IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

KENNETH W. BORGNINO
Major, JA
Lead Counsel
Office of The Judge Advocate General, United States Army
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, VA 22060-5546
Phone: (703) 693-0754
U.S.C.A.A.F. Bar No. 35098

CARRIE L. WARD
Captain, JA
Appellate Government Counsel
Government Appellate Division
U.S.C.A.A.F. Bar No. 36154

JAMES L. VARLEY
Lieutenant Colonel, JA
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 31031

JOHN P. CARRELL
Colonel, JA
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36047

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TO THE HONORABLE 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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. §866(b) [hereinafter UCMJ].[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(1), UCMJ, which permits review in "all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death."[2]

[1] UCMJ, art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, art. 67(a)(1), 10 U.S.C. § 867(a)(1).

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas,[3] of premeditated murder (two specifications) and attempted premeditated murder (three specifications), in violation of Articles 80 and 118 of the Uniform Code of Military Justice (UCMJ).[4] The panel sentenced appellant to death.[5] The convening authority approved the adjudged sentence.[6] The Army Court affirmed the findings and the sentence, and denied two requests for reconsideration.[7]

Statement of Facts

Markedly absent from appellant's brief is any discussion of the underlying facts supporting appellant's conviction and death sentence. Appellant stands convicted of the premeditated murder of Army Captain (CPT) Christopher Siefert and Air Force Major (MAJ) Gregory L. Stone, as well as the attempted premeditated murder of sixteen other Officers on the night of March 22, 2003. Appellant was a member of Company A, 326th Engineer Battalion, 1st Brigade Combat Team, 101st Airborne Division (Air Assault) staged at Camp Pennsylvania, Kuwait on the eve of Operation Iraqi Freedom.

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[3] Joint Appendix (JA) at 237.
[4] JA at 55-57, 1069; 10 U.S.C. §§ 880 and 918 (2002).
[5] JA at 1543.
[6] JA at 1545.
[7] JA at 1, 52-54.

On the night of the murders appellant was assigned to guard grenades with Private First Class (PFC) Christopher Pannell.[8] The grenades were located in High Mobility Multipurpose Wheeled Vehicle (HMMWV) Alpha 21, which was appellant's squad vehicle.[9] PFC Pannell went to find his replacement, PFC Thomas Wells, and left appellant alone with the grenades.[10] Appellant was also left alone with the grenades when PFC Wells went to wake up their relief later in the evening.[11] When left alone, appellant hid four M-67 fragmentation grenades and three M-14 incendiary grenades in his pro-mask carrier and some of the canisters in his Joint Service Lightweight Integrated Suit Technology (JLIST) bag.[12] After his guard duty ended, appellant returned to his tent on Camp Pennsylvania's Pad 4.[13]

Appellant donned the Interceptor Body Armor (IBA) of PFC Pannell and left the sleep tent, leaving his own IBA behind.[14] Appellant then walked from Pad 4 to Pad 7, where the Brigade Headquarters was located;[15] a distance of approximately 500 to 600 meters.[16] Appellant went to the stand-alone light generator and switched it off, plunging the outside of Pad 7 into

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[8] Supplemental Joint Appendix (SJA) at 166-170.
[9] SJA at 166-69, 179, 187.
[10] SJA at 171, 180.
[11] SJA at 181-82.
[12] SJA at 188-89, 199-200.
[13] SJA at 172-73.
[14] SJA at 172-73.
[15] SJA at 50, 64, 80.
[16] SJA at 50-51.

darkness.[17] Appellant moved from the generator to the entrance of Tent 1, which displayed a sign that identified it as the brigade command team's sleep tent, occupied by Colonel (COL) Fredrick B. Hodges (Brigade Commander), Command Sergeant Major (CSM) Bart Womack (Brigade Command Sergeant Major), and MAJ Ken Romaine (Brigade Executive Officer).[18] Appellant removed an M-14 incendiary grenade, pulled the pin, and threw the grenade into Tent 1.[19] The incendiary grenade ignited, filling the tent with smoke and fire.[20] Appellant then pulled out an M-67 fragmentation grenade, pulled the pin, and threw it into Tent 1.[21] The grenade exploded, shredding the inside of the tent and wounding COL Hodges.[22]

Appellant then waited outside of Tent 1. After the explosions, MAJ Romaine grabbed his M-9 pistol and exited Tent 1.[23] MAJ Romaine heard a noise, and when he turned, appellant fired his M-4 rifle at MAJ Romaine.[24] The bullet fired from appellant's rifle went through MAJ Romaine's pistol and his fingers, traveled up his arm, and deflected into his leg.[25] MAJ Romaine fell back into Tent 1 and attempted to charge his

[17] JA at 705, 3256; SJA at 60, 69, 99, 146.
[18] SJA at 54-55.
[19] SJA at 57-58.
[20] SJA at 206-07, 211-12.
[21] SJA at 213.
[22] SJA at 158.
[23] SJA at 59-60.
[24] SJA at 60-62.
[25] SJA at 62.

weapon, but was unable to do so because of the wounds to his hands.[26] MAJ Romaine survived the gunshot, but his hands were permanently disabled.[27]

After shooting MAJ Romaine, appellant moved to Tent 2 and pulled another fragmentation grenade. Appellant yelled into the tent, "We're under attack!" before throwing the grenade into the tent.[28] The grenade exploded, sending shrapnel flying through the air, wounding several of the tent's occupants and setting the tent on fire.[29] One of the officers sleeping inside Tent 2 was MAJ Stone.[30] The explosion from appellant's grenade shredded MAJ Stone's body with eighty-three shrapnel wounds.[31] MAJ Stone bled to death.[32]

Appellant then moved toward Tent 3, which had a sign in front of it that read, "The Captains Club."[33] At that moment CPT Ramon Rubalcaba, having heard the other explosions, exited Tent 3 and bumped into appellant.[34] CPT Rubalcaba yelled, "What the fuck?!?"[35] Appellant responded, "We're under attack."[36] After CPT Rubalcaba moved out, appellant moved to the entrance of Tent

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[26] SJA at 62-63.
[27] JA at 1133-34, 1137-38.
[28] SJA at 65, 76-77, 81-83, 87-89, 93-95.
[29] SJA at 66-68, 83, 88, 96-96, 102-03.
[30] SJA at 70, 78-79.
[31] SJA at 67, 84-85, 90-91, 98, 295.
[32] SJA at 85-86, 295.
[33] SJA at 104.
[34] SJA at 106, 110-11.
[35] SJA at 111.
[36] SJA at 106, 111, 115.

3 and threw a fragmentation grenade inside.[37] The grenade exploded, severely injuring numerous officers residing in the tent and plunging the tent into smoky chaos.[38] CPT Seifert received a shrapnel wound in his hand from the grenade.[39] CPT Seifert grabbed his gear and exited the tent.[40] At the same time, First Sergeant (1SG) Rodlon Stevenson exited Tent 4 and could see CPT Seifert with his gear.[41] 1SG Stevenson observed appellant move up behind CPT Seifert.[42] Appellant shot CPT Seifert in the back with his M-4 rifle from a distance of one or two feet, before running off into the night.[43] CPT Seifert suffered agonizing pain before he died from the gunshot wound.[44]

During his attack on Pad 7 appellant was wounded by one of his own grenades.[45] As appellant limped away from murdering CPT Seifert he encountered CPT Jerry Buchannan just outside of the Tactical Operating Center (TOC) tents.[46] When CPT Buchannan asked appellant what was happening, appellant responded that he was "hit."[47] CPT Buchannan noticed that appellant was favoring

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[37] SJA at 111, 114.
[38] JA at 706-710; SJA at 107-09, 112, 116-21, 123-27, 129-37, 302-308.
[39] SJA at 294.
[40] SJA at 139-140.
[41] SJA at 140-41.
[42] SJA at 141.
[43] SJA at 67, 129, 138, 141-44, 147, 149.
[44] SJA at 100-01, 122, 128, 145, 214-15, 293-96.
[45] SJA at 159-60.
[46] SJA at 201.
[47] SJA at 201.

his knee and limping.[48] CPT Buchannan told appellant to wait while he went to find medical assistance; however, when CPT Buchanan returned appellant was gone.[49]

The Brigade believed that they were under enemy attack and that their perimeter was compromised.[50] MAJ Kyle Warren, the Brigade S-2, began moving from area to area to set up a perimeter and coordinate any response that might be necessary.[51] MAJ Warren enlisted the assistance of First Lieutenant (1LT) Grant Sketo in setting up a perimeter around the TOC.[52] 1LT Sketo approached the Soldier on his left side, who turned out to be appellant.[53] When 1LT Sketo asked appellant what he was doing on Pad 7, appellant told him, "I was using the latrine."[54] 1LT Sketo assigned appellant a sector of fire,[55] and they waited there until Sergeant First Class (SFC) Thomas Butler sent appellant to a nearby bunker to push out the perimeter.[56]

When MAJ Warren went to brief COL Hodges on the security situation, COL Hodges told MAJ Warren, "This may have been one of our own. 2d Battalion is missing an engineer soldier. His

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[48] SJA at 202.
[49] SJA at 202.
[50] JA at 704; SJA at 128, 145, 157, 193-94, 208.
[51] JA at 3255-59, 3268-69; SJA at 151.
[52] JA at 3260-61; SJA at 150.
[53] SJA at 151-52.
[54] SJA at 152.
[55] SJA at 152.
[56] SJA at 153.

name is Sergeant Akbar. . . . There's some ammo missing."[57] MAJ Warren went back out to continue his security duties.[58] MAJ Warren approached a group of Soldiers at a bunker and asked them to identify themselves.[59] Appellant identified himself as "Sergeant Akbar."[60] MAJ Warren approached appellant and saw the letters A-K-B-A-R on appellant's helmet band.[61] MAJ Warren moved up behind appellant and tackled him to the ground.[62] After restraining appellant, MAJ Warren asked appellant if he bombed the tents, and appellant confirmed that he did.[63] MAJ Warren put appellant under armed guard. A medic was called to tend to appellant's wounds,[64] and appellant was taken into custody.

When appellant was apprehended he was found with the one remaining M-67 and two remaining M-14 grenades in his protective mask.[65] The three M-14 canisters were discovered in appellant's JLIST bag.[66] Appellant's assigned weapon was immediately confiscated by SFC Butler.[67] SFC Butler cleared a single round from appellant's rifle,[68] leaving twenty-six of a possible thirty

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[57] JA at 3285-86.
[58] JA at 3287.
[59] JA at 3292-93.
[60] JA at 3293.
[61] JA at 3294.
[62] JA at 3295.
[63] JA at 3297.
[64] SJA at 159-62.
[65] SJA at 203-04, 220, 223-25, 227-28, 300-01.
[66] SJA at 217, 219.
[67] SJA at 203.
[68] SJA at 204-05.

rounds in the magazine.[69] One expended shell casing from an M-4 rifle was discovered in front of Tent 1,[70] and two expended shell casings from an M-4 rifle were found in front of Tent 3,[71] accounting for the other three rounds. Ballistics analyses of the bullets that wounded MAJ Romaine and killed CPT Siefert, as well as the casings recovered near Tents 1 and 3, confirmed they were fired from appellant's assigned M-4 rifle.[72] Appellant's uniform and hands were tested and contained the residue of both M-14 and M-67 grenades.[73] Appellant's fingerprint was discovered on the Pad 7 light generator that was shut off just before the attack.[74]

The Federal Bureau of Investigation (FBI) obtained a federal search warrant for appellant's storage unit in Kentucky.[75] In the storage unit the FBI discovered appellant's computer which contained his diary.[76] On February 2, 2003 (forty-eight days before the murders), appellant wrote in his diary, among other things, "I may have to make a choice very soon about who to kill . . . . I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my

[69] SJA at 221-22.
[70] SJA at 209, 216.
[71] SJA at 218.
[72] SJA at 163, 281-82, 288.
[73] SJA at 229-31, 291-92.
[74] SJA at 197-98, 231, 283, 297-99.
[75] SJA at 232-35.
[76] SJA at 235-36, 289-90.

battle buddies."[77] On February 4, 2003 (forty-six days before the murders) appellant wrote, among other things, "I suppose they want to punk me or just humiliate me. Perhaps they feel I will not do anything about it. They are right about that. I am not going to do anything about it as long as I stay here. But, as soon as I am in Iraq, I'm going to kill as many of them as possible."[78]

Those additional facts necessary for the resolution of appellant's assignments of error are contained herein.

Assignments 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.

Summary of Argument

767 days.[79] That is the length of time that appellant's trial defense counsel dedicated their lives to attempting to save his. The level of post hoc vitriol with which he, his mitigation "specialists," and his self-proclaimed "capital experts" attack the trial defense counsels' representation of appellant is both unfounded and uncalled for. To believe appellant's version of events, his trial defense counsel:

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[77] SJA at 285.
[78] SJA at 284.
[79] March 23, 2003 through April 28, 2005.

conducted no independent investigation, interviewed no civilian witnesses, wholesale ignored the advice and needs of their experts, prepared no witnesses for trial, haphazardly selected a theme for the case without regard to its efficacy, and sat idly by during the course of a court-martial intended to decide a question of the life or death of their client. Setting aside the fact that these counsel were highly experienced officers of both the Court and in the United States Army, the record compellingly demonstrates that they in fact provided fully effective representation for appellant throughout the entire 767 days.

Presented with a client who had committed arguably one of the most egregious offenses in modern military history, an intolerant family saturated with mental illness who attempted to thwart the investigation and representation of appellant at nearly every turn, inexperienced civilian counsel more focused on their own ideologies than the representation of their client, mitigation "specialists" who considered their role was "to always request more time and more funding until the . . . government relented on pursuing the death penalty," rather than providing assistance to the actual defense, and a client who, on the eve of his capital murder trial, intentionally stabbed a guard in an escape attempt, appellant's trial defense counsel presented the best possible case available in an attempt to save

his life. That the attempt was unsuccessful is not relevant to the inquiry.[80]

Trial defense counsels' actions and strategic decisions in this case were based on a thorough investigation and full knowledge of the facts. They chose a strategy based on that knowledge that they felt would place appellant in the best position to avoid the imposition of a death sentence. Every tactical decision was made "in the exercise of reasonable professional judgment"[81] intended to maximize appellant's chances of avoiding a death sentence. Every witness examined, every exhibit admitted, and every argument made during the court-martial (not merely during the sentencing case), was focused on one fact: appellant was mentally ill.

Standard of Review

An allegation of ineffective assistance of counsel presents a mixed question of law and fact which this Court reviews *de novo*.[82]

Law and Argument

To prove ineffective assistance of counsel, an appellant is required to show that: (1) counsel's performance was deficient;

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[80] *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000)("the fact that a particular defense ultimately proved to be unsuccessful [does not] demonstrate ineffectiveness.").
[81] *Strickland v. Washington*, 466 U.S. 668, 690 (1984).
[82] *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (citation omitted).

and (2) the deficiency resulted in prejudice.[83] "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[84] The "review of counsel's performance is highly deferential and is buttressed by a strong presumption that counsel provided adequate professional service."[85] "Surmounting *Strickland's* high bar is never an easy task."[86]

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'"[87] In conducting this review, appellate courts "will not second-guess the strategic or tactical decisions made at trial by defense counsel."[88] Indeed, courts are "required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as

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[83] *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).
[84] *Strickland*, 466 U.S. at 686.
[85] *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005).
[86] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)). It should also be noted that, despite constant references to the phrase "death is different" by this and all other appellants in capital cases, *Strickland* itself was a capital case.
[87] *Harrington*, 131 S. Ct. at 787 (citing *Strickland*, 466 U.S. at 688).
[88] *Mazza*, 67 M.J. at 475 (citing *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001)).

they did."[89] "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[90]

As the Supreme Court has cautioned, "[i]t is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'"[91] This is because there are "countless ways to provide effective assistance in any given case."[92] "Even the best criminal defense attorneys would not defend a particular client in the same way."[93]

"With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[94] "[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."[95] "Instead, *Strickland* asks whether it is

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[89] *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011)(internal citations and quotations omitted).
[90] *Strickland*, 466 U.S. at 690.
[91] *Harrington*, 131 S. Ct. at 788, citing *Strickland*, 466 U.S. at 689.
[92] *Strickland*, 466 U.S. at 689.
[93] *Id*.
[94] *Harrington*, 131 S. Ct. at 787 (citing *Strickland*, 466 U.S. at 694).
[95] *Id*. at 791.

'reasonably likely' the result would have been different.'"[96] "The likelihood of a different result must be substantial, not just conceivable."[97] "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'"[98]

The military justice system has developed a three-pronged framework for analyzing whether an appellant has overcome the presumption of competence:

> 1. The appellant must prove his allegations are true; "and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?"
>
> 2. If the allegations are true, appellant must prove that his defense counsel's "level of advocacy f[ell] measurably below" an objective standard of reasonableness. That is, whether the defense counsel's performance fell significantly below what we ordinarily expect from "fallible lawyers."
>
> 3. "If defense counsel was ineffective, is there 'a reasonable probability that, absent the errors,' there would have been a different result." Were "the errors . . . so serious as to deprive the defendant of a fair trial?"[99]

Military courts have firmly established that appellant must first raise a colorable claim warranting further inquiry,[100] and in order to prevail "must present more than a prima facie case

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[96] *Id*. at 792.
[97] *Id*. at 792.
[98] *Id*. at 787 (citing *Strickland*, 466 U.S. at 693).
[99] *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991) (citations omitted).
[100] *United States v. Lewis*, 42 M.J. 1, 4 (C.A.A.F. 1995).

to meet his very heavy burden."[101] The prejudice prong requires appellant to show, even in a capital case, a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[102] Therefore, even if defense counsel's performance was deficient, appellant is not entitled to relief unless he was prejudiced by that deficiency,[103] meaning he must demonstrate that he would not have been convicted and sentenced to death.[104]

Appellant alleges that his trial defense counsel were ineffective at "every critical stage" of his case. Generic rhetoric aside, appellant's arguments of ineffective assistance of counsel can be broken down into 15 categories:

> (1) Failure to Interview Certain Witnesses;
> (2) Failure to Properly Utilize the Mitigation Specialists;
> (3) Failure to Conduct Site Visits of Appellant's Residences;
> (4) Dysfunctional Defense Team;
> (5) Failure to Request Additional Continuances;
> (6) Conceded Guilt;
> (7) Failure to Present a Coherent Theme at Trial;
> (8) Failure to Present a "Humanity" Defense;

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[101] *United States v. Young*, 50 M.J. 724 n.3 (Army Ct. Crim. App. 1999) (citing *United States v. Crum*, 38 M.J. 663, 666 n.3 (A.C.M.R. 1993), *aff'd* 43 M.J. 230 (C.A.A.F. 1995)).
[102] *Smith v. Spisak*, 130 S.Ct. 676, 685 (2010) (quoting *Strickland*, 466 U.S. at 694).
[103] *United States v. Quick*, 59 M.J. 383, 385-86 (C.A.A.F. 2004) (citing *Strickland*, 466 U.S. at 687).
[104] *Spisak*, 130 S.Ct. at 685; *Loving v. United States*, 68 M.J. 1, 7 (C.A.A.F. 2009), *cert. denied*, ___ U.S. ___, 2010 WL 621383 (October 4, 2010).

(9) Failure to Call Certain Witnesses;
(10) Failure to Prepare Certain Witnesses;
(11) Improperly Admitting the Complete Diary;
(12) Admitting Documents in Lieu of Live Testimony;
(13) Failure to Provide Complete Information to Dr. George Woods;
(14) Failure to Challenge Certain Members; and
(15) Cumulative Error.

Underlying appellant's entire claim of ineffective assistance of counsel is the premise that his trial defense counsel should have presented a "humanity defense" which detailed every aspect of his social life history, told by all of his friends and family who experienced it with him. Appellant's claims regarding nearly every witness identified who should have been interviewed or called to testify, the alleged failure to conduct site visits, and the decision to present primarily documentary evidence on sentencing, are all predicated on the notion that there is only a single effective method for defending a capital accused: humanize the accused. To the contrary, appellant's defense counsel chose an entirely reasonable strategy at trial, based on a detailed investigation and understanding of the evidence, to focus on appellant's alleged mental illness as a means of attacking premeditation and convincing a panel that he did not deserve to be executed for his crimes. As detailed herein, the trial defense counsels'

actions and decisions were fully consistent with the requirements of *Strickland*.

Each of appellant's specific allegations of ineffective assistance of counsel will be addressed in turn.

I. Failure to Interview Certain Witnesses

The duty to investigate a case does not necessarily require that every conceivable witness needs to be interviewed.[105] So long as a defense counsel is made fully aware of the witness' potential testimony, an accused generally cannot establish ineffective assistance of counsel, particularly where they fail to establish what additional information would have been garnered had the attorney personally interviewed the witness.[106]

Further, "a defendant may not merely allege that counsel failed to undertake an investigation, but must 'show to the

[105] *Riley v. Payne*, 352 F.3d 1313, 1318 (9th Cir. 2003); *United States v. Tucker*, 716 F.2d 576, 584 (9th Cir. 1983).
[106] *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986); *Turner v. Williams*, 35 F.3d 872, 898 (4th Cir. 1994); *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001)(amended as 253 F.3d 1150)(failure to interview is not ineffective where the account of the witness was fairly known and only speculation is offered about what further interviewing would disclose); *DeCastro v. Branker*, 642 F.3d 442, 452 (4th Cir. 2011)(need not interview when substance of testimony is known); *LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir. 1998)(need not personally interview where transcripts of prosecution interviews available); *Brown v. Payton*, 544 U.S. 133 (2005)(investigator notes made witness account fairly known).

extent possible precisely what information would have been discovered through further investigation.'"[107]

Appellant alleges that his trial defense counsel failed to interview sixteen separate witnesses: John Akbar, Mashiyat Akbar, Ruthie Avina, Sultana Bilal, Cathy Brown, Jill Brown, Dan Duncan, Appellant's Grandfather, Dr. Will Miles,[108] Donna Sachs, Marianne Springer, Paul Tupaz, Merthine Kimberly Vines, Regina Weatherford, and Starr Wilson.

A. Appellant does not Contest that his Trial Defense Counsel Personally Interviewed a Number of Civilian Witnesses

In addition to a number of the witnesses listed above, appellant's trial defense counsel expressly assert that they personally interviewed: Mustafa Bilal (appellant's brother),

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[107] *United States v. Gwyn*, 481 F.3d 849, 855 (D.C. Cir. 2007) (citing *United States v. Askew*, 88 F.3d 1065, 1073 (D.C. Cir. 1996)); *see also Hall v. Head*, 310 F.3d 683, 704-05 (11th Cir. 2002)(citing *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002)("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation"); *Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003) (citing *United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1133 (7th Cir. 1990)(accused "has the burden of providing the court sufficient precise information, that is, 'a comprehensive showing as to what the investigation would have produced'"); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985)(failure to make specific allegation of what would have been produced in a more detailed investigation sufficient basis to reject claim of ineffectiveness).

[108] Appellant also alleges that his trial defense counsel were ineffective for failing to call Dr. Will Miles as an expert witness. In light of this, the trial defense counsels' use of Dr. Miles will be addressed in subsection IX.

Quran Bilal (appellant's mother), Imam Abdul Karim Hasan (former Imam for appellant's family), Gail Garrett, (classmate), John Mandell (pre-college counselor), Doris Davenport (school guidance counselor), Roberta Osborne (undergraduate curriculum advisor), Rhonda Sparks-Cox (high school counselor), Ron Hubbard (college roommate), Kamal Lemseffer (college friend), William Bilal (step-father), Zineb Lemseffer (former wife), and Connie Dickerson (high school counselor).[109] Appellant has not presented any evidence or argument on appeal that his trial defense counsel failed to interview any of these witnesses. As a matter of fact, therefore, it is un-contradicted that appellant's trial defense counsel personally interviewed at a minimum these thirteen individuals. Consequently, appellant's argument that his trial defense counsel failed to interview *any* civilian witnesses is incorrect; rather, his argument must really be that they did not interview the specific ones listed by appellant.

B. The Evidence Presented by Appellant Fails to Make a Prima Facie Showing of Ineffective Assistance of Counsel for a Number of the Identified Witnesses

Neither Ruthie Avina nor Dan Duncan actually asserts that they were not interviewed by one of appellant's trial defense counsel. Dan Duncan admits that he had at least "limited contact" with appellant's "defense team," which specifically

[109] JA at 2347-48.

included an in-person meeting "with a man and a woman," in addition to another phone interview with them.[110] Ruthie Avina specifically admits to being interviewed by "a male" who called her to verify information that she had given to Scarlet Nerad in an earlier interview.[111] Appellant's arguments are focused more so on the breadth of the interviews conducted by the trial defense counsel, rather than on their actual occurrence. However, appellant fails to make a prima facie showing of what evidence would have been discovered had the trial defense counsel conducted further interviews of these witnesses.

Additionally, the evidence presented concerning Jill Brown, Merthine Kimberly Vines, Paul Tupaz, and Regina Weatherford fails, on its face, to raise a prima facie case of ineffective assistance of counsel. Jill Brown, Merthine Kimberly Vines, and Paul Tupaz[112] assert only that they "do not recall" being interviewed by appellant's trial defense counsel.[113] These

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[110] JA at 2850. This is consistent with evidence that LTC VH travelled with Deborah Grey to California to interview potential civilian mitigation witnesses. *See* JA 2683.
[111] JA at 2878-79. Ms. Avina's statement is consistent with the approach described by trial defense counsel for how they would handle interviewing witnesses identified by the mitigation specialists. JA at 2347.
[112] Paul Tupaz does admit that he was interviewed by trial defense counsel before he testified. JA at 2852.
[113] JA at 2852 ("I don't remember talking to any defense attorneys prior to showing up at Fort Bragg during the trial"); 2876 ("I do not recall being interviewed by anybody"); and 2886 ("I cannot remember if I spoke with anyone from the defense team prior to Hasan's trial").

statements are "too equivocal and ambiguous to overcome the presumption that [appellant's] counsel were competent."[114] In addition, Regina Weatherford has never even filed an affidavit with any court.[115] As the Army Court has noted, "an appellant should provide this court with either a sworn affidavit or a declaration made under the penalty of perjury" to effectively raise a claim of ineffective assistance of counsel.[116] The Army Court specified that "assertions of *fact*...must either be contained in the record or offered in an admissible form."[117] In so holding the Army Court reaffirmed "a longstanding legal principle: the oath or swearing process itself has legal import."[118] Consequently, Regina Weatherford's apparent refusal to submit a declaration or affidavit should serve to obviate any argument concerning her involvement in this case, or trial defense counsels' dealings with her.

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[114] *United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002); *see also United States v. McIntyre*, 2008 WL 4525359 (A.F. Ct. Crim. App. 2008)("A lack of memory is not synonymous with saying a discussion never occurred.").

[115] The only "evidence" concerning Regina Weatherford's involvement in this case is a declaration from one of appellant's appellate defense counsel relaying what occurred in a conversation he overheard between another appellate defense counsel and Ms. Weatherford. JA at 2888-89.

[116] *United States v. Gunderman*, 67 M.J. 683, 687 (Army Ct. Crim. App. 2009).

[117] *Id*.

[118] *Id*. at 688, (*citing United States v. Trainor*, 376 F.3d 1325, 1332 (11th Cir. 2004)). It should also be noted that Jill Brown never signed her declaration. JA at 2886.

C. The Record Compellingly Demonstrates that Donna Sachs was Interviewed by Trial Defense Counsel

Donna Sachs, while claiming she was never actually interviewed by trial defense counsel, does admit that she spoke to one of his trial defense counsel.[119] However, the record compellingly demonstrates the falsity of Donna Sachs' post hoc affidavit claiming she was not "interviewed":

> "I finally got a hold of the psychologist at UC Davis [Donna Sachs]. She admitted that she has no independent memory of our client. However, Scarlet [Nerad] has been showing her journal entries and other records and she thinks she might remember him now and might even be able to reconstruct a diagnosis if only Scarlet brings her more records as she promised at their last meeting. 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."[120]

This contemporaneous e-mail makes clear that LTC DB did interview Donna Sachs concerning her memory of appellant, and that interview made clear to the trial defense counsel that she had no "independent memory" of appellant. Consequently, any claim that trial defense counsel failed to properly interview Donna Sachs is without merit.

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[119] JA at 2801 ("A short time after Ms. Nerad's visit, a Major from the Army called me. 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 any questions about Hasan.").
[120] JA at 2939-40 (e-mail from LTC DB to MAJ DC dated March 11, 2005, discussing conversation with Donna Sachs).

D. Even Assuming Trial Defense Counsel did not Interview the Remaining Witnesses, They were Fully Aware of their Expected Testimony

While John Akbar, Marianne Springer, and Starr Wilson all claim that they were not interviewed by trial defense counsel,[121] the trial defense counsel specifically assert that they did personally interview these witnesses.[122] While this creates a conflict between these affidavits, a *Dubay* hearing is not required because, even assuming appellant's version of events is correct,[123] the record compellingly demonstrates that appellant's trial defense counsel were fully aware of what these witnesses would have testified to due to the extensive interviews conducted by the mitigation specialists.

With regard to John Akbar, specifically, he was interviewed repeatedly by Deborah Grey, and extensive summaries of those interviews were prepared for defense counsel.[124] In particular, in March 2004 Deborah Grey informed the trial defense counsel that she planned to meet with John Akbar to follow up on his medical records, further background on the Nation of Islam, and

[121] JA at 2829, 2834, 2873-74, 2881.
[122] JA at 2347-48.
[123] *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997)(*Dubay* hearing not required where "even if any factual dispute were resolved in appellant's favor," the "facts alleged in the affidavit allege an error that would not result in relief.").
[124] JA at 2020-27, 2482-86.

establish a basis for the family history of mental illness.[125] Deborah Grey then spoke with John Akbar a number of times in April 2004,[126] and Tom Dunn assisted in having John Akbar travel for a face to face meeting.[127]

It is also clear that the trial defense counsel were personally aware of the information he possessed. As early as February 2004, LTC VH noted that John Akbar has a "compelling sad life story."[128] The trial defense counsel also properly summarized his potential testimony in both witness lists and an internal strategy memorandum.[129]

As to the others, the witness summaries contained in the record conclusively establish that appellant's trial defense counsel were aware of these witnesses' expected testimony.[130]

Concerning Mashiyat Akbar, Sultana Bilal, and Cathy Brown, while the record does not contain the actual interview summaries of these witnesses, the record does compellingly demonstrate

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[125] JA at 1993, 1999.
[126] JA at 2004-05.
[127] JA at 2006.
[128] JA at 2045.
[129] JA at 2079, 2321.
[130] Marianne Springer and Starr Wilson: JA at 2080. Further, while any argument concerning Paul Tupaz is negated by his failing to affirmatively assert that he was not interviewed by trial defense counsel, he also confirms that a 10 page report was prepared detailing his earlier interviews with the mitigation specialists. JA at 2852. This lengthy interview summary (which he does not claim was incorrect) would undoubtedly have provided the trial defense counsel with sufficient information to evaluate his potential testimony.

that they were all interviewed by the mitigation specialists and that interview summaries were prepared for use by the trial defense counsel.[131] The record therefore makes clear that the trial defense counsel were fully aware of what these witnesses would have been willing to testify concerning.

E. Conclusion

The record compellingly demonstrates that appellant's trial defense counsel personally interviewed a number of civilian witnesses in preparation for trial. While affidavits may conflict concerning the interviewing of a few witnesses, the overall record also compellingly demonstrates that the trial defense counsel were fully aware of what those witnesses would have testified concerning, satisfying the reasonableness standard under *Strickland*. Further, appellant fails to point out what information would have been learned through additional interviews.

II. Failure to Properly Utilize the Mitigation Specialists

Appellant argues that his trial defense counsel failed to properly utilize their mitigation specialists during the

[131] Mashiyat Akbar: JA at 2871 (she admits to being interviewed); 2167 (indicating that a memo summarizing the interview is "forthcoming"); Sultana Bilal: JA at 2167 (indicating that a memo summarizing the interview is "forthcoming"); 2602; 2859 (admitting to speaking to "Laura"); Cathy Brown: JA at 2883 (recalled speaking to a "Caucasian woman some time in 2004"); 1976 (referencing interview report provided to Dr. Woods); 2167 (indicating that a memo summarizing the interview is "forthcoming").

investigation and when formulating a trial strategy. He relies on the affidavits of a number of mitigation specialists, some involved with the court-martial, others who were not, in order to attack the strategic and tactical decisions of his trial defense counsel. The fundamental flaw in his argument is his premise that a mitigation specialist is the ultimate resource for determining an effective trial strategy.

This Court has noted that mitigation specialists are, among other things, excellent at conducting pre-trial investigations into the life history of an accused, interviewing persons who may know the accused, and identifying mental health issues.[132] What is markedly absent from the general qualifications of a mitigation specialist is the legal acumen of an attorney recognized by *Strickland*. Until such time that a court finds mitigation specialists are more properly trained and suited to defend an accused in a criminal trial, as opposed to an attorney, appellant's reliance on their opinions concerning the conduct of his trial defense counsel is woefully misplaced.

Appellant's trial defense counsel explain in excellent detail the role of the mitigation specialists during the

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

preparation of appellant's defense.[133] That role coincides directly with the general expertise of mitigation specialists discussed in *Kreutzer*. The end-goal for a mitigation specialist is to collect sufficient information for the attorneys to be able to make their informed professional judgment regarding which strategy to take at the court-martial. That this eventual strategy might conflict with the views of particular mitigation specialists is irrelevant. *Strickland* views claims of ineffective assistance of counsel through the lens of professional norms of lawyers, not mitigation specialists. The question remains solely whether counsels' actions and decisions were reasonable, not whether they conflict with the viewpoint of a mitigation specialist.

The record establishes that the mitigation specialists in this case were utilized in precisely the manner discussed by appellant's trial defense counsel and envisioned by *Kreutzer*, and conducted an extensive mitigation investigation.

A. The Mitigation Investigation

After having multiple requests for the appointment of a mitigation specialist denied,[134] the convening authority granted trial defense counsels' request for the appointment of Ms.

[133] *See* JA at 1953-55, 2354-56.
[134] SJA at 539-40, 544.

Deborah Grey on August 28, 2003, for a period of 400 hours.[135] She remained the lead mitigation specialist until approximately June 4, 2004, when she was fired by Mr. Dan-Fodio because appellant's mother disapproved of her, and actually began to work to actively prevent Ms. Grey from interviewing family members.[136] By the time she had completed work, she had "done an extensive amount of mitigation work on the case,"[137] and had used nearly all of the 400 hours she had been authorized.[138]

During this time Ms. Grey "interviewed dozens of people who knew SGT Akbar at various times during his life,"[139] creating detailed summaries of those interviews.[140] She also reviewed "thousands of pages of records covering the entirety of SGT

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[135] SJA at 545.
[136] JA at 1805, 1931, 1953-54; SJA at 25. Mrs. Bilal's objections appear to have focused on the fact that Ms. Grey was white and "Ms. Grey couldn't effectively understand Mrs. Bilal's . . . ebonics." JA at 209.
[137] SJA at 553.
[138] SJA at 27.
[139] JA at 2046.
[140] The witnesses included: John Akbar (JA at 2482); Marianne Springer (JA at 2080); Starr Wilson (JA at 2080); Mashiyat Akbar (JA at 2871); Cathy Brown (JA at 1976, 2883-84); Musa Akbar (JA at 2035-38, 2482); Dan Duncan (JA at 2017, 2482); Regina Weatherford (JA at 2018, 2030-32, 2482); John Chattot (JA at 2019, 2482); Doris Davenport (JA at 2018, 2029-30, 2482; SJA at 309-); Gail Garrett (JA at 2018, 2027-28, 2482); Barbie Goodin (JA at 2019, 2482); Mohamed Hafez (JA at 2019, 2482); Imam Abdul Karim Hasan (JA at 1643-45, 2019, 2482); John Mandell (JA at 1627-28, 2017, 2482, 2995); Roberta Osborne (JA at 1639-42, 2019, 2032-34, 2482); Patty Shirley (JA at 2017); Rhonda Sparks-Cox (JA at 2018, 2028-29, 2482; SJA at 309); Cornelius van Dam (JA at 2019, 2482); Abe Henryhand (JA at 1976); David Rankin (JA at 1976), Tangi Rankin (JA at 1976); and Marcus Rankin (JA at 1976).

Akbar's life,"[141] to include his Louisiana school records, Locke High School records, University of California at Davis records, U.S. Army records, personal journals, FBI reports, and the Article 32 hearing transcriptions.[142] By the time she was finished, she had prepared an over 50 page Social History of appellant,[143] a family tree of appellant's close family,[144] a four page timeline of the major milestones in appellant's life,[145] and a detailed 27 page chart highlighting the significant passages within appellant's journal.[146]

Ms. Grey also prepared a five page transition report in June 2004, detailing what she believed remained to be accomplished in the mitigation investigation.[147] She estimated anywhere between 151-208 hours of work remained to be completed, focused primarily on interviewing appellant's mother and close family.[148]

Likely a portent of things to come, Ms. Grey's replacement, Scharlette Holdman (from the Center for Capital Assistance [CCA], recommended by Mr. Gant),[149] indicated that she required between 1,000-1,200 hours to complete the mitigation

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[141] JA at 2046.
[142] JA at 2482.
[143] JA at 2482-2536.
[144] JA at 1562.
[145] JA at 1563-66.
[146] JA at 1567-93.
[147] SJA at 496-500.
[148] SJA at 496-500.
[149] JA at 1807.

investigation, based on a "generic summary" of what she expected to be necessary.[150] On July 1, 2004, the convening authority approved funding for Ms. Holdman in the total amount of $1,000 for 75 hours of work in order to allow "Ms. Holdman to interview Ms. Bilal and to complete the defense mitigation investigation."[151] Ms. Holdman had already exhausted the 75 hours by the end of August 2004.[152]

Due to alleged health related reasons, Ms. Holdman had to be removed from the case as a mitigation specialist.[153] On September 21, 2004, the defense requested that Ms. Scarlet Nerad, a colleague of Ms. Holdman's at the CCA, be appointed as her replacement.[154] On September 30, 2004, in accordance with the defense request,[155] the convening authority appointed Ms. Nerad as a mitigation specialist/investigator, authorized to perform 368 hours as the mitigation specialist and 198 hours as an investigator, for a total authorized amount of $56,700.[156] After five months of conducting further investigation, by February 11, 2005, Ms. Nerad informed the trial defense counsel that "[w]e're flat broke, we've spent the store," indicating

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[150] JA at 1807; SJA at 28, 554.
[151] SJA at 555-56.
[152] SJA at 26. Ms. Holdman's contract was not approved until August 4, 2004. JA at 1807; SJA at 24.
[153] SJA at 557.
[154] SJA at 557
[155] SJA at 557-58.
[156] SJA at 559.

that they had used the complete 566 hours authorized (166 hours more than Ms. Grey had already used).[157] By this time, the various mitigation investigators had conducted roughly 1,041 hours of work for a total cost of $96,700.

While the record does not contain an exhaustive discussion of what Ms. Nerad and the CCA did with the 641 hours approved for them, it is clear that they did conduct numerous interviews and reviewed a considerable number of documents. Within the first 75 hours alone, by the end of August 2004, the CCA was able to review the records prepared by Ms. Grey, reviewed the transcripts of legal proceedings, located and interviewed 8 previously identified family members, identified, located and interviewed 5 additional family members, and began identifying documentary evidence to obtain.[158] By the middle of September they had interviewed appellant's two sisters, Sultana and Mashiyat, maternal first cousin Katherine Brown, brother Musa, maternal grandfather David, and paternal half brother Marcus, preparing summary memorandums for each.[159] Their work also included finally interviewing appellant's mother, Ms. Bilal.[160]

In December 2004, Ms. Nerad asserted to the Court that the CCA had interviewed appellant, members of his biological family,

[157] JA at 2205.
[158] JA at 2175.
[159] JA at 2167.
[160] SJA at 29.

three of his siblings, his parents, and "others who witnessed SGT Akbar at various stages of his development."[161] By that time the focus of the investigation was on obtaining documentary evidence to support the information they had uncovered through interviews.[162] By mid-February 2005, with the assistance of the military judge,[163] the defense was able to obtain all requested documents.[164]

However, the considerable hours of investigation expended by the CCA did not produce much additional evidence of use in the opinion of the trial defense counsel, in light of their theory for trial.[165] As they explained, "[t]he information [Ms. Nerad] was uncovering, while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. Grey."[166] In addition, certain members of the CCA appeared to become side-tracked on spurious issues such as whether appellant had taken lariam and whether he was even the perpetrator.[167]

The most significant piece of evidence obtained by Ms. Nerad and the CCA was the discovery in December 2004 of an early

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[161] JA at 1840.
[162] JA at 1840-41.
[163] SJA at 427-57.
[164] SJA at 41-42, 46-47; JA at 2162 (e-mail from Ms. Nerad: "over 2000 pages of documents regarding family genetics and dynamics have come in.").
[165] JA at 2935-36.
[166] JA at 1938.
[167] JA at 2156-59, 2200-01, 2204, 2970.

psychological analysis of appellant, when he was a child, by Dr. Fred Tuton.[168] That analysis formed a major part of Dr. Woods' ultimate testimony, and Dr. Tuton himself testified on behalf of the defense.[169]

B. Breakdown with Mitigation Team

The record establishes that appellant's case involves the tale of two mitigation investigations. The first, by Ms. Grey, was a detailed investigation that uncovered the bulk of the relevant background information concerning appellant, minus interviews of the specific family members limited by appellant's mother. As Ms. Grey highlighted, there was only a limited amount of work remaining to be completed when she was removed at the insistence of appellant's mother.

The second investigation was that conducted by the CCA, which from the outset appeared focused more on expending as much government money and delaying the court-martial as much as possible, rather than completing the limited remaining investigation necessary.

Early on in the involvement of the CCA, the trial defense counsel were concerned that the CCA was not working towards the

[168] JA at 1939.
[169] JA at 1939.

overall defense strategy, and were instead focusing on areas that were not necessarily helpful to the defense.[170]

The trial defense counsel point to a conversation with Ms. Nerad in 2005 concerning obtaining a declaration from her for an additional continuance request.[171] In this conversation, Ms. Nerad "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."[172] As trial defense counsel later explained, "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."[173] While Ms. Nerad contends she did not use those words (though she does not dispute that a statement along those lines was made),[174] the manner in which Ms. Nerad and

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[170] JA at 2082 ("I am beginning to feel a little nervous about this aspect of the case. I don't see any progress being accomplished and I don't know if they truly understand what it is that we want them [mitigation specialists and Dr. Woods] to do. I want to have them confirm all of the nuggets that we get from the government's mental health experts and convincingly show why going further in the diagnosis to insanity is reasonable. The best thing we have going for us is that nobody is going to say SGT Akbar was perfectly normal. If he wasn't insane, then he was definitely messed up emotionally.").
[171] JA at 1942.
[172] JA at 1942.
[173] JA at 2359.
[174] JA at 2780-81.

the CCA conducted the mitigation investigation supports the trial defense counsels' interpretation of her remarks.

In what can only be considered an attempt by Ms. Nerad to create a record to support a future claim of ineffective assistance of counsel, she sent an e-mail on November 5, 2004, to the trial defense counsel claiming that she had "almost no communication with defense counsel" and was unable to conduct her investigation due to "defense counsel's failure for whatever reason to communicate with me or assist me."[175] Appellant relies heavily on this e-mail to attack the conduct of his trial defense counsel. What appellant ignores, however, is the response sent by the trial defense counsel on November 8, 2004, specifically refuting the claims in her original e-mail, and pointing out their repeated contact and work together.[176] In addition, an e-mail sent to Mr. Al-Haqq confirms that Ms. Nerad's actual concern was "primarily about not having consistent scheduled contact with the defense team."[177] In order to resolve her concerns, the trial defense team decided to hold a weekly conference call with the mitigation team.[178]

Finally, there is clear evidence in the record that Ms. Nerad was attempting to manipulate witness testimony. After

[175] JA at 2188.
[176] JA at 2189.
[177] JA at 3007.
[178] JA at 3007.

contacting Dr. Sachs (whom Ms. Nerad had interviewed), LTC DB informed MAJ DC that Dr. Sachs "admitted that she has no independent memory of our client," but that if Ms. Nerad were to bring her more records she might be able to remember appellant.[179] As LTC DB characterized his impression of this issue, "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."[180] MAJ DC concurred with LTC DB's analysis, saying "I don't think anything that we have received from Scarlet has been accurate."[181] To be sure, Ms. Nerad has already been chastised by at least one court for engaging in precisely the tactics identified by trial defense counsel.[182]

C. Use at Trial

One of appellant's primary complaints on appeal concerning the use of the mitigation specialists is their lack of involvement in the actual court-martial. However, in light of the foregoing, it would not have been unreasonable for trial

[179] JA at 2940.
[180] JA at 2940.
[181] JA at 2939.
[182] *See In re Hamilton*, 975 P.2d 600 (Cal. 1999)(Chin, J. concurring) ("[t]he record suggests that the investigators [including Ms. Nerad] were more interested in generating a misconduct claim where their predecessor had failed than they were in the truth. Enough former jurors testified about questionable investigative tactics to cause serious concern.").

defense counsel to choose not to rely on Ms. Nerad and the CCA for assistance during the court-martial.

The record reflects that by March 2005, in the opinion of the trial defense counsel, the mitigation investigation was ostensibly complete,[183] and at that time the trial defense counsel requested that Ms. Nerad forward all of the remaining information they had collected for their use, which Ms. Nerad confirmed she was sending.[184] By that point, the extrinsic evidence reveals a clear breakdown between the trial defense counsel and Ms. Nerad and the CCA. While the former were necessarily focused on preparing for appellant's actual court-martial,[185] the latter was more focused on unnecessarily extending the mitigation investigation and exploiting the government for additional funding.

Regardless of why the mitigation specialists were not utilized at trial, undercutting appellant's entire argument is his inability to show how he was prejudiced by the lack of involvement of the mitigation team. As explained by Ms. Nerad,[186] mitigation specialists apparently perform no relevant function at trial beyond that which is already entrusted to the

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[183] JA at 2935-40; JA at 2359 ("Despite making this [final continuance] request, it appeared that Ms. Nerad did not really need the additional time or funding.").
[184] JA at 2209, 2938.
[185] See discussion, herein, regarding the futility of requesting additional continuances.
[186] JA at 2769.

attorney. Attorneys are fully qualified, trained, and expected to coordinate witnesses at trial and determine the appropriate theory to present. Appellant's trial defense counsel cannot be faulted for choosing not to rely on others to do that which they are already fully qualified to do themselves.

Appellant points to no witness who would have reacted differently during the court-martial had Ms. Nerad been present, or what cognizable impact she would have had on the proceedings. Indeed, appellant's sole argument appears to be predicated on the notion that trial defense counsel should have blindly followed the recommendations of Ms. Nerad and the CCA. Aside from the fact that mitigation specialists are not constitutionally entrusted with making reasonable tactical decisions at trial, as discussed in more depth throughout this brief, the trial defense counsel had already selected a reasonable trial strategy and employed that strategy in an effective and efficient manner. Consequently, appellant's claims regarding the use of mitigation specialists fails to overcome the stringent requirements of *Strickland*.

III. Failure to Conduct Site Visits of Appellant's Residences

The trial defense counsel at this time do not recall whether Ms. Nerad in fact advised them to travel to appellant's

homes in Baton Rouge or Los Angeles.[187] However, they do recall that LTC VH did travel to at least the Los Angeles home with the original mitigation specialist, and provided the defense team with his insight on those locations as well as some pictures.[188]

Regardless of whether the recommendation to visit those locales was actually made, appellant fails on appeal to explain, other than by resorting to hyperbole, what actual impact such a visit would have had for the preparation of the defense. He points to only five possible benefits to the trial defense team if they had conducted site visits: (i) Gain trust and confidence from potentially reluctant witnesses;[189] (ii) Assist witnesses in recalling events;[190] (iii) Experience the location, such as Locke High School in the 1980's;[191] (iv) Allow counsel to form appropriate questions to elicit a more accurate picture;[192] and (v) Would offer "tragic and humiliating facts about their family."[193] Even assuming these are accurate, appellant has woefully failed to establish any cognizable impact on his court-martial.

First, he has not identified a single witness who was reluctant to speak to members of the trial defense team, or that

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[187] JA at 2350-51.
[188] JA at 2350-51.
[189] AB at 65.
[190] AB at 65.
[191] AB at 66.
[192] AB at 66.
[193] AB at 69.

asserts they would have been willing to do so had trial defense counsel met them where they were located.

Second, appellant has failed to point to a single witness who would have recalled events in more detail had they been interviewed by trial defense counsel at their locale. Further, appellant has not shown what those "events" that were not recalled encompassed.

Third, appellant fails to rationally explain how anyone (other than H.G. Wells with a flux capacitor), visiting a place such as Locke High School in 2004-2005 would have been able to experience Locke High School in the 1980's.

Fourth, appellant has not posited a single question that trial defense counsel would have learned that could have been formed to "elicit a more accurate picture" of what life was like growing up for appellant.

Fifth, appellant does not identify what "tragic and humiliating facts" about his family, not otherwise known by trial defense counsel, would have been discovered with site visits to either Los Angeles or Baton Rouge.

Consequently, this mere speculation that a visit to those locales may have assisted the defense is utterly insufficient to establish a claim of ineffective assistance of counsel.[194]

[194] *See United States v. Lewis*, 786 F.2d 1278, 1283 (5th Cir. 1986)(no prejudice where appellant "has not . . . shown how his

IV. Dysfunctional Defense Team

Appellant argues that his trial defense team was "dysfunctional."[195] This stems in part from an e-mail sent on March 10, 2004, to trial defense counsel from Mr. Gant noting his "sense that there's 'trouble in Paradise' amongst the defense team."[196] This e-mail itself was in response to trial defense counsel's statement: "[a]ny acceptance [of assistance] would have to be approved by the civilian counsel, this has been problematic with regards to our mitigation expert and in other areas."[197]

It is undeniable that there were periods of friction between appellant's military defense counsel and his retained civilian defense counsel, the latter of which were likely unqualified to represent appellant at a capital court-martial.

Appellant initially fired two of his military defense counsel, LTC VH (arguably the attorney with the most trial experience) and CPT JT, at the likely behest of his mother primarily because of their work trying to convince appellant to submit an offer to plead.[198]

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travel outside the state would have produced favorable evidence.").

[195] AB at 70-72.
[196] JA at 2092.
[197] JA at 2091.
[198] JA at 1930, 2007.

Mr. Dan-Fodio was hired by appellant at the insistence of his mother in January 2004.[199] Mr. Dan-Fodio was a civilian attorney who had no military justice experience,[200] and his only capital experience was as a consultant on a case when charges were initially drafted.[201] His primary experience was as a member of the International Human Rights Association of American Minorities.[202] In that regard, Mr. Dan-Fodio's participation in appellant's case was focused solely on raising a frivolous defense under self-defense/defense of others couched in terms of human rights and international law.[203] The focus of his defense was on blaming the military for what happened.[204] To that end, Mr. Dan-Fodio was responsible for drafting a Motion for Appropriate Relief to Stay, Transfer and Adjudge the Provocative Violations of Defendant's Human Rights on May 22, 2004.[205] The motion was argued on May 24, 2004.[206] Immediately after arguing the motion, Mr. Dan-Fodio withdrew from representing appellant, almost a year before appellant's court-martial began.[207]

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[199] JA at 1930-31.
[200] JA at 2686.
[201] JA at 103.
[202] JA at 103-104.
[203] JA at 1931.
[204] JA at 2686.
[205] SJA at 378-96.
[206] JA at 174-91.
[207] JA at 193-96.

Despite Mr. Dan-Fodio's abject incompetence,[208] he performed little work on behalf of appellant. As trial defense counsel noted, "he did very little work in preparing" his self-defense strategy, and spent most of his time trying to file charges against various Soldiers in appellant's unit and having the case transferred to an international court.[209] During one of the initial trial strategy sessions, Mr. Dan Fodio requested to only be responsible for sharing voir dire, and doing the opening statement and the merits argument.[210] Otherwise, he left all remaining work to the military defense counsel.[211] Due to this, they maintained "a lot of control over the direction of the case," despite Mr. Dan-Fodio's singular focus on human rights violations.[212]

Mr. Dan-Fodio's most identifiable obstruction was in preventing Ms. Grey from attending a pre-referral meeting with

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[208] Mr. Skip Gant had found that everyone who worked with him had "a very low opinion of Fodio and his abilities." JA at 2945. On at least one occasion MAJ DC questioned Mr. Dan-Fodio's truthfulness and whether he "is truly interested in saving SGT Akbar's life." JA at 2999. LTC VH has explained that Mr. Dan-Fodio had no understanding what a mitigation investigation was intended to accomplish, and in fact LTC VH was required, on multiple occasions, to "explain to Mr. Dan Fodio what a mitigation expert was and how mitigation evidence would play into a capital case." JA at 2686.

[209] JA at 1932.

[210] JA at 3001.

[211] JA at 3001.

[212] JA at 3001; *see also* JA at 1932 ("Although Mr. Dan-Fodio made significant changes in the defense strategy; he did very little work in preparing that defense.").

the Commanding General, and limited the amount of mitigation evidence that could be presented to the convening authority for consideration.[213] However, the effect of this was limited, as LTC DB and MAJ DC were still able to present a significant amount of mitigation evidence to the convening authority for consideration.[214]

Mr. Al-Haqq was retained by appellant on April 23, 2004,[215] and became lead counsel on April 28, 2004.[216] He was an attorney with 17 years of experience, licensed in both California and Colorado.[217] At a meeting on April 28, 2004 between the complete defense team, Mr. Al-Haqq determined that the defense strategy should focus primarily on a full insanity defense, while still considering Mr. Dan-Fodio's International Human Rights issue as an option.[218]

During Mr. Al-Haqq's tenure, he focused primarily on working with Dr. George Woods and his own expert, Dr. Miles, to establish the insanity defense.[219] Mr. Al-Haqq apparently excluded trial defense counsel from working directly with the

[213] JA at 1931-32.
[214] JA at 1932; SJA at 546-552.
[215] JA at 1933; SJA at 23.
[216] JA at 199, 1933.
[217] SJA at 3, 23.
[218] JA at 1933.
[219] JA at 1935-36.

mental health experts.[220] However, Mr. Al-Haqq and the trial defense counsel held weekly meetings together to discuss progress in the case.[221]

Despite Mr. Al-Haqq serving as the lead counsel, the record indicates that he conducted very little actual work. In fact, it appears that Mr. Al-Haqq only served as counsel for four months.[222] Mr. Al-Haqq attended only four of the pre-trial Article 39(a) sessions,[223] and was absent for three other sessions while he was still officially retained as counsel.[224] His participation on the record while he was present in court was extremely limited. He merely discussed appellant's difficulties staying awake,[225] briefly argued in favor of

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[220] JA at 2107 ("Please do not make any independent decisions or take any unilateral actions regarding any psychological or mental health aspect of the case. We are working on a strategy in the area of our psychological or mental health defense and I need your full cooperation so that there is nothing which might occur that hurts, interferes with, or harms this strategy."). It appears trial defense counsels' role was to transmit documents to Dr. Miles. JA at 1935.

[221] JA at 200, 1936.

[222] Mr. Al-Haqq was retained on April 23, 2004. JA at 1933; SJA at 23. While he was not officially released until March 4, 2005 (SJA at 460-61), both appellant and the trial defense counsel confirmed that he had not done any substantive work on the case since August 24, 2004 (his final appearance on the record). JA at 289-90.

[223] May 10, 2004 (SJA at 3); May 24, 2004 (SJA at 12); August 2, 2004 (SJA at 20); and August 24, 2004 (SJA at 22).

[224] December 2, 2004 (SJA at 35); January 31, 2005 (SJA at 38); and March 4, 2005 (SJA at 43).

[225] SJA at 5-7, 30.

sequestering the panel,[226] discussed his attempts to have an alleged blood sample tested,[227] and argued two motions for continuances.[228]

Of the 58 substantive motions filed by the defense in appellant's court-martial, Mr. Al-Haqq and Mr. Fodio were involved in only one: the spurious Motion for Appropriate Relief to "Stay, Transfer, and Adjudge the Provocative Violations of Defendant's Human Rights."[229] The only other motion Mr. Al-Haqq filed was his motion to withdraw on March 4, 2005.[230]

In that motion to withdraw, Mr. Al-Haqq explained that the military defense counsel had both been aware for several months prior to his withdrawal of its eventuality, and that the "preparation for SGT Akbar's representation by both remaining military counsel has been done in light of the likelihood of this withdrawal."[231] As Mr. Al-Haqq also stated, "[b]oth military counsel have been intimately involved in every material aspect of SGT Akbar's representation since the beginning of the charges and have thorough knowledge of all defenses and the presentation of them in this court-martial. No additional time requirement exists to employ other counsel, thus neither SGT

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[226] SJA at 4.
[227] JA at 219-23.
[228] JA at 199.
[229] SJA at 378-96.
[230] SJA at 460-61.
[231] SJA at 460.

Akbar or [sic] the Government will suffer any undue prejudice as a result of this withdrawal."[232] The trial defense counsel confirmed that, because they were aware well in advance of Mr. Al-Haqq's impending withdrawal, they had been preparing the case not only as a full insanity plea (as desired by Mr. Al-Haqq), but also as a diminished capacity case which they had always believed was the best defense based on the evidence and their professional judgment.[233] In fact, Mr. Al-Haqq apparently conducted no substantive work on the case from August 24, 2004 (his last appearance on the record) until his release on March 4, 2005.[234] Appellant's trial defense counsel had been conducting most, if not all, of the case preparation since that time.[235] Consequently, Mr. Al-Haqq's withdrawal had little impact on the preparation of the case.

What is clear from the record is that the unwavering constant for appellant throughout his court-martial was his military trial defense counsel, LTC DB and MAJ DC. Any "dysfunction" was created solely by virtue of appellant's personal decisions (driven primarily by his mother) to hire the civilian attorneys and dismiss two other experienced counsel.

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[232] SJA at 460. Mr. Al-Haqq had previously complimented "the fine work" of the trial defense counsel, and based on his experience considered them to be "outstanding attorneys." JA at 205.
[233] JA at 1939.
[234] JA at 289-90.
[235] JA at 291.

Despite those errors in judgment, appellant's trial defense counsel were able to maintain and prepare for the theory at trial that they believed placed appellant in the best position to obtain a favorable result.

Perhaps the most direct evidence that the "dysfunction" existed solely outside of appellant's trial defense counsel is in the chart prepared by Ms. Grey on April 15, 2004, outlining the issues between the viewpoints of the members of the defense.[236] That chart makes clear that the views of the trial defense counsel were in line with the then mitigation specialist, that appellant's mental illness needed to be the focus of the defense case, and was the catalyst for the offenses.[237] This was the theory that the trial defense counsel always believed was the most appropriate, and was what they pursued at trial.[238]

It is clear, therefore, that appellant's civilian defense counsel had little to no impact on appellant's court-martial. While the Sixth Amendment does not provide different standards for representation between assigned and retained counsel,[239] this Court should at least recognize that any minor "dysfunction" caused by the civilian defense counsel in this case was the

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[236] JA at 2006-08.
[237] JA at 2007-08.
[238] JA at 1928, 1939-41.
[239] *See Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

result solely of appellant's intentional decision to retain counsel who were inadequate and not overly interested in representing appellant in his capital court-martial.

V. Failure to Request Additional Continuances

Appellant claims that his trial defense counsel were deficient for failing to request additional continuances just prior to the beginning of his court-martial in order to: (1) Continue to prepare his mitigation case; (2) Conduct additional psychological testing; and (3) Appropriately react to the stabbing incident.

"Generally, a defendant claiming ineffective assistance of counsel for failure to file a particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a reasonable probability that the granting of the motion would have resulted in a more favorable outcome in the entire case."[240] "The decisions on ... what trial motions should be made, and all other strategic and tactical decisions[, is within] the *exclusive province* of the lawyer...."[241] In dealing with claims relating to the failure to request additional continuances, an appellant must also show what would have been obtained and what

[240] *Styers v. Schriro*, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008)(citing *Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986).
[241] *Leavitt v. Arave*, 646 F.3d 605, 611 (9th Cir. 2011)(citing ABA Standards for Criminal Justice 4–5.2 (2d ed.1980))(emphasis original).

effect it would have had on the trial if a continuance had been granted.[242] Appellant fails on both counts in this case.

Markedly absent from appellant's brief is a detailed discussion of the numerous continuances requested by, and granted for, the defense. Following the completion of the Article 32 report on June 20, 2003,[243] between June 23, 2003 and March 9, 2004, the defense was granted seven separate continuances to continue to conduct their investigation.[244] On March 9, 2004, the defense informed the military judge that they would be prepared to go to trial in the fall of 2004; however, the military judge set the trial for July 12, 2004.[245] On May 20, 2004, the defense moved for a continuance from July 12, 2004, until June 2005, in order to continue the investigation.[246] This request was granted, in part, and the court-martial was delayed until October 25, 2004.[247]

The defense again moved the court for a continuance from October 25, 2004, until March 7, 2005.[248] The military judge granted the motion, in part, and set panel selection for February 15, 2005, with the presentation of the government case

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[242] *Lewis*, 786 F.2d at 1283.
[243] SJA at 32.
[244] SJA at 405-419.
[245] SJA at 1-2, 31, 420-26.
[246] SJA at 420-26.
[247] JA at 224-227.
[248] SJA at 22.

to follow on or about March 7, 2005.[249] The military judge stated directly: "Finally, defense, I do not anticipate further delays in this case. You should coordinate these dates and respective workloads carefully with Dr. Woods and Dr. Holdman; is that clear?"[250]

On December 2, 2004, the defense raised a final continuance request with the military judge until June 1, 2005, based on difficulties in obtaining records.[251] The Government opposed any delay beyond April 1, 2005.[252] The military judge granted the motion, in part, and set the trial to start on April 5, 2005.[253] Trial thereafter began on April 6, 2005.

In total, appellant was granted 656 straight days of delay from June 20, 2003, until trial began on April 6, 2005. From the original trial date of July 12, 2004, appellant was also able to successfully delay the ultimate start of his trial for an additional 268 days.

At the outset, appellant's entire premise supporting this argument is that the military judge would have granted any additional continuance requests by his trial defense counsel. What appellant fails to recognize, however, is that the criminal justice system is not designed solely for the benefit of an

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[249] SJA at 33.
[250] SJA at 34.
[251] SJA at 36-37.
[252] SJA at 37.
[253] JA at 264.

accused, to allow him to interminably delay being brought to trial. While an accused has a constitutional right to a speedy trial under the Sixth Amendment, the Government likewise has a legitimate interest in ensuring that perpetrators of heinous offenses (such as that which appellant committed) are brought to justice in a timely manner.[254] Based on the fact that appellant's court-martial was already scheduled to take place more than two years after he coldly murdered two Soldiers and attempted to murder sixteen others, due almost entirely to defense delay, appellant cannot establish that any continuance motion would have likely been granted.

Aside from this general failure of proof on appeal, appellant's specific arguments concerning the reasons justifying a continuance will be addressed in turn.

A. Mitigation Investigation

Appellant cannot establish that an additional continuance request to conduct further mitigation investigation would have been approved by the court. As discussed in more detail herein,[255] when Ms. Nerad was advising that trial defense counsel request an additional continuance, the mitigation investigation had already encompassed over 1,000 hours of work and cost almost

[254] *See United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997)(recognizing that "prejudice to opponent" is a factor to be considered in ruling on continuance motions).
[255] *Supra*, at 28-34.

$100,000. On August 24, 2004, the military judge made clear that he "did not anticipate further delays in this case."[256] While the military judge did grant an additional delay on December 2, 2004, to April 1, 2005, in order to assist the defense in obtaining records from various agencies, he denied the defense requested date of June 1, 2005, and only granted it through the period not objected to by the government.[257] In light of the fact that Ms. Nerad was planning to request an astounding additional 340 hours of work[258] despite having already performed over 1,000 hours (a requested increase of over 32%), coupled with the military judge's clear indication that further opposed delay would not be acceptable, appellant cannot establish that a delay request would have been granted.

Further, the circumstances at that time establish that the trial defense counsel had no legitimate reason to request further delay of the court-martial. First, the trial defense counsel informed Ms. Nerad on March 9, 2005, that in order to request additional time or funding, they required written declarations from her to support such requests.[259] Despite informing trial defense counsel that she would prepare the

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[256] SJA at 34.
[257] JA at 264; SJA at 36-37; *see also* JA at 2935-36 (recognizing that delay was only granted through April 1, 2005, because the government agreed).
[258] JA at 1941.
[259] JA at 1941-42, 2210.

declarations,[260] trial defense counsel never received them.[261] While Ms. Nerad claims she sent the declarations to trial defense counsel,[262] appellant has never presented those declarations to this or any court, rebutting her assertions. Without declarations to support additional time or funding, the trial defense counsel had no basis to file a motion for continuance.

Second, the trial defense counsel make clear that they felt Ms. Nerad did not actually require additional time or funding, but was merely requesting it "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."[263] Attorneys are not required to present frivolous or meritless arguments to the court, and their decision not to

[260] JA at 2211.
[261] JA at 1942.
[262] JA at 2768.
[263] JA at 2149; *see also* JA at 1942 ("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."). While Ms. Nerad disputes that she made those precise statements, she does not dispute that the conversation occurred, lending to the possibility that trial defense counsel may have interpreted her statements as such. JA at 2780.

cannot form the basis for an ineffective assistance of counsel claim.[264]

Third, aside from realizing that Ms. Nerad was acting disingenuously in requesting additional time and funding, the trial defense counsel did not believe that additional time was necessary. E-mails between the trial defense counsel on March 9-10, 2005, establish that they felt additional investigation was unnecessary and would not likely produce any additional probative evidence.[265] As LTC DB stated: "I'm reluctant to even ask for more funding. What do we really stand to gain at this point? They have not produced too much of use with the first $50,000. I can't think of too much they can add to my portion of the case, unless there is information they have not disclosed at this point."[266]

Consequently, even assuming Ms. Nerad would have provided the requested declarations, it would have been a reasonable tactical decision by trial defense counsel to not request additional time or funding. Coupled with it being undeniably

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[264] *See Green v. Johnson*, 160 F.3d 1029, 1037 (5th Cir. 1998)("failure to make a frivolous objection does not cause counsel's performance to fall below an objective standard of reasonableness."); *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999)("An attorney's failure to raise a meritless argument thus cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue.").
[265] JA at 2935-38.
[266] JA at 2935-36.

clear that the military judge would not have granted an additional continuance under these circumstances, appellant's claim of ineffective assistance of counsel on this issue fails.

B. Additional Psychological Testing

Initially, appellant does not explain how the purported additional psychological testing is qualitatively different than the "extensive battery of neuropsychological tests" already performed on appellant by Dr. Clement.[267] Regardless, it is clear from the record that Dr. Woods did recommend to trial defense counsel in a memorandum on February 28, 2005, that appellant required additional psychological testing.[268] The next day, LTC DB sent him an e-mail asking for additional information regarding the proposed testing to support requesting a delay to conduct further psychological testing.[269] However, as Dr. Woods clarified in a response the same day, "[t]he testing will add to the indications that he has a SEVERE mental disease. It will not be the only evidence, but will be corroborative."[270] As this response makes clear, Dr. Woods did not believe that additional testing was actually required to support his diagnosis, but would merely be potentially corroborative. In light of the timing of this information (a month before trial), coupled with

[267] JA at 1965.
[268] JA at 2389-95.
[269] JA at 2241.
[270] JA at 2242.

the extensive delays and the reluctance of the military judge to grant additional delays (discussed, *infra*), it was a reasonable tactical decision for the trial defense counsel to not request a further delay.

Further, other e-mails to Dr. Woods establish that the trial defense counsel felt the best tactical way to present Dr. Woods testimony was as simply as possible, in order for the panel to follow it.[271] The end goal was to have Dr. Woods "give [his] diagnosis of schizophrenia and then support it by defining the symptoms of schizophrenia that [he'd] identified in the client. Then we will go through and match those symptoms up with evidence from lay witnesses, the diary, etc."[272] The clear idea was to prevent the mental responsibility defense from being dragged down into "a battle of the experts which might be difficult for the panel to follow."[273]

Further, as Dr. Woods made clear, the additional testing was probative only to further support a clear diagnosis of schizophrenia. However, as he testified at trial (and discussed in more detail herein), an actual diagnosis of schizophrenia was not "clinically relevant" for purposes of his testimony at trial.[274]

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[271] JA at 2255.
[272] JA at 2255.
[273] JA at 1941, 1962.
[274] JA at 917.

As a result, the trial defense counsel's actions did not fall below objective standards of reasonableness due to a tactical decision to not request additional time for further psychological testing, as it was not required for their defense. Further, appellant has failed to show what plausible effect additional testing would have had on the proceeding, as Dr. Woods himself made clear that an actual diagnosis of schizophrenia was not relevant to his testimony.

C. Stabbing Incident

Following the stabbing incident on March 30, 2005, the trial defense counsel reached out to Dr. Woods, who informed them that "I think we should hold the course."[275] The trial defense counsel did successfully request an additional R.C.M. 706 evaluation be conducted, which determined that appellant remained competent.[276] Further, trial defense counsel successfully moved to exclude evidence of the stabbing incident, though the military judge allowed the government the ability to move to reconsider should the defense open the door to such evidence.[277]

The trial defense counsel were also concerned that if they requested a delay, the government would go ahead and charge

[275] JA at 2282.
[276] JA at 279.
[277] JA at 288, 1891-94, 1943.

appellant with the assault.[278] While appellant correctly points out that trial defense counsel controlled whether the government could have joined the additional offense to the charges at the time before the court-martial,[279] if the defense obtained a lengthy continuance on the eve of trial following the stabbing incident, nothing would have prevented the government from withdrawing the charges under R.C.M. 604, preferring, investigating, and referring the additional charge, and bringing all the charges to court-martial together. If the court-martial was already going to be delayed again, there would have been no reason for the government not to move forward with the additional assault charge, particularly in light of the fact that the government was precluded from proactively introducing evidence regarding the incident.

Consequently, it was clearly a reasonable tactical decision which should not be second guessed on appeal for appellant's trial defense counsel to choose not to increase the possibility that the government would bring the additional assault charges against appellant.

Finally, and importantly, appellant does not even attempt to point out what would have been garnered from any additional

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[278] JA at 1968.
[279] R.C.M. 601(e)(2) ("After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.").

delay due to the stabbing incident. He has presented no additional evidence that could have been discovered or admitted. Even assuming error, therefore, he cannot establish prejudice.[280]

VI. Conceded Guilt

Appellant's arguments that his trial defense counsel conceded guilt during the merits portion of his court-martial are absurd. Conceding certain elements, particularly an accused's identity as the perpetrator, and focusing on avoiding the death penalty is a widely accepted strategy.[281] The defense was faced with overwhelming evidence that appellant murdered CPT Seifert and MAJ Stone.[282] "In such cases, 'avoiding execution [may be] the best and only realistic result possible.'"[283] "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'"[284] The Supreme Court has noted

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[280] *Lewis*, 786 F.2d at 1283.
[281] *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004); *United States v. Johnson-Wilder*, 29 F.3d 1100, 1105 (7th Cir. 1994)("As to admitting certain elements of the alleged crime, if as here, it is futile to dispute them then it is not objectively unreasonable for defense counsel to save his arguments for the issues he has some hope of winning . . . trial counsel is not required to contest every element in the hope that he will get a lucky break."); *Parker v. Lockhart*, 906 F.2d 859, 861 (8th Cir. 1990);
[282] JA at 1923.
[283] *Nixon*, 543 U.S. at 191 (quoting 2003 ABA Guideline § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. 913, 1040).
[284] *Nixon*, 543 U.S. at 191-192 (quoting *United States v. Cronic*, 466 U.S. 648, 656-657 n.19 (1984), and Sundby, The Capital Jury

that even "[r]enowned advocate Clarence Darrow famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold."[285]

The focus of the entire defense case on the merits was to argue that appellant did not have the ability to form a premeditated intent to kill because of his mental illness.[286] Therefore, their argument was not a *de facto* plea of guilty because they did not concede an essential element of the offense: premeditation. This strategy allowed them an opportunity to avoid a death-eligible offense, while leaving their options open for sentencing arguments that also focused on the mental health evidence.[287] This strategy did not violate Article 45(b), UCMJ, and was a reasonable strategy under *Strickland*.

Appellant argues that because trial defense counsel elicited evidence that might tend to show appellant could create

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and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L.Rev. 1557, 1589-1591 (1998) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney."); ("interviews of jurors in capital trials indicate that juries approach the sentencing phase 'cynically' where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense"); *Id*. at 1597 ("in capital cases, a 'run-of-the-mill strategy of challenging the prosecution' case for failing to prove guilt beyond a reasonable doubt' can have dire implications for the sentencing phase.")).

[285] *Nixon*, 543 U.S. at 192 (citations omitted).

[286] JA at 688-89, 696-97, 1024, 1026-27, 1040, and 1050.

[287] JA at 1487-90, 1495-97, and 1505-06.

generic "plans," his trial defense counsel ostensibly admitted that he premeditated the murders. However, the fact that appellant could conceivably make "plans," albeit "ineffective" and "poor" plans, was not in dispute.[288] The fact that appellant might have made "plans" sometime in the past did not prove that he made a plan to commit the murders in this case. The argument was never that he was not capable of committing the offenses, but merely that his emotions and mental illness dictated his actions.[289]

Appellant's arguments concerning SPC Rice are unpersuasive.[290] First, "there is a strong presumption that counsel took certain actions for tactical reasons rather than through sheer neglect."[291] Though SPC Rice's testimony can be viewed in many ways, most evidence can be viewed as a "double-edged sword," with advocates arguing different conclusions from the same facts. While the scene in the movie referenced may have included the throwing of a grenade, the clear purpose of that testimony was to demonstrate a specific occurrence of appellant's inappropriate laughter and demeanor, one of the recurring facts highlighted by the defense to assist in

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[288] *See* JA at 901-08. Trial defense counsel did elicit that "[t]here is little in the diary that reflects Sergeant Akbar as someone that is capable of planning." JA at 915.
[289] JA at 852, 918.
[290] AB at 116-17.
[291] *Cullen*, 131 S. Ct. at 1404 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)).

establishing his mental illness.[292] Regardless, it is quite the exaggeration that the government's "[c]ase [was] closed" following this testimony.[293] To the contrary, it is more likely that the incontrovertible evidence that appellant committed the murders, the evidence surrounding the circumstances of the murders, and appellant's stated intention mere weeks before the murders to kill his fellow soldiers were the linchpin of the government case.[294]

Consequently, appellant has failed to establish that his trial defense counsel conceded guilt.[295]

VII. Failure to Present a Coherent Theme at Trial

Contrary to appellant's position, his trial defense counsel presented a comprehensive and coherent theme during his court-martial. The theme selected by appellant's trial defense counsel was "a hybrid defense that concentrates on the mental illness and the inappropriateness of the death penalty in cases

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[292] JA at 790-91; SJA at 245. *See Nielsen v. Hopkins*, 58 F.3d 1331, 1334-36 (8th Cir. 1995)(cross-examination of prosecution expert which elicited damaging evidence but also favorable evidence of intoxication was not functional equivalent of non-consented guilty plea).

[293] AB at 116.

[294] JA at 907-08; SJA at 284-86.

[295] Ironically, appellant also argues that it was ineffective for his trial defense counsel to fail to request an instruction regarding his inability to plead guilty. AB at 109. By appellant's suspect logic, therefore, his counsel would be ineffective for conceding their client was the perpetrator and ineffective for not telling the panel that their client wanted to plead guilty.

where the accused is not absolutely responsible."[296] The primary goal on the merits was to "attack[] the premeditation element of the murder specifications"[297] by showing that "due to mental illness, he did not premeditate and/or that he was in a heat of passion brought on by his mental illness which exaggerated his response to the derogatory comments he heard."[298] Almost a year before trial began, the defense counsel summarized the merits theme:

> By raising an attack on premeditation, we enable ourselves to present much of the mitigation evidence developed by Mrs. Grey and the defense team during the merits portion of trial. The manner that this evidence is presented is such that it will not alienate the panel members. While it is unlikely we will prevail on the premeditation issue, it does allow for a smooth transition to the sentencing case. It also enables us to explain how the unit's actions and SGT Akbar's mental state created a situation where he would feel (unreasonably so) compelled to act.[299]

Should the case proceed to sentencing, the theme continued to flow directly from the partial mental responsibility defense:

> SGT Akbar is mentally disturbed. Friends and acquaintances from his upbringing knew it, teachers and professors in his school knew it, [m]embers of his unit and command knew it, days before the attack – 1LT Evangelista knew it, even the government's own experts Dr. Southwell and Dr. Diebold

[296] JA at 2311.
[297] JA at 1930.
[298] JA at 2286-87.
[299] JA at 2478.

> know it . . . Death is an absolute punishment. And we, at least in this country, don't kill people that are not absolutely responsible.[300]

As defense counsel stated the month before trial, "the ultimate goal is to use the mental responsibility defense to lay the foundation for the mitigation case. We want to firmly establish that the client is mentally ill so that even if the panel does not accept the defense, they will have some sympathy built in when it comes time to determine a punishment."[301] The focus of the defense witnesses was to bring out appellant's "poor duty performance, odd behaviors, lack of common sense, deficiency of friends in unit, and his mental health difficulties,"[302] all of which would conform to Dr. Woods' testimony.[303]

A. Rejection of Full Lack of Mental Responsibility Defense

The trial defense counsel chose a defense based on partial mental responsibility because they did not believe they had a "viable lack of mental responsibility defense" in this case.[304] There were a number of different reasons for this.

First, the R.C.M. 706 board found that appellant did not suffer from a severe mental disease or defect, and could

[300] JA at 2319.
[301] JA at 2255.
[302] JA at 2319.
[303] JA at 2255.
[304] JA at 1928.

appreciate the nature and quality of his actions at the time of the offenses.[305]

Second, every psychological expert appointed to the defense agreed with the R.C.M. 706 board's findings.[306] Indeed, Dr. Woods testified at trial that appellant was in fact legally sane and was "capable of understanding the natural consequences of his act."[307]

Third, the defense was concerned that relying on a complete lack of mental responsibility defense unnecessarily increased the risk of opening the door to appellant's damaging statements to the R.C.M. 706 board.[308] Those statements include that he had intentionally targeted the brigade leadership, asked Allah to stop him if his actions were wrong, and that he "was doing this for Islam to prove my loyalty to Allah."[309] He also explained that he was fully cognizant of what he was doing.[310] The admission of these statements would have rebutted nearly every aspect of Dr. Woods' testimony.

Fourth, the defense was concerned that "much of the literature of capital defense indicated that mental

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[305] JA at 1940, SJA at 53-31.
[306] JA at 1940, 1963-65, 2255, 2288.
[307] JA at 873, 911.
[308] JA at 1941. A summary of appellant's statements are contained in SJA at 517-18.
[309] SJA at 517-18.
[310] SJA at 518.

responsibility defenses had a low success rate and had the potential to undermine other mitigation evidence."[311]

Fifth, the trial defense counsel were "deeply concerned" that the government would be able to present compelling evidence that appellant "was malingering symptoms of mental illness to build a defense."[312]

B. Implementation of the Theme at Trial

The theme began during the defense opening statement:

> The evidence in this case will show that the answer to that question [why SGT Akbar committed the offenses] lies in mental illness . . . The evidence will show that the enemy was in Sergeant Akbar's mind and that it had been there for 15 years or more. The evidence will show when Sergeant Akbar acted, it was not with premeditation, but with desperation, desperation born of a damaged mind.[313]

The primary focus of the defense cross examinations of government witnesses on the merits was on establishing appellant's "odd behavior," eliciting testimony such as that appellant was considered "odd" and "retarded," had difficulty staying awake, would fall asleep standing up, was a subpar NCO, would pace and talk to himself, laugh at inappropriate times, was "totally disassociated with what was going on around him,"

[311] JA at 1940, 2311.
[312] JA at 1940; *see also* JA 1981-91.
[313] JA at 689, 696.

and had been subjected to hearing derogatory terms towards Muslims.[314]

Every defense witness on the merits focused almost exclusively on appellant's "odd behavior," which was in turn used to support Dr. Woods' ultimate testimony regarding appellant's mental illness. The testimony began with Dr. Fred Tuton, establishing the baseline beginning of appellant's mental illness as a child,[315] continued through his time in college and strange behavior via the testimony of Mr. Paul Tupaz,[316] and culminated in multiple witnesses testifying about his behavior while in the military, leading up to the offenses.[317]

Dr. Woods, the ultimate defense witness, chronicled appellant's social history and the history of mental illness in his family.[318] He discussed specific instances of appellant's misperceptions of reality.[319] He discussed problems in appellant's collegiate and military career.[320] He explained the medical significance of appellant's habits of pacing, talking to

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[314] *See* SJA at 154-56, 164-65, 174-78, 183-86, 190-92.
[315] *See* JA at 733 (noting that appellant had "an adjustment disorder with depressed mood associated with a mixed specific developmental disorder.").
[316] *See* JA at 772 (trouble sticking to plans), 773 (pacing and talking to himself), 774 (trouble sleeping), 775-777 (wrestling incident and sexual abuse of sisters).
[317] *See* JA at 790-91; SJA at 239-77.
[318] JA at 799-809, 823-24.
[319] JA at 811-16.
[320] JA at 816-22.

himself, and laughing inappropriately.[321] He explained the medical testing that was conducted on appellant.[322] He informed the members that appellant "has unusual thinking," a "history of depression," "a vulnerability to decompensation under stress," and "a history of paranoia and suspicion."[323] Dr. Woods ultimately concluded that appellant suffered from "Schizotypal Personality Disorder," and that his myriad of symptoms "played a great role in his mental state at the time of the offense" by causing "him to be overwhelmed emotionally and to really not think as clearly, to not really understand, and just to be overwhelmed emotionally."[324]

The entirety of the defense closing argument on the merits focused on his mental illness, and how he could not have premeditated the murders. "[T]he evidence will show in this case that Sergeant Akbar was mentally ill. And because he was mentally ill, he became emotionally charged; and, under the head of emotion, he reacted out of confusion and out of fear, not with premeditation – not with a cool mind."[325] After describing how appellant's actions when he carried out the attack were disorganized, his trial defense counsel argued that "[t]hose facts show that Sergeant Akbar was suffering from mental

[321] JA at 822-23.
[322] JA at 824-27, 831-42.
[323] JA at 844.
[324] JA at 851-52.
[325] JA at 1027.

illness. This wasn't a well thought out, premeditated plan. It was driven by confusion; it was driven by fear; and it was driven by mental illness, that caused all those emotions in Sergeant Akbar."[326]

As the trial defense counsel explained in their pre-trial strategy memorandum, once the case moved on to sentencing "[t]he focus will be on bringing out SGT Akbar's poor duty performance, odd behaviors, lack of common sense, deficiency of friends in unit, and his mental health difficulties."[327] The goal, however, was to have already presented "much of the mental health and mitigation evidence into the merits case," in order to "allow the defense to easily transition into a sentencing case without having alienating[*sic*] the panel members."[328] This strategy to "frontload" the mitigation case during the merits had been the focus throughout the entirety of the investigation.[329]

Because the defense had already presented extensive evidence concerning appellant's mental illness during the merits portion of the trial, once the sentencing phase began the

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[326] JA at 1045.
[327] JA at 2319.
[328] JA at 1930.
[329] *See* JA at 2684 ("We understood the importance of "frontloading" mitigation evidence into the findings stage of the trial and if at all possible, maintaining a consistent, credible, and coherent theme in both findings and sentencing."); JA at 2007 ("Merits phase primary value is to frontload mitigation any way we can."); JA at 2011; JA at 2013 ("their plan here – and in SC – was to frontload vigorously as much social history into the mental health experts opinion.").

defense needed only to present "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."[330]

In final argument, trial defense counsel presented "a sentencing argument not based upon emotion, but based upon logic and reason," in order to counter the government's "sentencing argument based upon emotion."[331] In arguing against the death penalty, defense counsel argued that "[i]t's a punishment that should be reserved for those who are absolutely responsible; what I mean by 'absolutely responsible,' is that there are no issues of mental illness."[332] Defense counsel concluded:

> On 23 March 2003, Sergeant Akbar had fear that his brigade was going to kill him; he had fear his brigade was going to rape and kill Iraqi civilians. As I stand here today, I tell you that fear was not logical. We know that fear is not logical. But I hope that when you review everything, that it's understandable.[333]

A mitigation case based on attempting to make a panel understand the accused, rather than merely feel sympathy for the accused, is undoubtedly a reasonable trial strategy.[334]

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[330] JA at 1944.
[331] JA at 1484-85.
[332] JA at 1505.
[333] JA at 1508.
[334] *See Sears v. Upton*, 130 S. Ct. 3259, 3264 (2010)("This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his

From beginning to end, the consistent theme of appellant's defense was that he was mentally ill, and that such mental illness was the cause of his crimes. Because of his mental instability, he was unable to premeditate. Finally, because of that same mental instability, the death penalty was an inappropriate punishment, because "we, at least in this country, don't kill people that are not absolutely responsible."[335]

This was an entirely reasonable theme based on the evidence available in this case. The fact that the theme was not successful is not dispositive in a claim of ineffective assistance of counsel.[336]

VIII. Failure to Present a "Humanity" Defense

The government presented a powerful sentencing argument focusing on the emotional injury inflicted on the victims due to appellant's crimes.[337] According to appellant, to counteract

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horrendous acts"); *Cullen*, 131 S. Ct. at 1429 (Sotomayor, J., dissenting)(arguing that focusing on accused's mental illness issues in order to "explain why Pinholster was the way he was" would have been more reasonable than asking for sympathy).

[335] JA at 2319.

[336] *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000)("the fact that a particular defense ultimately proved to be unsuccessful [does not] demonstrate ineffectiveness.").

[337] JA at 1464-1484. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)(citing *Booth v. Maryland*, 482 U.S. 496, 517 (1987)(White, J., dissenting).

these powerful arguments his trial defense counsel were required to present his life story in a so-called "humanity defense."

There is no requirement for "defense counsel to present mitigating evidence at sentencing in every case."[338] To require otherwise would "interfere with the constitutionally protected independence of counsel at the heart of *Strickland*."[339]

As the Supreme Court has recognized, "'[t]he current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it. Not all defendants are capable of rehabilitation, and not all juries are susceptible to such a plea.'"[340] Such "life-history" would not necessarily be mitigating, and could reasonably alienate the panel.[341]

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[338] *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).
[339] *Id*. (internal citations and quotations omitted).
[340] *Cullen v. Pinholster*, 131 S. Ct. 1388, 1408 (2011)(quoting *Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009)(Kozinskini, C.J., dissenting)).
[341] *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002)(recognizing that mitigating evidence can be a "two-edged" sword that juries might find to show future dangerousness); *Royal v. Taylor,* 188 F.3d 239, 249 (4th Cir.1999)("[R]eliance on evidence of psychological impairments or personal history as mitigating factors in sentencing can be a 'double-edged sword'" (quoting *Wright v. Angelone,* 151 F.3d 151, 162 (4th Cir.1998)); *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983)("[M]itigation may be in the eye of the beholder.").

To begin with, much of the humanizing "life story" that appellant presents in his brief[342] was already presented to the panel. Dr. Woods testified in some detail about appellant's life,[343] including the physical abuse in his home,[344] the history of mental illness in appellant's family,[345] and his academic and military careers.[346] Mr. Tupaz and Mr. Duncan testified about their interactions with appellant during college and high school, respectively. The defense admitted a detailed summary of appellant's life history prepared by Ms. Grey, accompanied by a summary of relevant abstracts from his diary.[347] They also admitted a number of statements from family and friends who knew him at various stages of his life.[348]

The military's judge's instructions to the panel on mitigating and extenuating circumstances highlight the substantial amount of mitigation evidence presented at trial and the fallacy of appellant's criticism. The military judge not only listed thirty-one separate points to consider in mitigation and extenuation, but directed the panel to the evidence in the record presented by the defense during the trial that supported

[342] AB at 3-10.
[343] JA at 806-08.
[344] JA at 806.
[345] JA at 799-802.
[346] JA at 817-22.
[347] JA at 1561-93.
[348] JA at 1600-02, 1622-28; SJA at 309-11.

each point.[349] Even the prosecution noted in the Government's sentencing argument that the defense focused on appellant's "social history."[350]

MAJ DC's closing statement highlights the trial defense team's use of appellant's social history.[351] MAJ DC referenced the evidence of appellant growing up in a poor family, filled with neglect and molestation and that his community was racially intolerant.[352] MAJ DC continued to talk about appellant's "social history" by discussing appellant's progression through high school, college, and into the Army.[353] While not the central focus of the sentencing argument, it underpinned the overall argument that life without the possibility of parole was a more appropriate punishment than death.[354]

Consequently, appellant's true criticism cannot be read to mean that his trial defense counsel failed to present any social history, but rather that the "humanity defense" he now espouses should have been the primary focus of the defense case. What appellant fails to recognize is that attempting to "humanize" him to the panel for the purpose of obtaining mercy would have been an unreasonable sentencing strategy. Instead, attempting

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[349] JA at 1513-19.
[350] JA at 1470.
[351] JA at 1484-1508.
[352] JA at 1484-1508.
[353] JA at 1494-97.
[354] JA at 1486, 1498-99; SJA at 463-95.

to convince a panel that someone who commits murder as a result of long-standing serious mental illness does not deserve to die is a reasonable strategy, and the best available to appellant's trial defense counsel.

Focusing on mental illness and not the "humanity" defense would limit the exposure of potentially damaging evidence. The myriad objective actions and behaviors of appellant relied upon by Dr. Woods in discussing appellant's potential mental illness could not be rebutted.[355] The only question would be the degree to which these indicate the severity of his mental illness. The Government would have been hard-pressed to legitimately argue that appellant was at all times a fully functioning, rationale individual.

By contrast, 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, and would have likely conflicted with the mental illness defense. The 7th Circuit has considered the dangers associated with presenting the "life story" of particular accused persons:

> The narratives that defense counsel and their "mitigation specialists" present often contain material that the jury is likely to consider aggravating rather than mitigating. *Burger v. Kemp,* 483 U.S. 776, 793, 107 S.Ct.

[355] JA at 2082 ("The best thing we have going for us is that nobody is going to say SGT Akbar was perfectly normal. If he wasn't insane, then he was definitely messed up emotionally.").

> 3114, 3125, 97 L.Ed.2d 638 (1987); *Stewart v. Gramley,* 74 F.3d 132, 137 (7th Cir.1996). The mitigation specialist and the mitigation witnesses tell the story of the defendant's life, and it is often a life of crime. So in a case in which the jury might doubt the prosecution's evidence of aggravating circumstances, the presentation of evidence of mitigating circumstances can sink the defendant by filling in the gaps in the prosecution's case. As a matter of fact, the mitigation story that Emerson's current lawyers say that Sammons should have presented contains a number of criminal acts (the arson, the armed robbery, the attempted murder, and a number of Emerson's previous crimes) that were omitted from the prosecution's enumeration of aggravating circumstances.[356]

While appellant's life may not involve a similar history of criminal activity, it does involve a high level of extremely prejudicial information.

Appellant argues his life story should have begun with a discussion of his parents' lives. While events that SGT Akbar experienced himself would be relevant to explain how his mental health and personality were affected, that John Akbar grew up "in a racially divided South" where he witnessed "four men in white robes and hoods hang a black man" is not relevant to SGT Akbar's life.[357] Why his parents were racially intolerant and his biological father was a violent criminal were not at issue in appellant's court-martial.

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[356] *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996).
[357] AB at 4.

This life story is supposed to have continued with his indoctrination into the radical Nation of Islam by his father. John Akbar describes the Nation of Islam as a hate-filled, militant organization that views white people as the enemy.[358] John Akbar explains that as a child appellant became enthralled with the Nation of Islam, and planned to become a lieutenant in the organization at some point, which would have required appellant to "kill a white man."[359] Rather than "humanizing" appellant, this testimony might lead a panel to believe that appellant grew up always planning to kill white people, and would provide additional context to the comments in his diary indicating that he desired to kill white people. This could have directly rebutted the defense argument that appellant committed the murders merely as a result of his long-standing mental illness; it would have allowed the panel to believe that the murders were actually committed as a result of appellant's long-standing hatred of and desire to kill white people. Appellant's trial defense counsel rightly rejected any connection to the Nation of Islam in their mitigation case. "We

[358] JA at 2021-22, 2025.

[359] He explained that in order to become a lieutenant or captain in the Nation of Islam, one would be required to kill a white man. JA at 2021. He then states that it was his goal for appellant to "grow up to be captain or a lieutenant someday." JA at 2022. He even recalls telling his wife "Man, he's going to be a captain one day, baby." JA at 2022. Appellant himself also informed John Akbar that he desired to be a lieutenant in the Nation of Islam. JA at 2830.

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."[360]

When looking at the rest of appellant's life history, as espoused in his brief, there is nothing that portrays him as a good person who should be spared a death sentence. The best that appellant could present would have been that he did well academically in high school, a fact that was fully developed by Dr. Woods in the context of how it supported a diagnosis of mental deterioration.[361] Other than that, appellant was almost universally described as an anti-social, quiet individual who did not really have any friends.[362] In fact, the only person who characterized himself as a "close friend" of appellant was Paul Tupaz, who testified on his behalf.[363] It is not surprising then that, other than family members, the only people appellant identifies who could have provided further context on his life were minor acquaintances, such as teachers or school counselors. As to his family members being potential witnesses, even appellant's post-trial mitigation expert recognizes that nearly all of his family members suffer from some level of mental

[360] JA at 2351.
[361] JA at 810-11.
[362] JA at 772, 1601, 1622, 1625, 1628, 2835, 2876; SJA at 309.
[363] JA at 770.

illness.[364] Focusing on appellant's and his family's "more serious substance abuse, mental illness, and criminal problems" would in no way be "clearly mitigating," and could potentially have allowed the panel to conclude that appellant "was simply beyond rehabilitation."[365]

The defense clearly did not want to present him as a "hate-filled individual," but rather merely as a person suffering from mental illness. "He's not a hate-filled individual; this is a person with mental illness, who is very sensitive to anything said to him. He misreads cues, he misinterprets things, to the point that he has to go ask people, 'Are you going to rape Iraqi civilians?'"[366] The best way to avoid appellant being presented in such a light was to not focus on his life history.

It would have been unreasonable to pursue a strategy that appellant's "life story" made him deserving of mercy, in light of the significant negative effect his life history could create in undermining the defense's strategy. The full breadth of appellant's life, when compared to the lives and tragedy associated with his victims, would likely never convince a reasonable panel to bestow mercy upon him. In fact, attempting to paint the murderer as a victim, as appellant's argument on

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[364] JA at 2608-09; *see also* JA at 799-802.
[365] *Cullen*, 131 S. Ct. at 1410.
[366] JA at 1497-98.

appeal tries to do, could easily engender hostility from a jury or panel, in light of the impact of appellant's crimes.

Finally, any attempt to focus on appellant's good character by the defense would potentially open the door to the stabbing incident.[367] While appellant flippantly suggests that his trial defense counsel could have merely properly prepared potential witnesses, the danger of an inadvertently broad response would undoubtedly have outweighed the minimal impact of such additional evidence that did not directly support the defense theme of mental illness (which itself was already sufficiently presented to the panel).[368] And appellant's pointing out a number of statements presented at his court-martial that might have been relied on by the government in a motion to reconsider the suppression of the stabbing incident is unpersuasive. Because "there is a strong presumption that counsel took certain actions for tactical reasons rather than through sheer

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[367] *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012)("Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so."); *see also United States v. Stephenson*, 33 M.J. 79, 80 (C.M.A. 1991)(not deficient performance to decline to call a character witness at a sentencing hearing in order to avoid harmful rebuttal evidence).

[368] "Choosing whether to introduce evidence that has potential risks and rewards is at the very core of a trial counsel's tactical discretion -- a discretion that courts should only rarely second-guess." *Johnson v. Beckstrom*, 2011 WL 1808334 at *19 (E.D. KY (2011)(citing *Collier v. Lafler*, 2011 WL 1211465 at *5 (6th Cir. 2011), *Lema v. United States*, 987 F.2d 48, 55 (1st Cir. 1993)).

neglect,"[369] it can be presumed that appellant's trial defense counsel believed the minimal amount of "future dangerousness" related evidence presented, and the manner in which it was presented, did not greatly increase the chance that the government could introduce the stabbing incident. To argue, as appellant does, that his counsel should have actually presented further such evidence in order to more directly invite the government to attempt to introduce the stabbing incident is illogical and would have been foolhardy. Finally, what appellant cannot rebut is that the defense strategy was successful – the government was never able to admit evidence concerning the stabbing incident.

This was not a case about mercy; it was a case about understanding. It is not reasonable to request sympathy and mercy based on the "humanizing" life story of an individual who does not engender either, particularly when compared to the undeniable sympathy created by the victims of appellant's heinous actions. What is reasonable is to request that the panel attempt to understand why appellant did what he did, and that because the "why" in this case was mental illness, the death penalty is not an appropriate punishment. The fact that

[369] *Cullen*, 131 S. Ct. at 1404 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003)).

this argument failed does not render it unreasonable,[370] and appellant has failed to establish that any additional argument based on the purported "humanity defense" would have led to a different result.

IX. Failure to Call Certain Witnesses

To begin with, the choice as to whether to call certain witnesses is a strategic, tactical decision,[371] which is not to be second guessed on appeal.[372] The Army Court correctly pointed out that "[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel."[373]

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[370] *Ward v. Hall*, 592 F.3d 1144, 1164 (11th Cir. 2010)("the fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel.")(citing *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000).

[371] *Horton v. Allen,* 370 F.3d 75, 86 (1st Cir. 2004)("The decision whether to call a particular witness is almost always strategic, requiring a balancing of the benefits and risks of the anticipated testimony.") (quoting *Lema v. United States,* 987 F.2d 48, 54 (1st Cir. 1993)); *United States v. Luciano,* 158 F.3d 655, 660 (2d Cir.1998) (because "[t]he decision not to call a particular witness is typically a question of trial strategy," counsel did not render ineffective assistance by failing to call witness whose testimony "might well have been regarded [ ] as unnecessarily cumulative"); *Ward v. Hall*, 592 F.3d 1144, 1164 (11th Cir. 2010)("calling some witnesses and not others is the epitome of a strategic decision.")(internal citations and quotations omitted).

[372] *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009).

[373] *United States v. Akbar*, 2012 WL 2887230 at *31 (Army Ct. Crim. App. 2012)(mem. op.) (quoting *Grossman v. McDonough*, 466 F.3d 1325, 1347 (11th Cir. 2006)).

Appellant alleges that his trial defense counsel were deficient for failing to call a number of potential witnesses. These include: (1) John Akbar (father); (2) Quran Bilal (mother); (3) Musa Akbar; (4) Regina Weatherford; (5) Ron Hubbard; (6) Dr. Will Miles; and (7) Dr. Donna Sachs.[374]

Aside from these witnesses, appellant implies generally that the defense should have called unspecified family members, teachers, mentors, and friends. As to appellant's family, the trial defense counsel recognized early on that "many of the family members would present witness control issues given their proclivity to claim that SGT Akbar was either being framed by the Government or that he was a victim of some conspiracy by his unit."[375] In addition, nearly every member of appellant's family was suffering from some form of mental illness,[376] making it highly unlikely that any of these witnesses could have been relied upon to testify.

Further, nearly every witness identified by appellant on appeal would have testified solely to his background and "social history," ostensibly in support of the "humanity defense"

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[374] As already addressed, herein, the trial defense counsel were aware that Dr. Donna Sachs could not independently recall appellant. Consequently, appellant cannot establish that she would have been a relevant or necessary witness.
[375] JA at 2355.
[376] *See* JA 799-802, 2608-09.

appellant espouses on appeal. As discussed herein,[377] however, the trial defense counsel made a reasonable tactical decision to focus on appellant's mental illness, and not on his social history. Consequently, none of these witnesses would have provided any relevant evidence not otherwise presented during the court-martial.

A. John Akbar

Initially, whether John Akbar should have been called as a witness was definitively resolved during the court-martial. The military judge questioned trial defense counsel regarding the decision to not call John Akbar.[378] The trial defense counsel explained that they had made the conscious decision to not call John Akbar, had a tactical reason for choosing not to do so, and specifically discussed the matter with appellant.[379] Because defense counsel are entrusted with the exclusive authority, after sufficient consultation with their client, to determine which witnesses to call, this court should not second-guess this tactical decision.[380]

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[377] *See* discussion, *supra*, at 64-84.
[378] JA at 1450.
[379] JA at 1450.
[380] *See United States v. Fluellen,* 40 M.J. 96, 97 (C.M.A. 1994) (decision by defense counsel to not call alibi witnesses was a "tactical" decision); *see also United States v. Duran*, 2005 WL 1473962 at *4 (N.M. Ct. Crim. App. 22 June 2005)(unpub.); *see also United States v. Aaron*, 2004 WL 5862497 (Army Ct. Crim. App. 26 Feb 2004)(mem. op.)(unpub.)("It is well-settled that appellate courts will not second-guess the strategic or tactical

While appellant asserts that in John Akbar his trial defense counsel "could not have hoped for a better witness,"[381] nothing could be further from reality. According to appellant's own arguments, John Akbar: (1) Upon arriving in Los Angeles immediately became involved in criminal activity;[382] (2) Began to get involved in robberies, partying, and smoking marijuana;[383] (3) In 1973 was arrested and charged with armed robbery, and served part of his sentence at San Quentin;[384] (4) Joined the radical Nation of Islam while in prison;[385] (5) While on parole was arrested and charged with theft, possession of marijuana, and fraud;[386] (6) Became addicted to marijuana;[387] (7) Began taking PCP after his wife and appellant left him;[388] and (8) Became addicted to crack cocaine.[389]

John Akbar has been described as becoming "overwhelmed with emotion" when he speaks.[390] In addition, the original mitigation specialist Deborah Grey questioned John Akbar's cognitive abilities after speaking to him, recounting a story he told

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decisions made at trial by defense counsel, including which witnesses the defense team calls to testify.").

[381] JA at 2773.
[382] JA at 2605.
[383] JA at 2606.
[384] JA at 2606.
[385] JA at 2606.
[386] JA at 2607.
[387] JA at 2607.
[388] JA at 2607.
[389] JA at 2607.
[390] JA at 2020.

involving him contacting a hospital in a panic to be informed that despite his nose being congested, he could still breathe through his mouth, something which he had actually not considered.[391] More recently, John Akbar apparently believes he was not called as a witness because someone would try to assassinate him.[392]

Moreover, his contact with appellant throughout his life has been limited. John Akbar was sent to prison when appellant was only three years old, and did not return until appellant was nearly five.[393] Appellant and his mother then left him when appellant was only seven years old, and John Akbar never even saw appellant again until after appellant was arrested.[394] As a result, John Akbar's personal knowledge of appellant's life is limited to only five of appellant's first seven years of life. These five years encompassed the timeframe where John Akbar was involved in criminal activity and was addicted to marijuana.

The vast majority of John Akbar's testimony would have concerned his own life, not appellant's. While he could have provided direct testimony regarding appellant's early exposure to the Nation of Islam, such testimony could have, as discussed

[391] JA at 2020.
[392] JA at 2829.
[393] JA at 2024.
[394] JA at 2022.

herein and contrary to appellant's arguments, proven quite damaging on sentencing.[395]

Finally, trial defense counsel feared that by calling certain witnesses they might potentially open the door to the 30 March 2005 stabbing incident being admitted on rebuttal.[396] John Akbar was one of those witnesses.[397] It would be entirely reasonable for trial defense counsel to be afraid that appellant's father would make an overly broad statement about appellant that would open the door to rebuttal testimony regarding his character for peacefulness or future dangerousness. Indeed, in John Akbar's affidavit he states unequivocally that appellant was "[n]ot a violent kid at all," and is "a good boy and man."[398] This type of testimony during sentencing could arguably have opened the door to the extremely damaging stabbing incident, and it is reasonable for defense counsel to attempt to preclude its admission. These types of decisions are appropriately left to the discretion of counsel.[399]

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[395] *See* discussion, *supra*, at 78-80.
[396] JA at 2349-50.
[397] JA at 2350, 2369-70.
[398] JA at 2829, 2831.
[399] *United States v. Stephenson*, 33 M.J. 79, 80 (C.M.A. 1991)(not deficient performance to decline to call a character witness at a sentencing hearing in order to avoid harmful rebuttal evidence); *United States v. Datavs*, 71 M.J. 420, slip op. at 10 (C.A.A.F. 14 Dec 2012)("Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so.").

B. Quran Bilal

Appellant shockingly implies that his trial defense counsel should have called his mother as a witness during his court-martial.[400] The record makes abundantly clear that Quran Bilal would have been the worst witness imaginable for the defense to call at appellant's court-martial.

Everyone involved in appellant's court-martial believed that Mrs. Bilal was an intentional and major obstruction to appellant's defense.[401] Appellant's mother intentionally tried to subvert the actions of trial defense counsel during the course of the investigation. Based on her "significant emotional and mental control" over appellant, she insisted that he not submit either of his two offers to plead guilty, which was considered by the defense team to be "the best way for SGT Akbar to avoid the death penalty."[402]

Mrs. Bilal also intentionally tried to sabotage the defense investigation of her son by "advis[ing] family members and others not to talk to members of the defense team."[403] For

[400] AB at 87.
[401] JA at 1928-31, 2685; JA at 2997 ("Bottom line for us is that we should plan on the possibility that the mom will continue to be an obstacle and look for ways around her.").
[402] JA at 1928-29, 2685; SJA at 560.
[403] JA at 2685.

example, in November 2003, appellant's mother left a message for Deborah Grey, informing her they did not want her services. [404]

In addition, as discussed herein,[405] Mrs. Bilal was personally responsible for convincing appellant to hire two woefully inexperienced and disinterested defense counsel, Mr. Dan-Fodio and Mr. al-Haqq to represent him.

Even appellant expressed his distrust of his mother.[406] Mrs. Grey informed the trial defense counsel that appellant "is ambivalent at best about his mother who has disappointed and used him most of his life. He is mistrustful of her motivation in being "so nice" (read attentive) now and wonders if it [*sic*] because she wants his money."[407]

Further, she would not have presented as a good witness. Mrs. Bilal has been described as unable to "communicate well," and "[h]er interaction with SGT Akbar over the years had been troublesome."[408] Appellant's post-trial mitigation expert describes her as having "paranoid tendencies, hyperactive, trauma survivor, sexually abused, and hyper-religiosity."[409] This is supported by a conversation Mrs. Grey summarized in April 2004 with John Akbar wherein he described Mrs. Bilal as

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[404] JA at 2998.
[405] *See* discussion, *supra*, at 41-50.
[406] JA at 2985.
[407] JA at 2996.
[408] JA at 2983.
[409] JA at 2609.

being "so full of Islam."[410] Mrs. Bilal apparently believed that Mrs. Grey was secretly working for the government and that her husband was actually FBI.[411] Mrs. Bilal also describes appellant as having magically begun walking when told to do so at a year old, and instantly knew how to use a fork at 9 months.[412] She also believed that the Soldiers in appellant's unit should have been prosecuted for the way they treated appellant.[413]

Mrs. Bilal was also clearly unwilling to point out the bad aspects of appellant's childhood, which appellant focuses heavily on in his brief. Defense counsel noted that "she does not see many problems with Akbar's childhood. She thinks their faith made everything pretty normal."[414] "She will not agree to anything that uses the term poverty or poor in describing his upbringing . . . she is a very proud person and frankly does not want to be seen as poor . . . I did not discuss with her about the alleged sexual abuse of the step-father because I am certain she will deny it and become defensive."[415] A string of e-mails in 2003 reflect the difficulty the defense counsel had in

[410] JA at 2999.
[411] JA at 2999.
[412] JA at 3050.
[413] JA at 2355, 2993.
[414] JA at 2982.
[415] JA at 2987.

convincing Mrs. Bilal to discuss any of the family history of importance.[416]

The foregoing undoubtedly establishes the likely tactical reasons why the trial defense counsel wisely chose not to call Mrs. Bilal as a witness during the court-martial, a decision which appellant was fully advised about.[417]

C. Musa Akbar

In this case, there is no question that counsel was fully aware of Musa Akbar's potential testimony. They specifically list Musa Akbar as one of the witnesses they conducted face-to-face or telephonic interviews with.[418] Musa Akbar himself acknowledges that he was interviewed by one of the mitigation specialists, and was also later interviewed by one of appellant's trial defense counsel, who recorded the conversation and prepared a summary of the interview.[419] LTC Hansen was also sufficiently apprised of Musa Akbar's potential testimony as early as February 6, 2004, when he indicated that Musa Akbar was only a "2" on a scale of 1-4 for potential use as a witness.[420]

As trial defense counsel explain, Musa Akbar fell into the category of witnesses who they felt were unable to limit their

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[416] JA at 2982-88.
[417] JA at 1450. *See Harrington*, 131 S. Ct. at 791 (courts may not "insist counsel confirm every aspect of the strategic basis for his or her actions.").
[418] JA at 2347.
[419] JA at 2854.
[420] JA at 2045.

testimony in order to avoid opening the door to the March 30, 2005 stabbing incident.[421] This fact in and of itself creates a reasonable tactical decision for admitting Musa Akbar's testimony in documentary form, and not subjecting him to cross-examination.

Regardless, the record makes clear that Musa Akbar was not available to testify. Musa Akbar informed appellant's counsel that he didn't think he could testify due to the upcoming birth of his baby.[422] While Musa Akbar now claims that he would have been willing to testify since his child was born on April 23, 2005, he never claims that he ever informed the trial defense counsel that he was available to testify.[423] His original statement also refutes that claim, as it was signed on April 26, 2005 (three days after the birth), yet still reflected that he was "not able to leave her side to testify for my brother."[424]

Even assuming Musa Akbar would have been available to testify, appellant has failed to establish prejudice due to the trial defense counsel's decision to submit his written statement in lieu of live testimony. Musa Akbar does not present any new evidence of substance that he could have testified to if called as witness. Finally, as discussed herein, his testimony related

[421] JA at 2350, 2369-70.
[422] JA at 2854.
[423] JA at 2854.
[424] JA at 1622-24.

solely to the "humanity defense" that was not a part of the overall defense theme.

D. Regina Weatherford

The military judge questioned trial defense counsel regarding the decision to not call Regina Weatherford.[425] The trial defense counsel explained that they had made the conscious decision to not call Ms. Weatherford, had a tactical reason for choosing not to do so, and specifically discussed the matter with appellant.[426]

The tactical reason for not calling Mrs. Weatherford was apparently her unwillingness to testify during trial and her refusal to cooperate in arranging her travel plans.[427] Her recitation of the conversation with someone she believed to be one of appellant's lawyers defies belief, as it is unlikely that an officer and judge advocate would speak to a potential witness in such a manner.[428] Further, trial defense counsel confirm that Mrs. Weatherford indicated that she did not feel comfortable testifying for appellant.[429] Regardless, when faced with an

[425] JA at 1450.
[426] JA at 1450.
[427] JA at 2888-89.
[428] In addition, it is merely speculative that Mrs. Weatherford was actually speaking to one of the trial defense counsel. Since the Government is generally responsible for arranging witness travel, more than likely she was speaking either to a government paralegal or trial counsel attempting to arrange her travel.
[429] JA at 2370.

obstreperous and unwilling witness, it is reasonable for defense counsel to choose not to expend significant time and resources to secure their testimony for trial, particularly where their testimony held limited value. As Mrs. Grey indicated in a summary of her interview with Mrs. Weatherford, Mrs. Weatherford "did not care for [appellant] very much and that comes across – thought he was pompous and sexist."[430] It would be peculiar to call someone who outwardly disliked appellant as a person during sentencing when attempting to "humanize" him for the panel. Further, Mrs. Weatherford does not present any new information that she would have been able to provide the panel had she been called to testify, in addition to the information provided in her statement.[431] Therefore, the only thing that her live testimony would have provided to the panel would have been her demeanor, which apparently would have demonstrated her clear dislike for appellant as a person.[432] Consequently, appellant cannot establish that he would have suffered prejudice from Ms. Weatherford not testifying during his court-martial.

E. Ronald Hubbard

Appellant implies that Ronald Hubbard should have been called as a witness during his court-martial.[433] However,

[430] JA at 2018.
[431] JA at 1600-02.
[432] JA at 2018.
[433] AB at 87.

appellant has never submitted an affidavit from Mr. Hubbard or any other evidence proving either that he was willing and available to testify or what he would have testified about. As a result, he has failed to raise a prima facie claim of ineffective assistance of counsel for failing to call Mr. Hubbard.[434]

In addition, appellant asserts that because the government trial counsel was unable to make contact with Mr. Hubbard using the information provided by the defense, this *ipso facto* proves that the defense had never been in contact with him. What appellant fails to explain, however, is how trial defense counsel were able to summarize his expected testimony or

[434] *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)(Appellant is required to "bring to the attention of this Court specific information—such as the substance of expected testimony from [the witness]—that would support the claim of ineffective assistance. If these individuals exist, it is the responsibility of the defense to identify them and to advise this Court precisely what they would have said."); *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009)("to prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense."); *Danner v. Cameron*, 955 F. Supp. 2d 410, 439 (M.D. Pa. 2013)("ineffective assistance of counsel for failure to call witnesses will not be found where a defendant fails to provide affidavits from alleged witnesses indicating their availability and willingness to cooperate with the defense.")

personal observations of appellant without anyone having interviewed him.[435]

F. Dr. Will Miles

Appellant argues that his trial defense counsel were ineffective for failing to interview or call Dr. Will Miles, a clinical psychologist who had reviewed portions of appellant's case. According to appellant, Dr. Miles could have put "meat on the bones of the racial slur defense" and thus counsel were deficient for failing to even contact him.[436] Contrary to appellant's argument, however, his trial defense counsels' decision not to pursue Dr. Miles was reasonable based on the record.

First, appellant has failed to establish that the defense would have been entitled to the expert assistance of Dr. Miles. The defense had already been appointed an expert in neuropsychology, Dr. Pamelia Clement, on May 9, 2003.[437] Dr. Clement's psychological testing of appellant reflected schizophrenia, but she believed that appellant was able to appreciate the nature and quality or wrongfulness of his actions

[435] JA at 2322. Unless, of course, appellant is implying that his trial defense counsel fabricated Mr. Hubbard's expected testimony in their strategy memorandum, ostensibly to rebut a future claim of ineffective assistance of counsel. Based on the manner in which appellant has attempted to vilify his trial defense counsel in his various appellate pleadings, such an assertion would not be surprising.
[436] AB at 63.
[437] JA at 1926.

at the time of the charged offenses.[438] Because her opinion was unfavorable to the defense, she was not considered a strong witness.[439] Since Dr. Clement could not render a favorable opinion for the defense and given that Dr. Miles had reviewed appellant's mental health records, *on that information alone* appellant argues that defense counsel should have pursued Dr. Miles.

Defense counsel, however, are not deficient for failing to pursue other experts solely because their appointed expert is not a strong witness, or holds an unfavorable opinion for the defense. It is well-settled that an accused "is not entitled to a specific 'expert of his own choosing,' but is entitled only to 'competent assistance.'"[440] "Where counsel has obtained the assistance of a qualified expert on the issue of the defendant's sanity and nothing has happened that should have alerted counsel to any reason why the expert's advice was inadequate, counsel has no obligation to shop for a better opinion."[441] Furthermore, the defense has no "right to compel the Government to purchase for him any particular expert or any particular opinion."[442]

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[438] JA at 1961.
[439] JA at 1961.
[440] *United States v. McAllister*, 55 M.J. 270, 275 (C.A.A.F. 2001) (quoting *United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990)).
[441] *Forsyth v. Ault*, 537 F.3d 887, 893 (8th Cir. 2008).
[442] *United States v. Ingham*, 42 M.J. 218, 226 (C.A.A.F. 1995).

Here, Dr. Clement's and Dr. Miles' expertise significantly overlapped. Dr. Clement was "trained to administer and review the same type of testing" as Dr. Miles.[443] Further, *all* defense counsel agreed that her expertise was duplicative with Dr. Miles'.[444] The fact that Dr. Clement's testimony was unfavorable is not a legal basis for requesting additional expert assistance.[445] Defense counsel are not required to "shop around" for experts with more favorable opinions.[446] On these facts, because the defense team already had an appointed neuropsychologist, they were simply not required to contact Dr. Miles, even if he could ultimately offer helpful testimony or a more favorable opinion.

Even assuming it was error for defense counsel not to contact Dr. Miles, Dr. Woods' and Dr. Tuton's testimony

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[443] JA at 2129.
[444] JA at 2129; *see also* SJA at 532-38("[T]he defense needs this assistance to better understand how SGT Akbar's brain was working at the time of the charged offenses and how it is working now.")).
[445] *Leavitt v. Arave*, 646 F.3d 605, 610 (9th Cir. 2011)(a "defendant 'lacks the right to appointment of a *second* psychiatrist,' even where the first psychiatrist is alleged to be incompetent or reaches a diagnosis unfavorable to the defense . . . neither we, nor the Supreme Court, has ever held that a trial court violated *Ake* by refusing to appoint a second, let alone third, mental health expert.")(internal citations omitted).
[446] *United States v. Loving*, 41 M.J. 213, 240 (C.A.A.F. 1994)(citing *Pyner v. Murray*, 964 F.2d 1414, 1419 (4th Cir. 1992) ("The mere fact that defense counsel did not 'shop around' for another more favorable expert does not render them ineffective.").

substantially cover anything Dr. Miles would have added. Appellant alleges that Dr. Miles' testimony would have added the following to support the defense theory:

(1) Appellant had signs of "possible psychotic issues, probable 'thought disorder,' and possibly early childhood trauma that continues to affect his mental health into adulthood."[447]

(2) Appellant was not able to appreciate racial comments as "inappropriate banter" and instead saw them as "fighting words and serious threats."[448]

(3) Because of the stressful environment, the racial comments could have "seriously affected [appellant's] frame of mind at the time of the incident" and wholly undermined appellant's ability to premeditate.[449]

With minor differences, Dr. Woods and Dr. Tuton testified to all of the above.

Addressing Dr. Miles' first point, Dr. Woods testified to appellant's differential diagnosis.[450] Appellant does not even proffer how or what Dr. Miles would have added to that diagnosis and the explanation. Dr. Miles' barebones and conditional conclusion that appellant had a "probable thought disorder" is inadequate to prove ineffective assistance.

Further, Dr. Tuton and Dr. Woods clearly testified about the early childhood trauma appellant suffered, including the

[447] AB at 64.
[448] AB at 64.
[449] AB at 65.
[450] JA at 843-49.

molestation of appellant's sisters,[451] and that appellant was physically abused.[452] Dr. Tuton testified that these traumatic experiences were significant because they occurred at an early age, and "[t]he earlier the trauma, the more damage it does to the person...because [appellant] would not be able to really cope with it."[453] Finally, Dr. Tuton noted that if you develop paranoia at an early age, as appellant did, if not properly treated it could "harden" and be a "very significant problem as an adult."[454] This testimony substantially, if not entirely, covers appellant's first point.

As to the second point, while Dr. Woods may not have used the word "threat" to describe how appellant interpreted the racial slurs, Dr. Woods clearly testified that, regarding remarks made on March 22, 2003, appellant interpreted those as being "directed toward him" and "meant that he was to be killed."[455] Dr. Woods and Dr. Tuton testified extensively to appellant's paranoia and suspicion, which seriously impaired his ability to understand the environment and social cues,[456] to perceive reality,[457] and put the inappropriate remarks into

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[451] JA at 728-32.
[452] JA at 806.
[453] JA at 758-59.
[454] JA at 759.
[455] JA at 941-42; *Akbar*, 2012 WL 2887230 at *25.
[456] JA at 809, 940.
[457] JA at 815.

context.[458] Further, even a cursory review of appellant's diary makes clear that he interpreted these inappropriate comments as threats.[459] Any potential testimony by Dr. Miles would have been cumulative with this information.

Finally, as to Dr. Miles' third point (the impact of these slurs on appellant's mental state), unlike Dr. Miles' hedged conclusions, Dr. Woods' testimony is on point and much more direct:

> Q: Dr. Woods, finally, are you able to offer an opinion as to how these symptoms that you saw may have impacted Sergeant Akbar's actions on 23 March 2003?
>
> A: I think that these [sic] particular set of symptoms, particularly under the stress of war or potential of war and specifically given Sergeant Akbar's paranoia, his vulnerability to misunderstand cues and information – as recently as 2 nights before...that I think these symptoms played a great role in his mental state at the time of the offense....I think those symptoms allowed him to be overwhelmed emotionally and to really not think as clearly, to not really understand, and just to be overwhelmed emotionally. (R. 2291-92).

Dr. Miles would have added nothing beyond what Dr. Woods and Dr. Tuton testified to directly. Consequently, appellant cannot establish prejudice for failing to call Dr. Miles.

X. Failure to Prepare Certain Witnesses

Appellant's arguments that trial defense counsel failed to adequately prepare either Paul Tupaz or Dan Duncan to testify is belied by the record. As trial defense counsel make clear, LTC

[458] JA at 731 (Tuton); JA at 844-45 (Woods).
[459] JA at 907-08.

DB personally spoke with Mr. Tupaz on the phone prior to trial, went through draft questions with Mr. Tupaz, and then personally met with Mr. Tupaz in the days before trial and again went through his testimony.[460] The trial defense counsel also believe that they went through the same process with Dan Duncan.[461]

The record of trial shows that the two witnesses were properly prepared to testify. An extensive direct examination was conducted of both witnesses which covered all of the primary relevant facts that the witnesses possessed for the court-martial. It is unlikely that had appellant's trial defense counsel not prepared the witnesses to testify, they would have been able to glean the level of detail as they did during the witnesses' testimony.[462]

Finally, even assuming that appellant's trial defense counsel did not adequately prepare Mr. Tupaz and Mr. Duncan to testify, he cannot establish prejudice. Neither Mr. Tupaz nor Mr. Duncan offer in their affidavits any additional information that they could have provided beyond what was in their original testimony, or how additional preparation would have affected

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[460] JA at 2363-64, 2377.
[461] JA at 2364.
[462] *See, e.g., United States v. Taylor*, 832 F.2d 1187, 1196 (10th Cir. 1987) (counsel's vigorous cross-examination of witnesses reflected an extensive understanding of the case); *United States v. Payne*, 741 F.2d 887, 894, fn. 9 (7th Cir. 1984); *United States v. Callwood*, 2012 WL 6608982 at *8 (Army Ct. Crim. App. 2012) (depth of counsel's direct examination demonstrates level of preparation).

their testimony.[463] As a result, even if defense counsel had more thoroughly prepared these witnesses, appellant has failed to show how their testimony would have been any different than what it actually was.

XI. Improperly Admitting the Complete Diary

Appellant criticizes his trial defense counsel for submitting his diary without calling numerous witnesses and experts to contextualize the document. However, the decision to admit the entire diary is not as "inexplicable" as appellant claims. The trial defense counsel recognized both the benefits and risks contained within appellant's diary, as most evidence of this nature can be a double-edged sword.[464] They also recognized that the military judge allowed the Government to present "the most damaging aspects of [appellant's diary]."[465] These included:

> But as soon as I am in Iraq I am going to try to kill as many of them as possible.[466]

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[463] JA at 2852, 2854.
[464] *See Atkins*, 536 U.S. at 321(recognizing that mitigating evidence can be a "two-edged" sword that juries might find to show future dangerousness); *Royal v. Taylor,* 188 F.3d 239, 249 (4th Cir.1999)("[R]eliance on evidence of psychological impairments or personal history as mitigating factors in sentencing can be a 'double-edged sword'" (quoting *Angelone,* 151 F.3d at 162); *Zant*, 697 F.2d at 969 ("[M]itigation may be in the eye of the beholder.").
[465] JA at 1968-70; AB at 151.
[466] JA at 907-08; SJA at 284-86.

> I may not have killed any Muslims but being in the Army is the same thing. I may have to make a choice very soon about who to kill.[467]
>
> I will have to decide if I should kill my Muslim brothers fighting for Saddam Hussein or my battle buddies.[468]

Due to this, they "decided to embrace the diary for what it could offer in mitigation."[469] They made the strategic decision to admit the diary as a whole on sentencing, a decision based on proper research and investigation, because they believed that the diary as a whole supported the argument that appellant suffered from mental illness;[470] an argument supported by Dr. Woods.[471] Under *Strickland*, this reasonably calculated decision is not subject to second-guessing.

Furthermore, the trial defense counsel did not just submit appellant's diary without substantive analysis, as appellant claims, but also provided three different sources of analysis for his diary. First, there was Dr. Woods' discussion of the diary during his testimony.[472] Second, the trial defense counsel

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[467] SJA at 237-38.
[468] SJA at 238.
[469] JA at 1969.
[470] JA at 1968-70. During sentencing argument, MAJ Coombs stated that the diary provided a "unique look" into appellant's mind and "[y]ou have to look at the complete diary." JA at 1488.
[471] JA at 916 ("I think it's important to look at the diary as a whole.").
[472] JA at 810-12, 823, 891, 902-908, and 914-25.

made good use of the FBI's written assessment of his diary.[473] The FBI Assessment states that appellant's "diary reflects many years of lonely struggle to attain the love affection, and respect he so anxiously needed. The root of this need can almost certainly be traced to feeling unloved and unvalued at home."[474] The report goes on to detail appellant's loyalty to his family despite being abused and how life in the military exacerbated many of his deep-seeded problems.[475] Third, the trial defense counsel submitted Deborah Grey's lengthy analysis of appellant's diary.[476]

However, regardless of this testimony contextualizing the diary, the trial defense counsel believed the diary on its face would support their arguments concerning appellant's mental illness. "It was our belief that once the panel members read the diary, they would conclude that SGT Akbar did indeed have mental health issues."[477] Even appellant's post-trial mitigation

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[473] The original mitigation specialist, Ms. Grey, agreed that the FBI report was helpful to the defense. "[R]eceived the FBI review of journal . . . Journal: I thought that by and large it does not hurt us. It frames behaviors much as mitigation themes would frame them – with the exception of not making the link to mental illness." JA at 2009.
[474] JA at 1557-58.
[475] JA at 1558-59.
[476] JA at 1567-93.
[477] JA at 1970.

assistant agrees that "even a cursory reading of SGT Akbar's diary would lead a lay person to suspect [severe depression]."[478]

Appellant's argument that "[t]o say that 'there may have been some' prejudicial information in the diary is an amazing understatement"[479] is itself an overstatement. The passages which appellant focuses on clearly reference destroying America and killing white people; however, they were all written at least 5-12 years before appellant actually committed the murders.[480] The admission of these statements would arguably tend to mitigate the statements already admitted by the government, in that they show he had repeatedly made statements throughout his life about killing white people without ever having followed through, thereby negating any argument that his writings in February 2003 actually indicated a plan to commit the offenses.

Appellant also misconstrues the purpose of the diary in this case. It was not admitted in order to present the "human" SGT Akbar, or the good parts of his life. To the contrary, it was admitted solely to provide the panel a "unique look" into appellant's mind to show that he was mentally ill. While it

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[478] JA at 2599.
[479] AB at 24.
[480] AB at 24-26; DE A at 30, 38, 56, 101, 112, 122, 135-36, 179, 187 (appellant's complete diary was not included within either the Joint Appendix or Supplemental Joint Appendix).

shows a depraved mind, it also shows a mentally ill mind—the entire goal of the defense case.

Consequently, the decision to admit the complete diary in the manner in which it had been was a reasonable tactical decision by the trial defense counsel, based on full knowledge of the risks and rewards associated with its admission.

XII. Admitting Documents in Lieu of Live Testimony

Appellant rails against his trial defense counsel's decision to admit a good portion of the remaining evidence on sentencing in the form of documentary evidence, rather than calling a parade of witnesses to testify about appellant's life history. The decision to admit the documentary evidence in lieu of live testimony was a reasonable tactical strategy made by his defense counsel.

First, as discussed *infra*, the primary theme of appellant's defense was his long-history of mental illness, which was designed to both attack the premeditation element of the murder charges and convince the panel that a death sentence was not appropriate. In support of this theme the defense called numerous witnesses to testify about his mental illness and the bizarre behavior in support of Dr. Woods' diagnosis. By contrast, nearly all of the written statements admitted in lieu of live testimony were focused on appellant's life history,

which was in essence a secondary argument and not the focus of the defense case.

The trial defense counsel have also explained that, due to the stabbing incident on March 30, 2005, they felt "that the safest course of presenting this life history information was in documentary form and through Dr. Woods," because it provided "the best opportunity to present favorable information and yet not open the door to rebuttal by the government."[481] Based on their interviews with potential civilian mitigation witnesses, they felt that the witnesses either would be unable to limit their testimony to avoid opening the door to the stabbing incident, or could only offer testimony regarding future dangerousness or that the murders were not within appellant's character.[482]

Presenting documentary evidence, as opposed to calling live witnesses on sentencing, was objectively the best tactic to prevent evidence of the stabbing incident being presented. R.C.M. 1001 limits the evidence available for the government to present on sentencing, and it is clear that the stabbing incident was not directly admissible at the time of trial.[483]

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[481] JA at 2361.
[482] JA at 2350.
[483] *See* Discussion, R.C.M. 1001(b)(5)D)(while government may present evidence of future dangerousness as evidence of rehabilitative potential, any witness called "may not further elaborate on the accused's rehabilitative potential, such as

However, nothing would have prevented the government, on cross-examination of a defense witness who testified about appellant's good character or lack of future dangerousness, from asking that witness "Would it change your opinion if you knew that appellant attempted to kill a guard by stabbing him in the neck with a pair of scissors mere weeks ago in order to attempt to escape from custody?" By presenting documentary statements, as opposed to live testimony, the government was never given the opportunity to ask this question of any witness.

In light of the secondary nature of the witness statements presented compared to the danger of live testimony opening the door to arguably one of the most aggravating pieces of evidence (aside from the underlying atrocious murders and attempted murders), it was a reasonable tactical decision by trial defense counsel to present the evidence in the manner in which they did. Further, appellant presents nothing more than speculation that had these witnesses been called in person, a different result would have followed.

XIII. Failure to Provide Complete Information to Dr. George Woods

Appellant and Dr. Woods make a number of claims on appeal concerning how the trial defense counsel allegedly impeded his

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describing the particular reasons for forming the opinion."); *see also United States v. Williams*, 41 M.J. 134, 139 (C.M.A. 1994).

ability to render a diagnosis of paranoid schizophrenia. Dr. Woods claims that trial defense counsel: (A) failed to provide him specific information which would have allowed him to render a diagnosis of paranoid schizophrenia; (B) failed to provide him a complete social history; (C) failed to allow for additional testing of appellant; and (D) failed to make contact with him for the 5 months prior to trial. Each will be addressed in turn.

A. Failure to Provide Specific Information for a Diagnosis of Paranoid Schizophrenia.

At trial, Dr. Woods's testimony was focused on attacking the premeditation element of premeditated murder. He testified that appellant suffered from schizotypal disorder, and potentially was even suffering from schizophrenia.[484] The cumulative nature of appellant's various symptoms, such as being highly paranoid with bizarre thinking, suspicion, inability to understand social cues, vulnerability under stress, and "vulnerability to misunderstand cues and information," "allowed him to be overwhelmed emotionally and to really not think as clearly, to not really understand, and just to be overwhelmed emotionally" at the time of the offenses.[485] His testimony allowed the defense to argue on closing: "because he was mentally ill, he became emotionally charged; and, under the heat

[484] JA at 851, 891.
[485] JA at 851-52, 890, 918.

of emotion, he reacted out of confusion and out of fear, not with premeditation – not with a cool mind."[486]

Dr. Woods now concludes on appeal that appellant did in fact suffer "from Paranoid Schizophrenia both at the time of the offense and the time of trial, that he was not competent at either time, and that [his] testimony would have reflected the same had [he] been provided with a minimally competent social history and the required testing [he] requested."[487] Dr. Woods bases this new conclusion on his now learning of "the number of SGT Akbar's family who suffered from mental health disorders, the incidents of physical and possibly sexual abused [*sic*] of SGT Akbar, and additional observations of psychotic behavior by SGT Akbar."[488] He also asserts that knowing that appellant saw a mental health professional while he was in college would have assisted in his diagnosis.[489]

First, "[a]n expert's failure to diagnose a mental condition does not constitute ineffective assistance of *counsel*," and appellant "has no constitutional guarantee of

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[486] JA at 1027

[487] JA at 2470. Dr. Woods does not clarify how, if the lack of "required testing [he] requested" precluded him from rendering this diagnosis at trial, he is now able to render the diagnosis when that additional testing still has not been conducted.

[488] JA at 2470.

[489] JA at 2797-98.

effective assistance of experts."[490] Additionally, diagnoses of mental conditions years following a trial generally have been held to be of little relevance to a review of counsels' performance.[491] Courts "disfavor retrospective determinations of incompetence, and give considerable weight to the lack of contemporaneous evidence of a petitioner's incompetence to stand trial."[492]

Appellant fails to show why Dr. Woods' current diagnosis of paranoid schizophrenia is legally relevant. First, Dr. Woods does not explain how an actual diagnosis of schizophrenia would have affected appellant's ability to premeditate or to appreciate the nature or wrongfulness of his conduct. Second, Dr. Woods does not explain how it is legally relevant in light of his testimony at trial. As Dr. Woods testified, the actual diagnosis is less relevant than the symptoms the patient exhibits.[493] Further, he explicitly testified:

> I think the idea that a name somehow defines the work is not accurate. What is accurate are the symptoms that Sergeant Akbar shows. The fact that it may not be called

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[490] *Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010)(emphasis original).
[491] *See Cullen*, 623 F.3d at 1076 (contradictory evidence at the time of trial rendered later in time diagnosis irrelevant); *Boyde v. Brown*, 404 F.3d 1159, 1166-67 (9th Cir. 2005)(retrospective assertions that conflicted with evidence at time of trial not relevant to appeal).
[492] *Williams v. Woodford*, 384 F.3d 567, 608 (9th Cir. 2002).
[493] JA at 843 ("I think what's important is really the symptoms.").

> schizophrenia or what have you is, in the long run, less important because a person can be schizophrenic and not be paranoid for example. So I think the real issue is: What are the symptoms that Sergeant Akbar has shown consistently. *The fact that it's not – it may not be called schizophrenia is not clinically relevant*.[494]

In Dr. Woods' own words, therefore, an actual diagnosis of schizophrenia was not "clinically relevant" for purposes of his testimony at trial. Dr. Woods' assertions on appeal are consequently in direct conflict with his sworn testimony at trial. It is disingenuous for Dr. Woods to assert under oath at trial that an actual diagnosis is not a relevant consideration, and then on appeal claim trial defense counsel were ineffective for failing to provide him sufficient information to allow him to render a diagnosis.

In addition, Dr. Woods' current diagnosis of schizophrenia is contradicted by every other medical expert assigned to appellant's case at trial. The R.C.M. 706 Board found that appellant did not suffer from a severe mental disease or defect, and specifically did not diagnose him with schizophrenia.[495] Further, a second mental status inquiry was conducted after the stabbing incident on March 30, 2005, which again found that appellant was competent.[496]

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[494] JA at 917 (emphasis added).
[495] SJA at 530-31.
[496] JA at 279.

The other defense experts concurred with this conclusion. Dr. David Walker, the defense's forensic psychiatrist who viewed the R.C.M. 706 proceedings, did not believe that appellant suffered from schizophrenia.[497] Dr. Pamelia Clement, the forensic neuropsychologist assigned to the defense team who personally conducted psychologically testing on appellant, noted that the "MMPI-2 profile indicates a psychiatric diagnosis of Schizophrenia, possibly Paranoid type, or secondarily Paranoid Disorder."[498] However, she was unwilling to actually diagnose appellant with schizophrenia due to the lack of "indication of specific hallucinations or delusions."[499] Dr. Clement's ultimate conclusion was fully consistent with that of Dr. Gary Southwell, the psychologist who conducted the R.C.M. 706 sanity board. Dr. Southwell informed trial defense counsel that:

> [t]he test data from Dr. Clement and my administration of the MMPI2 are comparable for diagnostic purposes. A blind interpretation of the MMPI2 would result in a diagnosis of paranoid schizophrenia as the primary 'rule-out' for this pattern. Ours is not blind interpretation, and he did not meet the criteria for a schizophrenia diagnosis, which requires overt hallucinations or delusions, in addition to other features of schizophrenia.[500]

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[497] JA at 1961, 2255. Dr. Walker also disagreed with Dr. Woods' ultimate assessment that appellant suffered from a schizotypal personality disorder. JA at 2288.
[498] JA at 2413.
[499] JA at 2414.
[500] JA at 2285.

In fact, at trial Dr. Woods agreed with Dr. Southwell's opinion. After explaining that appellant's psychological testing showed "extreme elevation in schizophrenia, the schizi scale, and extreme elevations in paranoia," he clarified that "if you look at Sergeant Akbar clinically – if you do an interview with Sergeant Akbar, he doesn't necessarily present like the garden variety schizophrenic."[501]

Consequently, had Dr. Woods attempted to testify that appellant was in fact schizophrenic, such testimony would have conflicted with all of the other available medical evidence and testimony in this case. Therefore, appellant cannot establish that he has been prejudiced by Dr. Woods' alleged inability to testify that appellant was in fact schizophrenic.

Appellant's remaining assertions concerning Dr. Woods are addressed below.

i. Vomit Incident

Dr. Woods asserts that he "was unaware of many observed behaviors of SGT Akbar that would have helped me in forming a forensic diagnosis of . . . Paranoid Schizophrenia, such as an incident where SGT Akbar vomited onto his hand in confinement before the trial and then ate some of his own vomit. This would have clearly been an observed, psychotic behavior that I could

[501] JA at 849.

have used to substantiate a forensic diagnosis of paranoid schizophrenia."[502]

Trial defense counsel confirm that appellant did eat his own vomit on one occasion while in confinement.[503] While they assert that the vomiting incident was not contained in the RCF documents provided to Dr. Woods,[504] the affidavits create a conflict because the trial defense counsel also assert that LTC DB described the incident to Dr. Woods and provided him background on the genesis of the incident.[505] A *Dubay* hearing is not required, however, because the background behind the incident itself makes clear that, even assuming Dr. Woods had not been informed of it, it would not have had any impact on the proceedings.

During an early visit with his defense counsel, CPT JT, appellant asked a question "about the level of mental illness necessary to be found guilty by reason of lack of mental

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[502] JA at 2467.
[503] JA at 1957.
[504] While the trial defense counsel assert it was not described in the RCF documents, the post-trial mitigation report prepared by appellant lists a June 8, 2003, incident wherein appellant was reported in the "USDB CTF Notes" as having vomited onto his hands and then licked up his own vomit. JA at 2677. It is unclear whether this note would have been included with the documents provided to Dr. Woods. However, the evaluation reports of appellant on July 9 and 16, 2003, do not refer to the vomit incident of June 8, 2003. JA at 1981-88.
[505] JA at 1957-58.

responsibility."[506] Based on his experience in past cases, CPT JT provided examples of symptoms associated with mental illness, to including eating one's own vomit.[507] The vomit incident in question did not occur until shortly after this meeting.[508]

The timing of this incident convinced the trial defense counsel that appellant was attempting to feign symptoms to support a lack of mental responsibility defense.[509] This conclusion was consistent with the findings of the RCF psychiatrists, who also diagnosed appellant with malingering symptoms in order to potentially "establish a baseline of psychiatric disturbance from which to launch an insanity defense."[510] As concluded by the psychiatrist on July 8, 2003:

> Given these facts, and the fact that the similar episode in June ended abruptly after a visit from his defense counsel, the most probable conclusion regarding SGT Akbar's current behavior is that he is feigning psychosis in order to improve his chances of acquittal or some lesser sentence at courts-martial.[511]

The record makes abundantly clear that the trial defense counsel felt this incident was feigned in order to assist in appellant's mental illness defense. It would consequently have been unreasonable for trial defense counsel to have allowed

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[506] JA at 1957.
[507] JA at 1957.
[508] JA at 1957.
[509] JA at 1957.
[510] JA at 1987.
[511] JA at 1987.

their expert, Dr. Woods, to have relied upon it in forming a diagnosis.

The only reason Dr. Woods claims this incident is significant is because it would have been an "observed, psychotic" episode that could have supported a diagnosis of paranoid schizophrenia. However, Dr. Woods does not explain how a psychotic episode first occurring months after the attack would have allowed him to diagnose paranoid schizophrenia at the time of the attack. Further, Dr. Woods also does not explain why the other identified "observed, psychotic" behaviors detailed in the RCF documents provided to him[512] would have been insufficient to assist in his diagnosis.[513]

ii. Physical Abuse by Mother

Dr. Woods asserts that he "was unaware of the physical abuse suffered by SGT Akbar at the hands of his mother."[514] However, the only indication within the record that appellant was physically abused by his mother is contained within a declaration filed by Ms. Nerad with the military judge in December 2004 in support of a continuance motion.[515] Assuming there was evidence to support her contention (which appellant has never presented), and in light of her assertion that she was

[512] JA at 1977-78.
[513] *See* JA at 1982, 1985-86.
[514] JA at 2467.
[515] JA at 1840.

in contact with Dr. Woods,[516] appellant fails to establish why Dr. Woods would not have already been aware of this "evidence" at least 5 months before trial.

In addition, it is unclear how evidence of physical abuse by his mother would have been relevant towards a different diagnosis of appellant, since Dr. Woods had already considered the fact that appellant was physically abused as a child. During trial, Dr. Woods testified that appellant's "stepfather kicked him in the nose and broke his nose," and that his household was "physically abusive."[517] This information was consistent with Deborah Grey's findings, which Dr. Woods confirmed he had received.[518]

iii. Sexual Abuse

"I also believe that the potential sexual abuse of SGT Akbar by his step-father should have been highlighted and investigated as well."[519] The only evidence presented by appellant that he was ever sexually abused comes from the post-trial mitigation report by Lori James-Townes, which refers only to "notes in the attorney file" that documented a conversation with appellant informing them he had to "perform oral sex on his

[516] JA at 1841.
[517] JA at 806.
[518] JA at 2047, 2143, 2146, 2220.
[519] JA at 2467.

step-father" and "possible sexual abuse by a cousin."[520] However, appellant has never provided these "notes" to support Ms. James-Townes' assertion.

To the contrary, appellant himself denies that he was ever sexually abused by his step-father.[521] Further, Dr. Tuton, who evaluated appellant when he was 14 years old, confirmed that there was never any evidence of sexual abuse of appellant.[522]

Because the record compellingly demonstrates that appellant was never actually sexually abused, Dr. Woods should not be allowed to complain that his diagnosis was incomplete because he lacked information concerning incidents that never occurred.

iv. Family Mental Health Disorders

Dr. Woods also asserts that he "was unaware of . . . the large volume of family history of mental health disorders that would have significantly increased the probability of SGT Akbar suffering from a mental health disorder."[523] This statement is shockingly disingenuous in light of Dr. Woods' own testimony during the court-martial referring to the family history of mental health disorders. Dr. Woods specifically discussed appellant's maternal uncle suffering from psychiatric problems

[520] JA at 2612.
[521] SJA at 520-21.
[522] JA at 735.
[523] JA at 2467.

including an "emotionally unstable personality,[524] "clear indications of paranoia" in appellant's brother,[525] and "a significant history of depression," sleep problems, and suicidal ideations in appellant's father.[526] He then went on to describe how this genetic makeup in his family would have increased the likelihood that appellant suffered from a "disorder of perception."[527] Neither appellant nor Dr. Woods is able to adequately explain how any alleged additional information of family mental health disorders would have altered this discussion.

v. Dr. Sachs

Dr. Woods claims that he was never informed that appellant saw a mental health professional, Dr. Sachs, while in college.[528] However, the record categorically refutes Dr. Woods' assertion. First, Dr. Woods testified at trial concerning a clinical record he had reviewed from UC Davis dated April 2, 1992.[529] That document specifically states: "Patient states that he did see a therapist here on campus. He saw Donna Sachs and says that that session was very beneficial to him."[530]

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[524] JA at 799-800.
[525] JA at 801.
[526] JA at 802.
[527] JA at 805-11.
[528] JA at 2797-98.
[529] SJA at 312-15; JA at 812-15.
[530] SJA at 313.

Second, Deborah Grey created a social history of appellant that pointed out that appellant had "seen a therapist on campus, Donna Sachs," and had entered the outpatient clinic on campus in 1991 for "stress, memory loss."[531] Dr. Woods confirms receiving the social history.[532]

Third, on March 8, 2005, LTC DB sent Dr. Woods a responsive e-mail pointing out that "[t]here may also be another mental health provider from UC-Davis who treated the client during college."[533]

The record therefore compellingly demonstrates the falsity of Dr. Woods' assertion (under penalty of perjury) that he was unaware that appellant had seen a mental health provider, Dr. Sachs, while in college.

In addition, appellant cannot establish that any contact between Dr. Woods and Dr. Sachs would have had any impact on Dr. Woods' analysis, as the record makes clear that Dr. Sachs had "no independent memory of" appellant.[534] Even if he had chosen to consult with her, she would have been unable to provide any useful information.

B. Contact

[531] JA at 2506.
[532] JA at 2220.
[533] JA at 2255.
[534] JA at 2940.

"[D]efense counsel failed to communicate with me for five months prior to trial."[535] According to Dr. Woods' assertion, therefore, he would not have had any communication with trial defense counsel from December 2004 until April 2005 (the time of trial). To the contrary, the record clearly establishes the falsity of this statement.

On January 13, 2005, Dr. Woods sent an e-mail to trial defense counsel stating that he was putting a packet together for them, and that he recommended further neuropsychological testing, which LTC DB responded to the same day.[536] Between January 16 and 19, 2005, Dr. Woods and trial defense counsel engaged in e-mail conversations regarding his having not been paid, and how many additional hours he needed to complete his work.[537]

On February 20, 2005, Dr. Woods sent an e-mail stating that he reviewed the polysomnography from the sleep study, and that "we've hit paydirt."[538] He noted that "his pattern is pretty classic for the types of sleep disruption you get with schizophrenia, according to the articles."[539]

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[535] JA at 2384; *see also* JA at 2468.
[536] JA at 2222-23.
[537] JA at 2223-27; SJA at 502-0708.
[538] JA at 2239.
[539] JA at 2239.

On February 28, 2005, Dr. Woods sent a memorandum to trial defense counsel referring to recent conversations.[540] The next day, Dr. Woods and LTC DB engaged in an e-mail conversation regarding the memorandum and the possibility of requesting additional testing.[541]

There are also considerable other documents establishing consistent contact between Dr. Woods and trial defense counsel between March 2005 and trial,[542] including a discussion between Dr. Woods and the trial defense counsel regarding the stabbing incident on March 30, 2005.[543]

The record consequently explicitly refutes the abjectly false statement made by Dr. Woods (under penalty of perjury) that "defense counsel failed to communicate with me for five months prior to trial."[544]

C. Social History

Dr. Woods claims that "[t]he social history investigation in this case was a mere fraction of what I ordinarily am used to seeing in capital cases,"[545] and that trial defense counsel

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[540] JA at 2389.
[541] JA at 2241-42.
[542] JA at 2252, 2254-55, 2265, 2277, 2279-81, 2295, 2931, 2934, 2972; SJA at 509-10.
[543] JA at 2281-82; SJA at 511.
[544] JA at 2384; *see also* JA at 2468.
[545] JA at 2466.

"failed to provide me with the results of the mitigation investigation that I normally rely upon in capital cases."[546]

Initially, other than the specific items already addressed in this section, Dr. Woods does not identify what was missing from appellant's social history, nor how the unidentified missing information would have impacted a diagnosis at the time. He makes only the generic statement that it was "a mere fraction of what I ordinarily am used to seeing in capital cases."[547] Such a conclusory statement, without evidence to support what should have been provided, is insufficient to raise a prima facie case of ineffective assistance of counsel.

Moreover, the record makes clear that Dr. Woods was actually provided with extensive information concerning appellant's social and medical background. Concerning appellant's social background, he was provided: the original social history;[548] family history interviews of Marcus Rankins, John Akbar, Abe Henryhand, David Rankins, Katherine Brown, Nita Rankins, Tangi Rankins, Paul Topaz, Christine Irons, Koran Bilal, and Mustafa Bilal;[549] other family history to include appellant's father's history of depression,[550] his mother's

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[546] JA at 2384.
[547] JA at 2466.
[548] JA at 2220.
[549] JA at 794, 801, 874-75, 1976, 1978.
[550] JA at 802.

homelessness,[551] evidence of poverty in Los Angeles,[552] and Amite social work history.[553] In addition to this, Dr. Woods was provided appellant's complete journal.[554]

Dr. Woods was provided extensive medical records concerning appellant, including a 1986 evaluation conducted by Dr. Fred Tuton,[555] his college medical records,[556] his military medical records,[557] his sleep apnea medical records,[558] the redacted R.C.M. 706 medical report,[559] the psychological testing and raw data collected on appellant[560] (which he had re-scored by Dr. Dale Watson[561]), and the Regional Confinement Facility medical records.[562]

Dr. Woods was also provided appellant's high school and college academic records;[563] medical and mental records for his uncle, Tyrone Rankins,[564] and his father;[565] the complete Article

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[551] JA at 874.
[552] JA at 1977.
[553] JA at 1977.
[554] JA at 794, 1977-78, 2220.
[555] JA at 874, 1977-78.
[556] JA at 812, 1978.
[557] JA at 794, 875, 1977-78.
[558] JA at 841-42, 1977-78, 2223, 2258-59.
[559] JA at 876.
[560] JA at 794, 1976, 2250.
[561] JA at 875.
[562] JA at 1977-78.
[563] JA at 794, 817, 874-75, 2220.
[564] JA at 795, 875, 1980.
[565] JA at 1980.

32 hearing;[566] statements from all witnesses from the CID report;[567] and the criminal records of Muhammad Bilal.[568]

In addition to all of the documentary evidence provided to Dr. Woods, he personally interviewed appellant on three separate occasions for a total of 8 hours.[569] As Dr. Woods testified, he spent between 30 and 40 hours reviewing materials and preparing his diagnosis in this case, which he considered to be "[a] lot of hours."[570]

Finally, the record itself rebuts Dr. Woods' post-hoc conclusion that he had not been provided sufficient information. Prior to trial, Dr. Woods made clear that his "testifying is contingent on getting the social history and genetic family tree intact."[571] He specified that he would be prepared to testify only after "the social history has been completed."[572] The fact, therefore, that Dr. Woods testified on behalf of appellant indicates that he felt he had sufficient information for which to form the basis of his opinion. In fact, when pressed at trial on cross-examination, Dr. Woods asserted that he had

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[566] JA at 795, 874, 1976, 1978, 2260.
[567] JA at 1976, 2220.
[568] JA at 1977-78.
[569] JA at 794.
[570] JA at 870.
[571] JA at 2216.
[572] SJA at 501.

sufficient information available to him, both through what was provided to him and what he was able to obtain on his own.[573]

D. Testing

In general, "[d]ue process does not require a state to fund every technologically conceivable test to rule out the possibility of an organic mental disorder."[574]

Dr. Woods apparently recommended that "appropriate diagnostic tests be conducted, including neuropsychological testing by an expert in mental disorders, a thorough evaluation of Mr. Akbar's phase-delayed sleep disorder, and neuorimaging of the kind routinely conducted by the Brain Behavior Laboratory at the University of Pennsylvania School of Medicine."[575]

Dr. Woods' position is that additional psychological testing of appellant was required at the time in order to adequately assist in a diagnosis for use at trial. However, the record compellingly demonstrates the falsity of that claim. On March 1, 2005, in response to Dr. Woods' information paper wherein he recommended the additional testing,[576] LTC DB asked Dr. Woods a number of detailed questions regarding Dr. Woods'

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[573] JA at 879 ("I thought that the information that I had, including the psychological testing and the finding, was part of those interviews. So I thought that I had everything that I needed."); JA at 882-83.
[574] *Leavitt*, 646 F.3d at 610.
[575] JA at 2384.
[576] JA at 2389-95.

opinion in order to support a motion for additional testing.[577] Dr. Woods, in response, clarified that "[t]he testing will add to the indications that he has a SEVERE mental disease. It will not be the only evidence, but will be corroborative."[578] What this response makes clear is that Dr. Woods did not believe that the testing was *required* (as he now asserts) in order to render a diagnosis of a severe mental disease, but would merely be corroborative of his diagnosis.

Further, much of the testing that Dr. Woods describes had already been conducted. The neuroimaging he believed was necessary had been conducted the week of May 5, 2003, during the R.C.M. 706 sanity board, which showed "[n]ormal imaging study."[579] Appellant had also been subjected to numerous sleep studies leading up to trial.[580] Finally, trial defense counsel had already retained the services of a forensic psychologist, Dr. Pamelia Clement, to evaluate appellant. Dr. Woods even confirmed that he consulted with a psychologist on the case.[581]

Finally, without actually showing what additional testing could have produced, appellant cannot establish that he was

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[577] JA at 2241.
[578] JA at 2242 (emphasis added).
[579] SJA at 524.
[580] SJA at 524 (referencing sleep study performed on May 20-21); JA at 2229 (referring to results from sleep study); JA at 2239 (Dr. Woods noting that "we've hit paydirt" after reviewing the polysomnography results from the sleep study.); JA at 273-74; SJA at 6-13, 21, 30, 39-40, 48.
[581] JA at 913.

prejudiced by his trial defense counsel's decision not to seek additional testing.[582]

XIV. Failure to Challenge Certain Members

An attorney's actions during *voir dire* are considered to be matters of trial strategy and a strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.[583]

The trial defense counsel crafted a reasonable tactical strategy during voir dire and panel selection based on discussions with an expert on the military death penalty and relevant case law.[584] In particular, the goal was to keep as many members on the panel as possible, except for those who were determined to have a "clear basis for a challenge for cause."[585] This rationale was based in large part on the common sense analysis from Judge Morgan's dissent in *United States v. Simoy*.[586] This strategy has also been summarized in literature

[582] *See Bedford v. Collins*, 567 F.3d 225, 241 (6th Cir. 2009).
[583] *Miller v. Webb,* 385 F.3d 666, 672-73 (6th Cir. 2004).
[584] JA at 1946, 1951, 1966-67.
[585] JA at 1966.
[586] *United States v. Simoy*, 46 M.J. 592, 625-26 (A.F. Ct. Crim. App. 1996) *aff'd in part, rev'd in part,* 50 M.J. 1 (C.A.A.F. 1998).

documenting how removing members reduces the statistical chance of finding the one vote necessary to avoid a death sentence.[587]

The appellate defense bar also apparently agrees with trial defense counsel's strategy. It has alleged ineffective assistance of counsel in another capital case for defense counsel challenging too many members and thus reducing the probability of finding the "ace of hearts."[588]

The key point of the defense strategy was to only attempt to remove prospective panel members who had a clear bias. Because, as addressed in detail in response to Assignment of Error A.IV, no member possessed an actual or implied bias against appellant, the strategy chosen by and put into effect by trial defense counsel was a reasonable one.

XV. Cumulative Error

"The fact that many claims of counsel error are pressed does not alter fundamental math - a string of zeros still add up to zero."[589] The accumulation of non-errors cannot collectively amount to a violation of due process.[590] Because, as addressed herein, appellant cannot establish ineffective assistance of

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[587] Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty,* 158 Mil. L. Rev. 1 (1998).
[588] *See United States v. Walker,* 66 M.J. 721, 759 (N.M. Ct. Crim. App. 2008) (Assigned Error XXII – Appellant received ineffective assistance of counsel because his detailed defense counsel voluntarily reduced the size of the panel by using a challenge for cause and a peremptory challenge).
[589] *Hunt v. Smith*, 856 F. Supp. 251, 258 (D. Md. 1994).
[590] *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004).

counsel based on any of his specific assertions, his cumulative error argument fails as a matter of logic.

XVI. Conclusion

The trial defense counsel provided fully effective representation of appellant for 767 days. They conducted an in-depth investigation, and appropriately relied on the over 1,000 hours of work that the mitigation experts conducted. They selected a theme for trial which they felt placed appellant in the best position to avoid a capital sentence, based on full knowledge of the potential facts and evidence available. They executed this theme during the court-martial, and expertly argued that due to appellant's alleged mental illness, he both could not premeditate the offenses he committed, and that he did not deserve to be executed based on that mental illness. While the strategy proved unsuccessful in this case, it was still a reasonable one under *Strickland*. Based on all of this, appellant was fully provided the effective assistance of counsel guaranteed by the Sixth Amendment.[591]

A.II

THIS COURT SHOULD ORDER A POST-TRIAL EVIDENTIARY HEARING TO RESOLVE DISPUTED FACTUAL ISSUES RELEVANT TO SERGEANT AKBAR'S NUMEROUS LEGAL CLAIMS EVEN IF THIS COURT DOES NOT FIND IN HIS FAVOR ON ANOTHER DISPOSITIVE GROUND.

[591] *Strickland*, 466 U.S. at 686.

Appellant completely misinterprets the requirement for a post-trial hearing under *United States v. DuBay*[592] and *United States v. Ginn*.[593] *Ginn* requires that a post-trial fact-finding hearing be conducted only where there is a conflict between post-trial affidavits.[594] This is because appellate courts cannot "make credibility determinations on the basis of conflicting affidavits to resolve collateral claims of ineffective assistance of counsel."[595] To be sure, where "the record as a whole 'compellingly demonstrate' the improbability" of an appellant's claims, a post-trial hearing is not required because the Court of Appeals can resolve the factual dispute on its own.[596]

The vast majority of the "conflicts" identified by appellant are not between affidavits, but between trial defense counsels' affidavits and appellant's interpretation of the extrinsic evidence.[597] Further, most of the "conflicts" between

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[592] *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).
[593] *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997).
[594] *Ginn*, 47 M.J. at 243 ("we conclude that Article 66(c) does not authorize a Court of Criminal Appeals to 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.").
[595] *Ginn*, 47 M.J. at 243 (citations omitted).
[596] *Ginn*, 47 M.J. at 248.
[597] The Government has attached at Appendix 1 a replica of Appendix A to Appellant's Brief, "*US v Akbar* Trial Defense Counsel Affidavit Analysis – Summary of Voluminous Writings,"

actual affidavits are not actually direct conflicts, but are merely either differences of opinion between the affiants or conflict only as to appellant's interpretation of events. To the extent that there are legitimate, substantive conflicts between affidavits, those conflicts have already been addressed in response to Assignment of Error A.1. Based on the foregoing, 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.

A.III

WHETHER THE PROSECUTION'S VICTIM IMPACT PRESENTATION AND ARGUMENT, AND COUNSEL'S FAILURE TO OBJECT, VIOLATED SGT AKBAR'S FIFTH, SIXTH, AND EIGHT AMENDMENT RIGHTS.

Standard of Review

In general, "a military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion."[598] "Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error."[599] However, when reviewing errors of a constitutional dimension,

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with included discussion of appellant's specific arguments. A motion to attach the same is filed herewith.

[598] *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011).

[599] *Id*. at 197-98.

this Court "must be able to declare a belief that it was harmless beyond a reasonable doubt."[600]

Law and Argument

R.C.M. 1001 provides that "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . ."[601]

The Supreme Court has recognized for capital cases that "[i]n the majority of cases . . . victim impact evidence serves entirely legitimate purposes."[602] "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in

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[600] *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995)(quoting *Chapman v. California*, 386 U.S. 18, 24 (1967).
[601] R.C.M. 1001(b)(4); *see also* R.C.M. 1104(b)(4)(C)(requiring panel to weigh extenuating or mitigating circumstances against "any aggravating circumstances admissible under R.C.M. 1001(b)(4)); *United States v. Simoy*, 46 M.J. 592, 613 (A.F. Ct. Crim. App. 1996)("Under R.C.M. 1001(b)(4), the prosecution may always present evidence of aggravating circumstances directly relating to or resulting from the offenses of which the accused is convicted.")(*rev'd on other grounds*, 50 M.J. 1 (C.A.A.F. 1998)).
[602] *Payne*, 501 U.S. at 825.

question, evidence of a general type long considered by sentencing authorities."[603] The Court explained:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[604]

It found specifically that "evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[605] Victim impact evidence should be allowed to provide a "'quick glimpse of the life' which a defendant 'chose to extinguish,'" and to show each victim's "uniqueness as an individual human being.'"[606]

In so holding, the Supreme Court explicitly overruled its prior cases of *Booth v. Maryland*[607] and *South Carolina v.*

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[603] *Payne*, 501 U.S. at 825.
[604] *Payne*, 501 U.S. at 825 (quoting *Booth v. Maryland*, 482 U.S. 496, 517 (1987)(White, J., dissenting)).
[605] *Payne*, 501 U.S. at 827.
[606] *Payne*, 501 U.S. at 822-23 (citations omitted).
[607] 482 U.S. 496 (1987).

Gathers,[608] which had prohibited both the admission of, and argument concerning, victim impact evidence describing the "personal characteristics of the victims," and "the emotional impact of the crimes on the family."[609] The only remaining limitations on victim impact evidence (aside from the rules of evidence and procedure) are that victims are prohibited during the penalty phase from stating "characterizations and opinions about the crime, the defendant, and the appropriate sentence."[610]

Appellant points to 13 distinct statements made by witnesses on sentencing that he claims constitute improper victim impact evidence.[611] It is clear that none of the statements directly offer an opinion about an appropriate sentence. Rather, appellant's argument focuses exclusively on his position that the witnesses were improperly characterizing the crimes and appellant as "a terrorist and a traitor."[612] He claims that "trial counsel systematically invited victim witnesses to characterize SGT Akbar's crimes in inflammatory, irrelevant ways,"[613] and that the responses "implicat[ed] highly

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[608] *South Carolina v. Gathers,* 490 U.S. 805 (1989).
[609] *Payne*, 501 U.S. at 830.
[610] *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002)(collecting cases).
[611] AB at 134-138.
[612] AB at 138.
[613] AB at 145.

inflammatory notions of assisting the enemy, treason, and mutiny."[614] Nothing could be further from the truth.

First, as appellant concedes,[615] no witness actually likened the offenses to assisting the enemy, treason, or mutiny, and no witness characterized appellant as a terrorist or traitor. Appellant's entire argument is premised on his mischaracterization of the actual testimony of these witnesses.

The trial counsel never "systematically invited victim witnesses to characterize SGT Akbar's crimes in inflammatory, irrelevant ways." To the contrary, the trial counsel asked each of the witnesses how it personally made them feel when they learned that the perpetrator was an American Soldier.[616] These questions were designed not to characterize the crimes in any particular manner, but rather to determine what effect they had on the victims and their families, a wholly appropriate subject.

The fact that these questions focused on appellant's status as an American Soldier was relevant in light of the unique circumstances of the crimes in this case. All of the victims were assigned to a major combat unit and deployed to Kuwait on the eve of the invasion of Iraq, mere miles from the border. Every victim and their family members were thus fully prepared

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[614] AB at 147.
[615] AB at 138.
[616] JA at 1347, 1208, 1139-40, 1200, 1161, 1193, 1184, 1213, 1356, 1374, 1222, 1386, 1100.

for the distinct possibility that they might be killed or injured in the coming days when combat operations began. Such is the nature of war for Soldiers and their families. One of the few comforts that they might take in this circumstance is that a Soldier's comrades are there to try and protect them.

What the victims and their families could not be prepared for was that a fellow Soldier would try to murder them in the night. This is one of the reasons why appellant's crimes were so egregious in this case, and why the emotional impact of those crimes would be heightened in the victims and their families. This is why all of the victims stated that they were "angry," "mad," "pissed," "frustrated," "shocked," "confused," in "disbelief," and felt "betrayed." These were comments not on the crimes themselves, but on the direct emotional impact stemming from those crimes on the victims and their families. To be sure, a number of witnesses testified about how the attacks affected their ability to trust their fellow Soldiers during a critical time.[617] That type of testimony is wholly acceptable under *Payne*, and would be necessary for a panel to

[617] CSM Womack: "[i]t was hindered for months, especially within the month of the attack. I probably challenged everyone in the dark, not knowing who they were." (JA at 1148); CPT McClendon testified that while deployed, he manifested symptoms of paranoia; after "you already had an enemy to face, and then when you have an enemy within, it gives you a sense of distrust." (JA at 1180-81).

fully understand why these offenses had potentially a more profound impact on the victims and their families.

In particular, COL Hodges' mentioning of "fraggings" during the Vietnam War was tied directly to the psychological impact he felt as a result of appellant's crimes.[618] The nature of the attacks caused him to feel like he "had failed before we'd even gotten into Iraq."[619] The reason he felt like a failure was because he felt that he allowed something to occur within his unit that harkened from "the very worst days for the United States Army, at the end of Vietnam."[620] His reference was not to compare appellant's crimes to those actions, but rather to explain why he felt such an emotional reaction to the attacks. This is nothing more than testifying about the emotional impact of the crimes.

In addition, trial counsel's arguments on sentencing were altogether appropriate. While a witness may not be allowed to state "characterizations and opinions about the crime, the defendant, and the appropriate sentence," a trial counsel is undoubtedly allowed to do so when arguing for a particular sentence. The sentencing theme that appellant was the "enemy inside the wire" was fitting based on the nature of the

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[618] JA at 1100. The trial counsel had asked COL Hodges: "Psychologically, how did that impact you, sir?" (JA at 1099).
[619] JA at 1100.
[620] JA at 1100.

offenses. At no time did the trial counsel argue that appellant was a terrorist or that he had committed treason. The theme fit squarely into the egregiousness of appellant's crimes occurring while a combat unit was preparing to face the actual enemy in combat, only to be maliciously attacked from within its own ranks by a murderous individual.

In addition, the trial counsel did not inappropriately request that the panel weigh the lives of the victims against appellant's life. To the contrary, appellant abjectly mischaracterizes the record on this accord. The only argument by the trial counsel concerning "weighing" involved his discussion of the requirement in R.C.M. 1004(b)(4)(C), which specifically requires the panel to "weigh" the extenuating and mitigating circumstances with any aggravating circumstances. The trial counsel's argument was an appropriate discussion of the aggravating and mitigating evidence which the panel was required to weigh against each other.

Regardless, even assuming that any of the specific responses or portions of argument were erroneous under the Eighth Amendment, any such error is harmless beyond a reasonable doubt. The brief statements highlighted by appellant were only a minor portion of a lengthy, robust sentencing case put on by

the Government.[621] In addition, "the horrific nature of the murders was uncontroverted" and "the evidence of [appellant's] guilt was substantial."[622]

Even assuming the panel would have inferred from the witnesses' statements that they felt "betrayed" by appellant's actions that appellant was a "traitor," such assumption was already inherent in the evidence. It is undeniable that appellant murdered and attempted to murder his fellow Soldiers on the eve of the invasion of Iraq in a deceptive attack carried out at night. There is no other conclusion to be drawn from this irrefutable fact that appellant betrayed his fellow Soldiers. No reasonable panel member would ever have required a witness to tell them that this was a betrayal, and the fact that a witness may have said the words does not alter the reality that the panel would have concluded as such themselves.

Consequently, appellant's arguments are unsupported by the record and the law. The victim impact evidence admitted was wholly appropriate under the facts of this case. Even assuming the admission of certain statements was error, such error was

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[621] *See United States v. Bernard*, 299 F.3d 467, 480-81 (5th Cir. 2002)(finding that "brief statements did not alone unduly prejudice the jury."); *Payne*, 501 U.S. at 832 ("surely this brief statement did not inflame [the jury's] passions more than did the facts of the crime.").

[622] *Hain*, 287 F.3d at 1239-40 (finding no prejudice for improperly admitted victim impact testimony).

harmless beyond a reasonable doubt due to their relative minor and common sense nature.[623]

A.IV

THE MILITARY JUDGE, BY FAILING TO SUA SPONTE DISMISS FOURTEEN OF THE FIFTEEN PANEL MEMBERS FOR CAUSE BASED ON ACTUAL BIAS AND IMPLIED BIAS MANIFESTED BY RELATIONSHIPS OF THE PANEL 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 THE JUDGE SPECIFICALLY RULED WOULD NOT COME INTO EVIDENCE, DENIED SERGEANT AKBAR A FAIR TRIAL.

Standard of Review

A military judge's decision whether to excuse a member *sua sponte* is reviewed for an abuse of discretion.[624] Where the question is one of actual bias of a panel member, this Court gives "the military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member."[625] Where the question is one of implied bias, an "objective

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[623] Because it was neither error nor prejudicial for the statements at issue to be admitted, appellant's claim that his counsel were ineffective for failing to object is consequently unfounded.

[624] *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004)(citing *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000).

[625] *Strand*, 59 M.J. at 458 (quoting *United States v. Napolitano*, 53 M.J. 162, 166 (C.A.A.F. 2000).

standard is used" which is "less deferential than abuse of discretion but more deferential than de novo."[626]

However, the "[f]ailure to object to the composition of the jury has long been held to result in a waiver of the right of the accused to be heard by an impartial jury."[627] "Were the rule otherwise, a defendant could, as appellant seeks to do herein, fail timely to exercise his challenges and, after verdict, claim prejudice on appeal if the verdict displeases him."[628] This Court has consequently recognized that the failure to challenge panel members at trial results in the issue being reviewed on appeal for plain error.[629] Appellant did not challenge any of selected panel members, and did not use his peremptory challenge.[630]

This undoubtedly explains why appellant does not challenge the impartiality of the panel directly, but rather challenges the military judge's decision to not *sua sponte* disqualify any member: to obtain a more favorable standard of review for implied bias. To merely apply the abuse of discretion standard for actual and implied bias in this circumstance would eliminate any incentive for an accused to challenge members at trial.

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[626] *Strand*, 59 M.J. at 458.
[627] *United States v. Raglund*, 375 F.2d 471, 475 (2d Cir. 1967)(citations omitted); R.C.M. 912(f)(4).
[628] *Id*.
[629] *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998).
[630] JA at 673, 675.

While the standard of review for actual and implied bias should remain abuse of discretion, in this case such discretion should be reviewed under the rubric of plain error.

Law and Argument

"As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel."[631] "That is not to say that an accused has a right to the panel of his choice, just to a fair and impartial panel."[632] "In furtherance of this rule, this Court has determined that a member shall be excused in cases of implied bias, as well as in cases of actual bias."[633]

"The test for actual bias is whether any bias 'is such that it will not yield to the evidence presented and the judge's instructions.'"[634] Actual bias is "reviewed through the eyes of the military judge or the court members."[635]

"Implied bias is viewed through the eyes of the public, focusing on the appearance of fairness."[636] The "hypothetical 'public' is assumed to be familiar with the military justice

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[631] *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)(citing *United States v. Mack,* 41 M.J. 51, 54 (C.M.A. 1994); R.C.M. 912(f)(1)(N)).
[632] *Wiesen*, 56 M.J. at 174.
[633] *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).
[634] *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997)(quoting *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987)).
[635] *Wiesen*, 56 M.J. at 174.
[636] *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)

system,"[637] and a "reasonable, disinterested layman"[638] "considering the record as a whole."[639] "Implied bias addresses the perception or appearance of fairness of the military justice system,"[640] and exists when "most people in the same position would be prejudiced."[641] However, where "there is no actual bias, 'implied bias should be invoked rarely.'"[642]

The military judge is authorized, under R.C.M. 912(f)(4), to *sua sponte* "excuse a member against whom a challenge for cause would lie" in the interest of justice.[643] However, this court has characterized that authority as being one of "drastic action."[644]

Appellant makes a number of arguments alleging actual and implied bias on the part of 14 separate panel members, none of which were raised at trial, and some of which were not raised before the Army Court.[645] Each will be addressed in turn.

I. Knowledge of Uncharged Misconduct

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[637] *Id.*
[638] *Napoleon,* 46 M.J. at 283.
[639] *United States v. Townsend,* 65 M.J. 460, 465 (C.A.A.F. 2008) (stating a reasonable observer, considering the record as a whole, would have harbored no questions about the member's neutrality, impartiality, and fairness).
[640] *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002).
[641] *Rome*, 47 M.J. at 469.
[642] *Wiesen*, 56 M.J. at 174 (quoting *Rome*, 47 M.J. at 469).
[643] R.C.M. 912(f)(4).
[644] *United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998).
[645] For example, appellant did not argue that COL Quinn, COL Meredith, and LTC Turner were biased because they knew a witness in the case, or that CSM Cartwright had prior professional contact with the trial counsel.

Appellant alleges that COL Meredith, COL Quinn, LTC Ellis, LTC Gardipee, LTC Turner, CSM Cartwright, CSM Huffman, CSM Rivera, MSG Chung, SFC Cascasan,[646] were all biased because they held some level of knowledge of appellant's attack on a guard prior to trial. However, none of these members had any substantive knowledge of what had happened.[647] In fact, many of the members pointed out that they intentionally tried to ignore such reports or gossip based on the limiting order from the court.[648] In addition, every member except LTC's Ellis, Gardipee, and Turner specifically agreed that their limited knowledge would not affect their ability to judge appellant's case based solely on the facts presented at trial.[649] While LTC's Ellis, Gardipee, and Turner were not asked directly

[646] Appellant alleges that SFC Davis "heard on the radio of 'an altercation between SGT Akbar and the MPs.'" AB at 184. Nowhere in the record does SFC Davis state that he was aware of the stabbing incident, and appellant's cite to JA 655 does not support his proposition.
[647] COL Meredith knew only that appellant assaulted an MP with a pair of scissors. JA at 377. COL Quinn knew only that there was "a scuffle with an MP." JA at 366. LTC Ellis had heard there was an "altercation." JA at 391. LTC Gardipee and LTC Turner only saw a headline about a "scuffle." JA at 415, 446. CSM Cartwright's wife informed him there was a "fight between Sergeant Akbar and some guards." JA at 557. CSM Huffman knew only that appellant had "overtook one of the guards and injured himself and one of the guards." JA at 572. CSM Rivera had heard that "one of the guards was stabbed in the neck or something to that effect." JA at 541. MSG Chung heard only something about a guard being overpowered. JA at 615. SFC Casacasan knew only of an altercation between appellant and the MP's, where he overpowered the MP. JA at 657.
[648] JA at 391, 446, 615.
[649] JA at 367, 378, 541, 558, 573, 616, 657.

whether they could ignore what they had heard, these three had the least in-depth knowledge, having only heard about a generic "altercation" or "scuffle."[650]

Further, every panel member stated that he or she could give appellant a fair trial;[651] no matter would impair, or appear to impair, their impartiality;[652] they would presume appellant innocent until legal and competent evidence proved his guilt beyond a reasonable doubt;[653] they would form no opinions until receiving all the evidence;[654] and they would be fair on an appropriate punishment. The military judge reiterated in final instructions that they were only to consider the evidence in the case properly before them.[655]

Moreover, appellant's trial defense counsel did an effective job minimizing the fact of the stabbing by implying to the panel that what they heard from rumors or the media should not necessarily be believed.[656]

Based on the foregoing, no member had an actual bias based on their sparse knowledge of the stabbing incident, and a reasonable member of the public knowing all the facts would not question the impartiality of the panel.

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[650] JA at 391, 415, 446.
[651] JA at 312.
[652] JA at 314.
[653] JA at 315.
[654] JA at 316.
[655] JA at 965.
[656] JA at 378, 541, 572-73, 657.

II. Emotional Reaction to the Offenses

Appellant alleges that COL Meredith, MAJ Seawright, CSM Cartwright, MSG Chung, CSM Rivera, LTC Foye, and LTC Lizotte should have been removed because they experienced an "emotional reaction" upon learning of the attack committed by appellant. In so doing, appellant attempts to impart unsupported dramatic emphasis on rather benign statements by the panel members concerning their reaction to learning of the attack. The fact that the members may have felt "shock," "disbelief," or been "upset," upon hearing that a number of Soldiers were murdered by an American Soldier on the eve of combat operations in Iraq is nothing more than a wholly unremarkable comment on human nature. Any reasonable person, particularly a Soldier, would have experienced similar emotions.

In addition, most of the members specifically agreed that their initial reaction to the event would not affect their ability to be impartial as a panel member, and the rest confirmed that they would put all extraneous information out of their mind for the case.[657] As LTC Foye astutely pointed out, "[s]ince that time, a lot has happened. Quite honestly, after that happened, we went through a whole war that's continued. In my eyes, I didn't see much on it anymore – it kind of went

[657] JA at 379, 405, 464, 492, 540-41, 558, 616.

away."[658] While these panel members may have had an initial emotional reaction to the event, the extensive passage of time between the attack and appellant's court-martial undoubtedly ameliorated any emotional response.

III. Unwillingness to Consider Mitigation Evidence

Appellant alleges that SFC Davis, MAJ Seawright, LTC Gardipee, CSM Huffman, CSM Cartwright, and MSG Chung were all unwilling to fully consider mitigation evidence when they considered a possible sentence. Appellant's argument is premised on the notion that because many of these witnesses did not offer on their own accord that they would consider evidence in mitigation when deciding on a sentence, they obviously would refuse to consider such evidence. By appellant's logic, therefore, because these members did not state specifically that they would consider evidence in aggravation, they would not have considered anything presented by the government. The fact that these panel members did not provide exhaustive responses to the generic question of what they would consider in determining an appropriate sentence proves nothing. This is especially true where every panel member agreed that they would follow the instructions of the military judge,[659] and the military judge specifically instructed them that they were required to consider

[658] JA at 405.
[659] JA at 319.

all matters in extenuation and mitigation, going so far as to point out 31 specific points they were to consider.[660]

While appellant focuses on SFC Davis' response that he would not consider facts regarding an accused's life,[661] he ignores SFC Davis' pointing out that he would also consider the circumstances that provoked the offense and whether the accused was suffering from a mental condition,[662] which shows he would be willing to consider parts of the accused's life. He also agreed with the military judge in rehabilitation that he would follow the judge's instructions and consider all available punishments.[663] He said he would follow the judge's instructions on the full range of punishments;[664] would give appellant a fair trial;[665] that nothing would impair his impartiality;[666] he would not form an opinion on sentencing until he heard all of the evidence;[667] and he would be fair in determining an appropriate sentence.[668]

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[660] JA at 1512-20.
[661] JA at 632.
[662] JA at 633. Interestingly, these are the two primary themes relied upon by the trial defense counsel. SFC Davis' specific responses likely played a role in the defense counsel believing he should remain on the panel.
[663] JA at 634-35.
[664] JA at 634.
[665] JA at 312.
[666] JA at 314.
[667] JA at 317-18.
[668] JA at 318.

As to MAJ Seawright, appellant completely misconstrues his testimony, arguing that his calculus was merely "if one person dies, then that means that that person should die also."[669] The context of MAJ Seawright's testimony shows he misspoke when he made this statement. In response to when he would consider the death penalty appropriate, he noted that in general he believed it would only apply to cases with multiple victims.[670] He made very clear that in his personal opinion in order to consider the death penalty, more than one person would need to have been killed.[671]

While CSM Huffman may have indicated that the death penalty would be appropriate merely by conviction beyond a reasonable doubt, he clarified under examination by trial defense counsel that he would consider other factors, such as the mental status of the individual.[672]

Altogether, no panel member ever said that they would be unwilling to consider mitigation evidence. Appellant's supposition that they would not based on a limited question and answer session during voir dire stretches the correlation between fact and assumption beyond its breaking point. As a

[669] JA at 489.
[670] JA at 485-87.
[671] JA at 485-86.
[672] JA at 571-72.

result, none of these members could be considered biased requiring sua sponte removal.

IV. Preconceived Notion of Guilt or Sentence

Appellant alleges that SFC Cascasan had already previously determined the guilt of appellant based on statements he made at the time of the attack. However, he ignores SFC Cascasan's unambiguous statement that he no longer maintained that opinion at the time of trial, and that he was able to set aside everything he had heard about the case previously.[673] He also noted that his original opinion was not based on any personal knowledge of the facts in the case.[674] Consequently, the record directly refutes appellant's argument.

Appellant also argues that SFC Cascasan and SFC Davis already had a preconceived notion that the death penalty was appropriate in this case. This is flatly rejected by the record. SFC Cascasan noted that "the death penalty is the last resort to me."[675] He would have to be certain that the person committed the crime, and would not "take putting someone to death lightly."[676] He also explained that "[i]f it cannot be completely proved to me that the person should get the death

[673] JA at 637.
[674] JA at 637.
[675] JA at 647.
[676] JA at 648-49.

penalty, then I would say life without parole,"[677] and agreed that there are circumstances where he would vote for life without parole.[678] He would base his decision solely on the facts presented to him, not succumbing to emotions, and would select a punishment that fit the crime.[679] It is almost surprising that appellant would challenge SFC Cascasan for his views on the death penalty, as he arguably maintained the most defense friendly viewpoint.

Similarly, SFC Davis stated that the death penalty is not an automatic sentence, but would depend on the circumstances.[680] He also specifically noted that he would consider a life sentence as a viable punishment.[681]

Based on the foregoing, no panel member held a preconceived notion as to either guilt or sentence in this case.[682]

V. Relationship with Witness

Appellant alleges that COL Quinn, COL Meredith, and LTC Turner were all biased based on their relationships with two witnesses in the case. "[T]his Court has repeatedly held that a routine official or professional relationship between a member

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[677] JA at 651.
[678] JA at 655.
[679] JA at 654-55.
[680] JA at 631-32.
[681] JA at 633-35.
[682] *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961).

and a witness in a court-martial does not *per se* establish disqualifying implied bias."[683]

COL Quinn had only met COL Hodges the previous summer as he was a fellow Corps level staff officer, and lived on the same street; however, he had not seen COL Hodges in at least three months due to his deployment.[684] He never discussed any of the events in this case with him, and was not even aware that COL Hodges was a witness until he saw his name during voir dire.[685] There was nothing about his brief relationship with COL Hodges that would render it difficult for him to be impartial.[686]

COL Meredith knew COL Hodges through Command and General Staff College thirteen years earlier, and they had a merely professional relationship at Fort Bragg.[687] COL Meredith considered him an "acquaintance," as opposed to a friend."[688] He specified that he would treat COL Hodges as any other witness, because they were "not particularly close friends."[689]

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[683] *United States v. Ai*, 49 M.J. 1, 5 (C.A.A.F. 1998); *see also United States v. Velez*, 48 M.J. 220, 225 (C.A.A.F. 1998); *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997); *United States v. Lake*, 36 M.J. 317, 324 (C.M.A. 1993); *United States v. White*, 36 M.J. 284, 288 (C.M.A. 1993).
[684] JA at 357, 369.
[685] JA at 357.
[686] JA at 358.
[687] JA at 370, 372.
[688] JA at 370.
[689] JA at 372.

LTC Turner explained that he knew MAJ Kiernan; however, he was merely an acquaintance he knew in passing.[690] In fact, he could not even explain how he actually knew MAJ Kiernan.[691] He never spoke to him about the case, and the relationship would not influence LTC Turner at all.[692]

Based on the foregoing, the limited relationships between the various panel members and the witnesses are not grounds for dismissal.

VI. Member of Rating Chain

Appellant argues that the fact that COL Meredith was the supervisor of two junior members, LTC Foye and LTC Lizotte, created a bias. "It is well settled that a senior-subordinate/rating relationship does not *per se* require disqualification of a panel member."[693]

However, all three members made explicitly clear that the supervisory relationship would have no impact on their ability to serve impartially on the panel.[694] Because the military judge and counsel fully explored this issue with the members, and the members unambiguously stated that it would not affect their

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[690] JA at 407.
[691] JA at 407.
[692] JA at 407-08.
[693] *Wiesen*, 56 M.J. at 175; *see also United States v. Rome*, 47 M.J. at 469; *United States v. White*, 36 M.J. at 287-88; *United States v. Blocker*, 32 M.J. 281, 286-87 (C.M.A. 1991).
[694] JA at 309-10, 371, 458.

impartiality, there is no reason for them to have been disqualified.

VII. Miscellaneous

Appellant has a number of miscellaneous remaining arguments for bias. First, he argues LTC Turner was biased because one of his brothers was the commander of the 101st Airborne Division, and another brother was the Executive Officer at FORSCOM. In fact, his brother was not in command at the 101st before, during, or after the attacks, or even when appellant was also assigned to the unit, since General Petraeus transferred the case to Fort Bragg while he was still in command.[695] LTC Turner said he felt no pressure from his brother's position and never discussed the case with his brother.[696] In addition, he never discussed the case with his other brother at FORSCOM.[697] The mere fact that LTC Turner is related to other personnel in the Army is not grounds for disqualification.[698]

Appellant also alleges that LTC Gardipee had a "troubling view" of Islam. However, LTC Gardipee stated that his views on Islam would not affect his ability to be impartial and he would be fair minded.[699]

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[695] JA at 408; SJA at 336.
[696] JA at 408.
[697] JA at 415.
[698] *Compare Strand*, 59 M.J. at 459-60 (no actual or implied bias where son of acting convening authority served on panel).
[699] JA at 443-44.

Finally, appellant challenges CSM Cartwright based on his professional experience with one of the assistant trial counsels. However, a limited professional relationship between a panel member and a trial counsel is not grounds for disqualification.[700] CSM Cartwright's only experiences with the assistant trial counsel was to have a power of attorney updated and in the JOC while deployed, where they did not have a direct working relationship.[701] CSM Cartwright affirmed that his prior experience with the trial counsel would have no effect on his ability to fairly evaluate the evidence.[702] This limited relationship with the trial counsel is not a grounds for disqualification.

VIII. Conclusion

Based on the foregoing, appellant has failed to establish that any panel member had an actual bias, and no reasonable member of the public, fully aware of the facts of the case and the procedures of the military judge system, would objectively question the impartiality of the members. The military judge's decision to not *sua sponte* dismiss these panel members was not erroneous, let alone plainly erroneous.

A.V

[700] *United States v. Hamilton*, 41 M.J. 22, 25 (C.M.A. 1994); *Rome*, 47 M.J. at 469.
[701] JA at 554.
[702] JA at 554-55.

THE MILITARY JUDGED ERRED TO THE SUBSTANTIAL PREJUDICE OF SERGEANT AKBAR WHEN HE DENIED THE DEFENSE MOTION FOR A CHANGE OF VENUE.

Standard of Review

A military judge's ruling on a motion for change of venue is reviewed for an abuse of discretion.[703] Trial court judgments on the necessity for a change of venue are granted a "healthy measure of appellate-court respect."[704] The Supreme Court has noted that when pretrial publicity is at issue, "primary reliance on the judgment of the trial court makes especially good sense."[705]

Law and Argument

The military judge properly denied appellant's motion for a change of venue in which appellant argued prejudicial pretrial publicity.[706] An accused is entitled to a change of venue only when pretrial publicity creates "so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial."[707] The question is "whether the members, having been

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[703] *Loving,* 41 M.J. at 282.
[704] *Skilling v. United States,* 130 S.Ct. 2896, 2913 n.11 (2010).
[705] *Id.* at 2918. Appellate courts "making after-the-fact assessments of the media's impact on jurors should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by the trial judge." *Id.*
[706] JA at 109-117, 227-28, 1679-83.
[707] R.C.M. 906(b)(11) discussion. The language in the MCM mirrors the language in Federal Rule of Criminal Procedure 21 – the rule governing venue transfer in federal court. *See Skilling,* 130 S.Ct. at 2913 n.11.

exposed to publicity, can fairly and honestly try the issues."[708] The prejudice required for a showing of unfair pretrial publicity may be either presumed or actual.[709]

I. Presumed Prejudice

To establish presumed prejudice, "the defense must show that pretrial publicity (1) is prejudicial, (2) is inflammatory, and (3) has saturated the community" where the trial is held.[710] This presumption of prejudice "attends only the *extreme case*."[711] Pretrial publicity, "even pervasive, adverse publicity, does not inevitably lead to an unfair trial."[712] The potential for prejudice may be "ameliorated through measures such as a continuance, change of venue, sequestration, and regulation of public comment by counsel."[713]

Appellant fails to demonstrate presumed prejudice and his court-martial shares little in common with those trials in which

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[708] *Loving,* 41 M.J. at 254.
[709] *United States v. Simpson,* 58 M.J. 368, 372 (C.A.A.F. 2003).
[710] *Simpson*, 58 M.J. at 372. *See also United States v. Gray*, 51 M.J. 1, 28 (C.A.A.F. 1999).
[711] *Skilling*, 130 S. Ct. at 2915 (emphasis added). The Supreme Court has "rightly set a high bar for allegations of juror prejudice due to pretrial publicity." *Skilling,* 130 S.Ct. at 2925 n.34 (noting also the importance of publicity as news coverage of criminal trials of public interest conveys to society at large how the systems operate).
[712] *Id.* at 2916. A presumption of prejudice has been found where there was a "trial atmosphere utterly corrupted by press coverage." *Id.* at 2914.
[713] *Simpson*, 58 M.J. at 372.

courts have approved a presumption of prejudice.[714] Appellant's case does not even rival those highly charged cases with extensive pretrial publicity where a motion for change of venue was similarly denied.[715]

The military judge correctly found that the evidence "the defense presented concerning pretrial publicity is not prejudicial, inflammatory, and has not saturated the community."[716] The news articles were routine factual descriptions, stale in time, from a variety of news outlets, and were hardly the barrage of prejudicial, sensationalized, and inflammatory accounts directed at prospective panel members required under the law to warrant relief.[717]

The Supreme Court in *Skilling* highlighted three principles that factor into assessing a claim of presumed prejudice: (1) the size and characteristics of the community in which the crime occurred; (2) the time delay between the occurrence of the widely reported crime and the trial; and (3) the type of news stories, especially whether they were blatantly prejudicial of

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[714] *See Estes v. Texas,* 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana,* 373 U.S. 723 (1963).
[715] *See Skilling,* 130 S.Ct. at 2913 n.11 (discussing *United States v. Yousef*, No. S12 93 Cr. 180 (KTD) (S.D.N.Y. 1997), *aff'd,* 327 F.3d 56, 155 (2d Cir. 2003); *United States v. Lindh,* 212 F.Supp.2d 541, 549-551 (E.D.Va. 2002)).
[716] JA at 228, 3142-3236.
[717] JA at 3142-3236.

the type readers could not reasonably be expected to shut from sight.[718]

First, appellant fails to even recognize that the Government changed the venue on its own accord, moving the trial from Fort Campbell to Fort Bragg, where no Soldiers from his unit were assigned, in order to afford him a fair trial. Appellant does not even argue what about the community at Fort Bragg would have precluded a fair trial, other than highlighting that the case involved soldier on soldier crimes in a combat area. By appellant's logic, every installation would have been improper.

Second, *voir dire* did not even begin in this case until two years after the crimes occurred.[719] The prospective panel, located at a separate community from that affected, had been sent the order not to read about or discuss this case roughly a year earlier.[720] The time delay ameliorated any possibility of prejudice.

Third, there was no blatantly prejudicial information of the type readers could not avoid.[721] Similar to *Skilling*, appellant's case had little in common with those where a presumption of prejudice was recognized.

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[718] *Skilling*, 130 S.Ct. at 2915-16.
[719] JA at 293.
[720] SJA at 327-29.
[721] JA at 228, 3142-3236.

II. Actual Prejudice

To establish actual prejudice, "the defense must show that members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused."[722] Without such a showing, "evidence that the members had knowledge of highly significant information or other incriminating matters is insufficient."[723] Appellant fails to meet this burden.

When assessing actual prejudice, courts take into account the measures used to mitigate the adverse effects of publicity to include questionnaires, *voir dire,* and judicial instructions.[724] There were several steps in this case to ensure no actual prejudice was present on the panel: (1) trial was moved from Fort Campbell to Fort Bragg;[725] (2) the panel was screened through questionnaires;[726] (2) the panel was ordered to avoid the media and to disclose any knowledge they had of the case;[727] (3) *voir dire* was extensive and covered pretrial publicity;[728] and (4) the military judge admonished the panel to only render a verdict based on the evidence and nothing else.[729]

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[722] *Simpson*, 58 M.J. at 372.
[723] *Id*.
[724] *Skilling,* 130 S.Ct. at 2918-19. *See also Gray*, 51 M.J. 28-29.
[725] SJA at 336.
[726] SJA at 371-77.
[727] SJA 327-29.
[728] JA at 312, 314, 316, 318, 341, 636-37, 655.
[729] JA at 295-96, 298, 302-03.

Appellant fails to make any showing that the "members of the court-martial panel had such fixed opinions that they could not judge impartially the guilt of the accused."[730] Appellant fails to show any actual prejudice as a result of pretrial publicity.

Conclusion

The military judge correctly denied appellant's motion for a change of venue. Appellant falls well short of the high hurdle needed to establish presumed prejudice with pretrial publicity and fails to establish any actual prejudice. Appellant's case was heard by a fair and impartial court-martial panel.

A.VI

SERGEANT AKBAR WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AND EIGHTH AMENDMENTS, WHEN HIS TRIAL DEFENSE COUNSEL ACTIVELY REPRESENTED CONFLICTING INTERESTS WHICH ADVERSELY AFFECTED THEIR PERFORMANCE.

Law and Argument

Where an allegation of ineffective assistance arises from a claimed conflict of interest, deficiency is assessed using the two-pronged test of *Cuyler v. Sullivan*.[731] Under that test, an accused who raised no objection at trial must demonstrate (1) that an actual conflict of interest existed, and (2) that it

[730] *Simpson*, 58 M.J. at 372.
[731] 446 U.S. 335 (1980).

adversely affected his counsel's performance.[732] The Supreme Court reiterated this standard in *Mickens v. Taylor*, holding that even in cases of concurrent or successive representation an appellant must establish that an actual conflict adversely affected his counsel's performance.[733] An actual conflict of interest exists if the attorney's own interests materially limit his representation of the client.[734]

"[T]he rule applied when the trial judge is not aware of the conflict (and thus not obligated to inquire) is that prejudice will be presumed only if the conflict has significantly affected counsel's performance -- thereby rendering the verdict unreliable, even though *Strickland* prejudice cannot be shown."[735]

Appellant alleges that his trial defense counsel had conflicts of interest based on: (1) their relationship with appellant's mother, Mrs. Bilal; (2) their professional relationship with one of the victims; and (3) the government's change to trial defense counsels' personnel assignments to

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[732] *Id*. at 348; *see Strickland*, 466 U.S. at 692; *United States v. Hicks*, 52 M.J. 70, 72 (C.A.A.F. 1999); *United States v. Thompson*, 51 M.J. 431, 434-35 (C.A.A.F. 1999); *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988).
[733] *Mickens v. Taylor*, 535 U.S. 162, 173-75 (2002).
[734] Dep't of Army Regulation 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Appendix B, Rule 1.7(b)(1 May 1992) (AR 27-26) (as cited by *United States v. Best*, 59 M.J. 886, 892 (Army Ct. Crim. App. 2004), *aff'd*, 61 M.J. 376 (C.A.A.F. 2005)).
[735] *Mickens*, 535 U.S. at 172-73.

ensure continuity of counsel. Each of these is a baseless claim and did not create a conflict of interest.

I. Relationship with Mrs. Bilal

Appellant's entire argument that his counsel maintained a conflict of interest because they were in fact representing appellant's mother is based on nothing more than unsupported speculation and conjecture. Appellant claims, without evidence, that his trial defense counsel based every tactical decision on the wishes of Mrs. Bilal. This is an abjectly preposterous assertion.

Appellant also contends that his counsel inappropriately removed Mrs. Grey as the mitigation specialist and attempted to remove Mrs. Rogers at the behest of appellant's mother. What appellant ignores is that Mrs. Bilal "had refused to cooperate with Ms. Grey and had instructed other family members to do the same," and the trial team "met persistent resistance from Ms. Bilal" when they attempted to interview members of the family."[736] Based on this fact, the trial defense counsel replaced Mrs. Grey with Mrs. Holdman, after "Mrs. Bilal indicated that she would cooperate with Mrs. Holdman and also encourage others in her family to cooperate."[737] Once a mitigation specialist was located who was acceptable to Mrs.

[736] JA at 1930-31.
[737] JA at 1934-45.

Bilal, the family was appropriately interviewed.[738] The ridiculousness of appellant's assertions here are that if the trial defense counsel did not replace Mrs. Grey, and proceeded to trial without having had any family member be interviewed due to Mrs. Bilal's obstructionist actions, he would be claiming that they were ineffective for not doing so.[739]

Appellant also asserts his civilian defense counsel actively represented his mother's interests. He cites to no evidence to support this conclusion, other than his belief that they must have been doing so. The reality is that the poor decisions made by appellant's civilian defense counsel were not due to their acceding to his mother's wishes, but were borne out of their lack of experience and interest in appellant's case.[740] However, because these counsel did little to no legitimate work on appellant's case, their involvement is wholly irrelevant.[741]

The true issue in this case was not that Mrs. Bilal controlled the defense counsel, but that she controlled her

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[738] JA at 1937.
[739] Another example of appellant's "scorched-earth policy" of ineffective assistance of counsel.
[740] See discussion to Assignment of Error A.I.
[741] Appellant asserts that "Mr. Al-Haqq abandoned SGT Akbar less than six-weeks out from trial." AB at 194-95. To the contrary, the record makes clear that Mr. Al-Haqq had ceased representing appellant since at least the end of August 2004. JA at 289-90 (his last appearance on the record); SJA at 460; JA at 1939 (Mr. Al-Haqq's withdrawal was known well in advance).

son.[742] It was Mrs. Bilal who forced appellant to not submit an offer to plead guilty,[743] and to fire LTC VH and CPT JT.[744] Appellant's Oedipal issues with his mother cannot form the basis for a conflict of interest in his trial defense counsel.

II. Professional Relationship with a Victim

An accused may waive his right to conflict-free counsel.[745] Although courts indulge every reasonable presumption against waiver of this right,[746] waiver may nonetheless be found where the record shows it was a voluntary and "knowing intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences."[747]

The trial defense counsel informed appellant, in writing, that they knew one of the victims in this case, MAJ Andres Marton.[748] Appellant executed a written waiver of any potential conflict of interest.[749] The military judge discussed this waiver, on the record, with appellant and trial defense counsel.[750] Appellant knowingly and intelligently stated his

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[742] JA at 1928 ("It became apparent to the defense that Ms. Bilal had significant emotional and mental control over SGT Akbar.").
[743] JA at 1929.
[744] JA at 1930-31.
[745] *United States v. Lee*, 66 M.J. 387 (C.A.A.F. 2008)(citing *United States v. Davis,* 3 M.J. 430, 433 n.16 (C.M.A. 1977)).
[746] *Id.* (citations omitted).
[747] *Id.* (quoting *Brady v. United States,* 397 U.S. 742, 748 (1970)).
[748] JA at 2447-48, 2450-51.
[749] JA at 2451.
[750] JA at 97-101.

desire to retain the two attorneys with whom he built a "level of trust" and who had the necessary familiarity with his case.[751]

Appellant claims this waiver was not "knowing and voluntary" because he was not aware of his trial defense counsels' "strong personal feelings" about the attack.[752] The only evidence of this are the unsubstantiated suppositions made by two of the assistant mitigation personnel.[753] The lack of credibility of these individuals aside, the personal opinions of these two as to the feelings of trial defense counsel are speculative and irrelevant. Consequently, appellant properly waived any claimed conflict of interest concerning MAJ Marton.

Finally, appellant cannot establish that any possible conflict had any cognizable impact on his case. Appellant offers no proof that the trial defense counsel sabotaged appellant's defense out of loyalty to MAJ Marton. Appellant also fails to establish that defense counsel's dealings with MAJ Marton during trial were ineffective or unreasonable. His testimony did nothing more than establish the facts surrounding the explosion inside his tent on the night of 23 March 2003.[754] MAJ Marton never identified or implicated appellant in the crimes; he testified that he never knew or saw appellant until

[751] JA at 97-101.
[752] AB at 196.
[753] JA at 2552-53, 2792.
[754] JA at 698-712.

that day he testified.[755] There was simply nothing to question or challenge MAJ Marton about through cross-examination, regardless of the defense attorneys' identities.

III. Government Control of Personnel Assignments

Appellant's supposition that the Government ensuring that appellant's trial defense counsel remained his counsel throughout the duration of his court-martial and were not transferred to other positions fails on its face to establish a conflict of interest. How can an accused servicemember ever maintain continuity of counsel if the government (which controls military personnel) is not allowed to prevent their transfer to a new position? Had his trial defense counsel been transferred, there is no doubt that appellant would have claimed a violation of his right to counsel.

Appellant's arguments that the trial defense counsel made tactical decisions in order to expedite the completion of his court-martial is inherently speculative and based on no evidence in the record. Consequently, he cannot establish any conflict of interest.

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

[755] JA at 712.

> 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?

Standard of Review

"At trial, the burden of raising the issue of unlawful command influence rests with the defense."[756] Failure to raise the claim of unlawful command influence at trial when the facts concerning the allegation are known to the defense forfeits the issue on appeal.[757] Issues that are forfeited cannot serve to overturn a conviction or sentence unless the accused demonstrates plain error.[758]

To demonstrate on appeal that there was unlawful command influence, "appellant 'must show (1) facts which, if true, constitute unlawful command influence; (2) show that the

[756] *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999).
[757] *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999).
[758] *United States v. Harcrow,* 66 M.J. 154, 157-58 (C.A.A.F. 2008).

proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness."[759]

Law and Argument

"The right to effective assistance of counsel and to the *continuation of an established attorney-client relationship is fundamental in the military justice system."*[760] The trial counsel, as a representative of the Government, contacted the appropriate assignment authority to ensure that the assignments process did not interfere with appellant's right to effective counsel.[761] Appellant expressed to the military judge early in the case the importance of both LTC DB and MAJ DC and his desire for them to remain his counsel.[762] Other than presenting the issue itself, appellant provides no evidence that the trial defense counsel were adversely affected in either their representation of appellant or their career progression.[763] Any argument that the efforts to ensure appellant received the continued assistance of his detailed counsel somehow created an actual or perceived appearance of command influence, or conflict of interest, is unsupported by any facts or law.

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[759] *United States v. Richter*, 51 M.J. 213, 224 (C.A.A.F. 1999).
[760] *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988)(emphasis added)(citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)).
[761] Detailed discussions of this issue occurred on the record. JA at 202-06, 215, 225, 233-2365.
[762] JA at 100.
[763] JA at 1972-74 (both military defense counsel admitted that they never felt conflicted by the actions of the trial counsel).

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."

Law and Argument

Appellant argues that the Army Court erred when it found his trial defense counsel to be "well-qualified to handle a capital case,"[764] and for giving deference to the trial defense counsel's decisions.

Appellant is incorrectly operating under the assumption that the Army Court created a new standard by finding his trial defense counsel to have been "well-qualified." It is clear from the context of the decision that this court was not creating a separate class of "well-qualified" counsel for purposes of capital litigation, but was rather voicing its opinion concerning the level of qualification of appellant's trial defense counsel. That the Army Court used the term "well," as opposed to "highly," "adequately," "fully," or any other appropriate adjective to modify the term "qualified" is irrelevant to the decision. The Army Court's determination that appellant's trial defense counsel were sufficiently qualified to

[764] *United States v. Akbar*, 2012 WL 2887230 at *11 (Army Ct. Crim. App. July 13, 2012)(memorandum opinion).

represent him for purposes of the Sixth Amendment is well supported by the record and the law.

Appellant's primary argument that they are not "well-qualified" is based primarily on his position that the military must adopt the American Bar Association's (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter ABA Guidelines). To summarize the crux of appellant's argument: (1) this Court must formally adopt the ABA Guidelines and 18 U.S.C. § 3005 for the appointment of trial defense counsel in a capital case; and (2) trial defense counsel who fail to strictly meet those requirements have rendered per se ineffective assistance of counsel. Appellant's arguments are directly contrary to the law in this jurisdiction.

This Court has explicitly rejected the argument that either the ABA Guidelines or 18 U.S.C. § 3005 are binding on the military.[765] The breadth of an attorney's resume is not dispositive concerning whether an accused has been denied their Sixth Amendment right to effective assistance of counsel. "Every experienced criminal defense attorney once tried his

[765] *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994) *opinion modified on reconsideration,* 42 M.J. 109 (C.A.A.F. 1995) and *aff'd,* 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996); *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998). The reference to recent Supreme Court cases applying the ABA Guidelines are inapposite, as those cases dealt solely with the guidelines concerning sufficient investigations, not qualifications.

first criminal case,"[766] and "exceptionally well-qualified" counsel can still be found to be ineffective.[767]

Whether counsel provided constitutionally effective representation is "determined by reference to *Strickland v. Washington*."[768] This requires that this court "look to the adequacy of counsels' *performance*, rather than viewing the limited experience of counsel as an inherent deficiency."[769] While limited experience could potentially result in inadequate representation, the true question "is whether counsels' performance was 'deficient' and whether 'counsels' errors were so serious as to deprive the defendant of a fair trial,' one where the 'result of the trial is reliable.'"[770]

The Army Court correctly summarized appellant's trial defense counsels' experience.[771] In many respects their experience is similar to, if not greater than, the experience of the trial defense counsel in *Loving*.[772] This Court found there that the appellant "was competently represented . . . [by

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[766] *United States v. Cronic*, 466 U.S. 648, 665 (1984).
[767] *See Johnson v. United States*, 860 F. Supp.2d 663, 687 (N.D. Iowa 2012).
[768] *Loving*, 41 M.J. at 300.
[769] *Murphy*, 50 M.J. at 9 (emphasis added).
[770] *Murphy*, 50 M.J. at 9 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)).
[771] *Akbar*, 2012 WL 2887230 at *10-11; GAE 1 at 25-28.
[772] *See Loving*, 41 M.J. at 298-99 (summarizing experience of trial defense counsel).

counsel] with a degree of competence well above the constitutional minimums at his court-martial."[773]

Appellant's sole complaint regarding the experience of his trial defense counsel appears to be only that they had never represented a capital accused before. As *Loving* and *Murphy* have made clear, this fact does not preclude counsel from representing an accused in a capital court-martial, and it is not relevant to whether appellant received effective assistance of counsel. That is determined by applying *Strickland*.

Further, appellant incorrectly argues that the Army Court provided an undue level of deference to his trial defense counsel once it determined they were "well-qualified to handle a capital case." To the contrary, the Army Court merely applied that level of deference which it is required by law to provide on appeal.[774] The purpose of this presumption is to override the temptation to second-guess counsels' assistance after conviction or adverse sentence.[775] Appellant has failed to identify where

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[773] *Loving*, 41 M.J. at 298, 300.
[774] *See Cronic*, 466 U.S. at 658 ("we presume that the lawyer is competent to provide the guiding hand that the defendant needs."); *Strickland*, 466 U.S. at 689-90 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"); *United States v. Morgan*, 37 M.J. 407, 410 (C.A.A.F. 1993)("[w]e will not second-guess the strategic or tactical decisions made at trial by defense counsel.").
[775] *See Cullen*, 131 S. Ct. at 1403.

this supposed undue deference was applied, or why the presumption of competence mandated by the Supreme Court and this Court must be overturned in this case. It is appellant's burden to overcome the presumption of competence; he does not do so merely by claiming that no presumption should be applied.

Conclusion

Appellant's trial defense counsel were fully qualified to represent him at his court-martial. While they may not have met the specific requirements under the ABA Guidelines, those guidelines are not, and should not be made, binding on the military. As addressed in response to Assignment of Error A.I, applying the correct standard under *Strickland*, appellant's trial defense counsel provided him with fully effective assistance of counsel as guaranteed by the Sixth Amendment.

A.IX

DENYING SERGEANT AKBAR THE RIGHT TO PLEAD GUILTY UNCONSTITUTIONALLY LIMITED HIS RIGHT TO PRESENT MITIGATION EVIDENCE. IN THE ALTERNATIVE, COUNSEL'S FAILURE TO DEMAND AN INSTRUCTION ON THIS LIMITATION OF MITIGATION PRESENTATION AMOUNTED TO IAC AS OMISSION OF THE INSTRUCTION DENIED SGT AKBAR MITIGATION EVIDENCE IN VIOLATION OF THE EIGHTH AMENDMENT.

Law and Argument

There is no constitutional right to plead guilty in a capital case, and this Court has uniformly rejected appellant's

argument that Article 45, UCMJ, is unconstitutional.[776] Appellant presents no new or compelling arguments as to why these prior decisions should be overruled. While he points to a number of states which allow defendants to plead guilty, he ignores that a number prohibit guilty pleas.[777] This is consequently a matter of policy left to the sound discretion of Congress.[778]

Further, the requested instruction and potential argument by counsel would have violated Article 45(b), UCMJ. Had appellant's counsel argued that he was deprived of the right to plead guilty as a matter in mitigation, or were successful in having the requested instruction provided to the panel, it would have necessarily implied to the panel that appellant was in fact guilty. This would have been the functional equivalent of a guilty plea, and prohibited by Article 45(b), UCMJ.[779]

In addition, it is disingenuous on appeal for appellant to claim he was denied the right to plead guilty, or denied the right to inform the panel of such denial, when he never in fact requested to plead guilty or submitted an offer to plead guilty

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[776] *United States v. Matthews*, 16 M.J. 354, 362-63 (C.M.A. 1983) *Loving*, 41 M.J. at 292; *United States v. Gray*, 51 M.J. at 49.
[777] Alabama: A.C.A. § 5-4-608; Louisiana: LSA-C.Cr.P. Art. 557.
[778] *Matthews*, 16 M.J. at 363 ("we do not believe that Congress acted arbitrarily by providing in the Uniform Code that an accused cannot plead guilty to a capital charge.").
[779] *See United States v. McFarlane*, 23 C.M.R. 320 (C.M.A. 1957); *United States v. Dock*, 26 M.J. 620 (A.C.M.R. 1988).

to the convening authority.[780] In fact, appellant still contests his guilt.

Finally, appellant's trial defense counsel cannot be considered ineffective for failing to continue a request for an instruction that would have violated Article 45(b), UCMJ, and would never have been approved by the military judge.[781]

A.X

THE SECRETARY OF THE ARMY'S DECISION TO EXEMPT FROM COURT-MARTIAL SERVICE OFFICERS OF THE SPECIAL BRANCHES NAMED IN AR 27-10 WHICH VIOLATED ARTICLE 25(d)(2), UCMJ, PREJUDICED SERGEANT AKBAR'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Law and Argument

Appellant is correct that this Court held that the guidance published in 2005 by the Secretary of the Army in Army Regulation (AR) 27-10 which excluded certain special branch personnel violated Article 25, UCMJ.[782] This guidance was in effect at all times during the course of appellant's court-martial. However, appellant is entitled to no relief.

First, appellant has waived the issue. "[F]ailure to raise the issue of a systemic exclusion of a group is waived if the

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[780] SJA at 541-43, 560.
[781] *Styers v. Schriro*, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008)(citing *Kimmelman v. Morrison*, 477 U.S. 365, 390-91 (1986)).
[782] *United States v. Bartlett*, 66 M.J. 426, 427 (C.A.A.F. 2008) (holding that AR 27-10 ch. 7 impermissibly contravened provisions of Art. 25); U.S. Dep't of Army, Reg. 27-10, *Legal Services: Military Justice*, ch. 7 (6 September 2002).

issue is not raised when it is discovered."[783] The defense specifically stated they had no objection to the manner in which Lieutenant General (LTG) Vines or Major General (MG) Packett personally selected and detailed the members of the panel.[784]

Second, the record makes clear that the ultimate selection of the panel was not limited by the guidelines in AR 27-10. While the original convening authority, LTG Vines, was advised in selecting a panel in accordance with AR 27-10,[785] when MG Packett adopted the court-martial panel, he was advised that he could "choose *anyone* in your court-martial jurisdiction for service as a court member provided they meet the Article 25 criteria listed above" without the limitation of AR 27-10.[786] Therefore, the final convening order designating the panel was not actually affected by AR 27-10.

Third, even assuming error for following the guidelines in AR 27-10, appellant is still entitled to no relief. Contrary to appellant's arguments, because any such error is statutory, not

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[783] *United States v. Curtis*, 44 M.J. 106, 132-33 (C.A.A.F. 1996) (citing R.C.M. 912(b)(3), *People v. Blackwell*, 646 N.E.2d 610 (Ill. 1995) and Fed.R.Crim.P. 12(b)). In *Curtis*, CAAF found that allegations of the convening authority violated Article 25, UCMJ, by systematically excluding enlisted members and women from the panel were waived. "If the defense wanted to explore the convening authority's role and knowledge, they could have raised this issue at trial. Because it was not raised at trial, we hold that this issue was waived." *Curtis*, 44 M.J. at 133.
[784] JA at 288.
[785] JA at 2299; SJA at 359-70.
[786] JA at 1886-87 (emphasis in original).

constitutional, it is not structural and is consequently tested for prejudice.[787] While the burden is on the Government to show the error was harmless,[788] the factors addressed in *Bartlett* make clear that there is no prejudice in this case. There, this Court considered that: 1) there is no evidence that the Secretary of the Army enacted the regulation with an improper motive; (2) there is no evidence that the convening authority's motivation in detailing the members he assigned to Appellant's court-martial was anything but benign—the desire to comply with a facially valid Army regulation;[789] (3) the convening authority who referred Appellant's case to trial was a person authorized to convene a general court-martial; (4) Appellant was sentenced by court members personally chosen by the convening authority from a pool of eligible officers;[790] (5) the court members all met the criteria in Article 25, UCMJ; and, (6) as the military judge found, the panel was "well-balanced across gender, racial, staff, command, and branch lines."[791] All of these factors apply to this case.

Further, appellant's arguments concerning prejudice stemming from the receptiveness of certain branches to

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[787] *Bartlett*, 66 M.J. at 430.
[788] *Bartlett*, 66 M.J. at 431.
[789] The military judge found in this case that there was no "nefarious purpose" in the convening authority's selection of panel members. SJA at 14.
[790] JA at 2298-2309; SJA at 458-59.
[791] *Bartlett*, 66 M.J. at 431; JA at 430.

mitigation evidence, mental-health related evidence, and evidence concerning Islam, is nothing more than speculation.[792] Appellant has no right to panel members with specialized skill or knowledge.[793]

The panel members that sat for appellant's court-martial were all qualified under Article 25, UCMJ, and were properly balanced so that appellant's case was heard fairly and impartially.[794] Consideration of each *Bartlett* factor – particularly the actual composition of the panel – reveals that any alleged error in the convening authority's selection process was harmless.

A.XI

BECAUSE SERGEANT AKBAR'S TRIAL DEFENSE COUNSEL FAILED TO ADEQUATELY INVESTIGATE HIS CASE, THE ARMY COURT ERRED IN DENYING FUNDING TO RETAIN SERGEANT AKBAR'S REQUESTED FORENSIC PSYCHIATRIST AND PSYCHOLOGIST, DR. RICHARD DUDLEY AND DR. JANICE STEVENSON, OR, IN THE ALTERNATIVE, ORDERING THE GOVERNMENT TO PROVIDE ADEQUATE SUBSTITUTES. FURTHER INVESTIGATION BY APPELLATE DEFENSE COUNSEL ALSO REVEALS THE NECESSITY OF OBTAINING THE EXPERT ASSISTANCE OF CLINICAL PSYCHOLOGIST DR. WILBERT MILES.

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[792] *Bartlett*, 66 M.J. at 431 n.4.

[793] *See United States v. Straight*, 42 M.J. 244, 250 (C.A.A.F. 1995).

[794] The lack of certain branches does not mean appellant did not receive a fair trial. Both the Sixth Amendment and Article 25 work toward the same purpose; not to secure a "representative" panel but an impartial one. *See Holland v. Illinois*, 493 U.S. 474, 480 (1990); *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) *cert. denied*, 543 U.S. 1188 (2005).

Standard of Review

A service court's decision on whether to grant funding for expert assistance is reviewed for an abuse of discretion.[795]

Law and Argument

"[I]t is well-established that an accused service member has a limited right to expert assistance at government expense to prepare his defense."[796] Rule for Courts-Martial (R.C.M.) 703 and applicable case law lay out the factual predicate an accused must establish before expert assistance is required.[797]

To be entitled to expert assistance at government expense, appellant is required to show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the defense; and (3) why defense counsel are unable to gather and present the information that the expert assistance would be able to develop.[798] This same standard applies to both capital and non-capital cases.[799]

This case is squarely on point with *United States v. Gray*. In *Gray*, the Army Court denied a request for additional

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[795] *Gray*, 51 M.J. at 20 (citations omitted).
[796] *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996).
[797] *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994).
[798] *Gonzalez*, 39 M.J. at 461.
[799] *Gray*, 51 M.J. at 20 (citing *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985)); *United States v. Kreutzer*, 59 M.J. 773, 776 (Army Ct. Crim. App. 2004)(citing *Gonzalez,* 39 M.J. at 461).

psychiatric experts.[800] This Court then denied two petitions for extraordinary relief aimed at compelling the Army Court to provide the experts.[801] On direct review under Article 67, UCMJ, this Court held that because the Army Court "had a sufficient basis in the record for considering the mental-state issues before it," additional defense expenditures were not reasonably necessary.[802] Similarly, there is more than sufficient evidence in appellant's record of trial for all parties to adequately address appellant's claims regarding his mental health. From the date of his murders, appellant was repeatedly examined by psychiatrists, psychologists, neuropsychologists, neuropsychiatrists, and social workers.

The Army Court fully considered appellant's request for the appointment of expert assistance, and denied that request because "appellant has not made a sufficient showing that the requested expert assistance is necessary." After filing a petition for extraordinary relief with this Court on the subject, this Court similarly denied such petition.

Appellant was examined by at least eight different psychiatrists and psychologists during the pendency of his

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[800] *Gray*, 51 M.J. at 20.
[801] *Id*. (citing 34 M.J. 164 (1991) and 40 M.J. 25 (1994)).
[802] *Gray*, 51 M.J. at 21 (citations omitted).

trial, three of whom were working directly for the defense,[803] which included an entire battery of neuropsycholgical testing and even a "brain scan."[804] These tests were conducted between May 27-29, 2003, and were reviewed by Dr. Clement in March of 2005, in consultation with Dr. Woods.[805] Dr. Diebold discussed this "battery of psychiatric tests" during his testimony.[806] Dr. Woods concluded at trial that, of these numerous tests, the MMPI was the "most important."[807]

The issue and exploration of appellant's mental health is not a new subject in this case, but was heavily litigated during his court-martial. Appellant's entire argument is predicated on his conclusory assertion that he received ineffective assistance of counsel at trial; an argument that is contradicted by the record. Appellant does not want or need experts to understand

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[803] Dr. Southwell (neuropsychologist) and Dr. Diebold (forensic psychiatrist) served on the first sanity board. SJA at 531. Dr. Dominador Gobalez (forensic psychiatrist) conducted a second sanity board after appellant stabbed SPC Mitchell. SJA at 462. Dr. Walker (forensic psychologist), Dr. Woods (forensic neuropsychiatrist), Dr. Clement (neuropsychologist), and Dr. Tuton (appellant's childhood psychologist) were all assigned as experts for the defense. Dr. Walting was a neurologist who examined appellant in June of 2004 and again in 2005 due to his "arousal" problems (i.e. "excessive sleepiness"). JA at 2389-93; SJA at 316-26. Furthermore, appellant received psychiatric examinations by Dr. (COL) Randy Dymond, and Dr. (COL) John Richmond while he was in the Regional Confinement Facility at Ft. Knox. JA at 1981-9.

[804] SJA at 524.

[805] JA at 2425-28; SJA at 524-28.

[806] SJA at 279-80.

[807] JA at 824.

the record or to assess the performance of trial defense counsel; appellant has already made clear his claims. Appellant's goal is to manufacture new mental health evidence, through his own hand-picked experts, that he believes will be more favorable for his appeal than the voluminous mental health evidence in the record of trial.

However, appellate courts "do not welcome descent into the 'psycholegal' quagmire of battling psychiatrists and psychiatric opinions, especially when one side wages this war against its own experts by means of post-trial affidavits."[808] The fact that appellant can hire new doctors that might diagnose him differently does not mean that appellant's mental health examinations were inadequate or that he is entitled to new experts. "We initially note that divergence of opinion among psychiatrists is not novel and does not provide a legal basis for concluding that one or the other is performing inappropriate tests or examinations. In *Ake*, the Supreme Court said: 'Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on care and treatment, and on likelihood of future dangerousness.'"[809]

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[808] *Gray*, 51 M.J. at 17 (citation omitted).
[809] *Gray*, 51 M.J. at 17 (quoting *Ake*, 470 U.S. at 81).

As in *Gray*, additional expert assistance is not required. The myriad of psychological tests and examinations already conducted on appellant, none of which found him to be schizophrenic, are sufficient for review of this case. Additional expert assistance for appellant to merely conjure a favorable diagnosis is not necessary.

A.XII

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY PROVIDING RECONSIDERATION INSTRUCTIONS THAT FAILED TO INSTRUCT THE PANEL THAT 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.

Standard of Review

An instruction that is not objected to at trial by an accused is reviewed for plain error.[810]

Law and Argument

The fundamental flaw in appellant's argument is his premise that a panel is precluded from reconsidering a sentence to life with a view toward increasing it to death. The plain language of R.C.M. 1009(e)(3)(A) (view towards increasing) does not include an exception for capital cases. By comparison, R.C.M. 1009(e)(3)(B) (view towards decreasing), does include an exception for capital cases regarding the number of votes

[810] *United States v. Thomas*, 46 M.J. 311, 314 (C.A.A.F. 1997)(citing *United States v. Olano*, 507 U.S. 725 (1993); R.C.M. 1005(f)).

required for reconsideration.[811] In light of the fact that statutes are required to be applied according to their plain language,[812] and the President specifically did not include an exception for capital cases in R.C.M. 1009(e)(3)(A), despite having included one in the very next sub-section, (e)(3)(B), it is clear that the President did not intend for R.C.M. 1009 to preclude panels from reconsidering a sentence with a view towards increasing it to death.[813]

Every authority appellant cites for the proposition that a panel cannot reconsider a sentence less than death with a view towards increasing it to death refer solely to the prohibition against reconsideration of *findings* for the purpose of making the death penalty eligible. Appellant does not cite to a single case that supports his contention that a jury or panel in a capital case is prohibited from reconsidering its sentence determination.

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[811] A capital case requires only a single member to vote to reconsider, as opposed to one-fourth or one-third in other cases. R.C.M. 1009(e)(3)(B).

[812] *United States v. Kearns*, __ M.J. __, slip op. at 10 (C.A.A.F. 2014).

[813] *Russello v. United States*, 464 U.S. 16, 23 (1983)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")(quoting *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972); *See United States v. Wooten,* 688 F.2d 941, 950 (4th Cir. 1982).

The military judge properly instructed the panel regarding the procedures for determining a sentence in a capital case.[814] After informing the military judge that "reconsideration has been proposed," the panel confirmed that they had followed the court's instructions and had reached a sentence with the required concurrence.[815] Because the panel had reached a sentence, this necessarily requires that they had already voted on the requisite "gates" under R.C.M. 1004(b)(4).[816] After voting on the "gates," the panel was therefore required to vote first on the least severe sentence, life with the possibility of parole.[817] The order would therefore have been to vote on life, then life without parole, and finally death. Once the requisite concurrence of the number of members on any sentence was reached, voting was required to cease because a sentence had been found.[818] Based on this procedure, only one of two possible scenarios occurred prior to reconsideration: (1) The panel unanimously voted to sentence appellant to death (after having

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[814] JA at 1509-11, 1520-21, 1523-25.
[815] JA at 1538.
[816] *See* R.C.M. 1004(b)(7)(panel does not vote for a particular sentence under R.C.M. 1006 until after first voting on the aggravating factors).
[817] R.C.M. 1006(d)(3)(A); *Thomas*, 46 M.J. at 313 ("[t]he clear import of these Manual provisions is that the military judge must instruct the members that they are required to vote on a life sentence before they vote on a proposal for a death sentence."); JA at 1521.
[818] JA at 1525 ("once a proposal has been agreed to by the required concurrence, then that is your sentence.").

already failed to reach a concurrence on life or life without parole); or (2) The panel voted to sentence appellant to either life or life without parole, and therefore never had the opportunity to vote on a sentence to death. Because they actually reached a sentence, there is no possible scenario where the panel could have voted on a sentence to death and failed to reach a concurrence.[819] Consequently, appellant's reference to the "hung-jury" instruction is inapplicable to this case.

R.C.M. 1009 allows for reconsideration in either of these two possible scenarios. The military judge correctly instructed the panel in accordance with that rule that a majority vote was required to re-open deliberations with a view towards increasing either life sentence to death, and only a single vote was required to re-open deliberations with a view towards decreasing a death sentence.[820]

The military judge also correctly did not instruct the panel that they were required to re-vote on the "gates" under R.C.M. 1004. Because the panel had originally reached a sentence, it necessarily meant that they had already completed

[819] As the military judge informed the panel, if they had voted on all of the possible sentences without reaching a concurrence, they were required to inform the bailiff for the court to be reopened. JA at 1525. This never occurred.
[820] R.C.M. 1009(e)(3); JA at 1538-1540.

their voting on the "gates."[821] Appellant is prohibited from piercing the veil of the panel's deliberations with guess-work and supposition that they may not have voted properly on these factors.[822]

Conclusion

A panel is free under R.C.M. 1009 to reconsider a sentence with a view towards increasing it to death. Because the panel had followed the instructions of the military judge and arrived at a sentence, they were free to reconsider it. The military judge provided the correct instructions on reconsideration, and there is no reason to question that the panel followed them in arriving at appellant's death sentence. There was no error, let alone plain error, in this case.

A.XIII

THE MILITARY JUDGE ERRED IN NOT SUPPRESSING THE STATEMENT "YES" BY SERGEANT AKBAR TO MAJOR WARREN, WHEN THAT STATEMENT WAS GIVEN WHILE SERGEANT AKBAR WAS AT GUNPOINT, IN CUSTODY, AND BEFORE SERGEANT AKBAR RECEIVED RIGHTS WARNINGS UNDER EITHER MIRANDA V. ARIZONA OR ARTICLE 31(b), UCMJ

Standard of Review

[821] R.C.M. 1004(b)(7)(only "[a]fter voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.").
[822] Mil. R. Evid. 509, 606(b).

A military judge's ruling as to the suppression of evidence is reviewed for an abuse of judicial discretion.[823]

Law and Argument

The military judge fairly summarized the facts relevant to this issue in his ruling, which were adopted by the Army Court.[824] Because MAJ Warren was acting solely in an operational capacity to determine the identity of the threat to Camp Pennsylvania, and his questions of appellant were limited solely to accomplishing that mission, rights warnings were not required under Article 31, UCMJ.[825] Even assuming rights warnings were required, the "public safety exception" would undoubtedly apply in this circumstance where an apparent active attack was occurring at a military outpost mere miles from the Iraqi border on the eve of combat operations, where the identity of the perpetrator(s) was unknown.[826] As explained in *United States v. Jones*, MAJ Warren's only purpose in asking appellant "did you do

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[823] *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005).
[824] JA at 1790-95.
[825] *United States v. Loukas*, 29 M.J. 385, 389 (C.M.A. 1990); *United States v. Cohen*, 63 M.J. 45, 50 (C.A.A.F. 2006).
[826] *See, e.g., New York v. Quarles*, 467 U.S. 649 (1984); *United States v. Shepard*, 34 M.J. 583 (A.C.M.R. 1993)(trial court admitted statements under the "public safety" exception); *United States v. Jones*, 19 M.J. 961 (A.C.M.R. 1984)("as with *Miranda*, the underlying purpose of Article 31(b) is not offended when the occasion for unwarned questioning is to save a human life or avoid serious injury.").

this" was to provide security, save human life, and avoid further serious injury.[827]

Finally, even assuming the confession was improperly admitted, such error is harmless beyond a reasonable doubt based on the undoubtedly overwhelming nature of the remaining evidence of guilt.[828]

A.XIV - XVI

A.XIV

BASED ON THE SUPREME COURT'S REASONING IN *RING V. ARIZONA*, 536 U.S. 584 (2002), CONGRESS UNCONSTITUTIONALLY DELEGATED TO THE PRESIDENT THE POWER TO ENACT ELEMENTS OF CAPITAL MURDER, A PURELY LEGISLATIVE FUNCTION.

A.XV

FACTS THAT INCREASE THE MAXIMUM SENTENCE OF AN OFFENSE ARE ELEMENTS OF A GREATER OFFENSE. THE UCMJ EXPRESSLY REQUIRES THAT GENERAL COURT-MARTIAL CHARGES BE SWORN, INVESTIGATED, AND REFERRED BY A CONVENING AUTHORITY WHO IS NOT AN ACCUSER. DID THE PROCEDURES PROVIDED UNDER R.C.M. 1004 VIOLATE SERGEANT AKBAR'S RIGHT TO DUE PROCESS BY ALLOWING THE CONVENING AUTHORITY TO UNILATERALLY APPEND UNSWORN AND UNINVESTIGATED CAPITAL AGGRAVATING ELEMENTS TO HIS MURDER SPECIFICATIONS AT REFERRAL?

A.XVI

"WHEN A FINDING OF FACT ALTERS THE LEGALLY PRESCRIBED PUNISHMENT SO AS TO AGGRAVATE IT, THE FACT NECESSARILY FORMS A CONSTITUENT PART OF A NEW OFFENSE AND MUST BE SUBMITTED

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[827] *United States v. Jones,* 19 M.J. 961 (A.C.M.R. 1984).
[828] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); s*ee also United States v. Catrett*, 55 M.J. 400, 405-406 (C.A.A.F. 2001)(finding the "public safety" exception applied under the circumstances and also finding any error in admitting the statement would have been harmless beyond a reasonable doubt given the evidence against appellant).

TO THE JURY." *ALLEYNE*, 133 S.C.T 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).

Standard of Review

The constitutionality of capital sentencing procedures is a question of law reviewed de novo.[829]

Law and Argument

Both the Supreme Court of the United States and this Court have unequivocally found the military's capital sentencing procedures under R.C.M. 1004 to be constitutional.[830] Appellant nevertheless argues that the Supreme Court's later jurisprudence

[829] *See United States v. Cheely*, 36 F.3d 1439, 1441 (9th Cir. 1994).
[830] *Loving v. United States*, 517 U.S. 748 (1996); *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991).

now implicitly overrules those cases and constitutionally invalidates that military sentencing scheme.[831]

Appellant relies on *Apprendi*,[832] *Ring*,[833] and *Alleyne*[834] to support his proposition that the aggravating factors under R.C.M. 1004(c) are "elements" of "capital murder" and consequently must be: (1) Enacted by Congress, not the President; (2) Alleged in the Charge Sheet; (3) Investigated at the Article 32, UCMJ hearing; and (4) Proven, along with any other aggravating circumstance under R.C.M. 1001(b)(4), to substantially outweigh any mitigating circumstances under R.C.M. 1004(b)(4)(C) beyond a reasonable doubt.

Beginning with *Apprendi*, the Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond

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[831] Overruling by implication is a "disfavored practice." *United States v. Pack*, 65 M.J. 381, 383-84 (C.A.A.F. 2007)(citing *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005). "[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v Khan*, 522 U.S. 3, 19 (1997). "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[832] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[833] *Ring v. Arizona*, 536 U.S. 584 (2002).

[834] *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

a reasonable doubt."[835] In *Ring*, the Court applied this holding specifically to aggravating factors in capital sentencing schemes, requiring that they also be submitted to a jury and proven beyond a reasonable doubt.[836] In *Alleyne*, the Court has recently extended this requirement to facts which increase the statutory minimum sentence.[837]

Appellant's arguments are all based primarily on the Supreme Court's statements that "sentencing enhancements" and "aggravating factors" are "the functional equivalent of an element of a greater offense."[838] However, each of these decisions was based solely on the Sixth Amendment Right to a Jury Trial, and requires only that the "fact" in question be submitted to a jury and proven beyond a reasonable doubt.[839]

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[835] *Apprendi*, 530 U.S. at 490.
[836] *Ring*, 536 U.S. at 609.
[837] *Alleyne*, 133 S. Ct. at 2162-63.
[838] *Apprendi*, 530 U.S. at 494 n. 19; *Ring*, 536 U.S. at 609; *Alleyne*, 133 S. Ct. at 2158-63.
[839] *Apprendi*, *Ring*, and *Alleyne* were limited solely to the question of whether the Sixth Amendment jury trial right required that the "factors" be submitted to the jury and proven beyond a reasonable doubt. *Apprendi*, 530 U.S. 490; *see also Evans v. State*, 389 Md. 456, 475, 886 A.2d 562, 573 (2005)("it is noteworthy that, in confirming the essence of its footnote in *Jones*, the *Apprendi* Court, aware that it was dealing with a State prosecution, dropped any reference to the need to include elements in an indictment."); *Ring,* 536 U.S. at 588 ("This case concerns the Sixth Amendment right to a jury trial in capital prosecutions"); *Id.* at 597 n. 4 ("Ring's claim is tightly delineated. He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him"); and *Id.* at 609 ("For the reasons stated, we hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment

Based on the limited nature of these holdings, therefore, there is no question that the military sentencing scheme under R.C.M. 1004 explicitly complies with the direct holdings of *Appprendi*, *Ring*, and *Alleyne*.[840] It requires that the members find that at least one of the listed aggravating factors exists beyond a reasonable doubt.[841]

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jurisprudence cannot be home to both. Accordingly, we overrule *Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty* ")(emphasis added); *Alleyne*, 133 S. Ct. at 2156, 2163-64.

[840] It is not entirely clear that the rule in *Apprendi* would even apply to the specific circumstances of this case. As *Apprendi* held, "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). The emphasized portion of the rule was based on the Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) that there was no error for failing to allege a "sentencing factor" where that "factor" was merely "the prior commission of a serious crime. *Almendarez-Torres*, 523 U.S. at 230. *Apprendi* continued to apply this limited exception because "[b]oth the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the realty that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."). In this case, because the "aggravating factor" is the fact of being convicted of another charge of premeditated murder, as in *Almendarez-Torres*, there is logically nothing left to be determined by the trier of fact. The "fact" that an accused has been convicted of multiple premeditated murders at the same time is established solely by the panel's verdict, which itself contains all required due process considerations. Consequently, there does not appear to be any logical reason why *Apprendi*'s holding should apply to the particular aggravating factor in this case.

[841] R.C.M. 1004(b)(4)(A), (c).

Appellant's arguments intending to extend the holdings in *Apprendi*, *Ring*, and *Alleyne* beyond the Sixth Amendment jury trial right are addressed below.

I. Enacted by Congress, not the President

Appellant is correct that the elements of an offense must be promulgated by Congress and cannot be delegated to the President.[842] However, appellant's argument that because the Supreme Court has referred to "aggravating factors" as "the functional equivalent of an element of a greater offense,"[843] Congress is required to have promulgated them has already been directly rejected by the Supreme Court.

First, the Supreme Court has made clear that the rule announced in *Ring* is merely a procedural, rather than a substantive rule.[844] The Court unambiguously rejected the argument that *Ring* transformed "aggravating factors" into substantive elements of a capital offense.[845] It clarified that "[t]his Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact

[842] *United States v. Curtis*, 32 M.J. 252, 260 (C.M.A. 1991); *United States v. Castellano*, 72 M.J. 217, 221 (C.A.A.F. 2013).
[843] *Ring*, 536 U.S. at 609.
[844] *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).
[845] *Schriro*, 542 U.S. at 354.

essential to the death penalty. The former was a procedural holding; the latter would be substantive."[846]

Second, and directly on point, in *United States v. Booker*,[847] the Court, in addressing the application of *Apprendi* to the federal sentencing guidelines, explicitly rejected the argument that "any holding that would require Guidelines sentencing factors to be proved to a jury beyond a reasonable doubt would effectively transform them into a code defining elements of criminal offenses," resulting in "an unconstitutional grant to the Sentencing Commission of the inherently legislative power to define criminal elements."[848] The Court noted that "[t]he constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof."[849]

The Court made clear that its holding did not affect its prior upholding of the delegation to the Sentencing Commission

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[846] *Schriro*, 542 U.S. at 354.
[847] *United States v. Booker*, 543 U.S. 220 (2005). Appellant does not even cite to this directly controlling case.
[848] *Booker*, 543 U.S. at 241.
[849] *Booker*, 543 U.S. at 242 (quoting *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999)).

of the authority to promulgate the Sentencing Guidelines.[850] In the same manner, the decisions in *Apprendi*, *Ring*, and *Alleyne* do not alter the Court's upholding the delegation of authority to the President in *Loving* to enact the capital sentencing scheme.[851]

II. Alleged in the Charge Sheet

Appellant's argument that the Constitution requires "aggravating factors" be plead in the charge sheet is based primarily on the Supreme Court's holding in *Jones v. United States* that "under the Due Process of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt."[852] The Supreme Court reiterated following *Apprendi* that "[i]n *federal prosecutions*, such facts must also be charged in the indictment."[853] However, insofar as that requirement is based on

[850] *Booker*, 543 U.S. at 242-43 (citing *Mistretta v. United States*, 488 U.S. 361 (1989)).
[851] *Loving*, 517 U.S. 748.
[852] *Jones*, 526 U.S. at 243 n.6 (emphasis added).
[853] *United States v. Cotton*, 535 U.S. 625, 627 (2002)(emphasis added). However, neither *Apprendi* nor *Ring* involved a challenge to the indictment. *Apprendi*, 530 U.S. at 477, n.3 (specifically noting that there was no indictment challenge); *Ring*, 536 U.S. at 597, n.4 (same).

the Grand Jury and Indictment Clauses of the Fifth Amendment, it is explicitly inapplicable to the military.[854]

The question remains, however, whether the notice system enacted by the President in R.CM. 1004 provides "fair notice" under the Due Process Clause of the Fifth Amendment[855] and the Notice requirements of the Sixth Amendment.[856] The system does meet those notice requirements, as exemplified through reference to analogous State jurisdictions, who are similarly not bound by the Grand Jury and Indictment Clauses of the Fifth Amendment.[857]

Nearly every state jurisdiction to consider the issue has determined that *Ring* does not require jurisdictions not bound by the Indictment Clause to allege the "aggravating factors" in the state indictment.[858] As one Court noted, "[t]he only possible

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[854] U.S. Const. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . .")(emphasis added).
[855] U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law.").
[856] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.").
[857] *See Alexander v. Louisiana*, 405 U.S. 625, 633 (1972)("Although the Due Process Clause guarantees petitioner a fair trial, it does not require the States to observe the Fifth Amendment's provision for presentment or indictment by a grand jury.").
[858] *See Evans v. State*, 389 Md. 456, 476-77, 886 A.2d 562, 573-74 (2005)(collecting cases); *McKaney v. Foreman*, 209 Ariz. 268, 100 P.3d 18, 2-23 (2004)("All state jurisdictions with one exception have thus far held, as we hold today, that aggravating factors need not be specified or alleged in the indictment.")(collecting cases); *United States v. Bernard*, 299 F.3d 467, 488 (5th Cir.

constitutional implication that *Ring* and *Apprendi* may have in relation to our capital defendants is that they must receive reasonable notice of aggravating circumstances, pursuant to the Sixth Amendment's notice requirement."[859] Because each of these States had a capital sentencing scheme enacted whereby accused persons are required to be provided notice of the "aggravating factors," the constitutional requirements for due process and notice are satisfied.[860] The Court of Appeals of Maryland has described the justification behind providing separate notice:

> It gives the defendant fair notice of what must be defended; coupled with the indictment, it protects the defendant from a subsequent prosecution for the same offense; it enables the defendant to prepare for both phases of the trial; to the extent relevant, it provides a basis for the court to consider the legal sufficiency of the

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2002)("*Ring* does not hold that indictments in capital cases must allege aggravating and mental state factors"); 5 Crim. Proc. § 19.3(a) (3d ed. Dec. 2013)(collecting cases, and noting that the "vast majority" of state courts addressing the question of whether the federal constitution requires a state pleading to allege an *Apprendi*-type element have held that there is no such requirement).

[859] *State v. Hunt*, 357 N.C. 257, 274, 582 S.E.2d 593, 604 (2003); *see also State v. Glass*, 136 S.W.3d 496, 513 (Mo. 2004)("[T]he states are not bound by the technical rules governing federal criminal prosecutions under the Fifth Amendment.")(quoting *Blair v. Armontrout*, 916 F.2d 1310, 1329 (8th Cir. 1990)).

[860] *See, e.g., Evans*, 389 Md. at 477-79, 886 A.2d at 574-75; *Terrell v. State*, 276 Ga. 34, 40-42, 572 S.E.2d 595, 602-03 (2002)("Under Georgia law, the State is not required to allege the statutory aggravating circumstances in the indictment, and it may provide a defendant notice of the statutory aggravators through other means, such as the written notice of intent to seek the death penalty."); *State v. Glass*, 136 S.W.3d 496, 513 (Mo. 2004).

> indictment; and it informs whether and under what circumstances a death sentence is permissible. There is no prejudice to a defendant from this overall statutory approach.[861]

Similar to the States, the President, based on his delegated authority under Article 36, UCMJ, has set forth the procedures for providing notice to an accused that the Government intends to seek the death penalty and of which "aggravating factors" the Government intends to pursue. R.C.M. 1004(b)(1) requires the convening authority to "indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet" at the time of referral. Thereafter, prior to arraignment, the trial counsel is required to provide written notice to the accused "of which aggravating factors under subsection (c) of this rule the prosecution intends to prove."[862] These requirements clearly comport with similar State jurisdictions' statutes governing how notice is to be provided a capital accused, all of which comply with Constitutional requirements for "fair notice."[863]

In this case, the referred charge sheet, dated March 2, 2004, specifically instructed that appellant's case was "to be

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[861] *Evans*, 389 Md. at 478-79.
[862] R.C.M. 1004(b)(1)(B).
[863] *See Evans*, 389 Md. at 472-73 (notice required at least 30 days before trial); *State v. Nichols*, 201 Ariz. 234, 237, 33 P.3d 1172, 1176 (2001)(20 days); *State v. Glass*, 136 S.W.3d 496, 513 (Mo. 2004)("at a reasonable time before the commencement of the first stage of a capital trial.").

tried as a capital case."[864] The Government provided appellant written notice of the aggravating factor it intended to prove on March 9, 2004, prior to arraignment and over one year before appellant's court-martial began.[865] Over thirteen months of notice unquestionably satisfies constitutional requirements.[866]

Finally, even assuming it was error to not include the "aggravating factor" within the charge sheet, appellant cannot establish prejudice.[867] First, appellant has woefully failed to explain how the aggravating factor - multiple murder - should have been alleged, in that the charge sheet, on its face, includes two charges under Article 118(1), UCMJ — the requirement for R.C.M. 1004(c)(7)(J). As a matter of logic, there is nothing that would need to be amended on the charge sheet.

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[864] JA at 55-57.
[865] JA at 1653-54.
[866] *See, e.g., State v. Glass*, 136 S.W.3d 496, 513 (Mo. 2004)(5 months); *United States v. Robinson*, 367 F.3d 278, 287 (5th Cir. 2004)(4 months).
[867] UCMJ, art. 59(a). The Supreme Court has specifically said that errors flowing from *Apprendi* are tested for prejudice. *United States v. Cotton*, 535 U.S. 624 (2002). Further, every federal court that has considered the issue tests the failure to plead the aggravating factors in the indictment for prejudice. *See United States v. Quinones*, 313 F.3d 49 (2d Cir. 2002); *United States v. Jackson*, 327 F.3d 273 (4th Cir. 2003); *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001).

Second, appellant was undoubtedly on actual notice, well in advance of trial, that the government intended to seek the death penalty.[868]

Finally, the military judge discussed this issue in depth with appellant's counsel, and found that they would not have done anything differently had the aggravating factor been alleged in the charge sheet.[869] Consequently, appellant cannot establish prejudice.

III. Investigated at the Article 32, UCMJ hearing

Any argument that appellant has a constitutional right to have the "aggravating factors" investigated at an Article 32, UCMJ, hearing is dispelled by the simple fact that Article 32, UCMJ is a statutory, not a constitutional right. Neither Congress in the text of Article 32, UCMJ, nor the President in R.C.M. 405 has required that the "aggravating factors" be investigated during a hearing under those rules.

Even assuming error, appellant cannot establish prejudice.[870] Because the Article 32 Investigating Officer found reasonable grounds to believe that appellant was guilty of two specifications of Article 118(1), UCMJ, he would have been

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[868] *See* SJA at 337-54; SJA at 355-58 (30 May 2003 Defense Request for Witness Production).
[869] SJA at 15-19, 397-98.
[870] *See United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007)(errors in an Article 32 proceeding are evaluated under Article 59(a), UCMJ).

required (as a matter of logic and commonsense) to find that the aggravating factor of R.C.M. 1004(c)(7)(J) was present.

In addition, appellant could not proffer any legitimate additional evidence or argument that they would have offered at the Article 32 hearing had the aggravating factor been investigated there.[871] Consequently, any error in failing to investigate the "aggravating factor" is harmless.

IV. Proven, along with any other aggravating circumstance under R.C.M. 1001(b)(4), to substantially outweigh any mitigating circumstances under R.C.M. 1004(b)(4)(C) beyond a reasonable doubt.

The Fifth Circuit's analysis in *United States v. Fields* is the most cogent discussion of why appellant's argument is without merit:

> [T]he *Apprendi/Ring* rule should not apply here because the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a "highly subjective," "largely moral judgment" "regarding the punishment that a particular person deserves ...." In death cases, "the sentence imposed at the penalty stage ... reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." The *Apprendi/Ring* rule applies by its terms only to findings of fact, not to moral judgments.[872]

Because the weighing process is not a "finding of fact," it is logically impossible to require a panel to make the weighing

[871] SJA at 15-19, 397-98.
[872] *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007)(internal citations omitted).

determination "beyond a reasonable doubt."[873] R.C.M. 1004(b)(4)(C) is a "moral judgment," left to the panel to determine in their discretion whether the death penalty is an appropriate punishment.[874]

The Supreme Court's reasoning in *Kansas v. Marsh*,[875] also supports this conclusion. In *Marsh*, the Supreme Court reaffirmed "that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances."[876] If the Constitution can allow for a sentencing scheme to shift the burden of persuasion to an accused, it cannot require that the Government "prove" the balancing to the panel beyond a reasonable doubt. In addition, Justice Scalia in a concurring opinion in *Marsh*, specifically

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[873] *See Higgs v. United States*, 711 F. Supp. 2d 479, 540 (D. Md. 2010)("Whether the aggravating factors presented by the prosecution outweigh the mitigating factors presented by the defense is a *normative* question rather than a *factual* one. When jurors weigh aggravating and mitigating factors, they draw upon their sense of community norms in light of the totality of circumstances surrounding the criminal and the crime to determine a just punishment. In marked contrast, in order to find a first-order fact to be true, the jurors must evaluate the evidence presented to determine whether they believe in the truth of the fact beyond any reasonable doubt. In reaching this determination, jurors rely on their deductive and inductive reasoning and not upon normative considerations. While the line between facts and norms is not always a clear one, the process of determining a just punishment rests securely at the normative end of the fact/norm continuum.").

[874] *See Loving*, 41 M.J. at 278.

[875] *Kansas v. Marsh*, 548 U.S. 163 (2006).

[876] *Marsh*, 548 U.S. at 173 (citing *Walton v. Arizona*, 497 U.S. 639 (1990)).

recognized (without disagreement) that a reasonable doubt standard is not required in the weighing process: "[T]he State could, as Marsh freely admits, [adopt a] scheme requiring the State to prove *by a mere preponderance of the evidence* that the aggravators outweigh the mitigators."[877]

Based on the foregoing, the military judge did not err in refusing to instruct the panel that they were required under R.C.M. 1004(b)(4)(C) to find that the aggravating circumstances substantially outweighed the extenuating and mitigating circumstances beyond a reasonable doubt.

A.XVII

THE LACK OF A SYSTEM TO ENSURE CONSISTENT AND EVEN-HANDED APPLICATION OF THE DEATH PENALTY IN THE MILITARY VIOLATES BOTH SERGEANT AKBAR'S EQUAL PROTECTION RIGHTS AND ARTICLE 36, UCMJ.

The foundation of appellant's argument is the flawed premise that Due Process and Equal Protection require that the decision to pursue a death penalty case within the military justice system must be the same as the one followed by the Department of Justice, pursuant to the United States Attorney's Manual (USAM). However, federal courts have consistently held that these procedures do not confer any substantive or

[877] *Marsh*, 548 U.S at 187, n.2.

procedural rights.[878] Because the provisions of the USAM offer no legal protections to any accused within the civilian federal system, appellant cannot be denied the equal protection of legal safeguards that do not exist.

A.XVIII

SERGEANT 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.

Additional Facts

Appellant underwent an R.C.M. 706 sanity board evaluation, which found that appellant was not suffering from a severe mental disease or defect, and could appreciate the criminality of his actions.[879] Appellant was not suffering from a mental impairment, a mental condition, a mental deficiency, a character

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[878] *United States v. Jackson*, 327 F.3d. 273, 295 (4th Cir. 2003), *cert. denied*, 540 U.S. 1019 (2003); *United States v. Lopez-Matias*, 522 F. 3d 150, 155-56 (1st Cir. 2008) (citing *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir. 1990); *United States v. Lee*, 274 F.3d 485, 493 (8th Cir. 2001) (United States Attorneys' Manual not enforceable by individuals); *Nichols v. Reno*, 124 F.3d 1376, 1376 (10th Cir. 1997) (defendant has no "protectable interest" in enforcement of death penalty protocols); *United States v. Myers*, 123 F.3d 350, 355-56 (6th Cir. 1997) ("[A] violation by the government of its internal operating procedures, on its own, does not create a basis for suppressing ... grand jury testimony."); *United States v. Gillespie*, 974 F.2d 796, 800-02 (7th Cir. 1992); *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987)).

[879] JA at 958-59.

disorder, or a behavioral disorder.[880] The only diagnoses made by the board were that appellant was suffering from mild sleep apnea and Dysthymic disorder, which is "a low-grade, long-standing depression," most commonly referred to as "having the blues."[881]

The primary defense psychological expert, Dr. Woods, testified that appellant likely suffered from a schizotypal disorder.[882] He believed appellant demonstrated some symptoms of schizophrenia, but was unable to actually diagnose him as schizophrenic.[883] However, Dr. Woods specifically agreed that appellant was not insane, and that he was capable of understanding the lethality of his actions.[884]

Law and Argument

The Supreme Court has declared, based on evolving standards of decency, that imposition of the death penalty against juveniles[885] and those who are found to be mentally retarded,[886] violates the Eight Amendment's prohibition on cruel and unusual punishment. Furthermore, the Supreme Court held that a person cannot be executed if, at the time of the execution, they are

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[880] JA at 960; SJA at 278.
[881] JA at 958-59.
[882] JA at 847-48.
[883] JA at 849.
[884] JA at 873, 911.
[885] *Roper v. Simmons,* 543 U.S. 551 (2005).
[886] *Atkins v. Virginia,* 536 U.S. 304 (2002).

insane.[887] However, appellant was neither a juvenile, nor mentally retarded, at the time he murdered CPT Siefert and MAJ Stone, and cannot show that he is incompetent to be executed. Instead, appellant attempts to create an entirely new class of murderer who is no longer subject to execution: those who have a "severe mental disease or defect but are not legally insane."

Courts have uniformly rejected appellant's argument.[888] The Supreme Court itself has rejected certiorari on this precise issue,[889] and has in fact allowed the execution of others

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[887] *Ford v. Wainwright,* 477 U.S. 399 (1986).

[888] *Mays v. State*, 318 S.W.3d 368 (Tex.Crimp.App. 2010), *cert. denied*, 131 S. Ct. 1606 (2011) (finding that *Atkins* did not extend to a mentally ill defendant); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006), *cert. denied*, 546 U.S. 1161 (2006) (citing *In re Woods*, 155 Fed. Appx. 132, 136 (5th Cir. 2005))(*Atkins* does not apply to mental illness); *Carroll v. Secretary, DOC*, 574 F.3d 1354, 1370 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 500 (interpreting "*Atkins* to prohibit the execution of the mentally ill . . . would constitute a new rule of constitutional law."); *Magwood v. Culliver*, 481 F.Supp.2d 1262, 1273-74 (M.D. Ala. 2007), *aff'd in part, rev'd in part*, 555 F.3d 968 (11th Cir. 2009), *rev'd on alt grounds*, 130 S.Ct. 2788 (2010); *State v. Hancock*, 840 N.E.2d 1032, 1059-60 (Ohio 2006)("[m]ental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees."); *Lewis v. State*, 620 S.E.2d 778, 764 (Ga. 2005); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006); *State v. Weik*, 587 S.E.2d 683, 687 (SC 2002) (citations omitted) ("[W]hile it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant the imposition of such a sentence upon a mentally ill person is not disproportionate."); *People v. Runge*, 917 N.E.2d 940, 985-86 (Ill. 2009).

[889] *Wilson v. Ozmint*, 352 F.3d 847 (4th Cir. 2003), *cert. denied*, 542 U.S. 923 (2004); *Wilson v. Ozmint*, *Brief of Amicus Curiae National Alliance of the Mentally Ill, National Alliance of the Mentally Ill South Carolina, and National Mental Health*

diagnosed with mental illnesses since *Atkins* was decided.[890] Further, appellant fails to point to a single legislative body in the United States that has adopted his proposed standard.

Consequently, because appellant is not insane, a juvenile, or mentally retarded, the Eighth Amendment does not prohibit his sentence of death.

A.XIX

> THE MILITARY JUDGE ERRED IN ADMITTING THE GOVERNMENT'S CRIME SCENE PHOTOGRAPHS AS THEY WERE UNDULY PREJUDICIAL TO SERGEANT AKBAR'S DUE PROCESS RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENT. *SEE, E.G.,* APP. EXS. 157, 299 (JA 1870, 1901).

Appellant alleges that it was error to admit certain "crime scene photographs," but refers only to motions filed by trial defense counsel to exclude autopsy photographs; consequently, it is unclear what appellant is objecting to. As to the autopsy photographs, his counsel objected at trial to the admission of Prosecution Exhibits 35, 36, 38-42, 51, 54, 57, 217-222, 249-60, and 268. However, appellant withdrew his objection to exhibits

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Association in Support of Petitioner, 2004 WL 1159402 (2004), *cert. denied*, 542 U.S. 923 (2004).

[890] See, e.g., *Smith v. Spisak*, 130 S.Ct. 676 (2010)(wherein several witnesses testified to the accused's possible mental illness, including schizotypal and borderline personality disorders); *Panetti v. Quarterman*, 551 U.S. 930 (2007)(the Court reaffirming that severe mental illness alone is not sufficient to render an offender incompetent to be executed, despite a well-documented history of Panetti's mental illness).

35, 36, 38-42, 51, 54, and 57.[891] Of all the exhibits, only Prosecution Exhibits 39, 40, and 42 were ever admitted.[892] The trial defense counsel conceded that PE's 39 and 40 were not unduly prejudicial, but were merely of limited probative value.[893] They did argue that PE 42 was prejudicial merely because it showed the face of the deceased Soldier.[894]

Assuming the "crime scene photographs" refer to those of PAD 7, the Government admitted PEs 1-29, 31-32, and 34, which showed the tents appellant bombed and the location where he shot CPT Seifert, none of which appellant objected to at trial.[895]

Appellant fails to argue how the admission of these photographs would violate his due process rights. To the contrary, the admission of the limited number of photographs of the crime scene and injuries to the victims are precisely the type of evidence the Government is allowed to present.[896] Appellant fails to establish that the admission of these photographs violated Mil. R.'s Evid 401 or 403, let alone his

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[891] JA at 287.
[892] SJA at 195-96. The Government did not oppose the exclusion of Prosecution Exhibits 217-222, 249-60, and 268. JA at 1084.
[893] SJA at 45.
[894] SJA at 44.
[895] SJA at 49, 52-53, 56, 71-76, 105, 112-13, 148, 210, 226.
[896] "Photographs, although gruesome, are admissible if used to prove the time of death, identity of the victim, or exact nature of the wounds." *United States v. Gray*, 37 M.J. 730, 739 (A.C.M.R. 1992), *aff'd* 51 M.J. 1 (C.A.A.F. 1999). "It is not a matter of whether the photographs were inflammatory but whether they served a legitimate purpose." *Id*.

due process rights under the Fifth and Eighth Amendment. The military judge did not abuse his discretion by admitting the photographs.[897]

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.

Appellant fails to state, with any degree of reasonable specificity, any questions or comments to any member of the panel during *voir dire* that was objectionable. Furthermore, appellant took ample opportunity to *voir dire* the members and also discussed the possible theories of the defense to see if the members were willing to consider them. Appellant's oblique reference to R.C.M. 912(b) does not support any argument that the military judge committed plain error in allowing the parties opportunity for robust group and individual voir dire.[898]

A.XXI

> THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE MEMBER

[897] *United States v. Holt*, 58 M.J. 227, 230-31 (C.A.A.F. 2003)(military judge's ruling on the admissibility of evidence reviewed for abuse of discretion); *United States v. Smith*, 52 M.J. 337, 344 (C.A.A.F. 2000)(balancing test under Mil. R. Evid. 403 is left to the sound discretion of the military judge).
[898] *See United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005).

WITHOUT CAUSE, IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES 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).

This Court rejected this argument in *United States v. Loving*,[899] *United States v. Curtis*,[900] and *United States v. Gray*.[901]

A.XXII

THE PANEL'S RECONSIDERATION OF THE SENTENCE IN SERGEANT AKBAR'S CASE VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT 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).

Appellant claims, with no support, that the prohibition against reconsideration of *findings* for the purpose of making the death penalty eligible should be extended to reconsideration on sentence. Appellant cannot cite to a single case that

[899] *Loving*, 41 M.J. at 294-95 (citing *Batson v. Kentucky*, 476 U.S. 79, 98-99 (1986); and *Curtis*, 33 M.J. at 107 (internal citations omitted).
[900] *Curtis*, 33 M.J. at 131-33.
[901] *Gray*, 51 M.J. at 33.

supports the contention that a panel in a capital case is not allowed to reconsider its sentence determination.[902]

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.

Law and Argument

Appellant correctly notes that the Army Court failed to conduct a proportionality review in its decision. However, a remand for that purpose is neither appropriate nor necessary in this case. Because the proportionality review under Article 66, UCMJ, is not constitutionally required,[903] the general rule that nonconstitutional errors are reviewed for harmlessness should apply to a Court of Criminal Appeal's failure to conduct such a review.[904] There can be no question that had the Army Court conducted the proportionality review, it would have found appellant's case to be "generally similar" to cases where the death penalty has been imposed for like crimes. The death

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[902] See also the response to Assignment of Error A.XII.
[903] *Curtis*, 32 M.J. at 270.
[904] *See, e.g., United States v. Adams*, 44 M.J. 251, 252 (C.A.A.F. 1996); *United States v. Barnes*, 8 M.J. 115, 116-17 (C.M.A. 1979).

sentence for multiple murders would be "generally similar" to *United States v. Loving*, which found there that "the sentence is generally proportional to those imposed by other jurisdictions in similar situations."[905] If Loving's death sentence for multiple murders in the course of committing robberies is sufficiently proportional, there is no question that appellant's death sentence for multiple murders while carrying out a surreptitious attack with explosives and an assault rifle on his fellow Soldiers on the eve of the invasion of Iraq would be proportional.

Any remand to the Army Court to conduct a perfunctory proportionality review would be a mere formality here. While there may be cases where the failure to conduct a proportionality review would not be harmless, this is not that case.

B.II

THE ARMY COURT OF CRIMINAL APPEALS REFUSAL TO ACCEPT SERGEANT AKBAR'S EVIDENCE IN REBUTAL[*SIC*] TO GOVERNMENT APPELLATE EXHIBIT 13, A DECLARATION FROM TRIAL DEFENSE COUNSEL, AND REFUSAL TO GRANT THE FEW WEEKS NECESSARY TO OBTAIN DISCOVERY THAT

[905] *United States v. Loving*, 34 M.J. 956, 969 n.18, *on reconsideration,* 34 M.J. 1065 (A.C.M.R. 1992) *aff'd,* 41 M.J. 213 (C.A.A.F. 1994) *opinion modified on reconsideration,* 42 M.J. 109 (C.A.A.F. 1995) and *aff'd,* 517 U.S. 748 (1996) (citing *Boyde v. California,* 494 U.S. 370 (1990); *Walton v. Arizona,* 497 U.S. 639 (1990); *Clemons v. Mississippi,* 494 U.S. 738 (1990); *Blystone v. Pennsylvania,* 494 U.S. 299 (1990); and *Zant v. Stephens,* 462 U.S. 862 (1983).

WAS NOT TURNED OVER 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.

Law and Argument

Appellant cannot establish that he was prejudiced by the Army Court denying his request to admit certain appellate exhibits and for denying his extension request. Appellant cannot show why he was unable to obtain the additional documents in a more timely manner for review by the Army Court.

Appellant claims the declarations from Mr. Gant and Dr. Sachs,[906] were prepared in response to the second affidavit from trial defense counsel.[907] While this is technically correct, the relevance of the subjects which Mr. Gant and Dr. Sachs discuss in their untimely declarations were known to appellate defense counsel well before the second defense counsel affidavit was filed. Mr. Gant references only the trial defense counsels' first affidavit, and never responds to anything said directly in the second affidavit.[908] While Dr. Sachs provides more detail in response to the second affidavit concerning her conversation with trial defense counsel, there is no reason why this level of detail could not have been provided in her declaration filed on

[906] JA at 2900-06, 2908.
[907] JA at 2346-71.
[908] JA at 2900-06.

November 23, 2012,[909] wherein she had already discussed that conversation.

Further, appellant asserts it was error for the Army Court to allow for additional time to obtain new discovery. Appellant does not explain why he could not have obtained such discovery within the previous three years while his case was on appeal. In fact, the record makes clear that appellant's appellate defense counsel were fully capable of obtaining those documents at any time. The Army Court had issued an order for the trial defense counsel to provide complete access to appellant's appellate defense counsel on July 3, 2008, which was reiterated on February 8, 2011.[910] Appellant moved the court for additional orders on April 18 and 22, 2013, both of which were denied. Miraculously, despite not having an additional order from the Army Court, appellant was able to obtain the new documents[911] on his own accord. This establishes that the failure to timely locate and file these documents was due solely to the lack of effort on the part of appellate defense counsel.

Finally, this Court has already admitted the substantive documents that are relevant to this appeal for consideration. Based on this Court's plenary review authority under Article 67, UCMJ, for capital cases, he cannot establish that he was

[909] JA at 2800-01.
[910] JA at 3073-76.
[911] JA at 2909-3043.

prejudiced by the Army Court's failure to consider them, particularly where the only reason they were not considered was because appellant failed to expend the effort to obtain them in a timely manner. Finality is important in courts-martial, and appellant should not be allowed to wait to attempt to locate and file relevant information until after the Army Court has rendered its decision, where there is no reason it could not have been obtained earlier.

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[*SIC*] DENIED THE DUE PROCESS OF LAW GUARANTEED UNDER THE FIFTH AMENDMENT.

Standard of Review

This court reviews claims of error related to post-trial delay *de novo*.[912]

Law and Argument

In conducting a review of alleged dilatory post-trial processing, this Court begins by determining whether there is a facially unreasonable delay.[913] If there is a presumptively unreasonable delay, the court must balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the

[912] *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).
[913] *Moreno*, 63 M.J. at 136.

appellant's assertion of the right to timely review and appeal; and (4) prejudice.[914] No single factor is dispositive.[915]

In cases where the court finds no prejudice under the fourth factor of *Moreno* and *Barker*, a due process violation will be found only when "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."[916]

A. Length of the Delay

"The first factor under the *Barker* analysis . . . is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance."[917] 2,633 days is likely a facially unreasonable delay requiring consideration of the complete *Barker* factors.[918]

B. Reasons for the Delay

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[914] *Id*. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).
[915] *Id*. at 136.
[916] *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (*Toohey II*).
[917] *United States v. Schuber*, 70 M.J. 181, 188 (C.A.A.F. 2011)(quoting *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007)).
[918] Appellant's request for this Court to remand this case back to the Army Court to consider the *Barker* factors is unpersuasive. Had appellant desired the Army Court to review the post-trial processing in his case, he could have raised the issue before that Court.

In reviewing the second prong the court looks to "each stage of the post-trial period, the Government's responsibility for any delay, and any explanations for delay including those attributable to [appellant]."[919] A chart detailing the stages of post-trial processing is attached at Appendix 2.

Appellant's arguments concerning the post-trial processing of his case are absurd in light of the fact that the single longest delay was the over three years (1,153 days) appellant took to file his original brief with the Army Court. Appellant also took an additional 130 days to file his reply and supplemental briefs. In all, over 62% of the time appellant's case was on appeal was spent waiting for appellant to file his substantive pleadings. Had appellant desired his case to have been resolved in a timelier manner, he should have filed timelier briefs. This case harkens back to the concern expressed in *United States v. Quintanilla*:[920]

> [W]e find that a certain "revolving-door" mentality was the most significant obstacle to preparing and filing the brief. In other words, appellate defense counsel consciously or subconsciously deferred writing a brief in this case until they transferred or left active duty, when the case would be turned over to a successor appellate defense counsel . . . upon entering an appearance, each of these attorneys had an obligation to

[919] *Toohey II*, 63 M.J. at 359.
[920] *United States v. Quintanilla*, 60 M.J. 852 (N.M. Ct. Crim App. 2005), *aff'd in part, rev'd in part and remanded,* 63 M.J. 29 (C.A.A.F. 2006).

> read the record and file a brief in a timely manner.[921]

The remaining appellate delay included 301 days for the Government to file its response to appellant's 500 page brief, only a quarter of the time it took appellant. The 299 days following briefing it took for appellant's case to be argued on February 1, 2012, were based primarily on additional pleadings filed by appellant, as well as the assignment of a new judge to the panel on July 15, 2011. Following argument, the Army Court issued its opinion only 163 days later.[922]

The case took 567 days to proceed from sentence to Action. However, this was a capital case involving a 37 volume record of trial encompassing a 3,185 page transcript, 330 trial exhibits, and 316 appellate exhibits. Further, after the first addendum was signed following receipt of appellant's R.C.M. 1105 matters, appellant submitted additional clemency matters for consideration by the convening authority. Based on the logistical realities involving a voluminous record and the multiple requests for clemency submitted by appellant, the post-trial processing of appellant's case through action was reasonable.

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[921] *Quintanilla*, 60 M.J. at 868.

[922] This length of time from argument to decision falls within the range of other capital cases. *United States v. Gray*, 37 M.J. 730 (A.C.M.R. 1992)(251 days); *United States v. Quintanilla*, 60 M.J. 852 (N.M. Ct. Crim. App. 2005)(110 days); *Simoy*, 46 M.J. 592 (129 days).

Based on the foregoing, primarily the fact that the vast majority of the post-trial delay in this case is directly attributable to appellant, this factor weighs in favor of the government, or is, at most, "neutral."[923]

C. Speedy Trial Demand

As the Supreme Court has noted, "[t]he more serious the deprivation, the more likely a defendant is to complain."[924] Appellant has never submitted a speedy trial demand in this case, and did not raise post-trial delay as an error before the Army Court in either his original brief, reply brief, supplemental brief, motion for reconsideration, or second motion for reconsideration. Consequently, in light of the numerous delay requests filed by appellant during the appellate processing of his case, this factor weighs heavily in favor of the government.

D. Prejudice

The only actual "prejudice" appellant avers he has suffered is a denial of continuity of counsel; however, he does not even attempt to argue how the changes in his appellate counsel have impaired his appeal. In addition, as noted above, had appellant filed a timelier brief, it is less likely that as many changes

[923] *United States v. Danylo*, __ M.J. __, slip. op. at 10 (C.A.A.F. 2014)(citing *United States v. Wilson*, 72 M.J. 347, 352 (C.A.A.F. 2013).
[924] *Barker*, 407 U.S. at 531.

in counsel would have been required. Therefore, this factor weighs overwhelmingly in favor of the government.

E. Balancing of the Factors

Balancing the four *Barker* factors, the post-trial delay in this case did not violate appellant's right to due process. Although the delay in appellant's case exceeds the limits set forth in *Moreno*, the fact that all remaining factors favor the government, particularly the lack of any cognizable prejudice, dictates that appellant is not entitled to relief.

B.IV

THE ARMY COURT ERRED IN ALLOWING TRIAL DEFENSE COUNSEL TO FILE A JOINT AFFIDAVIT OVER SERGEANT AKBAR'S OBJECTION, DEPRIVING SERGEANT AKBAR OF THE INDEPENDENT RECOLLECTIONS OF BOTH TRIAL DEFENSE COUNSEL AND DELEGATING THE ARMY COURT'S FACT FINDING RESPONSIBILITY TO HIS TRIAL DEFENSE TEAM WHO NOW STAND OPPOSED TO SERGEANT AKBAR'S INTERESTS.

The law does not prohibit an appellate court from relying on a joint affidavit when addressing claims of ineffective assistance of counsel. To the contrary, an overwhelming number of cases in federal, state, and military courts rely on joint affidavits from defense counsel in addressing ineffective assistance claims.[925] Because defense counsel are evaluated as a

[925] *See United States v. Davis*, 52 M.J. 201, 203 (C.A.A.F. 1999); *United States v. Dillon*, 2009 WL 1508224 at *4 (A.F. Ct. Crim. App. 2009); *Outten v. Kearney*, 464 F.3d 401, 409 (3rd Cir. 2006); *Beck v. Angelone*, 261 F.3d 377, 392 (4th Cir. 2001);

team,[926] a joint affidavit is an efficient mechanism for answering allegations of ineffective assistance of counsel. As addressed in response to Assignments of Error A.I and A.II, the appellate record is sufficient to fully resolve appellant's allegations of ineffective assistance of counsel in favor of the Government, without recourse to a post-trial hearing.

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 SERGEANT 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?

United States v. Baltazar, 34 Fed. Appx. 151 at *4 (5th Cir. 2002); *United States v. Drayton*, 2010 WL 4136144 at *4 (W.D. Va. 2010); *Wright v. United States*, 2009 WL 320732 at *1-2 (D. Del. 2009); *Steward v. Graham*, 2008 WL 2128172 at *10 (N.D.N.Y. 2008); *State v. Dawkins*, 2008 WL 741487 at *1 (Del. Super. 2008).

[926] *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001).

Appellant is correct that "aggravating factors" "may not be unconstitutionally vague."[927] However, this Court's "vagueness review is quite deferential," and an aggravating factor "is not unconstitutional if it has some common-sense core of meaning that criminal juries should be capable of understanding."[928]

The meaning of the aggravating factor in this case, that "[t]he accused has been found guilty in the same case of another violation of Article 118,"[929] is plain on its face, and cannot possibly be considered vague. Moreover, this same aggravating factor has been relied on in every approved military capital death sentence.[930] As noted in *Curtis*, this aggravating factor is consistent with a number of state statutes.[931]

To the extent appellant argues in his headnote pleading (which itself is vague) that aggravating factors must refer to a single event, at least one district court has rejected that

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[927] *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).
[928] *Tuilaepa*, 512 U.S. at 973 (internal citations and quotations omitted).
[929] R.C.M. 1004(c)(7)(J).
[930] *United States v. Gray*, 37 M.J. 730, 741 n.8 (A.C.M.R. 1992) *supplemented,* 37 M.J. 751 (A.C.M.R. 1993) and *aff'd,* 51 M.J. 1 (C.A.A.F. 1999); *United States v. Loving*, 34 M.J. 956, 969 *on reconsideration,* 34 M.J. 1065 (A.C.M.R. 1992) *aff'd,* 41 M.J. 213 (C.A.A.F. 1994) *opinion modified on reconsideration,* 42 M.J. 109 (C.A.A.F. 1995) and *aff'd,* 517 U.S. 748 (1996).
[931] *Curtis*, 32 M.J. at 265 n.14 (collecting cases).

position.[932] Based on the foregoing, appellant's assignment of error is without merit.

B.VI

THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS AND SENTENCE.

When reviewing cumulative errors claims, courts must consider "the case as a whole, the type of number of errors committed, any relationship between errors, any combined effect of errors, how the errors were dealt with by the military judge, and the strength of the evidence of appellant's guilt."[933] "Courts have been less likely to find cumulative error where the record contains overwhelming evidence of guilt."[934] "Assertions of error without merit are not sufficient to invoke this doctrine."[935]

The cumulative error doctrine is inapplicable to this case. Not only is the evidence of guilt overwhelming, but, as discussed throughout this brief, appellant has failed to raise any actual error in the conduct of his court-martial. "[T]he

[932] *Bowling v. Parker*, 2012 WL 2415167, *21-22 (E.D. Ky. 2012)(mem. op.)(addressing vagueness of multiple-murder aggravator).
[933] *Walker*, 66 M.J. at 757 (citing *United States v. Dolente*, 45 M.J. 234, 242 (C.A.A.F. 1996).
[934] *Id*; *see also United States v. Witt*, 72 M.J. 727, 748 (A.F. Ct. Crim. App. 2013).
[935] *Gray*, 51 M.J. at 61.

fact that many claims of . . . error are pressed does not alter fundamental math—a string of zeros still adds up to zero."[936]

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 SENTENCE OF DEATH. *MCCLESKEY V. KEMP*, 481 U.S. 279 (1987).

This issue has already been resolved against appellant in *United States v. Curtis*.[937]

B.VIII – B.IX

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).

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

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[936] *Hunt*, 856 F. Supp. at 258. *See also Gilliam v. State*, 331 Md. 651, 686, 629 A.2d 685, 703 (1993)("This is more a case of the mathematical law that twenty times nothing is still nothing.").

[937] *Curtis*, 32 M.J. at 268 (not constitutionally required); *Loving*, 41 M.J. at 274; *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)("[i]n our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a per se rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.").

> 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).

This Court has already rejected appellant's arguments concerning a required number of members for the panel.[938] In addition, peremptory challenges are not constitutionally guaranteed; consequently the military judge did not err in refusing to deny additional peremptory challenges.[939] Further, Article 25a, UCMJ, which was applied to appellant's court-martial, does in fact set the minimum number of panel members at 12. Consequently, appellant is entitled to no relief.

B.X

> DISCUSSION OF FINDINGS AND SENTENCING INSTRUCTIONS AT R.C.M. 802 CONFERENCES DENIED SERGEANT AKBAR'S HIS RIGHT TO BE PRESENT AT "EVERY STAGE OF THE TRIAL." *SEE* APP. EX. XLVII (DEFENSE MOTION FOR APPROPRIATE RELIEF - REQUEST THAT ALL CONFERENCES BE HELD IN AN ARTICLE 39(A))(JA 1693).

Because appellant did not object to any R.C.M. 802 conference,[940] this issue is waived.[941] Further, appellant does

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[938] *Curtis*, 32 M.J. at 267-68.
[939] *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988).
[940] Appellant does not even identify which R.C.M. 802 conferences he is referring to in his headnote pleading.

not allege what any "discussion" entailed such to show that any rulings or argument of import were improperly made "off the record."[942]

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.

"[B]revity is the soul of wit."[943] Appellant's assignment of error is without merit.[944]

C.I and C.IV

C.I

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED SERGEANT AKBAR'S 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

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[941] *Curtis*, 44 M.J. at 151.
[942] *Walker*, 66 M.J. at 749-56 (despite military judge considering evidence, hearing argument, and issuing rulings during R.C.M. 802 conference, appellant was entitled to no relief).
[943] William Shakespeare, *Hamlet*, Act II, Scene II (1599-1602); *see also* Thomas Jefferson ("The most valuable of all talents is that of never using two words when one will do.").
[944] *See, e.g., Watts v. Thompson*, 116 F.3d 220, 224 (7th Cir. 1997); *S.S v. Eastern Kentucky University*, 532 F.3d 445, 451-52 (6th Cir. 2008); *Weeks v. Angelone*, 176 F.3d 249, 270-272 (4th Cir. 1999); *Orbe v. True*, 233 F.Supp.2d 749, 760-64 (E.D. Va. 2002); *United States v. Torres*, 170 F.3d 749 (7th Cir. 1999).

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).

C.IV

THE SELECTION OF THE PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE DIRECTLY VIOLATES SERGEANT AKBAR'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES 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).

Similar to the accused in *United States v. Loving*, appellant "makes a broad-based attack on virtually every aspect of the convening authority's role without briefing the issue."[945] This Court systematically rejected every one of these claims and appellant offers no new legal authority or argument in support of these claims.[946]

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 AMENDMENT'S TO THE UNITED STATES CONSTITUTION.

[945] *Loving*, 41 M.J. at 296. In fact, appellant copies the issues from *Loving* nearly verbatim into these Assignments of error.
[946] *Id*.

This exact issue was resolved against appellant in *Loving*.[947]

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).

"The policy concern for a random selection and a fair cross section essential in selecting a civilian jury is not applicable in the military justice system."[948]

C.V

> THE PRESIDENT EXCEEDED HIS ARTICLE 36 POWERS TO ESTABLISH PROCEDURES FOR COURTS-MARTIAL WHEN HE GRANTED 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).

The authority for the Government's preemptory challenge comes from Article 41, UCMJ, not through the President's

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[947] *Loving*, 41 M.J. at 291 (citing *Singer v. United States*, 380 U.S. 24 (1965), *Matthews*, 16 M.J. at 363).
[948] *Dowty*, 60 M.J. at 173 (citing *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997)); *see also Curtis*, 44 M.J. at 130-33.

authority under Article 36, UCMJ.[949] Therefore, the President could not have exceeded his authority.[950]

C.VI

> THE DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS DENIED SERGEANT AKBAR A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES 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).

This Court rejected this claim in *United States v. Curtis*[951] and *United States v. Gray*.[952] Appellant offers no legal authority or factual matter to distinguish his case.

C.VII

> THE DENIAL OF THE RIGHT TO POLL THE MEMBERS REGARDING THEIR VERDICT AT EACH STAGE IN THE 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).

This Court rejected this claim in *United States v. Loving*[953] and *United States v. Gray*.[954] Appellant offers no legal authority or factual matter to distinguish his case.

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[949] UCMJ, art. 41(b)(1)("[e]ach accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court."

[950] *See Curtis*, 44 M.J. at 130-33.

[951] *Curtis*, 44 M.J. at 150.

[952] *Gray*, 51 M.J. at 57-58.

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 UNITED STATES 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).

This Court rejected this claim in *United States v. Loving*,[955] and *United States v. Gray*.[956] Appellant offers no legal authority or factual matter to distinguish his case.

C.IX

> SERGEANT AKBAR WAS DENIED HIS RIGHT UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 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).

This Court rejected this claim in *United States v. Loving*, *United States v. Curtis*, and *United States v. Gray* based on the Fifth Amendment.[957]

C.X

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[953] *Loving*, 41 M.J. at 296 (citing R.C.M. 922(e) and 1007(c)).
[954] *Gray*, 51 M.J. at 60-61.
[955] *Loving*, 41 M.J. at 279-80 (citations omitted).
[956] *Gray*, 51 M.J. at 56.
[957] *Loving*, 41 M.J. at 296-97; *Curtis*, 44 M.J. at 130; *Gray*, 51 M.J. at 50; U.S. Const. amend. V. (“No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .)

COURT-MARTIAL PROCEDURES DENIED SERGEANT 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).

This Court rejected this claim in *United States v. Curtis*, and *United States v. Gray*.[958] Appellant offers no legal authority or factual matter to distinguish his case.

C.XI

DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF 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).

This Court rejected these claims in *United States v. Loving*.[959] Appellant offers no legal authority or factual matter to distinguish his case.

C.XII

THE ARMY COURT LACKED JURISDICTION BECAUSE THE JUDGES ARE PRINCIPAL OFFICERS WHOM THE PRESIDENT DID NOT APPOINT 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); *BUT CF.*

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[958] *Curtis*, 44 M.J. at 132; *Gray*, 51 M.J. at 48.
[959] *Loving*, 41 M.J. at 295 (citing *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *cert. denied*, 510 U.S. 1085 (1994) and *Weiss v. United States*, 510 U.S. 163, 169-171 (1994)).

EDMOND V. UNITED STATES, 115 U.S. 651 (1997).[960]

This Court rejected these claims in *United States v. Loving*.[961] Appellant offers no legal authority or factual matter to distinguish his case.

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 WHICH HAS THE POWER OF CHECKING CONGRESS AND THE 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 THE EXCLUSIVE CHECK OF THE ARTICLE III JUDICIARY). *BUT SEE LOVING,* 213, 296 (C.A.A.F. 1994).

This Court rejected this claim in *United States v. Loving*, and *United States v. Gray*.[962] Appellant offers no legal authority or factual matter to distinguish his case.

C.XIV

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[960] This case is incorrectly cited. It should be *Edmond v. United States*, 520 U.S. 651 (1997).

[961] *Loving*, 41 M.J. at 295 (citing *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), *cert. denied*, 510 U.S. 1085 (1994) and *Weiss v. United States*, 510 U.S. 163, 169-171 (1994)). *See also Weiss*, 510 U.S. at 176 ("[i]t is quite clear that Congress has not required a separate appointment to the position of military judge, and we believe it equally clear that the Appointments Clause by its own force does not require a second appointment before military officers may discharge the duties of such a judge.").

[962] *Loving*, 41 M.J. at 296 (citing *Matthews*, 16 M.J. at 364-68); *Gray*, 51 M.J. at 55.

> SERGEANT AKBAR HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AMENDMENT IN THAT ALL CIVILIANS IN THE UNITED STATES 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).

This Court rejected this claim in *United States v. Loving*, and *United States v. Gray*.[963] Appellant offers no legal authority or factual matter to distinguish his case.

C.XV

> SERGEANT AKBAR HAS BEEN DENIED EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES 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).

Article 74(a), UCMJ, gives the Service Secretaries statutory authority to remit or suspend sentences other than those reserved to the President. The Army Clemency and Parole Board (ACPB) was created to advise and assist the Secretary of the Army in reviewing and considering those cases within his statutory authority that he may consider for clemency and/or

[963] *Loving*, 41 M.J. at 295-96; *Gray*, 51 M.J. at 55.

parole.[964] The ACPB does not have an independent grant of authority and it does not confer rights upon those court-martialed.[965] It simply exists to serve the Secretary of the Army in his statutory role. The ACPB does not have the independent authority to grant clemency, but does so only when acting as a Secretary of the Army's designee.

Congress reserved the ability to commute or remit a death sentence to the President.[966] Because appellant was sentenced to death, he is eligible to receive clemency from the President rather than the Secretary of Army. Appellant fails to explain how such a statutory scheme denies him equal protection of the law.

C.XVI

SERGEANT AKBAR'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT'S 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).

This Court specifically rejected this argument in *United States v. Loving*.[967]

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[964] U.S. Dep't Army Reg. 15-130, *Army Clemency and Parole Board* (23 October 1998) [AR 15-130], paras. 1-1 and 1-4.
[965] AR 15-130, para. 1-1.
[966] UCMJ art. 71(a).
[967] 41 M.J. at 293-94; *see also Curtis*, 32 M.J. at 269 ("In sum, as we construe RCM 1004, it not only complies with due process

C.XVII

> THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES. *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 WAS PREDICATED ON THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE NECESSARY AND PROPER CLAUSE. *ID.* SERGEANT AKBAR'S ARGUMENT IS PREDICATED ON THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court rejected this claim in *United States v. Loving*.[968] The Eighth Amendment does not transform an otherwise meritless Tenth Amendment claim into a meritorious argument. Appellant offers no argument or legal authority for such a proposition.

C.XVIII

> THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 55, UCMJ, BECAUSE THE CONVENING AUTHORITY HAS NOT DEMONSTRATED HOW THE DEATH PENALTY WOULD ENHANCE GOOD ORDER AND DISCIPLINE IN THE ARMY. *SEE* APP. EX. LXVII (DEFENSE MOTION FOR APPROPRIATE RELIEF TO PRECLUDE IMPOSITION OF DEATH AS INTERESTS OF JUSTICE WILL NOT BE SERVED)(JA 1718).

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requirements but also probably goes further than most state statutes in providing safe-guards for the accused.").

[968] *Loving*, 41 M.J. at 293.

There is nothing in the plain language of Article 55, UCMJ, that requires a showing that any court-martial punishment must enhance good order and discipline in order to be valid. Appellant fails to provide this court any legal support for his proposition.

C.XIX

> THE CAPITAL SENTENCING PROCEDURE IN THE MILITARY IS UNCONSTITUTIONAL BECAUSE THE MILITARY JUDGE DOES NOT HAVE THE POWER TO ADJUST OR SUSPEND A SENTENCE OF DEATH THAT IS IMPROPERLY IMPOSED. *SEE* APP. EX. V (DEFENSE MOTION FOR APPROPRIATE RELIEF, HEIGHTENED DUE PROCESS)(JA 1655).

This Court rejected this claim in *United States v. Loving* and *United States v. Gray*.[969] Appellant offers no legal authority or factual matter to distinguish his case.

C.XX

> DUE [SIC] 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).

Both this Court and the Supreme Court have consistently upheld the death penalty procedures within the military justice system. "In sum, as we construe R.C.M. 1004, it not only complies with due process requirements but also probably goes

[969] *Loving*, 41 M.J. at 297; *Gray*, 51 M.J. at 61.

further than most state statutes in providing safeguards for the accused."[970]

C.XXI

> THE DEATH PENALTY CANNOT CONSTITUTIONALLY BE IMPLEMENTED UNDER CURRENT EIGHTH AMENDMENT JURISPRUDENCE. *SEE CALLINS V. COLLINS,* 510 U.S. 1141, 1143-59 (1994)(BLACKMUN, J., DISSENTING)(CERT. DENIED).

The Supreme Court reaffirmed in 2008 that capital punishment does not violate the Eighth Amendment to the U.S. Constitution.[971] Appellant cites no authority for overturning this settled principle of law.

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).

There is no legal requirement for an appellate system to have an exception to the finality of direct appellate review for

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[970] *Curtis*, 32 M.J. at 269.
[971] *Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976)) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.")).

claims of "actual innocence." Furthermore, appellant makes no claim of "actual innocence" in his case.[972]

The term "actual innocence" is used as a basis for allowing Federal Habeas review of a death sentenced inmate's case despite a procedural default of a defendant's state court claims.[973] Under the UCMJ, a capital case is not "final" until the case is reviewed by the Service Court, CAAF, and, if *certiorari* is granted, the United States Supreme Court, and the President approves the death sentence.[974] Prior to finality under Article 76, UCMJ, CAAF has held that an accused may seek collateral habeas review within the military justice system.[975] Even after finality under Article 76, UCMJ, the accused may seek collateral habeas review with the Article III courts.[976]

C.XXIII to C.XXV

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

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[972] *Sawyer v. Whitley*, 505 U.S. 333, 339, n.5 (1992) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986)).
[973] *House v. Bell*, 547 U.S. 518, 522 (2006) (citing *Schlup v. Delo*, 513 U.S. 298, 319-322 (1995)).
[974] UCMJ arts. 66(b)(1), 67(a)(1), 67a, 71(c) and 76; *Loving v. United States*, 62 M.J. 235, 240-46 (C.A.A.F. 2005).
[975] *Loving*, 62 M.J. at 240-46.
[976] Loving, 68 M.J. at 23-24 (Ryan, J., dissenting) (describing authority of Article III Courts to consider collateral writs of habeas corpus in Article III Courts); *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808, 810-11 (10th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1993) (citing *Burns v. Wilson*, 346 U.S. 137 (1953)).

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 [*SIC*] 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).

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).

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).

The Eighth Amendment does not limit victim impact evidence to "direct family members."[977] The Supreme also confirms that

[977] *United States v. Whitten*, 610 F.3d 168, 188-89 (2nd Cir. 2010) (citing *United States v. Bolden*, 545 F.3d 609, 626 (8th Cir. 2008); *United States v. Fields*, 516 F.3d 923, 946 (10th Cir. 2008); *United States v. Barrett*, 496 F.3d 1079, 1098-99 (10th Cir. 2007); *United States v. Nelson*, 347 F.3d 701, 712-14 (8th Cir. 2003); *United States v. Bernard*, 299 F.3d 467, 478 (5th Cir. 2002)).

such evidence may refer to the damage to "society."[978] R.C.M. 1001(b)(4) allows for the introduction of evidence in aggravation that is "directly related" to the offenses committed. This is an objective standard focusing on the type of evidence and the strength of its connection to the crime.[979]

Furthermore, appellant's suggestion that the sentencing evidence must be limited to those harms that an accused can foresee is unsupported by any legal theory. Any reasonable person would know that murdering two innocent men, as well as wounding sixteen others with grenades and an assault rifle, could have far-reaching consequences. Appellant's willful blindness to the devastation his crimes caused to both the victims' families and society as a whole cannot serve as a basis to hide that evidence from the panel.

Appellant's assignments of error are without merit.[980]

C.XXVI

THE DEATH SENTENCE IN THIS CASE VIOLATES THE *EX POST FACTO* CLAUSE, THE FIFTH AND EIGHTH AMENDMENTS, THE SEPARATION OF POWERS DOCTRINE, THE PREEMPTION DOCTRINE, AND ARTICLE 55, UCMJ, BECAUSE WHEN IT WAS ADJUDGED NEITHER CONGRESS NOR THE ARMY HAD SPECIFIED A MEANS OR PLACE OF EXECUTION. *SEE* APP. EX. LXXIII (DEFENSE MOTION TO DISMISS - MILITARY SYSTEM FOR ADMINISTERING

[978] *See Payne*, 501 U.S. at 825.
[979] *United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007).
[980] *See also* response to Assignment of Error A.III.

THE DEATH PENALTY VIOLATES THE NON-DELEGATION DOCTRINE)(JA 1728).

Appellant cites no support for the proposition that at the time of sentencing the Government is required to designate the manner and location of appellant's execution.[981]

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

KENNETH W. BORGNINO
Major, JA
Appellate Government Counsel
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0754
U.S.C.A.A.F. Bar No. 35098

CARRIE L. WARD
Captain, JA
Appellate Government Counsel
Government Appellate Division
U.S.C.A.A.F. Bar No. 36154

JAMES L. VARLEY
Lieutenant Colonel, JA
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 31031

JOHN P. CARRELL
Colonel, JA
Chief, Government Appellate
Division
U.S.C.A.A.F. Bar No. 36047

[981] *See United States v. Tipton*, 90 F.3d 861, 901-03 (4th Cir. 1996).

APPENDIX 1

Appendix 1

October 29, 2010 Trial Defense Counsel Affidavit (Gov't App. Ex. 1).

Question A. In response to appellant's claims 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?

Trial Defense Counsel Response	DAD Argument	Government Response
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).	a. This does not conflict. b. This does not conflict. To the contrary, it perfectly describes the trial defense counsel's strategy to begin its mitigation case on the merits which will then transition into sentencing. The fact that Mr. Dunn does not use the term "frontload" does not create a conflict. In addition, the trial defense counsel do not identify Mr. Dunn as the source of the recommendations.
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	a. On Sep. 17, 2004, the government instructed Ms. Nerad to cease her mitigation investigation because no funds were specifically authorized for	a-i. These references do not conflict with the affidavit. The trial defense counsels' response comports with the fact that the CCA did conduct an

Appendix 1

Trial Defense Counsel Response	DAD Argument	Government Response
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.	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).	extensive mitigation investigation, totaling roughly 641 hours and costing $66,700. *See* Response to AE A.I at 28-34.

Appendix 1

Trial Defense Counsel Response	DAD Argument	Government Response
	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 the	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	a. This does not conflict. While Mr. Lohman may claim he provided advice to the trial defense counsel, he does not contradict their statement that he was not included within their tactical discussions. b. This does not conflict. c. This does not conflict. d. This does not conflict. In fact, it comports with the trial defense counsels' affidavit that they did not have any significant contact with Ms. Rogers or Mr. Lohman.

Appendix 1

Trial Defense Counsel Response	DAD Argument	Government Response
case…"	called in on mobile telephone with intermittent reception. (JA 2770-71). d. 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).	
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 she was uncovering, while interesting in the abstract, did not add much evidentiary value to the detailed review already conducted by Ms. Grey.	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). 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).	a-b. This issue is addressed in response to AE A.I. at 36. c. This does not conflict. Trial defense counsel do not assert in this section that they had frequent contact with Mr. Al-Haqq. d. This issue is addressed in response to AE A.I. at 36. Further, trial defense counsel do not claim that they had continued contact with her after March 14, 2005. e. The trial defense counsel confirm that the CCA discovered Dr. Tuton. Discussion of Dr. Sachs is contained in response to AE A.I. at 23. The remaining information was already known to trial defense counsel. f. This does not conflict. The fact that they conducted interviews did not mean that they uncovered useful information from those interviews. g. This does not conflict. The trial defense counsel confirm that some useful information was uncovered;

Appendix 1

Trial Defense Counsel Response	DAD Argument	Government Response
	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 2389-2395).	however, their point is that much of what the CCA uncovered was either duplicative or unnecessary.
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 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	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	a. The e-mails do not create a conflict in affidavits. b. This is addressed in response to AE A.I. at 36. c. This does not conflict. As noted, above, Mr. Lohman and Ms. Rogers were not the primary contacts for the trial defense counsel, and were merely assistants to Ms. Nerad.

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Trial Defense Counsel Response	DAD Argument	Government Response
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 investigation was given to Dr. Woods and formed a significant basis for his ultimate opinion and was of enormous value to the defense.	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. 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	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).	a. This does not conflict, and e-mails cannot create a conflict between affidavits. b. This does not conflict, and e-mails cannot create a conflict between affidavits. c. This does not conflict. While Ms. Nerad may have personally felt that further investigation was required, the trial defense counsel were free to determine in their professional judgment that further investigation was not necessary. See response to AE A.I. at 53-57.

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Trial Defense Counsel Response	DAD Argument	Government Response
768-70].	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 January 2005, MAJ DB told a mitigation specialist to focus him on information relating to the "mental responsibility defense." (JA 2196).	a. This does not conflict. This e-mail relates solely to Mr. Gant's suggestion regarding when to have mental health experts begin working on a diagnosis. b. This is subjective argument by appellant, not pointing out a specific conflict between affidavits. c. E-mails do not create a conflict between affidavits. Further, the evidence is clear that the trial defense counsel were focused on a diminished capacity defense, not a complete insanity defense. Specific word choice by counsel in an e-mail does not change that fact.
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	On Feb. 11, 2005, Ms. Nerad informed military defense counsel that the mitigation specialists were "flat broke." (JA 2205).	This does not conflict. In fact, they directly support each other.

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records for 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	a. This does not conflict. Whether to request a continuance is left to the discretion of trial defense counsel. See response to AE A.I. at 50-61. b. This does not conflict. Trial defense counsel do not state that they intended to request additional time or funding, but merely that they asked her for the justification. c. This does not conflict. Trial defense counsel make all strategic and tactical decisions regarding what investigation needs to be conducted. See response to AE A.I. at 50-61.
47. Despite requesting the declarations, Ms. Nerad did not provide them to the defense. Instead, during a telephone conversation on 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	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,	a. This is not a conflict between affidavits. See also response to AE A.I. at 50-61. b. See response to AE A.I. at 50-61.

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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.	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).	a-f. These statements do not conflict with the affidavit response referenced.

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	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 occurred. 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 apprehension was the product of Ms. Nerad and 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 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	

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	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 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	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, the defense removed only two witnesses from their witness list. Of these, only the removal of confinement facility social worker, Steve Bowen, was 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	a-h. None of this creates a conflict between affidavits requiring a *Dubay* hearing.

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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].	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 seven 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 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). 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	a. Based on the defense witness lists, counsel apparently "turned to	

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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.	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?

Trial Defense Counsel Response	DAD Argument	Government Response
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 by LTC VH two years prior trial and who was fired by SGT Akbar approximately fifteen months prior to trial, not the counsel who tried the case. (JA 2953).	This is not a conflict in affidavits. Further, trial defense counsel are evaluated as a team. *See United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001)
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 non-profit 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	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.	a. This does not conflict. To the contrary, it perfectly describes the trial defense counsel's strategy to begin its mitigation case on the merits which will then transition into sentencing. The fact that Mr. Dunn does not use the term "frontload" does not create a conflict. In addition, the trial defense counsel do not identify Mr. Dunn as the source of the recommendations. b. These do not conflict. The affidavit confirms that Mr. Lohman assisted in arranging the meeting.

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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 participate in a meeting designed to again try to convince SGT Akbar to offer a plea in exchange for a non-capital referral.	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," 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?

Trial Defense Counsel Response	DAD Argument	Government Response
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	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	a. Extrinsic evidence refutes Ms. Nerad's claim that there were never discussions regarding trial strategy. *See* (JA at 2189). b. This does not conflict. The trial defense counsel assert that Mr. Lohman was not included within trial strategy discussions. c. This does not conflict. Trial defense counsel assert that they had limited contact with Ms. Rogers.

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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.	"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	d. This does not conflict. Trial defense counsel assert that they had limited contact with Ms. Rogers. f. This does not conflict.

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	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 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 Hansen 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.	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 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).	a. This does not conflict. b. This does not conflict. c. This does not conflict. Trial defense counsel do not assert that Ms. Grey advised them to present mitigation evidence through expert witnesses. d. This does not conflict. e. This does not conflict. Trial defense counsel do not assert that Mr. Dunn advised them to present mitigation evidence through expert witnesses. f. This does not conflict. Trial defense counsel do not assert that Ms. Nerad advised them to present mitigation evidence through expert witnesses. g. This does not conflict. Mr. Stetler was not involved in this case. h. This does not conflict. Ms. LeBoeuf was not involved in this case. i. This does not conflict. Ms. James-Townes was not involved in this case. j. This does not conflict, and is wholly unrelated. k. This does not conflict, and is wholly unrelated.

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	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	

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	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	

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	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	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	This does not create a conflict between affidavits.

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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.	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).	This does not create a conflict between affidavits.

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?

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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 SGT Akbar had with a mental health professionals as a child and	a. Dr. Woods' Aug. 4, 2004, declaration asserts that a complete social history is the foundation of his conclusions and that he would first need this before he could testify. (JA 1829). b. 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	a. This does not conflict. By testifying at trial, Dr. Woods implicitly confirmed that he received a complete social history. b. This does not conflict as it does not relate to the cited response by trial defense counsel. c. This does not conflict.

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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].	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). Despite Ms. Sachs' detailed recall of her sessions with SGT Akbar, counsel, apparently piqued at the mitigation specialists, dismissed her after a cursory telephonic interview. (JA 2908). According to Dr. Woods, "Dr. Sachs could have been used to develop the longstanding mental illness Hasan was suffering [which] would have added	d. This does not conflict as it is unrelated to the trial defense counsels' response. e. This is addressed in response to Assignment of Error A.I at 123-24. f. This is addressed in response to Assignment of Error A.I at 126-130. g-k. This does not conflict as it is unrelated to the trial defense counsels' response.

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	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." 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	

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	broached between myself . . . and the defense attorneys." (JA 2384, 2466, 2795-98). g. Ms. Nerad asserts that she was never able to complete her mitigation investigation. 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). 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	

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Trial Defense Counsel Response	DAD Argument	Government Response
	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 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 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.	This is addressed in response to Assignment of Error A.I at 130-132.
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.	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. (R. at	a. This argument does not focus on a conflict between affidavits. b. This does not conflict as it is unrelated to the trial defense counsels' response. c. This is addressed in response to Assignment of Error A.I at 66-67. Dr.

Trial Defense Counsel Response	DAD Argument	Government Response
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 . . .	2313, 2349, 2351). 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)	Clement's findings clearly do not conclude that appellant was schizophrenic, directly refuting Dr. Woods' assertion that they agreed appellant was actually schizophrenic. (JA at 2255, 2413-14). While schizophrenia was indicated through a blind interpretation of the MMPI2 results, a complete psychological evaluation ruled out schizophrenia. (GAE 10 at 126).

Question E. With respect to *voir dire* and panel member selection, including the use of challenges, what was the defense strategy?

Trial Defense Counsel Response	DAD Argument	Government Response
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	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	a. This is not a conflict in affidavits. b. This is not a conflict in affidavits. c-e. This is not a conflict of affidavits. This argument is also addressed in response to Assignment of Error A.I at 59-61.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	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)).	f. This is not a conflict of affidavits. g. This is not a conflict of affidavits.

Question F. What was the decision-making process in admitting appellant's diary, in its entirety, into evidence?

Trial Defense Counsel Response	DAD Argument	Government Response

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Trial Defense Counsel Response	DAD Argument	Government Response
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 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.	a. Counsel's pretrial strategy memorandum shows that 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). 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	a. Dr. Woods asserts that counsel's decision to admit the diary "was a mistake, and I never advised or would	a. While this creates a potential conflict between Dr. Woods' affidavit and trial defense counsels' affidavit,

Trial Defense Counsel Response	DAD Argument	Government Response
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.	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 that 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).	such conflict is not germane to the issue on appeal. Whether Dr. Woods agreed that the admission of the complete diary was appropriate is not the question. As discussed in response to Assignment of Error A.I, the admission of the complete diary was an objectively reasonable decision by the trial defense counsel based on the facts of this case. (pages 105-09). b. This does not conflict with the cited response by trial defense counsel. c. This does not conflict with the cited response by trial defense counsel. d. This does not conflict with the cited response by trial defense counsel.

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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-	a. Counsel who tried the case provide no evidence that they interviewed any witness who was not at trial. Counsel	a. This is not a conflict in affidavits. b. This is addressed in response to

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Trial Defense Counsel Response	DAD Argument	Government Response
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.	does not state who specifically they interviewed face-to face. b. Family members, friends and associates who provided declarations regarding their potential testimony all state that they were not interviewed face to face by counsel. (JA 2829, 2834, 2850, 2854, 2859, 2871, 2873, 2876, 2878, 2881, 2883, 2886, 2897).	Assignment of Error A.I at 18-26.
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	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 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).	a. This does not conflict with the cited trial defense counsels' response. b. This does not conflict with the cited trial defense counsels' response. c. This does not conflict with the cited trial defense counsels' response. d-f. This does not conflict. Trial defense counsel confirm that they had limited contact with the other members of the CCA. (JA at 1938). g. This is addressed in response to Assignment of Error A.I at 18-26 h. This does not conflict with the cited trial defense counsels' response. i-p. This is addressed in response to Assignment of Error A.I at 18-26.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	c. 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." 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 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). 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).	

Trial Defense Counsel Response	DAD Argument	Government Response
	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	

Trial Defense Counsel Response	DAD Argument	Government Response
	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). 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 openended questions. The conversation	

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Trial Defense Counsel Response	DAD Argument	Government Response
	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	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. 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	a-e. This is addressed in response to Assignment of Error A.I at 18-26. f. This does not create a conflict in affidavits. g. This does not create a conflict in affidavits. h-l. This does not create a conflict in affidavits, and is irrelevant to whether the trial defense counsel interviewed these individuals.

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Trial Defense Counsel Response	DAD Argument	Government Response
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 because they had no recollection of SGT Akbar, or their potential testimony would not be favorable to him.	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). 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).	

Trial Defense Counsel Response	DAD Argument	Government Response
	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 VC ceased his representation, he identified thirteen witnesses that he recommended be contacted. (Gov. App. Ex. 5, at 4 [E-mail from LTC VC 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?

Trial Defense Counsel Response	DAD Argument	Government Response
1. The e-mail from LTC Victor Hansen on 6 February 2004 listed witnesses that he had interviewed along with our former mitigation expert Ms. Grey. The list provided by LTC Hansen 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	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,	a. This is not a conflict in affidavits. b. This is not a conflict in affidavits. c. This is not a conflict in affidavits. Moreover, Ms. Davenport was not called as a witness, and LTC

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Trial Defense Counsel Response	DAD Argument	Government Response
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.	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).	VH's opinion of which witnesses to call a year before trial is not dispositive.
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).	a. This is not a conflict between affidavits. b-d. This is not a conflict between affidavits. Moreover, whether persons were removed or added to demonstrably fluid witness lists is not dispositive concerning whether particular individuals became unwilling to testify following the stabbing incident. Further, while the warden was never listed on a witness list, the context of the trial defense counsels' affidavit indicates he may not have been identified as a witness until after the last witness list before the stabbing was prepared. (JA at 1942-43). e-k. This is not a conflict between affidavits.

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Trial Defense Counsel Response	DAD Argument	Government Response
	e. On Apr. 22, 2005, the government moved the military judge to reconsider his decision to exclude evidence of the Mar. 30, 2005, incident. The 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." The 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 evidence or testimony they planned to offer on SGT Akbar's behalf could potentially "open the door" to the Mar. 30, 2005, 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	

Trial Defense Counsel Response	DAD Argument	Government Response
	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	

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Trial Defense Counsel Response	**DAD Argument**	**Government Response**
	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.	a. Based on witness lists, counsel apparently "turned to documentary evidence" over live testimony well before the Mar. 30, 2005 incident. (JA 2910-29).	a. This is not a conflict between affidavits.
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 "reinterviewed" 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 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 that though he spoke with SGT Akbar's counsel before trial, "they never really	a. This is not a conflict between affidavits. b-c. This is not a conflict between affidavits. d-e. This is addressed in response to Assignment of Error A.I at 18-26. f-g. This is not a conflict between affidavits, and is addressed in response to Assignment of Error A.I at 82-83. h. This does not conflict and is unrelated to the cited response by trial defense counsel.

Trial Defense Counsel Response	DAD Argument	Government Response
	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	

Trial Defense Counsel Response	DAD Argument	Government Response
	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?

Trial Defense Counsel Response	DAD Argument	Government Response
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 counsel who were lead counsel for extended periods of time. During the times the civilian counsel	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).	a. These statements do not conflict. Trial defense counsel confirm she may have made the suggestion, but do not recall at this time. b. This is not a conflict between affidavits. c. This is not a conflict between affidavits.

Trial Defense Counsel Response	DAD Argument	Government Response
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 Hansen 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 Hansen 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 interview telephonically depending on the nature of the potential testimony.	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).	d. This is not a conflict between affidavits.

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?

Trial Defense Counsel Response	DAD Argument	Government Response
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	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	a. These do not directly conflict, as trial defense counsel acknowledge that they do not recall any specific discussion with Ms. Nerad about this issue. Further, this issue is irrelevant as appellant fails to establish who this cultural expert is or what they would have actually been able to testify to at trial. b. This is not a conflict between

Trial Defense Counsel Response	DAD Argument	Government Response
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.	complete, unvarnished, diary expressing violent Islamic extremism throughout based on the teachings of the Nation of Islam. (Def. Ex. A (sealed exhibit)).	affidavits.

Question E. Describe what independent mitigation investigation and witness interviews the defense team conducted on their own separate and apart from the mitigation specialists.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	This is not a conflict between affidavits.

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.

Trial Defense Counsel Response	DAD Argument	Government Response

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Trial Defense Counsel Response	DAD Argument	Government Response
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). d. 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). e. Ms. Rachel Rodgers also was never given guidance from counsel as to how	a. This is not a conflict between affidavits. Moreover, the e-mails referenced do not reflect concerns by Ms. Nerad with the trial defense counsel personally. b. This issue is discussed in response to Assignment of Error A.I. d-f. This is not a conflict. Trial defense counsel confirm that they had limited contact with the other members of the CCA. (JA at 1938)

Trial Defense Counsel Response	DAD Argument	Government Response
	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). 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).	

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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	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).	a. Extrinsic evidence refutes Ms. Nerad's claim that there were never discussions regarding trial strategy. *See* (JA at 2189). b-d. This is not a conflict. Trial defense counsel confirm that they had limited contact with the other members of the CCA. (JA at 1938) e. This is not a conflict as it is unrelated to the cited response by trial defense counsel.

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Trial Defense Counsel Response	DAD Argument	Government Response
panel.	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	f. This is not a conflict between affidavits.

Trial Defense Counsel Response	DAD Argument	Government Response
	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.	a. This is not a conflict as it does not relate to the cited response by trial defense counsel, and is taken wholly out of context. b. This is not a conflict between affidavits, but merely argument.

Appendix 1

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?

Trial Defense Counsel Response	**DAD Argument**	**Government Response**
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 co-workers 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.	*See* previous responses.
9. Over the next few months, Ms. Nerad worked with Dr. Woods to complete the social history of SGT Akbar. She provided regularly 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).	This is not a conflict between affidavits.
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	a. On Aug. 3, 2004, Ms. Holdman estimated that the mitigation investigation would "require a minimum of nine months to conduct" placing the earliest date of completion in May 2005. (JA 1826).	a. This is not a conflict between affidavits. Moreover, an estimate in August 2004 does not definitively establish that the investigation was not ostensibly complete by February 2005.

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Trial Defense Counsel Response	DAD Argument	Government Response
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.	b. Ms. Nerad's Sep. 2004, declaration provided an estimated 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 that 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 that she informed counsel repeatedly that she could not complete her investigation, review the 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 that counsel were	b. This is not a conflict between affidavits. Moreover, an estimate in September 2004 does not definitively establish that the investigation was not ostensibly complete by February 2005. c. This is not a conflict between affidavits. Moreover, an estimate in December 2004 does not definitively establish that the investigation was not ostensibly complete by February 2005. d. This does not directly conflict. Whether Ms. Nerad believed further investigation was necessary is not relevant to the question of whether the trial defense counsel believed further investigation is necessary. Trial defense counsel have tactical control over the conduct of an investigation, not mitigation specialists. e-g. This is not a conflict. Trial defense counsel confirm that they had limited contact with the other members of the CCA. (JA at 1938) h. This is not a conflict between affidavits.

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Trial Defense Counsel Response	DAD Argument	Government Response
	"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	

Trial Defense Counsel Response	DAD Argument	Government Response
	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 March 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 September 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.	a-b. This is addressed in response to Assignment of Error A.I. *See* previous responses.

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?

Trial Defense Counsel Response	DAD Argument	Government Response
1. The response to this question is contained in paragraphs 45 through 47	*See* responses and contrary evidence for para. 45 through 47 of Question A of	*See* previous responses.

Trial Defense Counsel Response	DAD Argument	Government Response
in Question A of the 29 October 2010 affidavit.	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.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	This is not a conflict between affidavits.

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	*See* previous response

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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."	This is not a conflict between affidavits.

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?

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Trial Defense Counsel Response	DAD Argument	Government Response
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 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. 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).	a. This does not directly conflict. The trial defense counsel do not assert that they intended to introduce documentary evidence solely through their expert witness. b. This does not conflict, as it is unrelated to the cited response by trial defense counsel. The response does not discuss any conversations with Ms. Holdman.
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.	*See* previous responses

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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.	This is not a conflict between affidavits.

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?

Trial Defense Counsel Response	DAD Argument	Government Response
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.	*See* previous responses

Question Q. Why were no family members or friends from his life prior to college called to testify?

Trial Defense Counsel Response	DAD Argument	Government Response
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.	*See* previous responses

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?

Trial Defense Counsel Response	DAD Argument	Government Response
1. Neither of the undersigned have	a. Defense counsel's answer is non-	a. This is not a conflict between

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Trial Defense Counsel Response	DAD Argument	Government Response
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 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.	responsive to the Army Court's questions except for responding to the claim by Ms. Nerad. 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 presenting 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).	affidavits. b. This is not a conflict between affidavits. c. This does not directly conflict, as trial defense counsel assert that they do not recall any discussions at this time. d. While this creates a potential conflict between Dr. Woods' affidavit and trial defense counsels' affidavit, such conflict is not germane to the issue on appeal. Whether Dr. Woods agreed that the admission of the complete diary was appropriate is not the question. As discussed in response to Assignment of Error A.I, the admission of the complete diary was an objectively reasonable decision by the trial defense counsel based on the facts of this case. (pages 105-09).
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.	*See* previous responses.

Question S. Describe in detail how Mr. Tupaz and Mr. Duncan were prepared to testify? When were they interviewed and by whom?

Trial Defense Counsel Response	DAD Argument	Government Response
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).	a. This is not a conflict between affidavits. b. This issue is addressed in response to Assignment of Error A.I at 18-26.

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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	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.	a. This is not a conflict between affidavits. b. *See* previous responses.

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Trial Defense Counsel Response	DAD Argument	Government Response
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.		
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. In it, MAJ DC writes as follows: "I looked	a. This is not a conflict between affidavits. b-d. This is not a conflict between affidavits, and is unrelated to the cited response by trial defense counsel.

Trial Defense Counsel Response	DAD Argument	Government Response
	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.	*See* previous responses.

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?

Trial Defense Counsel Response	DAD Argument	Government Response
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	a. This response confirms that counsel never attempted to contact Dr. Miles independently to obtain additional details regarding his observations and conclusions.	a. This is not a conflict between affidavits. b. This is not a conflict between affidavits. Moreover, trial defense counsel assert only that they had

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Trial Defense Counsel Response	DAD Argument	Government Response
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.	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). f. 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.	limited individual interaction with Dr. Miles regarding his potential testimony, and do not discuss the fact that they provided him documents on behalf of Mr. Al-Haqq. c. This is not a conflict between affidavits. Moreover, this e-mail confirms that Mr. Al-Haqq was the individual working directly with Dr. Miles. d. This is not a conflict between affidavits, and in fact is in direct accord with the affidavit. f. This does not conflict with the affidavit. In addition, the use of Dr. Miles is discussed in detail in response to Assignment of Error A.I.

Trial Defense Counsel Response	DAD Argument	Government Response
	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?

Trial Defense Counsel Response	DAD Argument	Government Response
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	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	a. This issue is addressed in response to Assignment of Error A.I. b. This is not a conflict between affidavits, and comports with the

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Trial Defense Counsel Response	DAD Argument	Government Response
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 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 Hansen's experiences with mitigation experts, we were concerned	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 that 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 that SGT Akbar had not sought psychological treatment while in college other than one instance with Dr. Ibarra)).	affidavit response. c. This is addressed in detail in response to Assignment of Error A.I at 123-24. As discussed in the brief, Dr. Woods' assertion that he was unaware of Dr. Sachs is demonstrably false.

Trial Defense Counsel Response	DAD Argument	Government Response
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 for his consideration.		

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.

Trial Defense Counsel Response	DAD Argument	Government Response
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	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.	This is not a conflict between affidavits. *See* previous responses.

Trial Defense Counsel Response	DAD Argument	Government Response
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 counsel 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 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		

Trial Defense Counsel Response	DAD Argument	Government Response
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.	*See* previous responses.

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:

Trial Defense Counsel Response	DAD Argument	Government Response
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).	a. This does not conflict, as trial defense counsel confirm they were not aware of Ms. Rankins' expected testimony. b. This is not a conflict between affidavits.
2. The remaining witnesses the defense team had either interviewed personally or telephonically and thus was aware of	a. Mr. John Akbar asserts that though he spoke with SGT Akbar's counsel before trial, "they never really	a-f. This is addressed in response to Assignment of Error A.I at 18-26.

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Trial Defense Counsel Response	DAD Argument	Government Response
the substance of their expected testimony.	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	g-l. This is not a conflict between affidavits.

Trial Defense Counsel Response	DAD Argument	Government Response
	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).	

Trial Defense Counsel Response	DAD Argument	Government Response
	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	a. This is not a conflict between affidavits. b-c. This is addressed in response to Assignment of Error A.I at 18-26.

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Trial Defense Counsel Response	DAD Argument	Government Response
	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"	a. This is not a conflict between affidavits. b. This is not a conflict between affidavits. c. This is not a conflict between affidavits. d. This is not a conflict between affidavits. Moreover, it is pure speculation.

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Trial Defense Counsel Response	DAD Argument	Government Response
	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 April 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 in that it states 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.	This is not a conflict between affidavits. *See* previous responses.
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.	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,	a. This is not a conflict between affidavits. Moreover, the fact that witnesses may have been removed from a witness list does not establish that they were not re-interviewed following

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Trial Defense Counsel Response	DAD Argument	Government Response
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.	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 March 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 March 30, 2005 incident.	the stabbing incident. b-d. This is addressed in response to Assignment of Error A.I at 95-96.

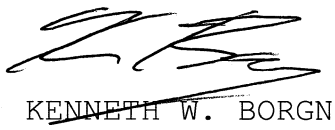
APPENDIX 2

Appendix 2: Post-Trial Processing Timeline

Event	Date	Split	Total
Sentence	4/28/2005	0	0
SJAR	1/18/2006	265	265
Receipt of SJAR	2/10/2006	23	288
Request for Delay for RCM 1105 Matters	2/10/2006	0	288
RCM 1105 delay granted to Mar 13, 2006	2/24/2006	14	302
RCM 1105 Matters (received-signed for on March 10)	3/16/2006	20	322
Letter from appellant	4/5/2006	20	342
Letter from appellant	5/5/2006	30	372
First Addendum to SJAR	9/25/2006	143	515
Second Request for Clemency	11/7/2006	43	558
Second Addendum to SJAR	11/16/2006	9	567
Action	11/16/2006	0	567
Case Received at Defense Appellate Division (DAD)	12/1/2006	15	582
Docketed at Army Court	12/6/2006	5	587
DAD Brief filed	2/1/2010	1153	1740
Government response Filed	11/29/2010	301	2041
Government Request for Argument	3/21/2011	112	2153
Defense request for Argument	3/30/2011	9	2162
Original Order for Argument (set for August 3, 2011)	4/4/2011	5	2167
Reply Brief Filed	4/8/2011	4	2171
Supplemental Defense Brief Filed	4/8/2011	0	2171
Delay of Argument	7/15/2011	98	2269
Amended order for argument (set for February 1, 2012)	11/14/2011	122	2391
Oral Argument	2/1/2012	79	2470
Army Court Opinion	7/13/2012	163	2633
Defense Motion for Reconsideration	11/26/2012	136	2769
Government Response to Motion for Reconsideration (after obtaining second affidavit from trial defense counsel)	4/17/2013	142	2911
Army Court Decision on Reconsideration	4/24/2013	7	2918
Defense Motion to Reconsider Decision on Reconsideration	4/26/2013	2	2920
Army Court Decision on Recon of Recon	5/7/2013	11	2931
Docketed with CAAF	5/23/2013	16	2947

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 12, 2014.



KENNETH W. BORGNINO
Government Appellate Attorney
Government Appellate Division
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703) 693-0754