Rather, counsel's withdrawal of the requested mitigation instruction *for sentencing* amounted to IAC as there was no logical reason to withdraw the instruction and a failure to deliver the instruction deprived SGT Akbar of a properly instructed panel regarding all aspects of mitigation. Further, as defense counsel now claim that their mitigation plan was to introduce all aspects of mitigation during the merits phase (JA 2349), it was incumbent on them to fully inform the panel that their defense against the premeditation element was offered as mitigation evidence as well. As they failed to capitalize on this opportunity through instructions, the panel saw this evidence as it was presented—as a feeble defense to the crimes alleged, not mitigation.

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.

Contrary to the government's argument, SGT Akbar does not

assert Equal Protection requires the military justice system employ the same procedures prescribed in the USAM. SGT Akbar argues the military justice system has *no* procedures ensuring the equal application of the decision to pursue death, nor does it ensure the same level of expertise and experience required of counsel in federal courts and military commissions. Simply by virtue of their status, servicemembers are denied the uniform application of the death penalty and equal quality of counsel.

The federal government issued a formal protocol for U.S. Attorneys to follow in all death penalty cases in response to the Federal Death Penalty Act. 18 U.S.C. § 2245 (1994); USAM § 9-10.010. This protocol grants the Attorney General the ultimate decision on whether to pursue death. *Id.* at § 9-10.040. This ensures consistent application of the federal capital sentencing scheme across more than ninety U.S. Attorney offices.

Unlike the federal system, the military does not ensure consistent application of capital punishment. In contrast to the USAM, there is no protocol for convening authorities to follow in military capital cases. This means that in the more than ninety Army GCMCAs, along with the hundreds of GCMCAs in the sister services, any GCMCA can refer a case capital at his sole unfettered discretion. R.C.M. 504.

In addition to lacking systemic consistency, soldiers charged with capital crimes are the only class of federal

capital defendants not guaranteed representation by counsel "learned in applicable law relating to capital cases." *See* 18 U.S.C. § 3005; 10 U.S.C. § 949a. Even enemy belligerents charged with capital crimes are guaranteed learned capital counsel at military commissions. 10 U.S.C. § 949a(b)(2)(c)(ii). Under R.C.M. 506, if a capitally charged soldier wants qualified counsel, he must do so "at no expense to the government." *Id*. This is in stark contrast to 10 U.S.C. § 949a, which requires learned counsel be appointed and compensated. Thus, American soldiers receive less procedural safeguards than al Qaeda terrorists.

Like suspected terrorists, federal capital defendants are provided at least one counsel "learned in the law applicable to capital cases." 18 U.S.C.A. § 3005.[29] According to the "Guide to Judiciary Policy," learned counsel "should have distinguished prior experience in the trial, appeal, or post-conviction review of federal [or state] death penalty cases . . . ." Vol. 7A, Appx. 6A 1(b) (2010). SGT Akbar was denied such representation.

Federal capital defendants are represented by counsel with a highly developed skill set, whereas members of the military are provided counsel unprepared for the intricacies of capital

[29] *See also* Lt. Cmdr. Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military,* 2010 Army Law. 5, 16 (discussing *the* vast majority of states that authorize death have some form of capital counsel standards).

litigation. The death penalty is qualitatively different from other punishments and demands "extraordinary efforts on behalf of the accused" at every state of the proceeding, and counsel must have a highly developed skill set to handle such cases. ABA Standards for Criminal Justice: Defense Function, Standard 4-1.2(c), in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993). Unlike other federal capital defendants, however, soldiers are unconstitutionally deprived of capitally qualified counsel.[30] Thus, SGT Akbar should receive a new trial, or at a minimum, a new sentencing hearing with qualified counsel.

Assignment of Error B.I

> THE ARMY COURT OF CRIMINAL APPEALS FAILURE TO DO AN ARTICLE 66(C), UCMJ, PROPORTIONALITY REVIEW REQUIRES REMAND FOR A COMPLETE REVIEW BECAUSE (1) IT WAS REQUIRED BY LAW TO CONDUCT THE REVIEW, AND (2) THE FAILURE TO DETAIL ITS REVIEW IN ITS OPINION, IF DONE, HAS TRAMMELED THIS COURT'S ABILITY TO REVIEW THE PROPORTIONALITY ANALYSIS PURSUANT TO ARTICLE 67, UCMJ.

The government concedes the Army Court failed to conduct the required proportionality review in SGT Akbar's case. (Gov't Br. 218). Article 66(c), UCMJ, requires a proportionality review of death sentences by the service courts. *United States*

[30] Additionally, Articles 16 and 25a, UCMJ, denied SGT Akbar equal protection because similarly situated defendants in federal district court may be tried by judge alone where SGT Akbar could not be. Further, federal defendants enjoy twenty peremptory challenges in capital cases and SGT Akbar only got one. Fed. R. Crim. P. 24(b). SGT Akbar's military status is an arbitrary distinction on which to receive different treatment.

v. Curtis, 33 M.J. 101, 109 (C.M.A. 1991); *cf. Davis v. Florida*, 121 So.3d 462, 499-501 (Fla. 2013)(detailing a proportionality review that considered the most aggravated cases along with the least mitigated cases, to include considering cases with mental health mitigation). Even so, the government maintains the Army Court's failure to conduct such a review was harmless because this Court can look to *United States v. Loving* and five Supreme Court cases from 1990 and earlier to determine that SGT Akbar's death sentence is proportional and thus should be affirmed.

Leaving aside whether a proportionality review relying solely on aged cases is appropriate,[31] because of the Army Court's "unique sentencing power under Article 66(c)" the Army Court is the only appropriate forum for a proportionality review. *United States v. Gray*, 51 M.J. 1, 63 (C.A.A.F. 1999). "The power to review a case for sentence appropriateness, including relative uniformity, is vested in the Courts of Criminal Appeals, not in our Court, which is limited to errors of law." *United States v. Lacey*, 50 M.J. 286, 288 (C.A.A.F. 1999). Thus, as this Court found in *Curtis*, the Army Court's

[31] Two recent cases illustrate the flaw in the government's application of *Loving* and similarly stale cases to a service court's analysis. Staff Sergeant Robert Bales received LWOP for murdering sixteen Afghan civilians. Joel Millman, *Soldier Gets Life in Massacre*, Wall St. J., August 23, 2013. SGT John Russell also received LWOP for murdering five service members in Iraq. Adam Ashton, *Sgt. John Russell Gets Life Sentence for Murder of 5 at Clinic in Iraq*, Seattle Times, May 16, 2013.

failure requires remand to that court for its statutorily required review without a prejudice analysis. 33 M.J. at 109.

As the Army Court failed to conduct the appropriate proportionality review, which also deprives SGT Akbar of this Court's review of the Army Court's proportionality analysis as required by Article 67, this Court should remand SGT Akbar's case to the Army Court to perform a proper proportionality review as mandated by Article 66(c) and *Curtis*, 33 M.J. at 109.

Conclusion

WHEREFORE, SGT Akbar requests that this Court set aside the findings and the sentence, or, in the alternative, affirm a sentence to LWOP 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 August 6, 2014.

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