IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States, Appellee, v. Andrew Witt Senior Airman (E-4) U.S. Air Force, Appellant.	APPELLANT'S BRIEF USCA Dkt. No. 15-0260/AF Crim.App. No. 36785

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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STATEMENT OF STATUTORY JURISDICTION

The lower court affirmed Appellant's sentence to death, which continues the mandatory appellate review of this case. 10 U.S.C. § 866(b)(1) (2012); 10 U.S.C. § 867(a)(1) (2012).

STATEMENT OF THE CASE

On October 5, 2005, a panel of officer members, sitting as a general court-martial, convicted Appellant, contrary to his pleas,[1] of two specifications of premeditated murder, and one specification of attempted premeditated murder in violation of Articles 118 and 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 918 and 880 (2000). On October 13, 2005, Appellant was sentenced to be put to death. R. Vol. 31 at 2707. On July 11, 2006, the convening authority approved the findings and sentence. R. Vol. 14, Convening Authority's Action.

On August 9, 2013, the lower court, sitting *en banc* and by a divided vote, affirmed the findings, but set aside the sentence and authorized a rehearing. *U.S. v. Witt*, 72 M.J. 727, 775 (A.F. Ct. Crim. App. 2013). The government moved for reconsideration, and on October 21, 2013, the lower court, sitting *en banc*, granted the government's motion for reconsideration and vacated its published decision.

[1] Unlike other federal jurisdictions and the military commissions system, Appellant had no choice; he could only plead not guilty. *See* Issue C-XXXIV (citing Article 45, UCMJ; R.C.M. 910(a)(1)).

On June 30, 2014, the lower court, again sitting *en banc* and by a divided vote, affirmed the findings and sentence. *U.S. v. Witt*, 73 M.J. 738, 824-25 (A.F. Ct. Crim. App. 2014). This case was docketed with the Court on Christmas Eve 2014.

STATEMENT OF FACTS

In the early morning hours of July 5, 2004, Senior Airman (SrA) Andrew Schliepsiek and SrA Jason D. King began a series of angry phone conversations with Appellant over Appellant's attempt to kiss SrA Schliepsiek's wife, Jamie, two days prior. *Id.* at 753. The argument became physical several hours later when Appellant burst in the Schliepsiek's home in base housing at Warner Robins AFB sometime after 0400. *Id.* at 754.

A fight ensued and SrA King placed Appellant in a headlock to separate him from SrA Schliepsiek. *Id.* Appellant stabbed SrA King and then SrA Schliepsiek with a knife he brought with him. Appellant stabbed SrA King several more times as he fled the home. *Id.* Appellant then killed SrA Schliepsiek and his wife. Appellant was charged with the premeditated murders of SrA Schliepsiek and his wife, and with the attempted premeditated murder of SrA King. Additional facts relevant to the issues before this Court are discussed below.

ARGUMENT

Part A

A-I.

TRIAL DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PRE-SENTENCING HEARING BY FAILING TO DISCOVER AND PRESENT AVAILABLE MITIGATING AND EXTENUATING EVIDENCE AND BY FAILING TO OBJECT TO INADMISSIBLE AGGRAVATING EVIDENCE.

A. Failure to investigate and present evidence that Appellant suffered a traumatic brain injury (TBI) just 4½ months before the murders.

Additional Facts

Ms. Cheryl Pettry is a mitigation specialist retained to assist trial defense counsel. *See* Cheryl Pettry Declaration A (Pettry A) J.A. 3916, 3917 ¶¶ 1, 7. She explains, "I am part of the defense team, and work closely with defense counsel and other consultants and experts so as to develop a logical and coherent theory of the case, formulate trial strategy, and present the defendant's life history." J.A. 3916, ¶1. When she wrote her declaration in 2007, she had worked in more than 90 state, federal, and military capital cases, and she has worked on many more since then. *Id.*

None of the trial defense counsel had capital experience. J.A. 449-52. This Court has observed that since "there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." *U.S. v. Kreutzer*, 61 M.J. 293, 298 n.7 (C.A.A.F. 2005). That was certainly true here.

Ms. Pettry says she urged counsel to conduct further testing and present evidence concerning a motorcycle accident Appellant had 4½ months before the murders,[2] but they refused to do so. J.A. 3918-20, ¶¶ 8-18. She explains:

> As part of my investigation, I learned that Andrew was involved in a motorcycle accident about four and a half months prior to the homicides, on February 23, 2004. In fact, the motorcycle accident was one of the first items I discovered when I joined the defense team. I learned of the accident through several sources. First, I reviewed the pretrial sanity board report, which discussed the accident. Second, I obtained and reviewed all of Andrew's medical records, which contained his treatment following the accident. Given that Andrew was knocked unconscious during the accident, I believed it to be, based on my experience . . . an important area of inquiry. I therefore advised the defense counsel of a course of action.

J.A. 3918, ¶ 8.

Ms. Pettry provided a written memorandum on August 24, 2004, advising counsel of "several concerns" about Appellant's "closed head injury on February 23, 2004[.]" J.A. 3921. She wrote:

> I strongly recommend that a full psychological battery of tests be administered to Sr. Airman Witt. Because of the closed head injury due to the motorcycle accident and reported changes in behavior since that time, I believe we have a responsibility to pursue any possible brain damage.

Id.

[2] The occurrence of this accident, which the Air Force Court twice notes, is "undisputed[.]" *Witt*, 73 M.J. at 777, 783.

Ms. Pettry observed that "[t]he pretrial sanity board report stated that Andrew had suffered a closed head injury, and noted Andrew's lack of consciousness." J.A. 3918, ¶ 9. Medical records also noted he was knocked unconscious. *Id.*

Ms. Pettry also warned that the standard of practice for capital representation required the accident be investigated:

> My experience has taught me that closed head injuries often times can explain aberrant behavior. I have attended and taught at numerous conferences and seminars related to defending capital cases . . . and without exception, attendees are told the importance of inquiring into whether the defendant has suffered any traumatic brain injury. Science has shown that such injuries can and do affect individual's behavior, judgment, and impulse control.

J.A. 3918, ¶ 9. "Given the proximity to the homicides," she held, "I determined it absolutely necessary to investigate the potential ramifications of the motorcycle accident." *Id.*

She went to great lengths to preserve physical evidence:

> I met with Edward Love [Appellant's roommate to whom Appellant's father sold the motorcycle and helmet] on 24 August 2004. We met at the Area Defense Counsel's office at Robins Air Force Base. Captain Darren Johnson was also present during this interview. At that time, we discussed Andrew's motorcycle accident. Senior Airman Love told me that he still had the motorcycle and helmet, and in fact, had them in his truck. We went outside to inspect. The motorcycle was in the bed of his truck, standing erect and held in place by chains; the helmet was in the cab. He brought the helmet into the office. I viewed the helmet and saw damage to it. The helmet was scratched, gouge[d] in the front, and the visor was completely missing.
>
> Seeing the damage to the helmet confirmed my desire to fully explore the issue and finding out what the

> accident could have done to Andrew's personality and how he would react to confrontation situations. Moreover, Senior Airman Love told me that he had observed a change in Andrew's behavior following the accident. I reduced our interview to writing, as I do in any investigation I do, and distributed it to each of Andrew's three defense attorneys.

J.A. 3918, ¶ 10; see also J.A. 3896-97 (SrA Love interview notes).

Ms. Pettry sought permission to keep the helmet, believing "an expert should look into the accident, and that the helmet would be necessary in such an inquiry." J.A. 3918, ¶ 11. Not only did she consider further investigation necessary, she also recognized the use the helmet as a tangible exhibit at trial:

> I also believed the helmet could be used effectively as an exhibit at trial. Senior Airman Love was not happy about giving us the helmet and was quite upset. At that time, I told Captain Johnson that he must not give the helmet back to Senior Airman Love. I placed the helmet on a top shelf in the conference room of the Area Defense Counsel's office for safekeeping and later use by the defense team.

Id. When she learned shortly before trial that SrA Love was upset about having to relinquish the helmet and had approached Captain Johnson about getting the helmet back, she "reiterated my desire to keep the helmet, telling Captain Johnson that he must not return the helmet to Senior Airman Love." *Id.* at ¶ 11.

SrA Love's interview revealed that Appellant's personality changed. Ms. Pettry's notes say, "he became more outspoken. He

wouldn't put up with anything anymore. After the accident was the first time I saw him in a fight." J.A. 3896.

The Air Force Court criticized reliance on Ms. Pettry's recollection of her interview of SrA Love as "[t]he only data point standing for the proposition that appellant's motorcycle accident changed his personality." *Witt*, 73 M.J. at 779; *id.* at 777 ("critical components of the appellant's argument . . . rest on representations made, many now long after the fact, by the defense mitigation expert"). But when SrA Love was interviewed 10 years later, he confirmed just what Ms. Pettry had reported:

> 5. Prior to the motorcycle accident in February 2004, I had never seen SrA Witt in a fight. The occasion had simply never come up. A couple of months after the motorcycle accident, we were at a bar and SrA Witt almost got into a fight with a civilian. I don't know his name. The two of them started to argue, and decided to take it outside. I followed them to make sure that Andrew did not get hurt. SrA Witt was standing his ground. Eventually, the other guy backed down, and the two of them made up and had a drink. That was the first time I had seen SrA Witt being aggressive or "ballsy" in this way, and it was first time a scenario like this had presented itself.

J.A. 4126, ¶ 5. That "data point" proved itself very reliable.

Ms. Pettry recommended additional neuropsychological testing and consultation with a specific neuropsychologist:

> I also discussed the motorcycle accident and helmet with Dr. Bill Mossman, a forensic psychologist the defense had hired to work on Andrew's case. I believed that because of the accident that Andrew had to have neuropsychological testing done. . . . I even recommended Dr. Frank Wood, from North Carolina, to

> conduct brain imaging. It is my understanding that no comprehensive testing or brain imaging was ever done.

Id., ¶ 13.

Ms. Pettry described her unsuccessful efforts to have counsel further investigate the accident's effects on Appellant, during a pretrial defense team meeting at Robins AFB, Georgia:

> I again brought up the importance of investigating all aspects of the motorcycle accident. Defense counsel quickly dismissed the idea, not agreeing with me regarding the importance of pursuing the accident. I replied that investigating the accident was not to show that Andrew was crazy but that it could potentially show damage that provided an explanation of why he committed the murders. Despite my memorandum, this meeting, as well as further conversations, it became apparent to me that the defense attorneys were not going to pursue what I believed to be a necessary, thorough, and sufficient inquiry into the accident.

J.A. 3919, ¶ 14.

She provided copies of the hospital and insurance records. J.A. 3919, ¶ 15. She related her interview of (then-SrA) Denise Hassen,[3] who took Appellant to the hospital after his accident and counsel's rationale for refusing to call her to testify:

> I met Denise Hassen at the Area Defense Counsel's office at Robins Air Force Base on 22 June 2005. She was a member of security forces and I recall vividly Captain Johnson expressing concern because she entered the office with a sidearm and K-9 police dog with her. I recommended Denise Hassen as a witness due to her actions, but Mr. Spinner told me that he did not want to use her because of the possibility of negative

[3] SrA Denise Hassen has since promoted to Technical Sergeant, and her married name is Pumphrey.

> repercussions to her career for testifying on behalf of Andrew.

J.A. 3919, ¶ 16.

Ms. Pettry recommended presenting evidence of the motorcycle accident – testimony, documents, physical evidence – to the members during sentencing:

> I believed that Andrew's hospital records regarding the motorcycle accident, the helmet, Senior Airman Love's observations of Andrew's behavior before and after the accident, and Denise Hassen's actions should have been used as evidence at Andrew's trial. I also believe we should have accomplished a thorough neuropsychological evaluation of Andrew. I ensured the defense attorneys knew of my recommendations and suggestions, and ensured they each received copies of any documentation I developed in this regard. Any information I collected was made readily and immediately available to defense counsel. I never retained any notes, information, documents, files, or names to the exclusion of any defense counsel. However, none of this evidence was used nor my suggestions followed.

J.A. 3919, ¶ 17.

Ms. Pettry noted that she could have testified concerning the mitigating effect of the accident: "I certainly could have testified with the helmet and the consequences of closed head injuries at trial. I was ready, willing, and able to do so, yet the defense counsel never asked me to." J.A. 3920, ¶ 18.

Appellant's father also attempted to persuade the counsel to explore the motorcycle accident. Witt Declaration A, J.A. 3910. He wrote:

> Of particular concern to me was the fact that Andrew lost consciousness before the accident. I hoped that Andrew's defense attorneys would look into the accident to see what may have caused it and, more importantly, what impact it may have had on him. I raised my concerns about the accident with Andrew's first military defense counsel, Captain Joseph Blackwell. I repeated my concerns to each of Andrew's defense counsel, Mr. Frank Spinner, Captain Douglas Rawald, and Captain Darren Johnson.

Id., ¶ 3. "In all," he writes, "I raised the issue with Andrew's defense attorneys three to five times." *Id.* He was "adamant" and asked every one the trial defense counsel to look into the accident because "it was a major concern to [him]." *Id.*

His efforts to persuade counsel were in vain:

> Each time, Andrew's defense attorneys did not appear to share my level of concern. While they said they would look into it, they did not indicate to me that it was a pressing matter. To my knowledge, they did not request any additional brain imaging above the CAT scan performed after the accident, and did not have an expert evaluate Andrew other than Dr. Bill Mossman. I eventually stopped asking them to look into the accident when it became obvious to me that they were not going to pursue it. I did have the insurance paperwork related to Appellant's medical treatment after the accident . . . which I would have been more than willing to share with his defense attorneys.

Id., ¶ 4.

Counsel presented no evidence of the accident in findings or sentencing. The members never heard evidence that Appellant had been in an accident 4½ months before the offenses,[4] that he

[4] The Air Force Court also remarks that counsel "introduced no evidence of the motorcycle accident[.]" *Witt*, 73 M.J. at 775-76.

was knocked unconscious, that such accidents can cause mild TBI, that mild TBI can cause behavioral changes including increased aggression, or that his girlfriend and roommates observed behavioral changes after his accident.

As mentioned, Ms. Pettry recommended Dr. Frank Wood by name. He was an expert on TBI and professor of neuropsychology at Wake Forest University School of Medicine (1975-2008). Pettry A J.A. 3919, ¶ 13; (Wood CV) J.A. 4025. No member of the defense team did so. Wood A J.A. 4039, ¶ 7. Appellant's counsel contacted Dr. Wood in February 2012, and asked him what he would have told counsel if they had contacted him in 2004. *Id.* at 5, J.A. 4041.

Dr. Wood earned a neuropsychology Ph.D. at Duke University; has testified in more than 50 criminal trials, including 30 capital trials, on neuropsychology, TBI, and neuroimaging; and has regularly lectured at continuing education programs for lawyers, educators, and mental health clinicians. *Id.*, ¶¶ 1-3.

After reviewing Ms. Pettry's and counsel's declarations and Dr. William Mosman's testing data, *id.*, ¶¶ 5-6, he determined what he would have told counsel had they contacted him in 2004:

- That he was available to consult and to testify as an expert and to provide a free consultation about whether further testing was advisable. *Id.*, ¶¶ 7a-d.
- That Appellant's CT scan shortly after the accident "could not exclude TBI, since an immediate CT scan is mostly sensitive to acute bleeding[.]" *Id.*, ¶ 7e.

- That three indicia from the testing data (grip strength, a disparity between verbal and visual memory, and a disparity between IQ and verbal memory) suggest damage to the "left anterior temporal lobe." *Id.*, ¶ 7f.

- That damage to the left temporal lobe is associated with "disinhibited emotional and aggressive behavior." *Id.*

- That he would have recommended additional testing based on "experience consulting and testifying in capital trials" where he has seen "first-hand how important evidence of traumatic brain injuries can be to juries." *Id.*, ¶ 7g. "It can make the difference," he says, "between a death sentence and confinement for life without parole." *Id.*

- That he would have recommended both an MRI and a PET scan, and "[n]othing less would have been conclusive." *Id.*, ¶ 7h.

- That with proper imaging, he could locate the lesion and identify the abnormalities expected with injuries to that region of the brain. *Id.*, ¶ 7i.

- That Appellant's "actions, injuries, and behavior were consistent with TBI." *Id.*, ¶ 7j.

- That he would have been willing to testify at sentencing following the unsuccessful *Daubert* hearing, even without examining Appellant. *Id.*, ¶ 7k.

Dr. Wood disagrees with Dr. Mosman's advice that additional testing would have been a waste of time, saying that is "untrue, uninformed, and inconsistent not only with generally accepted scientific and clinical principles but also with Dr. Mosman's expertise." *Id.*, ¶ 8. He would expect any expert in 2004, to have recommended "additional testing – and, specifically, an MRI, PET scan, or both[.]". *Id.*, ¶ 8.

Dr. Wood opines that even without additional scans, there is a "reasonable probability" Appellant suffered from a TBI.

Id., ¶ 9. He notes that his "behavior changes following the accident and his uncharacteristic behavior on the night of the homicides are highly typical of the impairment in emotional self regulation and impulse control that results from left anterior temporal lobe damages[.]" *Id.*, ¶ 9.

After receiving Dr. Wood's first declaration, Appellant's counsel tracked down TSgt Denise Pumphrey (neé Hassen) who drove Appellant to the hospital after his accident. She wrote:

> 4. When SrA Witt rode his motorcycle onto base after his accident in February 2004, I ran into him outside the dormitories. As I later learned, the accident occurred about two blocks from his home, which was about two miles from base. His motorcycle was damaged, his helmet gouged and scraped, and it was obvious that he had just been in an accident. His face was scratched. He was bleeding over his left eye. He clothes were disheveled and his pants torn.
>
> 5. I asked SrA Witt about three or four questions. I said more or less, "What happened? Were you in an accident? Are you hurt? Are you okay?" There would be a long pause before he would answer my questions. I noticed right away that he was talking and answering slower than he normally would. In my experience, he was outgoing, energetic, and talkative. It was not like him to speak slowly or to give delayed responses. That made me worry that he had been hurt in the motorcycle accident.
>
> 6. I also noticed that SrA Witt was not walking normally. It did not appear that he was walking that way because of any physical injury. He was walking in a slow and cautious manner – sort of like someone might walk after spinning around and feeling dizzy.
>
> 7. Because SrA Witt's helmet and motorcycle were damaged, because of his appearance, and because of the way that he was talking and walking, I told him that he should go to the hospital. At first he

> resisted going the hospital, saying that he was fine. Eventually, he gave in and I drove him to the hospital.
>
> 8. I left the hospital while he was awaiting treatment in order to find a locksmith to open SrA Witt's car, and I went back to the hospital to pick him up later. I remember going to find a locksmith to open SrA Witt's car, at his request, because he did not have his keys. But it was not clear to me then, nor is it clear to me now what happened to his keys. He drove his motorcycle onto base after the accident, yet he did not seem to know where to find his car keys. He seemed confused or disoriented.

J.A. 4049. Even the Air Force Court, which was skeptical about whether Appellant suffered from a TBI, acknowledged that TSgt Pumphrey's "observations show the appellant suffered a head injury of some indeterminate severity[.]" *Witt*, 73 M.J. at 778.

Dr. Wood's certainty of his diagnosis only increased after reviewing TSgt Pumphrey's declaration. In response, he wrote:

> 7. If Mr. Spinner had contacted me in 2004, in addition to what I listed in Paragraph 7 of my original declaration, I would have told him the following based on Ms. Pumphrey's declaration:
>
> a. SrA Witt's delayed speech and slow speech is indicative of a [TBI] brain injury, the full extent of which would only be discernible after a period of some months (for any recovery to have taken place) and only then with MRI or PET or both.
>
> b. SrA Witt's slow and cautious walking, apparently caused by dizziness, is also indicative of a [TBI].
>
> c. Taken separately, these three symptoms are merely suggestive; however, taken together, they are consistent with and substantially add to the evidence I cite in my original declaration – evidence of anterior left hemisphere damage. Damage to this region of the brain is associated with disinhibited emotional

> and aggressive behavior. Even mild [TBI] can affect impulse control, normal cognitive functions, emotional self-regulation, and behavior.
>
> 8. In my original declaration, Paragraph 8, I mention that I disagreed with Dr. Bill Mosman's advice that additional brain scanning would have been a waste of time, concluding that it was "untrue, uninformed, and inconsistent . . . with generally scientific and clinical principles[.]" I stand by that opinion, and Ms. Pumphrey's declaration only increases my confidence in my original opinion.

Id., ¶¶ 7-8.[5] So his testimony would have been more definitive if counsel had spoken with then-SrA Hassen in 2004.[6]

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[5] The Air Force Court suggests Ms. Foster and Drs. Wood and Armstrong failed to consider TSgt Pumphrey's declaration as to Appellant's personality change after the motorcycle accident. *Witt*, 73 M.J. at 778. In fact, all three cite her declaration in their 2012 declarations, *see* J.A. at 4073 (Wood), 4098 (Armstrong), 4052 (Foster), and Dr. Armstrong and Ms. Foster wrote new declarations in 2014 reminding the Court that they had said so in 2012. *See* J.A. at 4130 (Armstrong); 4170 (Foster).

[6] The Air Force Court finds Appellant's claim that he suffered from a personality change after the accident was "resoundingly contradicted," *Witt*, 73 M.J. at 779, in part, by TSgt Pumphrey's declaration saying she would have testified that the Appellant "was good, kind, funny, and . . . did not have any enemies" and that his crimes "were completely out of character." *Id.* at 778 (quoting J.A. 4050, ¶ 11). Yet she wrote a declaration after the Court issued its opinion, clarifying the timeframe that she spoke of:

> My relationship with SrA Witt was limited in the six months before and after the accident. I cannot speak to whether his personality changed after the motorcycle accident because by that time, we were neither working together nor socializing on a regular basis. When I described his personality and character using the language quoted in the Air Force Court's opinion, I was referring to the SrA Witt that I knew while we were in basic training in 2001-02 and when we first arrived at Robins AFB following tech school in

Monica Foster has been Indiana's Federal Public Defender since 2012, and has 30 years' capital litigation experience. Foster CV J.A. 4059. The Indiana Supreme Court has described her as a "good source" as to standards of care in capital cases. *Baer v. State*, 942 N.E. 2d 80, 107-08 (Ind. 2011). She reviewed this case, and opined as to the standard of practice for investigating TBI. Foster B, J.A. 4051.

She explains, "It has been known in the capital defense community that organic brain damage is a frequent contributing factor to capital crimes." *Id.*, ¶ 24. "[O]rganic brain damage is something capital defense lawyers investigate carefully." *Id.*, ¶ 25. She lists "red flags" counsel should have noticed: loss of consciousness, personality change, symptoms immediately after the motorcycle accident, and no criminal history. *Id.*, ¶¶ 25-29.

Ms. Foster faults counsel for overreliance on a generalist such as Dr. Mosman in lieu of a specialist. *Id.*, ¶¶ 31-33. Had they contacted an experienced capital defender, they "would have been directed to retain a qualified neuropsychologist to conduct

---

> mid-2002. I still cannot account for how he could have changed so drastically to have committed the murders in July 2004.

J.A. 4124, ¶ 6. Thus, far from contradicting that Appellant may have suffered a personality change as the Air Force Court avers, her testimony would have supported that proposition. Why else would someone "good, kind, funny, and . . . [who] did not have any enemies" commit two murders and attempt a third, which was "completely out of character"? J.A. 4050, ¶ 11.

a full battery of neuropsychological testing." *Id.*, ¶ 37. Such guidance was "merely a phone call away." *Id.*, ¶ 32.

She finds counsel's declarations "reflect that they relied on Dr. Mosman in ways that fall below the prevailing norms of reasonably competent counsel." *Id.*, ¶ 31. "[I]t appears counsel delegated counsel's obligations to Dr. Mosman." *Id.*, ¶¶ 34-35. He performed several tests, but only three were "designed to identify neurological dysfunction[.]" *Id.*, ¶ 40. "[T]here simply was no full neuropsychological testing[.]" *Id.*, ¶ 41.

Counsel concede that Ms. Pettry recommended further imaging and neuropsychological testing. Spinner A J.A. 4022, ¶ 7; Rawald A J.A. 4008-09, ¶¶ 14, 18; Johnson B, J.A. 4001, ¶¶ 9-10. Dr. Wood would have consulted for free. Wood A, J.A. 4039 ¶ 7a. Counsel had virtually unlimited funding. *See* Spinner A, J.A. 4022, ¶ 7. Dr. Wood describes how easy it would have been to consult with him:

> a. I would have told Mr. Spinner that I was willing to provide a **preliminary consultation on the case without remuneration** in order to help the trial defense team to determine whether brain imaging would have been a worthwhile endeavor.
>
> b. I would have told Mr. Spinner that I had done similar consulting in dozens of capital cases, and that sometimes I was hired for further consultation and sometimes I was not.
>
> . . .
>
> d. I would have told Mr. Spinner I was **available not only to consult on the neuroimaging but also to**

> **testify at Witt's court-martial about my findings.** At the time, I had been qualified as an expert witness in brain imaging of capital defendants approximately 30 times.

Wood A, J.A. 4039, ¶¶ 7a, 7b, 7d (emphasis added).

Dr. Craig C. Rath – the prosecution's psychologist, whom counsel enlisted to evaluate Appellant following their own psychologist's poor showing at a *Daubert* hearing testing his theory of the case – wrote a declaration in response to Dr. Wood's first two declarations. J.A. 4085. Dr. Wood responded with a third declaration. J.A. 4119. Carol Armstrong, adjunct at the University of Pennsylvania Medical School credited Dr. Wood's methods as "reasonable" and consistent with standard practice but called Dr. Rath's "nonstandard." J.A. 4100-02, ¶¶ 8, 12-14.[7]

If counsel investigated the accident in 2004-05, they would have discovered more evidence of a TBI. They would have learned that Appellant's girlfriend, TSgt Molelekeng Mohapeloa, also

[7] Dr. Armstrong's objections to Dr. Rath's methodology are not trivial. She objects that he relies, in part, on Appellant's self-reporting during his two-hour interview as to whether he suffered from a cognitive impairment. J.A. 4101-02, ¶¶ 11-13. Dr. Wood also explains, "a patient's self-report of neurological symptoms is known to be invalid for establishing the presence or absence of neurological disease." J.A. 4121, ¶ 11. Yet the Air Force Court nevertheless credits Dr. Rath's declaration and even adopts his faulty methodology, noting Appellant did not self-report that he "any cognitive impairment or behavioral changes at any time prior to his arrest[.]" *See Witt*, 73 M.J. at 779.

noticed a personality change. Counsel contacted her in 2014, and she had this to say:

> 4. I was aware that SrA Witt was in a motorcycle accident sometime in late February 2004 and had been treated for a head injury. He gradually started to change after that. Little by little, his behavior and personality changed in significant ways. This is what I remember:
>
> a. Earlier in our relationship, SrA Witt was sweet, kind, and affectionate. He would cook for me. He was respectful. He was a really nice guy.
>
> b. After the motorcycle accident, SrA Witt became aggressive, angry, and hostile. He was not as respectful as he used to be. He was often rude. Sometimes he would snap at me with little or no provocation when we were in public and would say to me things like, "What the fuck were you thinking?" This happened more than once, it was uncalled for, and it was downright humiliating.
>
> c. There were also more subtle differences. For example, sometimes SrA Witt would be too dressed up for the occasion. It was almost as if he were pretending to be a different person.
>
> d. SrA Witt also became more outgoing or expressive after his accident. I would say that he became more "free" with females. Part of the reason we broke up was that he would openly flirt with other women even right in front of me. He was looser in his speech and more ornery.
>
> e. After the motorcycle accident, SrA Witt also started drinking more heavily and more often. He was definitely not like that before his motorcycle accident. This was also part of the reason we broke up because he was always a jerk when he was drunk.
>
> f. SrA Witt also became more sexually aggressive with me. On the last weekend we hung out before I broke up with him in March/April, he tried to have sex with me when we were about to go to bed. I said no, and he angrily pushed me away. I was already lying

> down at that point. He was physical in the wrong way. Before the motorcycle accident, he had never pushed me or physically assaulted me in any way.
>
> g. After the motorcycle accident, SrA Witt would sometimes go into what I would call his "weird zone," where he seemed to be acting under some kind of influence. He seemed out of touch. We even talked about it. He said that when he was in that state of mind he would see the color red or blood in his mind's eye. All of this was new. I had never seen him act this way before his motorcycle accident.
>
> h. There is no doubt in my mind that SrA Witt's behavior started to change after his motorcycle accident until we broke up.
>
> i. It was hard for to me break up with SrA Witt because I still cared for him. And yet he had changed so much that I hardly recognized him and even started to feel leery around him.

J.A. 4152-53.

A thorough pretrial investigation would have also included speaking with another of Appellant's roommates at the time of the murders, Mr. Chris Coreth, who also noticed a change in his personality following the motorcycle accident. Wood D, J.A. 4164, ¶ 23.

After the Air Force Court's 2014 opinion, Dr. Wood wrote a fourth declaration responding to the court's misunderstanding of the science. J.A. 4154. And, because the Court faulted Dr. Wood for not personally evaluating Appellant, *Witt*, 73 M.J. at 739,

n.18, his counsel sought funding for him to do so.[8] Regarding his August 18, 2014 interview at Ft. Leavenworth he wrote:

> [M]y examination of Witt substantially corroborated the conclusions that I had drawn based on Dr. Mosman's neuropsychological testing from almost a decade ago. The examination strengthened my earlier conclusion that in July 2004, Witt was operating under an impairment caused by a [TBI] in the vicinity of his left anterior temporal lobe resulting from his motorcycle accident in February 2004. I now conclude

[8] The Air Force Court complains that "more than two years since Dr. [Wood]'s first affidavit raised verifiable brain injury as a potentially overlooked mitigating factor, no such scanning has ever been performed," *Witt*, 73 M.J. at 780, faulting appellate counsel for not having sought additional testing after they learned such testing might bear fruit. This exemplifies what Judge Saragosa calls a "heightened standard" in her dissent:

> [T]he majority establishes a heightened standard of proof for the appellant inconsistent with *Strickland*. The majority is bogged down in the mire of a hypothetical battle of the experts as to whether or not the appellant can prove he suffered a traumatic brain injury as if that is a legal prerequisite to prevailing on the prejudice prong of *Strickland*. At some point, the majority opinion essentially equates prejudice to proof that the appellant actually suffered a traumatic brain injury. The opinion undertakes to rescript the sentencing case with its own rendition of how such testimony might have been presented and rebutted and ultimately concludes that unless appellant can present evidence on appeal that he in fact suffered a traumatic brain injury and that such injury in fact influenced his behavior, then he cannot establish a reasonable probability of a different outcome. In several places, the majority suggests that the omitted evidence could not be mitigating such to affect the appellant's moral culpability unless he could affirmatively establish a traumatic brain injury that influenced his behavior and excused his misconduct.

Id. at 835-36.

> that the impairment was a psychotic one as well as a reduction of behavioral self-control. I further conclude, with stronger certainty than before, that brain imaging was appropriate and necessary for a proper defense at trial and thorough investigation.

J.A. 4160, at ¶ 16. He also found that Appellant appears to have suffered from "auditory and visual hallucination[s]." *Id.*, ¶ 18c. Following his review of SSgt Love's account, interviews of TSgt Mohapeloa and Mr. Coreth, and neuropsychological testing, he ultimately concluded "with an even higher degree of reasonable probability that Witt suffered from a [TBI], most likely in the vicinity of the left anterior temporal lobe, and possibly to its neighboring structures." J.A. 4165, ¶ 26. Further, he found that "with the same level of certainty that Witt was in the throes of a transient psychotic disorder, consisting of a classic command hallucination, and that for these reasons taken together Witt lost self-control at the time of the murders." *Id.*[9]

[9] Contrary to the assertion that SrA Love was "the only data point standing for the proposition that the appellant's motorcycle accident changed his personality," *Witt*, 73 M.J. at 779, two more witnesses confirm that his personality changed. Although the Air Force Court repeatedly notes that "only one witness in a hundred" observed a personality change, *id.* at 774, 777, 784, there were, in fact, three. Indeed, these three – his two roommates and his ex-girlfriend – were better situated than anyone else to closely observe Appellant's behavioral changes immediately before and after the motorcycle accident. *See Glossip v. Gross*, 576 U.S. ___ (2015) (Breyer, J., dissenting) ("I recognize that a 'lack of evidence' for a proposition does not prove the contrary.").

Dr. Armstrong also provided another declaration in 2014. She details the Air Force Court's misreading of her declaration. J.A. 4130, ¶ 8; 4132-33, ¶ 11. She expounds on its misunderstanding of the science. J.A. 4131, ¶ 9. And she criticizes its reliance on Dr. Rath, whose methods were "nonstandard" and "departed from prevailing scientific principles" rather than on Dr. Wood's "reasonable" methodology. J.A. 4130-31, ¶¶ 7, 9.

Though the Air Force Court suggests that Dr. Rath is on par with Drs. Wood and Armstrong, *see Witt*, 73 M.J. at 781 (calling him "well-pedigreed"), he is not on par with them. First, Drs. Wood and Armstrong are both neuropsychologists, while Dr. Rath is only a forensic psychologist (that is, a generalist). Second, it seems that Dr. Rath's main line of work is serving as expert witness, whereas Drs. Wood and Armstrong are academics steeped in the literature. And, third, they are not only academics but academics who have published extensively on the very questions at issue here. *Compare* J.A. 4025 (Wood CV) *and* J.A. 4136 (Armstrong CV) *with* J.A. 4090 (Rath CV).

The Air Force Court not only criticized Dr. Wood's findings in the abstract, but also made the perilous choice to argue with him about the science, asking a series of rhetorical questions that Dr. Wood supposedly left unanswered. *Witt*, 73 M.J. at 780.

Dr. Wood then answered these questions, in turn, providing ample citations to the literature. *See* J.A. 4155-57, ¶¶ 7-11.[10]

As Judge Saragosa's dissent explains, the Air Force Court found that the failure to investigate and present evidence of a TBI did not prejudice Appellant, *Witt*, 74 M.J. at 784, because they applied a "heightened standard" of prejudice. *Id.* at 835-36. While it does not explicitly hold counsel were deficient,

[10] For example, the Air Force Court criticized Dr. Wood for saying that Appellant's grip strength was indicative of a TBI, and noted theatrically that his grip was sufficient to thrust a knife deep into the victim's chest. *Witt*, 73 M.J. at 780, n.19. But Dr. Wood explains that the forensic significance is not his *absolute* grip strength but his *relative* grip strength:

> Page 47 of the opinion asks a series of rhetorical questions about the disparity in Witt's grip strength, pointing out that Witt had sufficient grip strength in his right hand to kill two people with a knife. That his grip strength was "substantial" is not the issue. For decades, the neurobehavioral literature has documented that it is the relative disparity of grip strength (between the left and right hands) that is the diagnostic sign, at p values often less than .001. Such disparity is particularly diagnostically significant when the dominant (right) hand—which should be stronger than the other—is instead weaker. In Witt's case it is doubly significant because his left hand was the one injured in the motorcycle accident and yet the right hand strength was even lower than that of the strength of the injured hand. Of course, while no one sign or symptom should stand alone as the final evidence of a left hemisphere injury, it is one reliable symptom of left hemisphere injury.

J.A. 4156, ¶ 8 (citations omitted). Dr. Wood answers the lower court's other questions with similar dispatch. *Id.* ¶¶ 7, 9-11.

neither do they hold that they were not deficient, "bas[ing their] holding on the second prong" of *Strickland. Id.* at 784.

Concerning the prejudice of the "uninvestigated and omitted mitigating evidence," Judge Saragosa writes, "The death sentence handed down at trial in this case did not come easy. It was far from a quick and obvious decision. The members deliberated for nearly 12 hours over a three-day period before reaching their death sentence," making the probability "reasonable that any one member might have embraced the uninvestigated and omitted mitigating evidence" and "decide[d] against death." *Id.* at 840.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. *U.S. v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007).

Law and Analysis

Military appellate courts analyze IAC claims under the Supreme Court's two-part test in *Strickland v. Washington*, 466 U.S. 668 (1984). *U.S. v. Gutierrez*, 66 M.J. 329, 331 (C.A.A.F. 2008). They ask "whether counsel's performance fell below an objective standard of reasonableness" and, if so, whether, "but for the deficiency, the result would have been different." *Id.* An appellant "has the burden of demonstrating both deficient performance and prejudice." *Id.*

1. The Substandard Performance Prong

a. Deficiency is assessed based on counsel's

aggregate omissions and mistakes.

Substandard performance is assessed based on the aggregate of counsel's omissions and mistakes. Even if "[t]aken alone, no one instance establishes deficient representation," a reviewing court will find the substandard performance prong satisfied if the mistakes and omissions cumulatively fall below an objective standard of reasonable competence. *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999).

b. The *ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* are instructive in determining whether counsel's performance fell below an objectively reasonable standard.

As this Court has observed, the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* "are instructive." *U.S. v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998). This Court has cited the Guidelines in IAC cases. *U.S. v. Kreutzer*, 61 M.J. 293, 302, 305 (C.A.A.F. 2005). Appellant also cites the ABA Guidelines — in addition to several other sources — to establish the prevailing norms of practice in 2005.

The Guidelines are particularly instructive here. First, unlike *Bobby v. Van Hook*, 558 U.S. 4 (2009), which was tried not only before the ABA adopted the 2003 Guidelines but even before the ABA adopted the 1989 Guidelines, *see id.* at 15, 17, this case arose after the 2003 Guidelines were in place. Thus, not only are the Guidelines instructive concerning the standard of

practice, but reasonably competent counsel in a capital case – particularly counsel who had never tried a death penalty case – would familiarize himself with them. Mr. James G. Connell, who serves as statutorily-required "Learned Counsel" in capital litigation for the military commissions system, J.A. 4076, ¶ 1, says that by 2005 the Guidelines established the standard of care:

> From extensive involvement in capital cases, teaching at and attending capital defense conferences, review of relevant caselaw, and review of the ABA Guidelines, I am aware of the standards governing review of the effective assistance of counsel in capital cases[.] By 2005, the capital defense community considered the 2003 ABA guidelines for capital defense . . . to establish the standard of care in capital cases.

J.A. 4078, ¶ 9, 9.a.

Second, unlike their 1989 predecessor, the 2003 Guidelines rescinded the exception for military practice. ABA Guidelines at 2, Guideline 1.1 (Feb. 2003).

Third, the Air Force itself mandated compliance with the Guidelines. *See* TJAG Policy Memorandum: TJAGC Standards –3 (15 May 2005), Attachment 1, page 1 (adopting ABA Standards of Criminal Justice 4-1.2(c)). By specifying that counsel "should comply with" the ABA Guidelines, the Air Force has helped to establish the prevailing professional norm. *Id.*

Finally, reference to the ABA Guidelines is appropriate in light of Supreme Court and this Court's precedent calling them

"important guides" when considering "the standard for counsel's performance." *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *U.S. v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012).

c. A different standard of care applies in capital cases than in non-capital cases.

"There is no doubt that '[d]eath is different.'" *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002). This Court has also held that "'Death is different'" and that this "is a fundamental principle of Eighth Amendment law." *Loving v. U.S.*, 62 M.J. 235, 236 (C.A.A.F. 2005).

The difference between capital and non-capital trials is more than a matter of Eighth Amendment law. Different statutes and regulations provide for a larger panel, a prohibition on bench trials, a prohibition against guilty pleas,[11] and more.

The standard of practice is also different. In *U.S. v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997), this Court set aside a death sentence due to an unpreserved instructional error, though it did not do so in a similar error in a non-capital case, *U.S. v. Fisher*, 21 M.J. 327 (C.M.A. 1986), observing "in *Fisher*, the servicemember only received a 6-month sentence to confinement, which was further reduced by the convening authority to 3 months. In sum, *Fisher* is not dispositive of appellant's death penalty appeal." *Thomas*, 46 M.J. at 315. Death is different.

[11] *See* Issue XXXIV, *infra*.

2. The Prejudice Prong

The standard is whether the outcome was likely affected. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). That "do[es] not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" *Porter v. McCollum*, 130 S.Ct. 447, 455-56 (2009) (quoting *Strickland,* 466 U.S. at 693–94).[12]

a. This Court has found reversible IAC for sentencing in cases comparable to and more aggravated than this.

The offenses in this case are strikingly similar to those of *U.S. v. Curtis*, where a Marine tricked his way into his officer-in-charge's (OIC) house, stabbed and killed his OIC and his OIC's wife, and sexually molested the wife in front of her husband while both lay dying. *See U.S. v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996), *rev'd in part*, 46 M.J. 129 (C.A.A.F. 1997). Upon a motion for reconsideration, Chief Judge Cox observed, "We have seen many cases where the death penalty has not been

[12] Judge Saragosa maintains that the majority misapplied this prejudice standard and "essentially equates prejudice to proof that the appellant actually suffered a traumatic brain injury." *Witt*, 73 M.J. at 836. "In several places, the majority suggests that the omitted evidence could not be mitigating such to affect the appellant's moral culpability unless he could affirmatively establish a traumatic brain injury that influenced his behavior and excused his misconduct." *Id.*

imposed in situations which were equally, or even more, heinous when compared to the circumstances of this case." *U.S. v. Curtis*, 48 M.J. 331, 332 (C.A.A.F. 1997) (concurring).

Here, the contributing factor was even more mitigating — and the failure to use it even more deficient — because, unlike Lance Corporal Curtis's voluntary intoxication, there is almost no risk the members would consider the contributing factor here to be "an aggravating factor rather than a mitigating factor." *Curtis*, 44 M.J. at 123 (quoting *U.S. v. Loving*, 41 M.J. 213, 242 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996)). Members may view voluntary intoxication as morally culpable; there is almost no risk they would view a closed head injury in like manner.

U.S. v. Murphy was another case with worse facts, where this Court reversed a death sentence although the appellant committed three murders. *U.S. v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998). *Curtis* and *Murphy* show reversal is not foreclosed nor is a death sentence inevitable with facts "equally, or even more, heinous when compared to the circumstances of this case." *Curtis*, 48 M.J. at 332.

b. Sentencing authorities often opt against death sentences in cases comparable to and more aggravated than this.

Many state and federal cases involving more heinous offenses have resulted in reversal or only life sentences. For example, in *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007),

the court reversed an Oklahoma death sentence due to prejudicial IAC though the defendant was convicted of killing three people. In *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004), the court reversed another death sentence even though the defendant killed *five* people, including three children.

In *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007), the court reversed an Ohio death sentence on IAC grounds during sentencing grounds where the defendant was convicted of two counts of aggravated murder and one count of attempted murder.

In *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), the court affirmed a district court's reversal of a Washington State death sentence where the defendant was convicted of *13* first degree murders. The district court emphasized that under Washington law, the vote of only one juror was necessary to avoid a death sentence. *Mak v. Blodgett*, 754 F. Supp. 1490, 1501 (W.D. Wash. 1991), *aff'd*, 970 F.2d 614 (9th Cir. 1992). The Ninth Circuit rejected the State's challenge to that reasoning. *Mak*, 970 F.2d at 620-21. This is significant as, like in Washington State, in the military, an accused needs "only one vote to avoid a death sentence." *Curtis*, 44 M.J. at 171 (Gierke, J., dissenting).

Further demonstrating that death is not inevitable in a case involving two premeditated murders and one attempted murder, numerous juries in federal cases have adjudged sentences less than death in cases where the defendant was convicted of

killing three or more people, including in the cases of Terry Nichols, Zacharias Moussaoui, and the American Embassy bomber.[13]

State cases regularly impose sentences of less than death for gruesome murders of three or more, even for serial killers.[14]

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[13] *See, e.g.*, *U.S. v. Terry Nichols* (D. Colo.) (McVeigh's codefendant was sentenced to life for involvement in the Oklahoma City bombing that killed 168 people); *U.S. v. Khalfan Mohamed & Rashed al-Owhali* (S.D.N.Y.) (life sentence for their involvement in the terrorist bombing at American embassies that killed 224 people); *U.S. v. Zacharias Moussaoui* (E.D. Va.) (life sentence for involvement in the September 11 terrorist attacks); *U.S. v. Kehoe* (D. Ark.) (life sentence for murdering two adults and a small child); *U.S. v. Gilbert* (D. Mass) (life sentence for a VA nurse who murdered four patients and attempted to murder three others); *U.S. v. Beckford* (E.D. Va.) (life sentence for six drug-related murders); *U.S. v. Elijah & Michael Williams* (S.D.N.Y.) (life sentence for execution-style triple murder); *U.S. v. Pitera* (E.D.N.Y.) (life sentence for seven drug-related murders in which the victims were tortured and their bodies dismembered); *U.S. v. Bass* (E.D. Mich.) (life sentence for four drug-related murders); *U.S. v. Grey & Moore*, (D.D.C.) (life sentence for 31 drug related murders); *U.S. v. Edelin*, (D.D.C.) (life sentence for 14 drug-related murders); *U.S. v. Shahem & Raheem Johnson* (E.D. Va.) (life sentence for five drug-related murders); *U.S. v. Anthony Jones* (D. Md.) (life sentence for six drug-related murders).

[14] For example, in Kentucky, a jury decided to not impose death on Tina Hickey Powell for a rampage in which she killed five people by shooting them in the head, stabbing them, or running them over with a car, sometimes using more than one of these methods after having kidnapped some of the victims. *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1991).

In California, a jury sentenced Angelo Buono, the "Hillside Strangler" who terrorized Los Angeles and killed nine young women, to less than death. *See* Linda Deutsch, *Life Term Given in 'Strangler' Case*, PHILADELPHIA INQUIRER (Nov. 19, 1983). Also in California, a jury sentenced another serial killer, Brandon Tholmer, who was found guilty of murdering four elderly women while committing rape, sodomy, arson, and burglary to less than death. Terry Pristin, *Jury Votes to Spare Life of Killer of 4 Women*, LOS ANGELES TIMES (Aug. 9, 1986). Serial killer Dorothea

Puente was also sentenced to less than death when a California jury deadlocked on whether to impose death for killing three. Wayne Wilson, *Jurors Deadlock; Puente to Get Life*, SACRAMENTO BEE (Oct. 14, 1993). Also in California, a jury sentenced Dennis Miller to less than death for three execution style homicides, Nick Welsh, *Build It So They Won't Come*, SANTA BARBARA INDEPENDENT (Feb. 14, 2008). Toufic Naddi was sentenced to less than death for murdering his wife and four relatives. *Jurors Recommend Life Without Parole for Naddi*, LOS ANGELES TIMES (July 10, 1990).

In New York, a jury sentenced James Allen Gordon to less than death for the execution-style murders of three women whom he also raped and sodomized. Karen Friefeld, *Sentenced to Life/ Killer's Childhood Helps Him Avoid Execution*, NEWSDAY (Dec. 19, 1998). Another New York jury deadlocked on whether to sentence Dennis Alvarez-Hernandez to death for killing his girlfriend and two of her children, resulting in a sentence of less than death. Yilu Zhao, *Jury Deadlock Spares Life of Man Guilty in 3 Murders*, NEW YORK TIMES (May 24, 2003).

In Maryland, James Perry was sentenced to less than death for committing three murders-for-hire. *State v. Perry*, 822 A.2d 434, 436-37 (Md.App. 2002). The man who hired him also received a sentence of less than death. Arlo Wagner, *Horn Gets Four Life Terms in Triple Murder*, WASHINGTON TIMES (May 17, 1996).

In Illinois, a jury decided not to impose death on Jason Smith for killing his ex-girlfriend, her infant son, and two of her friends. Jennifer Bowen & Rickeena Richards, *Jury Recommends Life in Prison for Smith*, BELLEVILLE NEWS DEMOCRAT (Feb. 2, 2008).

In Texas, a jury decided not to sentence James Burkett to death for killing three people, two of whom were kidnapped and taken to a secluded area where they were shot. *Burkett v. State*, 172 S.W.3d 250, 252 (Tex.App. 2005). Also in Texas, Stephen Walter was sentenced to less than death for murdering three, including a pregnant woman. *Walter v. State*, No. 06-04-00173-CR (Tex.App. 6th Dist. Nov. 15, 2006), *available at*, http://www.6thcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=8500.

In Missouri, a jury sentenced Harold Lingle to less than death for the murders of a pregnant mother and three children. *State v. Lingle*, 140 S.W.3d 178, 180 (Mo. App. 2004). Another Missouri jury sentenced Gary Beach to less than death for murdering his stepson and four men. Jo Napolitano, *Stepfather Gets Life Term in 5 Killings*, NEW YORK TIMES (April 20, 2002).

In Connecticut, a jury decided to impose less than death on Derek Roseboro for killing an elderly woman, a mentally retarded man, and a young girl. *State v. Roseboro*, 604 A.2d 1286 (Conn. 1992). Another Connecticut jury decided not to sentence Jonathan

Since Appellant filed his original brief with the Air Force Court in 2010, more decisions have set aside death sentences on IAC grounds where the accused was convicted of more than two homicides. For example, a federal jury rejected a death sentence in a case where the accused was convicted of three homicides and had previously been convicted of a fourth homicide

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Mills to death for murdering his aunt and her two children. Alaine Griffin, *Triple Killer Spared the Death Penalty*, HARTFORD COURANT (Oct. 19, 2004).

In North Carolina, a jury sentenced Keith Hall to less than death for killing four. Jefferson George, *Members of Victims' Families Watch in Court: Man Who Killed 4 is Spared; Jury Recommends Life in Prison, Not Death Penalty, in '03 Slayings*, CHARLOTTE OBSERVER (Dec. 6, 2006). Likewise, a North Carolina jury decided not to impose a death sentence on Kenneth French killing four people. *State v. French*, 467 S.E.2d 412, 413 (N.C. 1996).

In Tennessee, a jury sentenced Courtney Mathews to less than death for the execution-style murders of four. *Killer of 4 at Taco Bell Gets 4 Life Sentences*, MEMPHIS COMMERCIAL APPEAL (Aug. 15, 1996). Another Tennessee jury did not impose death on Cary Caughron for four murders. *State v. Caughron*, No. 03C01-9310-CR-00181, 1994 WL 510183 (Tenn. Ct. Crim. App. Sept. 20, 1994).

In New Jersey, a jury deadlocked on whether to sentence Lloyd Massey to death for shooting three people to death, resulting in the imposition of a life sentence. *State v. Massey*, No. 00-12-2444, 2007 WL 2301651 (N.J. Sup. App. Div. Aug. 13, 2007). In another New Jersey case, Derrick Mack was sentenced to less than death for three contract killings. *See* Dwight Ott, *Judge Will Decide Sentence for Mack/Because Jurors Were at Odds, the Death Penalty Was Automatically Ruled Out./The Defendant Faces a Possible 3 Life Terms*, PHILADELPHIA INQUIRER (Nov. 3, 1994).

In Oklahoma, a jury sentenced David Postelle to less than death for murdering four people. Jay F. Marks, *Prosecutors See No Justice Without Death: Memorial Day Killer Receives Life Sentence*, THE OKLAHOMAN (March 13, 2008). And Terry Nichols was sentenced to less than death in state court for his involvement in the Oklahoma City bombing. Nolan Clay & Ken Raymond, *Nichols Avoids Death Penalty: Jurors Sent Home After Deadlocking*, THE OKLAHOMAN (June 12, 2004).

in state court. *See* Howard Mintz, *San Jose Federal Jury Declines to Recommend Death Penalty in Gang Leader's Trial*, Alameda Times-Star, Dec. 21, 2010, *available at* 2010 WLNR 25216744.

In 2011 a jury opted not to impose death in a case where the accused killed four people and grievously injured a fifth. *See* Elizabeth Findell, *Roberto Rojas Granted Life*, THE MONITOR, Aug. 27, 2011, *available at* 2011 WLNR 16987036.

In 2011 the Eleventh Circuit set aside a death sentence on IAC grounds where the accused had been convicted of three counts of first degree murder. *Cooper v. Secretary, Dep't of Corrections*, 646 F.3d 1328 (11th Cir. 2011). Also in 2011, the Florida Supreme Court set aside a death sentence on IAC grounds where the accused was convicted of four first-degree murders and one attempted first-degree murder. *Coleman v. State*, 64 So.3d 1210 (Fla. 2011) (per curiam). And in 2012, the U.S. District Court for the Northern District of Iowa reversed a death sentence on IAC grounds where the accused was convicted of five murders in furtherance of a continuing criminal enterprise. *Johnson v. U.S.*, 860 F. Supp. 2d 663 (N.D. Iowa 2012).

In 2012 a jury opted not to impose death where the accused was convicted of killing four. *Texas: Nurse Spared Execution in Bleach Deaths*, N.Y. TIMES, Apr. 3, 2012, at A11.

These cases and many more like them refute the notion that due to the number of victims or nature of the killings, a death

sentence was inevitable. Many cases with worse facts, including military cases, have resulted in non-death sentences. And while examples abound, these cases demonstrate that a death sentence was not inevitable and this Court is not precluded from finding IAC for sentencing in a case such as this.

c. The analysis of prejudice under *Strickland* is cumulative.

Just as substandard performance prejudice is based on the aggregate omissions and mistakes, prejudice must be evaluated based on counsel's overall shortcomings. *See Strickland*, 466 U.S. at 695; *Williams v. Taylor*, 529 U.S. 362, 397 (2000).

Even where "errors, in isolation, were not sufficiently prejudicial," relief is warranted where the errors' "cumulative effect prejudiced" the accused. *Martin v. Grosshans*, 424 F.3d 588, 592 (7th Cir. 2005); *see also Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors.") (quoting *Williams*, 529 U.S. at 397); *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999) ("trial counsel's cumulative errors rendered the

result of Moore's punishment phase unreliable and affirm the district court's grant of relief as to punishment only").[15]

d. The presentation of some mitigation evidence does not insulate the defense from IAC for failure to present other mitigating evidence.

As the Supreme Court has emphasized, the mere fact that the defense presented some mitigating evidence does not insulate counsel from being found deficient. In the course of reversing a denial of habeas relief on IAC grounds where counsel failed to present TBI evidence, the Court said, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigating evidence' presented." *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010) (per curiam).

The Court observed that in some previous cases, it "found deficiency *and* prejudice" where "counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* It continued, "We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* So a court assessing an IAC claim must assess the likely

[15] Judge Saragosa writes that the majority ignores the *Strickland* standard and "addresses each of the alleged deficiencies raised by appellant and assesses its individual potential for prejudice in appellant's sentencing case." *Witt*, 73 M.J. at 535.

effect of evidence that counsel failed to present "regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 3266-67.

Analysis

1. Trial defense counsel's declarations confirm that they inadequately investigated Appellant's motorcycle accident; thus, their representation was deficient.

a. Counsel's investigation was inadequate as they terminated it without contacting a true subject-matter expert – despite their mitigation specialist insisting that they do so and even providing them with the name and contact information of just such an expert.

The investigation was insufficient because counsel did not consult a specialist concerning TBI despite their mitigation specialist's advice. That was unreasonable as such an expert was a phone call away. Pettry A, J.A. 3919, ¶ 13; Wood A, J.A. 4039, ¶¶ 7a, 7b, 7d. Thus, their representation was deficient.

In *Rompilla v. Beard*, 545 U.S. 374, 379 (2005), the Court remarked on the counsel's efforts in *Wiggins v. Smith*, faulting counsel for "investigating inadequately, to the point of even ignoring the leads their limited enquiry yielded." 539 U.S. 510 (2003). It was unforgiving that counsel did not seek a certain file until just before sentencing. "The unreasonableness of what they did was heightened by the **easy availability** of the file." *Rompilla*, 545 U.S. at 389 (emphasis added); *see also Gray*

v. Branker, 529 F.3d 220 (4th Cir. 2008) (faulting counsel for not accepting a free mental health evaluation).

Here, counsel failed to pursue leads despite the "ease" with which they could have done so. Dr. Mosman believed further testing unnecessary. Ms. Pettry disagreed, recommended more testing, and provided the name of an expert (Dr. Wood) with the expertise Dr. Mosman lacked.[16] Dr. Wood's consultation would have been free, and money was not an issue. *See* Wood A J.A. 4039, ¶ 7a; Spinner A J.A. 4022, ¶ 7. The "unreasonableness" of not consulting Dr. Wood "was heightened by the *easy availability*" of doing so. *Rompilla*, 545 U.S. at 389.

In a case like this, where a mitigation specialist with extensive capital experience recommended further inquiry into a TBI, where documents proved a closed head injury occurred, where the literature made clear that the sort of testing that had been done would *usually* fail to discover TBI, and where counsel knew (or should have known) that people close to Appellant reported behavioral changes, it was unreasonable to fail to make a phone call to a willing subject matter expert recommended by name.

In his declaration, Mr. Spinner avers that he did not seek "further neuropsychological testing" or "specialized experts" as

[16] Judge Saragosa suggests "the very existence of disagreement between two of the defense team's experts . . . could be argued to support the proposition that further examination was warranted." *Witt*, 73 M.J. at 784.

Dr. Mosman "saw no value to be gained." Spinner A J.A. 4022, ¶ 7. But counsel's deficiency was more basic than a failure to seek additional testing or appointment of a specialist. They failed to do something so simple as to *consult* a specialist.

Further, counsel's case file reveals they were contacted by another psychologist, who could have rendered a second opinion. Dr. Ebert's E-mail, J.A. 3909. Dr. Ebert offered his services seven months before trial. When faced with conflicting advice from their mitigation specialist and psychologist, counsel should have sought a second opinion. The failure to do so, when several were readily available, was deficient representation.

b. Given what counsel already knew about the accident, they abandoned their investigation at an "unreasonable juncture".

The Supreme Court faulted Wiggins's counsel because they "**abandoned** their investigation . . . after having acquired only rudimentary knowledge . . . from a **narrow set of sources**." *Id.* at 524 (emphasis added). *Wiggins*, 539 U.S. at 524. Here, counsel "abandoned" further testing based on a single source. Spinner A J.A. 4022, ¶ 7; Rawald A J.A. 4008-09, ¶¶ 14, 18; Johnson B, J.A. 4001, ¶ 9. So their culpability was greater. They relied not on a "narrow set of sources" but on just one. 539 U.S. at 524.

Worse, they "abandoned their investigation," *id.*, despite conflicting advice from their mitigation specialist. And they

abandoned their investigation without performing a rudimentary literature review, which would have contradicted Dr. Mosman and signaled the need for further investigation.[17]

There was another reason exclusive reliance on Dr. Mosman was unreasonable, which concerns the second factor in *Wiggins*. The Supreme Court found the investigation unreasonable given what counsel had already discovered: "[a]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* at 525. In assessing reasonableness, *Wiggins* held that "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527

[17] Counsel's failure to investigate a TBI is neither excused nor explained by the unremarkable results of the CT scan at the time of the accident. Had counsel conducted a rudimentary review of the literature, they would have found that CT scans *usually* fail to detect mild TBI. A 2004 study of individuals with mild TBI found that CT scans identified the abnormalities in only 5 to 30% of the cases. J. Borg, L. Holm, JD Cassidy, et. al., *Diagnostic Procedures in Mild Traumatic Brain injury: Results of the World Health Organization Collaborating Centre Task Force on Mild Traumatic Brain Injury*, 43 J. REHABILITATION MED. S61 (2004). In other words, the vast majority of cases of TBI will not be revealed by a CT scan. Even MRIs will often fail to reveal TBI. As DVBIC Director Dr. Deborah Warden explained in an April 2005 Air Force news release, in cases of TBI, "[o]ften there is no visible sign of an injury, and even magnetic resonance imagery does not pick it up." *Brain Injury Center treats new affliction for war on terrorism*, *supra*; *see also* Douglas H. Smith, David F. Meaney, & William H. Shull, *Diffuse Axonal Injury in Head Trauma*, 18 J. HEAD TRAUMA & REHABILITATION 307 (2003).

Here, the already known evidence was considerable; it would have led any "reasonable attorney to investigate further," *id.*:

- Appellant had been in a serious motorcycle accident 4½ months before the murders.
- His helmet and motorcycle were damaged.
- He was unconscious for some period of time.
- He was treated for a closed head injury at the Houston Medical Center, and a CT scan was done.
- His roommates noticed behavioral changes immediately after the motorcycle accident.
- Additional scans could have been conducted for review by a specialist in neuropsychology or neurology.
- An expert in neuropsychology, Dr. Wood, could have advised them about as to whether further testing was worthwhile.
- TBIs are frequently used in capital litigation and are considered some of the best mitigation evidence.
- Funding for further neuropsychological testing would have been readily available.
- His father and the capital mitigation expert insisted on pursuing this line of investigation.
- The murders were out of character based on what family, friends, classmates, coworkers, et al. said about him.

Given what counsel already knew,[18] they "chose to abandon their investigation at an unreasonable juncture." *Wiggins*, 539 U.S. at 527; *Stankewitz v. Woodford*, 365 F.3d 706, 720 (9th Cir. 2004)

[18] Judge Saragosa wrote in her dissent that the "quantum of evidence already known" would have led "a reasonable attorney faced with the task of saving a client from the death penalty to investigate further." *Witt*, 73 M.J. at 833.

(faulting for discontinuing investigation "despite tantalizing indications"); *Loving v. U.S.*, 68 M.J. 1, 5 (2009) (finding IAC where counsel discontinued investigation at an "unreasonable juncture") (quoting *Wiggins*, 539 U.S. at 527-28)).

"*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Wiggins*, 539 U.S. at 527. Nor did a "cursory investigation" justify counsel's "strategy" here. Despite "tantalizing indications," *Stankewitz*, 365 F.3d at 720, they abdicated at an "unreasonable juncture." *Wiggins*, 539 U.S. at 527. Judge Saragosa's dissent weighed in on this: "competent counsel must undertake a certain threshold of investigation by being reasonably diligent prior to making the strategic decision to 'draw [the] line'" when "'further investigation would be a waste.'" *Witt*, 73 M.J. at 830 (quoting *Rompilla*, 545 U.S. at 383). After carefully reviewing the timeline, she found:

> I find a reasonable attorney handling a death penalty case would have investigated this issue further. In essence, there was no tactical or strategic decision not to pursue this lead; instead, there was simply a decision not to investigate because one of two experts, who later proved unreliable, felt the quest would be fruitless. Given the stakes in a death penalty case and the need to convince just one member that death is not warranted, I also find no reasonable tactical or strategic purpose for failing to present the known evidence of the motorcycle accident to the members.
>
> . . . The constraints placed on this potential lead were also unreasonable in light of what appellate

> defense counsel actually discovered and the ease with which this evidence could have been obtained.

73 M.J. at 833.

c. In capital cases, evidence of TBIs requires especially diligent investigation.

Decisions in the Fourth, Sixth, Ninth, and Tenth Circuits suggest a special duty to investigate and present in mitigation evidence of brain injuries.[19] Ms. Pettry alerted counsel and emphasized that a TBI might explain Appellant's actions. Pettry A J.A. 3918, ¶¶ 9-10. Counsel confirmed this. Spinner A J.A. 4022, ¶ 7; Rawald A J.A. 4008-09, ¶¶ 14, 18; Johnson B J.A. 4001, ¶ 9. They were deficient as they deferred to Dr. Mosman's advice without consulting other experts or the literature. They should have realized that a TBI had the potential to be the weightiest mitigation and, thus, required additional efforts.

In *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), the Sixth Circuit granted habeas relief where counsel failed to investigate the connection between a brain injury and the crimes. It could "conceive of no rational strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment[.]" 343 F.3d at 794.

[19] This section discusses only selected opinions from the Fourth, Sixth, and Ninth Circuits, but in 2012 Appellant's counsel identified 77 state and federal opinions reversing death sentences due to counsel's failure to investigate or present evidence of brain damage or impairment. *See* J.A. 4080.

They knew of this impairment, yet "counsel failed to investigate the matter or present any evidence regarding the same." *Id.*

Appellant had a CT scan shortly after his accident. Witt A (attached Tricare Report), J.A. 3911. Any "reasonable attorney" knowing about his accident "would have compared [his] records with the medical literature on brain damage[.]" *Frazier*, 343 F.3d at 795. In 2005 the literature indicated CT scans *usually* fail to detect TBI. Borg, et al., *supra*, note 17 (CT scans detect only 5-30 percent)). Any "reasonable attorney" would have "compared . . . the medical literature on brain damage" with Appellant's head injury and concluded that further investigation was necessary. 343 F.3d at 795. And any "reasonable attorney," *id.*, would have called Dr. Wood when Ms. Pettry recommended him by name.

Counsel was alerted to the significance of this issue and recognized a duty to investigate incumbent upon them. In an e-mail exchange with Appellant's father, lead counsel promised "to leave no stone unturned in trying to understand why Andrew did what he did[.]" *See* J.A. 3899. They did just the opposite.

The Fourth Circuit reached a similar conclusion about a tepid investigation in *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), granting habeas relief where counsel failed to explore evidence of mental impairment. It found counsel's efforts insufficient given that "a reasonable investigation by counsel

could have led to the development of mental health evidence, such as the expert opinion offered by Dr. Bellard[.]" *Id.*

The Ninth Circuit has been especially clear about the duty to investigate TBIs: "Failure to investigate a defendant's organic brain damage or other mental impairments may constitute [IAC]." *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1999). Here, counsel consulted just one psychologist. Caro's counsel went further, consulting "one medical doctor, a psychologist, and a psychiatrist." *Id.* Counsel was deficient as Caro suffered from injuries caused by exposure to pesticides and "none of the experts were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain." *Id.*

Dr. Mosman, a forensic psychologist – like the physician, psychologist, and psychiatrist in *Caro* – was a generalist. He was not a neurologist, neuropsychologist, or neuropsychiatrist, and so lacked these disciplines' expertise in neurophysiology or the pathophysiology of brain injuries. Ms. Foster observes, the "[f]ailure to hire experts with the appropriate expertise can, and frequently will, lead counsel to overlook important factors in the case for life." Foster B. J.A. 4055, ¶ 33. "It appears likely," she concludes, "that is what happened here." *Id.*, ¶ 33.

Finally, in *Littlejohn v. Trammell*, 704 F. 3d 817, 860 n. 23 (10th Cir. 2013), the Tenth Circuit reversed denial of habeas

corpus where counsel presented "general" mental-health evidence but failed to investigate organic brain damage:

> [W]here there are **credible, reasonably discernable clues** that a capital defendant's circumstances will support a mitigation theory based on organic brain damage, it is at the core of a defense counsel's constitutional responsibilities to conduct a reasonable investigation into the existence of evidence to validate or bolster such a theory and, ordinarily, to present such evidence to the jury, if it is found. Given the powerful mitigative effect of such evidence, reasonably competent counsel would not have settled for *some* mitigation case based on mental-health evidence such as presented here, regarding largely behavioral abnormalities, if the organic-brain-damage option was available; not only is this behavioral-abnormality evidence different in kind from evidence concerning organic brain damage, but, critically, in most instances it also will be of significantly lesser mitigative value.

Id. (emphasis added).

Given what counsel knew about the closed head injury and their mitigation specialist's and Appellant's father's urging, they should have pursued such "credible, reasonably discernable clues" by consulting more than just one generalist. *Id.* They should have done "meta-research" to determine which specialists to consult. They should have at least called the specialist Ms. Pettry recommended by name. Pettry A, J.A. 3919, ¶ 13. They did neither and were, therefore, deficient. *Mann v. Ryan*, 774 F. 3d 1203, 1220 (9th Cir. 2014) (finding IAC for failure to investigate defendant's TBI resulting from a 1985 traffic accident).

d. As counsel's pretrial investigation was inadequate, their strategy was unprotected by the presumption of competence.

Mr. Spinner confirms that Ms. Pettry alerted counsel of the significance of the accident. J.A. 4022, ¶ 7. He claims counsel "did not ignore this issue and made a tactical decision" based on Dr. Mosman's advice. *Id.* Their "tactical decision," however, was ignorantly made, and their ignorance resulted from neglect. The law does not afford ignorantly made decisions any deference: "An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) (citing *Strickland*, 466 U.S. at 690-91); *see also U.S. v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977) (holding an unreasonable "tactical" decision will not defeat an IAC claim); *Murphy*, 50 M.J. at 13 (holding that a "lack of training and experience" calls in question tactical judgments so that "there are no tactical decisions to second-guess").

Despite counsel's attempt to style their decision not to investigate as "tactical," their decision was ignorantly made. So it was no strategy at all. *See Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002) ("'mere incantation of 'strategy' does not insulate attorney") (quoting *Brecheen v. Reynolds*, 41 F.3d 1343, 1369 (10th Cir. 1994)); *Bullock v. Carver*, 297 F.3d 1036 (10th Cir. 2002) (even if counsel pursued a course action for "strategic reasons," courts still consider if the course was

"objectively reasonable" despite *Strickland*'s strong deference to strategic decisions).

Courts concentrate on counsel's stated reasons for not investigating or presenting evidence. *See Laws v. Armontrout*, 863 F.2d 1377, 1386 (8th Cir. 1988) (counsel's "reasons for the failure to present mitigating circumstances . . . that are the proper subject for judicial scrutiny"). Counsel's declarations indicate that they dismissed Ms. Pettry's recommendation based on nothing more than Dr. Mosman's opinion. *Compare* Pettry A J.A. 3919, ¶ 14 ("counsel quickly dismissed the idea"); *with* Spinner A J.A. 4022, ¶ 7; Rawald A J.A. 4008-09, ¶¶ 14, 18; Johnson B J.A. 4001, ¶ 9. Counsel did not present powerful mitigation evidence only because they did not investigate and, thus, never appreciated its importance. They failed to investigate despite Ms. Pettry's advice, despite Appellant's father's pleas, and "despite tantalizing indications." *Stankewitz*, 365 F.3d at 720.

Trial defense counsel confirm that Ms. Pettry and Mr. Witt recommended that investigating the motorcycle accident:

- Ms. Pettry recounts a meeting with all three counsel, urged them investigate the motorcycle accident, recommended Dr. Wood by name, and pled for more neuropsychological testing and brain imaging. Pettry A J.A. 3919, ¶ 14.

- One counsel remembers this meeting. Johnson B J.A. 4001-02, ¶ 10.

- Ms. Pettry submitted her recommendations to defense counsel in writing: "Because of the closed head injury due to the motorcycle accident and reported changes in behavior since

that time, I believe we have a responsibility to pursue any possible brain damage." Pettry A J.A. 3918, ¶¶ 9-10.

- Counsel confirm that she advised them to investigate the motorcycle accident. Spinner A J.A. 4022, ¶ 7; Rawald A 4008, ¶ 14; Johnson B 4001-02, ¶ 10.

- Ms. Pettry went to great lengths to acquire the damaged helmet. J.A. 3918-19, ¶ 10-11. She advised counsel to keep it, *id.*, ¶ 11, which counsel confirmed, Rawald A J.A. 4009, ¶ 15.

- Appellant's father also begged counsel to investigate the motorcycle accident and head injury. Witt A J.A. 3910, ¶¶ 2-4. Counsel confirmed that. Rawald A J.A. 4009, ¶ 17.

Further, we know from counsel's records that one appellate defense counsel, Major James Winner, contacted the lead defense counsel, Mr. Spinner, and advised him of the need to explore the possibility of a TBI. J.A. 3900. Maj Winner even recommended an article from the *California Lawyer* magazine, Martin Lasden, *Mr. Chiesa's Brain: Can High-Tech Scans Prove that Criminal Acts Are the Result of a Damaged Brain?* J.A. 3901. Mr. Witt and Ms. Pettry were not alone. A seasoned appellate litigator can be added to the list of those whom counsel ignored.

Strickland affords deference to strategy only after a "thorough investigation of law and facts[.]" 466 U.S. at 690. It continues, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

The Tenth Circuit held that "the failure to investigate the existence of [mitigation] evidence triggers a fundamental component of the Sixth Amendment" that "derives from counsel's basic function, which is to make the adversarial process work in the particular case." *Stouffer*, 168 F.3d at 1167 (quoting *Williamson v. Ward*, 110 F.3d 1508, 1514 (10th Cir. 1997)).

This due diligence is especially important in capital sentencing, as "[t]he Supreme Court has underscored every defendant's right to introduce mitigating evidence at capital sentencing because the death sentence is '*so profoundly different from all other penalties*.'" *Id.* at 1168 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)).

That duty to investigate included phoning Dr. Wood for a second opinion given Ms. Pettry's opposition to Dr. Mosman. Instead, counsel discontinued their investigation, abdicating their "basic function" as defense counsel, thereby subverting the "adversarial process." *Stouffer*, 168 F.3d at 1167).

e. Counsel's inordinate reliance on Dr. Mosman was unreasonable and constituted deficient representation.

Counsel defend their choice not to investigate the accident based on Dr. Mosman's preliminary testing. Spinner A J.A. 4022, ¶ 7; Rawald A J.A. 4008-09, ¶¶ 14, 18; Johnson B J.A. 4001, ¶ 9. Their reliance on Dr. Mosman was unreasonable because of conflicting advice from Ms. Pettry; because of Appellant's

father's insistence; because of what they knew about the motorcycle accident; and because of the known behavioral changes after the accident.[20]

Any reasonable counsel would have recognized that such an accident, combined with behavioral changes, only months before the murders would have been among the most compelling mitigation evidence available. It could have been the difference between life and death. Reasonable counsel would not carelessly abandon the pursuit of potentially outcome determinative evidence based on the opinion of one non-specialist psychologist whose opinion was controverted. Pettry A J.A. 3918-20, ¶¶ 8-15, 17-18.

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[20] Judge Saragosa's dissent made the following observations about counsel's "sole reliance" on Dr. Mosman:

> Trial defense counsel's sole reliance on Dr. BM's opinion was unreasonable for several reasons. First, counsel were faced with diverging opinions on the issue from two experienced experts. One, [Ms. Pettry], had prior experience in dealing with traumatic brain injury at the sentencing phase and the presentation and impact of mitigation evidence such as this closed-head injury. The other trained in the field of psychology. I believe reasonable counsel would endeavor to resolve this dispute by simply picking up the phone and contacting Dr. [Wood] with some basic level of inquiry. Second, while Dr. [Mosman] was a forensic psychologist who may have been qualified to perform some neuropsychological tests, he did not possess the same qualifications as Dr. [Wood] as a neuropsychologist, and therefore it was not reasonable to rely on his opinion in an area outside of his area of expertise.

Witt, 73 M.J. at 832.

In the face of conflicting opinions, counsel could not rely on Dr. Mosman's preliminary results and wash their hands of any further responsibility. Counsel are to be shepherds, not sheep. "Here, it appears," writes Ms. Foster about this case, "counsel delegated counsel's obligations to Dr. Mosman." J.A. 4055, ¶ 35.

If counsel had done even minimal research into Dr. Mosman's "adrenaline theory," they would have found it was unsupported.[21] If they had done independent research, they would have found reasons to doubt not only his adrenaline theory but also other advice he had rendered: particularly, that neuropsychological testing would be a waste of time.

Minimal research would also have revealed Dr. Mosman advanced an equally unsupported theory in collateral proceedings in another capital case more than a year before Appellant's trial on July 27, 2004. *Hertz v. State*, 941 So. 2d 1031, 1037 (Fla. 2006). The Florida Supreme Court would later summarize the trial court's December 30, 2004 order in that case: "[T]he trial court found Dr. Mosman's testimony on this point not to be credible." *Id.* at 1042. "Subsequent to the evidentiary hearing, the trial court denied the claims advanced by Hertz for postconviction relief based in large part on the determination

[21] It was, opposing counsel writes, "simply not grounded in sufficient scientific support to serve as a legally acceptable theory[.]" Government's Answer below at 334.

that the trial court did not find Dr. Mosman to be a convincing witness." *Id.* at 1037.

The State of Florida's brief to the Florida Supreme Court dated July 12, 2005 summed up Dr. Mosman's performance in *Hertz*:

> Essentially, the court found all of Dr. Mosman's opining to be unsupported by the record, unsupported by any specific facts as to the crime, and most glaringly, incredible because Dr. Mosman was uninformed as to the facts and events of Hertz's case. Dr. Mosman read no guilt phase transcripts, read no part of Hertz's competency hearing, did not read all of the doctor's reports, read none of the mitigation evidence presented in book form to the jury and never spoke to defense counsel.

Guerry v. State, 2005 Fl. S. Ct. Briefs 59, **74 (2005). Florida bolstered its argument by referencing Dr. Mosman's questionable performance in two other capital cases, *Henry v. State*, 862 So. 2d 679 (Fla. 2003) and *Kimbrough v. State*, 886 So. 2d at 975-76 (Fla. 2004). *Id.* at **57; **76.

In *Kimbrough*, the Florida Supreme Court discussed Dr. Mosman's testimony:

> On cross examination, Mosman acknowledged that this was not the first time he had testified in a capital case that a defendant's mental age does not match his chronological age. He had previously testified that a thirty-eight-year-old man had the mental or developmental age of a fourteen-year-old. Mosman was not aware that this Court upheld the trial court's rejection of this proposed mitigator because his opinion was contradicted by twenty-five witnesses called by the defense during the penalty phase. He agreed that none of the various IQ test scores in this case placed Kimbrough in even the mild mental retardation range.

Kimbrough, at 975.

> Trial counsel appeared fully aware of these cases:
>
> TC: I just want to make sure that I heard you correctly. Your testimony has never been kept out under *Daubert*?
>
> MOSMAN: Yes, that would be true. I don't have any---
> -
>
> TC: Is it fair to say that it has been limited under *Daubert*?
>
> MOSMAN: It might have been. I would have to look at the case. I don't have a recollection at all. I can't answer that question.
>
> TC: You do not have any recollection of going through a *Daubert* hearing and being told that you could or could not testify to certain things?
>
> MOSMAN: Not specifically, no.
>
> TC: I want you to think about the recent cases that you have testified in, and just tell me, again, have you been through hearings before where the substance of your testimony has been limited?

R. at 1727-28, J.A. 1214-15. For their part, defense counsel opted to trust Dr. Mosman on blind faith, and waited for his medical opinions to implode on the witness stand just as they had in *Kimbrough* and *Hertz*.

In *Wilson v. Sirmons*, 536 F.3d 1064, 1089 (10th Cir. 2008), the court held counsel have a "managerial" and "supervisory" role when dealing with experts and that "counsel may not simply hire an expert and then abandon all further responsibility." Here, in the face two conflicting experts, counsel abdicated

their supervisory role, deferring to Dr. Mosman without further inquiry, independent research, or even a second opinion.

Counsel discontinued their investigation based on the word of one generalist, when a specialist's opinion was required. Further, because they did not do any background research, they were unaware that a forensic psychologist lacked the expertise to answer questions about the pathophysiology of the brain. *See* "A decision to not pursue or present mitigating evidence cannot be considered a reasonable strategic decision unless counsel supports that decision with investigation." *Mann*, 774 F. 3d at 1217-18. Their representation was, therefore, deficient.

In *Caro*, 165 F.3d at 1226, the Ninth Circuit explained that counsel "have an obligation to conduct an investigation which will allow a determination of what sorts of experts to consult." The court found counsel deficient even though they consulted a medical doctor, psychologist, and psychiatrist because none of these "were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain." *Id.*

Likewise, counsel's consultation with just one expert, who lacked the requisite expertise, does not suffice. *See Frierson v. Woodford*, 463 F.3d 982, 992 (9th Cir. 2006) (finding IAC for relying on a forensic psychologist rather than a neurologist, who was "the only expert qualified to evaluate organic brain

dysfunction caused by multiple childhood head trauma"). Counsel must investigate what needs to be investigated to establish what expertise is required and to ascertain the proper scope of their investigation. That counsel did not do.

The Eighth Circuit overturned a capital sentence in *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), because counsel failed to identify Antwine's bipolar disorder. One psychiatrist found he "did not suffer from any mental disease or defect, and that his actions at the time of the offense were consistent with PCP intoxication." *Id.* at 1365. But reliance on a single expert's evaluation did not suffice. The court faulted counsel for not seeking a revaluation as Antwine exhibited odd behavior even when he was not intoxicated. *Id.* at 1367-68. It reasoned, "If Antwine's abnormal behavior was not due to PCP intoxication, what was its cause? Antwine's trial counsel should have followed through on this question." *Id.* at 1368.

There were analogous unanswered questions here. This was "more like inadequate trial preparation than a strategic choice." *Id.* at 1367. Reliance on a generalist was misplaced, especially when their mitigation specialist pled with them to consult a specialist, providing the name of an expert whose free consultation was a phone call away. Wood A J.A. 4039, ¶ 7a.

f. Even if initial reliance on Dr. Mosman was reasonable, failure to seek a replacement, consulting with the

prosecution's expert, and continued reliance on Dr. Mosman after the *Daubert* hearing were inexcusable.

Additional Facts

During his opening, Mr. Spinner promised the members they would hear from Dr. Mosman about premeditation. Trial counsel objected and demanded a *Daubert* hearing. J.A. 1073-78, 1090. Dr. Mosman performed so poorly that counsel could not deliver. Mr. Spinner acknowledges Dr. Mosman "caught the defense team by surprise" at the *Daubert* hearing. Spinner A J.A. 4024, ¶ 13. Dr. Mosman also "conceded that he compromised his ability to further testify . . . due to errors and inconsistencies between what he told us and what he told the government[.]" *Id.* Mr. Rawald confirms that Dr. Mosman "suddenly became reluctant to testify" and counsel were concerned about statements at the *Daubert* hearing that were inconsistent with things he had been telling them for months. J.A. 4016, ¶ 51. Mr. Rawald describes this as a "critical moment" and a "dramatic event that impacted our other decisions." *Id.*, 4017, ¶ 52.

When counsel later consulted with Dr. Rath, psychologist for the prosecution, he told them Dr. Mosman misinterpreted his own testing results. Rawald A, J.A. 4018, ¶ 57. He held "this misreading would affect Dr. Mosman's ultimate opinion." *Id.*

Dr. Wood later found that Dr. Mosman had misread his own testing. J.A. 4041, ¶ 8. He wrote, "I find that Dr. Mosman's

advice that neuroimaging would have been a 'waste of time' to be untrue, uninformed, and inconsistent not only with generally accepted scientific and clinical principles but also with Dr. Mosman's expertise." *Id.* He concludes, "I would expect any expert who was knowledgeable in the field in 2004 to have advised Witt's defense team that additional testing – and, specifically, an MRI, PET scan, or both – were required." *Id.*

Law and Analysis

That Dr. Mosman misread his own testing should have given counsel pause: his advice that further testing would be a "waste of time" depended on his ability to read his own results. *Id.*, ¶ 18.[22] Judge Saragosa's dissent picked up on this point, "assuming *arguendo* that it was reasonable to relay on Dr. [Mosman]'s advice preliminarily, such reliance is reasonable until the moment it proves otherwise." *Witt*, 73 M.J. at 832. "[O]nce it became obvious that there were significant problems with Dr. [Mosman]'s evaluation, scoring, and diagnosis of the appellant, such that his testimony became riddled with

[22] Mr. Rawald explains that it was in part due to the "sizeable amount of data" that Dr. Mosman was relying on that they "deferred to his advice [that further testing was a waste of time] even though it contradicted that of his long time friend and colleague, Ms. Pettry." *Id.* Mr. Rawald says he did "well over a dozen tests" and that these "included a battery of neuropsychological exams, an intellectual cognitive functioning assessment and personality tests." *Id.*

credibility issues . . . any reliance on his prior opinions became unreasonable and warranted immediate reevaluation." *Id.*

Counsel were not without recourse. Dr. Wood's expertise was available to counsel in 2004, had counsel heeded Ms. Pettry. Even after the *Daubert* hearing, all was not lost. Counsel had a golden opportunity. Dr. Wood would have testified "after the unsuccessful *Daubert* hearing" and he would have been "willing to testify during sentencing even without examining or interviewing Witt." *Id.*, ¶ 7k. Specifically, he "would have been willing to testify about the nature of traumatic brain injuries, the possibility of a TBI given Witt's motorcycle accident, and the effects that even a mild TBI can have on impulse control, normal cognitive functions, emotional regulations, and behavior." *Id.* Reasonable counsel would have put in for a delay or phoned Dr. Wood immediately after the *Daubert* hearing during a recess.

And Dr. Wood was not the only option. For example, Dr. Ebert had contacted Mr. Spinner and offered his services seven months before trial. J.A. 3909. Although he lacked a specialist's expertise, a second opinion had become a necessity. The failure to seek one fell below an objective level of reasonableness.

Three axioms can be drawn from the *Daubert* hearing: (1) No reasonable counsel would have continued to rely on Dr. Mosman. (2) No reasonable counsel would have relied on opposing

counsel's expert in lieu of her own. And (3) any reasonable counsel would have sought a continuance and appointment of an independent expert. Counsel violated all three axioms.

It is not clear from counsel's affidavits to what extent they cut ties with Dr. Mosman after the *Daubert* hearing. It is clear that they had not done so entirely. They recognized that he was compromised and could not testify. Spinner A J.A. 4024, ¶ 13; Rawald A J.A. 4016-17, ¶¶ 51-52. But they were still intent on delivering his "theory." Rawald A J.A. 4018, ¶ 58 ("Frank and I still wanted to at least get in the adrenaline evidence," so they sought a "stipulation of testimony from Dr. Mosman."); J.A. 1329-31 (Dr. Mosman's stipulation of expected testimony ultimately presented).[23] They continued to seek his counsel after the hearing. Rawald A J.A. 4016, ¶ 51 ("Dr. Mosman . . . instead suggested we focus on the adrenaline issue[.]"). And they report that part of the reason they agreed to Dr. Rath's evaluation was "to see if we could find some support for [Dr. Mosman's] testimony through the evaluation of another psychologist[.]" *Id.*, ¶ 55.

[23] So important was attacking Appellant's capacity to form the *mens rea* for premeditated murder based on Dr. Mosman's theory of the case that lead trial defense counsel's primary contribution to the case was to develop, present, and argue that theory. *See* J.A. 4022 S, ¶ 6. Dr. Mosman was not their backup strategy; his theory was the essence of the defense's strategy. Hence, their reluctance to readjust even after Dr. Mosman proved unreliable.

There is another indication counsel had not cut ties and continued to rely on Dr. Mosman. In their consultation with Dr. Rath, they sought to corroborate Dr. Mosman's opinion that the motorcycle accident did not contribute to the murders. Yet they did not ask him that question. *See* Spinner A J.A. 4022, ¶ 7; 4024, ¶ 13. Mr. Spinner writes, "Dr. Rath did not indicate that in any way that the motorcycle accident caused trauma that would be relevant to either our defense on the merits or at sentencing." *Id.*, ¶ 7. He continues, "because I believe Dr. Rath is a man of integrity, I also believe that if he identified a mental responsibility issue, he would disclose it to us. . . . [H]e did not identify any issues that we could use in the findings or sentencing portions of trial." *Id.*, ¶ 13. In the same paragraph where he speaks about consulting with Dr. Mosman and Dr. Rath about the motorcycle accident, Mr. Spinner concludes, "The defense team did not ignore this issue [i.e., the motorcycle accident] and we made our tactical decision in reliance on the experts." *Id.*, ¶ 7. Thus, even after the *Daubert* hearing, counsel continued to rely on Dr. Mosman.[24]

Counsel's choice to consult opposing counsel's expert was also unreasonable. Given the adversarial nature of our system, experts – even those who are ostensibly "straight shooter[s]"

[24] That is, presumably "experts" (plural) refers to the only two experts mentioned in that paragraph: Drs. Mosman and Rath.

and "m[e]n of integrity" – cannot be expected to impartially render their services to both sides. Rawald A J.A. 4017-18, ¶ 56; Spinner A J.A. 4024, ¶ 13. "It is not a novel concept to impeach an expert witness based upon possible bias toward the party hiring the expert." *Nickerson v. State Farm Ins. Co.*, 2011 U.S. Dist. LEXIS 124762 (N.D. W. Va. 2011).

Human nature leads us to take sides, even the best of us. That is all the more true in a setting so emotionally fraught as a court-martial for double murder. Forensic psychologists are not exempt, and are no less subject to such human limitations. No reasonable counsel would rely on opposing counsel's expert, especially about a potentially case dispositive matter.[25]

The manner in which counsel engaged with Dr. Rath merits further scrutiny. They expected him to advise them *sua sponte* about the motorcycle accident. Mr. Spinner says, "we knew that the motorcycle accident would be considered by Dr. Rath." J.A.

[25] Counsel also claim that consulting Dr. Rath was necessary to "impose more control over the evaluation than if it was ordered by the military judge[.]" Rawald A J.A. 4017, ¶ 55. "We saw this as an opportunity to keep Dr. Rath from further assisting the government." Spinner A J.A. 4024, ¶ 13. Neither reason stands scrutiny. Even assuming these were viable goals, any reasonable counsel would have recognized that it was more important – by several orders of magnitude – to have their own expert rather than to exercise some marginal control over the prosecution's expert. Regardless, Dr. Rath testified on behalf of the prosecution and to considerable effect. J.A. 2546-61.

4022, ¶ 7. How so? Their declarations suggest they never asked him about it or ascertained what he knew about the head injury.

Although Dr. Rath knew less about the accident[26] than they did, they never asked him about it and relied on his failure to raise the accident *sua sponte*. It was unreasonable to engage with the prosecution's expert instead of asking for their own. It was even more unreasonable not to ask him about the accident and assume he would raise the issue if it was helpful.

Regarding the third axiom, even counsel recognized that they needed a new expert. Mr. Rawald says that part of the reason they agreed to consult with Dr. Rath was to "buy time" in order to find another expert. J.A. 4017, ¶ 55. Yet they did not. They did not consult the expert their mitigation specialist had recommended (Dr. Wood), an expert who had reached out to counsel (Dr. Ebert), or anyone else. Mr. Rawald says they knew they needed a substitute. No tactical rationale supported failing to place a call; this fell below an objective level of competence.

Dubious as the initial decision to consult with opposing counsel's expert was, this consultation confirmed that counsel needed to find a substitute. Part of the reason they spoke with him was "to see if we could find some support for [Dr. Mosman's]

[26] Dr. Rath probably knew much less than counsel did as he did not have Ms. Pettry's investigation of the motorcycle accident.

testimony through the evaluation of another psychologist[.]" Rawald A J.A. 4017, ¶ 55. Far from supporting his testimony, Dr. Rath said that Dr. Mosman had misinterpreted his own testing results. Rawald A J.A. 4018, ¶ 57. "In Dr. Rath's opinion, this misreading would affect Dr. Mosman's ultimate opinion." *Id.* If his performance at the *Daubert* hearing were not warning enough, this should have been a red flag, signaling a continuance was necessary. If they could not rely on Dr. Mosman's reading of his testing data, how could they trust advice that further testing was unnecessary, *which was predicated on his reading of the same testing data*?[27]

Turpin v. Bennett, 513 S.E.2d 478, 480 (Ga. 1999), stresses the significance of the failure to request a continuance in like circumstances. There, counsel did not seek a continuance even though their expert was clearly unprepared: "His clothes were disheveled; he was unkempt and sloppy. His testimony was the worst defense counsel had ever seen: He confused names and appeared irrational; his voice fluctuated inappropriately; and

[27] Judge Saragosa's dissent notes that the problems at the *Daubert* hearing arose on September 26, 2005 and that the presentencing hearing was not until October 6, 2005, giving counsel ample time to adjust. *Witt*, 73 M.J. at 833. And yet, "Counsel never requested a continuance or delay, never attempted to secure a new forensic psychologist consultant, and there is no evidence they conducted any subsequent investigation into this known alternative explanation for appellant's behavior." *Id.*

his facial expressions were 'cartoonish.'" Though there is no "'separately-cognizable claim of ineffective assistance of expert,'" such claims are sometimes available based on "'the constitutionally deficient performance . . . of counsel[.]'" *Id.* at 481-82 (quoting *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992)). The court ultimately reversed and found counsel deficient for not seeking a continuance. *Turpin v. Bennett*, 525 S.E.2d 354 (Ga. 2000). Here, counsel should have known better than to continue relying on an expert who had proven himself unreliable at the *Daubert* hearing. Yet they did not.

In *U.S. v. Walker*, a Marine Corps double homicide case tried a decade before this case, in the middle of trial, the defense's mental health expert engaged in conduct that precluded the defense from calling him. *U.S. v. Walker*, 66 M.J. 721, 735 (N-M. Ct. Crim. App. 2008), *rev'd on other grounds*, 2012 CAAF LEXIS 861 (C.A.A.F. 2012). The defense immediately requested and received a replacement expert. *Id.* Displaying the standard of care expected of reasonable counsel, Walker's counsel sought a continuance to allow the substitute expert to have more time to prepare. *Id.* Denial of that continuance was reversible error. *Id.* at 737-39. Counsel here did not seek a continuance. Here, failing to seek a continuance after deciding their expert could not testify fell below an objective level of performance.

In *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), the Sixth Circuit granted habeas relief where the counsel continued to use an expert at the sentencing phase after he had proven unreliable. The psychologist testified during the findings phase, and his "testimony was rambling, confusing, and, at times, incoherent to the point of being comical." *Id.* at 264. His counsel elected to call him at a second penalty hearing "despite his previous poor performance." *Id.* The court did not find counsel ineffective for initially enlisting his services. *Id.* at 269. Its concern was that counsel called him again: "After having observed [the psychologist's] bizarre and eccentric testimony, did counsel have a duty to find a different psychiatric expert for the retrial of the penalty phase? Put differently, did counsel have a responsibility to present meaningful mitigation evidence? We think that they did." *Id.* The court tolerated hiring a quack, but would not abide using him again after he had proven himself to be a quack. *See also Stevens v. McBride*, 489 F.3d 883, 896-98 (7th Cir. 2007) (overturning a capital sentence given counsel called an expert again at sentencing even though he had already proven that he was a "quack" during the guilt phase).

Dr. Mosman's testimony during the *Daubert* hearing was not unlike Skaggs's expert at the guilt phase. Counsel opted not to call Dr. Mosman to testify after he had contradicted himself.

But they did not cut all ties. They continued to rely on his advice that further testing would be a waste of time, or else they would have sought a continuance and arranged for proper testing.

Counsel say they lost faith in Dr. Mosman after the *Daubert* hearing. Spinner A J.A. 4024, ¶ 13; Rawald A J.A. 4016-17, ¶¶ 49-52; Johnson B, J.A. 4001-02, ¶ 10. Whatever their subjective concerns may have been, their objective behavior was deficient. They did not seek a continuance or a new expert; instead, they consulted the prosecution's expert. They sought to validate what their expert had told them about the value of further testing and to validate his theory (i.e., alcohol/adrenaline prevented formation of the requisite intent).[28] If they privately lost confidence in Dr. Mosman's advice, their actions suggest otherwise as they did nothing to adjust their strategy after the *Daubert* hearing.

2. The failure to investigate or present evidence of Appellant's TBI "undermines confidence" that the members would have imposed a death sentence.

a. Organic brain impairment is among the most compelling mitigation evidence in capital cases.

[28] It seems that counsel fell prey to confirmation bias, hearing from Dr. Rath only what they wanted to hear: that their reliance on Dr. Mosman had not been entirely misplaced.

Strickland's second prong is prejudice, evaluated based on counsel's overall shortcomings. *See Strickland*, 466 U.S. at 695; *Williams*, 529 U.S. at 397. "If there is a reasonable probability that at least one juror would have struck a different balance . . . prejudice is shown." *Hooks v. Workman*, 689 F. 3d 1148, 1202 (10th Cir. 2012) (quoting *Wiggins*, 539 U.S. at 537). So prejudiced was Appellant by the failure to investigate and present evidence of a TBI that this alone constitutes adequate grounds to overturn his sentence. *See Curtis*, 46 M.J. at 130 (holding failure to present available mitigating evidence to explain the offenses was reversible IAC).

Smith v. Mullin, 379 F.3d 919, 944 (10th Cir. 2004), overturned a capital sentence for five murders because counsel failed to present evidence of retardation, brain damage, and a troubled background. It paid particular attention to the mental handicaps resulting from an organic brain injury.[29] *Id.* at 939-43. It explained the evidence omitted was "exactly the sort of evidence that garners the most sympathy." *Id.* at 942. *See also Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995) (citing to studies of juror sympathy to claims of "organic brain

[29] The appellant in *Smith* suffered from mental handicaps because he almost drowned as a child "and the resulting lack of oxygen caused brain damage, or hypoxia." 379 F.3d at 941. His injury affected the area of the brain involved in "emotional regulation." *Id.*

problems"); *Brewer v. Aiken*, 935 F.2d 850, 862 (7th Cir. 1991) (explaining that jurors mistrust mental illness but "an organic problem . . . cuts the other way; jurors are much more likely to credit these claims and to express sympathy.").

There was another reason the *Smith* court found evidence of organic brain injury significant that is very significant here. Smith's counsel focused on family and friends testifying that he "was a kind and considerate person." 379 F.3d at 939. They "made no attempt to explain how this kind and considerate person could commit such horrendous crimes, although mental health evidence providing such an explanation was at his fingertips." *Id.* at 939-40. It compared counsel's presentation to "the sort of 'halfhearted mitigation case' derided by the Supreme Court in *Wiggins*." *Id.* at 944 (quoting *Wiggins*, 539 U.S. 526 (2003)).

Counsel here presented the same sort of "halfhearted" mitigation case as Smith's counsel, characterizing Appellant as polite, kind, considerate, and respectful.[30] They "made no

[30] Counsel presented 15 witnesses at presentencing. J.A. 104. Their testimony was that Appellant's crimes were inconsistent with the kind and considerate young man they knew. His aunt, Lynda Smith, said Appellant was "honest and dependable and funny, just great to be around." J.A. 2706. A classmate, David Baxley, said he was "always happy, very polite, very respectful." J.A. 2725. Michael Roraff, a lawn mowing business partner, described him as courteous and kind, a "hard worker," and "polite". J.A. 2729-30. His cousin, Jesse Dzierzanowski, said Appellant loved his grandparents "unconditionally" and that he was a good listener. J.A. 2752, 2754. Father John McHugh,

attempt to explain how this kind and considerate person could commit such horrendous crimes although" evidence of a TBI "was at [their] fingertips." *Smith*, 379 F.3d at 939-40.

If anything, the explanation was even closer to counsel's "fingertips" as their mitigation specialist alerted them of the possibility of a TBI, pled with them to investigate, and even recommended Dr. Wood by name. *See* Pettry A J.A. 3918-20, ¶¶ 8-15, 17-18. Dr. Wood says he would have consulted for free. J.A. 4039, ¶ 7a. It doesn't get easier than that.

Counsel's sentencing case backfired. Like Smith's counsel, they presented a "'halfhearted mitigation case'" that was "pitifully incomplete." 379 F.3d at 944 (quoting *Wiggins*, 539

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his teacher at Aquinas High School in La Crosse, Wisconsin, said, "Andrew went to the extreme because he was always so polite and courteous that sometimes you'd have to shake him and say, 'Andrew you don't need to be this polite.' . . . I knew he was very, very well brought up and disciplined individual." J.A. 2781. Mr. Richard Jacobson, his employer at Hobby Lobby, described Appellant as "honest", "trustworthy", and having "an excellent work ethic". J.A. 2791. Mr. Joseph Gaspard, his ninth grade physical science teacher and coach, said he played golf like a gentleman and was "very respectful". J.A. 2799-800. Two classmates from his time studying abroad in England found him "quick with a smile" and polite and said he was a "gentleman." J.A. 2808, 2817. Dr. Greg Pehling, his stepfather, said that Appellant was gentle with his younger siblings and was never violent; he described a stepson who was loving and respectful. J.A. 2855, 2864. His mother, Melanie Pehling, said he was not evil but that, "He was a joy." J.A. 2903. Finally, his father related his own substance abuse problems and said that "Andrew stuck by [him] through thick and thin, through [his] dark days in the abyss, and he unconditionally loved [him] through that." J.A. 2939.

U.S. at 526). Like *Smith*, presenting such a saccharin-sweet mitigation case was dangerous as it fed into the government's narrative. *See id.* at 939-40; J.A. 1339-40, 1452, 1468; *see also Anderson*, 476 F.3d at 1146-47 (explaining the mitigation case "played into the prosecution's theory that the only explanation for the murders was that Anderson was simply an 'evil' man"). The prosecution offered Appellant's evil nature as the only explanation for the murders. Counsel countered with a very ineffective *non sequitur*: essentially, when Appellant isn't killing people, he's a "nice guy." Their abject failure to offer a plausible counter-explanation, when one was at their "fingertips," *Smith*, 379 F.3d at 939-40, prejudiced Appellant.

It appears that lead trial defense counsel is still unaware of how presenting a mitigation case saying Appellant was "kind and considerate" played into the prosecution's hands:

> [O]n balance, SrA Witt's parents made a strong case in SrA Witt's favor when they testified. **I could not have been more pleased with their testimony.** The picture they painted of SrA Witt as a loving son and brother to Melanie's other children I believe fully developed the **positive image** we wanted to paint.

Spinner A J.A. 4023, ¶ 11 (emphasis added).

In another Tenth Circuit case, *Wilson*, 536 F.3d at 1093-96, the court granted habeas relief since counsel elicited testimony regarding less helpful diagnoses from their psychologist when more helpful diagnoses were available. The court distinguished

mental illnesses "associated with abnormalities of the brain," which "are likely to be regarded by a jury as more mitigating," from personality disorders, which are regarded as less mitigating. *Id.* at 1094. It held, "Courts have repeatedly found [the former] to be powerful mitigation." *Id.* at 1093-94 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("defendants who commit criminal acts that are attributable to . . . emotional or mental problems, may be less culpable than defendants who have no such excuse.") (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see also Rompilla*, 545 U.S. 374 at 391-92 (noting the powerful mitigation effect of schizophrenia and organic brain damage); *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002) (holding the failure to present organic brain disorder was prejudicial); *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1988) ("psychiatric evidence . . . has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior").

The effect of counsel's failure to investigate cannot be underestimated. Had counsel conducted a proper investigation, they likely would have found evidence of the sort of injury that is "regarded by a jury as more mitigating[.]" *Wilson*, 536 F.3d at 1094. *Wilson* cites "*Williams*, *Wiggins*, and *Rompilla*, as well as *Anderson*, *Smith*, and many more decisions across the country"

in support of its conclusion that it cannot "regard the failure of counsel to effectively present mitigating evidence based on mental health as inconsequential." *Id.* at 1096.

Using Dr. Mosman's testing results, Dr. Wood located the region of the injury (left anterior temporal lobe) and symptoms associated with lesions in that region. J.A. 4040-41, ¶¶ 7f, 9 ("disinhibited emotional and aggressive behavior" and "impairment in emotional self regulation and impulse control"). Because juries tend to respond more favorably to physical brain injuries than to them more "intangible" mental illness, evidence of Appellant's TBI very likely would have been "regarded by a jury as more mitigating[.]" *Wilson*, 536 F.3d at 1094.

The Tenth Circuit is not alone. In *Glenn v. Tate*, the Sixth Circuit found the failure to "draw the jury's attention to the organic brain problem . . . both objectively unreasonable and prejudicial." 71 F.3d at 1211. "Our sister circuits have had no difficulty in finding prejudice in sentencing proceedings where the defense counsel failed to present pertinent evidence of mental history and mental capacity." *Id.* (citing *Brewer*, 935 F.2d at 860); *Stephens v. Kemp*, 846 F.2d 642, 652-55 (11th Cir. 1988), ("the resulting prejudice is clear"); *Blanco v. Singletary*, 943 F.2d 1476, 1505 (11th Cir. 1991) (holding prejudice requirement "clearly met" by failure to present evidence of seizures and organic brain damage); *Loyd v. Whitley*,

977 F.2d 149, 159-60 (5th Cir. 1992) (holding failure to present mitigating evidence of substantial mental defects "undermines our confidence in the outcome"). The court concluded, "We would be badly out of step with the other circuits if we were to conclude that there was no prejudice in the case at bar." *Id.*

Judge Saragosa aptly wrote in her dissent, "Above all else, the failure to investigate the possibility of a traumatic brain injury and failure to present evidence of the same is undeniably prejudicial." *Witt*, 73 M.J. at 839. This is not a close call.

b. TBI evidence would have been a powerful response to the prosecution's assertion that Appellant was "evil".

"Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available." *Littlejohn*, 704 F. 3d at 864. "Appellant's case was not a dispute about 'Did he do it?' Quite to the contrary, the focus of the case was 'Why did he do it?' The defense team's job was to provide an explanation sufficient to win one vote for life." *Curtis*, 44 M.J. at 171 (Gierke, J., concurring in part and dissenting in part), *adopted by majority of the Court*, 46 M.J. 129, 130 (C.A.A.F. 1997); *Littlejohn*, 704 F. 3d at 131 ("Counsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's *mental problems*, life circumstances, and personal

history and, on the other, his commission of the crime in question.")(emphasis original)(citation omitted).

The question presented here was no different. Yet counsel utterly failed to provide an explanation, but not because such an explanation was unavailable. It was at their fingertips.

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000), was much like this case. The Fifth Circuit granted habeas relief in a double homicide as counsel conducted an inadequate investigation into mitigation evidence even though they knew that their client suffered a head trauma and resulting seizures. *Id.* at 713. Likewise, counsel knew about Appellant's motorcycle accident and closed head injury. *See* Pettry A J.A. 3918-20, ¶¶ 8-15, 17- 18; Witt A J.A. 3910, ¶¶ 2-4. They confirmed that in their declarations. Spinner A J.A. 4022, ¶7; Rawald A J.A. 4008-10, ¶¶ 14-15, 17-18, 24; Johnson B J.A. 4001-02, ¶¶ 9-10.

Lockett's mother hired a psychiatrist who recommended additional testing, including an electroencephalogram, a CT brain scan, and neuropsychological studies. 230 F.3d at 712-13. These tests did not happen. Here, the most experienced member of the defense team recommended "neuropsychological testing." Pettry A J.A. 3919, ¶ 13. Like Locket's counsel, counsel chose not to pursue further testing. Spinner A J.A. 4022, ¶7; Rawald A J.A. 4008, ¶ 14; Johnson B J.A. 4001, ¶ 9.

The Fifth Circuit found Lockett's counsel deficient and that his decision not to present evidence of brain abnormalities during the penalty phase was not an "informed strategic choice" under *Strickland*. 230 F.3d at 714-15. It found prejudice because if counsel had done their duty they would have had "a strong predicate from which to argue to the jury that Lockett was rendered less morally culpable for the ruthless, cruel, and senseless murder he had committed." *Id.* Likewise, by failing to investigate and present evidence of Appellant's TBI, counsel lost a "strong predicate" from which to argue that Appellant "was rendered less morally culpable" for his crimes. *Id.* Dr. Wood provides a glimpse of what might have been available:

- That Appellant suffered a TBI probably to the left anterior temporal lobe, "which is a region whose damage or disease is often implicated in disinhibited emotional and aggressive behavior." Wood A J.A. 4040, ¶ 7f(4).

- "[W]ith proper scanning . . . I would expect to find not only whether [he] suffered from a TBI, but I would also be able to locate the lesion and identify the specific behavioral abnormalities associated with the lesion." *Id.*, at ¶ 7i.

- "Even without additional neuroimaging, the information I have reviewed suggests a reasonable probability that Witt suffered from a TBI." *Id.*, ¶ 9.

- "[T]he behavioral changes following the accident and [Appellant's] uncharacteristic behavior on the night of the homicides are highly typical of the impairment in emotional self regulation and impulse control that results from left anterior temporal lobe damage— as is legitimately suspected from the neuropsychological testing." *Id.*

That this evidence (and more) was not presented at sentencing so "undermine[s] confidence" that the members would have imposed a capital sentence, *Strickland*, 466 U.S. at 694, that Appellant's sentence cannot be sustained.

Dr. Wood offered more than just an academic perspective. He described his "experience consulting and testifying in capital trials" where he has seen "first-hand how important evidence of traumatic brain injuries can be to juries." Wood A, ¶ 7g, J.A. 4040. He concludes, "It can make the difference between a death sentence and confinement for life without parole." *Id.* Surely it could have had the same effect here.

c. Evidence of TBI and Dr. Wood's testimony would have been especially persuasive to the members with medical or technical training.

Major Alice J. Straughan has undergraduate degrees in chemistry and biology and a doctorate of veterinary medicine. XLV, J.A. 3507. Six members had degrees in mathematics, science, or engineering. *See* XXXVII J.A. 3369 (Col Tufts, industrial engineering); XXXVIII J.A. 3404 (Col Holcomb, mathematics, physics, engineering); LIV J.A. 3643 (Lt Col Wilford, mechanical engineering); LVI J.A. 3676 (Lt Col Koerkenmeier, aerospace engineering); XLVII J.A. 3541 (Capt Branson, aeronautical science); IL (sic) J.A. 3609 (1st Lt Albertson, aeronautical science).

Dr. Wood's testimony likely would have resonated with at least one of these seven members with technical training. Even if it resonated only with Maj Straughan, as it might have, one vote would have been enough.[31] The composition of a panel steeped in scientific training compounded the prejudice. A panel with this background likely would have recognized the import of Dr. Wood's testimony; the failure to present his testimony to these members cannot be deemed harmless.

d. TBI evidence would have been especially persuasive to a military jury.

A panel of members also would have been particularly likely to find evidence of a head injury important and mitigating given

[31] This raises another problem with the majority's application of *Strickland*. The majority relies on *Wiggins*, 539 U.S. at 534, for the proposition that mitigating and aggravating evidence must be reweighed. But Judge Saragosa explains that this reweighing is not only for Gate 3, which requires a unanimous vote that the mitigation is substantially outweighed by the aggravation under R.C.M. 1004(b)(4)(C), but also applies to Gate 4. "The critical question," she writes, "is whether 'there is a reasonable probability that at least one juror would have struck a different balance' in weighing the evidence for and against sentencing the defendant to death." *Witt*, 73 M.J. at 835 (quoting *Wiggins*, 539 U.S. at 537). "This is a discretionary decision for each court member subject to no specific balance." *Id.* Thus, in this case, one member may have found the aggravation evidence substantially outweighed the mitigation evidence and thus voted with her peers as to Gate 3 and yet still exercised her discretion at Gate 4. "At this stage," Judge Saragosa continues, "there are no elements to meet, no standards of proof, no burden of persuasion required, just the absolute discretion of the court members to consider all facets of the crime and the individual characteristics of this person who committed it to render the ultimate decision as to whether he is sentenced to death or not." *Id.* at 836.

the emphasis the services placed on TBIs at the time of trial. *See, e.g.*, *High Hopes for Brain-Injured Vets*, US Federal News, May 5, 2005 (available on WESTLAW at 2005 WLNR 7129384); *Brain Injury Center Treats new affliction for War on Terrorism*, Department of Defense U.S. Air Force Releases (Apr. 14, 2005) (available on WESTLAW in "allnews") (discussing the work of the Defense and Veterans Brain Injury Center). Counsel no doubt could have obtained expert testimony from a DoD doctor concerning minor TBI and its effects on behavior.

e. The TBI would have been compelling given the availability of physical evidence.

Mitigating evidence concerning the head injury would have been particularly persuasive given the availability of compelling physical evidence. Counsel could have wheeled in the damaged motorcycle and brought in the helmet for the members' inspection. "[P]resenting tangible objects or visible images to the trier of fact is highly persuasive." Michael J. McHale, *Fourth Newport Symposium: "The Use of Evidence in Admiralty Proceedings": Demonstrative Evidence in Admiralty Proceedings*, 34 J. MARITIME L. & COMMERCE 135, 135 (2003). "Exhibits bring an extra dimension to all parts of trial. They are tangible; they can be seen, touched, smelled. And, of course, that which can be seen or even felt resonates more powerfully and more memorably than that which can only be heard." L. TIMOTHY PERRIN,

H. MITCHELL CALDWELL & CAROL A. CHASE, THE ART & SCIENCE OF TRIAL ADVOCACY 247 (2003). Here, counsel had tangible objects that would have allowed them to present significant mitigating evidence in a powerful way. Inexplicably, they failed to do so.

WHEREFORE, this Court should remand for a new sentencing hearing where evidence of the motorcycle accident and mild TBI can be investigated and presented to the members.

B.

Failure to obtain and present Appellant's mother's mental health records, which would have revealed, *inter alia*, a family history of schizophrenia.

Additional Facts

Appellant's mother, Melanie Pehling, was hospitalized at the Minirith Meier New Life Clinic for depression when Appellant was 14. Pehling B J.A. 3947, ¶ 2; Minirth Meier New Life Clinic Records J.A. 3864. She sought help from the clinic due to recurring bouts of depression. *Id.*

Records from her stay at the clinic state that she had her first episode of depression following Appellant's birth and had experienced depression for the two years prior to her admission. *Id.* Moreover, they reveal she underwent psychological testing showing "major depression, moderate to severe, without psychotic features and also borderline features on Axis II." *Id.* It also showed "she may have [had] some trouble with paranoia at times of increased stress." *Id.* Her records say she had "depressive

features, anxiety features, and difficulties with interpersonal relationships marked by isolation, persecution and alienation." *Id.* Due to her "limit[ed] . . . psychological resources," her providers found she was likely "at risk for decompensation. . . . Her personality scale elevation suggests a significant disturbance in her personality organization marked by borderline features." *Id.* They noted "negative views of herself and the world around her, tending toward ongoing depressive features" and "difficulties with repressed anger and hostility." *Id.* She had "trouble with anger and setting boundaries" and "was having many vegetative signs of depression; hopelessness . . . She has had some explosive temper with yelling." *Id.* They record a family history of mental health problems: her father's schizophrenia, a brother's bipolarism, and other' relatives' depression. *Id.*

Ms. Pettry, counsel's mitigation expert, learned of Mrs. Pehling's hospitalization during her investigation. Pettry E J.A. 3933, ¶ 8. Upon learning of this, she held that "obtaining as much information as possible about the mental histories of [SrA Witt's] family was necessary." *Id.*, ¶ 8. Ms. Pettry drafted a release for Mrs. Pehling, but she refused to sign it. *Id.*, ¶ 9.

Ms. Pettry, believing the records "were critical to our investigation and development of a case," asked Mr. Spinner to

subpoena them. *Id.*, ¶¶ 10, 11. She believed they were critical as her experience taught her that mental health is hereditary. *Id.*, ¶ 10. Also, she believed Mrs. Pehling's hospitalization "could have an impact on [Appellant's] development and behavior." *Id.* She told Mr. Spinner about the importance of the records, but he declined to subpoena them because he "understood [Mrs. Pehling] and her religion" and this was his reason for not subpoenaing the records. *Id.*, ¶ 11.

Before the trial, counsel drafted a questionnaire for *voir dire*. *See* XXXV, J.A. 3332. It asked for the members' views about mental health professionals. It asked, "Have you or anyone you know ever had a good or bad experience with a psychologist or any type of mental health professional?"; "What is your opinion about the ability of psychologists or others doing a mental health exam to identify and explain the reasons for human behavior?"; and "Do you believe someone can fool a psychologist or other person doing some type of mental health evaluation?" *Id.* Several members' answers indicated favorable impressions:

- Col Eriksen wrote, "I believe that most psychologists are able to catch . . . the person's attempts to 'fool' them." XXXV, J.A. 3348.

- Col Tufts said, "Someone would have to be very smart to know what to [fool] . . . a trained psychologist." XXXVII, J.A. 3382.

- Col Holcomb reported a "medium-high confidence in the ability of mental health professionals." XXXVIII, J.A. 3416.

- Col Sharpless called their ability "a wonderful gift." XL, J.A. 3450.

- Lt Col Rowlands said he has had positive experiences with mental health professionals personally and professionally and that he believes "there are definite reasons for human behavior and our health providers are able to I.D. and explain the reasons" and that "I do not have experience or a formal education in mental health, so I do rely and have trusted the opinions of the experts". XLI, J.A. 3485.

- Lt Col Wilford stated mental health professionals "are very good at analyzing people and getting to the root cause of some of their problem[s]." LIV, J.A. 3655.

- Lt Col Koerkenmeier held a favorable opinion of psychologists and thought that fooling them would be difficult. LVI, J.A. 3688-89.

- LXVIII, J.A. 3587 (Capt Russell, "I believe qualified professionals can identify and explain reasons for human behavior").

During *voir dire*, counsel explored their opinions and received additional positive responses. *See* J.A. 487 (Col Eriksen, help from psychologist was positive, no negative experience, always helpful); J.A. 642 (Lt Col Rowlands, good experiences with psychologists); J.A. 482 (Capt Russell, psychological evidence important). In particular, Mr. Spinner and Lt Col Hess had this exchange:

> MBR (LT COL HESS): Yes, sir. In one of the courts-martial that I was on, they did bring in a--I think it was a psychologist.
>
> CIV DC: And, did you find that helpful?

MBR (LT COL HESS): Yes, sir.

J.A. 943.

In his opening, counsel promised testimony from a forensic psychologist. J.A. 1079. In the event, he presented only a stipulation of fact, 15 lay witnesses, character letters, and SrA Witt's unsworn statement. While Dr. Pehling made a passing reference to his wife's stay at Minirith Meier clinic for depression, J.A. 2851, and her family's mental issues, J.A. 2885-87, no one described, explained, or discussed the results of her psychological testing or doctors' conclusions. No one suggested that she had struggled with depression, or "has trouble with anger and setting boundaries," "was having many vegetative signs of depression; hopelessness," or that she "has had some explosive temper with yelling." Minirth Meier New Life Clinic Records J.A. 3864.

Counsel's post-trial affidavits do not help their cause. They offer mutually inconsistent reasons for failing to obtain Mrs. Pehling's mental health records:

- Mr. Spinner did not seek the records because Dr. Mosman did not tell him to. Spinner A J.A. 4023, ¶ 11.
- Dr. Mosman advised counsel to explore how Appellant's family experiences shaped his behavior and mental health. Rawald A J.A. 4008, ¶ 14; Johnson B J.A. 4001, ¶9.
- Mr. Rawald would have sought the records had he known that Ms. Pettry wanted them. Rawald A 4012-13, ¶¶ 35-36.

- Mr. Johnson knew Ms. Pettry wanted to subpoena the records and says he told Mr. Spinner and Mr. Rawald, Johnson B J.A. 4003, ¶ 16. Ultimately, he deferred to them "based upon how the case responsibilities were divided," and they did nothing. *Id.*

Judge Saragosa finds "none of the trial defense counsel presents any tactical, strategic, or other reason as to why investigation into this known lead was not pursued." *Witt*, 73 M.J. at 784.

Regarding the prejudice arising from the failure to present the mother's mental health records, the Air Force Court held "the evidence adduced at trial suggests this theme would have been an even harder sell than the one involving the motorcycle accident and the possibility of a TBI." *Witt*, 74 M.J. at 794. Even Judge Saragosa found that while the failure to obtain these records was constitutionally deficient, "it adds very little to the overall assessment of prejudice." *Id.* at 837.

What neither the majority nor Judge Saragosa knew in June 2014 was the result of Dr. Wood's August 2014 interview and neuropsychological testing. He found not only that Appellant likely suffered a TBI, but that he exhibited traits prior to his accident that were a "precursor to schizophreniform psychoses." J.A. 4164, ¶23.a. He found the "Psychotic Disorder diagnosis also gains additional probability from two additional sources," one of which was "Witt's mother's medical record from Minir[i]th Meier New Life Clinic of Wheaton, Illinois." *Id.* at ¶24.

Dr. Wood explains that the Minirith Meier's Dr. Andrew Inglis "documented a Major Depressive Disorder necessitating 3 weeks of inpatient treatment in Andrew's mother." *Id.* at ¶24.a. Further, "He also documented her father's full Schizophrenia and brother's Bipolar Disorder with psychosis." *Id.* He concludes, "This family history increased Witt's likelihood of developing psychotic symptoms, including command hallucinations." *Id.* Although the Air Force Court discusses the failure to obtain and present the mental health records at great length, *Witt*, 73 M.J. 784-94, it is unclear if they reaching a finding about whether counsel were deficient or based their decision on the prejudice analysis.[32] They did, however, hold that "none of the trial defense counsel presented any tactical, strategic, or other reason as to why investigation into this known lead was not pursued." *Id.* at 784.

Analysis

1. The failure to obtain Mrs. Pehling's mental health records was deficient representation.

The Supreme Court has long recognized that in capital cases, "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

[32] As Judge Saragosa observes, "it appears that their opinion is based on a lack of prejudice rather than an analysis of counsel's performance." *Witt*, 73 M.J. at 834.

Evidence of a "defendant's childhood, social background, character, and mental health is highly relevant to sentencing determinations because of the 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Boyde v. California*, 494 U.S. 370, 382 (1990) (citations omitted).

Competent counsel would have obtained Mrs. Pehling's records and presented them because they portray a more complete picture of SrA Witt's family mental health history and childhood. *See Turner v. Duncan*, 158 F.3d 449, 456 n.9 (9th Cir. 1998) ("failure to utilize available psychiatric information . . . falls below acceptable performance"); *Kenley v. Armontrout*, 937 F.2d 1298, 1307 (8th Cir. 1991) (holding that "there is no legal authority limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence; evidence of lesser conditions, disorders and disturbances are precisely the kinds of facts which may be considered by a jury as mitigating evidence"). "It is the duty of the lawyer to conduct a prompt investigation . . . and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla*,

545 U.S. at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)). Here, counsel failed in that duty.

Counsel's failure to obtain Mrs. Pehling's records becomes even more unreasonable as counsel's mitigation expert actually explained the need for the records. Pettry E, ¶ 11, J.A. 3933. In military capital cases, frequently the mitigation specialist is the most experienced member of the defense team, *Kreutzer*, 61 M.J. at 298 n.7, as was the case here. Yet counsel disregarded Ms. Pettry's advice to subpoena or otherwise obtain the records.

The ABA Guidelines confirm that the failure to even obtain Mrs. Pehling's mental health records was deficient performance. Guideline 10.7 outlines counsel's responsibility to investigate an accused's case, specifically to "conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guidelines, *reprinted in* 31 HOFSTRA L. REV. 913, 1015 (2003). The commentary is even more prescriptive as to counsel's investigatory responsibilities. It provides that counsel "needs to explore: . . . (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence)." *Id.* at 1022.

Despite these clear norms expected of counsel representing an accused in a capital case, *cf. Canaan v. McBride*, 395 F.3d

376, 384-85 (7th Cir. 2005) (saying ABA Guidelines are relevant to "the proper measure of attorney performance"), Appellant's counsel did not seek Mrs. Pehling's mental health records.

David I. Bruck, best known for his representation of Susan Smith but with a wealth of other capital experience,[33] opines that the failure to obtain the records was unreasonable: "no attorney performing within 'the wide range of professionally competent assistance,' [citing *Strickland*] would have failed to carry out so basic a task as to seek out the client's mother's mental health records." Bruck, ¶ 11, J.A. 3987-88. Citing the ABA Guidelines, he explains "*Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children.* A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a

[33] The U.S. District Court for the Southern District of New York has noted and relied upon his expertise. *U.S. v. Miranda*, 148 F. Supp. 2d 292, 294, 297 (S.D.N.Y. 2001). As another scholar observed in 2004, Professor Bruck "has participated in hundreds of capital cases" and served as "a Federal Death Penalty Resource Attorney who advises attorneys appointed to represent federal capital defendants." Welsh S. White, *A Deadly Dilemma: Choices by Attorneys Representing "Innocent" Capital Defendants*, 102 MICH. L. REV. 2001, 2023 (2004). Since then, he had has 11 more years' capital litigation experience as the Director of the Washington and Lee University School of Law's Virginia Capital Case Clearinghouse. Few experts are better placed to opine on about the standard of care in the litigation of capital cases.

diagnosis or underscore the hereditary nature of a particular impairment." *Id*.

Counsel's strategy was never about whether SrA Witt killed the Schliepsieks but rather *why* he did so. His mother's records contained information counsel should have explored to decide how to answer the question of why he did what he did.

During the "penalty phase . . . effective assistance requires counsel to make reasonable efforts to determine whether a defendant's mental health presents a plausible argument against imposing the death penalty." *Wilson*, 536 F.3d at 1132. Mental health evidence is "of vital importance to the jury's decision at the punishment phase." *Smith*, 379 F.3d at 942. When Mrs. Pehling refused to release the records, Ms. Pettry asked counsel to subpoena them. This was consistent with a reasonable effort to determine if mental health would have been "of vital importance." *See* Rule for Court-Martial 703(e)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Mr. Spinner's response was inconsistent with such reasonable efforts.

Mr. Spinner declined to seek a subpoena as he "understood [Mrs. Pehling's] religion." Pettry E, ¶ 11, J.A. 3933. The decision to forgo seeking the records, to be permissible under the Sixth Amendment, must be based on "all relevant information and . . . necessary facts." *Wiggins*, 539 U.S. at 525; *see also U.S. v. Sales*, 56 M.J. 255, 258 (C.A.A.F. 2002) ("[c]ounsel have

a duty to perform a reasonable investigation or make a determination that an avenue of investigation is unnecessary").

Without the details of Mrs. Pehling's diagnoses, her tests, and psychologists' observations, counsel did not have the facts to make an informed decision on whether to abandon investigating her mental health history and its impact on Appellant. *See U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) (holding "counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made"). "[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28.

2. Failure to obtain and utilize Mrs. Pehling's mental health records prejudiced appellant.

Had counsel pursued the records, they would have learned more about Mrs. Pehling's personality, which would have provided insight into Appellant's childhood. Counsel would have obtained "powerful evidence that the defendant's formative environment — not only at the time of his mother's psychiatric hospitalization when he was 14, but throughout his short life prior to that time — as marred by circumstances that could have been expected to do grave harm to any young child." Bruck, ¶ 12, J.A. 3988. They would have learned:

- SrA Witt's mother suffered from what appears to have been post-partum depression with each of her newborn children, including Witt, at a time in these children's lives when such an illness can be expected to interfere with the processes of bonding and attachment that are essential for any child's successful development.

- It would be reasonable to infer that the impact of his mother's depression on SrA Witt's formative experiences may have been exacerbated by his father's drug and alcohol addiction and his physical abuse of Witt's mother.

- The fact that Mrs. Pehling was home-schooling SrA Witt at the time of her hospitalization, while experiencing explosive outbursts of temper and vegetative symptoms of depression, suggest that SrA Witt's early adolescence was spent in an environment where the deleterious impact of his mother's serious mental illness would have been exacerbated by his social isolation and lack of peer interaction or educational supervision at school.

- While Mrs. Pehling appears to have somewhat minimized her own history of mental illness, the records leave little doubt that she suffered from some serious psychiatric symptomatology throughout her adult life (beginning with her own report of bulimia at age 17-21), and that she was the product of a toxic home life marked by domestic violence, extreme instability, and serious mental illness (including her own mother's suicide attempt).

Id., J.A. 3988-89.

Based on the content of the records, reasonable counsel would have enlisted "expert assistance in interpreting them, and in planning further investigation." *Id.*, ¶ 14. Counsel did not do so and were unreasonable. *See id.*, ¶ 12 (saying the mental health records "illuminat[e] . . . why counsel is required to seek out such records in the first place").

Reasonable counsel would have presented the records to the members. Such evidence of an accused's childhood "is typically

introduced by defendants in mitigation," *Eddings*, 455 U.S. at 115, and is "of vital importance to the jury's decision at the punishment phase," *Mullin*, 379 F.3d at 942. Here, the records provide valuable insight into Appellant's mental health. They:

> tend to establish both a genetically-based risk that SrA Witt would suffer from substance abuse and major mental illness, and also suggested that his childhood, from infancy through early adolescence, may have been marked by domestic violence, chronic fear, emotional withdrawal, social isolation, and pervasive instability.

Id., ¶ 13. Professor Bruck offers three possible uses counsel could have made of Mrs. Pehling's mental health records:

> - simply submitting the records themselves, and elucidating the likely effects of the numerous adverse circumstances by argument of counsel and through lay witnesses;
>
> - presenting a psychological evaluation of the defendant that would have been informed by this rich source of information concerning his formative environment and genetic inheritance, or
>
> - use of a non-evaluating or "teaching" expert who (without actually evaluating the defendant) could have assisted the sentencing authority by interpreting the records, and extracting from them as much insight as possible concerning SrA Witt's background and the probable impact of such a history of familial mental illness, substance abuse, domestic violence, social isolation, and chronic maternal depression.

Id., ¶ 15. But without the records, counsel could not pursue any of the foregoing.

While counsel did elicit that Mrs. Pehling was aloof, had a family history of mental health issues, and stayed at Minirith

Meier clinic, that pales in comparison to the detail contained in the records: that she suffered from depression for years; had "trouble with paranoia"; struggled with "interpersonal relationships marked by isolation, persecution and alienation"; had "significant disturbance in her personality organization marked by borderline features"; suffered from "repressed anger and hostility;" had "trouble with anger and setting boundaries"; had "vegetative signs of depression"; and had an "explosive temper[.]" Minirith Meier, J.A. 3864.

Presenting the records alone would have preempted the trial counsel's argument that Mrs. Pehling did "everything, as you have heard, and you must feel for her, to give him a chance," his claim that SrA Witt was not a victim of "emotional abuse," that SrA Witt "was blessed through his childhood," or was "a kid with every benefit, every background, everything you could need, everything you could want." J.A. 1450, 1457-58, 1468.

Evidence like that contained in Mrs. Pehling's records would have been of great importance as the members indicated in their questionnaires that they valued psychological evidence. *See, e.g.,* LXVIII J.A. 3602 (Capt Russell, offering that "mental stability has to be taken into consideration"). These records had "the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." *Middleton*, 849 F.2d at 495.

Counsel also could have presented the records through an expert. The members were provided only minimal testimony about Mrs. Pehling's mental health history, her hospitalization, and SrA Witt's father's drug and alcohol abuse. But an expert would have been able to explain the significance of these facts, along with the evidence of Mrs. Pehling's particular afflictions. An expert could have explained how those issues affected Appellant and articulated the hereditary nature of mental illness.

Dr. Robert B. Connor, a clinical psychiatrist, evaluated Appellant, examined his mental health records and trial record and reviewed Mrs. Pehling's mental health records. Connor J.A. 3992, ¶ 3. He could have provided the very testimony *Horn* and *Caro* found necessary at sentencing. He could have provided an opinion that Lt Col Rowlands would have trusted and set forth "definite reasons for human behavior and our health providers are able to I.D. and explain the reasons." XLI, J.A. 3485-86. He could have discussed SrA Witt's "mental stability," which Capt Russell said "has to be taken into consideration." LXVIII J.A. 3602. And he would have gotten to "the root cause of some of [Appellant's] problem[s]" for Lt Col Wilford. App. Ex. LIV, J.A. 3655.

Dr. Connor can proffer what a psychiatrist would have said about Mrs. Pehling's records. Professor Bruck observed that "it seems extremely unlikely that [Appellant] emerged from childhood

unscathed by" the circumstances described in his mother's mental health records. J.A. 3989, ¶ 13. Dr. Connor confirms that.

Dr. Connor "believe[s] that Melanie Pehling's mental health records provide important information that may help explain SrA Witt's behavior the night of the homicides. These records depict an individual – Mrs. Pehling – with profound psychiatric problems." Connor A, J.A. 3992, ¶ 5. He highlights Mrs. Pehling's depression, paranoia, and personality disorder, her suffering from "chronic recurrent depression [and] anger dyscontrol issues." *Id.*, ¶ 6. Because of limitations in recognizing boundaries, she lacked the ability to "to establish self identity." *Id.* Per Dr. Connor, such issues would have been influential in her interactions with her 14-year-old son. *Id.* Likewise, her "vegetative signs, and . . . explosive temper" were significant risk factors in the development of a child who would be observing and interacting with her. *See id.*, ¶ 8. But the members never heard of this. They did not "have the benefit of expert testimony to explain the ramifications of these experiences on [Appellant's] behavior." *Caro*, 165 F.3d at 1227.

An expert informed by the clinic records would have told the members that the "impact of Mrs. Pehling's mental health issues created an environmental factor that would have had a profound impact on SrA Witt's emotional, social, and psychological development." Connor A, ¶ 12, J.A. 3993. This

contradicts trial counsel's argument that SrA Witt was not emotionally abused. *See* J.A. 1457. Whereas he attempted to portray SrA Witt's upbringing and childhood as "blessed," *see* J.A. 1458, the truth is that his childhood was anything but.

Dr. Connor could have provided the precise "powerful evidence that the defendant's **formative environment**—not only at the time of his mother's psychiatric hospitalization when he was 14, but throughout his short life prior to that time—was marred by circumstances that could have been expected to do grave harm to any young child." Bruck, ¶ 12, J.A. 3988, (emphasis added).

SrA Witt's formative environment was not "blessed," but marked by his mother's "explosive outbursts of temper and vegetative symptoms of depression," his social isolation, and a mother with "trouble with anger and setting boundaries." Bruck J.A. 3988, ¶ 12; Connor A, ¶ 8, J.A. 3992-93. Counsel could not present such evidence — or even consider *whether* to present it — as they failed in the basic step of obtaining the records, despite their mitigation specialist's urging to do so.

Dr. Connor also would have informed the members as to the significance of Mrs. Pehling's family's mental health history as it related to Appellant. He could have ensured that the members were aware that mental health is hereditary, so that they knew that her father's schizophrenia, brother's bipolarism, and her own depression and personality disorders put SrA Witt at risk of

suffering from mental health illness. *See* Connor A, ¶¶ 9, 12, J.A. 3993. He opines that SrA Witt suffered from chronic dysthymia disorder, a form of depression, "which would be traceable to his mother's family history of mental disorders," such that his "biological inheritance severely inhibited his development." *Id.*, ¶ 12. This bolsters Professor Bruck's observation that Mrs. Pehling's mental health records establish "a genetically-based risk that SrA Witt would suffer from . . . major mental illness." J.A. 3989 ¶ 13. The members never heard of any connection between Mrs. Pehling's mental health history and SrA Witt's mental health.

Defense counsel's opening told the members they would hear about SrA Witt's upbringing. And he promised they would learn about "the environment that created the person who committed the acts on the 5th of July." J.A. 1073. An expert like Dr. Connor would have put paid to that. He concluded that "SrA Witt's upbringing and biological inheritance severely inhibited his development." Connor A, ¶ 4, J.A. 3992. Accordingly,

> It is my professional opinion that SrA Witt was stunted by environmental and biological factors such that he did not have the emotional capacity commensurate with his biological age. His conduct has to be understood within the context of his emotional level of development, rather than his physiological level of development.

Id., ¶ 12, J.A. 3993. This is a different explanation than provided by the trial counsel, who claimed SrA Witt was "evil":

> [S]ometimes there's evil in this world. Sometimes people are bad. This case seems to support just that. Here's a kid with every benefit, every background, everything you could need, everything you could want. Here's a kid whose parents really, really do care and love him and got him on the right path. And, then he goes astray in the Air Force. It is not the Air Force's fault. It's not God's fault. It's nobody's fault but his own. Sometimes people are just bad.

J.A. 2659.

Counsel did not counter that with Mrs. Pehling's records because they never obtained them. Had they done so, they would have had a counter-explanation. *See Boyde*, 494 U.S. at 382 (noting a belief that those who commit crimes "attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse").

The analysis of an expert like Dr. Connor would have been helpful in convincing the members that Appellant was not "evil", *see* J.A. 1468, but rather a product of forces and an environment that made him less culpable. *See also* Bruck, ¶ 13, J.A. 3989 (observing that SrA Witt's past was not his fault and would serve as a mitigator). That is sufficient to undermine the confidence in the sentence. *See Strickland,* 466 U.S. at 687.

3. Failure to obtain the mental health records cannot be considered in isolation, either as a matter of law or as a matter of fact.

Judge Saragosa claims the majority misapplied *Strickland* in that "it addresses each of the alleged deficiencies raised by appellant and assesses its individual potential for prejudice in

appellant's sentencing case." *Witt*, 73 M.J. at 835. She writes, "The ultimate determination as to whether the prejudice prong of the *Strickland* test is met is based upon consideration of counsel's errors as a whole, rather than individually." *Id.* Thus, *as a matter of law*, the prejudice caused by the failure to obtain the records cannot be considered in isolation.

There is another reason the failure to obtain the records cannot be considered in isolation. These records indicate Appellant's grandfather suffered from schizophrenia and his uncle from bipolar disorder with psychosis. Dr. Wood held the family history increased his "likelihood of developing psychotic symptoms, including command hallucinations." J.A. 4165, ¶24.a. Thus, the TBI resulting from his motorcycle accident is bound up with his hereditary predisposition to mental illness. And so, *as factual matter*, the prejudice caused by the failure to obtain the mental health records cannot be considered in isolation. The two are inextricably linked. Evidence that Appellant was predisposed to schizophrenia or psychosis would have worked synergistically with the TBI. *See* Deborah W. Denno, *The Impact of Behavioral Genetics on the Criminal Law: Revisiting the Legal Link Between Genetics and Crime*, 69 LAW & CONTEMP. PROB. 209, 212 (2009)("Presumably, judges and juries would be less likely to think that a defendant is feigning states such as schizophrenia

or alcoholism if such disorders commonly occurred across generations of the defendant's family.")

The prejudice caused by the failure to obtain the records, thus, cannot be considered in isolation. Under *Strickland* they must be considered cumulatively. And the connection between TBI and hereditary mental illness exacerbated the prejudice caused by the failure to subpoena the mental health records. This was not harmless by itself, and it definitely was not harmless when juxtaposed with evidence of the accident and closed head injury.

This was the factual context that neither the majority nor Judge Saragosa had when writing in June 2014. *See Witt*, 74 M.J. at 794 (calling any prejudice arising from the mother's mental health records a "harder sell"); *id.* at 837 (Saragosa, J., dissenting) (writing that this "adds very little to the overall assessment of prejudice"). It was not until Dr. Wood evaluated Appellant in August 2014, and reviewed his mother's records that anyone recognized that Appellants exhibited traits prior to his accident that were a "precursor to schizophreniform psychoses." J.A. 4164, ¶23.a. Only then was it known that a predisposition to mental illness and TBI were factually intertwined. *See id.* at ¶24, J.A. 4165 (reporting the "Psychotic Disorder diagnosis also gains additional probability from . . . Witt's mother's medical record from Minir[i]th Meier New Life Clinic of Wheaton, Illinois"). So, especially when considered together, there is a

"reasonable probability that at least one juror would have struck a different balance[.]" *Wiggins*, 539 U.S. at 537.

The record does not reveal any good reason for counsel not obtaining Mrs. Pehling's mental health records. The failure to obtain them prejudiced Appellant. Counsel thus fell well below objectively reasonable representation by failing to obtain the records and failing to present them to the members.

WHEREFORE, this Court should remand for a new sentencing hearing so Appellant's family's mental health history and the effect on Appellant can be developed and presented to a panel.

C.

Failure to move that the military judge exclude the victims' family members from the courtroom due to excessive emotional displays.

Additional Facts

Throughout the trial, members of the victims' families sat in the courtroom and made emotional displays in full view of the members. Not only Appellant's family, but also the mitigation specialist, a paralegal, and counsel all confirm this.

Mr. Charles Terry Witt, Appellant's father, states:

> 2. I attended every day but one of Andrew's court-martial. I was able to watch the other people in the courtroom. The friends and family of Andrew sat on one side of the courtroom, behind the defense table. The friends and family of Andy and Jamie Schliepsiek and Jason King sat on the other side of the courtroom, behind the prosecutors' table. There were about 50 friends and family members of Andy and Jamie Schliepsiek and Jason King who attended every day of

> the court-martial. They sat about 30 feet from the members. Given the configuration of the courtroom, they sat in the field of vision of the members. Any of the victims' family members' body gestures, hand and head movements, and entries/exists from the courtroom were visible to the members. Also, given the relatively short distance between the gallery and the members, comments from the gallery were audible to the members.
>
> 3. The friends and family members of Andy and Jamie Schliepsiek and Jason King often made body gestures, comments, hand and head movements, and entries/exits from the courtroom during the court-martial and in view of the members. They did react to witness testimony and questions from the lawyers. In particular, during Andrew's unsworn statement, James Bielenberg – Jamie Schliepsiek's father – stood from his seat in the gallery and left the courtroom. This was clearly noticeable to everybody in the courtroom, including the members.

Mr. Witt B, ¶¶ 2, 3, J.A. 3915.

The defense's mitigation specialist recommended that counsel object to the family members' presence in court. She noted they "sat in plain view of the members" and observed:

> 8. I did not think it wise to allow family members of the victims in a death penalty case to be allowed to be in clear view of the members deciding the case. In my experience in these types of cases, the presence of family members watching a death penalty trial who are to be called as witnesses injects an emotional element to the trial the criminal accused cannot effectively counter.
>
> 9. Andrew's defense attorneys did not agree with my recommendation. They did not challenge the presence of the family members in the courtroom. Based on my participation in approximately 100 capital trials, not attempting to exclude testifying family members from the courtroom fell below the standard of practice. On those occasions where I observed the proceedings in Andrew's trial, a large contingent of victim family

> members were present, including those on the witness list who had yet to testify. They reacted to statements and questioning by the defense counsel by folding their arms, shaking their heads, and loudly sighing, all in the view of the members.

Pettry F, ¶¶ 8, 9, J.A. 3936.

Dr. Pehling, Appellant's step-father, attended most of the court-martial. Dr. Pehling C, ¶ 2, J.A. 3948. He observed:

> 4. The family and friends of Andy, Jamie, and Jason appeared very angry, hurt, and emotional. Some sat in defiant and aggressive postures, and expressed their emotions throughout the court-martial. They would shake their heads, fold their arms, and the like during defense attorney questioning and defense witness testimony. Whether it was in disbelief, anger, or disgust, I honestly do not know, but it was clearly visible. As I sat close to the members and could see and hear them, the members must have been able to do the same as well.
>
> 5. In particular, Jim Bielenberg's anger was very apparent throughout the court- martial. He glared during some presentations by the defense and gave negative reactions frequently. Dave Schliepsiek would also sometimes put his head down upon hearing from the defense and shake his head.

Id., ¶¶ 5, 6.

TSgt Kenneth R. Henkel was the defense paralegal. Henkel A J.A. 3951, ¶ 2. He recounts:

> 4. I was in Georgia during SrA Witt's court-martial, and I was able to attend portions of every phase of the trial. Each time I attended, there was a large number of friends and family of SrA Andy and Jamie Schliepsiek and SrA Jason King observing the trial.
>
> 5. The friends and family of SrA Andy and Jamie Schliepsiek and SrA Jason King sat approximately 30 feet from the members, within their field of vision. When I attended the trial, I observed numerous

> instances where the friends and family would roll their eyes, fidget, cross and uncross their arms, shake their heads, and exhale loudly during the defense attorneys' examination of witnesses.
>
> 6. When SrA Witt gave his unsworn statement, James Bielenberg, Jamie Schliepsiek's father, stood up and stated, "**I don't have to listen to this shit**," or words to that effect and left the courtroom in a heated manner. I was able to hear and see this, and I sat approximately 10 feet from the members. I observed an uncomfortable, awkward pause in the trial after Mr. Bielenberg did this.

Id., ¶¶ 4-6 (emphasis added).

One defense counsel, Mr. Rawald, whose declaration the Government submitted, recounts the same incident: "I distinctly heard Mr. Bielenberg say 'I don't need to listen to this shit!' as I was questioning SrA Witt and he was offering his apology to the family members." Rawald A, ¶ 40, J.A. 4014. He continues, "I have no doubt that the members could hear this comment as well given my positioning in the courtroom at that time." *Id.*

Mr. Rawald also remembers an outburst during his cross-examination of a witness: "I also recall complaining to the court on at least on[e] occasion that the behavior of the victim's [sic] friends and family was inappropriate and disruptive of my examination of a witness." *Id.*, ¶ 41. He states, "I clearly heard derogatory remarks from one of the victims' family members about the questions I was asking. I told this to the judge and he advised the family members to withhold their comments." *Id.*

Law and Analysis

Military law has long expressed concern over exactly what happened in this case: demonstrative displays from "[e]motional displays by aggrieved family members [that] . . . equate to the bloody shirt being waved." *U.S. v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984); *accord U.S. v. Fontenot*, 29 M.J. 244, 252 (C.M.A. 1989). That "bloody shirt" was waved at this trial.

Had counsel objected to the families' emotional displays, controlling precedent would have required the military judge to take *effective* corrective action — which, in this case, would have entailed ensuring that the victims' family members could no longer engage in emotional displays in the members' presence. But counsel failed to object, resulting in continued displays from the victims' families. The failure to object led to the crescendo of Mr. Bielenberg standing up and leaving just before Appellant's unsworn statement, upstaging that vitally important moment for the defense's case in mitigation.

Failure to take action in order to curtail these emotional displays fell below an objective standard of reasonableness. The mitigation specialist even warned counsel of the importance of removing the families from their prominent position in front of the members. They should have familiarized themselves with governing case law, such as *Pearson* and *Fontenot,* and used those decisions to protect their client. But they did not.

As with deficient representation, prejudice is calculated not individually, but collectively. Yet the failure to curtail families' displays was particularly damaging, as recognized by the Court of Military Appeals in *Pearson* and *Fontentot*.

WHEREFORE, this Court should remand for a sentencing hearing where the members are presented appropriate aggravation evidence.

A-II.

> THE LOWER COURT HELD TRIAL DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT TESTIMONY OF A DEPUTY SHERRIFF WHO COULD HAVE OFFERED EVIDENCE OF REMORSE IN MITIGATION CONSTITUTED DEFICIENT PERFORMANCE UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). THE LOWER COURT ERRED WHEN IT CONCLUDED THERE WAS NO REASONABLE PROBABILITY THAT, BUT FOR THIS DEFICIENCY, THE MEMBERS WOULD HAVE RETURNED A SENTENCE OTHER THAN DEATH.[34]

Additional Facts

The Article 32 Investigation was held at the Bibb County Courthouse. Foster, ¶ 2, J.A. 3961. One of the deputy sheriffs who provided security was Louis Foster, Jr. *Id.*, ¶¶ 1-2. He explains that he witnessed Appellant's genuine remorse:

[34] The prejudice resulting from this deficiency must be weighed in the aggregate with prejudice from other deficiencies found by the lower court. *Raether v. Meisner*, 2015 U.S. App. LEXIS 6107 (7th Cir. 2015) (Granting habeas relief where state court "examined the prejudice flowing from each alleged error individually, but the correct question is whether Raether was prejudiced by counsel's errors in the aggregate.").

> 3. During his Article 32 hearing, I witnessed SrA Witt overcome by emotion. When the prosecution presented its evidence against SrA Witt, he broke down and sobbed uncontrollably. This happened, in particular, when crime scene photos were displayed. I saw a broken young man, in great pain and despair. He was so emotionally overcome that he had to excuse himself from the hearing.
>
> 4. I accompanied SrA Witt to another part of the courthouse while the hearing continued. He continued to display sadness and great emotion. I took it upon myself to give him comfort and spiritual guidance. I wrapped my arms around him to give him a hug. I whispered words of encouragement to him in the hopes of consoling him. I wanted him to know that he was walking with God. I told SrA Witt that God loved him and that I loved him. I interpreted SrA Witt's emotion to be genuine and sincere. I would not have approached him otherwise. I believe he was remorseful for what he had done.

Id., ¶¶ 3, 4. He continued to interact with SrA Witt even after the Article 32 hearing, reading scripture with him. *Id.* ¶ 5.

Had he been asked, Deputy Foster would have testified on his behalf: "If I had been asked to testify on behalf of SrA Witt, I would have done so. I would have told the court-martial about my interaction with him during his Article 32 hearing, our scriptural discussions, and my observations of his emotion and remorse." *Id.*, ¶ 8. He explains that as a 15-year law enforcement veteran, it was rare for him to do so:

> In my experience in law enforcement, I have dealt with numerous murderers, rapists, and other violent criminals. I have never testified on behalf of any of them. Only one other time did I observe the emotion and remorse, and sincerity of such, like I did of SrA Witt in another defendant.

Id., ¶ 8.

Ms. Pettry, the mitigation expert, "recommended that the defense call as a witness Deputy Louis Foster, a Macon County deputy sheriff who guarded Andrew during the Article 32 hearing in November 2004." Pettry B, J.A. 3924, ¶ 10. She explains:

> 10. During the Article 32 hearing, Andrew was incredibly emotional. It began once the pictures of the crime scene were presented and continued with presentation of other evidence, including a recording of the 9-1-1 call made by Andy Schliepsiek. To my knowledge, this was the first time Andrew had [seen] and/or heard the evidence of what happened the night of the murders. Upon seeing and hearing this, he was crying uncontrollably, shaking and unable to regain his composure. We had to request that he be excused as a result. I followed Andrew out of the courtroom and tried to rub his arm to console him, without success.
>
> 11. Deputy Foster, however, took Andrew into his arms and held him for over 2 minutes. Andrew kept crying hysterically, and Deputy Foster continued to hold him and whisper words of encouragement. . . . .
>
> 12. I believed that Deputy Foster could have testified for two purposes. First, he would have testified to Andrew's good behavior, readiness to follow instruction, and obedience. Second, Deputy Foster could have testified to evidence of remorsefulness. Given that he only knew what Andrew had done, he would have been an impartial party testifying to Andrew's demonstration of sorrow and shame.

Id., ¶¶ 10-12.

But Deputy Foster was never even contacted by SrA Witt's defense counsel. Foster, J.A. 3962, ¶ 9. Ms. Pettry explains that Mr. Spinner, "declined to call Deputy Foster as a witness, telling me that that decision was based on the fact that Deputy

Foster no longer worked for the Macon County Sheriff's Department (even though I knew how and where to contact Deputy Foster)." Pettry B, ¶ 12, J.A. 3925.

SrA Witt's mother, Mrs. Pehling, called Deputy Foster at home to thank him for spending time with SrA Witt. Ms. Pehling, ¶ 6, J.A. 3944. His phone number was in the Macon telephone book, and he had the same number from he met SrA Witt through the completion the trial and beyond. Foster, ¶ 7, J.A. 3961.

Mr. Rawald discussed Deputy Foster during a 2007 interview. He said Deputy Foster was friendly with Appellant and seemed to like him. Capt Sorrell, J.A. 3983, ¶ 4. He said they "did not call Deputy Foster as a witness during sentencing proceedings because they did not have contact information for him." *Id.* He said "Deputy Foster was no longer working for the Macon County Sheriff's Department at the time of trial." *Id.*

Law and Analysis

The Supreme Court has emphasized that during a death penalty sentencing case, favorable testimony from a corrections officer is particularly important. "The testimony of more disinterested witnesses — and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges — would quite naturally be given much greater weight by the jury." *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). The standard of review and applicable law

regarding claims of ineffective assistance of counsel is set forth above beginning at page 28.

1. The failure to interview Deputy Foster and present his testimony was constitutionally deficient.

The lower court held counsel's "failure to investigate whether Deputy Sheiff [sic] LF could have offered helpful remorse evidence to constitute deficient performance under the first prong of a *Strickland* analysis." *Witt*, 73 M.J. at 796-99.[35] The *ABA Guidelines* confirm that counsel's failure to identify Deputy Foster as a witness and present his testimony constituted deficient performance. Guideline 10.11 provides "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." Guideline 10.11. Commentary Guideline 10.11 notes: "[P]rison guards . . . who interacted with the defendant . . . often speak to the jury with particular credibility." *Id.* at 1062.[36]

[35] On this point the lower court was unanimous. For the dissent, Judge Saragosa writes, "counsel simply failed to follow up on this known lead and have offered no tactical or strategic reason why they failed to do so." *Witt*, 73 M.J. at 834-35.

[36] Monica Foster (no relation) opines that the stated rationale for failing to call Deputy Foster as a witness is "a wholly inadequate reason to fail to call a witness who could testify to such compelling information as Sgt. Foster was prepared to do."

2. The failure to present Deputy Foster's testimony prejudiced Appellant.

Prejudice is not addressed on an individual basis, but is assessed based on "the totality of the evidence before the judge or jury" and "the totality of the omitted evidence." *Strickland*, 466 U.S. at 695; *Williams*, 539 U.S. as 397. The failure to present Deputy Foster's testimony was significant. The members likely would have accorded great weight to his testimony, as he was a law enforcement officer with "no particular reason to be favorably disposed toward" Appellant. *Skipper*, 476 U.S. at 8.

Additionally, the subject of his testimony — the expression of sincere remorse — was particularly important at sentencing. The prosecution sought to rebut the notion that Appellant was remorseful and, during sentencing argument, depicted Appellant's

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J.A. 4046, ¶ 27. Nor were objectively reasonable any concerns about whether he would "deliver on the stand":

> Sgt. Foster's recollections of the Article 32 hearing appear consistent with the recollections of Douglas Rawald. It falls below prevailing professional norms to presume that a witness, particularly a law enforcement witness with a religious background, will commit perjury on the witness stand as justification for failure to call that person. Contrary to Mr. Spinner's beliefs that law enforcement witnesses such as Sgt. Foster could provide testimony of only "marginal value", evidence of remorse is an important mitigating factor.

J.A. 4047-48, ¶ 31. "I can imagine no constitutionally permissible strategic or tactical reason for failing to call Sgt. Foster as a witness," she concludes. *Id.*, ¶ 32.

expressions of remorse as inadequate and possibly insincere. *See* J.A. 2768, 1464-66; *Witt*, 73 M.J. at 838-39 (Saragosa, J., dissenting) (explaining that given the prosecution's "concerted effort at showing the appellant's lack of remorse, it was necessary to rebut such evidence with the best evidence at trial defense counsel's disposal" and that the failure to investigate Deputy Foster's "potential testimony left their arsenal wanting of such remorse evidence."). Deputy Foster's testimony would have provided powerful evidence of remorse, lending support to this "important mitigating factor" and rebutting the attempts to portray SrA Witt as unremorseful. *See Jones v. Polk*, 401 F.3d 257, 264 (4th Cir. 2005).

Ms. Pettry, the defense's capital mitigation expert, wrote: "In my experience . . . remorse is considered a highly valuable mitigating factor. Thus, where there is evidence of it, it is imperative for the defense to introduce it and highlight it for the jury." Pettry C, ¶ 11, J.A. 3939,. Justice Kennedy has similarly observed, "In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring); *Jones*, 401 F. 3d at 264 (remorse is an important, relevant mitigating factor in a capital sentencing proceeding).

Calling Deputy Foster as a witness might have been a matter of life and death. *U.S. v. Whitten*, 610 F. 3d 168, 202 (2nd Cir. 2010)("That insight accords with experience, intuition, and research."); *U.S. v. Mikos*, 539 F. 3d 706, 724 (7th Cir. 2008)(Posner, J., concurring in part and dissenting in part)("In one study, 39.8 percent of jurors in capital cases said that a lack of remorse either made them or would have made them more likely to vote to impose the death penalty."). Inexplicably, counsel failed to talk to Deputy Foster before deciding not to call him. That falls far below an objective standard of reasonableness and prejudiced Appellant by depriving him of potentially outcome-determinative mitigation.

Mr. Connell confirms the prejudice that resulted from the defense's failure to present Deputy Foster's testimony. Based on his review of the transcript in this case, he notes that "remorse or lack thereof was a key controverted issue in the sentencing phase of the trial." Mr. Connell, ¶ 8, J.A. 4077. He notes that counsel for both sides explored remorse in their witness examinations and "[s]everal members of the panel asked questions relating to the question of whether SrA Witt showed remorse after his crime." *Id.* And "[b]oth sides argued the question of remorse extensively in their closing statements, and Defense Counsel used remorse as his first argument in support of a less-than-death verdict." *Id.* Based on his experience, he

concludes: "It is reasonable to believe that the testimony of a neutral, unbiased law enforcement witness like Deputy Foster may have resulted in a different sentence." *Id.*, ¶ 10.

Ms. Foster also emphasizes the mitigating value that Deputy Foster's testimony would have had. She explains:

> The overriding duty of defense counsel in a penalty phase is to humanize the client. In this effort counsel must do everything possible to allow the jury to look at the Defendant as a human being with frailties and vulnerabilities and not as the monster frequently portrayed by the Prosecution and media.

Id., ¶ 23. She observes that research concerning jury decision-making reveals "remorse is a particularly relevant mitigating circumstance." *Id.*, ¶ 24. She then addresses the effect Deputy Foster's testimony would have had at trial:

> Sgt. Foster's potential testimony here likely would have had the effect of humanizing SrA Witt by showing that he was not the remorseless killer the Government alleged him to be. This testimony would have demonstrated that, although he had committed a terrible crime, he was repentant and sorrowful for his actions. The testimony would likely cause the jury to view SrA Witt through a different lends than they would without the testimony.
>
> Two factors make Sgt. Foster's potential testimony particularly credible: (1) he is not related to SrA Witt, nor does he enjoy a friendly relationship with him, and (2) he is a law enforcement officer who has "dealt with numerous murderers, rapists, and other violent criminals' but has never testified for any of them. The first factor renders his testimony immune from the common prosecutorial cross examination which attempts to show the witness's testimony is colored by their warm feelings toward or consanguinity with the Defendant. The second factor establishes Sgt. Foster's experience with persons similarly situated to SrA Witt

> and demonstrates that SrA Witt is different and more remorseful than those persons.

Id., ¶¶ 25-26 (paragraph numbering omitted).

Judge Saragosa's remarks about the prejudice caused by the failure to investigate and to present Deputy Foster's testimony on Appellant's remorse concluded with the following:

> None of the other remorse evidence presented came close to the picture painted by Deputy [Foster] as evidenced by his post-trial declaration. Furthermore, the record reveals the panel's keen interest in the appellant's remorse as a court member presented questions . . . gleaned from the appellant's letter. Given a strong focus of the Government's sentencing case was the appellant's lack of remorse, the interest in the appellant's level of remorse demonstrated via the court member's question, and the limited amount of remorse evidence presented by the defense, Deputy [Fosters]'s testimony would have presented an unbiased and new perspective on the issue otherwise absent from the appellant's mitigation case.

Witt, 73 M.J. at 838-39. In short, he would have "paint[ed] a picture of a young man broken down by remorse." *Id.* at 838.

WHEREFORE, this Court should remand for a new sentencing hearing where Deputy Foster's testimony about Appellant's remorse can be presented to the members.

A-III.

> TRIAL COUNSEL COMMITTED PLAIN ERROR IN VIOLATION OF CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985) WHEN HE SUGGESTED TO THE MEMBERS DURING HIS SENTENCING ARGUMENT THAT IF THEY WERE TO ADJUDGE A DEATH SENTENCE, IT MIGHT BE REVERSED ON APPEAL.

Additional Facts

During sentencing argument, trial counsel said, "[Witt]'s going to live even if you sentence him to death for who knows how long? He gets to keep living. We have the death penalty in the military, like everywhere else, and it takes years and years." J.A. 1454. "[Y]ou vote on whether or not this accused should be sentenced to death, to go live at Leavenworth, where he can visit his parents, where his family is going to move, where he can go to school, where he can get an education, where he can use a computer, where he can watch TV, for however many years it takes, if it's ever done." J.A. 1444.

During his rebuttal sentencing argument, trial counsel responded to a defense argument about the members' ultimate responsibility for imposing the death penalty:

> And the defense, through sleight of hand, suggests to you, 'That you are going to kill him.' That was the line. No, you are not. You impose a sentence that then gets appealed, then we stay, in this judicial process that we love so much, at some point maybe it is carried out.

J.A. 1483. The defense did not object. *Id.*

Standard of Review

"Because Appellant did not object to trial counsel's sentencing arguments at trial, this Court reviews the propriety of the arguments for plain error." *U.S. v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). To prevail, Appellant must prove that: (1) there was an error; (2) it was plain or obvious; and (3) the

error materially prejudiced a substantial right. *U.S. v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). Once an appellant "meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt." *U.S. v. Paige*, 67 M.J. 442, 449 (C.A.A.F. 2009) (citing *U.S. v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005)).

Law and Analysis

In *Caldwell v. Mississippi*, 472 U.S. 320, 325 (1985), the Court addressed a sentencing argument strikingly similar to the one in this case:

> I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.

Id. at 325.

The Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. The Court reasoned that "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced

suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." *Id.* at 329. One reason is that jurors might not understand the limited role appellate courts play. *Id.* at 330-31. The Court specifically referred to the authority of the sentencing jury to apply mercy but the prohibition against an appellate court doing so. *Id.* at 331 (quoting *Caldwell v. State*, 443 So. 2d 806, 817 (Miss. 1983) (Lee, J., joined by Patterson, C.J., and Prather and Robertson, JJ., dissenting)).

The Court also observed that "legal authorities almost uniformly have strongly condemned the sort of argument offered by the prosecutor here." *Caldwell*, 472 U.S. at 333. The Supreme Court noted that post-*Furman*, state Supreme Court decisions had reversed death sentences based on such impermissible argument even absent defense objection and even where the trial court provided curative instructions. *Id.* at 334 n.4 (citing, e.g., *Hawes v. State,* 240 S.E.2d 833, 839 (Ga. 1977) (setting aside death sentence in spite of counsel's failure to object to prosecutor's argument); *Fleming v. State,* 240 S.E.2d 37, 40 (Ga. 1977) (setting aside death sentence in spite of curative instruction); *State v. Jones,* 251 S.E.2d 425, 427 (N.C. 1979) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though there was no contemporaneous objection); *State v. White,* 211 S.E.2d 445, 450

(N.C. 1975)(ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though trial judge gave curative instruction); *State v. Gilbert,* 258 S.E.2d 890, 894 (S.C. 1979)(setting aside death sentence in spite of defendant's failure to raise issue on appeal)).

The lower court correctly noted Justice O'Connor's concurring opinion in *Caldwell* is controlling law. *Witt*, at 802 (citing *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). Justice O'Connor wrote separately in disagreement with the Court's opinion that accurate information regarding appellate review was "wholly irrelevant" to a jury. *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring). "[A] State [could] conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review[.]" *Id.* at 343. But she agreed with the Court that the prosecutor's remarks did more than this and "sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate." *Id.*

Caldwell thus prohibits comments "that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing

decision." *Romano*, 512 U.S. at 9 (citing *Darden v. Wainwright*, 477 U.S. 168, 184 n. 14 (1986) ("*Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would be automatically reviewed by the State Supreme Court, and that the jury should not be made to feel that the entire burden of the defendant's life was on them.")).

The "plain import of [the] remarks is that although the jury may impose the death penalty, it may not be carried out, thus removing from the jury the responsibility for imposing the death penalty." *Commonwealth v. Jasper*, 558 Pa. 281, 283-84 (Pa. 1999) (ordering new sentencing hearing where instruction of judge that death sentence would be "reviewed thoroughly" and "**may be carried out**" gave "impression that any mistake which the jury may make in imposing the death penalty would be corrected by appellate review.") (emphasis added). While the remarks in *Jasper* were made by the judge, the error here is no less plain and obvious.

For the very reasons set out by the Supreme Court in *Caldwell*, this error was enormously prejudicial. By making the members feel less responsible than they should for the sentencing decision, the trial counsel's argument impermissibly increased the likelihood of a death sentence. That danger is particularly great in the military justice's death penalty

system, where the vote of one member is sufficient to eliminate death as a potential sentence. Each individual member should have understood that his or her vote would determine Appellant's fate. Yet the trial counsel provided each member with the moral escape hatch of foisting to appellate authorities ultimate responsibility for Appellant's execution. No wonder, as the Supreme Court noted in *Caldwell*, state Supreme Courts had reversed death sentences on this basis even in the absence of a defense objection and even where a curative instruction had been given. *See Caldwell*, 472 U.S. at 334 n. 4.

Incredibly, the lower court described trial counsel's arguments as "accurate", and dismissed them as "three passing comments, that there is an appellate process following the verdict[.]" *Witt*, at 802-03. Notably, the President has never accepted Justice O'Connor's invitation to enhance the military capital sentencing scheme in Rule for Court-Martial 1004 to authorize accurately informing members of the post-trial appellate process, and the "limited nature of appellate review[.]" *Caldwell*, at 343.

Caldwell merely "reconfirmed the broad discretion retained by the states over whether to apprise juries of state postsentencing laws." *O'Dell v. Netherland*, 95 F. 3d 1214, 1231 (4th Cir. 1996) (*en banc*) *aff'd*, 521 U.S. 151 (1997). "[T]he Court agreed, in both *Ramos* and *Caldwell*, that should the states

choose to provide information as to postsentencing laws and procedures, they cannot affirmatively mislead the jury as to those laws and procedures." *Id.* Accordingly, the discretion to inform the members in this case of the limited nature of appellate review under Articles 66 and 67, UCMJ, rested first with the President, not trial counsel.

However, this Court need not resolve this case on the question of whether, absent Presidential authorization, trial counsel may raise collateral matters such as appellate review during capital sentencing proceedings because trial counsel did not limit his comments to the existence and limited nature of appellate review. Trial defense counsel dismissed the members' responsibility for Appellant's life as defense "sleight of hand" and a defense "line." J.A 1483. When the defense rightly told the members they were ultimately responsible for Appellant's life, trial counsel reassured them: "No you're not." *Id.* The "prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously, or through whim or mistake." *Caldwell*, at 343 (O'Connor, J., concurring) (citations omitted).

WHEREFORE, this Court should set aside the sentence of death and remand this case for a rehearing as to sentence.

A-IV.

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE MEMBERS THAT THEY MUST NOT CONSIDER THE "ALLEGED DESIRES OF SOCIETY OR ANY PARTICULAR SEGMENT OF SOCIETY" WHEN DETERMINING THE APPROPRIATE SENTENCE. U.S. V. PEARSON, 17 M.J. 149, 153 (C.M.A. 1984).[37]

Additional Facts

In his sentencing argument and his rebuttal sentencing argument, the trial counsel repeatedly told the members that they were being watched by society in general or particular segments of society. For example, in his rebuttal sentencing argument, the trial counsel told the members that "in arriving at your determination, select the sentence which best serves the ends of good order and discipline, the needs of the accused, and the welfare of society. Society is watching this case. You've seen it and you've seen them throughout this process and you've come to know them." J.A. 1485. During his initial sentencing argument, the trial counsel said:

> But, what about the communities who are looking to the Air Force for justice in this case? Because this isn't just an Air Force case. This isn't an Airman who stole from the BX, and you only have to deal with it — the impact on that base. This case has far-ranging impact. As Houston, Peoria, and everyone else looks to see what the Air Force, what the Air Force views as the right answer when their Airman, and a

[37] This Court should also review trial counsel's comments for prosecutorial misconduct as set forth in A-XI at page 202.

> wife of their Airman, is attacked and killed in base housing by another Airman.

J.A. 1463.

Earlier in his argument, the trial counsel had emphasized that people from the outside community had attended the court-martial, which was tried off-base at the Bibb County Courthouse in downtown Macon, Georgia:

> The community looks at this community, the Air Force, as something different, as we know. And, the Bibb County community has taken us in for this trial, of what is one of the most serious cases you're ever going to find in the Air Force. People have been here every day and seen different parts of this trial. People have seen the destruction and devastation that an Airman brought upon a family, upon a community, and on the Air Force.

J.A. 1442.

Shortly thereafter, the trial counsel invoked the outside community again: "A community has watched how the Air Force has dealt with it, and the community deserves to hear and see what he did. It's also likely because of the amount of facts you have in this case." J.A. 1442-43. Later, he added: "Those families will never forget this. This community will never forget this. The Air Force will never forget this." J.A. 1445. And in his sentencing argument, trial counsel said 1500 people attended the victims' funeral in Peoria, Illinois. J.A. 1463.

At the end of his rebuttal argument, the trial counsel asked the members to "[o]ffer the families a chance to see

justice in our community. Offer the families a chance to see Andy and Jamie redeemed." J.A. 1486. He also told the members, "And now you have everybody wondering what is Air Force justice?" *Id*. The military judge did not address any of these remarks in his instructions. *See* App. Ex. CCXXIX, J.A. 3764-79. Nor did defense counsel request any instructions concerning the trial counsel's remarks. R. 2690.

Standard of Review

"The adequacy of a military judge's instructions is reviewed *de novo*." *U.S. v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014).

Law and Analysis

Binding case law required the military judge to instruct the members that they may not consider "the alleged desires of society or any particular segment of society" in determining an appropriate sentence in this case. *Pearson*, 17 M.J. at 153. That binding authority also indicates that where, as here, the members adjudge the maximum authorized sentence in the absence of such an instruction, the appropriate remedy is to overturn the adjudged sentence. *Id*.

In *Pearson*, this Court emphasized that "[i]n the military justice system, the court-martial alone is entrusted with the responsibility of representing the community in arriving at an appropriate sentence for an accused." *Id*. This Court explained:

> Just as the supposed expectations of a convening authority may not be brought to bear on a court-martial (*see* Article 37(a), UCMJ, 10 U.S.C. § 837(a)), neither can the alleged desires of society or any particular segment of society be allowed to interfere with the court's independent function, for it is the court-martial alone that has seen the evidence and must make the decisions.

Id. Thus, for a witness to imply "that the entire unit was hanging on the outcome of the trial, this fundamental sanctity of the court-martial was violated." *Id*. Where that occurs, a corrective instruction to the members is required. *Id*.

Trial counsel invoked society directly, telling the members, "society is watching this case." J.A. 1485. He asked the members to "[o]ffer the families a chance to see justice in our community. Offer the families a chance to see Andy and Jamie redeemed." J.A. 1486. Early in his sentencing argument, the trial counsel asked the members, "But, what about the communities who are looking to the Air Force for justice in this case?" J.A. 1463. At the very end of his rebuttal sentencing argument, the trial counsel returned to that theme and emphasized to the members that "now you have everybody wondering what is Air Force justice?" J.A. 1486.

In *Pearson*, this Court held that it was reversible error for a gunnery sergeant to unintentionally imply that "the entire unit was hanging on the outcome of the trial." *Pearson*, 17 M.J.at 153; *Sinisterra v. U.S.*, 600 F. 3d 900, 910 (8th Cir.

2010)("[T]elling the jury to act as the conscience of the community, and asking the jury to send a message with its verdict [is] improper. Such arguments impinge upon the jury's duty to make an individualized determination that death is the appropriate punishment for the defendant."). What occurred here was far worse. A representative of the United States government in the courtroom told the members that "Houston, Peoria, and everyone else looks to see what the Air Force, what the Air Force views as the right answer when their Airman, and a wife of their Airman, is attacked and killed in base housing by another Airman." J.A. 1463; *U.S. v. Runyon*, 707 F. 3d 475, 516 (4th Cir. 2013) (Urging a jury to "'send a message to the community' invites it to play to an audience beyond the defendant—to use its decision not simply to punish the defendant, but to serve some larger social objective or to seek some broader social *Stankewitz* approval as well.").

The *Pearson* decision provides the correct remedy for the military judge's failure to instruct the members not to consider the alleged desires of society or any particular segment of society in arriving at their sentence. Where the adjudged sentence is "the literal maximum punishment for the offense of which appellant was convicted . . . it is impossible for us to state with certainty that appellant was not prejudiced as to sentence." 17 M.J. at 153. In this case, just as in *Pearson*,

the court-martial panel adjudged the maximum authorized sentence. Reversal of the sentence is therefore required.

WHEREFORE, this Court should set aside the sentence of death and remand this case for a rehearing as to sentence.

A-V.

THE MILITARY JUDGE COMMITTED PLAIN ERROR IN VIOLATION OF BOOTH V. MARYLAND, 482 U.S. 496 (1987) BY FAILING TO EXCLUDE VICTIM IMPACT WITNESSES' CHARACTERIZATIONS OF THE OFFENSES AND FAILING TO PROVIDE CURATIVE INSTRUCTIONS.

Additional Facts

One of the witnesses the prosecution called during its case in aggravation was Casey Bielenberg, Jamie's younger sister. J.A. 2589. In response to trial counsel's question as to how she has struggled with how her sister died, Casey related,

> I just kept saying it over and over, "make sure that that bad person doesn't get out, I know she suffered." And, all that I had heard was that they were dead in their home. But, I just knew it. And, that is the major thing, is knowing that those two—there are so many people out there that loved them, and there are so many people out there that could have been with them that night and comforted them, and they had no one. They died alone, suffering[.]

J.A. 2595-96. The defense did not object.

Later during its aggravation case, the prosecution called Mr. James A. Bielenberg, Jr., Jamie Schliepsiek's father. J.A. 2598. He told the members neither he nor Andy Schliepsiek's

father, David Schliepsiek, could "seem to get off the last ten minutes of the kids' lives when they died." J.A. 2607.

After Mr. Bielenberg testified about learning of the murders, Assistant Trial Counsel asked, "You have found out since that day, a lot more detail. You've sat through the trial and you have talked with us, and you have been to the Article 32. What is it about those last ten minutes that is so bad for you?" J.A. 2610. Counsel did not object to the question. Mr. Bielenberg answered,

> Well, I am going to be honest. My daughters and my wife, they are very nice about all of this stuff. But there is nothing nice about what this guy did to my daughter. I mean, I cannot believe whatever testimony they are going to hear tomorrow or whenever that I want—the people on the jury to remember what—what happened in the last 10 minutes. Can you imagine? I mean, looking at those photographs and being her father? I mean, this is my little girl. [Witness is crying.] I mean, this is my little girl that I spent thousands of nights with; going to swim meets, going to the park, and I've got to keep remembering what her body looked like? And, I just want to be there. If I could have been there in that door when that thing got knocked down. I mean, can you imagine? This is not some strong, muscular person who could defend herself. This is just the biggest act of cowardice to go and do that to a young lady. I can't—this is just—I mean, she is sitting back behind that door knowing that she is going to die. And, I've got to live with that the rest of my life [sniffling and crying]. No human being ought to die that way. No human being deserves this. Not in a civil society. This is unacceptable.

J.A. 2610-11. Counsel neither objected to that testimony nor sought an Article 39(a) session during or after Mr. Bielenberg's testimony to address its prejudicial impact.

Mr. Bielenberg subsequently testified to the members:

> You just you – unless is has happened to you, you don't know [crying]. You cannot believe, if any of you have a daughter or a son, you cannot believe what it does to you, knowing how she died. I wish that it had been a car accident or something, a plane crash, but not – not this. I mean, it is bad enough that they are gone and you are going to never be with them. But, that you have to live with the way that she died. This is the part that I just cannot – I can't understand. I cannot tolerate. Society should not tolerate it.

J.A. 2612. Again, counsel neither objected nor sought an Article 39(a) session.

Later that afternoon, the prosecution called Mr. Dave Schliepsiek, Andy Schliepsiek's father. J.A. 26354. During his testimony, Mr. Schliepsiek talked about the offenses:

> [A]t these proceedings I heard a number, it was 300 seconds [sniffling]. I can't stop thinking—you have to understand, my son was madly in love with his wife. Jamie was his soul mate. I mean, I love my wife very much. I have been with her for almost 38 years. We met when we were sixteen. But he had a better understanding of what a soul mate was than I did. He—can—can you—I can't stop thinking—Andy laid in his own blood. You have this doctor, the gal that did the autopsy, she explained to you that his second wound was to the spine, and it split his spine in half, or split it, or whatever you want to say. And, he immediately went down. Can you imagine what my son's—what he must have gone through mentally—I don't even want to talk about the physical stuff. I can't (?) deal with the physical stuff. But, what he dealt with for that supposedly 300 seconds. You can hear it in the tape. I hear it every day. Looking down that hallway, seeing what was happening to his beloved wife, and not being able to do anything about it? That haunts me. It haunts me to know that my son saw, at the end, the knife go through his heart. That is what my son saw. I can't imagine in my—I just can't

> imagine what—that haunts me every day. That is what I think about [sniffling].

J.A. 2645.

During the second day of the sentencing hearing, the prosecution presented one of Andy Schliepsiek's brothers, Jeremy Schliepsiek. He testified that he told his son, "I have to go down to Georgia because we have to make sure that that bad person doesn't ever get out." J.A. 2676. Again, counsel neither objected nor sought an Article 39(a) session.

Standard of Review

"A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error." *U.S. v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011) (citation omitted). Once Appellant "meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt." *Paige*, 67 M.J. at 449 (citing *Carter*, 61 M.J. at 33).

Law and Analysis

In a capital case, the Eighth Amendment prohibits testimony in which a victim's relative characterizes or expresses opinions about the crime, the accused, or the appropriate sentence. Mr. Bielenberg's dramatic and emotional testimony as to his opinions

about the offense and SrA Witt was, therefore, inadmissible, as were Mr. Dave Schliepsiek's extended characterizations of the offense, Casey Bielenberg's characterizations of the offense, and Jeremy Schliepsiek's characterization of Appellant.

In *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987), the Supreme Court held that a murder victim's "family members' opinions and characterizations of the crimes and the defendant" are "irrelevant to a capital sentencing decision" and that the admission of such evidence "creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." While *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991), overruled portions of *Booth*, it did not disturb the portion of the *Booth* holding raised here. *See, e.g.*, *Lockett v. Trammel*, 711 F. 3d 1218, 1235 (10th Cir. 2011) (*Payne* "did not affect *Booth's* rule that admission of a victim family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eight Amendment") (*citing Payne*, 501 U.S. at 830 n. 2).[38]

[38] This has been widely recognized by federal and state courts. *See, e.g., Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *U.S. v. Bernard*, 299 F.3d 467, 480 (5th Cir. 2002); *Fautenberry v. Mitchell*, 515 F.3d 614, 638 (6th Cir. 2008); *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999); *U.S. v. Mitchell*, 502 F.3d 931, 990 (9th Cir. 2007); *Welch v. Sirmons*, 451 F.3d 675, 703 (10th Cir. 2006); *U.S. v. Brown*, 441 F.3d 1330, 1351 (11th Cir. 2006); *Ex parte Rieber*, 663 So. 2d 999, 1007 (Ala. 1995); *Lynn v. Reinstein*, 68 P.3d 412, 415 (Ariz.

Mr. Bielenberg's testimony characterized and expressed opinions about the offense, such as calling it "the biggest act of cowardice to go and do that to a young lady" and telling the members: "No human being ought to die that way. No human being deserves this. Not in a civil society. This is unacceptable." J.A. 2611. These remarks were delivered immediately after the notation "[sniffling and crying]" appears in the record. J.A. 2610-11. This was exactly the kind of "emotionally charged" testimony that the Supreme Court concluded would inappropriately "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth*, 482 U.S. at 508. It is also the kind of testimony "about the nature" of the crime that the Fifth Circuit held to be plain error in *Bernard*, 299 F.3d at 480.

Mr. Bielenberg's statement that "[s]ociety should not tolerate it" after describing the offenses is similar to the statement of the murder victims' son in *Booth* that he "doesn't

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2003); *Miller v. State*, 362 S.W.3d 264, 284 (Ark. 2010); *People v. Lancaster*, 158 P.3d 157, 190 (Cal. 2007); *Cherry v. Moore*, 829 So. 2d 873, 880 n.3 (Fla. 2002); *Livingston v. State*, 444 S.E.2d 748, 750 n.2 (Ga. 1994); *State v. Lovelace*, 90 P.3d 298, 305 (Idaho 2004); *State v. Williams*, 708 So. 2d 703, 720 (La. 1998); *State v. Bjorklund*, 604 N.W.2d 169, 214 (Neb. 2000); *Kaczmarek v. State*, 91 P.3d 16, 33 (Nev. 2004); *State v. Koskovich*, 776 A.2d 144, 177 (N.J. 2001); *State v. Thompson*, 604 S.E.2d 850, 862 (N.C. 2004); *State v. Nesbit*, 978 S.W.2d 872, 889 n.8 (Tenn. 1998); *Fryer v. State*, 68 S.W.3d 628, 630 (Tex. Crim. App. 2002); *State v. Pirtle*, 904 P.2d 245, 269 (Wash. 1995).

think anyone should be able to do something like that and get away with it," testimony that was held to be impermissible. *Booth*, 482 U.S. at 508. Mr. Dave Schliepsiek offered an extended characterization of the offense, asking the members to imagine what Andy Schliepsiek went through while his wife was being murdered. Ms. Casey Bielenberg's testimony that "I know she suffered, I know she suffered," J.A. 2595, and description of her sister and brother-in-law dying "alone, suffering," *id.*, was similarly impermissible, as was Mr. Jeremey Schliepsiek's testimony that he told his son that "we have to make sure that that bad person doesn't get out." J.A. 2676.

The impermissible testimony in this case "was not a one-off or a mere aside. It was a drumbeat." *Dodd v. Trammell*, 753 F. 3d 971, 997 (10th Cir. 2013). In *Dodd*, a case involving collateral review, the Tenth Circuit found similar, repeated violations of *Booth* were not harmless. And they were certainly not harmless beyond a reasonable doubt in this direct appeal.

WHEREFORE, this Court should set aside the sentence of death and remand this case for a rehearing as to sentence.

A-VI.

THE LOWER COURT HELD TRIAL DEFENSE COUNSEL'S FAILURE TO LIMIT THE "SUBSTANCE AND QUANTITY" OF THE VICTIM IMPACT WITNESSES' CHARACTERIZATIONS OF THE OFFENSES WAS DEFICIENT PERFORMANCE UNDER STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984). THE LOWER COURT ERRED WHEN IT CONCLUDED THERE WAS NO

> REASONABLE PROBABILITY THAT, BUT FOR THIS DEFICIENCY, THE MEMBERS WOULD HAVE RETURNED A SENTENCE OTHER THAN DEATH.

The lower court concluded counsel's failure to research and present arguments "to limit the substance, as well as the quantity, of victim impact testimony offered by the Government's sentencing witnesses at trial" constituted deficient performance under *Strickland*. *Witt*, 73 M.J. at 802.

Although counsel's failure to attempt to limit the quantity of evidence was constitutionally deficient, the lower court found no prejudice, in part, because the testimony was "isolated and very brief[.]" *Id.* at 802. In fact, the testimony was far more expansive and prejudicial than the written victim-impact evidence at issue in *Booth*. *Compare, e.g.*, *Booth*, 508 (son's parents were "butchered like animals") *with* J.A. 2645 ("Looking down that hallway, seeing what was happening to his beloved wife, and not being able to do anything about it? That haunts me. It haunts me to know that my son saw, at the end, the knife go through his heart. That is what my son saw.").

There is more than a reasonable probability that Appellant would not have been sentenced to death absent this highly-charged testimony. "To pretend that such evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction. Rather,

such potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion and bias[.]" *U.S. v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005); *U.S. v. Johnson*, 713 F. Supp. 2d at 622-23.

WHEREFORE, this Court should set aside the sentence of death and remand this case for a rehearing as to sentence.

A-VII.

THE MILITARY JUDGE ERRED BY FAILING TO *SUA SPONTE* INSTRUCT THE MEMBERS THAT A NON-UNANIMOUS VOTE ON A PROPOSED SENTENCE AT THE FINAL SENTENCING STAGE ELIMINATES DEATH AS AN AUTHORIZED SENTENCE.

Additional Facts

The military judge provided introductory instructions about sentencing before counsel's closing argument sand additional instructions following argument. J.A. 2591-97; R. 2679-93. Those instructions did not inform the members that if they voted on a proposed death sentence and their vote was not unanimous, the death penalty was no longer an authorized sentence. Nor did the defense request such an instruction. R. 2690.

Standard of Review

"The adequacy of a military judge's instructions is reviewed *de novo*." *MacDonald*, 73 M.J. at 434.

Law and Analysis

Military law provides that a non-unanimous vote at the final sentencing stage eliminates death as an authorized sentence. *U.S. v. Simoy*, 50 M.J. 1, 2 (C.A.A.F. 1998). The military judge failed to instruct concerning that crucial rule.

In *Simoy*, this Court explained:

> In order for the death penalty to be imposed in the military, four gates must be passed:
>
> (1) Unanimous findings of guilt of an offense that authorizes the imposition of the death penalty, RCM 1004(a)(2);
>
> (2) Unanimous findings beyond a reasonable doubt that an aggravating factor exists, RCM 1004(b)(7);
>
> (3) Unanimous concurrence that aggravating factors substantially outweigh mitigating factors, RCM 1004(b)(4)(C); and
>
> (4) Unanimous vote by the members on the death penalty, RCM 1006(d)(4)(A). *See Loving v. Hart*, 47 MJ 438, 442 (1998).

Id. at 3. "If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option." *Id.*

An instruction that a non-unanimous vote at the Fourth Gate eliminates death as an authorized sentence is thus required. That instruction was not covered by the other instructions that the military judge gave. Under the instructions as given, the members would likely believe that – provided that they did not vote for a sentence of confinement for life or confinement for life without eligibility for parole – they could continue to vote on a death sentence repeatedly until they finally reached a

unanimous vote. R. 2687. But such a procedure, which would be the members' most likely interpretation of the instructions, would violate *Simoy*.

Finally, the instruction concerned a vital matter. Unobjected to instructions regarding Gate Four have accounted for two of the eight appellate reversals of death sentences under the current military capital system. *Simoy*, 50 M.J. at 2-3; *U.S. v. Thomas*, 46 M.J. 311, 316 (C.A.A.F. 1997). The absence of such instructions "create[s] an intolerable risk that this ultimate sanction was erroneously imposed." *Thomas*, 46 M.J. at 316.

WHEREFORE, this Court should set aside the sentence of death and remand this case for a rehearing as to sentence.

A-VIII.

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING FINDINGS; COUNSEL'S ERRORS – BOTH INDIVIDUALLY AND COLLECTIVELY – WARRANT A NEW TRIAL.

This assignment of error addresses ineffective assistance of counsel during findings. While each of the following errors identified below is a sufficient basis to reverse the outcome of Appellant's trial, it is beyond question that this Court must test for prejudice by evaluating counsel's errors "collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995);

see also U.S. v. Loving, 41 M.J. 213 (C.A.A.F. 1994), *aff'd* 517 U.S. 748 (1996) (deeming "it appropriate to consider whether defense counsel's conduct of the trial as a whole might have been defective . . . even though individual oversights or mistakes standing alone might not satisfy *Strickland*"); *Frey v. Fulcomer*, 974 F.2d 348, 361 n.12 (3d Cir. 1992) (determining prejudice assessed by review of all of counsel's combined errors); *U.S. v. Dobson*, 63 M.J. 1, 40 (C.A.A.F. 2006). The standard of review and applicable law regarding claims of ineffective assistance of counsel are set forth above beginning at page 28.

A.

Counsel failed to investigate and present evidence that at the time of the killings Appellant's mental capacity was impaired by both a TBI and psychosis including auditory and visual hallucinations.

As outlined above in assignment of error A-I(A), counsel failed to investigate or present evidence that Appellant's mental functioning was impaired by both a TBI and psychosis at the time of the murders. Dr. Wood D, ¶ 26, J.A. 4165. Had the defense conducted the investigation their mitigation specialist implored them to do, they would have had an evidentiary basis for the mental-impairment instruction they unsuccessfully sought based upon their discredited "adrenaline theory." J.A. 2020-23.

Because the members had to be unanimous in finding Appellant had a premeditated design to kill in order to proceed to the next gate,[39] there is a reasonable probability of a different result. *U.S. v. Webb*, 66 M.J. 89 (C.A.A.F. 2006) (holding, "We cannot fault the military judge for concluding that it was probable that had the prosecution provided the nonjudicial punishment to the defense, it would have produced a substantially more favorable result for Appellee—in other words, it undermined confidence in the outcome of the trial.")

B.

Defense counsel made promises during his opening statement on which he did not deliver during findings or sentencing.

Additional Facts

In his opening statement, Mr. Spinner conceded Appellant killed SrA Andy Schliepsiek and Jamie Schliepsiek and stabbed SrA King. *See* J.A. 1083-84. He emphasized that the focus of the defense instead would be on Appellant's state of mind on July 5, 2004. *See* J.A. 1079. Thus, he explained:

> The defense is going to put on witnesses who will tell you who Andrew Witt is; where he came from; the Christian home that he was raised in; the divorce of two loving parents; the facts that led him into the United States Air Force; the environment that created the person who committed the acts on the 5th of July. Andrew Witt is in his early twenties. For the most part was raised by Greg and Melanie Pehling. Dr.

[39] *Simoy*, 50 M.J. at 2.

> Pehling, his stepfather and his mother, Melanie, were married not long after Melanie was divorced from her first husband, Terry Witt.
>
> . . . .
>
> [Y]ou will hear evidence regarding Airman Witt's upbringing. You will hear from his parents, his natural mother and stepfather, and you will hear from his natural father, Terry Witt and Emily Witt, who was married to Terry at one point, but is not married to him today. I also anticipate that you will hear from the sister of Melanie Pehling, Andrew's aunt, Lynda Smith. With their testimony, you're going to learn about those forces that shaped Andrew Witt and brought him to the point where he was handed over to the Air Force and began an Air Force career.
>
> I anticipate that you're going to hear from two expert witnesses that the defense will call. Dr. Bill Mosman is a forensic psychologist. He has looked at the facts of this case; he's interviewed multiple individuals and witnesses; and he will testify regarding Senior Airman Witt's state of mind on the night of the 4th and into the early morning hours of the 5th of July of 2004.
>
> . . . .
>
> Dr. Mosman, the forensic psychologist, I anticipate will testify about Andrew's state of mind at that point in his life; his state of fear about the fact that these people were threatening to ruin his career; the provocation that flowed from that.

J.A. 1073, 1079, 1083.

Trial counsel objected to counsel's opening statement, arguing that they did not believe the anticipated testimony proffered by defense counsel would be admissible during findings, if at all. *See generally* J.A. 1073-79. During an Article 39(a) hearing on the objection, Appellant's civilian

defense counsel acknowledged he walked a thin line making the representations that he did, but nevertheless indicated the defense intended to present the case as set forth in his statement. J.A. 1075 ("there's always a risk that in an opening statement that you will not present evidence or evidence will not be presented. But, at this point, Your Honor, we do intend to call those witnesses. They will lay the foundation for Dr. Mosman's testimony. We've given notice[.]").

Counsel ostensibly set the stage for Dr. Mosman's testimony by including questions in the members' questionnaires about mental health professionals, which included inquiries such as, "Have you or anyone you know ever had a good or bad experience with a psychologist or any type of mental health professional?"; "What is your opinion about the ability of psychologists or other doing a mental health exam to identify and explain the reasons for human behavior?"; and "Do you believe someone can fool a psychologist or other person doing some type of mental health evaluation?" *See, e.g.*, App. Ex. XXXV, J.A. 3347-49.

The members' responses on the questionnaires as well as to *voir dire* questions suggested favorable impressions of mental health professionals. *See, e.g.*, App. Ex. XXXV, J.A. 3348 (Col Eriksen, stating "I believe that most psychologists are able to catch . . . the person's attempts to 'fool' them"); App. Ex. XXXVII, J.A. 3382 (Col Tufts, stating "Someone would have to be

very smart to know what to [fool] . . . a trained psychologist"); App. Ex. XXXVIII, J.A. 3416 (Col Holcomb, stating "I have medium-high confidence in the ability of mental health professionals"); App. Ex. XL, J.A. 3450 (Col Sharpless, stating their abilities "is a wonderful gift."); App. Ex. XLI, J.A. 3485-86 (Lt Col Rowlands, indicating he has had positive experiences with mental health professionals, both personally and professionally, and that he believes "there are definite reasons for human behavior and our health providers are able to I.D. and explain the reasons"; and, "I do not have experience or a formal education in mental health, so I do rely and have trusted the opinions of the experts."); App. Ex. LIV, J.A. 3655 (Lt Col Wilford, expressing mental health professionals "are very good at analyzing people and getting to the root cause of some of their problem[s]"); App. Ex. LVI, J.A. 3688-90 (Lt Col Koerkenmeier, holding favorable opinion of mental health professionals, based on both personal and professional experience, and believing that fooling a mental health professional would be very difficult.); App. Ex. LXVIII, J.A. 3602 (Capt Russell, offering that "mental stability has to be taken into consideration."). Indeed, not one member intimated that he or she would not consider mental health evidence or demonstrated any bias or prejudice against such evidence.

The defense case-in-chief ultimately, however, did not mirror that promise during counsel's opening statement. Counsel did not call any foundational witnesses for Dr. Mosman, as they decided not call Dr. Mosman for the originally stated purpose. Instead, Dr. Mosman provided information about adrenaline and "fight or flight" via a stipulation of expected testimony. *See* J.A. 2500-02. The only other findings expert witness the defense called, Dr. Robert Shomer, testified about perception, memory, and recall. J.A. 2400-74.

Immediately after counsel read Dr. Mosman's stipulation of testimony to the panel, one of the members submitted a question to the military judge requesting a synopsis of the defense's opening statement. J.A. 1334; App. Ex. CLXXI, J.A. 3754. The military judge denied the request, explaining that opening statements were not evidence but only "what [counsel] expect the testimony to show." J.A. 1334.

Law and Analysis

Here, counsel violated a cardinal principle of trial advocacy: he promised the members particular evidence, but did not deliver. While it is true that counsel must adapt to changing conditions which might necessitate decisions contrary to the original trial plan, in a capital case, counsel must be more careful about what they promise in their opening statement.

Counsel's strategy had never been to argue that Appellant did not kill SrA Andy Schliepsiek and Jamie Schliepsiek, or stab SrA King. The sole defense was disputing premeditation. To accomplish this, they hired Dr. Mosman and worked with him for almost a year to develop facts and evidence tending to show Appellant was incapable of premeditating. Apparently, counsel became convinced such evidence was admissible and compelling, and formulated a plan to present it to the members. Indeed, based on his opening statement, counsel inarguably suggested to the members that Dr. Mosman was their "star" witness. The members, however, never heard Dr. Mosman's opinions about the forces that shaped Appellant. He never testified as promised.

In *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988), the First Circuit confronted a very similar situation. There, the defendant was charged with first degree murder of his wife. During opening statement, counsel told the jury he would call a psychiatrist and a psychologist as witnesses. *Id*. at 16. Yet, despite their availability, counsel opted not to call these experts and rested after having called only lay witnesses. *Id*.

On appeal from the denial of his petition for writ of habeas corpus, the court instructed that "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id*. Accordingly, the court reversed the appellant's conviction. "Counsel substantially

damaged the very defense he relied on," as opposed to abandoning one defense for another. *Id.* at 19. Perhaps not insignificant to the decision was the fact that during *voir dire*, counsel asked about the helpfulness of mental health experts. *Id.* at 16. Thus, the failure to call such witnesses was something "[the jury] would not forget." *Id.*

In *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010), the Sixth Circuit confronted yet another similar situation, this time involving a lay witness. There, the appellant was charged with assault with intent to commit murder. *Id.* During opening, his counsel told the jury appellant's girlfriend would testify that he acted in self-defense. *Id.* at 719. Despite her availability, the defense counsel opted not to call the witness. *Id.* On appeal from the denial of his petition for writ of habeas corpus, the Sixth Circuit found that based on reasons given by the trial defense counsel, the decision not to call the witness was not an unreasonable trial strategy. *Id.* at 728. Yet the court held that "counsel's failure to adequately investigate that decision before trial was deficient performance sufficient to satisfy the first prong of the *Strickland* test." *Id.*

In reaching its decision, the court found that the deficiency rose from the appellant's attorney being "ill equipped to assess [the witnesses] credibility or persuasiveness as a witness, or to evaluate and weigh the risks and benefits of

putting her on the stand at the time when he made the decisions affecting his trial strategy." *Id.*; *see also*, *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3rd Cir. 1993); *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990) *Cf*. *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994) (explaining that courts within the Fourth Circuit have rejected a *per se* rule governing an attorney's failure to present evidence as promised in an opening statement)).

The instant case is virtually indistinguishable from the cases described above. Here, counsel questioned the members about their attitudes towards mental health experts, and received positive responses from many. *See, e.g.*, J.A. 490 (Col Eriksen, stating help from psychologist was positive, no negative experience, always helpful); J.A. 632 (Lt Col Rowlands, commenting on good experiences with psychologists); J.A. 744-45 (Capt Russell, noting psychologist evidence important). Then, during his opening, he made sweeping promises about Dr. Mosman's testimony. To support such testimony, counsel also suggested he would call additional witnesses to lay a foundation.

When counsel did not deliver the promised evidence, the jury did not forget. J.A. 1334. The members even wanted a reminder of what they thought they were going to hear. App. Ex. CLXXI, J.A. 3754. The military judge denied the request, explaining that opening statements were not evidence but only

"what [counsel] expect the testimony to show." J.A. 1334. They specifically asked for it during the defense's case-in-chief. While they did not receive the requested synopsis of defense counsel's opening statement, they also did not receive anything remotely close to what they thought they would hear.

Dr. Shomer, whose testimony counsel never mentioned in opening, *see* J.A. 1072-84, only spoke of perception, memory, and recall, not the forces that shaped Appellant. Dr. Mosman's stipulation of expected testimony, a description of the chemical process in the brain during a high-stress event, did not discuss at all Appellant's upbringing, influences, or home life. Moreover, it did little to inform the members about Appellant's state of mind on July 5, 2004.

The government's case-in-chief consisted of one week of testimony and evidence from 27 witnesses. *See* J.A. 1032 (opening and first witness), J.A. 2392 (government rests). The defense promised an involved defense, but in the end presented over the course of two days only one live expert witness and a two-page stipulation of expected testimony. J.A. 2400 (Dr. Shomer first called at 1430 hours); J.A. 2474, 2477 (Dr. Shomer excused at 1850 hours); J.A. 1332 (defense rests).

Such a flimsy presentation in light of the grandiose preview undoubtedly damaged counsel's credibility, and ultimately and more importantly, Appellant. *See Deutscher v.*

Whitley, 884 F.2d 1152, 1160-61 (9th Cir. 1989) (failure to present mental health history and current mental status of the accused, even when not sufficient for insanity claim, held ineffective assistance of counsel); *see also U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219 (7th Cir. 2003) (finding counsel ineffective, *inter alia*, for making unfulfilled promises during opening statement); *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Crim. App. 1991) (finding counsel ineffective in murder case for promising jury in opening statement that defendant, defense psychiatrist, and other witnesses would testify that the defendant was a battered wife who had killed in self-defense and then counsel presented no witnesses).

In the end, counsel had a strategy and wholly abandoned it. Sadly, prior to making such a decision, counsel had told the trier of fact of that strategy. Thus, after a week of testimony and evidence of what Appellant had done, how he did it, and what he had said about it, the members then heard virtually no response from the defense. More importantly, whatever response they did receive inarguably fell well below any expectation they had in light of defense counsel's opening statement. The only logical conclusion they could have drawn was that the defense's anticipated response, as previewed in opening, was bogus.

"A juror's impression is fragile. It is shaped by his confidence in counsel's integrity. When counsel promises a

witness will testify, the juror expects to hear the testimony. If the promised witness never takes the stand, the juror is left to wonder why. The juror will naturally speculate why the witness backed out, and whether the absence of that witness leaves a gaping hole in the defense theory. Having waited vigilantly for the promised testimony, counting on it to verify the defense theory, the juror may resolve his confusion with negative inferences." *Saesee v. McDonald*, 725 F. 3d 1045, 1049 (9th 2013).

Indeed "little is more damaging than to fail to produce important evidence that had been promised in an opening." *Butler*, 858 F.2d at 16. Prejudice must be found in this case where "the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained." *Saesee*, 725 F. 3d at 1049-50. Counsel is above all obliged to develop a sound trial strategy and then take the steps necessary to carry it out. *U.S. v. Fluellen*, 40 M.J. 96, 98 (C.M.A. 1994). As a result, counsel's own words came back to haunt Appellant: he took the "risk . . . in [] opening statement" and did "not present [the] evidence," *see* J.A. 1075, and Appellant was convicted by a unanimous vote.

C.

Defense counsel's mishandling of several critical mental health issues seriously undermined Appellant's ability to defend himself.

Additional Facts

Two weeks after the stabbings, the special court-martial convening authority ordered an evaluation of Appellant pursuant to Rule for Court-Martial 706. *See* Superseded Order for Mental, Physical, and Neurological Examinations and Approval of Pretrial Delay Request, dated 19 July 2004, Volume 4, J.A. That order does not appear to be in response to a request from Appellant or his counsel.

Dr. Ajay K. Makhija, a forensic psychiatrist, conducted the evaluation on July 26, 2004, and concluded Appellant did not suffer from a mental disease or defect on July 5, 2004, was able to appreciate the nature and wrongfulness of his actions on July 5, 2004, and was competent to stand trial. *See* App. Ex. CXLIV, J.A. 3733. Dr. Makhija's evaluation consisted of a 2.5 hour clinical interview of Appellant, and six hours reviewing the charge sheet, Appellant's medical records, personnel file, and confession. *See id.* Dr. Makhija determined that Appellant did not suffer from any clinical diagnosis (Axis I), personality disorder (Axis II), or general medical condition (Axis III). *Id.*

Dr. Makhija documented his findings and conclusions in two reports – an abbreviated version released to all counsel, and a full report disclosed only to the defense. *Id.* In the full report, Dr. Makhija reported numerous admissions Appellant made.

Specifically, after receiving the calls from SrA Schliepsiek, Appellant stated that he had the thought that "Andy is dead." *Id.* Further, he stated that he observed SrA Schliepsiek, Jamie Schliepsiek, and SrA King for 30 minutes. *Id.* Once he was inside the Schliepsieks' house, Appellant reported feeling "faster than them" and moved quickly. *Id.* He described SrA Schliepsiek as "drunk and stunned." *Id.* Appellant also told Dr. Makhija that after returning to the house after chasing SrA King, he saw SrA Schliepsiek on the phone and therefore smashed the phone because "he didn't want the police coming." *Id.*

During trial, without an order from the military judge, counsel disclosed to the prosecution the full report containing these statements. *See* J.A. 1094 (where trial counsel says, "the results of that sanity board have been provided to the government."); J.A. 1141 (where trial counsel offers the full sanity board as an appellate exhibit).

On August 27, 2004, seven weeks after the stabbings, the special court-martial convening authority approved appointment of and funding for Dr. Bill E. Mosman, a forensic psychologist, to assist the defense. *See* Approval of Expert Consultant - U.S. v. Witt, dated August 27, 2004, Volume 4 (hereinafter, Approval of Consultant). Counsel requested Dr. Mosman for the purpose of developing evidence for findings and sentencing purposes. *See*

Request for Expert Consultant, dated August 13, 2004, Volume 4 (hereinafter, Request for Consultant).

The request indicated Dr. Mosman would conduct a forensic analysis to assist the defense's understanding of "the complex dynamic of the individual's psychological development," and would include a review of investigative reports, statements, and other evidence; clinical interviews with Appellant; evaluation of Appellant's neuropsychological functioning, personality structure, and emotional functioning; interviews of Appellant's family members and other witnesses; and evaluation opinions of government experts involved in Appellant's case. *Id.*

Trial counsel sought an expert of their own, and on August 2, 2004, the convening authority approved the appointment of and funding for Dr. Rath "as a prosecution expert consultant. . . . Should the prosecution later desire to expand their use of Dr. Rath beyond confidential consultant to expert witness, I also authorize the employment of Dr. Rath by the prosecution as an expert witness." *See* Approval of Consultant, *supra*. Subsequent requests for additional funding for Dr. Rath indicated he "provides the prosecution with valuable insight into the psychological aspects of the case; . . . [he] will enable the prosecution to anticipate and respond to the strategies and guidance the defense will receive from its own expert consultants," to include Dr. Mosman. *See* Approval of Consultant,

supra (citing also the evaluation conducted by Dr. Makhija); *see also* Expert Consultant Funding, dated August 23, 2005, Volume 4 (stating Dr. Rath "will assist the government in preparing for all pretrial proceedings and trial" in Appellant's case).

Dr. Rath worked in a consultant capacity for a year, spending approximately 200-300 hours on the case. J.A. 2551. He reviewed the evidence and attended the Article 32 hearing, the April 2005 pretrial motion hearing, and each day of the court-martial. J.A. 2550-51. His consultation included assisting trial counsel in interviewing Dr. Mosman. *See* J.A. 1158. Additionally, he helped trial counsel with closing, visual aids, and evaluating in- court testimonies. *See* J.A. 1078.

While the defense initially requested Dr. Mosman to serve as a confidential consultant, *see* Approval of Consultant, *supra*, counsel ultimately decided Dr. Mosman would testify, and a week before trial gave the prosecution notice of such. *See* J.A. 1075. During the civilian counsel's opening statement, wherein he promised the members the defense would "put on witnesses who will tell you who Andrew Witt is; where he came from; the Christian home that he was raised in; the divorce of two loving parents; the facts that led him into the United States Air Force; the environment that created the person who committed the acts on the 5th of July," trial counsel objected. J.A. 1073.

As a result, the military judge held an Article 39(a). There counsel confirmed he would be calling "Dr. Mosman in findings to give testimony on the element of premeditation state of mind." J.A. 1075. Trial counsel argued and the military judge agreed that a *Daubert* hearing was necessary to determine the admissibility of his testimony. J.A. 1076-78.

The *Daubert* hearing was six days later, on September 26, 2005. J.A. 1091. During that hearing, Dr. Mosman described what he had done as a defense consultant. He related:

> I've had access basically to everything. I have had access to every interview that . . . was done by the special investigators. I visited the crime scene twice. I have been through all the autopsy photos, the two CDs provided; I have gone over the transcripts, the Article 32 hearing, and I attended that, I've attended here; I have a--and I keep a running account of each individual thing I do and I have--it's up to four pages long now, over 300--I think close to 250 items on it, give or take a few. I've also interviewed and tested Andrew Witt. I've interviewed him perhaps six to eight times.

J.A. 1100; *see also* App. Ex. CXVI at 5-8 (Dr. Mosman's record of work he had done on Appellant's case). He stated that he had conducted a forensic evaluation of Appellant, consisting of "fifteen--fourteen areas . . . including all of the collateral data from the crime scene investigations. I've also interviewed the natural mother, natural father, the stepfather, stepmother, and uncle of Andrew Witt on more than one occasion--four

occasions." J.A. 1100. He also reviewed Dr. Makhija's sanity board report. J.A. 1101.

Regarding the testing he had conducted on Appellant, Dr. Mosman explained:

> The type of instruments were a combination of objective and subjective psychological instruments. That's the only two categories we have. I did a neuropsychological battery that would have included the Isihari Color Vision Test, I-S-I-H-A-R-I, there would be the Stroop, S-T-R-O-O-P, there were several sub-sets of the Denman, D-E-N-M-A-N, there was Trail Making A and Trail Making B, a Bender Gestalt, there might have been one or two more on the neuropsychological portion of it.
>
> On the intellectual cognitive functioning portion then I administered the WAIS III, that's the Wexler, IQ test, the WRAT, W-R-A-T III, academic test.
>
> Then on the personality portion of it, the MCMI III, those would be Roman numeral III, and then the MMPI-2, that would be a dash 2, and again, we can go into what they actually are, but that's the abbreviations and that's how we define them. And I believe--I'm pretty sure I covered all of them. There were fifteen of them altogether covering the areas relevant to this type of inquiry.

J.A. 1102.

At the conclusion of the *Daubert* hearing, trial counsel first argued that the military judge should exclude Dr. Mosman's testimony, or at least limit it. Alternatively, if the military judge decided to admit the testimony, trial counsel sought a compelled evaluation of Appellant. *See* J.A. 1270-72. Trial counsel made it clear that they wanted their own expert, Dr. Rath, to conduct the evaluation. J.A. 1270, 1272 (stating "we

think some further testing is appropriate, **along with our own doctor** to confirm or—to either corroborate Dr. Mosman or not") (emphasis added); J.A. 1272 (noting that if "we are going to call Dr. Rath; well, the cross is obvious, 'Have you done an assessment? No. Have you tested him? No.' I mean, his basis is automatically less than Dr. Mosman's because he cannot sit down with the Accused."). The military judge ruled that Dr. Mosman could testify without limitations, but deferred ruling on a compelled evaluation. J.A. 1269, 1278-79.

The parties researched the matter and returned to the military judge two days later, on September 28, 2005. J.A. 1317-19. Apparently unable to find authority to prohibit the judge from ordering an evaluation of Appellant, counsel opted to relieve the judge from making a decision on trial counsel's request, and instead consented to an evaluation by Dr. Rath. *Id.* The military judge summarized the agreement as follows:

> [MJ:] The accused will submit to psychological testing by Dr. Rath and to an interview with Dr. Rath. At the conclusion of that testing and the conclusion of the interview, Dr. Rath will provide the results of his testing and his opinion concerning whether or not the accused has a personality disorder, and if so, to what extent, to the defense counsel. Not to the prosecution, just to the defense counsel. Then, based on that information, the defense will make a tactical determination as to whether or not they are going to have Dr. Mosman testify at all. If Dr. Mosman does not testify at all during the findings portion of the trial, the government will not have access to Dr. Rath's testing or the results of his interview. If Dr. Mosman does testify, than the government will be

given access to all of the information that Dr. Rath uncovered during the course of his testing and interview.

[MJ:] And both sides also agreed that if Dr. Mosman testifies in his broader fashion, as he testified to in our preliminary hearing, that all of the information from the sanity board that the prosecutor questioned him about during motion practice would be fair game, and that the government can go into any and all areas concerning what Senior Airman Witt may or may not have said to the sanity board and how that information impacted Dr. Mosman's ultimate conclusion that the accused did not premeditate. And the government could also use the stuff that came from Dr. Rath's interview and testing to whatever extent they choose to do so. If Dr. Mosman testifies in a much more limited form--that being only in the area of, I think, memory and adrenaline, and that sort of thing, and does not go beyond that, does not express his ultimate opinion, and does not open the door by going too far in that regard--the government would not have access to Dr. Rath's information. But if Dr. Mosman testifies too broadly and starts touching into areas that may warrant the government being able to then review that information, the government will request a hearing under Article 39(a), and we'll deal with whether or not they get that information at that point. All that for findings.

[MJ:] As to the sentencing portion of the trial, should we get there, Dr. Mosman may or may not testify about future dangerousness of the accused and his potential for rehabilitation. If Dr. Mosman does testify as to those areas, the government can then call Dr. Rath to rebut the dangerousness and rehabilitation testimony of Dr. Mosman. But that he would not talk about anything that the accused said to him during the course of his testing and interview.

[MJ:] Trial Counsel, did I accurately state the agreement that you and the defense have reached?

TC: With one small point, and that is if the defense counsel, in sentencing, were to cross-examine Dr. Rath about the basis for his opinion about future dangerousness or lack of potentiality. We would then

have access to that part of the information, these statements by the Accused, et cetera.

MJ: With that addition, Mr. Spinner, was my summary accurate?

CIV DC: Yes, Your Honor.

J.A. 1318-19.

The military judge next addressed Appellant. Wanting to ensure Appellant understood the agreement involved, he asked:

MJ: Senior Airman Witt, I want to talk to you about this. I won't say that it's-- it's certainly a well-reasoned approach by both sides, I think, or I wouldn't let them do it. In order to give the government access to some information that they think--to potentially give the government access to some information they think they may need, but to also protect, to the maximum extent possible, your rights in this regard. In other words, what this procedure will do is it allows--you'll be required to participate in the testing and participate in the interview, but you and your defense counsel will control basically whether or not the members ever hear anything about that information. In other words, you know, if you all elect to not put on Dr. Mosman or elect to limit his testimony in some way, the information from that interview would never come before the court members. But if it goes the other way, then that information would be available to court members. Do you understand?

ACC: Yes, I do, Your Honor.

J.A. 1319-20.

Dr. Rath evaluated Appellant on September 28-30. J.A. 2486-87. Neither counsel, nor Dr. Mosman, nor any other member of the defense, attended the evaluation. Nor was it recorded. Consistent with their agreement, defense counsel met with Dr.

Rath to discuss his findings. J.A. 2487. After speaking with him, counsel decided to limit Dr. Mosman's findings testimony, offering only a stipulation of expected testimony on adrenaline and "fight or flight." J.A. 2500-02. The defense rested. J.A. 2503. Dr. Mosman never testified during presentencing.

Law and Analysis

Counsel seriously undermined the adversarial process in Appellant's case by mishandling their client's privileged statements, consenting to an evaluation of their client by the prosecution's expert psychologist, and failing to use their own psychologist for the purpose for which they hired him. Their decisions in these matters demonstrate a gross misunderstanding of the law as well as a failure to perform a sufficient investigation to make informed choices regarding representation of their client and defending his life. The choices they made involving their "star" witness as well as their own client lack any logical, tactical, or reasonable justification.

As counsel stated in their remarks to the members, this case was not about what Appellant did, but rather why he did what he did, and more importantly, why he should not die. *See* J.A. 1078-79, 1083-84, 1384, 1472. Their strategy relied on Dr. Mosman's investigation, opinions, and conclusions. Having worked with him for almost a year, civilian counsel promised,

> you're going to hear from . . . Dr. Bill Mosman . . . He has looked at the facts of this case; he's interviewed multiple individuals and witnesses; and he will testify regarding Senior Airman Witt's state of mind on the night of the 4th and into the early morning hours of the 5th of July of 2004. . . . Dr. Mosman, the forensic psychologist, I anticipate will testify about Andrew's state of mind at that point in his life; his state of fear about the fact that these people were threatening to ruin his career; the provocation that flowed from that.

J.A. 1079.

Additionally, Dr. Mosman presumably developed mitigation and extenuation evidence to present to the members during sentencing proceedings in the 12 months he worked for the defense team. *See* Request for Consultant. Ultimately, however, the members only heard a stipulation about adrenaline's effects on the brain. They heard no mental health evidence about the "the complex dynamic of the individual's psychological development," the "forces that shaped" Appellant, his state of mind, or his "state of fear about the fact that . . . people were threatening to ruin his career." *Id.*; J.A. 1079, 1083.

1. Counsel's decision to disclose Appellant's privileged statements from the sanity board was unreasonable in light of established law.

Military Rule of Evidence 302(a) provides an accused with "a privilege to prevent any statement made by [him] at a mental examination ordered under Rule for Court-Martial 706 and any derivative evidence obtained through use of such statement from being received into evidence against [him] on the issue of guilt

or innocent or during sentencing proceedings." That privilege applies even when the defense offers expert testimony on the accused's mental condition. *See* Mil. R. Evid. 302(c). Only if the defense introduces the accused's statements, or evidence derived from those statements, does the privilege not apply. Mil. R. Evid. 302(b)(1).

In this case, defense counsel gave trial counsel access to further incriminating statements privileged under Military Rule of Evidence 302(a). These included his statements that "Andy is dead," he felt "faster than them," he moved quickly, SrA Schliepsiek appeared "drunk and stunned" after SrA King was stabbed, everyone started screaming after he stabbed SrA King, he smashed the cell phone out of SrA Schliepsiek's hand to avoid a call to the police, he had multiple thoughts of not wanting to leave any witnesses while in the house, and that he disposed of his clothing so "no one would find it." App. Ex. CXLIV at 5, J.A. 3733 (sanity board report).

Such statements did not duplicate what the prosecution already knew; rather, they provided new and more detailed accounts of Appellant's thought process. *Cf.* J.A. 1788-1807 (SA Billups's testimony regarding the confession); J.A. 1832-38 (SA Cromwell's testimony regarding the confession); Pros. Ex. 30, J.A. 3078-87 (Appellant's confession); J.A. 1581, 1587-90 (Ms. Steele's and Mr. Coreth's testimony regarding admissions).

Trial counsel's examination of SA Billups, who interrogated Appellant, only revealed that Appellant had admitted to watching SrA Schliepsiek, Jamie, and SrA King without specifying a timeframe. J.A. 1795-97. SA Billups did not testify that Appellant believed he was able to move more quickly than SrA Schliepsiek, Jamie, or SrA King, that SrA Schliepsiek appeared "drunk and stunned," that Appellant thought "Andy is dead" after the initial phone calls, or that Appellant recognized SrA Schliepsiek was calling the police from his cell phone; in fact, SA Rutherford did not reference the cell phone other than to say he had collected it as evidence. *See* J.A. 1757-59. Similarly, SA Cromwell, also present during Appellant's interrogation, did not indicate that Appellant's confession contained detail like those in his statements to Dr. Makhija. *See generally* J.A. 1830-42; Pros. Ex. 30, J.A. 3078-87 (Appellant's written confession).

Mr. Coreth, Appellant's roommate at the time of the stabbings, testified to statements Appellant made to him after the murders, but his testimony did not convey the specific information Appellant told to Dr. Makhija. *See* R. J.A. 1585-90. Similarly, Priscilla Steele, Appellant's friend, testified only that Appellant admitted that he killed everyone on July 5, 2004 so as not to leave any witnesses. J.A. 1014.

Nothing required counsel to disclose Appellant's statements to Dr. Makhija to opposing counsel. While the defense made it

clear at the start of trial that they intended to offer expert testimony on Appellant's mental condition, *see* 1073-77 (where counsel stated "we intend to call Dr. Mosman in findings to give testimony on the element of premeditation state of mind. . . . We've given notice and they've had that notice for weeks now that Dr. Mosman was going to be a witness in the proceeding"), that intention only triggered an obligation to disclose the full sanity board report, **with the exception of Appellant's statements**. *See* Mil. R. Evid. 302(c).

Military Rule of Evidence 302(c) authorizes disclosure of the statements in the full sanity board report only after the defense first introduces those statements, or evidence derived from them. Based on Dr. Mosman's *Daubert* hearing testimony, it is clear that the defense never intended to introduce Appellant's statements. In fact, Dr. Mosman did not testify to any of Appellant's statements at all during direct examination. These statements were, however, exploited by trial counsel on cross-examination. J.A. 2235, 2249-50.

Dr. Mosman's testimony similarly would not have qualified as derivative evidence. His review of the full sanity board report did not trigger Rule 302(c). *U.S. v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988), illustrates why. There, the Court doubted that a "diagnosis offered by a defense expert can, in and of itself, be considered 'derivative evidence' merely because it is based in

part on what the accused has told the examining psychiatrists." *Id.* at 103. If a diagnosis does not necessarily qualify as "derivative evidence," Dr. Mosman's testimony certainly does not. While he made a diagnosis of personality disorder not otherwise specified, he made no indication whatsoever that diagnosis resulted from what he had read in the report.

In *Bledsoe*, the military judge ordered disclosure to trial counsel of a full sanity board report, including the appellant's statements. *Id.* at 99-100. Prior to his trial, a sanity board of three mental health professionals evaluated the appellant. *Id.* During its case-in-chief, the government presented the testimony of Dr. Townsend-Parchman, a member of the sanity board. *Id.* The defense countered with testimony of another member of the sanity board, Dr. Martin, who opined the appellant suffered from a conversion disorder and could not offer a good answer as to whether the damage to the military property was willful. *Id.* at 100.

After Dr. Martin's direct examination, the trial counsel requested access to the full sanity board report, "particularly the statements made by the accused in the evaluation process . . . [to] conduct an effective cross-examination of [Dr. Martin]." *Id.* at 100. The trial counsel asserted the defense had "opened the door" to the full report through its examination of Dr. Martin. *Id.* The military judge overruled an objection,

and the trial counsel elicited damaging admissions made during the sanity board. *Id.* at 100-01.

On appeal, this Court explicitly noted the trial counsel had no right to the appellant's statements to the sanity board. *Id.* at 102. Citing Military Rule of Evidence 302, the Court recognized that such statements were privileged and exempt from disclosure unless the defense introduces the statements or evidence derived therefrom. *Id.* In Bledsoe's case, the defense did not introduce the statements, and the Court doubted the witness's testimony resulted from exposure to the statements. Thus, the Court found the appellant should have been entitled to prevent the use of his statements in the cross-examination of Dr. Martin. *See id.* (finding no prejudicial error in admission of statements given minimal impact and no specific objection).

U.S. v. Clark, 62 M.J. 195 (C.A.A.F. 2005), also supports the proposition that mere exposure to an accused's statements contained in a sanity board report does not grant trial counsel access to them. There, the appellant was evaluated pursuant to Rule for Court-Martial 706 by Dr. Massero, at the defense counsel's request. *Id.* at 197. He concluded the appellant was competent and mentally responsible. *Id.* The defense counsel enlisted the services of a second mental health professional, Dr. Peterson, to evaluate the appellant. *Id.* She testified that, while she reviewed Dr. Massero's report, she came up with a

separate, independent conclusion. *Id.* More importantly, she did not testify as to any statements contained in the sanity board report conducted by Dr. Massero. *Id.* at 199. Still, as a result of her testimony, the military judge ordered disclosure of the full sanity board report, and allowed her to testify as to the statements the appellant made during her inquiry. *Id.* at 197.

This Court reversed. *Id.* at 200-01. The Court explained that Military Rule of Evidence 302 allows an accused to control whether his statements to a sanity board will be released to the prosecution. *Id.* at 200. Only when the accused presents a defense which "includes specific incriminating statements made by the accused to the sanity board, [can] the military judge . . . order disclosure to the trial counsel." *Id.* at 200, n.30. Accordingly, the Court concluded that Dr. Peterson testified as to her treatment and did not in any way "reveal to the members Appellant's incriminating statements to the sanity board." *Id.*

In so doing, the Court made it clear when an expert's testimony derives from an accused's incriminating statements, triggering Military Rule of Evidence 302(c). Mere review of a full sanity board and exposure to an appellant's statements will not suffice. Similarly, unless an expert actually relies on the statements in the report in making a diagnosis or conclusion as to the appellant's mental condition, Military Rule of Evidence

302 does not permit disclosure to trial counsel. *See also* STEPHEN SALTZBURG ET. AL, MILITARY RULES OF EVIDENCE MANUAL 162-75 (4th ed. 1997).

Here, Dr. Mosman's *Daubert* hearing testimony clearly shows that whatever review he made of the full sanity board played little if any role in his assessment. On the contrary, he conducted psychological testing not administered by the board, interviewed collateral witnesses the board did not, and evaluated evidence not accessed by the board. Indeed, his conclusions and testimony were derived from wholly independent sources. His conclusions did not mirror those of the sanity board; thus, it cannot be said his testimony derived from it.

Despite the clear weight of authority to the contrary, counsel turned over privileged statements to the prosecution. It appears that counsel misunderstood Military Rule of Evidence 302. As he told the military judge, his understanding was that "ultimately, the sanity board results can be provided to the government." J.A. 2345. This conclusion, though, does not show an appreciation of what precisely must be disclosed and that the defense still controls the disclosure of the accused's statements. Yet, Military Rule of Evidence 302 is abundantly clear as to when statements must be disclosed, and lest there be any doubt, *Bledsoe* and *Clark* eliminate any possible confusion.

"Knowledge of the law is a basic prerequisite to providing competent legal assistance. If an attorney does not investigate

clearly relevant law, then he or she has objectively failed to provide effective assistance." *State v. Ross*, 951 P.2d 236 (Utah Ct. App. 1997) (finding counsel ineffective for failing to know the law:); *see also Smith v. Dretke*, 417 F.3d 438, 442 (5th Cir. 2005) (holding "[f]ailing to introduce evidence because of a misapprehension of the law is a classic example of deficiency of counsel"); *U.S. v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996) (finding IAC based on not knowing the law); *U.S. v. Paus*, 60 M.J. 469, 475 (C.A.A.F. 2005) ("Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel."). Here, disclosure of privileged statements evinced ignorance of the controlling law. By failing to research the relevant law – despite having more than a year to prepare – counsel abdicated a fundamental responsibility to their client.

Courts have routinely shown that disclosure of privileged information can be grounds for ineffective assistance. In *U.S. v. Ankeny*, 28 M.J. 780 (N.M.C.M.R. 1989), *aff'd on other grounds*, 30 M.J. 10 (C.M.A. 1990), the counsel revealed to government authorities that prior to the urinalysis, the accused had solicited a fellow officer to falsely substitute his urine for that of the accused. *Id.* at 781. The accused was then charged and convicted of using cocaine and soliciting an officer to be derelict in his duties when the Government had no prior knowledge of the solicitation charge and probably never would

have but for the disclosure. *See also U.S. v. Paaluhi*, 54 M.J. 181, 183-85 (C.A.A.F. 2000) (rejecting the argument that counsel made a tactical decision and finding counsel ineffective based on an improper evaluation of privilege, where counsel advised client to speak with a clinical psychologist, without first requesting the military judge or convening authority to assign such an expert, and the client made numerous admissions later used against him). *Cf. U.S. v. Thompson*, 51 M.J. 431, 435-36 (C.A.A.F. 1999) (counsel not ineffective in advising client not to speak to government mental health expert because of self-incrimination problem – "defense counsel's recognition of this peril hardly constituted ineffective assistance"); *People v. Sagstetter*, 532 N.E.2d 1029, 1034-36 (Ill. App. Ct. 1988) (finding the defense's disclosure of the appellant's privileged statements to therapist "counsel clearly failed to perform as a reasonably competent attorney").

As noted above, Appellant's statements to the sanity board were not cumulative and could only have helped the prosecution. Counsel inarguably had a duty to ensure the prosecution never learned about them, provided they played no role in the defense of their client. This they did not do. Based on the *Daubert* hearing, it becomes clear Dr. Mosman would not have introduced Appellant's statements. At a bare minimum, counsel should have refrained from disclosing the statements until after Dr. Mosman

testified to see if the military judge believed the defense had triggered Military Rule of Evidence 302(c). This they also did not do, as they clearly believed Rule 302 required disclosure of the entire sanity board report by virtue of their use of expert mental health testimony.

This conduct hamstrung the defense. Not only did it give the government insight into Appellant's thought processes but, more importantly, his statements provided fruitful ground for cross-examining Dr. Mosman. The *Daubert* hearing only showed a glimpse of how the trial counsel intended to use the report. The hearing lasted one day, but trial counsel indicated he had much more to discuss with Dr. Mosman than what they covered. *See* J.A. 2170 (start of hearing on 26 Sep 05); J.A. 2344 (end of hearing on 26 Sep 05); *id.* at 1668 (stating, with regard to some of Dr. Mosman's conclusions, "I'm not going to go through all of these today. We'll save that . . . Okay. We will talk more about it tomorrow."). The defense thus gave the prosecution an untold advantage, at the expense of their own "star" witness.

Though trial counsel never introduced the statements, the nonevidentiary use is clear. *See U.S. v. McDaniel*, 482 F.2d 305, 310-12 (8th Cir. 1972) (noting that within context of improper use of immunized statements, nonevidentiary uses include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence,

planning cross-examination, and otherwise generally planning trial strategy); *see also U.S. v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987); *U.S. v. Pantone*, 634 F.2d 716, 723 (3d Cir. 1980); *U.S. v. Semkiw*, 712 F.2d 891 (3d Cir. 1983). Namely, he used these statements in his strategy, planning, interpreting evidence, and cross-examination. Indeed, his aim during the *Daubert* hearing was to keep Dr. Mosman off the witness stand. Be it by a military judge's ruling or defense decision, trial counsel wanted to discredit him so that he would not testify.

Furthermore, the use of Appellant's statements during the cross-examination undoubtedly played a role in securing the defense's consent to an evaluation of Appellant by Dr. Rath – again, all part of trial counsel's overall trial strategy. As discussed below, that decision in turn led the defense to not call Dr. Mosman for the purpose for which they hired him.

Consequently, by disclosing privileged statements to the prosecution, despite the authority protecting those statements, the defense ultimately enabled the prosecution to make such use of otherwise protected information that the defense abandoned their "star" witness. There simply is no conceivable tactical purpose in the decision to cede Appellant's statements to the prosecution. It played a significant role in crippling their case, and jeopardized Appellant's chances to have the members learn of powerful reasons to spare his life.

2. Counsel's decision to consent to an evaluation by Dr. Rath was unreasonable, unwarranted, and inconsistent with prevailing law.

Having given trial counsel more specific insight into Appellant's thought processes and untold strategic options by disclosing privileged statements contained in the sanity board report, counsel exacerbated his error by handing his client over to the government's very own expert psychologist for evaluation. Counsel came to this decision based upon his understanding that the law allowed the military judge to order such an evaluation, although the record does not indicate what law that was. Appellant respectfully contends the law does not authorize the evaluation agreed to by defense counsel. Moreover, had counsel not "preempted" an order that Appellant submit to an evaluation by consenting to an evaluation, the law would have restricted both the evaluation and use of statements made therein.

Rule for Court-Martial 706, which constitutes the *Manual*'s sole treatment of the subject, authorizes a military judge to compel an accused to submit to an inquiry into his mental responsibility and capacity. So long as a nonfrivolous, good-faith basis exists to believe the accused lacked responsibility at the time of the offense or lacks capacity to stand trial, the military judge should do so. *See U.S. v. Pattin*, 50 M.J. 637, 639 (A. Ct. Crim. App. 1999) (citing *U.S. v. Nix*, 36 C.M.R. 76,

80-81 (C.M.A. 1965)). Since trial counsel made the request, he bore the burden of meeting this standard.

Dr. Mosman's *Daubert* testimony revealed that he had diagnosed Appellant with a personality disorder, not otherwise specified. During his direct examination, he indicated that he identified Appellant as having borderline and schizoid features. J.A. 2167. However, during cross-examination, he acknowledged that he had miscommunicated his diagnosis, and that he meant to say that Appellant suffered from borderline and paranoid features. *Id.* at 1655. Moreover, Dr. Mosman admitted that although he had consulted on Appellant's case for almost a year (administering psychological testing, conducting clinical interviews, and reviewing records), he did not reach a diagnosis until approximately one week into trial. *See id.* at 1657.

In his argument for a compelled evaluation with Dr. Rath, trial counsel emphasized Dr. Mosman's diagnosis of Appellant,

> the issue then becomes, the defense then asked for a forensic psychologist. He did testing and he said all of the testing was within normal range. We didn't do another sanity board because everything was normal. Then, the doctor comes in and testifies that even though it is all within normal range, he has this personality disorder, which plays a role in his conduct. So, that is the basis, and I think in some regard it is, I don't want to say "outside of the box," to quote Dr. Mosman's transcript, but it is different, but it is very comparable to other jurisdictions. It is also different, but very comparable to a sanity board. And, it is different in this case because the defense's expert has changed his diagnosis on a number of occasions, and it is well

> worth corroborating or refuting. Otherwise, the defense gets to put him on, we are going to call Dr. Rath; well, the cross is obvious, "Have you done an assessment? No. Have you tested him? No." I mean, his basis is automatically less than Dr. Mosman's because he cannot sit down with the Accused.

J.A. 2230-31.

At no time in his questioning of Dr. Mosman or his argument did trial counsel point to any information, facts, or evidence suggesting he, trial counsel, had reason to question Appellant's mental responsibility. On the contrary, the clear message of the argument was disbelief of Dr. Mosman's diagnosis, which even the military judge recognized. J.A. 2299 (stating "Well, we have [a diagnosis], we just have one that you don't agree with.").

The trial counsel lacked a good faith, nonfrivolous basis for seeking a compelled mental health evaluation. Had defense counsel researched the law, they could have properly objected. Initially, it seemed they understood that the trial counsel had no basis for a compelled inquiry. Counsel noted:

> All of these tests have been provided to the government. So, why do they need additional testing, I guess I am not sure that I understand what the basis for that is when tests have been done, and they have offered no expert testimony to refute that that test was done correctly, scored correctly, or whatever. Where there may be areas of dispute, are only on the interpretations to be given to those tests. And, quite frankly, if they have an expert who interprets them differently, they can call him in rebuttal.

J.A. 2334-35.

Later, he told the military judge:

> I know of no basis in military law for a judge to order or compel an Accused to submit to a test in this circumstance. Certainly *Parker*[40] does not apply here. So, I believe that if this court were to order such additional testing, it would be going outside of current law, both the Manual for Courts-Martial, the UCMJ, or any appellate decision that I am aware of. Now, if there is other case law outside of *Parker* that I am unaware of that the court will use as a basis for compelling additional testing, I am not aware of what that is, Your Honor.

J.A. 2351. Appellant is similarly unaware of any law that allows a military judge to compel an evaluation of an accused, other than under Rule for Court-Martial 706.

The trial counsel, for his part, did not cite to any authority authorizing a compelled evaluation. He did refer to the sanity board process in the military as authority to compel an accused, and justified his request for additional testing based on the fact the original sanity board did not conduct such testing because he was a psychiatrist and not a psychologist. J.A. 2352. He alluded to "some federal cases," but the "real concern is that the accused cannot be compelled to make statements that incriminate himself to the government psychologist. And, we would agree with that. If we test him, any statements that he makes about the offenses, we would suggest are inadmissible. We can't make the accused talk about the offenses." J.A. 2352. Still, he admitted he did not desire

[40] 15 M.J. 146 (C.M.A. 1983).

only additional testing; he wanted a full assessment, to include an interview. *Id.*

Admittedly, federal law does permit a compelled evaluation of a defendant in a capital case should he intend to introduce expert testimony concerning his mental condition, either in findings or sentencing proceedings. *See* Fed. R. Crim. Pro. 12.2(b). But that rule does not apply in a court-martial. *See* Fed. R. Crim. Pro. 1(a)(1) (noting "These rules govern the procedure in all criminal proceedings in the U.S. district courts, the United States courts of appeals, and the Supreme Court of the United States.").

Even if an argument exists that the federal rule is of general applicability, *U.S. v. Spann*, 51 M.J. 89 (C.A.A.F. 1999), suggests the rule still would not apply. This Court stated, "Recognizing that Congress, in the UCMJ, 'established an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts, we have emphasized the necessity of 'exercising great caution in overlaying a generally applicable statute specifically onto the military system.'" *Id.* at 92-93 (citing *U.S. v. Dowty*, 48 M.J. 102, 106, 111 (C.A.A.F. 1998)).

Implicit in *Spann*'s language is the principle that while generally applicable federal statutes may or may not apply in a court-martial, rules that apply only to federal district courts

do not apply to courts-martial. Under Article 36, Congress has delegated to the President the authority to establish rules of procedure for courts-martial. Thus, the military judge could not rely on a Federal Rule of Criminal Procedure to authorize the compelled evaluation, which counsel should have known. *See Spann*, 51 M.J. at 93 (noting, "If Government counsel or others involved in the administration of military justice believe that such rules should apply in courts-martial, the appropriate route is not through litigation involving statutes outside the UCMJ that are subject to interpretative uncertainties, but through amendments to the Manual for Courts-Martial or, if necessary, though legislative changes.").

Assuming *arguendo* the military judge could have ordered a compelled evaluation of Appellant, it would not have resembled that which counsel agreed to. Thus, counsel granted the government access to his client beyond what the law allows.

3. A compelled evaluation would not have allowed the full assessment desired by trial counsel.

Trial counsel clearly desired an unlimited assessment. Because Dr. Mosman's *Daubert* testimony revealed that he did not conduct psychological testing in some areas, trial counsel suggested the lack of testing as reason to grant a compelled evaluation. J.A. 2337. However, when queried by the military

judge, trial counsel indicated that he wanted more than just additional testing – he wanted an interview as well:

> What we are asking for is our psychologist to be able to do an assessment. But, our psychologist would not testify about what the Accused said about the offenses. He might need that for the assessment. He may need to hear the Accused's story about what happened to go through the memory and those types of things, and the effects of adrenaline. . . . As you see from the testing that was done, if we accept this as a science, the testing, it is all within normal range, and we think some further testing is appropriate, along with our own doctor to confirm or— to either corroborate Dr. Mosman or not, and who knows what the results will be.

J.A. 2352.

The purpose of a compelled evaluation, should an accused seek to introduce expert testimony as to his mental condition, is to allow the government an opportunity to rebut the same. *See Estelle v. Smith*, 451 U.S. 454, 465 (1981). The interview trial counsel sought exceeded a permissible rebuttal purpose. *See U.S. v. Taylor*, 320 F. Supp. 2d 790, 794 (N.D. Ind. 2004) (wherein "Court agrees the Government must be limited to a parallel testing" "rather than allowing the Government to use [an evaluation] as an open door for any type of mental testing").

Similarly, any interview would have been limited to those subject matters the defense sought to raise in its case-in-chief. *See U.S. v. Fell*, 372 F. Supp. 2d 753, 761 (D. Vt. 2005), *aff'd on other grounds*, 531 F.3d 197 (2d Cir. 2008) (holding "the government should be afforded the opportunity to have a

mental health expert interview [the defendant] concerning his mental condition at the time of the alleged offense.").

Had there been a compelled evaluation, Appellant should have argued for some form of representation. Specifically, counsel should have insisted that either he, or perhaps better, Dr. Mosman, attend. In jurisdictions that authorize a compelled evaluation, the law clearly recognizes a psychiatric interview by a representative of the prosecution is a "critical stage" of the criminal process during which an accused has a Sixth Amendment right to counsel. *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981). *Estelle* discussed but did not decide whether the Sixth Amendment requires counsel's presence. *See id.* at 470, n.14. However, by now, the better view is that it does. For example, in *Houston v. State*, 602 P.2d 784 (Alaska 1979), the Alaska Supreme Court held as follows:

> On balance we have concluded that the superior court erred in its refusal to allow Houston's counsel to be present at the court-ordered psychiatric examination. . . . In so holding, we are persuaded . . . that the rights implicated are best protected by recognition of the need for the presence of counsel at a psychiatric examination which is conducted by a state witness.

Id. at 796. *See also Thomas-Bey v. Smith*, 869 F.Supp. 1214, 1225-27 (D. Md. 1994), *aff'd mem.*, 67 F.3d 296 (4th Cir. 1995) (setting aside death sentence due to IAC because counsel did not attend the prosecution psychiatrist's interview of his client); *see also* N.Y. Crim. P. Law §§ 250.10(3), 400.27(13)(a) (counsel

have a right to attend prosecution examinations conducted for penalty phase purposes, in a passive role of observer); Ky. Rev. Stat. § 504.080 (allowing attendance at government psychiatric interview by "a psychiatrist or psychologist retained by the defendant"); Rule 5 of the Superior Court Special Proceeding Rules for the State of Washington (stating "the defendant may have a representative present at [a prosecution mental health examination], [to] observe" in capital cases); Fla. R. Crim. P. 3.202(d) (allowing counsel attendance at prosecution mental health examination). Indeed, ABA Guideline 10.11(J) advises counsel to do so: "If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should: . . . 3. attend the interview."

Moreover, federal district courts have routinely recognized an accused does not shed all constitutional protections when a compelled evaluation takes place. At a minimum, then, counsel should have sought other measures of protection for their client in turning him over to the government's expert. For example, they could have required tape-recording and a contemporaneous audio-video feed of the testing and interviews. *See, e.g.*, *Fell*, 372 F. Supp. 2d at 761; *Johnson*, 362 F.Supp. 2d at 1091; *U.S. v. Sampson*, 335 F. Supp. 2d 166, 247-48 (D. Mass. 2004).

4. Moreover, a compelled evaluation would not have necessarily allowed the government to have access to or use of Appellant's statements, both to the government's expert as well as to the R.C.M. 706 board.

As discussed above, any statements Appellant would have made in a compelled evaluation, as well as the original Rule for Court-Martial 706 inquiry, would have remained privileged, regardless of whether Appellant presented expert testimony regarding his mental condition. *See* Mil. R. Evid. 302. Only if counsel first introduced those statements would they have been required to disclose them to the prosecution. *See* Mil. R. Evid. 302(c). Yet, Dr. Rath, as the government expert, had access to Appellant's statements to the sanity board, which undoubtedly factored into his approach in interviewing Appellant.

5. Defense counsel did not adequately advise his client.

In the end, counsel did not properly advise his client. In *Buchanan v. Kentucky*, 483 U.S.402 (1987), the Supreme Court discussed the nature and scope of the right-to-counsel that attaches in the context of a government psychiatric examination, and more importantly, the nature of the consultation between attorney and client regarding such an evaluation. The Court stated, "such consultation, to be effective, must be based on counsel's being informed about the scope and nature of the" evaluation. *Id*. at 424.

The military judge stated that counsel made a tactical decision to give the government's expert unfettered access to his client. J.A. 2478-80. As far as tactical decisions go, this was outside the range of professional competent assistance that one would expect in a capital case. Counsel should have demanded an exhaustive and inclusive summary of the testing and questioning to be conducted on his client **before** it took place. Without being informed of what types of questioning and testing would be conducted, counsel could not effectively advise Appellant. *See Buchanan*, 483 U.S. at 424.

6. As a result of the defense counsel's mishandling of critical mental health issues, the defense abandoned the presentation of mental-health evidence almost entirely.

The consequences of counsel's mishandling of privileged statements and subsequent agreement to let Dr. Rath evaluate Appellant led to the catastrophic decision to entirely abandon the presentation of mental health evidence specific to Appellant.

Indeed, counsel recognized the importance of having a mental health professional as part of their team in the first place. *See* ABA Guideline 4.1 ("the defense should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."). Mental health evidence is "of

vital importance to the jury's decision at the punishment phase." *See ABA Guidelines* 1.1, 4.1, 10.4, 10.7, 10.11 (2003 ed.); *see also Turner v. Duncan*, 158 F.3d 449, 456 n.9 (9th Cir. 1998) ("[The] failure to utilize available psychiatric information . . . falls below acceptable performance standards."); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) (noting there is no legal authority limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence; evidence of lesser conditions, disorders and disturbances are precisely the kinds of facts which may be considered by a jury as mitigating evidence).

As discussed above, the members on Appellant's court-martial largely exhibited a positive attitude towards mental health evidence. Many desired to hear an expert help them decide this case. *See, e.g.,* App. Ex. XXXV, J.A. 3348 (Col Eriksen, stating "I believe that most psychologists are able to catch . . . the person's attempts to 'fool' them"); App. Ex. XXXVII, J.A. 3382 (Col Tufts, stating "Someone would have to be very smart to know what to [fool] . . . a trained psychologist"). Given that one member could have voided the death sentence either when balancing matters in aggravation against matters in mitigation, *see* R.C.M. 1004 (b)(4)(C), or at the Gate-Four stage, *see Simoy*, 50 M.J. at 2 (citing R.C.M. 1006

(d)(4)(A)), the lack of testimony from a qualified mental health professional was all the more concerning.

That Appellant suffered prejudice is without question. Dr. Mosman did not testify at trial, except for a brief stipulation of expected testimony for findings purposes. Neither he nor any other mental-health professional made an appearance at sentencing. This absence substantially reduced Appellant's chances of a life sentence. And it resulted directly and inexcusably from defense counsel's failure to properly understand the law, to adequately investigate the issues, and the consequent concession to deliver Appellant to Dr. Rath.

Counsel probably received negative information about Appellant from Dr. Rath. However, they never gave another mental health professional an opportunity to respond to Dr. Rath's opinions. This is especially disturbing given the vastly different scope of the two inquiries. Dr. Mosman spent a year evaluating Appellant, his family, and friends; Dr. Rath spent only two days, and only with Appellant. Similarly, counsel did not attempt to have a mental health professional present during their engagement with Dr. Rath, nor try to have that professional speak with Dr. Rath directly. Counsel's conduct fell far below the standards expected of even fallible attorneys.

As a result of counsel's failure to adequately investigate, they inadvertently abandoned valuable mitigation evidence. Evidence concerning a defendant's childhood, social background, character, and mental health is highly relevant to sentencing determinations because of the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, *may be less culpable than defendants who have no such excuse*." *Boyde v. California*, 494 U.S. 370, 382 (1990) (internal quotation marks and citations omitted). *See also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)("Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence . . . . Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." (internal citations omitted)). More importantly, and especially pertinent to this case, psychological mitigation evidence can be powerful in persuading jurors to choose life imprisonment over death. *See, e.g.*, *Mullin*, 379 F.3d at 942 (noting that jurors respond strongly to mitigation evidence that the defendant has suffered a mental illness); *Silva*, 279 F.3d at 847 (finding that counsel's failure to present "potentially compelling" evidence regarding the defendant's childhood, mental illnesses, organic brain disorders, and substance abuse was prejudicial). As the Eleventh Circuit critically noted,

psychiatric evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." *Middleton v. Dugger*, 849 F.2d 491, 495 (11th Cir. 1989).

Furthermore, by abandoning then available mental-health evidence, counsel abandoned evidence that would have been relevant in findings. The opinions proffered by a replacement for Dr. Mosman would have explained that Appellant endured a dysfunctional childhood that contributed to his exceptionally underdeveloped maturity level, and likely caused what can only be characterized as a wholly irrational response to SrA Schliepsiek's and SrA King's threats. This powerful psychological testimony would have put in context Appellant's feelings, emotions, and conflict resolution skills (or lack thereof), at the very least offering the panel an explanation of why this happened.

Without the guidance of expert evidence, the panel was left to speculate about whether Appellant was susceptible to being provoked by the circumstances he confronted that night. The panel would have benefited from a mental health explanation for why Appellant did what he did. Counsel recognized this in closing: "Why would an Airman in the Air Force do something that appears so reprehensible and horrific? We want to try to

understand. Isn't that what you want to do before you make judgment or pass judgment on him?" J.A. 1393.

Of course, the answer is "yes". But counsel did not present psychological testimony that would answer these questions. Instead, he posed a series of rhetorical questions to the members: "So where does that leave us in terms of this idea of adequate provocation or provocation? What would cause someone to lose control?" J.A. 1394. "What was Andrew Witt's susceptibility to these physiological changes? How great of an emotional stress was he experiencing that night?" J.A. 1396.

The members did not have answers to any of these questions because counsel had failed to present them any of the answers. Counsel highlighted this failure when he wrapped up his closing argument by declaring, "There is no way to map Andrew Witt's state of mind in a way that tells us how these forces were working that night that led to the point that he killed two of his friends." J.A. 1411-12.

Appellant received IAC during findings. His counsel made multiple errors that were outside the range of professional, competent assistance in a capital case. But for these errors, the results of his trial would have been different in findings and sentencing.

WHEREFORE, Appellant respectfully requests this Court set aside the findings and sentence, and order a new trial.

A-IX.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE FOR CAUSE AGAINST COL HOLCOMB, WHO ATTENDED SUNDAY SCHOOL AND CHURCH WITH THE CONVENING AUTHORITY, AND WHOSE SELECTION CAME AFTER THE CONVENING AUTHORITY REJECTED OTHER RECOMMENDATIONS AND PERSONALLY WROTE IN COL HOLCOMB'S NAME ON THE REFERRAL MEMORANDUM INSTEAD.

Additional Facts

Col Holcomb's questionnaire and answers during *voir dire* revealed a personal and religious connection with the CA. Col Holcomb served as a squadron commander under the CA, Maj Gen Collings. App. Ex. XXXVIII, J.A. 3405. He also attended the same church and Sunday School class as Maj Gen Collings for the year leading up to the trial. *Id.* at 7, J.A. 3407; J.A. 548-50. Col Holcomb and Maj Gen Collings also "[went] out to lunch occasionally after church." J.A. 549. Maj Gen Collings had also been to Col Holcomb's home for a birthday party and to visit Col Holcomb when he was injured. *Id.*

After not seeing Col Holcomb's name on the list of potential members presented to him, Maj Gen Collings wrote in Col Holcomb's name when referring charges. *See* J.A. 97-99.

Counsel challenged Col Holcomb for cause, relying primarily on his relationship with the convening authority, including the fact that the CA handwrote Col Holcomb's name at referral. *See* J.A. 831. The military judge denied this challenge for cause:

> As to Colonel Holcomb, the defense challenge for cause appears to be based primarily on the implied bias standard based on his relationship[] with the convening authority . . . . In that regard, the defense challenge for cause is denied. While Colonel Holcomb attends Sunday school and church with the convening authority, he is not a close friend. Further, he has not discussed the case with the convening authority, nor has the convening authority mentioned the case to him. The relationship in this case is much less close than many of the other panel members. . . . [This] relationship[] [does not] arise to the level of actual or implied bias. His answers . . . in *voir dire* gave me no indication that they would be unable to give fair and balanced consideration to all of the evidence presented by both sides and clearly indicated that they could follow my instructions.

J.A. 839-40.

Standard of Review

This Court reviews "implied bias challenges pursuant to a standard that is less deferential than abuse of discretion, but more deferential than *de novo* review." *U.S. v. Castillo*, 74 M.J. 39, 42 (C.A.A.F. 2015).

Law and Analysis

"[T]his Court looks to an objective standard in determining whether implied bias exists." *U.S. v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015) (citing *U.S. v. Wiesen*, 56 M.J. 172, 175 (C.A.A.F. 2001)). "The core of that objective test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel. *Id.* (citing *U.S. v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998)). And,

"the totality of the circumstances should be considered. While cast as a question of public perception, this test may well reflect how members of the armed forces, and indeed the accused, perceive the procedural fairness of the trial as well." *Castillo*, 74 M.J. at 42 (quoting *Peters*, 74 M.J. at 34).

"Military judges are enjoined to be liberal in granting challenges for cause." *U.S. v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003); *see also U.S. v. Moreno*, 63 M.J. 129, 134 (C.A.A.F. 2006). However, at no time during his analysis of the challenge to Col Holcomb did the military judge reference the liberal grant mandate,[41] nor did he apply "an objective standard, viewed through the eyes of the public." *U.S. v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). He simply concluded there was no actual or implied bias. "Incantation of the legal test without analysis

[41] The lower court correctly noted the military judge referenced the liberal grant mandate, but it omits that the judge did so just before ruling on the *government's* challenges for cause, 36 pages before he discussed the challenge for cause to Col Holcomb. *Compare Witt*, 73 M.J. at 757-58, *with* J.A 803, 839. This is precisely the type of "incantation" rejected by this Court in *Peters*, where—unlike here—the military judge addressed the liberal grant mandate contemporaneously with his analysis of the challenge to LTC Cook. "We will afford a military judge less deference if an analysis of the implied bias challenge on the record is not provided." *Peters*, 74 M.J. at 34. Further, it bears mentioning that trial counsel went so far as to suggest that the liberal grant mandate may apply to the prosecution. *See* J.A. 1008 (saying regarding Col Sharpless, who in the end served on the member panel, "[g]iven the liberal grant mandate, and I understand there is some difference as to whether or not it applies to the government"). Defense counsel did not dispute this, nor did the military judge correct trial counsel. *Id.*

is rarely sufficient in a close case." *Peters*, 74 M.J. at 34. This is insufficient in a capital case.

Col Holcomb's questionnaire, *voir dire*, and the CA's referral memorandum all raised significant issues giving reason for a reasonable member of the public, as well as Appellant, to perceive his presence on the panel as less than fair. He served as a squadron commander to the convening authority. For at least a year he attended the same Sunday school class as the convening authority, would go to lunch with him on occasion after church, and received the convening authority as guest in his home on more than one occasion.

The military judge limited his analysis to the relationship between Col Holcomb and the convening authority, summarily dismissing it as "much less close than many of the other panel members." J.A. 839. Regardless of whether those who share meals together after attending Sunday school and church are more accurately described as "friends" or "close friends", Colonel Holcomb's relationship with the CA was "qualitatively of a sort that reflects the kind of bond that would undermine the fairness of a proceeding or raise the prospect of appearing to do so." *Peters*, 74 M.J. at 35; *State v. Ceballos*, 266 Conn. 364, 411 (Conn. 2003) (observing that "religion, perhaps more so than any other subject, evokes intensely personal, and deeply held, feelings.")

Their relationship carries special importance in a capital case. "[C]ertain deeply held religious beliefs may have particular resonance with the demanding moral issues surrounding capital punishment. And the First Amendment plainly illustrates that religion poses unique concerns within our legal system. The Constitution does not, therefore, allow religious considerations to replace legal ones." *Robinson v. Polk*, 444 F. 3d 225, 226-27 (4th Cir. 2006) (Wilkinson, J., concurring). Aside from the issues of public perception in any challenge for implied bias, reliance on religion "during capital sentencing deliberations also has serious implications for the public perception of our criminal justice system. A defendant must never suspect that he was sentenced to death on the basis of religious dictate, especially if the jury's religious beliefs are not his own."[42] *Id.* at 227.

This Court has repeatedly emphasized that the liberal grant mandate is just that — a mandate, and not a suggestion. *Peters*, 74 M.J. at 34; *see also Rome*, 47 M.J. at 469. "This mandate

[42] "[I]t is extremely difficult for reviewing courts to determine if improper influence actually occurred. Jury deliberations are often carefully guarded, and the discussions are only known to jurors." Amanda C. Shoffel, *The Theocratic Jury Room: Oliver v. Quarterman and the Burgeoning Circuit Split on Biblical Reference and Influence in Capital Sentencing*, 36 N.E. J. CRIM. & CIV. CON. 113, 129 (2010). Here, Appellant is focused solely on the public perception of the CA's dispatching his friend and fellow congregant to deliberate in a case the CA felt warranted the death penalty.

stems from a long-standing recognition of certain unique elements in the military justice system including limited peremptory rights and the manner of appointment of court-martial members that presents perils that are not encountered elsewhere." *Peters*, 74 M.J. at 34 (citations omitted); *compare* R.C.M. 912(g)(1) *with* Fed. R. Crim. P. 24(b) (providing 20 peremptory challenges in capital cases, 10 for other felonies).

"In the military justice system, panel members are chosen by the same individual—the convening authority—who decides whether to bring criminal charges forward to trial." *U.S. v. Woods*, __M.J. __ (C.A.A.F. 2015). In a capital case, he also determines whether those charges will be referred capital and, if they are, R.C.M. 912(f)(1) reduces the number of peremptory challenges available in civilian federal cases from 20 to one. An objective member of the public would not believe Appellant received a fair trial where the CA was also allowed to hand-select a fellow congregant and personal friend to deliberate on the ultimate punishment he sought.

WHEREFORE, Appellant requests that this Honorable Court set aside the findings and sentence and remand for a retrial.

A-X.

THE STAFF JUDGE ADVOCATE EXERTED UNLAWFUL COMMAND INFLUENCE BY ATTENDING MOST DAYS OF THE COURT-MARTIAL, SITTING IN THE IMMEDIATE VICINITY OF THE VICTIMS' FAMILY MEMBERS AND THE PROSECUTION'S PARALEGALS, AND ENGAGING

IN COMMUNICATIONS WITH THE PROSECUTORS DURING COURT-MARTIAL PROCEEDINGS.

Additional Facts

The Convening Authority's Staff Judge Advocate was Colonel Jeffrey L. Robb. R. 45, *see also* Special Order AC-2, dated December 12, 2004; Special Order AC-6, dated July 8, 2005; Special Order AC-9, dated September 15, 2005. During *voir dire*, four of the original members said they knew Col Robb. J.A. 281, 578-79, 965. Two of them were excused during challenges. J.A. 992, 1016. Thus, at least two of the members who sat on Appellant's panel and ultimately voted in favor of the death penalty, knew he was the Staff Judge Advocate. J.A. 555, 606.

According to Col Robb himself, he "attended most days of the trial." Colonel Robb Declaration, ¶ 9, J.A. 3953.

Mr. Johnson, assistant defense counsel, confirms that "Colonel Robb was very visible at the proceedings in the *Witt* court-martial. There were many occasions throughout the trial that Colonel Robb would make an appearance at the Bibb County Courthouse," though he "would not always stay the entire day." *See* Mr. Johnson A, ¶ 3, J.A. 3949.

Col Robb physically associated himself with the prosecution and victims' family members. Mr. Johnson explains:

> When Colonel Robb was in the courtroom, during the trial proceedings, he would sit on the trial counsel's side of the courtroom. He would typically sit in the vicinity of the victims' family members in a reserved

> seating area. He would, for example, sometimes sit in the reserved seating area of the courtroom in close proximity to Mr. Jim Bielenberg, the father of Jamie Schliepsiek, and Mr. Dave Schliepsiek, the father of Senior Airman Andy Schliepsiek.

Id., ¶ 5, J.A. 3949.

Technical Sergeant Kenneth R. Henkel, a defense paralegal in the case, confirms that Col Robb "would sit with the victims' family members in the front rows to the gallery, behind the prosecution table." TSgt Henkel A, ¶ 3, J.A. 3950. Col Robb himself concedes that while he "sat behind both counsel tables at various times," he "predominantly" sat "behind the prosecution table." Col Robb's Declaration, ¶ 7, J.A. 3953.

The victims' families with whom Col Robb often sat engaged in demonstrative behavior throughout the court-martial. Dr. Gregory B. Pehling, SrA Witt's step-father, states in a sworn declaration that "[f]amily and friends of Andy and Jamie Schliepsiek and Jason King" in the courtroom:

> appeared very angry, hurt, and emotional. Some sat in defiant and aggressive postures, and expressed their emotions throughout the court-martial. They would shake their heads, fold their arms, and the like during defense attorney questioning and defense witness testimony. Whether it was in disbelief, anger, or disgust, I honestly do not know, but it was clearly visible. As I sat close to the members and could see and hear them, the members must have been able to do so as well.

Dr. Pehling C, ¶¶ 2, 4, J.A. 3948; *see also* Mr. Witt B, ¶ 3, J.A. 3915. Dr. Pehling emphasizes that "Jim Bielenberg's anger

was very apparent throughout the court-martial. He glared during some presentations by the defense and gave negative reactions frequently." Dr. Pehling C, ¶ 5, J.A. 3948.

Dave Schliepsiek would sometimes put his head down and shake his head upon hearing from the defense. Dr. Pehling C, ¶ 5, J.A. 3948. Ms. Melanie A. Pehling, SrA Witt's mother, also noticed Mr. Bielenberg's demonstrative conduct:

> Jim Bielenberg, Jamie's father, for example left the courtroom multiple times. When he did so, he did so in a heated, agitated, and angry manner. He did not leave quietly, but rather made dramatic scenes as he stormed out. One time, he stood up and said "I can't listen to this," doing so in a loud and angry manner. Mr. Bielenberg was not a small man, and carried himself in a manner that commanded attention.

Ms. Pehling, ¶ 5, J.A. 3944. "[N]umerous times during the trial . . . family and friends of the victims would cry loudly. This sobbing, like the other utterances I heard, would have been audible to the members." *Id.*, ¶ 8.

Col Robb frequently consulted with the trial counsel during breaks, consulting with them on more than one occasion during the proceedings, and at one point even assigned a task to one of the trial counsel. Both Lt Col Spath and Mr. Jonathan Scott Williams confirm that at one point during the trial, Col Robb handed a note to then-Maj Spath. Lt Col Spath Affidavit, ¶ 8, J.A. 3956; Mr. Williams Declaration, ¶ 5, J.A. 3957. TSgt Henkel "observed Col Robb interacting with the prosecutors –

then-Maj Vance Spath, Maj Richard Rockenbach, and Capt Scott Williams. I recall more than one occasion during the trial when Col Robb would lean over the railing separating the spectator section and the parties to speak to the prosecutors." TSgt Henkel A, ¶ 4; J.A. 3950. Mr. Johnson adds:

> 6. During breaks in the proceedings, Colonel Robb would typically confer with then-Major Spath, Major Rockenbach, or both.
>
> 7. At one point during a recess, I overheard Colonel Robb direct Captain J. Scott Williams to prepare a synopsis of the day's proceedings for Colonel Robb to forward to Major General Rives, the Judge Advocate General of the Air Force at the time of the proceedings.

See Mr. Johnson A, ¶¶ 6, 7, J.A. 3949.

Standard of Review

"An allegation of unlawful command influence is reviewed *de novo*." *U.S. v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999). Neither waiver nor forfeiture apply to unlawful command influence claims. *See U.S. v. Douglas*, 68 M.J. 349, 356 n.7 (C.A.A.F. 2010) (citing *U.S. v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)).

Law and Analysis

To raise an unlawful command influence claim, there must be "'some evidence' of 'facts which, if true, constitute unlawful command influence'" and the alleged unlawful command influence must have "'a logical connection to the court-martial in terms of its potential to cause unfairness in the proceedings.'" *U.S.*

v. Harvey, 64 M.J. 13, 18 (C.A.A.F. 2006) (quoting *U.S. v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). Once that standard is met, the burden shifts to the Government to demonstrate that unlawful command influence did not occur or that any unlawful command influence did not affect the proceedings. *Id.* The Government can meet that burden by proving any one of three things beyond a reasonable doubt: "(1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence." *Id.* (quoting *Biagase*, 50 M.J. at 151).

This Court has held that a convening authority's presence in the courtroom can meet the "low threshold of 'some evidence' to raise the issue of unlawful command influence." *Harvey*, 64 M.J. at 19. In *Harvey*, it was enough to raise unlawful command influence where it was only shown that one member of the panel was familiar with the convening authority being in the court room. *Id.* at 20.

Col Robb was known to at least two of the panel members to be the Staff Judge Advocate. These members were senior officers who undoubtedly knew that in his capacity as the Staff Judge Advocate he served as the senior legal advisor to the convening authority. As this Court has noted, "A staff judge advocate generally acts with the mantle of command authority." *U.S. v.*

Kitts, 23 M.J. 105, 108 (C.A.A.F. 1986) (citing *U.S. v. McClain*, 22 M.J. 124 (C.M.A. 1986)); *U.S. v. Youngblood*, 47 M.J. 338, 341 (C.A.A.F. 1997) (recognizing that an SJA, though not a commander, generally acts with "the mantle of command authority"); *U.S. v. Hamilton*, 41 M.J. 32, 37 (C.A.A.F. 1994) (though a staff judge advocate is not a convening authority, actions by a staff judge advocate can constitute unlawful command influence because a staff judge advocate generally acts with the mantle of command authority).

By repeatedly aligning himself with the prosecution and the victims' families, Col Robb gave panel members the impression that he, and by extension the Convening Authority, supported the prosecution. Further, by conferring with trial counsel during breaks and leaning over the railing to speak with them during trial, he could have given the panel members the impression that the prosecutors were speaking for the Convening Authority. This impression could have been particularly damaging when they asked for the death penalty during sentencing.

WHEREFORE, Appellant respectfully requests this Court set aside the findings and sentence, and order a new trial.

A-XI.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING ARGUMENT ON FINDINGS AND SENTENCE BY REPEATEDLY REFERENCING THE VICTIMS' FAMILY MEMBERS AND THEIR PRESENCE IN THE GALLERY.

Additional Facts

At Appellant's trial, almost 200 people sat in the spectator gallery. *See Is Death Different?*, THE REPORTER, Vol. 34, No. 1 at 6 (Mar. 2007).[43] Among the observers were friends and family members of SrA Schliepsiek, Jamie, and SrA King. They sat approximately 30 feet from the members. *See* TSgt Henkel Declaration A, J.A. 3951; *see also* J.A. 2773-74 (where military judge stated, "There's a lot of people up awfully close to the court members."). More importantly, many of the victims' family members and friends who watched the entire trial also testified as witnesses, in findings, sentencing, or both.

Emotions ran high. Trial counsel attempted to capture the atmosphere in the courtroom in a post-trial article. Explaining that logistical issues required conducting the court- martial at the Bibb County Courthouse vice Robins' on-base courtroom, the courtroom accommodated 200 observers. *See* Spath et al., *Is Death Different?,* at 5-6. One reason for staging the court-martial at the Bibb County Courthouse was a safety concern: "Given the subject matter of the trial and the intense emotion felt by all involved, . . . [e]very witness, every turn of events as the

[43] *available at* http://www.afjag.af.mil/shared/media/document/AFD-090107-042.pdf

trial unfolded, constituted a challenge to the composure and self-restraint." *Id.* at 5.

For two weeks, members heard tearful witnesses, saw bloody crime scene and autopsy photographs, and listened to chilling audiotapes detailing how SrA Schliepsiek and Jamie died, all in the presence of their fathers, mothers, siblings, aunts, uncles, cousins, and friends.

Rather than allow family members and friends to remain as passive observers, however, trial counsel made them a part of Appellant's trial during his findings and sentencing argument. He started by arguing "evil can walk through anyone's door at anytime, for the most senseless of reasons. That's the part . . . that those families struggle with everyday." J.A. 1339. "I think they deserve to hear what happened that night." *Id.* And, he continued, "Evil exists, and for those families evil exists right here, he sits right here." J.A. 1340.

Later in his argument, trial counsel again referenced the families: "The defense will suggest to you that adrenaline, adrenaline can cause this. . . . Members, I would suggest that getting up to give a closing argument in a case with all of the family members here watching can cause a rush of adrenaline." J.A. 1353. Toward the end, he came back to the families by implying a purpose of Appellant's court-martial was information for the families: "We have struggled to give you as many

[answers] as we can and the families as many [answers] as we can." J.A. 1382.

Rebuttal brought more comments directed towards those the members knew were watching the trial. Trial counsel stated "we've tried to give you the facts. . . . We gave you others because you all have the same questions the families struggles with everyday [sic], every night." J.A. 1420-21. He concluded: "We do demand justice. Those families have waited 15 months for their day for their kids, because Andy and Jamie aren't here to tell you they need justice." J.A. 1421.

During his sentencing argument, trial counsel repeatedly referred to the behavior of individuals in the courtroom's gallery. For example, during his opening sentencing argument, before playing the 9-1-1 tape, trial counsel stated:

> And, before I play this, I warn everyone in this courtroom, if this is something that you don't want your children to hear, I would suggest [inaudible]. [Several people left the courtroom.]
>
> It is remarkable the Witt and Pehling families--how could you not feel for them? But, it is also remarkable that they leave at different points, the adults when it's their son, their son who caused this.

J.A. 1448.

During trial counsel's opening sentencing argument, the following exchange occurred:

> [Appellant's] dad, on re-direct, finally said to the families, "We're sorry." Nobody before that. The families, they do choose to be here, are here to

listen to this and to hear this. And it takes until re-direct of the father for someone to finally turn over there and tell we're sorry to you, the Schliepsiek's and the Bielenberg's.

CIV DC: Your Honor, I have to object to that. Because this counsel knows that outside this courtroom, the families have attempted to make, make these statements. And, I, you know, I have to, I have to say----

TC: I object to him----

CIV DC: --- that the way he used that----

TC: --- for bringing evidence in that wasn't offered here. And, he knows they don't want it outside the courtroom, Your Honor.

CIV DC: But, it's--the way he's using this is wrong.

MJ: Objection's overruled. Proceed.

TC: They get up here. And, you know what, yes, people have tried to approach them and apologize. And, the nerve of these people for not being ready in the last 12 months. Can you believe it? Can you believe that Dave Schliepsiek didn't just say thank you so much when he was approached by the uncle? I really want to hear from you. What would you expect? Dave's shown remarkable grace and restraint every moment in this trial. They haven't muttered. They haven't said anything. Jim Bielenberg, he left yesterday because he didn't want to hear the apology. He did it with grace. The others have stayed in here and never gotten outraged. On the inside, you can be sure they have. They never lost their cool. They exposed to you the most personal grief people could go through. And, yet again, you have outrage over here.

J.A. 1453-54.

Standard of Review

For the comments where a proper objection was made at trial, this Court reviews for prejudicial error. *U.S. v.*

Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005). The remainder of trial counsel's comments are reviewed for plain error. *Id.*

Law and Analysis

Prosecutorial misconduct occurs when trial counsel oversteps "the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *U.S. v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014), *cert. denied*, 135 S. Ct. 148 (2014) (citation omitted). In assessing prejudice under the plain error test, this Court looks "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *U.S. v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (*citing U.S. v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005)). *Fletcher* adopted a three-part test to analyze claims of prosecutorial misconduct: (1) severity; (2) measures adopted to cure the misconduct; and (3) weight of the evidence supporting the conviction. 62 M.J. at 184.

The misconduct in this case is severe. "It is generally recognized that a prosecutor may not comment on the victim's family during closing argument in order to appeal to the sympathies of the jury." *State v. Severson*, 215 P. 3d 414, 440 (Idaho 2009). *See also U.S. v. Quesada-Bonilla*, 952 F. 2d 597, 601-02 (1st Cir. 1991) (holding improper a prosecutor's comments that "The instructions call for you to give a defendant a fair

trial. But the instructions also require that you do justice to Mr. Arce, who was the victim in this case. To Mrs. Erin Benitez, who was walking in the post office with a four year old while a man armed with a .45 was walking out with a bag full of money. That is what you must look at."); *State v. Watlington*, 579 A. 2d 490, 493 (Conn. 1990) (finding reference to victims and their families during closing was improper); *People v. Harris*, 866 N.E. 2d 162, 180 (Ill. 2007); *People v. Bernette*, 30 Ill. 2d 359, 371 (Ill. 1964); *Mowoe v. State*, 328 Ga. App. 536, 541 (Ga. Ct. App. 2014) (finding asking member of the gallery to stand during argument was improper).

Unlike in *Fletcher*, the military judge took no curative measures to "overcome the severity of the trial counsel's misconduct." 62 M.J. at 185. The most egregious of his comments — an extended discussion of the failure of Appellant's family to offer a timely apology to the family of the victims — drew an objection, which was overruled. J.A. 1453-54. "If any doubt existed as to its materiality, it was removed when defense counsel's objections were overruled. In overruling the objections the prejudicial effect was amplified." *People v. Hope*, 116 Ill. 2d 265, 278 (Ill. 1986). Trial counsel then compounded this error by drawing the members' attention to

Bielenberg's dramatic exit from the courtroom[44] immediately before Appellant's unsworn and informed them he did so "because he didn't want to hear the apology." J.A. 1454.

Appellant concedes "every mention of a deceased's family does not *per se* entitle the defendant to a new trial. In certain instances, *depending upon how this evidence is introduced*, such a statement can be harmless; this is particularly true when the death penalty is *not* imposed." *Hope*, 116 Ill. at 276 (emphasis original). But that is not this case. Here, counsel struck foul blows aimed at inflaming the passions or prejudices of the court members. *See also Berger v. U.S., 295 U.S. 78 (1935); U.S. v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *U.S. v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983).

While the weight of the evidence is strong that Appellant committed two murders, neither the finding of premeditation nor the sentence of death were foregone conclusions. And this error is compounded by the fact, fully addressed above in assignment of error A-I(C) at page 103, the victims' family members conduct in the gallery had already required admonishment by the military judge on more than one occasion. J.A. 1793-94, 2825. "Here a timely objection to the argument was immediately *overruled* by the court without comment, which ruling stamped approval on the

[44] This exit has been addressed in Assignment of Error A-I-C at page 102.

argument, thereby aggravating the prejudicial effect." *Edwards v. State*, 428 So. 2d 357, 359 (Fla. Dist. Ct. App. 1983). Trial counsel's arguments were "premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process." *Antwine v. Delo*, 54 F. 3d 1357, 1364 (8th Cir. 1995) (citation omitted).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and sentence and order a rehearing.

A-XII.

IN RULING CRIME SCENE AND AUTOPSY PHOTOGRAPHS ADMISSIBLE DURING FINDINGS IN PART BECAUSE THE GOVERNMENT REQUIRED A UNANIMOUS VERDICT FOR THE DEATH PENALTY TO REMAIN A SENTENCING OPTION, THE MILITARY JUDGE COMMITTED ERROR BY BASING HIS DECISION ON AN ERRONEOUS APPLICATION OF THE LAW.

Before trial, counsel moved to exclude various crime scene and autopsy photographs. *See* App. Ex. IV (defense motion); J.A. 1017-65 (motion hearing); App. Ex. LVIII, J.A. 3707; App. Ex. LIX, J.A. 3712. Of the 23 photographs of Jamie's autopsy, App. Ex. LXIII, 14 photographs of SrA Schliepsiek's autopsy, App. Ex. LXIV, and 29 crime scene photographs, App. Ex. LXVI, the government sought to admit and counsel objected to numbers 39, 42, 53, 55, 66, 67, 69, 71-74, 79, 80, 103, 105, 106, 107, and 152. *See* J.A. 1018, 1020, 1025-26, 1035; App. Ex. IV, J.A. 3309.

With the exception of four photographs, the military judge denied the defense motion. *See* J.A. 1047-51. His reasoning for this ruling included the following:

> [I]n making this ruling, the court appreciates something that both sides have been telling me for a few days now. That being that death is different. One of the ways, in this case, that it's different is that the government must prove beyond a reasonable doubt that the accused intended to kill his victims, and that he did so with a premeditated design. **Unlike non-capital murder cases, where the government must prove to two-thirds of the members in order to obtain a conviction, in this case, in order to obtain a conviction and for the death penalty to remain on the table, the government must convince every member.** Unlike some civilian jurisdictions, a non-unanimous verdict doesn't result in a hung jury where the jury is--where the government can re-prosecute. **The government only gets one shot to prove to 12 members that the accused is guilty of premeditated murder beyond a reasonable doubt.**

J.A. 1058 (emphasis added). Almost all of the autopsy photos came in. *See* J.A. 1062; Pros. Exs. 23-24, J.A. 2979-3073.

An appellate court reviews rulings on the admissibility of evidence for abuse of discretion. *U.S. v. Holt*, 58 M.J. 227, 230-31 (C.A.A.F. 2003). A military judge abuses his discretion if he bases his ruling on an erroneous view of the law. *Id.*; *see also U.S. v. Travers*, 25 M.J. 61, 63 (C.M.A. 1987); *Koon v. U.S.*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

Rule for Court-Martial 921(B) instructs that "[a]s to any offense for which the death penalty is not mandatory, a finding

of guilty results only if at least two-thirds of the members present for vote for a finding of guilty." Article 106, UCMJ, sets forth the sole offense for which death is mandatory. *See* R.C.M. 921(A), Discussion.

Because Appellant was charged with an offense for which death was only authorized, the required concurrence for a finding of guilty was two-thirds, or 8 members. *See* J.A. 1016 (noting panel consisted of 12 members); App. Ex. CCXXIX, J.A. 3778 (military judge's findings instructions noting "Since we have twelve members that means eight members must concur in any finding of guilty"). In ruling to admit the crime scene and autopsy photographs, the military judge considered the requirement of a unanimous vote to authorize the death penalty.

In determining whether evidence is admissible, the law makes no differentiation between the quantity or percentage of members who must be convinced of an Appellant's guilt. Because he based his decision to admit nearly all the autopsy and crime scene photos on how many members had to vote guilty in order for the death penalty to be authorized, the military judge based his decision on an incorrect view of the law. So the military judge abused his discretion by admitting the photographs.

WHEREFORE, Appellant respectfully requests that this Court set aside the findings and sentence and remand for a new trial.

A-XIII.

THE CUMULATIVE ERRORS IN THIS CASE COMPEL REVERSAL OF THE FINDINGS AND SENTENCE.

Trial counsel and military judge injected myriad errors into this record of trial. Even if this Court concluded that no single error compels reversal, the cumulative effect of those errors does. "It is well-established that an appellate court can order a rehearing based on the accumulation of errors not reversible individually." *U.S. v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996). As Chief Judge Posner has written for the Seventh Circuit, "[I]n assessing whether a conviction should be upheld despite the presence of error, a court is required to assess the harm done by the errors considered in the aggregate." *U.S. v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). Indeed, "the cumulative effect of trial errors may deprive a defendant of his constitutional right to a fair trial." *Id.* (quoting *U.S. v. Rogers*, 89 F.3d 1326, 1338 (7th Cir. 1996)).

In a capital case such as this, cumulative error deprives the accused of both his Fifth Amendment Due Process right and his Eighth Amendment right to heightened reliability. Cumulative error rendered this trial fundamentally unfair and, thus, unconstitutional. The findings must be set aside due to the government's inability to prove beyond a reasonable doubt that cumulative error was harmless. *See Chapman v. California*, 386 U.S. 18 (1967). This Court "cannot say with any certainty

that the cumulative effect of [the] errors did not affect the outcome of this case." *Dollente*, 45 M.J. at 243. The findings and sentence, therefore, must be reversed.

A-XIV.

THE SENTENCE OF DEATH IS UNLAWFUL WHERE NO STATUTE OR REGULATION PRESCRIBES A METHOD OF EXECUTION.

Additional Facts

Rule for Court-Martial 1113(e)(1)(A) provides that "[a] sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned." In this case, the "Secretary concerned" is the Secretary of the Air Force. As of this filing, the Secretary of the Air Force has not designated a method of execution per Rule for Court-Martial 1113(d)(1).

Standard of Review

Whether the manner in which a sentence is executed constitutes cruel and unusual punishment under the Eighth Amendment or cruel or unusual punishment under Article 55, UCMJ, is a question of law that this Court considers *de novo*. *U.S. v. Wise*, 64 M.J. 468, 473 (C.A.A.F. 2007).

Law and Analysis

Appellant is prejudiced by the Secretary of the Air Force's failure to fulfill the duty prescribed by paragraph 5.3.7 of DoD Directive 1325.04. Military law permits an appellant to

challenge the method of executing a sentence upon direct appeal. *See, e.g., U.S. v. White*, 54 M.J. 469 (C.A.A.F. 2001). Appellant is deprived of the ability to do so because the Secretary of the Air Force has failed to comply with DoD Directive 1325.04. Additionally, the failure to prescribe a method of execution violates Appellant's right to due process guaranteed by the Fifth Amendment to the U.S. Constitution.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the sentence, and affirm only so much of the sentence that extends to life without the possibility of parole, total forfeitures, reduction to E-1, and a dishonorable discharge. In the alternative, this Court should abate proceedings until the Secretary of the Air Force complies with Rule for Court-Martial 1113(e)(1)(A).

A-XV.

A NEW CONVENING AUTHORITY'S ACTION IS REQUIRED BECAUSE THE STAFF JUDGE ADVOCATE WHO PREPARED THE R.C.M. 1106 RECOMMENDATION WAS NOT NEUTRAL AND/OR A REASONABLE OBSERVER AWARE OF ALL THE FACTS WOULD HAVE SUBSTANTIAL DOUBTS AS TO THE STAFF JUDGE ADVOCATE'S NEUTRALITY.

For the reasons set for in assignment of error A-X at page 196-97, a new recommendation is required pursuant to Rule for Court-Martial 1106. *U.S. v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004).

WHEREFORE, Appellant requests this Court set aside the Convening Authority's action and return the record to the Judge Advocate General of the Air Force for a new post-trial review.

A-XVI.

APPELLANT'S FIFTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE POST-TRIAL DELAY HAS BEEN VIOLATED IN THIS CASE.

Appellant has been denied his due-process right to timely appellate review. *U.S. v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

WHEREFORE, Appellant requests this Honorable Court set aside the sentence, and affirm only so much of the sentence that extends to life without the possibility of parole, total forfeitures, reduction to E-1, and a dishonorable discharge.

A-XVII.

THE SUPREME COURT'S DECISION IN RING V. ARIZONA, 536 U.S. 584 (2002) REQUIRES THAT THE MEMBERS FIND THAT AGGRAVATING CIRCUMSTANCES SUBSTANTIALLY OUTWEIGH MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT.

"[A]ny 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 v. New Jersey*, 530 U.S. 466, 490 (2000). "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found

by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

WHEREFORE, Appellant respectfully requests this Court set aside the sentence and authorize a rehearing as to sentence.

A-XVIII

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 THE FUNCTIONAL EQUIVALENT OF ELEMENTS OF CAPITAL MURDER, A PURELY LEGISLATIVE FUNCTION.

"If 'aggravating factors' used in channeling the discretion of the sentencing authority in death cases were elements of the crime, we would have no choice but to hold that they must be set forth by Congress and cannot be prescribed by the President." *U.S. v. Curtis*, 32 M.J. 252, 260 (C.M.A. 1991) (citing *Walton v. Arizona*, 497 U.S. 639, 648-49 (1990)). *Ring* overruled *Walton*, and held capital aggravating factors are "the functional equivalent of an element[.]" *Ring*, 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n. 19).

WHEREFORE, Appellant respectfully requests this Court set aside the sentence and authorize a rehearing as to sentence.

Part B

B-I.

THE LOWER COURT'S RECONSIDERATION OF AN *EN BANC*, PUBLISHED OPINION SETTING ASIDE THE DEATH SENTENCE IN THIS CASE, WHICH WAS INITIATED BY THE JUDGE ADVOCATE GENERAL'S

DESIGNATION OF A CHIEF JUDGE TO PRESIDE OVER RECONSIDERATION, VIOLATES ARTICLES 37 & 66, UCMJ, DUE PROCESS, AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST THE ARBITRARY AND FREAKISH IMPOSITION OF THE DEATH PENALTY.

Additional Facts

On August 9, 2013, the lower court, sitting *en banc*, set aside the death sentence in this case and authorized a rehearing as to sentence. *Witt*, 72 M.J. at 775. The opinion was authored by Judge Saragosa, and joined by Chief Judge Stone and Senior Judge Harney. Senior Judge Orr concurred in part and dissented in part, and he was joined by Judge Marksteiner. *Id.* at 735. Senior Judge Helget and Judges Soybel, Mitchell, Wiedie, and Peloquin "each chose not to participate given their recent assignments to the Court." *Id.* Four other judges, including Senior Judge Roan, recused themselves due to conflicts. *Id.*

With Chief Judge Stone's retirement approaching on October 10, 2013,[45] the government moved for reconsideration of the lower court's decision on September 9, 2013. J.A. 267. Appellant's counsel responded on September 16, 2013. Although federal judges routinely recuse themselves from *en banc* proceedings due

[45] United States Air Force Court of Criminal Appeals Past Judges (hereinafter, "AFCCA Judicial Roster"), dated November 4, 2014, http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev._04_nov_14.pdf.

to their recent judicial appointments[46], the government sought, in a separate motion, to override the exercise of judicial discretion by five judges to recuse themselves due to their recent assignment to the lower court:

> The United States urges each judge on this Court to fully and carefully review the entire record of trial, the briefs from both sides, and this motion and then return to deliberations to issue a true 'en banc opinion' utilizing the decades of experience, wisdom and judgment which the Judge Advocate General of the Air Force lauded during the formal ceremonial investiture of those same judges on 28 August 2013. Justice has not yet been achieved, but it is not too late.

J.A. 257. Thus, the government did not even make an attempt to conceal its ultimate goal of having its case reviewed a second time at the lower court by a new slate of judges.

But the lower court was never permitted to independently determine whether "justice" is served by requiring judges, who understandably recused themselves from participating in a decision that took place nearly three weeks before their formal investiture, to participate in reconsideration of that same decision. *Id.* On October 18, 2013, the Judge Advocate General of the Air Force designated Senior Judge Helget, who had declined to participate in the previous decision due to his

[46] *Spencer v. U.S.*, 773 F. 3d 1132 (11th Cir. 2014); *McBride v. Estis Well Serv., L.L.C.*, 768 F. 3d 382 (5th Cir. 2014); *Kinney v. Weaver*, 367 F. 3d 337 (5th Cir. 2004).

recent assignment to the lower court, as Chief Judge "in the matter of United States v. Senior Airman ANDREW P. WITT, 36785 (recon)." J.A. 202. The Designation Memorandum indicates Senior Judge Roan had been elevated to Chief Judge with Chief Judge Stone's retirement, and that he was recused in this case. *Id.*

Just three days later, on October 21, 2013, the lower court, again sitting *en banc*, granted the government's motion for reconsideration and vacated its August 9, 2013, opinion. J.A. 338. The order is silent as to which judges, to include those who previously recused themselves or declined to participate, participated in the decision to reconsider and vacate the Court's previous opinion. *Id.* In the 73 days between the lower court's decision and its order to vacate that decision, the lower court also issued 78 other decisions.[47]

On June 30, 2014, the lower court, sitting *en banc*, affirmed the findings and sentence. *Witt*, 73 M.J. 738. Senior Judge Marksteiner, who had joined since-retired Senior Judge Orr's dissent in the Court's previous decision, now wrote for a four-member majority. *Id.* He was joined by Chief Judge Helget, Senior Judge Harney, and Judge Mitchell. *Id.* Judge Saragosa, who had authored the court's previous majority opinion, now

[47] http://afcca.law.af.mil/content/opinions.php%3Fyear=2013&sort=pub&tabid=3.html (last visited on June 12, 2015).

dissented. *Id.* at 825. She was joined by Judge Peloquin, who retired on June 1, 2014. *Id.* at 752.

The majority evaporated hours later. Chief Judge Helget and Senior Judge Harney retired the same day the opinion was issued. AFCCA Judicial Roster at 2.[48] Senior Judge Marksteiner was reassigned the same day. *Id.* Pursuant to Rule 17(c) of the lower court's Rules of Practice and Procedure, the only member of the majority remaining to vote on additional reconsideration was Senior Judge Mitchell. A-F. Ct. Crim. App. Rules of Practice and Procedure 17(c) (July 31, 2009).

This is alarming in light of the **dramatic shift in the factual landscape** following the lower court's second opinion, most notably a declaration from Dr. Wood that Appellant was in a psychotic state at the time of the murders. J.A. 4154 (Dr. Wood's fourth declaration following his personal examination of Appellant at Fort Leavenworth, Kansas on August 18, 2014); *see also* J.A. 4126-27 (declaration of Appellant's roommate, SSgt Love, confirming that he had noted a personality change following the motorcycle accident just as Ms. Pettry had reported from her previous interview); J.A. 4152-53 (declaration of Appellant's ex-girlfriend, TSgt Mohapeloa, who revealed that she had broken up with Appellant following his motorcycle

[48] http://afcca.law.af.mil/content/afcca_data/cp/past_judges_-_alphabetical_rev._04_nov_14.pdf

accident because of his marked personality change); J.A. 4164 (Dr. Wood's interview of Mr. Coreth, another roommate, who had not been interviewed previously about Appellant's personality change after the accident, and who reported that after the motorcycle accident Appellant was "way different from how he used to be").

Standard of Review

Structural objections are reviewed *de novo*. *Bahlul v. U.S.*, 2015 U.S. App. LEXIS 9868 (D.C. Cir. 2015). Additionally, this Court reviews allegations of unlawful command influence over the judiciary *de novo*. *U.S. v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013). "Allegations of unlawful command influence are reviewed for actual unlawful command influence as well the appearance of unlawful command influence." *Id.* "Even if there was no actual unlawful command influence, there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system.'" *Id.* (citing *U.S. v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). Finally, the question of whether a judge has acted consistent with a recusal, as a mixed question of law and fact, is reviewed *de novo*. *U.S. v. Roach*, 69 M.J. 17, 19 (C.A.A.F. 2010).

Law and Analysis

If permitted to stand, the lower court's decision will endorse the imposition of a death sentence obtained solely by

the government's manipulation of the constant rotation of judges on the Air Force Court of Criminal Appeals. "This 'uncertainty and unreliability' ran afoul of the constitutional prohibition on the 'wanton' and 'freakish' imposition of the death penalty." *Jackson v. Bradshaw*, 681 F. 3d 753, 778 (6th Cir. 2012) (quoting *Furman v. Georgia*, 408 U.S. 238, 310 (1972)).

It also ran afoul of the UCMJ. The "legislative history makes it clear that Congress intended the CCAs to serve as appellate bodies independent of the Judge Advocate Generals and Government appellate attorneys." *U.S. v. Jenkins*, 60 M.J. 27, 29 (C.A.A.F. 2004). "[W]e do not feel it sound judicial procedure to permit the Judge Advocate General who is displeased with an opinion by one board of review, to refer the case back or to another board of review. Surely, no board of review can act honestly and independently under such supervision and restriction." *Id.* at n. 2 (quoting Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 & H.R. 4080 Before a Subcomm. of the Comm. on Armed Forces, 81st Cong. 151 (1949) (hereinafter, Hearings on S. 857) (statement of Colonel John P. Oliver)).

Colonel Oliver was addressing then-proposed Article 66(e), which provided: "Within ten days after any decision by a board

of review, the Judge Advocate General may refer the case for reconsideration to the same or another board of review." Hearings on S. 857 at 17. His condemnation of Article 66(e) was echoed by Brigadier General Franklin Riter, who testified on behalf of the American Legion, "But to permit the Judge Advocate General to 'shop around' his department and find another board of review which is willing to adopt the Judge Advocate General's view on a given question is wholly destructive of the appellate formula laid down in proposed article 66 et seq." *Id.* at 186-87. "It is allowing the prosecution to have 'two bites at the cherry.' If the Judge Advocate General is dissatisfied with the ultimate holding of a board of review, he may send the case to the Judicial Council, but he should not be permitted to seek a board of review that will adopt his ideas." *Id.* at 187.

The condemnation of Article 66 (e) was widely held. "It is hoped that the Congress will not pass any law which includes such a provision." *Id.* at 199 (statement of John J. Finn). "We believe that this provision destroys the independence and integrity of boards of review, and that it should be stricken." *Id.* at 208 (statement of Richard H. Wells). Senator Pat McCarran, Chairman of the Senate Committee of the Judiciary, submitted a letter addressing, in part, proposed Article 66(e): "This reference may not amount to a coercive act on [TJAG's]

part but an opportunity to exert pressure is certainly afforded." *Id.* at 113.

Mr. Arthur E. Farmer, testifying on behalf of the War Veterans Bar Association, was blunt: "[N]o reason exists why [TJAG] should be able to peddle the case among other boards of review until he obtains the decision which he desires." *Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Forces*, 81st Cong. 650 (1949) (hereinafter, Hearings on H.R. 2498). Frederick Bryan, testifying on behalf of the American Bar Association, called proposed Article 66(e) a "double-take proposition and I do not think 66-E is a very salutary provision." *Id.* at 624. "When he finds one board of review that he cannot agree with he can shop around his command and get another one. That is an insidious thing." *Id.* at 673 (statement of Brig Gen Riter).

"I do wish to point out that it is highly irregular to allow the Judge Advocate General to send a case to one board of review after another, if he is dissatisfied with a board's findings." *Id.* at 822 (statement of Mr. Robert D. L'Heureux).

Proposed Article 66(e) was discussed extensively by the House Subcommittee on Armed Services. *Id.* at 1191-95; 1201-1207.

Chairman Overton Brooks noted that TJAG "is the commanding officer in this instance[.}" *Id.* at 1194. "He can go on until he does get a conviction, or by the same token an acquittal. Whenever he decides what he wants, he is going to get it." *Id.* Congressman Charles H. Elston summed up the criticism, "If the Judge Advocate General wasn't satisfied with the decision of the board of review he could just send it to another board and it would give him too much authority. There ought to be something final about the action of a board of review. As long as he is not satisfied he sends it to another board." *Id.* at 1191. Congressman Elston would later call proposed Article 66(e) a "dangerous provision", and it was stricken from the UCMJ. *Id.* at 1202; 1206-07.

The fears of the UCMJ's framers have been realized here. The Judge Advocate General of the Air Force, perhaps displeased with the result in this case, referred the government's motion for *en banc* reconsideration to a judge who had previously exercised his judicial discretion not to "participate given [his] recent assignment[] to the Court." *Witt*, 72 M.J. at 735. And he did so at a critical time, with the original *en banc* court divided 2-2 in the wake of Chief Judge Stone's retirement. Even if he knew nothing about Senior Judge Helget, by inserting him into this case, the Judge Advocate General gave the government at least a coin toss's chance of salvaging the death

sentence it sought. *U.S. v. Ledbetter*, 2 M.J. 37, 42 (C.M.A. 1973) ("[T]he Judge Advocate General and his representatives should not function as a commander's alter ego but instead are obliged to assure that *all* judicial officers remain insulated from command influence before, during, and after trial.") (emphasis original); *U.S. v. Mabe*, 30 M.J. 1254, 1266 (N.M.C.M.R. 1990) ("A supervising judge, and particularly the Chief Judge, cannot preserve the integrity and independence of the judiciary if he is, or is perceived to be, a conduit for commanders.").

The Judge Advocate General already wields considerable power over the lower court, including the power prescribe uniform rules of procedure, to designate a chief judge, and to remove an appellate judge from his judicial assignment without cause. *Edmond v. U.S.*, 520 U.S. 651, 664 (1997). "The power to remove officers, we have recognized, is a powerful tool for control." *Id.* But his power, "to be sure, [is] not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings, Art. 37, UCMJ, and has no power to reverse decisions of the court." *Id.*

In *U.S. v. Walker*, 60 M.J. 354 (C.A.A.F. 2004) this Court endorsed the Judge Advocate General of the Navy's designation of a chief judge for two capital cases where the chief judge had recused himself. Importantly, the memorandum at issue in that

case stated it was the substitute chief judge who, in turn, "determine[d], as appropriate, a panel of qualified appellate judges to consider said cases."[49] *Id.* at 356. Here, the Judge Advocate General's Memorandum made no such distinction and directly inserted Senior Judge Helget into ongoing litigation. "Panel composition, however, is a responsibility committed to the judiciary, not the parties." *Walker*, 60 M.J. at 358.

It must also be mentioned the Judge Advocate General of the Navy intervened in *Walker* when the Court of Criminal Appeals had "not yet conducted significant proceedings on the merits of the pending appeal[.]" *Id.* at 359. Indeed, the decision was issued nearly four years later. *Walker*, 66 M.J. 721. And the Judge Advocate General of the Navy intervened only when the panel at the court of criminal appeals was proceeding with a two-judge panel. *Walker*, 60 M.J. at 359. Here, the Judge Advocate General had neither the need nor the authority to intervene in litigation over reconsideration pending before the lower court *en banc*.

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[49] Appellant respectfully submits *Walker* was wrongly decided. The language of Article 66, UCMJ, is plain and unambiguous. "The Judge Advocate General shall designate as chief judge *one* of the appellate military judges of the Court of Criminal Appeals established by him." 10 U.S.C. 866 (2012) (emphasis added). Article 66, UCMJ, does not vest the Judge Advocate General, already wielding considerable power over the Court of Criminal Appeals, the ability to also populate that court with numerous chief judges to preside over specific cases and thus indirectly steer litigation.

And he certainly had no authority to designate Senior Judge Helget as Chief Judge in a case in which he had previously recused himself. "Once recused, a military judge should not play any procedural or substantive role with regard to the matter about which he is recused." *Roach*, 69 M.J. at 20. "[C]oncerns about perceptions of impartiality in the military justice system are heightened where a court of criminal appeals is asked to review not only the decision of a trial court, but as in this case, the actions taken by a panel of the same court." *Id.* at 20. "A military judge who acts inconsistently with a recusal, no matter how minimally, may leave a wider audience to wonder whether the military judge lacks the same rigor when applying the law." *Id.* at 21.

In *Walker* this Court recognized the "intensive review required in a capital case[.]" *Walker*, 60 M.J. at 359. That intensive review led Senior Judge Helget to recuse himself in this case "given [his] recent assignment[] to the Court." *Witt*, 72 M.J. at 735. But within three days of being directed to participate in this case by the Judge Advocate General — his intensive review complete — the lower court vacated its previous decision.

In addition to violating the UCMJ, what occurred below also violates Due Process. "Judge-shopping" is "conduct which abuses the judicial process"; "the random assignment system is intended

to comport with due process, by preventing any person from choosing the judge to whom an action is to be assigned." *State v. Gales*, 269 Neb. 443, 457 (Neb. 2005) (quoting *Hernandez v. City of El Monte*, 138 F. 3d 393, 399 (9th Cir. 1998)). "To meet due process requirements, capital and other felony cases must be allotted for trial to the various divisions of the court, or to judges assigned criminal court duty, on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney to choose the judge to whom a particular case is assigned." *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989).

The Judge Advocate General intervened in the lower court's reconsideration by inserting a judge who had previously declined to participate; and — within three days — the decision setting aside Appellant's sentence was vacated. Here, the Judge Advocate General of the Air Force was literally "tinker[ing] with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). At very least, such conduct places an "intolerable strain on public perception of the military justice system." *Lewis*, 63 M.J. at 415.

WHEREFORE, Appellant respectfully requests this Court set aside the reconsideration opinion of the lower court and affirm *U.S. v. Witt*, 72 M.J. 727 (A.F. Ct. Crim. App. 2013).

B-II.

THE EIGHTH AMENDMENT REQUIRES THAT A CAPITAL-SENTENCING JURY BE AFFIRMATIVELY INSTRUCTED THAT MITIGATING CIRCUSTMANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT. STATE V. GLEASON, 299 KAN. 1127 (2014) *cert. granted* 135 S. CT. 1698 (2015).

WHEREFORE, Appellant respectfully requests this Court set aside the sentence and authorize a rehearing as to sentence.

Part C

C-I.

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY ALLOWING THE CONVENING AUTHORITY TO ACT AS A GRAND JURY IN REFERRING CAPITAL CRIMINAL CASES TO TRIAL, PERSONALLY APPOINTING MEMBERS OF HIS CHOICE, RATING THE MEMBERS, HOLDING THE ULTIMATE LAW ENFORCEMENT FUNCTION WITHIN HIS COMMAND, RATING HIS LEGAL ADVISOR, AND ACTING AS THE FIRST LEVEL OF APPEAL, THUS CREATING AN APPEARANCE OF IMPROPRIETY THROUGH A PERCEPTION THAT HE ACTS AS PROSECUTOR, JUDGE, AND JURY. *See U.S. v. Jobson*, 31 M.J. 117 (C.M.A. 1990) (courts-martial should be "free from substantial doubt as to legality, fairness, and impartiality"); *but see Loving*, 41 M.J. at 296-97.

WHEREFORE, Appellant respectfully requests this Court set aside the sentence, and affirm only so much of the sentence that extends to life without the possibility of parole, total forfeitures, reduction to E-1, and a dishonorable discharge.

C-II.

THE ROLE OF THE CONVENING AUTHORITY IN THE MILITARY JUSTICE SYSTEM IN SELECTING COURT-

MARTIAL MEMBERS DENIED APPELLANT A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-III.

APPELLANT 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. *But see Curtis III*, 44 M.J. at 130-33.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-IV.

THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS DO NOT PERMIT A CONVENING AUTHORITY TO HAND-PICK MILITARY SUBORDINATES, WHOSE CAREERS HE CAN DIRECTLY AND IMMEDIATELY AFFECT AND CONTROL, AS MEMBERS TO DECIDE A CAPITAL CASE. *But see Curtis*, 41 M.J. at 297; *Loving*, 41 M.J. at 297.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-V.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BECAUSE THE MEMBERS WERE NOT RANDOMLY SELECTED. *But see U.S. v. Thomas*, 43 M.J. 550, 593 (N-M. Ct. Crim. App. 1995), *aff'd in part, rev'd in part*, 46 M.J. 311 (C.A.A.F. 1997).

WHEREFORE, Appellant requests this Honorable Court set aside the sentence, and affirm only so much of the sentence that extends to life without the possibility of parole, total forfeitures, reduction to E-1, and a dishonorable discharge.

C-VI.

THE SELECTION OF THE PANEL MEMBERS BY THE CONVENING AUTHORITY IN A CAPITAL CASE VIOLATES THE APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BY GIVING THE GOVERNMENT, IN EFFECT, UNLIMITED PEREMPTORY CHALLENGES.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-VII.

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. *But see Curtis*, 44 M.J. at 130-33.

WHEREFORE, Appellant requests this Honorable Court set aside the sentence, and affirm only so much of the sentence that

extends to life without the possibility of parole, total forfeitures, reduction to E-1, and a dishonorable discharge.

C-VIII.

> THE PEREMPTORY CHALLENGE PROCEDURE IN THE MILITARY JUSTICE SYSTEM, WHICH ALLOWS THE GOVERNMENT TO REMOVE ANY ONE MEMBER WITHOUT CAUSE, IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS CAPITAL CASES, WHERE THE PROSECUTOR IS FREE TO REMOVE A MEMBER WHOSE MORAL BIAS AGAINST THE DEATH PENALTY DOES NOT JUSTIFY A CHALLENGE FOR CAUSE. *But see Curtis*, 44 M.J. at 131-33; *Loving*, 41 M.J. at 294-95.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-IX.

> THE DESIGNATION OF THE SENIOR MEMBER AS THE PRESIDING OFFICER FOR DELIBERATIONS DENIED APPELLANT A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ. *But see Curtis*, 44 M.J. at 150; *Thomas*, 43 M.J. at 602.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-X.

> THE DENIAL OF THE RIGHT TO POLL THE MEMBERS REGARDING THEIR VERDICT AT EACH STAGE DENIED

APPELLANT A FAIR TRIAL BEFORE IMPARTIAL MEMBERS IN VIOLATION OF HIS FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS AND ARTICLE 55, UCMJ. *But see Curtis*, 44 M.J. at 150; *Thomas*, 43 M.J. at 602.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XI.

THERE IS NO MEANINGFUL DISTINCTION BETWEEN PREMEDITATED AND UNPREMEDITATED MURDER ALLOWING DIFFERENTIAL TREATMENT IN VIOLATION OF THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ. *But see Loving*, 41 M.J. at 279-80.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XII.

APPELLANT WAS DENIED HIS RIGHT UNDER THE FIFTH AMENDMENT TO A GRAND JURY PRESENTMENT OR INDICTMENT. *But see Curtis*, 44 M.J. at 130 (quoting *Johnson v. Sayre*, 158 U.S. 109, 115 (1895)).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XIII.

COURT-MARTIAL PROCEDURES DENIED APPELLANT HIS ARTICLE III RIGHT TO A JURY TRIAL. *But see Curtis*, 44 M.J. at 132 (citing *Solorio v. U.S.*, 483 U.S. 435, 453-54 (1987) (Marshall, J., dissenting).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XIV.

DUE PROCESS REQUIRES THAT TRIAL AND INTERMEDIATE APPELLATE JUDGES IN A MILITARY DEATH PENALTY CASE HAVE THE PROTECTION OF A FIXED TERM OF OFFICE. *But see Loving*, 41 M.J. at 295.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XV.

THE DUE PROCESS CLAUSE'S EQUAL PROTECTION COMPONENT AND ARTICLE 36(b) OF THE UCMJ PROHIBIT MEMBERS OF THE AIR FORCE FROM BEING DENIED THE RIGHT TO TRIAL AND INTERMEDIATE APPELLATE JUDGES SERVING FIXED TERMS OF OFFICE WHEN MEMBERS OF THE ARMY AND THE COAST GUARD HAVE SUCH A RIGHT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility

for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XVI.

> THE SYSTEM WHEREBY THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE APPOINTS TRIAL AND APPELLATE JUDGES TO SERVE AT HIS PLEASURE IS UNCONSTITUTIONAL, VIOLATING THE APPOINTMENTS CLAUSE. *But see Loving*, 41 M.J. at 295.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XVII.

> R.C.M. 1001 UNCONSTITUTIONALLY FORCES AN ACCUSED TO FORGO MITIGATION EVIDENCE, WHICH IS REQUIRED UNDER THE EIGHTH AMENDMENT, BECAUSE THE GOVERNMENT MAY RELAX THE RULES OF EVIDENCE FOR REBUTTAL UNDER R.C.M. 1001(d) IF THE ACCUSED RELAXES THE RULES OF EVIDENCE (1001(c)(3)). *See U.S. v. Jackson*, 390 U.S. 570, 583 (1968).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XVIII.

> APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT BECAUSE UNDER AIR FORCE INSTRUCTION 131-205, ¶ 10.10.5 (7 April 2004), HIS APPROVED DEATH SENTENCE RENDERS HIM INELIGIBLE FOR CLEMENCY BY THE AIR FORCE CLEMENCY AND PAROLE BOARD,

WHILE ALL OTHER CASES REVIEWED BY THIS COURT ARE ELIGIBLE FOR SUCH CONSIDERATION. *But See Thomas*, 43 M.J. at 607.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XIX.

APPELLANT'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. *But see Loving*, 41 M.J. at 293-94.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XX.

THE DEATH PENALTY PROVISION OF ARTICLE 118, UCMJ, IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND TENTH AMENDMENTS AS IT RELATES TO TRADITIONAL COMMON LAW CRIMES THAT OCCUR IN THE UNITED STATES. *But see Loving*, 41 M.J. at 293.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXI.

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. *But see Loving*, 41 M.J. at 297.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXII.

DUE TO INHERENT FLAWS IN THE MILITARY JUSTICE SYSTEM, THE DEATH PENALTY VIOLATES THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER ALL CIRCUMSTANCES. *But see Thomas*, 43 M.J. at 606.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXIII.

THE DEATH PENALTY IS IN ALL CIRCUMSTANCES CRUEL AND UNUSUAL PUNISHMENT FORBIDDEN BY THE FIFTH, SIXTH, EIGHTH, AND NINTH AMENDMENTS TO THE U.S. CONSTITUTION. *Glossip v. Gross*, 576 U.S. ___ (2015) (Breyer, J., dissenting); *But see Gregg v. Georgia*, 428 U.S. 153 (1976).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility

for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXIV.

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 from denial of certiorari).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXV.

THE DEATH SENTENCE IN THIS CASE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND NINTH AMENDMENTS AND ART. 55, UCMJ, BECAUSE THE CONVENING AUTHORITY HAS UNLIMITED DISCRETION TO APPROVE IT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXVI.

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 THE APPELLANT AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS. *See South Carolina v. Gaither*, 490 U.S. 805, 811-12 (1985); *see also People v. Fierro*, 821 P.2d 1302, 1348-

50 (Cal. 1991) (Kennard, J., concurring in part, dissenting in part); *but see Payne v. Tennessee*, 501 U.S. 808, 842 (1991).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXVII.

THE MILITARY JUDGE ERRED IN ADMITTING VICTIM IMPACT EVIDENCE REGARDING THE PERSONAL CHARACTERISTICS OF THE VICTIM WHICH COULD NOT REASONABLY HAVE BEEN KNOWN BY THE APPELLANT AT THE TIME OF THE OFFENSE IN VIOLATION OF HIS FIFTH AND EIGHTH AMENDMENT RIGHTS. *See Gaither*, 490 U.S. at 811-12; *see also Fierro*, 821 P.2d at 1348-50 (Kennard, J., concurring in part, dissenting in part); *but see Payne*, 501 U.S. at 842.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXVIII.

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* R.C.M. 912(B), DISCUSSION.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility

for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXIX.

R.C.M. 1004 IS UNCONSTITUTIONAL UNDER THE FIFTH AND EIGHTH AMENDMENTS AND VIOLATES ARTICLE 55, UCMJ, BY NOT REQUIRING THAT SENTENCING PROCEDURES BE MORE DETAILED AND SPECIFIC TO ALLOW A RATIONAL UNDERSTANDING BY THE MILITARY JUDGE AND CONVENING AUTHORITY AS TO THE STANDARDS USED BY THE MEMBER. *But see Curtis*, 32 M.J. at 269.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXX.

THE COURT-MARTIAL LACKED JURISDICTION OVER THE CAPITAL MURDER ALLEGED IN SPECIFICATIONS 1 AND 2 OF CHARGE I BECAUSE TRIAL BY COURT-MARTIAL OF A SERVICE MEMBER FOR CAPITAL MURDER WHICH OCCURRED WITHIN THE U.S. NOT IN A TIME OF DECLARED WAR IS UNCONSTITUTIONAL UNDER ARTICLES I AND III AND THE FIFTH, EIGHTH, NINTH, AND TENTH AMENDMENTS.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXI.

ARTICLE 18, UCMJ, AND R.C.M. 201(F)(1)(C), WHICH REQUIRE TRIAL BY MEMBERS IN A CAPITAL CASE, VIOLATE THE FIFTH AND EIGHTH AMENDMENT

GUARANTEES OF DUE PROCESS AND A RELIABLE VERDICT. *But see Curtis*, 44 M.J. at 130; *Loving*, 41 M.J. at 291.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXII.

DISCUSSION OF FINDINGS AND SENTENCING INSTRUCTIONS AT R.C.M. 802 CONFERENCES DENIED APPELLANT HIS RIGHT TO BE PRESENT AT "EVERY STAGE OF THE TRIAL." *See* R.C.M. 804(a); *cf. State v. Meyer*, 481 S.E.2d 649 (N.C. 1997) (capital defendant's absence from in- chambers conference was a violation of the state constitutional right of capital defendants to be present at all stages of trial and required resentencing); *Walker*, 66 M.J. at 753 (holding a military capital accused has a constitutional right to be present at "any stage of the trial where the defendant's presence and participation would be meaningful"); *but see Curtis*, 44 M.J. at 150-51.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXIII.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FAILING TO *SUA SPONTE* INSTRUCT THE MEMBERS ON SELF-DEFENSE. *U.S. v. Rose*, 28 M.J. 132 (C.M.A. 1989); *but see Curtis*, 44 M.J. at 155.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXIV.

APPELLANT'S DEATH SENTENCE IS INVALID UNDER THE FIFTH AND EIGHTH AMENDMENTS AND ARTICLE 55, UCMJ, BECAUSE THE MEMBERS WERE IMPROPERLY PERMITTED TO CONSIDER "PRESERVATION OF GOOD ORDER AND DISCIPLINE," AND SPECIFIC DETERRENCE IN SENTENCING DELIBERATIONS. *See* R at 2627; *but see Loving*, 41 M.J. at 268-69.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXV.

APPELLANT WAS DENIED HIS RIGHT TO EQUAL PROTECTION UNDER THE FIFTH AND EIGHTH AMENDMENTS AND ARTICLE 36, UCMJ, BECAUSE THE MILITARY HAS NO SYSTEM FOR CENTRALIZED DEATH PENALTY DECISION-MAKING SIMILAR TO THAT EMPLOYED IN FEDERAL DISTRICT COURTS.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXVI.

ARTICLE 142(B)(2), UCMJ'S LIMITATION OF COURT OF APPEALS FOR THE ARMED FORCES JUDGES TO TERMS OF OFFICE OF FIFTEEN YEARS VIOLATES ARTICLE III, SECTION 1 OF THE CONSTITUTION, WHICH GUARANTEES A LIFE TERM OF OFFICE TO JUDGES OF INFERIOR COURTS ESTABLISHED BY CONGRESS. *But see Curtis*, 44 M.J. at 164; *Loving*, 41 M.J. at 295.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXVII

ALLOWING DEFENSE COUNSEL ONLY ONE PEREMPTORY CHALLENGE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT IN THAT SIMILARLY SITUATED DEFENDANTS IN FEDERAL DISTRICT COURT ENJOY 20 PEREMPTORY CHALLENGES IN A CAPITAL CASE, *see* FED. R. CRIM. P. 24(b); APPELLANT'S MILITARY STATUS IS AN ARBITRARY BASIS FOR DIFFERENT TREATMENT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXVIII.

ARTICLE 45, UCMJ, AND R.C.M. 910(a)(1) DEPRIVED APPELLANT OF HIS FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS TO PRESENT MITIGATING EVIDENCE, AS THEY PRECLUDE HIM FROM PLEADING GUILTY, THEREBY DEPRIVING HIM OF A WELL-ESTABLISHED MITIGATING CIRCUMSTANCE AND FORCE HIM TO PRESENT

POTENTIALLY CONFLICTING THEORIES DURING THE FINDINGS STAGE AND THE SENTENCING STAGE.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XXXIX.

ARTICLE 45, UCMJ, AND R.C.M. 910(a)(1) DEPRIVED APPELLANT OF EQUAL PROTECTION UNDER THE LAW UNDER THE FIFTH AMENDMENT, AS SIMILARLY SITUATED DEFENDANTS IN BOTH FEDERAL DISTRICT COURT AND MILITARY COMMISSIONS MAY PLEAD GUILTY (*see* FED. R. CRIM. P. 11; 10 U.S.C. § 949i; R.M.C. 910(a)); APPELLANT'S MILITARY STATUS IS AN ARBITRARY DISTINCTION ON WHICH TO BASE DIFFERENT TREATMENT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XL.

ARTICLES 16 AND 25A, UCMJ, DENIED APPELLANT EQUAL PROTECTION UNDER THE LAW UNDER THE FIFTH AMENDMENT, AS SIMILARLY SITUATED DEFENDANTS IN FEDERAL DISTRICT COURT MAY BE TRIED BY JUDGE ALONE; APPELLANT'S MILITARY STATUS IS AN ARBITRARY DISTINCTION ON WHICH TO RECEIVE DIFFERENT TREATMENT.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility

for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XLI.

ARTICLES 16 AND 25A, UCMJ, DENIED APPELLANT HIS RIGHT TO DUE PROCESS AND RIGHT TO HEIGHTENED RELIABILITY UNDER THE EIGHTH AMENDMENT BY DENYING HIM THE RIGHT TO BE TRIED BY A MILITARY JUDGE ALONE.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XLII.

THE NOTICE REQUIREMENT IN R.C.M. 1004(B)(1), WHERE NOTICE OF AGGRAVATING FACTORS IS NOT REQUIRED ON THE CHARGE SHEET OR AT THE ARTICLE 32 HEARING, VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, NOTICE, AND EFFECTIVE ASSISTANCE OF COUNSEL.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1, or, in the alternative, remand the case for retrial.

C-XLIII.

APPELLANT WAS TRIED FOR AN OFFENSE OVER WHICH THE COURT-MARTIAL HAD NO JURISDICTION BECAUSE A PERSON OTHER THAN THE CONVENING AUTHORITY REFERRED THE AGGRAVATING FACTORS, WHICH ARE FUNCTIONAL ELEMENTS, IN VIOLATION

OF ARTICLE 55, UCMJ, AND THE FIFTH AND EIGHTH AMENDMENTS.

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1 or, in the alternative, remand the case for retrial.

C-XLIV.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY ALLOWING GOVERNMENT SENTENCING WITNESSES TO TESTIFY CONCERNING THE ADVERSE EFFECTS THAT APPELLANT'S TRIAL HAD ON THE VICTIMS' FAMILY MEMBERS. *See U.S. v. Mobley*, 31 M.J. 273 (C.M.A. 1990); *U.S. v. Carr*, 25 M.J. 637 (A.C.M.R. 1987); *U.S. v. Farinella*, 558 F.3d 695 (7th Cir. 2009); *Burns v. Gammon*, 260 F.3d 892 (8th Cir. 2001); *Bushnell v. State*, 637 P.2d 529 (Nev. 1981) (per curiam); *Cresci v. State*, 278 N.W.2d 850 (Wis. 1979); *U.S. v. Wiley*, 278 F.2d 500 (7th Cir. 1960); *but see U.S. v. Stephens*, 67 M.J. 233 (C.A.A.F. 2009).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

C-XLV.

THE MILITARY JUDGE COMMITTED PLAIN ERROR BY PRESIDING OVER APPELLANT'S TRIAL WHEN HIS BAR STATUS DID NOT ALLOW HIM TO PRACTICE LAW, THEREBY FAILING TO MEET THE REQUIREMENTS OF AIR FORCE INSTRUCTION 51-103 TO SERVE AS A MILITARY JUDGE. *But see U.S. v. Maher*, 54 M.J. 776 (A.F. Ct. Crim. App.

2001), *aff'd*, 55 M.J. 361 (C.A.A.F. 2001) (summary disposition).

WHEREFORE, this Court should set aside the death sentence and approve a sentence of life imprisonment without eligibility for parole, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to E-1.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on July 1, 2015, pursuant to this Court's order dated July 22, 2010, and that a copy was served via electronic mail on the Air Force Appellate Government Division on July 1, 2015.

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