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 REPLY 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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COMES NOW Appellant, and offers the following reply to the government's answer:

The government's brief rests on the false premise that a death sentence was inevitable in this case. Answer 91, 97, 113, 130, 222. Recent experience proves again that a death sentence is never inevitable when jurors are presented with an effective case in mitigation. Dan Frosch & Ana Campoy, *James Holmes Spared Death Penalty in Colorado Theater Shooting*, WALL STREET J., Aug. 7, 2015, http://www.wsj.com/articles/james-holmes-spared-death-penalty-in-colorado-theater-shooting-case-1438989277 (jury did not impose a capital sentence due to effective use of mental health evidence, despite 12 murders and 70 injured).

The *Holmes* case joins 50 murder cases cited in Appellant's Brief that were comparable to or more aggravated than this one, and where a death sentence was avoided or overturned on appeal. Brief 29-36, n.13. The government ignores these cases, asking this Court instead to accept assurances that this case is somehow more "egregious" than similar appeals due to an "avalanche of aggravation[.]" Answer 91, 100, 144. It is not.

The government attempts to buttress its inevitability argument by calling this case the "twin" of *U.S. v. Akbar*, 74 M.J. 364 (2015), Answer 100, and then repeatedly references that case. Answer 94, 106, 126, 132, 135, 137, 162, 164, 169-70, 178, 181-82, 216, 220-21, 224, 229-30, 240-41, 245-48. Repetition

alone cannot make it so.[1]

Among the many differences between this case and *Akbar* is that Sergeant Akbar—two years after killing two officers and wounding 14 others—stabbed an MP in the neck with a pair of scissors and "allegedly tried to seize the MP's firearm before being subdued[.]" *Akbar*, 74 M.J. at 375. Here, Appellant wept in the arms of one of his jailors in an expression of genuine remorse for the killing of his two friends. J.A. 3961.

The members never heard this testimony because, as with Dr. Frank Wood, Appellant's defense team ignored the recommendations of their mitigation expert and didn't even place a phone call to further investigate evidence that was readily available in 2004. When paired with the numerous other errors in this case, many of which were acknowledged by the lower court even in its second *en banc* decision, there is more than a "reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

STATEMENT OF THE CASE

The government asserts that the lower court's "original decision was in fact not considered en banc." Answer 1. In the same sentence, Appellee acknowledges the lower court granted its unopposed motion for *en banc* consideration. Order Granting *En*

[1] If *Akbar*'s wartime fratricide has any corollary it is *Holmes*, but even that case cannot neatly be described as its twin.

Banc Consideration (April, 21, 2010) (*en banc*).

Appellee does not reference the lower court's August 2, 2012, and October 5, 2012, orders setting oral argument before the *en banc* court, or that the Court heard oral argument on October 11, 2012, while sitting *en banc*. *En Banc* Order Scheduling Oral Argument (August 2, 2012) (*en banc*); *En Banc* Order Scheduling Oral Argument (October 5, 2012) (*en banc*).

The slip opinion, which is still available on its website,[2] unambiguously states it was issued by the court sitting *en banc*. *U.S. v. Witt*, No. ACM 36785 slip op. at 1; 4 (A.F. Ct. Crim. App. August 9, 2013). Not surprisingly, the electronic version available on West, the Military Justice Reporter's publisher, notes the case was "[b]efore the Court En Banc." *U.S. v. Witt*, 72 M.J. 727, 736 (A.F. Ct. Crim. App. 2013) (*en banc*).

Appellant cannot account for why the electronic version of the published decision available on Lexis does not expressly note that the lower court was sitting *en banc*, although an editor's note reflects the table of contents was also removed by editors from the Military Justice Reporter. *Witt*, 72 M.J. at 736. But this of no consequence where even that version of the opinion states that all 15 active judges assigned to the lower court were accounted for, either participating or recusing themselves.

[2] http://afcca.law.af.mil/content/afcca_opinions/cp/witt-36785.pub.pdf (last visited Dec. 15, 2015).

Id. at 735; *U.S. v. Negron*, 60 M.J. 136, 137 (C.A.A.F. 2004) (referring to opinion as *en banc* even where opinion not labeled as such). Further, the record contains no special designation appointing all 15 judges to a "panel".

To the extent the government now argues for the first time that—as a matter of fact—the lower court's initial decision was not issued by the court "sitting as a whole" for purposes of Article 66(a), this argument is without factual basis whatsoever and is repeatedly and directly contradicted by the record. To the extent the government argues that—as a matter of law—the lower court was not sitting *en banc* because five judges recused themselves due to their recent assignment to the court, this argument is without merit.

The government failed to cite any authority for the proposition that a judge abuses her discretion in recusing herself from a case due to recent assignment to a Court. Appellant has invited this Court's attention to numerous examples where appellate judges have done so. *Bahlul v. U.S.*, 767 F. 3d 1 (D.C. Cir. 2014) (*en banc*); *Spencer v. U.S.*, 773 F. 3d 1132 (11th Cir. 2014) (*en banc*); *McBride v. Estis Well Serv., L.L.C.*, 768 F. 3d 382 (5th Cir. 2014) (*en banc*). And they have done so pursuant to a statute that, unlike Article 66, UCMJ, requires the participation of "all circuit judges in regular active service[.]" 28 U.S.C. § 46 (2012).

The decision of a judge to participate in a case is solely a matter of judicial discretion, which is tested for abuse of discretion. *Kolon Indus. V. E.I. Dupont De Nemours & Co.*, 748 F. 3d 160, 167 (4th Cir. 2014); *In re Moody*, 755 F. 3d 891, 898 (8th Cir. 2014). The judges who declined to participate in the court's first *en banc* decision did not abuse their discretion by declining to participate where they arrived within days or weeks of the release of the court's published decision and many months after the court heard argument *en banc*.

Appellant notes the court's second *en banc* decision indicates Chief Judge Allred, "joined the Court after oral argument was heard en banc, [and] did not participate in this decision." *U.S. v. Witt*, 73 M.J. 738, 825 (A.F. Ct. Crim. App. 2014) (*en banc*). The government's belief in the merit of its argument is reflected in its failure to argue, as it did with the first *en banc* decision, that the decision now pending review before this Court is therefore "***doubly inchoate***[.]" J.A. 244.

ARGUMENT

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.

1. Supposed Inconsistencies Among Declarations

The government argues that inconsistencies among the post-trial declarations "would be comical if the stakes were not so high." Answer 89. Not so. They have been part of the record for more than a year, and the government found only a handful of (at best) minor inconsistencies. With witnesses remembering events from a decade ago, one would expect their accounts to vary. They would be suspicious if they did not. The variance is within the range one would expect from people independently recalling events to the best of their recollections.

The first purported inconsistency entails no contradiction: that TSgt Pumphrey says that Appellant rode his motorcycle onto base after the accident, Answer 38 (citing J.A. 4049)), whereas SSgt Love remembers him pushing the motorcycle home. *Id.* (citing J.A. 4126). The accounts are different but one wonders where the inconsistency lies.[3] This disagreement is immaterial to what they say in their declarations and the issues Appellant raises.

The next supposed inconsistency is that TSgt Pumphrey said in her first declaration that she knew Appellant well and in her

[3] It is certainly possible (and in no way inconsistent with the parties' memories) that Appellant's motorcycle was serviceable when he rode onto base and sometime later Appellant had to push it home because it had by that time stopped running. The record indicates the motorcycle was in good enough condition for SSgt Love to later buy it from Appellant's father. J.A. 4126, ¶3.

second that she did not socialize with him after the motorcycle accident and could not speak to his behavior then. Answer 45. Her second declaration was in response to the Air Force Court's second decision, which wrongly concluded that her declaration "contradicted" evidence of a personality change following the motorcycle accident. *Witt*, 73 M.J. at 778. She wrote:

> 4. As I explained [previously], I met SrA Witt while we were in Basic Training at Lackland AFB, Texas, from November 2001 until January 2002. He was in my "brother" flight. I arrived at Robins AFB, Georgia, in April 2002, where SrA Witt was also assigned.

She continues:

> 6. 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 mid-2002. I still cannot account for how he could have changed so drastically to have committed the murders in July 2004.
>
> 7. In my previous declaration, I wrote this about my association with SrA Witt at Robins AFB: "We hung out four times. Although we were not close friends, he definitely made an impression on me" (paragraph 3). What I did not explain was the timeline. I met him when [sic] were at basic training together. We lost track of each other during tech school. I first learned that he was also at Robins AFB when I was posted at the gate and saw him drive up. We were surprised to see each other. We were new to the Air Force and new to the base, and neither of us had made very many friends at that point. So we socialized some after we first arrived. As time passed, we hung

> out less and less because we were in different career fields, worked different schedules, and established a different circle of friends - I hung out mostly with other cops. I'd estimate of the four times we hung out, most of those were in 2002 or maybe early 2003. By mid-2003, I still considered him a friend but we would see each other very infrequently and only in passing. After that time, it was not until his motorcycle accident in February 2004 that I had any extended interaction with him.

J.A. 4124-25. There is no contradiction here.

The third inconsistency the government attempts to prove involves Appellant's ex-girlfriend, TSgt Mohapaloa, who says in her 2014 declaration that his personality changed drastically after the motorcycle accident. According to the government, she was presented with a "golden opportunity" to answer a question she was never asked at trial. Answer 45-48. The context of her testimony resides in a footnote. Answer 48-49 n.15.

Her testimony was prompted by a question from a member: "What was his demeanor in your opinion after the movie?" A.E. XCII. So the military judge asked, "Was his demeanor different, in your mind, from what you had seen previously **either during the movie or after you all left the movie and were home**?" J.A. 1735 (emphasis added). She replied, "No, sir." *Id.* He then asked if "[a]nything about his "demeanor" that night "struck [her] as . . . in any way out of the ordinary from what you had seen over the previous year," and she replied, "Not at all." *Id.*

TSgt Mohapeloa was speaking to what she observed that night

on a single date. Her testimony that his demeanor that night was not "out of the ordinary" for him does not contradict her declaration that his personality had changed enough to break up with him (as she details in her declaration, J.A. 4152-53).

Finally, the government makes much of the "inconsistency" that SSgt Love told Ms. Pettry in 2004 that Appellant had been in a bar fight, whereas in 2014 he wrote that the parties were able to resolve their dispute before resorting to fisticuffs. Answer 49-50 (citing J.A. 3896, 3919). This is small bore, especially when his entire 2014 declaration is considered:

> 5. Prior to the motorcycle accident in February 2004, I had never seen SrA Witt in a fight. The occasion has 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 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 the first time a scenario like this had presented itself.

J.A. 4126, ¶5 (emphasis added). For anyone who has ever played the telephone game, or tried to remember in detail an event from a decade before, what is striking about the juxtaposition of Ms. Pettry's recollection and SSgt Love's own is their consistency. *Compare* J.A. 3896 (Ms. Pettry) *with* J.A. 4126, ¶5 (SSgt Love).

SSgt Love stands accused of "yet another" inconsistency for

saying in 2004 that he was willing to testify on Appellant's behalf and in 2014 that he had "no desire to help" and that he was "very angry with him." Answer 50, n.16 (citing J.A. 3897, 4127). This is a strange line of attack. The government criticizes SSgt Love, not for *factual*, but for *emotional* inconsistency.[4]

The government later accuses Appellant of engaging in "revisionist history" based on the "inconsistencies between and among the various declarations[.]" Answer 89. Close examination of the post-trial declarations proves just the opposite.[5]

2. Dr. Frank Wood

The government faults Dr. Wood for reaching preliminary conclusions about Appellant's likely injuries in 2012 before he personally examined him in 2014. Answer 53-55. This ignores

[4] The victims, SSgt Love, and Appellant were part of the same social circle. While Appellant was a friend before the murders, he killed two of SSgt Love's friends. SSgt Love is conflicted, as any normal person would be.

[5] For a genuine example of internally inconsistent statements, this Court need look no farther than trial defense counsel's mutually inconsistent accounts of why they failed to obtain Appellant's mother's mental health records: Mr. Spinner says he did not seek the records because Dr. Mosman did not tell him to. J.A. 4023, ¶11. Messrs. Rawald and Johnson remember Dr. Mosman advising counsel to explore Appellant's family history and how that would have affected his mental health. *Id.* 4008, ¶14. Mr. Rawald says he would have sought the records had he known that Ms. Pettry wanted them. *Id.* 4012-13, ¶¶35-36. Mr. Johnson knew that Ms. Pettry wanted to subpoena the records and says that he told Messrs. Spinner and Rawald. *Id.* 4003, ¶16. Ultimately, he deferred to them "based upon how the case responsibilities were divided," and they did nothing. *Id.*

that he answered this charge in a third declaration in 2012: "That I have not myself examined SrA Witt is irrelevant to my review of [the] evidence." J.A. 4121, ¶15.[6] Earlier, he explains why an interview is not a valid diagnostic tool, responding to Dr. Rath's claim that during his interview, he was "looking for evidence of cognitive impairment":

> [C]ognitive impairment **is not assessed by interviews.** It is a well-established clinical truism that mental health professionals, whether physicians or psychologists, cannot identify or diagnose cognitive impairment simply by conversing with a patient. . . . Conclusions about a patient's cognitive impairments simply from an interview of the type described by Dr. Rath are not based on procedures within the generally accepted standard of care; they are simply guesswork.

J.A. 4120, ¶7 (emphasis added). Given the strong disagreement with Dr. Rath, counsel sought a separate opinion from another neuropsychologist, Dr. Carol Armstrong, to evaluate Dr. Rath's and Dr. Wood's methodologies (discussed in the next section).

The government faults Dr. Wood for "chang[ing] course" in response to the Air Force Court's opinion citing some evidence

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[6] The government asserts that Dr. Wood interviewed Appellant only because he "finally recogniz[ed] that his opinions carried little weight without a personal interview." Answer 56. Not so. He performed an in-person interview because the Air Force Court erroneously found Dr. Rath's opinion more reliable only because he had performed such an interview. *Compare* J.A. 39 (Air Force Court contrasting Dr. Rath's interview with Dr. Wood not having evaluated Appellant) *with* J.A. 4160, ¶16 (Dr. Wood's explanation for deciding to do an interview after the second opinion); *see also* J.A. 4120, ¶7 ("cognitive impairment is not assessed by interviews" and conclusions based on "an interview of the type described by Dr. Rath are not based on procedures within the generally accepted standard of care" and are only "guesswork").

from coworkers and friends that Appellant was not having the sort of impulse control problems that Dr. Wood had predicted. Answer 55. Yet Dr. Wood does not contradict himself; rather, he provides more detail and expands on his rationale. He explains:

> I chose not go into detail in my previous declarations only because my impression was that the Court would be interested in an overview of what could have been discovered if the trial defense team had contacted me in 2004 as Cheryl Pettry had recommended—rather than a detailed exegesis of the science, which is voluminous.

J.A. 4156-57, ¶9. He then answers the Air Force Court's various rhetorical questions, amply citing the literature. *Id.* 4157-67.

Continuing with its criticism of Dr. Wood's findings about impulse control, the government scoffs at his diagnosis of what they call compulsive impulsivity, Answer 56, which, by design, sounds oxymoronic. *See* J.A. 4159-60, ¶15.[7] The government did not seek an expert to explain the science or write a declaration to contradict Dr. Wood in 2014. Thus, the analysis of Dr. Wood, a preeminent expert in the field, is scientifically unrebutted.

The government also criticizes Dr. Wood's 2014 finding that Appellant likely suffered a hallucination since Appellant did not himself recognize this. Answer 57 (citing the Sanity Board,

[7] Dr. Wood uses this *impulsive* and *compulsive* as shorthand for two types of unrestrained behavior documented in the literature. J.A. 4159-60, ¶15.a. He notes that murders have been committed by persons suffering from both forms of impairment. *Id.* He gives as an example of the latter the 1966 clock tower shooter at the University of Texas who was able to plan and deliberate. J.A. 4159, ¶15.c. Then he explains why the Appellant likely suffered from a similar cognitive impairment. J.A. 4159, ¶15.d.

J.A. 3738).[8] Persons suffering from mental illness often lack what experts call "insight", or the capacity to recognize their own mental illness. Some even call this the "hallmark" of many forms of mental illness.[9] As Dr. Wood explained "a patient's self-report of neurological symptoms is known to be invalid for establishing the presence or absence of neurological disease." J.A. 4158, ¶13 (citing J.A. 4121, ¶11). Even if Appellant were a neuropsychologist, he would still struggle to self-diagnose.

The government asserts that Appellate counsel spent the better part of a decade "locat[ing] an expert with a divergent opinion," who would disagree with Dr. Rath, Dr. Mosman, and Dr.

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[8] But Appellant did make at least one contemporaneous statement that is compatible with the hallucinations Dr. Wood describes, wherein Appellant recounts a "voiceless influence" and a vision of "a hallway of doors, all shut and locked, except the very last door" giving him no choice but to kill the victims. J.A. 4161, ¶18.c. In one letter Appellant laments that God let this happen because he felt in a sense compelled to do what he did: "The Bible says that God won't let you be tempted more than you can bear, and he will provide an escape. **I have wracked my brain, and I still can't find what my escape route was**[.]" J.A. 3156 (emphasis added). He lacks Dr. Wood's diagnostic skills and his reasoning reflects his religion-soaked upbringing, but his letters suggest that in 2005 he was already trying to put into words the sense of compulsiveness or inevitability he felt when he committed the murders. *See also* J.A. 3158 (describing being "betrayed by [his] own mind"); 3163 (saying he was "manipulated into this situation" and doubting if "free will" exists); 3174 (writing that he felt "trapped in someone else's life" as if he were in a "dream" or the "Twilight Zone").

[9] *See* Anthony S. David, et al., *Failures of Metacognition and Lack of Insight in Neuropsychiatric Disorders*, 367 PHILOSOPHICAL TRANSACTIONS ROYAL SOCIETY 1379 (2012) (explaining that "lack of insight or unawareness of illnesses are the hallmarks of many psychiatric disorders, especially schizophrenia"), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3318769/.

Makjija. Answer 88. The government overlooks Dr. Wood's centrality to this case: he is the very expert whom the trial defense counsel's capital mitigation expert suggested calling. A reasonably competent counsel would not have phoned just any expert, but specifically Dr. Wood. Yet trial defense counsel failed to take that simple step recommended by their experienced capital mitigation specialist. J.A. 3919, ¶13.

A recurring theme throughout the government's brief is that trial defense counsel should not be judged with the benefit of hindsight, but based on what they knew at the time. *See* Answer 66, 73, 77, 86-87, 89, 105-07, 113, 122, 125, 186. Appellant does not disagree that this is the lens through which his counsel's performance must be viewed. *See, e.g.*, *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015) (finding no deficient performance where, at time of trial in 1995, critical report of discredited comparative bullet lead analysis was, in pre-internet era, only available in card catalogues in some public libraries).

This is not "Monday-morning quarterbacking." Answer 77, 107. Counsel knew about Dr. Wood in 2004. They did not have to search for a "needle in a haystack" because their mitigation specialist told them where it was. *Kulbicki*, 136 S. Ct. at 4-5 (internal citation omitted). And this Court can see what Dr. Wood would have provided in 2004 had he been contacted then. *See*

J.A. 4039-40, ¶7.[10]

3. Dr. Carol Armstrong

Given the disagreement between Dr. Wood's and Dr. Rath's findings, Appellant's counsel sought another opinion, but only to evaluate the merits of their the diagnostic methodologies. She found the former's methodology "reasonable" and "consistent with the standard of practice the field," the latter's "faulty" and "nonstandard." J.A. 4100-02, ¶¶8, 12, 12.a.

The government now attacks her for not having reviewed the entire record on appeal and for not having formed an independent opinion about whether Appellant actually suffered a TBI. Answer 59-60. That was not her purpose, nor did counsel make such a proffer when submitting her declaration.

Dr. Armstrong substantiates Dr. Wood's criticism of Dr. Rath's methodology: namely, that a personal interview isn't an accepted diagnostic method. J.A. 4120, ¶7. She writes:

> [C]ognitive and neurological impairments must be formally tested. The preponderance of scientific studies show, with consensus from psychological researchers, that the **clinical judgment of an expert is inferior to actuarial data**. Neuropsychological

[10] Dr. Wood's first declaration describes what his advice would have been if counsel had contacted him in 2004 and specifies that he would done so "based on what the trial defense team **knew at that time** about Witt's motorcycle accident, injuries, and behavior and the state of the science in the field **as it existed in 2004**[.]" J.A. 4039, ¶7 (emphasis added). He later concludes, "Based on what the trial defense team knew **at that time**, I would have told Mr. Spinner that Witt's accident, injuries, and behavior were consistent with TBI." *Id.*, ¶7.j (emphasis added).

> testing is objective, actuarial data that is not dependent on the interpretation, clinical sensitivity, or bias of the psychologist. **Rath's evaluation of Witt by a possibly biased and incomplete interview technique and by his clinical judgment, rather than by neuropsychological testing, definitively fails to reach scientific rigor** regarding the presence of brain dysfunction, and thus a Daubert standard regarding neuropsychological diagnosis or diagnosis of traumatic brain injury.

J.A. 4101-02 (emphasis added). This is significant because the government stresses the fact that Dr. Rath interviewed Appellant and Dr. Wood did not (at first). Answer 53-55.[11] Interviews may seem important to laymen, but Appellant has provided two experts saying that the sort of interview that Dr. Rath relies on is no substitute for objective neuropsychological testing.

4. Ms. Monica Foster

Appellee also attacks Ms. Foster, now the Chief Federal Defender for the Southern District of Indiana, for failing to

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[11] The Air Force Court made a similar mistake, to which Dr. Armstrong responded with a second declaration in 2014:

> The opinion is mistaken to rely on the psychologists who interviewed Witt in person and to discount those who did not[.] . . . It puts far too much stock in Dr. Rath's opinion based on his interview with Witt after the *Daubert* hearing. As I explained in my previous declaration, the basis for [Dr. Rath's] opinion was inconsistent with the prevailing science and methodology due to the inferiority of subjective information to information derived from objective tests, and because there is evidence that subjective and objective neurobehavioral data have little correlation[.]

J.A. 4131, ¶9.

review the entire record. Answer 58 (citing J.A. 4051-52). This is misguided. She candidly describes what she reviewed, *id.*, ¶15, and seeks not to supplant this Court's review of the full record; she opines as to the standard of care in two respects.

First, was it reasonable not to call Deputy Foster because counsel did not have his phone number, when it was in the local phonebook? She says that it was not. J.A. 4046-48, ¶¶25-32 ("I can imagine no constitutionally strategic or tactical reason for failing to call Sgt. Foster as a witness.").

Second, was it reasonable to stop their TBI investigation based on what counsel knew about the motorcycle accident? She says that it was not. J.A. 4053-57, ¶¶22-44 ("Competent counsel in 2003 would have run a full neuropsychological examination by a qualified neuropsychologist. The cost of such an examination is generally less than $5000."); 4169-71, ¶¶4-9.

These were questions that her partial review of the record amply prepared her for, and were appropriate given her wealth of capital litigation experience. J.A. 4051-52, ¶¶5-14.

5. Ms. Cheryl Pettry

The government would impugn Ms. Pettry's character on the basis of one court's dissatisfaction with her availability for testimony in a post-trial hearing.[12] *See* Answer 39 n.7. A decade

[12] Ms. Pettry testified in *Walker v. State*, 2015 Ala. Crim. App. LEXIS 8 (Al. Crim. App. 2015).

ago, she had already assisted in 90 capital cases. J.A. 3916. Concluding from just two cases—both of which involved lead counsel Michael Crespi[13]—that Ms. Pettry has a "history of conflict" with defense counsel is bad math. Answer 39 n.7. This "one data point" is "unremarkable." *Id.*

Further, as this Court recognized in *U.S. v. Kreutzer*, 61 M.J. 293, 298, n.7 (C.A.A.F. 2005), "there is no professional death penalty bar in the military services," so "it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." Counsel ignored Ms. Pettry when they lacked *any* such experience. J.A. 449-52.

The attempt to disprove that Ms. Pettry recommended Dr. Wood in 2004 also fails. The government selectively quotes the trial defense counsel's declarations: while Mr. Rawald does not remember mention of Dr. Wood, Mr. Johnson does "vaguely recall Ms. Pettry advising [them] to seek brain imaging and neuropsychological testing[.]" J.A. 4001, ¶10.[14] And unlike

[13] In *Benjamin v. State*, 156 S. 3d 424, 447 (Ala. Crim. App. 2015), Mr. Crespi's co-counsel testified Mr. Crespi "did not inform her until one week before Benjamin's trial that she was going to be in charge of the penalty phase." She also testified "that she had difficulty communicating with Crespi, that she did little in preparation for trial, and that Crespi was in charge of the guilt phase." *Id.* at 441.

[14] The fact that Mr. Rawald remembers that Ms. Pettry "glowingly recommended" Dr. Mosman, Answer 42 (citing J.A. 4083) (emphasis removed), does not disprove that she also recommended Dr. Wood by name. The former was a forensic psychologist, the latter is a neuropsychologist. It is not uncommon in capital litigation

trial defense counsel, who rely upon seven-year-old memories, Ms. Pettry provides a contemporaneous memorandum advising on the need for a "full psychological battery of tests" due to the motorcycle accident, closed head injury, and possible TBI. *See* J.A. 3921 (dated August 24, 2004). If any dispute remains, the appropriate remedy would be a *DuBay*[15] hearing.

The government also criticizes Appellant for extensively citing Ms. Pettry and at the same time "seemingly derid[ing]" her for gathering and encouraging defense counsel to present evidence of Appellant's good character. Answer 40 n.8. However, the problem Appellant identified in his opening brief was not that his defense team presented "nice guy" evidence, but that they presented such evidence to the exclusion of any counter-explanation to the governments' theory that Appellant was just "evil". *See* Brief 70-72. Explaining that Appellant was a good person before his TBI was a necessary predicate for making the argument that his character/personality had changed. Counsel laid this foundation, but then stopped short, leaving the jury to wonder how a "nice guy" could commit such horrible crimes.

6. Coworkers & Acquaintances

The government spends a page reciting the nice things that coworkers and acquaintances said about Appellant. Answer 51-52.

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for multiple mental health experts to prepare different aspects of the mitigation case.

[15] *United States v. DuBay*, 17 U.S.C.M.A. 147 (C.M.A. 1967).

This is supposed to disprove that his personality changed after his motorcycle accident. Yet a capacity for what are cordial professional relationships disproves nothing. In her response to the Air Force Court opinion, Dr. Armstrong addressed this:

> I also disagree with the Court about whether certain statements in Ms. Pumphrey's declaration actually support the conclusion that SrA Witt did not suffer from a traumatic brain injury since he did not always exhibit impulsive, emotional, or erratic behavior. I **would not expect someone who sustained an injury to the left anterior temporal lobe to behave in that fashion all of the time or even most of time.** Highly stressful circumstances or environments could trigger such behavior; however, the orderly and structured environment of domestic military service might actually mask the symptoms of this form of traumatic brain injury.

J.A. 4131, ¶8.c (emphasis added). And Dr. Wood opined:

> **It does not follow from the fact that Witt did not always – or even usually – exhibit aggressive behavior that he did not sustain a traumatic brain injury** (TBI) or that such an injury did not influence his behavior on the night of the murders in July 2004. **Particularly in low-stress, orderly environments, there is often no threatening trigger for pathological aggression.** I am not surprised, therefore, that Witt behaved normally during a golfing trip to Europe or that he performed his duties within the orderly routine of the military environment, or a highly regulated confinement setting, without incident.

J.A. 4155, ¶5 (emphasis added).[16]

[16] Appellee challenges Dr. Wood's finding that Appellant has impulse control problems only under special circumstances by arguing that his "potential physical altercation at a bar" was the sort of "high stress and disorderly environment" that should have triggered impulsive behavior. Answer 56 (citing J.A. 4126). Where that threshold lies is a matter best left to experts, but Appellant's counsel would note the significant difference in the

To those who knew him only superficially, Appellant seemed normal. But those closest to him confirm that he had profoundly changed after his accident. *See* J.A. 4152-53 (girlfriend), 4164, ¶23 (Mr. Coreth, roommate); 4126, ¶5 (SSgt Love, roommate).

Law and Analysis

1. Incomplete Investigation

Citing *Wiggins*, the government notes that defense counsel "were not required to investigate every conceivable line of mitigating evidence." Answer 76. While that is no doubt true, Appellant's closed head injury from an accident just 4½ months before the murders was not just one more line of mitigation that counsel could cast aside or pursue on a whim. The failure to investigate was unreasonable based on the law and the facts.

The case law put counsel on notice that evidence of brain

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level of stress between macho bravado at the bar and the events on the night of the murders. When SrA Schliepsiek learned that Appellant had tried to kiss his wife the night before, he called to confront Appellant at 0137, and they spoke for four minutes. J.A. 2968-70. At 0142, he called him again, and they spoke for six minutes. *Id.* At 0200, he called a third time, and they spoke for three minutes. *Id.* SrA King said that this conversation was "heated," and remembered SrA Schliepsiek telling Appellant that he was going to tell his first sergeant and commander about what Appellant had done. J.A. 1511. Between 0206 and 0212, he tried calling Appellant nine more times. J.A. 1517, 2968-70, 2973-76. Appellant called back at 0221, and they spoke for 33 minutes. J.A. 2974-76. When Appellant arrived at the scene, "scuffling" and "wrestling" began immediately, two against one. J.A. 1523, 1527, 2527, 2961. SrA King put Appellant in a headlock. J.A. 1523-24, 2523. The difference in stress level between some tough talk at the bar versus harassment and an actual physical altercation on the night of the murders could not be more stark.

damage requires especially diligent investigation. Brief 44-47. That is because "[e]vidence of organic mental deficits ranks among the most powerful types of mitigation evidence available." *Littlejohn v. Trammell*, 704 F. 3d 817, 864 (10th Cir. 2013).

But it is the facts known in 2004 that make Appellee's assertion that trial defense counsel's investigation was "thorough" untenable. Answer 87. Appellant itemizes what was known on page 42 of his opening brief.[17] Judge Saragosa aptly concluded 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, J.A. 83 (citing *Wiggins*, 539 U.S. at 527); *see also U.S. v. Witt*, 72 M.J. 727, 759 (A.F. Ct. Crim. App. 2013), J.A. 188 (same point in her original opinion).

2. Brain Damage and Voluntary Intoxication

The Air Force Court found that the evidence of voluntary intoxication in *Curtis*, 46 M.J. at 130, was "less speculative than the potentially mitigating evidence" in this case. J.A. 49. Following that line of reasoning, Appellee argues that "there was no available condition" given that there was no "scientific

[17] This is in keeping with what the government calls the Supreme Court's "command" that defense counsel "must be judged upon the facts as known to them at trial." Answer 90 (citing *Strickland*, 466 U.S. at 689). Further, counsel would have known even more in this case if they had not stopped their investigation at an "unreasonable juncture". *Wiggins*, 539 U.S. at 527.

nexus" proving appellant suffered a TBI. Answer 88. This is wrong in five distinct ways.

First, like the Air Force Court, the government mistakenly argues that the facts were more certain in *Curtis* than they are here. But this is how the Navy-Marine Corps Court characterized the evidence of voluntary intoxication in that case:

> The evidence of premeditation in this case was absolutely overwhelming. All of the appellant's confessions detail the planning undertaken to carry out these offenses, from stealing a K-bar knife and obtaining a pair of gloves to avoid fingerprints to formulating a ruse to gain entry into the Lotz home. Additionally, the **experts who evaluated the appellant opined that he was not so incapacitated that he could not premeditate the offenses**. The appellant had a history of alcohol abuse which likely increased his tolerance above that of the average person. Finally, the **evidence indicated that the appellant filled a canteen full of gin and took it with him to the Lotz home but did not consume any prior to the crimes**. The evidence is **silent as to whether any alcohol was consumed after the murders and this possibility could not be excluded in an extrapolation of the blood-alcohol level**. Consequently, any attempt to define the actual blood-alcohol level would have been of little benefit to the defense.

U.S. v. Curtis, 38 M.J. 530, 539-40 (N-M.C.M.R. 1993), *aff'd in part, rev'd in part*, 46 M.J. 129 (C.A.A.F. 1997) (per curiam) (emphasis added). Whether voluntary intoxication even existed in *Curtis* was a matter in dispute throughout the appeal. Here, that Appellant suffered a closed head injury 4½ months before the murders is beyond dispute, even if some questions remain about how exactly that might have affected his mental state.

Second, the government seeks to impose a "scientific nexus" standard for capital mitigation even though the Supreme Court has rejected that standard. *See Tennard v. Dretke*, 542 U.S. 274, 281 (2004) (overturning a line of Fifth Circuit cases holding that evidence of low IQ in capital cases must meet a higher standard, where the Fifth Circuit held that appellant was precluded from introducing this evidence since it "bore no **nexus** to the crime") (emphasis added). "[T]he 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context." *Id.* at 284 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990)). "Once this **low standard** of relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." Id. at 285 (emphasis added) (*quoting Boyde v. California*, 494 U.S. 370, 377-78 (1990) (citations omitted)).

Third, the government is wrong that Appellant has not given enough proof that he suffered from the effects of a TBI when he committed the murders in 2004. *See* Brief 3-23. The standard of proof is not that Appellant must provide sufficient evidence to convince Appellee in the middle of an adversarial contest; if that were so, no appellant could ever meet that burden.

Fourth, evidence of TBI is incomparably stronger mitigation evidence than evidence of voluntary intoxication. *See Ruiz v.*

Thaler, 783 F. Supp. 2d 905, 950 (W.D. Tex. 2011) (holding that "in the context of a capital sentencing proceeding, evidence of voluntary intoxication is at best a double-edged sword.").

Finally, following an in-person interview and additional neuropsychological testing, Dr. Wood offered a final declaration in 2014. The government did not provide any scientific evidence to counter him or to show that there was an insufficient nexus.

3. Dr. Mosman

Appellee does not address the cases cited in Appellant's brief finding IAC where counsel ended their investigation on the advice of a forensic psychologist when more specialized expertise was needed. Brief 55-57. Still, Appellee would have this Court consider Dr. Mosman's opinions in pristine isolation, outside of their relevant context. *See, e.g.*, Answer 43, 89, 94, n.29. Yet his opinions do not exist in a vacuum, and the context matters here.

Dr. Mosman did indeed advise against additional testing. But he rendered this advice on the basis of misinterpretation of his own psychological testing results. This is not in dispute. Mr. Rawald remembers the government's psychologist, Dr. Rath, telling him that Dr. Mosman had misinterpreted them. J.A. 4018, ¶57. Dr. Wood confirmed this, saying advice that neuroimaging would have been a "waste of time" based on the initial testing was "untrue, uniformed and inconsistent . . . with generally

accepted scientific and clinical principles[.]" J.A. 4041, ¶8. The government fails to say a word about this.

Even if the failure to recognize Dr. Mosman's unreliability before trial were excusable (it was not),[18] counsel were on alert following his poor showing at the *Daubert* hearing.[19] Defense counsel themselves say as much in their post-trial declarations. *See* J.A. 4016, ¶51; 4017, ¶52; 4024, ¶13. If he could not be trusted after the *Daubert* hearing, why did the defense continue relying on his opinion that additional testing was unnecessary? How could counsel continue to rely on Dr. Mosman's advice when it was based on the misinterpretation of own testing results? The government fails to say a word about this, much less explain counsel's constitutionally deficient and prejudicial inaction.[20]

4. Clinical Improbability of TBI Without a "Trace"

The government clings to Dr. Rath's opinion that it was "improbable" that Appellant received a TBI in February 2004, still suffered from its effects the following July, and remitted 14-15 months later. Answer 93-94 (citing J.A. 4088). To bolster his opinion, the government notes that two other experts failed to notice signs of a TBI. *Id.* This omits serious problems with

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[18] *See* Brief 51-57.

[19] *See* Brief 58-68 (recounting Dr. Mosman's performance at the *Daubert* hearing and counsel's response). This was not Dr. Mosman first failed *Daubert* hearing on record. *See* Brief 54-55 (quoting *Kimbrough v. State*, 886 So. 2d at 975-76 (Fla. 2004)).

[20] *See* Brief 60-61, 65-68 (discussing counsel's several options, including requesting a delay in order to find another expert).

Dr. Rath's methods, the basis for the other experts' opinions, and any reference to Dr. Wood's contrary opinion.

As explained previously, Dr. Rath's interview methods have been called into question by Drs. Wood and Armstrong. J.A. 4101-02, ¶12; 4120, ¶7; 4131, ¶9. That Dr. Rath did not recognize symptoms in 2005 likely has more to do with his methodology than with the presence or absence of such symptoms in 2005.

Despite Dr. Rath's assertion to the contrary, Drs. Wood and Armstrong – who, unlike Dr. Rath, are specialists in the area, and, unlike Dr. Rath, whose CVs are brimming with publications and prestigious academic appointments in this area – explain that remissions are not uncommon. J.A. 4102, ¶12; 4121, ¶12.

The government's utilization of Drs. Makhija and Mosman to corroborate Dr. Rath is similarly unavailing. That Dr. Makhija did not find mitigation evidence is unsurprising because he was assessing competence to stand trial under R.C.M. 706. J.A. 4121-22, ¶¶15-16. He was not looking for mitigation evidence, and he did not find it. In addition to the bias inherent in having the government's expert evaluate Appellant, *see* Brief 62-63, it does not appear that counsel alerted Dr. Rath of concerns about the motorcycle accident nor asked him to evaluate appellant for TBI. *Id.* (citing J.A. 4022, ¶7). Dr. Rath, like Dr. Makhija, was to evaluate him for a specific purpose: "to aid the prosecution in the countering" Dr. Mosman's testimony that adrenalin might have

had on Appellant's "ability to premeditate on the night of the murders." J.A. 4085-86, ¶3.[21] That Drs. Makhija and Rath did not find what they were not looking for is unremarkable.

Finally, contrary to the government's assertion that the TBI "fail[ed] to leave a trace," the evidence of brain damage was not indiscernible to Dr. Wood – either in 2012 when he first examined Dr. Mosman's neuropsychological testing data or when he personally interviewed Appellant in 2014. *See* J.A. 4039-41 (Dr. Wood's opinion in 2012); 4154-67 (Dr. Wood's opinion in 2014).

5. Excruciating Life History

The government argues that Appellant lacks the sort of "excruciating life history" described in *Wiggins*, 539 U.S. at 537, and that he is not, therefore, entitled to relief. Answer 96. To be sure, Appellant's life was not "excruciating" in the same sense that Wiggins's was, but neither was his home pulled from a Norman Rockwell painting.[22] This is, however, the wrong sort of analysis for several reasons.

First, the different timeframe of the mitigation evidence in this case doesn't render it irrelevant. The government seems

[21] Dr. Rath claims to have "explor[ed] every possibly remaining psychological issue that had not been ruled out and that might serve as a defense or mitigating factor," which seems ambitious for a two-hour interview. J.A. 4086, ¶4.

[22] *See* Brief 97-98 (explaining that his "formative environment" was not "blessed", as the prosecutor argued, but marked by his mother's "explosive outbursts of temper and vegetative symptoms of depression" and his social isolation).

to argue that because Wiggins's sentencing evidence spanned back to his childhood (neglect, abuse, low IQ), whereas Appellant's TBI happened only 4½ months before the murders, Appellant's quality of life was better overall and, thus, the failure to investigate is insignificant. *Witt* and *Wiggins* are analogous not because Witt's and Wiggins's aggregate suffering was equivalent but because both cases concern the failure to investigate; both are about counsel "who chose to abandon their investigation[s] at an unreasonable juncture." *Wiggins*, 539 U.S. at 527.

Second, because Appellant had been raised in a relatively affluent home, explaining *why* someone with his background would do something so heinous was more imperative, not less. As Judge Gierke wrote in *Curtis*, "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." 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). Like *Smith v. Mullins*, counsel put on evidence that Appellant came from a good background and was a nice guy but neglected the next logical step: "explain[ing] how this kind and considerate person could commit such horrendous crimes" when such evidence "was at [their] fingertips." 379 F.3d at 939-40.

The government attempts to impose an elevated standard of

prejudice that could rarely be met: that Appellant prove that his counsel failed to uncover evidence of an "excruciating life history." In fact, Appellant need only prove a "reasonable probability" exists "that at least one juror would have struck a different balance[.]" *Wiggins*, 539 U.S. at 537.

Finally, based on three cases from the Eleventh Circuit,[23] the government infers that reversing a capital sentence requires "much more severe circumstances" than what Appellant presented. Answer 96-97. Leaving aside the fact that the Eleventh Circuit is not this case's "actual" jurisdiction, Answer 95, these cases were reviewed under a highly deferential standard for collateral attacks. Under the Eleventh Circuit's interpretation of 28 U.S.C. § 2254 (2012), relief is granted only if a petitioner satisfies *Strickland* **and** "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Court's precedents." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F. 3d 1230, 1256 (11th Cir. 2012).

Regardless, three cases from the last decade prove nothing – especially when the government does little more than list them without any analysis that would explain how these three cases are more analogous than are the five Eleventh Circuit cases from a similar vintage that Appellant cites in which capital

[23] Although the government argues the Western District of North Carolina is in the 11th Circuit, it is not. Answer 97.

sentences were overturned on appeal. *See* Brief 35, 73, 74.

6. Actual Jurors versus Fantasy Jurors

The government criticizes Appellant's argument that TBI evidence would have been especially persuasive to members with medical technical training because a "reasonable" juror would not have been moved. Answer 94 n. 27 (citing Brief 78). Appellee asserts it is inappropriate to "dissect[] the member data sheets" and consider the jurors one-by-one. *Id.* Yet the court members inhabited the real word and were personally selected due to their "education, training, [and] experience[.]" R. 166. They weren't just faceless "reasonable" jurors. Answer 94 n. 27.

Pointing out that some evidence might have been persuasive to particular members based on their education, training, or experience was appropriate, especially because only one juror needed to vote for life to avoid a capital sentence. Indeed, federal courts[24] have relied on the length of deliberations as indicia of prejudice arising from trial error.[25] In *Curtis*,

[24] Federal appellate courts have endorsed the view that "[t]he length of jury deliberations can be one factor in determining how close the jury viewed the case to be." *Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005); *see also, e.g.*, *Murtishaw v. Woodford*, 255 F.3d 926, 973 (9th Cir. 2001); *U.S. v. Garza*, 608 F.2d 659, 666 n.6 (5th Cir. 1979).

[25] *See Fry v. Pliler*, 551 U.S. 112, n. 4 (2007) (Stevens, J., dissenting) (citing federal cases where courts have looked to the length of deliberations to ascertain the juries' uncertainty in reaching their verdicts).

Judge Gierke (in a concurring opinion that would later be adopted by this Court) referenced that the members deliberated for only an hour and eighteen minutes before sentencing LCpl Curtis to death. *Curtis*, 44 M.J. at 171 (Gierke, J., concurring); *see also, Akbar*, 74 M.J. at 439 (Baker, C.J., dissenting) (references 6-hour deliberation as evidence members could have been swayed by an effective mitigation presentation).

Such an analysis is based on the actual jury. Here, the members chosen through the Article 25 criteria included a member with medical training. She alone could have precluded a death sentence, which is particularly significant given the extended deliberations before the panel returned a death sentence.[26]

7. "Avalanche" of Aggravation

The government argues that, due to the "avalanche" of aggravation evidence, that there was, apparently, a lesser duty to investigate because there could be no defense in this case. Answer 91. Appellant does not concede that this case is *sui generis* as the government repeatedly insists. Answer 100, 144. However, assuming *arguendo* that the aggravators are worse than any capital case before or since as the government insists (and that is decidedly not the case), it does not follow that defense counsel would be excused for not attempting to find mitigation

[26] Deliberations lasted 10½ hours over three days. *See* R. 2696-97, 2699-00, 2701-02, 2705-06,

evidence in response. The duty to investigate would be just as high since the stakes would be just as high: the client's life.

8. Competing Declarations

Appellee would have this Court resolve the IAC question by disfavoring Appellant's declarations and favoring their own. *See* Answer 43 (citing Mr. Johnson); 42-44, 50, 120, 174, 187, 193 (citing Mr. Rawald); 43, 61, 173, 176 (citing Mr. Spinner).

This Court has repeatedly held that Courts of Criminal Appeals cannot resolve IAC claims on the basis of competing declarations where there is a dispute concerning material facts that cannot be resolved based on the record of trial and appellate filings. *See, e.g.*, *U.S. v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). And in *Loving v. U.S.*, 64 M.J. 132, 149 (C.A.A.F. 2006), this Court held that in *Massaro v. U.S.*, 538 U.S. 500, 504-05 (2003), the Supreme Court "created a preference in favor of factual development" of IAC claims "at a hearing."

This case can be reversed but not affirmed without a *DuBay* hearing. There are more than sufficient uncontroverted facts to lead to a finding of IAC. Indeed, the facts that trial defense counsel concede are sufficient for such a finding. But to the extent that this Court determines the case turns on facts that are controverted by the parties' respective declarations, it should remand for factual development below to answer the material facts that are in dispute. *See Loving*, 64 M.J. at 149.

9. Superhuman Feats of Lawyering

Consulting Dr. Wood – when their mitigation specialist recommended him by name – required not "superhuman feats of lawyering," Answer 67, but only *Strickland*'s bare minimum.

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

1. Mr. David Bruck

Though the government styles this section *additional facts*, as with the sections on Dr. Wood, Dr. Armstrong, and Ms. Foster, the government offers no new facts to rebut Mr. Bruck. Rather, the government opines on the value of his declaration.[27] Rather than engaging the government's analysis of his diction or attempting to bolster his credentials (Brief n.33) with counsel's own views, Appellant will only observe that the government attacks a straw man.

That Mr. Bruck lacks a medical degree, Answer 61, is not a revelation because he does not claim to be a physician or offer medical opinions – nor did the defense offer his declaration for any such purpose. What he knows is capital litigation, and he details the full weight of the prejudice that resulted from the

[27] Here, the government would again have this Court decide this case by crediting the government's declarations and disregarding Appellant's. *See Ginn*, 47 M.J. at 248 (holding that IAC claims often cannot be resolved on the basis of competing declarations where there is a dispute concerning material facts).

failure to obtain Appellant's mother's mental health records.[28] Brief 92-94 (citing J.A. 3988-89).

2. Dr. Robert Connor

Dr. Connor says Appellant's mother's mental health records show his upbringing had a "profound impact" on his "emotional, social and psychological development." J.A. 3993. Appellee spends three pages describing how intelligent Appellant is (which Dr. Connor never questioned) and coworkers who described him as a nice guy, Answer 63-65, and then counts this as a "refut[ation]". *Id.* 65. Though Dr. Connor's finding of a "profound impact" is not uncontroverted, neither has the government "refuted" Dr. Connor merely by showing that several laymen (may) disagree with his medical opinion.

Further, the fact that there was conflicting evidence did not excuse defense counsel from gathering mitigation evidence. Even if the entire Air Force thought that Appellant was a nice guy before the murders, counsel still had a duty to investigate. In fact, stopping short by presenting only "nice guy" evidence was constitutionally deficient representation under *Strickland*. *See* Brief 70-72 (citing *Smith v. Mullin*, 379 F.3d 919, 944 (10th

[28] Even Mr. Bruck was unaware of the full value of the mental health records as he did not know that Dr. Wood would later use these very records to find that Appellant exhibited a "precursor to schizophreniform psychoses," indicating that his family's history of mental illness and TBI were factually intertwined. Brief 102-03 (citing J.A. 4164, ¶¶23a-24).

Cir. 2004) (overturning a capital sentence because counsel put on evidence that Smith "was a kind and considerate person" but "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"); *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007) (overturning a death sentence because a weak mitigation case "played into the prosecution's theory that the only explanation for the murders was that Anderson was simply an 'evil' man").

3. Non-Cumulative

The government argues Appellant's mother's mental health records were cumulative. Answer 101. But Appellant's opening brief quoted Mr. Bruck's list of the significant details from those records. Brief 93 (J.A. 3988-89). This merits review.

Appellant also referenced what Dr. Connor says about those records: without them the prosecutor could plausibly argue that Appellant's childhood was "blessed"; with them it would have been clear that Appellant's mother's mental health "created an environmental factor that would have had a profound impact on SrA Witt's emotional, social, and psychological development." Brief 98 (citing J.A. 1458, 3993, ¶12). Dr. Connor holds that the records "provide important information that may help explain SrA Witt's behavior the night of the homicides" as they depict a woman with "profound psychiatric problems." J.A. 3992, ¶5.

Law and Analysis

1. What Judge Saragosa Did Not Know

The government notes that Appellant cites Judge Saragosa 48 times and that although her views are generally congenial to the defense even she found his mother's mental health records were cumulative. Answer 103 (citing J.A. 192). Appellant made this very same observation. Brief 102 (citing *Witt*, 74 M.J. at 837). But Appellee fails to mention that additional facts came to light after Judge Saragosa's dissent was written.

Dr. Wood interviewed Appellant in August 2014 and found that he exhibited "precursor[s] to schizophreniform psychoses." Brief 102 (citing J.A. 4164, ¶23.a). This diagnoses "gain[ed] additional probability from . . . Witt's mother's medical record from Minirth Meier New Life Clinic [.]" J.A. 4164, ¶24. Review of these and other "relevant medical records" led Dr. Wood to "conclude with an even higher degree of reasonable probability that Witt suffered from a traumatic brain injury[.]" *Id.*, ¶26.

Rather than being cumulative, the basis for Dr. Wood's findings indicate that the mental health records' significance was factually intertwined with the TBI evidence. The records are not cumulative; they are corroboration. That would've been obvious if the defense counsel had obtained them in 2004 as even minimally competent counsel would have done.

2. Superhuman Feats of Lawyering

When counsel are gathering mitigation evidence, filing for subpoenas is routine work. Here, appellate counsel obtained the mother's mental health records simply by asking. Neither effort would have required "superhuman feats of lawyering." Answer 67.

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

The government criticizes Appellant for "making no mention of the statutory right of the victims to be present for the court-martial[.]" Answer 119 n. 33. But there is no precedent "overlaying [this] generally applicable statute specifically onto the military justice system." *U.S. v. Dowty*, 48 M.J. 102, 111 (C.A.A.F. 1998); *see generally, LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013) (resolving case under Military Rules of Evidence instead of Crime Victims' Rights Act).

Regardless, Appellant objects to the emotional displays of the victims' family members, not their presence. Appellant does not seek a "Cheryl Pettry exception to the Strickland standard." Answer 122. He seeks relief under this Court's long-standing precedent. *U.S. v. Pearson*, 17 M.J. 149 (C.M.A. 1984).

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.

Additional Facts

1. Short Timeframe

The government argues that "Deputy Foster 'knew' Appellant for all of a matter of hours over the course of two days." Answer 123. It proceeds to calculate the percentage of time Deputy Foster spent with him in comparison with total pretrial confinement. *Id.* 129-30. And his interaction recedes as the government's pleading progresses from "days" to "a matter of hours" to "an afternoon." Answer 123; 127. By the end of its pleading, Deputy Foster is a "virtual stranger." Answer 136.

This argument appears to be directly contradicted by Deputy Foster's declaration. J.A. 3961, ¶5. "I continued to communicate with SrA Witt. I was told by other deputies in fact, that SrA Witt would request to speak with me. When I would meet with him, he would light up and engage me. We continued to read scripture together." *Id.* Appellant's mother also phoned Deputy Foster "to thank her for spending time with her son." *Id.* at ¶6. Deputy Foster continued to "meet with [Appellant]" until he left the Macon County Sherriff's Office for another law-enforcement job at the Wesleyan College Police

Department sometime before Appellant's trial in 2005.[29] *Id.* at ¶1; 5-7. Only a strained reading of Deputy Foster's declaration would lead one to conclude all of this interaction occurred in a "matter of hours." Answer 127.

Even if Deputy Foster had only interacted with Appellant for two days of his pretrial confinement as the government suggests, his observations of Appellant's genuine remorse at his Article 32 hearing remains powerful mitigation because he was immune from the attacks of bias the government continues to level against *every* other witness: their "credibility is largely suspect[.]" Answer 119; 89. He was experienced with the criminal justice system, having more than a decade of experience in law enforcement at the time of the trial. J.A. 3961, ¶1. In that time he "dealt with numerous, rapists, and other violent criminals" and had "never [once] testified on behalf of any of them." *Id.*, ¶8. Why? Presumably because some criminals who are caught do cry "crocodile tears," Answer 130, and Deputy Foster wasn't the sort of fellow who would rush to their defense.

Deputy Foster says he would have testified on Appellant's behalf if counsel had asked him – even though he was acquainted with him for only a short time. Again, why? He observed that Appellant was "overcome by emotion," "a broken young man, in

[29] If the precise amount of time that Deputy Foster interacted with Appellant is considered dispositive by this Court, this dispute should be resolved at a *DuBay* hearing.

great pain and despair," and "continued to display sadness and great emotion" after excusing himself from the hearing. J.A. 3961, ¶¶3-4. Deputy Foster made this effort, he says, because he "interpreted SrA Witt's emotions to be genuine and sincere" and says he "would not have approached him otherwise." *Id.*, ¶4.

Although the precise amount of time Deputy Foster spent with Appellant cannot be neatly calculated, he was not a naïf who had never been around criminal defendants. Yet he chose to approach Appellant at the Article 32, still remembered him three years later, and said that he would have been willing to testify on his behalf if he had been asked. That he formed a favorable opinion of Appellant's sincerity and remorse even over the short period of time asserted by the government is not "devastating" impeachment as the government believes – in fact, rather than undermining Deputy Foster, the timeframe might have impressed on the members just how remorseful Appellant was. Why else would his jailer be willing to testify on his behalf?

2. Jailhouse Letters

The government emphasizes that Appellant wrote "damning" letters in which he blamed God for what he had done. Answer 123-25, 128, 130-31, 133-35. From these letters, it concludes that Deputy Foster, due to his faith, would have declined to testify on Appellant's behalf once he was told about those letters. Answer 131, 133, 135. Further, the government repeatedly argues

that Deputy Foster's remorse testimony would have been to no avail as Appellant's jailhouse letters could be used for cross-examination and rebuttal. Answer 123-25, 128, 130-31, 133, n.41. That is wrong on three counts.

First, it is wrong because the impeachment evidence in question already came in. *See* J.A. 2765-69 (Ms. Fruit cross-examination); 2823 (Ms. Fruit's letters admitted); R. 2600 (Mr. Emurian's letters admitted). Appellant did not face further risk, and the same stale impeachment evidence would have lost its effect through repetition. The government misrepresents the soundness of a trial strategy founded on a vain effort to keep out rebuttal evidence that would inevitably come in. *See also* J.A. 2775 (Mr. Spinner acknowledging there was no conceivable evidentiary objection to admitting the letters). The government acknowledges "that apparently was not the informed defense strategy here[.]" Answer 133.

Second, it is wrong because the letters themselves are not as remarkable as the government suggests. *See* Answer 124 ("tremendous" and "stunning"), 123 ("damning"), 128 ("most damaging"), 130 ("crippling"), 133 ("crushing" and "extremely probative"), 134 ("vitriol"). Stripped of bold print, the letters are about what one would expect from someone coming to grips with the prospect of (at least) life in prison and ashamed of the conduct that led him there. Without considering more

innocuous passages, consider the worst passages quoted from:

- Appellant asks theological questions that anyone from a home similarly permeated with religion might ask: Why did God let this happen? Why did God allow him to be tempted above what he could bear? *See* J.A. 3155-56.

- He questions why he did what he did (and is consequently being punished) when he had never been in trouble before. *See* J.A. 3157-58.

- He makes suicidal comments, which are not inconsistent with someone wracked with remorse and sorrow. *See* J.A. 3158.

- He expresses self-hatred, which, again, is indicative of his remorse rather than the opposite. *See* J.A. 3160.

These were not the musings of a heartless killer bragging about or trivializing his crimes. *See e.g.*, *Pruett v. Thaler*, 455 Fed. Appx. 478, 488 (5th Cir. 2012) ("The subject wrote letters from jail where he bragged about the murder to his friends. He also threatened to kill a witness from the jail. After the jury sentenced the subject, the subject 'fainted' and when he 'awoke', he tore off his shirt and stated 'you better watch out for me. I'm going to kill every mother fucker I see.'"). These supposedly "damning" letters reveal the same troubled soul of the young man Deputy Foster described as "broken," who "sobbed uncontrollably" when faced with the evidence. J.A. 3961, ¶3.

Third, while the government notes trial counsel was "incredibly able", Answer 130, the lower court found trial defense counsel were deficient in failing to investigate the potential testimony of Deputy Foster. *Witt*, 73 M.J. at 795. The

government may be right to describe a one-sided contest as "crippling" or "crushing", but it remains to be seen how Deputy Foster will testify when prepared by effective counsel. Answer 133. However, rather than guess about how Deputy Foster would have responded to this line of cross-examination based, the correct approach would have been to seek a counter-declaration. Alternately, this Court could order a *DuBay* hearing. Guesses about to how these letters would have been received are speculation and should not be entertained.

Law and Analysis

1. Deficient Performance

The lower court found that counsel's failure to investigate Deputy Foster's testimony constituted deficient performance. *Witt*, 73 M.J. at 795. Though the government continues to defend the reasonableness of not calling him, the deficient performance issue has been resolved and, because the government did seek certification of that ruling, it is the law of the case and not before this Court. *U.S. v. Savala*, 70 M.J. 70 (C.A.A.F. 2011).

2. Prejudice

The government argues, although it seems to be referring to prejudice, that the probative value of evidence of Appellant's emotional and remorseful response at the Article 32 would have been without value even at a "run-of-the-mill court-martial" and had even less value in a capital murder trial. Answer 134. This

accords neither with common sense nor with what is known about how juries respond to evidence of remorse. *See, Skipper v. South Carolina*, 476 U.S. 1 (1986).

Justice Kennedy has 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); *see also Jones v. Polk*, 401 F.3d 257, 264 (4th Cir. 2005) (holding that remorse is an important and relevant mitigating factor in a capital sentencing proceeding); *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.")

Two capital litigators also weighed in on the prejudice from failing to call Deputy Foster. Mr. Connell noted, "remorse or lack thereof was a key controverted issue," J.A. 4077, ¶8, and "the testimony of a neutral, unbiased law enforcement agent like Deputy Foster may have resulted in a different sentence." *Id.*, ¶10. Ms. Foster reviews the empirical evidence on remorse, J.A. 4045-46, ¶¶20, 24, and concludes that she "can imagine no constitutionally permissible strategic or tactical reason for failing to call Sgt. Foster as a witness." J.A. 4048, ¶32.

This evidence was *more* relevant and probative in a capital setting. The failure to present Deputy Foster's testimony caused material prejudice. As Judge Saragosa's dissent recognizes, his testimony would have "paint[ed] a picture of a young man broken down by remorse." 73 M.J. at 838; J.A. 88.

3. Superhuman Feats of Lawyering

Locating Deputy Foster required not "superhuman feats of lawyering," Answer 67, but only picking up the phone book. This would have been of far more value and required far less effort than locating and traveling a Hobby Lobby manager to attest to Appellant's good character. *See* R. 2424-32; J.A. 2426.

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 ADJUGE A DEATH SENTENCE, IT MIGHT BE REVERSED ON APPEAL.

Law and Analysis

This Court applies the "Supreme Court's interpretation of the Eighth Amendment in the absence of any legislative intent to create greater protections in the UCMJ." *U.S. v. Lovett*, 63 M.J. 211, 215 (C.A.A.F. 2006). The government's suggestion that the Supreme Court's decision in *Caldwell*, "has no applicability to the military" warrants little discussion. Answer 138 n. 43. Appellate courts in both Texas and New York have fact-find

authority,[30] and Texas, which carries out the vast majority of executions in this country,[31] has never advanced the argument that it is not bound by the Supreme Court's jurisprudence.

The government criticizes Appellant for a lack of analysis where none is necessary. Answer 139. *Caldwell* prohibits "certain types of comment-those 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." Answer 139. One need only compare the sentencing arguments in *Caldwell* and Appellant's case side-by-side:

> 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.

Caldwell, 472 U.S. at 325; App. Br. at 119.

> 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. *Res ipsa loquitur*.

Without citing any case law, the government argues trial counsel's *Caldwell* violation is justifiable because Appellant

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Tex. Code Crim. Proc. Ann. art. 44.25 (2015); N.Y. Crim. Proc. Law § 470.15 (2015).

[31] *Glossip v. Gross*, 135 S. Ct. 2726, 2775 (2015) (Breyer, J., dissenting).

invited the error by referencing the appellate process in his unsworn. Answer 140. But the impermissible comments were not a response to the unsworn but to defense counsel's sentencing argument. *See* J.A. 1483. Further, the government in *Caldwell* made a similar invited error argument, which was rejected. 472 U.S. at 335.

Appellant does not dispute the members were given standard instructions prior to deliberation, but they were never given the "strong curative instruction," called for by *Caldwell*, 472 U.S. at 339, given immediately after the offending remarks, as the Supreme Court recommended in *U.S. v. Young*, 470 U.S. 1, 13-14 (1985), or given later but with specific reference back to the misleading remarks, as in *Donnelly v. DeChristoforo*, 416 U.S. 637, 640-41, n. 9 (1974). The standard instructions were woefully deficient to cure the Eighth Amendment violation here.

Finally, again without citing authority, the government argues that comments diminishing the jury's responsibility for a death sentence are reviewed under *U.S. v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005), which is rooted in the Fifth Amendment's Due Process Clause, instead the Eighth Amendment as instructed by the Supreme Court in *Caldwell*. *Caldwell* violations do have a Fifth Amendment corollary: prosecutorial comment on the silence of the accused. *Griffin v. California*, 380 U.S. 609 (1965).

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.

Law and Analysis

As with the failure to investigate Deputy Foster addressed above, the holding that defense counsel's failure to limit the substance and quantity of impermissible victim-impact testimony is the law of the case and not before this Court. *Savala*, 70 M.J. at 76-77. What remains, in Chief Judge Posner's words, is only "to assess the harm done by the errors considered in the aggregate." *U.S. v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000).

The government argues—again without citation to authority—*Booth* is inapplicable because "the disputed testimony in the case *sub judice* came directly from the witnesses rather than carrying the imprimatur of the government in the form of a formal written report prepared by a government agency . . . Booth was never intended to apply to such facts." Answer 167. This is directly at odds with this Court's application of *Booth* in *Akbar* to witness testimony. *See* 74 M.J. 364, 393 (quoting *Booth*, 482 U.S. at 508); *see also DeRosa v. Workman*, 679 F. 3d

1196, 1237 (10th Cir. 2012) (applying "clearly established federal law" to victim-impact testimony). The Eighth Amendment does not put form over substance as the government suggests.

With regard to prejudice, the government alleges "there is no likelihood" the impermissible testimony "impacted the members improperly in their sentencing deliberations[.]" Answer 170. Yet the improper testimony by four family members speaks for itself. Answer 130-33. Mr. Bielenberg and Mr. Schliepsiek's inadmissible comments cannot be described as "passing" or "brief", and they dwarf those at issue in *Booth*. Answer 163, 170. Had the members not been exposed to this evidence, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. 537.

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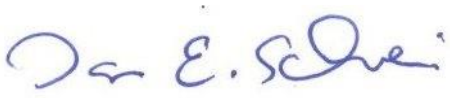

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CERTIFICATE OF FILING AND SERVICE

I certify that I have electronically filed a copy of the foregoing with the Clerk of Court on December 21, 2015, and that a copy was served via electronic mail on the Air Force Appellate Government Division on December 21, 2015.

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