30 November 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. No. 36785
Senior Airman (E-4) ANDREW PAUL WITT, USAF *Appellant.*	)	USCA Dkt. No. 15-0260/AF

BRIEF ON BEHALF OF THE UNITED STATES

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UNITED STATES, *Appellee,*	)	UNITED STATES' BRIEF
v.	)	Dkt. No 15-0260/AF
Senior Airman (E-4), ANDREW PAUL WITT, USAF, *Appellant.*	)	ACM 36785

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

STATEMENT OF STATUTORY JURISDICTION

This is a mandatory review case under Article 67(a)(1), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is partially correct. The Air Force Court's first decision was not conducted en banc as alleged by Appellant; it was in fact only a panel decision of the Court. On 21 April 2010, the Air Force Court granted the United States' 1 February 2008 motion for en banc consideration, but the Court's original decision was in fact not considered en banc. The decision itself is not labeled as an en banc decision; United States v. Witt, 72 M.J. 727 (A.F. Ct. Crim. App. 2013). Footnote 17 of the opinion details the Air Force Court judges who did not participate either because of a conflict of interest or retirement but notes: "The remaining judges each chose not to participate given their recent assignments to the Court." Witt, 72 M.J. at 776. Because the remaining available judges "chose" not to participate, it was

not an en banc decision. The United States filed a timely motion to vacate the Court's original decision because it was not considered en banc as required by the Court's own order. The United States also filed a timely motion for reconsideration and reconsideration en banc of the original decision. The Court granted reconsideration and reconsideration en banc, and the Court actually sitting en banc this time, reversed the Court's original decision. United States v. Witt, 73 M.J. 738 (A.F. Ct. Crim. App. 2014). The second decision is clearly labeled en banc and was considered by en banc composition of the Court. The United States' motion to vacate became moot by the Court's grant of reconsideration and reconsideration en banc.

STATEMENT OF FACTS[1]

The evening of 4 July 2004 and the early morning of 5 July had been a good time for SrA Andy Schliepsiek, his wife Jamie, and then-SrA Jason King and his wife Paige. Between 1630 and 1700, Andy and Jamie arrived at the Kings' on-base residence, 1085-B Sergeants Dr., to cookout with Jason, Paige, and their young daughter. (J.A. at 1498, 2958.) The two couples spent most of their time on the back porch eating, drinking, and playing games. (J.A. at 1499.) Andy and Jamie, along with the

[1] Appellant's brief does not discuss of the facts of his brutal crimes. The United States sets forth detailed facts to demonstrate why the aggravating facts outweighed any mitigation and why a death sentence was inevitable.

Kings' daughter, drew on the sidewalk with chalk. (J.A. at 1509.)

At 2100, when the Kings' daughter went to bed, everything was normal. (J.A. at 1498.) At 0100, now 5 July, when Paige went to bed, everyone was "fine." (J.A. at 1502.) However, when Paige was awoken three hours later by her doorbell and banging on her door, Andy and Jamie would be dead and Jason would be fighting for his life.

I. King Residence: 0130-0317

Just after Paige went to bed, at approximately 0130, Jamie told Andy and Jason about Appellant's unwanted sexual advance upon her the night before. On the evening of 3 July 2004, Appellant, considered a friend by the Schliepsieks, was invited to Jason's on-base residence by Andy. (J.A. at 2522.) Appellant drove to Jason's house and met Jason for the first time. (Id.) Appellant was introduced to Jason as "Andrew" but no last name was given. (Id. at 2522, 2532.) Later, Appellant went to the on-base residence of Andy and Jamie. (J.A. at 1789.) Later in the evening, Appellant made, as he would later describe, an "unwelcome" sexual advance towards Jamie. (Id.) She refused the advance and went to bed. (Id.)

Upon hearing this for the first time on the morning of 5 July, Andy became angry and immediately called Appellant using his cell phone. (J.A. at 1510-11.) The call took place at 0137

and lasted four minutes. (J.A. at 2968-70.) At 0142, Andy made a second call to Appellant that lasted six minutes. (Id.) At 0200, Andy made a third call to Appellant that lasted three minutes. (Id.) Jason described the initial call between Andy and Appellant as a "heated conversation," and he remembered Andy telling Appellant he was going to tell his first sergeant and commander about what Appellant had done. (J.A. at 1511.) Between 0206 and 0212, Andy and Jason tried to call Appellant a total of nine times, none of which were picked up by Appellant. (J.A. at 1517, 2968-70, 2973-76.) The last call from either Andy or Jason to Appellant took place at 0212. (J.A. at 2973.)

All of the phone calls originating from either Andy or Jason took place on Jason's back patio. (J.A. at 1512.) Although Andy was upset while the initial phone calls took place, the two stopped calling Appellant at 0212 because they "were over it." (J.A. at 1513-14, 2537.) At 0221, Appellant called Andy. (J.A. at 2974-76.) The call lasted 33 minutes, ending at 0254. (Id.)

II. Appellant's Planning and Premeditation to Kill: 0130-0400

At approximately 0315, 21 minutes after ending his phone conversation with Andy, Appellant drove onto Robins Air Force Base via Gate 2 from his off-base residence. (J.A. at 1599, 2979-3037.) The approximate distance between Gate 2 and Appellant's residence is 6.9 miles. (J.A. at 3093-94.)

Appellant parked his car in base housing approximately 50 yards from 871B 9th Street, a distance of 2.5 miles from Gate 2. (J.A. at 2959, 3093-94.)

About five and a half hours earlier, at approximately 2145 on the evening of 4 July, Appellant had gone to see a movie with a friend, SSgt Molelekeng Mohapeloa. (J.A. at 1732.) After the movie released at approximately 2350, SSgt Mohapeloa drove Appellant to his house and stayed there for about one hour until 0100 on now the morning of 5 July. (J.A. at 1733.) When she left the house at 0100 (just 37 minutes before Andy would make his first call to Appellant), Appellant was wearing cargo shorts, a shirt, and flip-flops. (J.A. at 1734.)

Appellant would later tell Mr. Christopher Coreth, his roommate up until 5 July 2004, that he got a call from Andy, that Andy knew that Appellant had tried to make a pass at Jamie, and that Andy was going to say something about this and another affair Appellant was having in order to get Appellant into trouble. (J.A. at 1586-87.) In response to this, Appellant told Mr. Coreth that he drove on base to their house. (J.A. at 1588.) Appellant told Mr. Coreth that he wore BDUs so that "they wouldn't see me."[2] (Id.)

In his written statement, Appellant wrote that when he left his house, he took the knife from his closet and put it in his

[2] Appellant was not scheduled for duty and did not perform any military-related duties between 2 and 5 July 2004. (J.A. at 2966.)

trunk. (J.A. at 3078-87.) Appellant wrote, "The clothes I wore were fatigues I wanted to observe them unseen to see what was going on." (Id.) He also wrote, "I parked my car about 50 ft from the corner of where I showed OSI the place I threw the knife. I parked there to, again, be unnoticed." (Id.)

During his interview with SA Billups, Appellant initially claimed that he was not on base that night. (J.A. at 1792.) Upon further questioning, Appellant changed his story by first saying that he came on base to drive around a little bit, then saying that he came to the base to hang out in a dorm. (J.A. at 1794.) Upon additional questioning, Appellant changed his story a third time to say that he came on base and went to Andy and Jamie's house to apologize and that Andy and Jamie had told him to leave, which he said he did. (J.A. at 1795.) He then changed his story again to say that he came onto base, parked his car, and went to Jason's residence and observed them "from behind the bushes and the trees." (Id.) Appellant also told SA Billups he wore BDUs because "he did not want to be seen." (J.A. at 1818.)

Now on base, camouflaged, and watching Andy, Jamie, and Jason "from behind the bushes and trees," Appellant called Jason at 0332. During that 10-minute call, Jason remembered Appellant was "apologetic" and said that he did not know why he did that. (J.A. at 1513.) Appellant also told Jason that he and Andy

"should come over here and kick my ass." (J.A. at 1543.) At 0350, Tim Johnson, Jason's close friend, called Jason. (J.A. at 2977-78.) The call, lasting 16 minutes, would end at 0406. (Id.) According to Mr. Johnson, the issue about Appellant trying to kiss Jamie "did not seem to be a big deal to me" and that he "did not think it was too big of a deal for [Jason] either." (J.A. at 3756.)

III. Appellant's Murderous Attack Begins: 0400

At approximately 0400, Andy, Jamie and Jason left Jason's house by car to go to Andy and Jamie's house. (J.A. at 1518.) Though he could not remember why, Jason remembered that they were going to be at the Schliepsiek's house for "minutes, not any extended amount of time" before they would return back to his house. (J.A. at 1519, 1740.) The distance on foot between the two houses was approximately .2 miles while the distance by car was approximately .3 miles. (J.A. at 2958, 3093-94.) Jamie drove the car while Jason continued his phone conversation with Mr. Johnson. (J.A. at 1519.)

Appellant would later tell SA Billups that he watched Andy, Jamie, and Jason from the bushes and trees because he "wanted to know what they were doing, what they were up to." (J.A. at 1796.) He would recount seeing the three get into a vehicle and watching them drive away. (Id.) Appellant then told SA Billups

that he traveled to the Schliepsiek house by foot. (J.A. at 1797.)

At 0355, SSgt Shawn Alexander was awoken by his new puppy. (J.A. at 1638.) Sitting in the back of his residence at 1056A 10th Street, SSgt Alexander saw a person running on the street of Sergeants Drive between 1093B and 1094A going left to right.[3] (J.A. at 1638-39, 1642.) The person was white, had short brown hair, was wearing dark pants and a heavy shoe, and was moving "like he had just started out running." (J.A. at 1639, 1641.) SSgt Alexander testified that about 100 feet separated his house from Sergeants Drive and that Sergeants Drive has several lights that light up the street. (J.A. at 1640, 1643.) Approximately 10 minutes later, after he had gone back in and was going back to bed, SSgt Alexander saw lights and, after looking through his window, saw Security Forces cars outside. (J.A. at 1640.)

Upon arriving at the Schliepsiek residence, either Andy or Jamie unlocked the dead bolt and the door lock of the front door. (J.A. at 1742.) Jamie had taken Jason's phone from Jason and was talking to Mr. Johnson. (J.A. at 1520.) Jamie went through the front door and down the hallway to her and Andy's bedroom. (J.A. at 1520, 2960-61.) Jason followed Jamie down the hall because he wanted to hear what she and Mr. Johnson were

[3] SSgt Alexander's testimony of "left to right" was based on Prosecution Exhibit 5. From his actual vantage point on his back porch, the person was moving right to left. (J.A. at 1638-39.)

saying about him. (J.A. at 1521.) Jamie handed Jason his phone back briefly after he entered the bedroom. (Id.)

In his oral statement, Appellant told SA Billups that he let himself into Andy and Jamie's house and found Andy in the kitchen. (J.A. at 1797.) Andy immediately began yelling at Appellant to "Get out. You just need to, you need to leave." (Id.) Andy also yelled, "What the fuck are you doing here? Why are you here?" (Id.) Appellant wrote the same version of events in his written statement but added that the main door to Andy's house was open when he entered. (J.A. at 3078-87.)

Almost immediately after getting his phone back from Jamie, Jason heard Appellant in the hallway. (J.A. at 1521-22.) Jason did not hear a doorbell ring or a knock on the front door. (J.A. at 2524.) When Jason first saw Appellant, Appellant was standing in the hallway looking into the bedroom. (J.A. at 1522.) Appellant, wearing BDUs, stated, "Oh good, you're here, too" in a calm tone. (J.A. at 1522, 2528, 2540.) Appellant then turned around and went back to the living room as Andy followed. (J.A. at 1522.) Jason remembers hearing Andy saying, "Get out of my house. Why are you here?" (J.A. at 1525.) Jason remembered he was "concerned as to why [Appellant] was wearing BDUs." (J.A. at 2533-34.)

Jason told Mr. Johnson, "Tim, I've got to go . . . The guy's here who we've been talking about, I've got to go." (J.A.

at 1523.) Jason hung up the phone and walked down the hallway. (Id.) When Jason got to the doorway at the end of the hallway leading into the living room, Andy and Appellant were "scuffling" near the kitchen door that leads into the living room. (J.A. at 1523, 1527, 2961.) Appellant was to the left of Andy and the two were shoulder to shoulder. (J.A. at 1523.) Jason stated that "there was no fists being thrown, it was just a struggle. It looked like they were kind of wrestling around . . . ." (J.A. at 2527.) Jason, intending to break them up and feeling that Appellant was getting the better of Andy, went to Appellant's left side and put him in a headlock using his right arm. (J.A. at 1523-24, 2523.) Jason pulled Appellant's head back and said, "Dude, get the fuck out of here." (J.A. at 1524.) Jason recalled, "I wanted to get [Appellant] off of Andy and get him out of the house." (J.A. at 2527.)

Jason did not punch or strike Appellant at any time. (J.A. at 1524.) In fact, Jason remembered thinking that he "didn't want any trouble." (J.A. at 1561.) After getting Appellant off of Andy, Jason remembered Andy staggering and "kind of rolled off to the side and went further into the living room." (J.A. at 1525, 2523, 2539.) Jason described further, "As soon as I put [Appellant] in a headlock, Andy turned 180 degrees and went farther into the living room." (J.A. at 2539.)

Appellant would later tell SA Billups that he and Andy got into a scuffle between the hallway and the kitchen and that Jason, who came from the back bedroom where he and Jamie were, grabbed Appellant from the top, bent him forward at the waist, and put him in a headlock. (J.A. at 1797.) During his interview with SA Billups, Appellant "didn't mention anything about being physically threatened once he arrived at the house" and he "never mentioned that his life was in danger." (J.A. at 1820-21.) In fact, SA Billups stated that Appellant did not indicate that he felt threatened in any way during the physical confrontation that occurred before Appellant began stabbing Jason. (J.A. at 1821.) Appellant stated that Jason told him, "You just need to get out of here." (Id.)

As soon as Jason asked Appellant to leave, Appellant stabbed him in the chest. (J.A. at 1555.) Jason described that "we are talking seconds. I put him in a headlock, he--Andy rolled off, I asked him to leave, and I got stabbed." (J.A. at 2527.)

Appellant told SA Billups that he stabbed Jason in the kidney. (J.A. at 1798.) When asked where the knife came from, Appellant responded that he "grabbed the knife from his right cargo pocket" of his BDU uniform. (J.A. at 1798-99.) Appellant told SA Billups that the knife "could go through an inch of steel." (J.A. at 1804.)

According to Appellant, Jason responded to being stabbed by backing up and screaming, "He's got a knife." (J.A. at 1799.) Appellant told SA Billups that Jason started to turn and run away at which point Appellant stabbed Jason again. (Id.) Appellant could not remember if he stabbed Andy before he stabbed Jason the second time but did state that he stabbed Andy in the back. (J.A. at 1799-1800.)

In his written statement, Appellant wrote that after he initially stabbed Jason he "tried to stab the guy again and missed and he yells that I have 'a knife' and that's when everyone started screaming and running and I stabbed Andy while Jamie runs into the bedroom and locks the door." (J.A. at 3078-87.)

Jason let go of Appellant and backed into the kitchen. (J.A. at 2979-3037, 3078-87.) When he backed into the kitchen, Jason heard Jamie scream, "Oh my God, you're bleeding." (J.A. at 1528.) Jason was not sure if Jamie was reacting to either him or Andy bleeding. (J.A. at 1549.) Upon hearing that, Jason looked down to find his shirt torn and blood everywhere. (J.A. at 1528.) Jason immediately turned left through the kitchen and went to the side door. (J.A. at 1529, 2979-3037.)

The door was locked and dead-bolted. (Id.) As he was trying to open the door, Appellant stabbed Jason in the back. (Id.) Jason remembered the kitchen was not in the disarray

shown in Prosecution Exhibit 21, Picture 046 before he was attacked. (J.A. at 1533-34.) Eventually, Jason got the door opened and went outside. (Id.; *see also* J.A. at 2979-3037.) Jason ran towards the first house he saw with a light on and remembered thinking about "getting away, getting to the house, because I knew that he had stabbed me three times in the back." (J.A. at 1530-31, 2979-3037.) Appellant chased him out of the house, and Jason thought Appellant stabbed him once he was outside. (J.A. at 1530, 1549.)

Jason stated the he left the Schliepsiek house and went around a storage shed outside. (J.A. at 1738.) He tripped over a tree branch, and fell down approximately 25 yards from the door he had just left. (J.A. at 1738-39.) Jason then got up, cut through the grass at the corner of Fort Valley and 10th Street, crossed the sidewalk and 10th Street, and went to the door. (J.A. at 1739.) At some point, Jason lost one of the flip-flops he was wearing. (J.A. at 1534, 2979-3037.)

When Jason arrived at the closest house with a light on, he rang the doorbell, knocked, and made a loud commotion. (J.A. at 1531, 1644.) TSgt Jimmy Fee, the owner of the house, testified that he opened the door to find Jason "standing outside the door bleeding all over the place from his right side." (J.A. at 1644.) After telling TSgt Fee to call 911, Jason laid down on the driveway. (J.A. at 1531, 2979-3037.) At 0411, TSgt Fee

called 911 and described the assailant as a white male, wearing BDUs, with the name "Andrew." (J.A. at 1649, 3077, 3088-90.)

IV. Appellant Returns to Kill Andy and Jamie: 0407

At the same time as Jason was running to TSgt Fee's house, the unmitigated horror continued less than a block away in the Schliepsiek residence. Four minutes prior to TSgt Fee calling 911 for Jason, Andy had made his call to 911 at 0407. (J.A. at 2968-70.) It was during this one minute call that Appellant reentered the Schliepsiek home.

As he would later tell SA Billups, Appellant chased Jason to the door where he stabbed him again. (J.A. at 1800.) When Jason continued to run, Appellant stabbed him a third or fourth time. (Id.) Appellant told SA Billups that he then went back to the house because "he didn't want to leave any evidence." (Id.) When he returned, Appellant said that he found that "somebody was on the phone." (Id.)

Ms. Rita Triplett answered Andy's 911 call that early morning. (J.A. at 2162.) Ms. Triplett remembered hearing "a lot of screaming on the phone." (J.A. at 2164.) She recalled hearing two voices, the first being a female, and hearing someone say, "I've been stabbed." (J.A. at 2164-65.) At trial, she stated, "You hear the name, 'Andrew', said. You hear, 'No.' And that's pretty much what I remember hearing from that night, or the three things that stick out of my mind." (J.A. at 2165.)

She remembered the two voices on the other end were "in distress, screaming, just a lot of screaming." (Id.) She remembered initially thinking "it was a female talking to a male named Andrew, telling him to stop" but that her mind changed when she "heard the second scream." (Id.)

Very shortly thereafter, the 911 call ended on Andy's end. (J.A. at 2164.) Mr. Triplett attempted to call Andy's cell phone back three different times but received his voice mail each time. (Id.)

Appellant told SA Billups that Jamie locked herself in the back bedroom. (J.A. at 1801.) He told SA Billups that he kicked the door a couple of times and used his shoulder to break through the door. (Id.) Once inside, he found Jamie behind the door in the fetal position. (Id.)

After stabbing Jamie multiple times, Appellant told SA Billups that he closed the bedroom door, went back down the hallway, and found that Andy was still alive. (J.A. at 1802.) Appellant told SA Billups that he stabbed Andy in the heart. (Id.) After stabbing Andy in the heart, Appellant told SA Billups that he went down the street, threw the knife into a yard, got into his vehicle, and drove off. (J.A. at 1803.) Overall, the sequence of stabbings, as explained by Appellant to SA Billups, consisted of Appellant first stabbing Jason, then stabbing Andy, then following Jason outside, and then returning

to stab Jamie and finally stabbing Andy again on Appellant's way out of the door. (J.A. at 1814.)

According to his written statement, Appellant stated that he ran after Jason, stabbed him again, and then Jason fell down. (J.A. at 3078-87.) Appellant stated that he ran back in, busted down the door where Jamie was, and stabbed her "a couple times." (Id.) He wrote that he ran after Jamie because he "was scared to leave a witness." (Id.) He wrote that he stabbed Andy in the ribs and heart, ran out of the house, dropped the knife and left. (Id.) Appellant specifically noted that as he was running out of the house and to his car that he did not see "Andy's friend." (Id.) In particular to his final attack on Andy, Appellant wrote, "I then run out to Andy and stab him in the ribs and finished with a blow to the heart." (Id.)

At some point in July 2004, SSgt Priscilla Steele, who had been Appellant's best friend, had a conversation with Appellant about what happened in the morning hours of 5 July. (J.A. at 1580-81.) Appellant told SSgt Steele that he killed everybody. (J.A. at 1581.) When SSgt Steele asked why, Appellant responded the reason was to "not leave any witnesses." (Id.)

Back at TSgt Fee's house, Security Forces arrived on the scene first. (J.A. at 1531.) SSgt Heaven Adams, along with SSgts Grimme and Ranjo, found Jason laying on the ground "severely bleeding." (J.A. at 1669.) Jason told them "Andrew"

had done it and that he was wearing BDUs.[4] (J.A. at 1531, 1655.) Jason also told them to tell his wife and daughter that he loved them and that he was going to die. (J.A. at 1532, 1655.)

At 0420, the paramedics, including Mr. Andrew McNeil, arrived at the residence. (J.A. at 3088-90.) Upon arrival, Mr. McNeil found Jason "lying in front of a doorstep" and "bleeding profusely." (J.A. at 1654.) Jason had four to six stab wounds to his back and torso. (J.A. at 1655, 1663.) Mr. McNeil checked Jason's radial pulses at his wrist and found they were absent, which told him that Jason's blood pressure was "very low." (J.A. at 1660.)

Meanwhile, at 0423, Appellant called his roommate Airman Edward Love. (J.A. at 2974-76, 3138.) The phone call was never answered and no message was left. (J.A. at 3138.)

Back at TSgt Fee's house, the paramedics left from the residence at 0432 with Jason and arrived at the nearest hospital, Houston Medical Center, at 0441. (J.A. at 3088-90.) The paramedics would have normally taken him to a separate hospital, one that is a designated trauma center, but they went to the closer one because, as Mr. McNeil testified, "We didn't feel like he was going to make it." (J.A. at 1658.)

Approximately 10 to 15 minutes after arriving at TSgt Fee's house, SSgts Adams, Grimme and Ranjo left to find Jason's

[4] Jason had also told TSgt Fee that "Andrew" had stabbed him. (J.A. at 1645.)

residence. (J.A. at 1670.) After establishing a perimeter around Jason's house and noticing the back porch light on and a small candle still lit, the officers knocked on the door. (J.A. at 1671.) Paige answered the door and the officers realized Paige was alone in the house with her daughter. (J.A. at 1672, 1687.) When asked where her husband was, Paige looked at the backyard and told SSgt Grimme, "I have no idea." (J.A. at 1688.) Paige told the officers who had been there and that they may have gone to the Schliepsiek's house. (J.A. at 1673.) The officers left the King residence approximately one minute later headed toward the Schliepsiek home. (J.A. at 1688.)

Upon arrival, the lights were off outside but the kitchen light was on. (Id.) SSgt Grimme knocked on the closed front door but received no response. (J.A. at 1696.) Looking through the window, SSgts Adams and Grimme could see Andy lying on the floor. (J.A. at 1674, 1690.) While establishing a perimeter around the house, SSgt Adams noticed the side door of the house leading to the kitchen area was open. (Id.) SSgt Adams, along with SSgt Grimme and two other officers, entered the home through that door with their guns drawn. (J.A. at 1675, 1692.) They immediately noticed disarray near the doorway. (J.A. at 1675.)

From the kitchen, the officers went into the immediate room and saw Andy. (J.A. at 1675, 2979-3037.) An officer checked

Andy's pulse and found none. (J.A. at 1691.) The officers proceeded down the hallway to clear the other rooms and found more blood. (J.A. at 1676, 2979-3037.) When they walked down the hallway, all doors in the hallway were closed. (J.A. at 1692.) SSgt Grimme checked the bathroom and the master bedroom. (J.A. at 1693.) When SSgt Grimme came to the completely closed master bedroom door, blood was flowing from underneath the door and there was blood spatter around the door. (J.A. at 1693, 2979-3037.) SSgt Grimme noticed a large crack in the door running from the doorknob to the doorjamb and splintered wood, indicating to him that there had been forceful entry prior to his arrival. (J.A. at 1693, 1705.)

With his gun drawn, SSgt Grimme twice stated, "Security Forces. If anyone is inside, open the door and step out with your hands up." (J.A. at 1694.) When he received no response, TSgt Gonzales kicked the door. (Id.) The door opened slightly and then closed back into place indicating to SSgt Grimme that someone or something was behind the door. (J.A. at 1694, 1703.) SSgt Grimme and TSgt Gonzales holstered their weapons and pushed the door open approximately two feet so that SSgt Grimme could barely squeeze through the door sideways. (J.A. at 1695.)

SSgt Grimme entered the room and found Jamie dead. (J.A. at 1695.) SSgt Grimme put on a pair of gloves and checked for a pulse, finding none. (Id.) He was in the room for

approximately 30 seconds. (Id.) The officers then exited the house through the front door. (J.A. at 1704.) SSgt Grimme went into the street because he, a seven-year police officer, felt nauseous. (J.A. at 1703.)

V. The Aftermath

At approximately 0500 on the morning of 5 July, SA Billups arrived at the Schliepsiek home. (J.A. at 1805.) SA Billups observed Jamie from the outside of the bedroom window. (J.A. at 1806.) To not disturb Jamie's body and the evidence inside the room, SA Billups broke the bedroom window from the outside in order to gain access to the bedroom. (Id.) SA Billups stated the Prosecution Exhibit 21, DSC_0149 portrayed the condition of Jamie's body when he looked into the window. (Id.) He also stated that the item of clothing to the right of the picture was in the same position when he looked into the room. (J.A. at 1807.)

As Amn Love later told SA Billups, Appellant and Amn Love went to lunch at Applebee's on 5 July. (J.A. at 1812, 1823.) Amn Love had heard that there had been two stabbings on base and that he wanted to go to the base to "see how Jamie and Andy were and visit because he hadn't seen them." (Id.) Appellant stated that when he and Amn Love drove up to the crime scene, Amn Love began screaming, "Oh, my God. Oh, my God. It's Jamie and Andy." (Id.)

According to Amn Love, "On the afternoon of 5 July 2004, SrA Witt told me SrA Andy Schliepsiek was not happy with him and did not want to be friends anymore." (J.A. at 3780-81.) Amn Love saw Appellant for a few minutes at Applebee's that afternoon but Amn Love went to SSgt Steele's house to see his daughter. (Id.) While there, Amn Love saw on the news that something had happened on base and called Appellant to let him know he was going on base. (Id.) Amn Love picked Appellant up at his house and, on the way there, told Appellant that he had a bad feeling and was scared. (Id.) Appellant responded that Amn Love was scaring him too. (Id.) Once they had pulled up to the crime scene, Appellant stated, "I can't be here, I have to go." (Id.)

At approximately 1915 at the crime scene on 5 July, Appellant was apprehended after he had returned to the crime scene as a passenger in Amn Love's truck. (J.A. at 1786-87.) Appellant did not approach the officers when he arrived and did not turn himself in. (J.A. at 1809.) By that time, Appellant had been identified as a suspect and the officers were checking the identification of persons at the crime scene. (J.A. at 1810.) Both Appellant and Amn Love were placed in handcuffs. (J.A. at 1823.)

After being taken to the AFOSI office and advised of his rights under Article 31, UCMJ, Appellant gave both a verbal and

written statement. (J.A. at 1787-88.) SA Billups never told Appellant anything about the crime or the crime scene other than that it was a stabbing and did not tell Appellant details of the crime such as how many times each person was stabbed or where the stab wounds were on each person at any point in the interview. (J.A. at 3757.)

VI. Appellant's Attempt to Dispose of Evidence

During his interview, Appellant described to SA Lamar Cromwell where he disposed of the knife. (J.A. at 1832.) Appellant agreed to show the agents where he threw the knife and drove with the agents to the location in the late evening of 5 July or just after midnight on the morning of 6 July. (J.A. at 1834-35.) SA Cromwell seized the knife, and Appellant later identified the knife as his own and the knife that he used to kill Andy and Jamie. (J.A. at 1834-36.)

On 6 July, pursuant to a search warrant, SA Thomas Rutherford searched Appellant's residence. (J.A. at 1751.) There, SA Rutherford found Appellant's BDU pants and blouse balled up in the corner of his bedroom. (J.A. at 1752.) Appellant's BDU cap or boots were not found at the residence. (J.A. at 1753.) Both the BDU blouse and pants were sent to United States Army Criminal Investigation Laboratory (USACIL) for trace analysis. (J.A. at 1754, 1756.) Blood matching the DNA profiles of Jamie and Jason were found on Appellant's

blouse. (J.A. at 1974.) Jamie's blood was found on Appellant's pants. (J.A. at 1976.)

Also on 6 July, SA James Billups collected a pair of boots and a military BDU cap from a dumpster outside of the Children's Learning Center off of Moody Road near Appellant's residence. (J.A. at 1778, 1784, 2979-3037.) During Appellant's earlier interview with SA Billups, Appellant told SA Billups that he threw his boots and BDU cap in that specific dumpster. (J.A. at 1784.) The boots were sent to USACIL for testing. (Id.) Jamie's blood was found on both of Appellant's boots. (J.A. at 1977.) Two blood samples were also taken from Appellant's BDU cap; one matched Jamie's DNA profile while the second had a mixture of two possible contributors, Andy and Jamie. (J.A. at 1973.)

When asked by SA Billups why he threw away his BDU cap and boots but not his BDU pants or blouse, Appellant responded that when he got home to take a shower and pulled off his uniform he noticed blood on his hat and boots and decided to throw them away. (J.A. at 1819.)

VII. Evidence Gathered at the Schliepsiek Residence

SA Rutherford seized a number of items from the Schliepsiek residence including a cell phone, Jamie's eyeglasses, Jamie's skirt, and other blood samples. (J.A. at 1757.) Jamie's eyeglass frames were smashed. (J.A. at 1758.)

The cell phone depicted in Prosecution Exhibit 21, DSC_0004, was found open, and the phone was off when it was seized. (J.A. at 1759-60.)

Jamie's skirt was located in the back bedroom of the home. (J.A. at 1760.) SA Rutherford saw the skirt in its original position and remembered the biggest thing that stood out was the bloodstain on the skirt itself. (J.A. at 1761, 2979-3037.) SA Rutherford originally found the skirt "kind of tossed to the side" on both the tile and edge of the rug as depicted in Prosecution Exhibit 21, DSC_0149. (J.A. at 1761, 1767.) The skirt was not in a pool of blood, and there was no pool of blood or significant blood spatter found under the skirt. (J.A. at 1761.) After testing at USACIL, the blood found on Jamie's skirt matched her DNA. (J.A. at 1979.)

VIII. Blood Evidence at the Schliepsiek Residence

On 7 July, AFOSI SA James Poorman selected 19 samples of blood from the Schliepsiek residence for testing at USACIL. (J.A. at 3096-98.) At trial, SA Poorman used Prosecution Exhibit 50, a slide show, to describe where the blood samples were taken throughout the house. (J.A. at 1905.) SA Poorman also testified about the position in which he found Jamie's skirt and specifically noted that the skirt was both unbuttoned and unzipped. (J.A. at 1914.)

Mr. Paul Kish, a blood stain pattern analyst recognized as an expert by the court, evaluated the crime scene and forensic evidence in this case. (J.A. at 1990.) Using crime scene photographs and diagrams, Mr. Kish explained the blood patterns present at the Schliepsiek residence. (J.A. at 1992, 3137.)

IX. Jason's Wounds: "His Survival Was Close to a Miracle."

In total, Appellant stabbed Jason four times and lacerated his arm. (J.A. at 1530.) Jason had emergency surgery to save his life and remained in the hospital for 15 days. (J.A. at 1532.) As part of his treatment, Jason had multiple surgeries and spent over 30 days in the hospital. (App. Ex. CCXXXVIII.)[5] Dr. Virgil McEver treated Jason upon his arrival to the hospital and would eventually perform four to five surgeries on him. (J.A. at 1944, 1950.) Dr. McEver estimated Jason had lost approximately 30 percent of his blood. (Id.)

At trial, Dr. McEver explained Jason's wounds using Prosecution Exhibit 34 as a reference. (J.A. at 1945.) Approximately two inches across, Jason's stab wound on his chest (referred to as Wound 1) was a full stab wound to the hilt. (J.A. at 1946.) The wound punctured Jason's left lung and "went almost through the entire chest cavity." (J.A. at 1948, 1951.)

[5] The United States recognizes that App. Ex. CCXXXVII is not contained within the Joint Appendix. However, after reviewing Appellant's brief, this and a small number of additional documents became necessary for the government's Answer. As a result, for those few documents not contained in the Joint Appendix, the government has cited to the Record of Trial.

Wound 2, on Jason's back, was similar to Wound 1 in size and shape. (J.A. at 1948.) Wound 2 went to the splenic hilum and cut the splenic artery. (Id.) Dr. McEver "literally could put two fingers all the way up until the last part of the wound" and then could put the tip of his finger there. (J.A. at 1951.)

Wound 3, also on Jason's back, hit the traverse processes of the backbone and went through the lower pole of the left kidney. (J.A. at 1949.) Dr. McEver could put his finger in the wound and "literally feel the spine." (J.A. at 1952.)

Dr. McEver stated that any of Wounds 1 through 3 could have been lethal and that "it took a lot of force to make the injury to go the depth and to do the damage that was done."[6] (J.A. at 1952.) Dr. McEver was "surprised when I saw the extent of the wounds that he made it to the hospital." (J.A. at 1954.) Dr. McEver stated at trial that he was still surprised Jason survived because "he could have bled to death . . . from [Wound 1] or any of these other two wounds in two and three." (Id.) According to Dr. McEver, "I have said many times that Jason is a lucky man, and his survival was close to a miracle." (App. Ex. CCXXXVIII.)

X. Andy and Jamie

[6] Dr. McEver described Wound 4 as "more of a superficial wound" and was not sure if it penetrated anything. (J.A. 1949.)

Andy and Jamie were not so lucky. Dr. Elizabeth Rouse, recognized at trial as an expert in pathology, performed the autopsies on them. (J.A. 2069.)

a. Andy

In total, Appellant stabbed Andy three times, and Andy was alive when he received each of the wounds. (J.A. at 2077, 2088, 3117.) Dr. Rouse described Wound B as a "sharp" and "complex" wound with irregular edges, indicating "some type of movement on behalf of the weapon or on the person." (J.A. at 2077-78, 3038-49.) Dr. Rouse explained, "So the weapon basically moved in two planes. Either the weapon was moved or the victim was moving with the weapon held in place." (J.A. at 2083.)

Dr. Rouse determined the direction of Wound B was from the back of the body to the front and went from Andy's left to his right and slightly upward as it entered Andy's back. (J.A. at 2078, 3099-3106.) The wound measured 4.5 centimeters across and was deep enough that it entered Andy's right chest cavity even though the knife entered on the left side of Andy's back. (J.A. at 2079, 3099-3106.) The knife penetrated Andy's diaphragm and went into his liver. (J.A. at 2079.) After being stabbed at the location of Wound B, Andy would have still been able to talk and walk. (J.A. at 2082.) Dr. Rouse explained that if Appellant had only stabbed Andy at Wound B, Andy's prognosis

would have been "excellent for a full recovery." (J.A. at 2083.)

Wound A was vertically oriented and located exactly on the midline of Andy's back. (J.A. at 2087, 2089, 3038-49.) The wound, as compared to Wound B, was "very smooth and straight." (J.A. at 2087.) The wound penetrated the skin, went through the soft tissue of the back's midline, cut through Andy's backbone at the back portion of the fifth and sixth thoracic vertebrae, cut Andy's spinal cord, and embedded in the front portion of the thoracic vertebrae. (J.A 2089.) Dr. Rouse noted that Wound A was not a glancing blow but a blow that went "directly through those two vertebrae." (J.A. at 2090.) Though she could not give a "pounds per square inch" indication on the amount of force used to make Wound A, Dr. Rouse explained, "It depends on the weapon how much force is required, but most people know cutting steak versus when you hit a bone, I mean bone is hard. And this is a young individual that would have robust, healthy bones that would be--have considerable strength." (J.A. 2091.)

When the knife pierced his spinal cord, Andy lost all nerve connections between his brain and anything below his fourth thoracic vertebrae. (J.A. at 2092.) In other words, Andy was instantly paralyzed from his upper waist down and would have immediately fallen since he would have lost his ability to stand. (Id.) However, Andy would have still been able to talk,

yell, and be aware of what was going on around him. (J.A. at 2093.) Though the wound was incapacitating, it was not life-threatening or lethal. (J.A. at 2092.) Thus, if Appellant's attacks had stopped at that point, Andy would have lived, mostly likely a paraplegic and wheelchair bound. (Id.)

Wound C was horizontally oriented and located on Andy's chest just above his left nipple. (J.A. at 2095, 3038-49.) Wound C went through the skin and soft tissue of Andy's chest, entered the chest cavity between the fourth and fifth ribs, went through the front part of the pericardial sack, through the front and back of the left ventricle of Andy's heart, through the back part of the pericardial sack, completely through the thoracic aorta, and ended in the front portion of the thoracic vertebrae, Andy's spine. (J.A. at 2096.)

Dr. Rouse noted an abrasion around the left edge of the wound and stated it was consistent with a hilt. Dr. Rouse agreed this was consistent with the knife being driven into Andy to the hilt and noted that Appellant's knife had hilts that were consistent with the abrasion. (J.A. at 2099.)

Dr. Rouse suspected Wound C "would cause a near arrhythmia, which would cause the heart to stop, essentially immediately." (J.A. at 2098.) She explained the blood loss from the heart and aorta wounds would cause immediate loss in pressure and oxygen to the brain. (Id.) In noting that the brain can only

withstand a lack of oxygen for "four to eight or twelve seconds," Andy would have experienced a "very rapid loss of consciousness." (Id.)

Dr. Rouse concluded Wound B occurred first, followed by Wound A, and then Wound C. (J.A. at 3117.) In explaining how she determined Wound B occurred first, Dr. Rouse began by stating that Wound C was "an immediately lethal wound." (J.A. at 2100.) She explained that Andy could not have received either Wound A or Wound B after Wound C because both Wound A and Wound B showed internal hemorrhaging that would not have occurred if Andy was already dead. (J.A. at 2100, 2153.)

Dr. Rouse stated that Wound B also occurred before Wound A since Wound A was immediately incapacitating. (Id.) Dr. Rouse stated "it would be very hard to inflict wound B after wound A" because "the instant wound A was inflicted he would have started collapsing, and it would have been loss of all motor abilities, I mean he would be dead weight . . . ." (J.A. at 2101.) Dr. Rouse also noted that Andy received either Wound A or B or both while upright based on the blood drops on his ankles. (J.A. at 2151.) Dr. Rouse's conclusions of wound order correlated with the blood found at the crime scene. (J.A. at 2101.)

Based on the order of wounds, Andy was laying on his back when Appellant stabbed Andy through his heart. (J.A. at 2102.) Dr. Rouse stated that Andy would have had no use of his legs,

lying flat on his back, paralyzed from the upper chest down, and would not have been capable of sitting up or pulling himself into an upright position. (J.A. at 2102-03.)

When asked whether someone intending to stab Andy through the heart could have done a better job, Dr. Rouse responded, "No," and explained that the stab wound's location just to the side of the midline (as opposed to the midline were the sternum is located) was "basically the easiest and direct route through the ventricles . . . ." (J.A. at 2104.) Dr. Rouse concluded that the wound came "right through--not at either edge--right through the center of the heart." (J.A. at 2104.)

b. Jamie

In total, Jamie was stabbed five times, endured an additional incised wound, and was alive when she received each of the wounds. (J.A. at 2105, 2138, 3118.) At trial, Dr. Rouse began by reviewing an overall picture of Jamie's back that showed four of her six stab wounds. (J.A. at 2105.) For the specific wounds, Dr. Rouse first spoke about Wound B, located on Jamie's back to the left of her midline. (J.A. at 2107, 3050-72.)

She described the wound as "complex" because there was either movement of the knife or the body as the knife's edge was brought down. (J.A. at 2109.) The direction of Wound B was

from the back to the front and traveled slightly downward. (J.A. at 2110.)

Wound B entered the back of Jamie's left chest cavity between the 10th and 11th ribs, through the diaphragm, and into the spleen. (J.A. at 2108.) The wound caused Jamie's left lung to collapse. (Id.) While she stated the wound was "potentially survivable," Dr. Rouse described the wound as "significant." (J.A. at 2109.) In terms of the pain experienced by Jamie as a result of the wound, Dr. Rouse explained a collapsed lung would result in increased respiratory distress. (J.A. at 2109.)

Wound C was located under Jamie's left arm. (J.A. at 2112, 3050-72.) Dr. Rouse described Wound C as an "incised wound," meaning that the wound is "wider than it is deep." (J.A. at 2112.) The wound, which measured five centimeters in length, cut across the intercostal muscles, and cut into Jamie's sixth, seventh, and eighth ribs. (Id.) Though not a life-threatening injury, Wound C was one of the more painful injuries because of all the muscle, lining of the bones, and the three ribs it cut across. (J.A. at 2113.)

Wound D was located on Jamie's lower back. (J.A. at 2114, 3050-72.) Wound D cut through the skin and soft tissue of the lower back, through the psoas muscle (the large internal muscles in the lower back that allow a person to elevate their back), and went into Jamie's kidney and liver. (J.A. at 2114.) Dr.

Rouse estimated the depth of the wound was five to six centimeters. (J.A. at 2116.) The direction of the wound was back to front and came upward once the knife entered Jamie's back. (J.A. at 2115.)

Wound E was located on the right edge of Jamie's back. (J.A. at 2117, 3050-72.) The left edge of Wound E had "radiating abrasions" that were consistent with a hilt. (J.A. at 2118.) Wound E went through the skin and soft tissue of the back and entered the right chest wall between the sixth and seventh ribs, causing her right lung to collapse just as Wound B caused her left lung to collapse. (J.A. at 2120.) With both lungs collapsed, Dr. Rouse stated Jamie would have had "considerable difficulty breathing." (J.A. at 2121.)

Wound F was located beneath Jamie's right armpit. (J.A. at 2125-25, 3050-72.) Dr. Rouse described the wound's exterior as "deceptive" since the wound, as photographed, appears to not look very deep. (J.A. at 2126, 3050-72.) However, Wound F went through the skin and soft tissue of the breast and anterior chest, through the upper part of the right chest wall between the fifth and sixth ribs, and cut into the upper, middle, and lower right lung lobes. (J.A. at 2127.) All told, Jamie had three separate wounds that entered into her chest cavity. (Id.)

Wound A was located on Jamie's back to the left of her midline. (J.A. at 2129, 3050-72.)

Dr. Rouse described Wound A as the "most rapidly lethal wound--the wound with the most lethality." (J.A. at 2130.) Wound A went through the skin and soft tissue of the upper back, through the left posterior back chest wall between the ninth and tenth ribs, cut the aorta (the large artery carrying blood away from the heart) and the inferior vena cava (the large vessel that returns blood back to the heart), cut the esophagus, went through the back part of the pericardial sack (which encloses the heart), and cut the right atrium of Jamie's heart. (J.A. at 2130-31.) When asked how much time Jamie would have left after Wound A was inflicted, Dr. Rouse responded, "I would estimate seconds to even half a minute or a minute or more. It's going to be rapidly lethal, but not instantaneously lethal." (J.A. at 2132.)

Jamie also had a fracture of her left distal radius, one of the bones in her forearm closer to her wrist. (J.A. at 2125, 3050-72.) Jamie also had a blunt force injury to her right elbow and a red contusion or bruise on her right forearm. (J.A. at 2122, 2124, 3050-72.) Dr. Rouse explained that a blunt force injury is where Jamie's arm impacted a harder, relatively flat or rounded object. (J.A. at 2123.) She stated that such a fracture was "very characteristic of a fall on an outstretched hand." (J.A. at 2146.) Dr. Rouse explained such fractures are

"very painful" and that Jamie would have had "extreme loss in the use of that hand . . . ." (J.A. at 2147.)

Dr. Rouse also noted abrasions and scrapings on Jamie's knees and a linear, small abrasion on her left upper arm. (J.A. at 2125.) Both of Jamie's knees had multiple contusions and "superficial abrasions." (J.A. at 2133-35, 3050-72.) Dr. Rouse described these abrasions as "a scraping of the layers of the skin . . . more what we call like a 'rug burn' a superficial sliding . . . ." (J.A. at 2133.) The contusions and abrasions were located at the top and both sides of Jamie's knee. (Id.)

When asked if Jamie's knee supported the conclusion of seven to eight impacts to the knee, Dr. Rouse stated, "The abrasions are all in separate planes, so I think it really indicates different interactions, so that's a total of five discrete abrasions, and to most likely three or four different bruises." (J.A. at 2135.) Dr. Rouse said the injuries supported at least two or three impacts or dragging. (Id.)

Dr. Rouse specifically noted that no "classic defense wounds" were found on Jamie. (J.A. at 2136.) Dr. Rouse explained, "Classic defense wounds are where the victim will grab at the knife or use their arms to ward off the knife and have incised wounds on their forearms or hands, and, so, she did not have any of those." (Id.) In explaining the injuries to Jamie's contusions and abrasions, Dr. Rouse stated, "These would

be more indicating a struggle type injury. These are not where she's attempting to defend herself or ward off the attack." (Id.) Dr. Rouse found no defensive wounds on Andy either. (Id.)

When asked to put Jamie's wounds in order as she had done for Andy's, Dr. Rouse explained that she could put some of the wounds in relative order though she could not "delineate with medical accuracy one through six." (J.A. at 2137.) Dr. Rouse stated that Wound D corresponded with the blood staining on Jamie's skirt and that the staining supported that she was wearing the skirt and in a standing position when the injury and resulting bleeding occurred. (Id.)

Dr. Rouse also concluded that Jamie was not wearing her skirt when the other injuries were inflicted. (J.A. at 2138.) Noting that Jamie's skirt had no blood on the front or sides, Dr. Rouse explained that Jamie's other stab wounds resulted in a significant amount of blood loss and stated that if Jamie had been wearing her skirt at the time of those wounds that her skirt would have had similar blood staining as her shirt, which was soaked with blood. (Id.)

Based on this analysis, Dr. Rouse favored that Wound D was the earliest wound. (Id.) She also favored Wound A as the last wound since it was the "most lethal, most immediately lethal wound." (Id.) Though she was unable to determine the order of

the other three stab wounds and one incised wound, Dr. Rouse did state that "all of the wounds have evidence that she was alive, you know, she has pressure, she has bleeding in response to those wounds." (Id.)

After receiving Wounds A and B and being paralyzed on the floor, Dr. Rouse agreed that Andy would have been alive, conscious, and aware of his surroundings as Appellant walked down the hall and attacked Jamie in both the hallway and master bedroom. (J.A. at 2141.) She also agreed that Andy would have been alive, conscious, and aware of his surroundings as Appellant came back down the hall after attacking Jamie. (J.A. at 2142.) Dr. Rouse concluded, "Yes, he would have, until he received the chest wound, he would have been fully aware."

ISSUE A-I

TRIAL DEFENSE COUNSEL PERFORMED EFFECTIVELY BY EXERCISING A REASONABLE STRATEGY IN FOCUSING ON "STRONGER" MITIGATION WITNESSES TO THE EXCLUSION OF "WEAKER" WITNESSES, AND COMMITTED NO ERROR IN FAILING TO OBJECT TO ADMISSIBLE GOVERNMENT AGGRAVATION EVIDENCE.

Additional Facts

The United States provides the following additional facts.

A. Appellant's Motorcycle Accident

i. The Incident

Appellant submitted affidavits from multiple individuals who describe their recollection of Appellant's motorcycle

accident on 20 February 2004. Each contradict one another. In 2012, TSgt Denise Pumphrey provided Appellant an affidavit describing her version of events on the day of the accident. (J.A. at 4049.) TSgt Pumphrey states that the accident occurred "about two miles from base," Appellant "rode his motorcycle onto base after the accident," and that she drove Appellant to the hospital. (J.A. at 4049.)

Two years later, in 2014, SSgt Ed Love submitted an affidavit where, even though he states he now cannot remember the name of his and Appellant's roommate at the time, he is now able to provide new and specific details of events involving Appellant that occurred over a decade ago. (J.A. at 4126.) Unfortunately, SSgt Love's recollection directly refutes TSgt Pumphrey. Whereas TSgt Pumphrey stated Appellant rode his motorcycle onto base after the accident before she took him to the hospital, SSgt Love claims to remember Appellant "pushing the motorcycle to the house and telling me what had happened." (J.A. at 4126.) Love continues, "We tried to fix the motorcycle, but we couldn't get it running again." (J.A. at 4126.)

SSgt Love also claims the accident occurred because Appellant "either swerved to avoid the groundhog or accidentally hit the groundhog and the [sic] lost control of the motorcycle." (J.A. at 4126.) This version is contradicted by Appellant's own

father, Charles Witt, who, in his own post-trial affidavit, states that he expressed his concerns about the motorcycle accident to Appellant's counsel, therein stating, "Of particular concern to me was the fact that Andrew lost consciousness *before* the accident." (J.A. at 3910.) (emphasis added.)

ii. Appellant's Academic Record After the Accident

Despite his motorcycle incident, Appellant was able to take a CLEP test on the subject of Educational Psychology just five days later, on 25 February. (J.A. at 3270.) He took a second CLEP test on 3 March, another in late March, and a fourth in early May. (J.A. at 3271-73.) In the meantime, Appellant was admitted to Georgia Military College on 5 March 2004, approximately two weeks after the incident, and took two classes amounting to 10 quarter hours during the spring quarter. (J.A. at 3274.) Appellant passed and received 10 credit hours for Political Science and English classes from March-May 2004. (J.A. at 3279-83.)

iii. Cheryl Pettry[7]

[7] This is not the only case in which Ms. Pettry has engaged in revisionist history and gone out of her way to condemn trial defense counsel after a capital murder trial. In Walker v. State, 2015 Ala. Crim. App. LEXIS 8 (Ala. Crim. App. 2015), Ms. Pettry made claims very similar to those she is making in this case, unsuccessfully attacking the petitioner's capital murder conviction and sentence. Perhaps in a vacuum this one data point would be unremarkable. However, Ms. Pettry engaged in similar post-trial claims in Benjamin v. State, 156 So. 3d 424 (Ala. Crim. App. 2013). Of note, in Benjamin the Court of Criminal Appeals of Alabama endorsed the following findings of the circuit court regarding Ms. Pettry's credibility:

In 2007, Cheryl Pettry, Appellant's mitigation specialist at trial, provided Appellant six separate affidavits on a variety of issues. Within her multiple affidavits Ms. Pettry derides Appellant's trial defense counsel on one hand for not pursuing evidence showing that Appellant's attitude and behavior "changed" after his motorcycle accident while, on the other hand, also complaining that they did not follow her advice when she "recommended to the defense attorneys that they use Appellant's friends, fellow Airmen, and supervisors as witnesses to offer recent descriptions of [Appellant] to establish ***good character*** as well as that he had support from people in the military."[8] (J.A. at 3927.) (emphasis added.)

> This Court is also deeply troubled that Ms. Pettry feigns concern for [Benjamin's] rights and status as a death row prisoner, yet she did not cooperate with [Benjamin's] present attorneys to appear at the Rule 32 hearing so that she could be examined and cross-examined and this Court could effectively judge the credibility of her claims. She claimed to be 'severely ill' with a sinus and ear infection and purportedly could not travel from Virginia to Dothan, and then she could not travel due to neck and disc surgery. This Court made every effort to schedule an available time for Ms. Pettry to travel to Dothan at her convenience and physical status dictated, yet she constantly had some excuse as to the infeasibility of travel.

Benjamin, 156 So. 3d at 446. It is clear the Court of Criminal Appeals recognized, as should this Court, that Ms. Pettry has a history of conflict with trial defense counsel that should be factored in when evaluating the credibility of and weight to be given to her affidavits.

[8] Curiously, even though he submitted six different affidavits from Ms. Pettry and cites to her over 60 times throughout his brief to this Honorable Court, Appellant at the same time seemingly derides Ms. Pettry's advice on establishing "good character" at trial by saying such things as "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…." (App. Br. at 72.)

According to one of her affidavits, Ms. Pettry "collected thousands of pages of documents related to [Appellant] and interviewed approximately a hundred individuals…." (J.A. at 3917.) According to Ms. Pettry, "the motorcycle accident was one of the first items [she] discovered when [she] joined the defense team."[9] (J.A. at 3918.) Ms. Pettry reviewed the pretrial sanity board report, "all of Andrew's medical records, which contained his treatment following the accident,"[10] and spoke with then-SrA Ed Love. (J.A. at 3918.)

When she spoke with then-SrA Love, Ms. Pettry observed both Appellant's motorcycle and helmet, which were both in SrA Love's truck. (J.A. 3918.) While Ms. Pettry noted Appellant's motorcycle helmet as being "scratched, gouged in the front, and the visor was completely missing," Ms. Pettry provided no description of the motorcycle in her affidavit. While the motorcycle helmet was seized from SrA Love and kept at the Robins AFB Area Defense Counsel office until at least June 2005, Ms. Pettry never saw the motorcycle again after her meeting with SrA Love in August 2004. (J.A. at 3919.)

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[9] While Ms. Pettry states the accident occurred on 23 February 2004, Tricare billings provided by Appellant to this Court show Appellant received treatment on 20 February 2004. (J.A. at 3917.)

[10] While Appellant has provided this Court with nearly 40 post-trial affidavits, one of which includes Tricare billings, Appellant has provided no medical records, particularly none that document any alleged injuries as a result of his motorcycle accident. In fact, the only documents presented by Appellant showing any *actual* injuries are the Tricare medical bills that show Appellant was treated only for "superficial wound(s)."

Per her affidavit, Ms. Pettry discussed the motorcycle accident and helmet with Dr. Bill Mosman, defense expert, though she fails to state exactly when this discussion took place. (J.A. at 3918.) She claims to have recommended Dr. Frank Wood at this time to conduct brain imaging. (J.A. at 3919.)

Mr., then Capt, Doug Rawald, one of Appellant's trial defense counsel, recalls differently. He states, "I do not recall Cheryl Pettry ever mentioning Dr. Frank Wood by name to us or recommending that we contact him or ask the convening authority to appoint him as an expert at any point prior to my first hearing his name in the course of [Appellant's] appeal. Dr. Bill Mosman was the only expert I recall us ever discussing by name with Ms. Pettry…***she glowingly recommended we ask the convening authority to appoint Dr. Mosman to our team and we followed her advice***." (J.A. at 4083) (emphasis added.)

According to Ms. Pettry, she attended a pretrial defense team meeting with Appellant's three defense attorneys and Dr. Mosman. (J.A. at 3919.) Ms. Pettry does not provide a date for this meeting. She claims to have brought up the importance of investigating the motorcycle accident which, according to her, was "quickly dismissed" by defense counsel. (J.A. at 3919.) She states she provided the defense team with Appellant's hospital records, insurance paperwork, and that she interviewed

Denise Hassen (now Pumphrey), though she gave no specifics on that interview in her affidavit. (J.A. at 3919.)

Mr., then Capt, Darren Johnson, another of Appellant's trial defense counsel, remembered Ms. Pettry advising the defense team to seek brain imaging and neuropsychological testing. (J.A. at 4001.) However, once Dr. Mosman opined that further testing was not necessary, Mr. Johnson did not "recall the issue being pressed any further by Ms. Pettry or discussed again at any later stage of the case." (J.A. at 4002.) Mr. Rawald agrees, stating, "I do not recall Ms. Pettry continuing to suggest that we pursue further testing for evidence of a possible brain injury from [Appellant's] motorcycle accident once Dr. Mosman provided his assessment that the accident had no relationship to [Appellant's] actions the night of the murders." (J.A. at 4083.) Mr. Frank Spinner, Appellant's lead trial defense counsel, concluded, "[t]he defense team did not ignore this issue and we made our tactical decision in reliance upon the experts."[11] (J.A. at 4022.)

[11] In his affidavit, Mr. Spinner provided a more detailed explanation regarding his approach to defending cases over the course of his decades-long career as well as Ms. Pettry's shotgun approach to Appellant's defense, stating as follows:

> [I]t must be noted that while I valued Cheryl Pettry's work and input, I felt that she did not fully appreciate the unique challenges of defending military cases with members senior in rank to the accused as opposed to trying a case before a civilian jury. I spent most of my entire professional life defending military cases in front of members. My approach is to be focused in presenting a

Ms. Pettry concluded her first affidavit by stating that she "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. at 3920.) Mr. Rawald stated otherwise, saying, "[i]n the run up to trial, I do not, however, recall Ms. Pettry ever discussing further thoughts on using the helmet as an exhibit." (J.A. at 4008.) Mr. Rawald noted that "we put into evidence at pre-sentencing every physical item Ms. Pettry provided us so I do not know why we would not have used it if she had recommended we do so at that time." (J.A. at 4008.)

Overall, Mr. Rawald explained exactly why the defense did not call Ms. Pettry during the trial, as well as Ms. Pettry's thoughts (at the time at least) concerning this strategy. He stated that the defense team was "concerned that calling Ms. Pettry would give the government the opportunity to interview

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> defense or a sentencing case. In other words, I do not as a rule call marginal witnesses or raise marginal issues before members. In my opinion there is too much risk they will ultimately hurt your case. Cheryl seemed to be more willing to throw everything against the wall and hope that at least one member would respond. Early in my professional career as a trial attorney, however, I was burned by using that approach. I did not want lukewarm witnesses or uncharged misconduct coming before the members. In [Appellant's] case, I believed we should go with our strongest witnesses and stay focused. I can safely say that I am confident we discussed the pros and cons of calling every potential sentencing witness. I respected Cheryl's recommendations, listened to her input and am grateful for all her hard work.

(J.A. at 4022-23.)

Ms. Pettry before her testimony, thereby learning more about our privileged communications. As I recall, Ms. Pettry ***agreed*** with our assessment that it was better to not call her as a witness but instead maintain her as a consultant and keep her material privileged." (J.A. at 4008) (emphasis added.)

iv. Accounts of Appellant's Personality Before and After the Incident

a. TSgt Denise Pumphrey

In her 2012 affidavit, TSgt Pumphrey stated that she had only "hung out" with Appellant four times, but that he "definitely made an impression on me." (J.A. at 4049.) She described him as "outgoing, energetic, and talkative," and as someone who was "good, kind, and funny, and that he did not have any enemies." (J.A. at 4049-50.) In a second affidavit, provided two years later in 2014, TSgt Pumphrey stated that she had "little or no interaction" with Appellant between the motorcycle accident and the murders. (J.A. at 4124.)

b. TSgt Molelekeng Mohapaloa

In 2014, over ten years after Appellant's crimes, TSgt Molelekeng Mohapaloa submitted an affidavit on behalf of Appellant. (J.A. at 4152.) In it, she stated she and Appellant dated from September or October 2003 until March or April 2004. (J.A. at 4152.) She claimed Appellant started to "change" after his motorcycle accident, moving from a "sweet, kind and

affectionate" person to "aggressive, angry and hostile." (J.A. at 4152.) She stated that he would "snap at me with little or no provocation when we were in public" and was more "sexually aggressive" with her. (J.A. at 4152.) She explained that one night when they were lying down "he tried to have sex with me when were about to go to bed. I said no, and he angrily pushed me away." (J.A. at 4152.) Seemingly, Appellant did not pursue any further sexual activity with her once she said "No," certainly not forcing himself on her or engaging in other "sexually aggressive" behavior.

TSgt Mohapaloa also claimed that Appellant would go into a "weird zone" and that he stated when he "was in that state of mind he would see the color red or blood in his mind's eye." (J.A. at 4153.) She now claims that if she had been interviewed by Appellant's defense counsel, she "would have told them about the matters I have described in this declaration and would have been willing to testify about what I observed." (J.A. at 4153.)

Curiously, then-SSgt Mohapaloa was interviewed in 2004 by a member of Appellant's defense team, one Ms. Pettry. (J.A. at 3927.) According to Ms. Pettry in 2004, then-SSgt Mohapaloa described Appellant in "similar descriptions" as other coworkers she had interviewed.[12] (J.A. at 3927). According to Ms. Pettry,

[12] Those descriptions included terms such as "helpful," "gentleman," "smart and quick," "never angry," and someone who "did not resort to physical violence." *See* (J.A. at 3926-27.)

SSgt Mohapaloa told her in 2004 that Appellant "brought her food and took her to a movie when her purse was stolen." (J.A. at 3939.) Even though Ms. Pettry was apparently aware of Appellant's motorcycle injury at the time of her interview with SSgt Mohapaloa in 2004, Ms. Pettry gave no indication in her 2007 affidavit that SSgt Mohapaloa described anything about any "change" in Appellant's otherwise "gentlemen[ly]" behavior at any time.[13]

Later in her new 2014 affidavit, TSgt Mohapaloa reveals important indications as to her true feelings toward Appellant. (J.A. at 4153.) Even though he had allegedly "changed," TSgt Mohapaloa explains in detail how she and Appellant began socializing once again in June 2004, four months after the motorcycle accident. (J.A. at 4153.) In fact, on the night of the murders, she and Appellant went to a movie together and, afterwards, talked of "getting back together." (J.A. at 4153.) Appellant omits this portion of TSgt Mohapaloa's new affidavit in his brief. Appellant also fails to note that on the night of

[13] The government notes that in Ms. Pettry's third affidavit, dated 7 November 2007, she seemingly attached memoranda to her affidavit that included notes from her interview with SSgt Mahopoloa. (J.A. at 3939.) That attachment was not included in Appellant's "Motion to Attach Documents," dated 15 October 2010, to AFCCA wherein Appellant moved to attach Ms. Pettry's affidavit. Appellant did attach, however, a memorandum Ms. Pettry attached to her first affidavit, dated 6 November 2007, regarding her interview with SSgt Love. (J.A. at 3896-97, 3918.)

the murders, 4 July 2004, TSgt Mohapaloa made future dinner plans with Appellant. (App. Ex. CCXXXV.)[14]

Finally, while TSgt Mohapaloa now says she never had the opportunity to testify that Appellant was "not the same man," the record reflects otherwise. During her findings testimony at trial, the military judge asked her a question from a court member about Appellant's demeanor, including if his demeanor the night of the murders was "in any way out of the ordinary from what [she] had seen over the previous year?" (J.A. at 1735.) Presumably, this would have provided TSgt Mohapaloa a golden opportunity to tell the military judge and the military court members about "the dramatic changes in [Appellant's] personality" as she now tells this Honorable Court she wishes she had. Instead, she replied simply, "Not at all."[15] (J.A. at 1735.)

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[14] The United States recognizes that App. Ex. CCXXXV is not contained within the Joint Appendix. However, after reviewing Appellant's brief, this and a small number of additional documents became necessary for the government's Answer. As a result, for those few documents not contained in the Joint Appendix, the government has cited to the Record of Trial.

[15] The full exchange between TSgt Mohapaloa and the military judge went as follows:

> Q: You indicated that you met [Appellant] in 2003?
> A: Yes, sir.
> Q: Do you remember approximately when?
> A: Around July.
> Q: Okay. Around July of '03. So you'd known him for about a year by the 4th of July of 2004?
> A: Yes, sir.
> Q: Did you all spend—were you all friends, spend a lot of time together?
> A: Yes, sir.

c. SSgt Ed Love

According to Cheryl Pettry, SSgt Love told her in 2004 that "he had observed a change in Andrew's behavior," though there is no indication that he elaborated further. (J.A. 3919.) Ms. Pettry's notes also show that SSgt Love stated that "after the accident was the first time I saw [Appellant] in a fight." (J.A. at 3896.)

In his 2014 affidavit, SSgt Love reiterates that he had never seen [Appellant] in a fight prior to the motorcycle accident. (J.A. at 4126.) However, he sheds light on the "fight" he mentioned to Ms. Pettry back in 2004. SSgt Love explains one instance after the motorcycle accident where Appellant "almost got into a fight with a civilian." (J.A. at 4126.) SSgt Love states that the two started to argue and decided to take it outside, but that "the two of them made up and had a drink." (J.A. at 4126.) SSgt Love mentioned no other fight-related incidents either in 2004 or now a decade later.

> Q: Okay. So, you'd had the opportunity in the past to observe his demeanor and the way he acted and that sort of stuff?
> A: Yes, sir.
> Q: Was his demeanor any different, in your mind, from what you had seen previously either during the movie or after you all left the movie and were home?
> A: No, sir.
> Q: Anything that struck you as, about his demeanor, that was in any way out of the ordinary from what you had seen over the previous year?
> A: Not at all.

(J.A. at 1735.)

Notably, SSgt Love's wavering accounts of the facts, whether it be to Appellant's behavior or his recollection of Appellant's motorcycle accident, was seemingly as much an issue in 2004 as it was ten years later in 2014. Mr. Rawald recalled that "Ms. Pettry had interviewed [Love] at least once, possibly multiple times, and expressed concerns to us about his possible testimony. We also had concerns that Airman Love had proven to be an unfaithful friend in the time leading up to the trial and had said things negative about [Appellant]. We concluded that Airman Love would have been a risky witness. Based on these concerns, we did not call Airman Love as a witness to testify . . . ."[16] (J.A. at 4010.)

d. TSgt Priscilla Steele

In 2014, TSgt Priscilla Steele provided Appellant with an affidavit. TSgt Steele began spending more time with SSgt Love, Appellant, and Chris Coreth beginning in late October 2003 after she found out she was pregnant. (J.A. at 4168.) TSgt Steele stated, "[a]lthough I had met [Appellant] before I was pregnant, I definitely got to know him much better after I was pregnant..." (J.A. at 4168.) Though she did not know Appellant very well before October 2003, TSgt Steele did not notice a

16 In yet another example of inconsistencies in his statements and affidavits, SSgt Love states in his 2014 affidavit that he has "no desire to help [Appellant]. I am very angry with him." (J.A. at 4127.) In 2004, however, SSgt Love was "willing to help [Appellant] by testifying at his trial" according to Ms. Pettry's notes. (J.A. at 3897.)

significant difference in his behavior or personality between when she first started hanging out with him in October 2003 through after the February accident. (J.A. at 4168.) Notably, TSgt Steele stated that she "got to know [Appellant] much better and hung out with him over a longer period of time ***after*** the February motorcycle accident." (J.A. at 4168.) (emphasis added.)

This statement by TSgt Steele is especially crucial considering her statements to Ms. Pettry in 2004 when she described Appellant in "similar descriptions" as other coworkers she had interviewed.[17] (J.A. at 3927.) More specifically, then-SSgt Steele told Ms. Pettry that Appellant "had become her best friend and hang-out partner." (J.A. at 3939.) Even at trial, TSgt Steele described her and Appellant as "best friends." (J.A. at 1580.) Based on TSgt Steele's timeline, such descriptions of Appellant's behavior would have been based on her time with Appellant ***after*** his motorcycle accident.[18]

e. Other Interviews Conducted by Ms. Pettry

Ms. Pettry also interviewed "numerous co-workers and fellow Airmen of [Appellant] to be able to present information from those who knew [Appellant] during his time in the Air Force."

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[17] *See* footnote 12, supra. (J.A. at 3926-27.)

[18] Interestingly, while Appellant submitted TSgt Steele's affidavit to AFCCA in 2014, Appellant does not cite to that affidavit in his brief to this Honorable Court.

(J.A at 3926.) SrA Eddie Robinson described Appellant's "helpful nature, that [Appellant] was taking college courses to better himself, and that he saw [Appellant] get mad at a bar once, but that he did not resort to physical violence." (J.A. at 3926.) SrA Kelly Lynch "described [Appellant] in similar terms," explaining that Appellant "had always treated her well, that he was a gentleman, and that she had never seen him angry." (J.A. at 3926.) SMSgt Jorge Martinez, Appellant's supervisor, described Appellant as "smart and quick, never angry," and "actually gave [Appellant] more responsibility at work because [Appellant] wanted it." (J.A. at 3927.)

Per Ms. Pettry, she "recommended to the defense attorneys that they use these Airmen as witnesses to offer recent descriptions of [Appellant] to establish ***good character*** as well as that he had support from people in the military." (J.A. at 3927) (emphasis added.) Even though Ms. Pettry was aware of Appellant's motorcycle injury at the time of these interviews conducted in 2004, Ms. Pettry gave no indication in her 2007 affidavit that either SrA Robinson, SrA Lynch, SMSgt Martinez, SSgt Steele, or, ***most importantly***, SSgt Mohapaloa described anything about any "change" in Appellant's otherwise "gentlemen[ly]" behavior at any time.

v. Dr. Frank Wood

In June 2012, Dr. Frank Wood, a clinical neuropsychologist, provided Appellant an affidavit of his opinion on ***potential*** injuries Appellant ***may have*** suffered as a result of his motorcycle accident. (J.A. at 4037.) In providing this opinion, Dr. Wood had no actual contact with Appellant and did not review any of Appellant's medical records. (J.A. at 4037-38.) Still, Dr. Wood stated he would have recommended additional neuroimaging if he had been consulted in 2004. (J.A. at 4040.) He also determined, again without bothering to examine Appellant or his medical records, that Appellant had damage to his left anterior temporal lobe, therein stating, "the behavioral 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..." (J.A. at 4041.) He continued, "I would have been willing to testify about the nature of traumatic brain injuries, ***the possibility of a TBI*** given [Appellant]'s motorcycle accident, and the effects that even mild TBI can have on impulse control, normal cognitive functions, emotional self-regulation, and behavior." (J.A. at 4041) (emphasis added.) Dr. Wood said he would have been willing to testify to this "even without examining or interviewing Appellant." (J.A. at 4041.)

Dr. Wood provided a second affidavit in July 2012 after reviewing Ms. Denise Pumphrey's first affidavit. (J.A. at 4073.) Based on Ms. Pumphrey's recitation of events, including seeing Appellant "just after he had been in a motorcycle accident" and his "delayed" responses and "slow" speech, Dr. Wood opined that he was more convinced that the defense team should have done additional testing. (J.A. at 4075.) Dr. Wood again provided his affidavit without reviewing Appellant's medical records or having any actual contact with Appellant. (J.A. at 4073-75.) In continuing his belief that Appellant suffered damage to the anterior left hemisphere of his brain, Dr. Wood stated, "[d]amage to this region of the brain is associated with disinhibited emotional and aggressive behavior." (J.A. at 4074.)

After reviewing Dr. Rath's affidavit, Dr. Wood provided a third affidavit in October 2012. (J.A. at 4119.) Dr. Wood attacks the basis of Dr. Rath's opinion by saying Dr. Rath did not personally evaluate Appellant ***enough***, seemingly forgetting that he provided an opinion of Appellant after having had ***no*** actual contact with Appellant. (J.A. at 4119-20.)
Even though his review of this case, again consisting of only documentary evidence, could only come to the vague conclusion that brain damage in this case was "plausibly suggestive," Dr. Wood oddly dismissed Dr. Rath's opinion, one based on an actual

evaluation of Appellant that Dr. Wood lacked, as "simply guesswork." (J.A. at 4121.)

In August 2014, after AFCCA's decision, Dr. Wood provided his fourth, and latest, version of his opinion on the case. (J.A. at 4154.) While his previous affidavits focused on "disinhibited emotional and aggressive behavior," and the effect "even mild TBI can have on impulse control, normal cognitive functions, emotional self-regulations, and behavior," Dr. Wood's 2014 opinion seems to change course in the face of AFCCA's opinion recognizing evidence showing Appellant was non-confrontational, not prone to violence or emotional outbursts, never angry, and performed his military duties normally. (J.A. at 4154-55.) Now, Dr. Wood says that one does not have to "always – or even usually" exhibit aggressive behavior to have sustained a TBI, a marked change from his previous affidavits. (J.A. at 4155.) Whereas in 2012, Dr. Wood said "even mild TBI" would affect impulse control, cognitive functions, and behavior, Dr. Wood now says he is "not surprised" Appellant behaved normally in social situations and at work. (J.A. at 4155.)

Dr. Wood did attempt to caveat this change by saying, "[p]articularly in low-stress, orderly environments, there is often no threatening trigger for pathological aggression." (J.A. 4155.) However, he failed to then address the occasion, after Appellant's motorcycle incident, where Appellant had a

potential physical altercation at a bar, a presumably high-stress and disorderly environment, where Appellant was able to remain calm, seemingly control his impulses and behavior, not engage in a fight, and even, according to SSgt Love, "ma[k]e up and ha[ve] a drink" with the other party. (J.A. at 4126.)

Further, now faced with his seemingly contradictory opinion that that TBI affected Appellant's "impulse control" in the face of this case's wealth of evidence showing Appellant's meticulous planning and deliberate acts, Dr. Wood attempted to parse the principle of "impulsivity" into two categories, "impulsive" and "compulsive." (J.A. at 4159.) Dr. Wood now says Appellant did not exhibit the "impulsive" form of "impulsivity," but instead exhibited the "compulsive" form of "impulsivity," stating that "[t]hose who murder and are suffering from the compulsive form of brain injury indeed can do so with planning" and "are unrestrained in the sense that once they have an idea, in this case a command hallucination, they feel bound to follow the particular course of action." (J.A. at 4159.)

Over 10 years after the crime, Dr. Wood now claims Appellant did in fact have these symptoms at the time of the murders. Perhaps finally recognizing his opinions carried little weight since he did not previously actually interview Appellant before rendering such conclusions, Dr. Wood decided to interview Appellant 10 years after the murders. After

interviewing Appellant for the first time in 2014, Dr. Wood opined that, in addition to the "behavioral self-control" symptom, Appellant also suffered from a "psychotic" impairment in 2004. (J.A. at 4160.) Dr. Wood said that Appellant now claims, 10 years after the fact, to have felt a "darkness" coming over him in the weeks following the motorcycle accident and that a "voiceless influence" began whispering in his right ear that put him in a "strong grip" to travel to Robins AFB and "encounter" Andy and Jamie. (J.A. at 4160-61.)

Up until 2014, however, neither Appellant nor anyone else had provided any evidence of a "command hallucination" either during trial or through over seven years of appellate litigation, including Appellant's offering of over 30 post-trial affidavits. In fact, the record, and Appellant's own words, show the exact opposite. In his 26 July 2004 evaluation in the course of a Sanity Board, Appellant reported "no psychiatric symptoms until ***after*** the alleged incident" and "denie[d] any prior depressed mood, or neurovegetative signs." (J.A. at 3738.)

Significantly, the report states, "Prior to July 5, 2004, [Appellant] reports no psychiatric symptoms." (J.A. at 3738.) Appellant also "denied auditory hallucinations or visual hallucinations." (J.A. at 3739.) Appellant further "denied racing thoughts, flight of ideas, grandiosity or delusions."

(J.A. at 3739.) He also "denied ideas of reference, obsessive thoughts, ***compulsions***, or phobias." (J.A. at 3739) (emphasis added.) The report states, "There was no evidence of thought insertion or thought broadcasting." (J.A. at 3739.) The report continues, "[Appellant] did not display any current symptoms of psychosis or cognitive impairment that would impair his ability or insight." (J.A. at 3740.) These statements by Appellant were made to Dr. (Maj) Ajay Makjija, a Board Certified Forensic Psychiatrist, just three weeks after his murders.

vi. Monica Foster

Ms. Monica Foster, an attorney from Indiana, provided two affidavits in 2012 and a third in 2014 following AFCCA's opinion. Her second affidavit focused on Appellant's motorcycle accident and her opinion that Appellant's counsel should have ordered additional testing. (J.A. at 4051.) Her opinion is based on selected, purely documentary evidence; in fact, in her third affidavit, Ms. Foster states, "[m]y review of the case was limited to the documents listed in my previous declarations, and so some details about the case that I read about in the [AFCCA] opinion were new." (J.A. at 4171.) Ms. Foster spoke with no one personally about the case. (J.A. at 4052.)

From this evidence, Ms. Foster based her opinion on facts that are in dispute even among Appellant's own post-trial affidavits. For example, Ms. Foster states Appellant's

motorcycle was "totaled" after the accident, even though TSgt Pumphrey says the motorcycle was in working order. (J.A. at 4049, 4053.) Based only on Ms. Pettry's account of her interview with SSgt Love in 2004, Ms. Foster states Appellant was "prone to emotional outbursts" after the motorcycle accident, even though AFCCA has provided a multitude of evidence showing otherwise, evidence that even Dr. Wood now acknowledges.[19] (J.A. at 4053.)

vii. Dr. Carol Armstrong

In an affidavit provided to Appellant in 2012, Dr. Carol Armstrong, a clinical neuropsychologist, provided her opinion of both Dr. Wood's and Dr. Rath's opinions regarding Appellant's motorcycle incident. (J.A. 4098.) While calling Dr. Wood's methodology for providing a forensic expert opinion "reasonable," Dr. Armstrong "[could not] verify Dr. Wood's conclusion that the evidence was suggestive of lesions to the left anterior temporal lobe" because she did not review the data herself. (J.A. at 4100.) Much like Dr. Wood in 2012, Dr. Armstrong based her opinion solely on documentary evidence; Dr. Armstrong spoke with no one personally about the case, including Appellant, and conducted no independent review. (J.A. at 4098.)

[19] *See* (J.A. at 4155.) ("I am not surprised, therefore, that [Appellant] 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.")

As she put it, "I am basing my opinion not on independent review of the underlying facts and testing data but on the facts as set forth in Dr. Wood's two declarations and Pumphrey's declaration." (J.A. at 4098.) Particularly, Dr. Armstrong did not review any portion of the record of trial, Appellant's medical records, or Appellant's sanity board documents. As Dr. Armstrong noted in her second affidavit two years later in 2014, "[m]y review of the case for my previous declaration was mainly limited to the documents listed in paragraph 6 of that declaration, so I was not aware of all of the facts recited above nor the record of trial in its entirety. There are no doubt other details that I am still unaware of." (J.A. at 4130.) Such a professed lack of knowledge as to the facts of this case did not deter Dr. Armstrong in her 2014 affidavit, however, of accusing AFCCA of taking evidence out of context in its opinion, calling their findings "incorrect" and "mistaken." (J.A. at 4130-32, 4134.)

B. Mental Health Records of Appellant's Mother

i. Obtaining the Mental Health Records of Appellant's Mother

In one of her six declarations, Ms. Pettry provides her account of her interaction with Melanie Pehling, Appellant's mother, particularly with regard to obtaining Ms. Pehling's release for her mental health records. (J.A. at 3933.) When Ms. Pehling would not release the records, Ms. Pettry stated

that she "asked Frank Spinner to subpoena the mental health records since Melanie was not being cooperative," but that he declined because "he understood Melanie and her religion." (J.A. at 3933.)

Mr. Spinner recalls otherwise. He stated, "[t]o the extent we did not seek Melanie's mental health records, in my mind it was simply that Dr. Bill Mosman did not ask us to obtain them. Had he done so, we would have had trial counsel obtain them. Everything Cheryl Pettry raised that fell within Dr. Mosman's area of expertise we ran by him." (J.A. at 4023.)

ii. Appellant's Attempt to Establish a Connection Between His Mother's Mental State in 1996, His Overall Development, and His Actions in 2004

a. David Bruck

In 2010, Appellant obtained an affidavit from David Bruck, an attorney with no evident medical training or licenses, who opined as to the importance of the mental health records of Appellant's mother. (J.A. at 3986.) Mr. Bruck began his affidavit by mistakenly noting that Ms. Pehling received depression treatment at Minirith Meier Clinic "[i]n around September 1998;" her treatment actually took place two years earlier. (J.A. at 3864, 3986.)

Throughout his affidavit, Mr. Bruck used words and phrases such as "suggest" (four times), "could have" (two times) and

"may have" (three times) in opining on Appellant's "formative environment." (J.A. at 3986-89.) Notably, Mr. Bruck offered his opinion based solely on Ms. Pehling's mental health records; it appears from his affidavit that Mr. Bruck never interviewed Appellant, Appellant's mother, or any other member of Appellant's family, nor did he review Appellant's actual medical records or any evidence presented during the trial. (J.A. at 3986-3990.)

b. Dr. Robert Connor

Also in 2010, Appellant obtained an affidavit from Dr. Robert Connor, a clinical psychiatrist. After, as Appellant states in his brief, "highlight[ing]" Ms. Pehling's symptoms throughout his affidavit, Dr. Connor stated, "[t]he impact of Mrs. Pehling's mental health issues created an environment factor that would have had a ***profound impact*** on [Appellant]'s emotional, social and psychological development." (J.A. at 3993.) (emphasis added.) He claims in his "professional opinion that [Appellant]'s upbringing and biological inheritance ***severely inhibited*** his development." (J.A. at 3992) (emphasis added.) He concluded his affidavit by stating, "I would diagnose [Appellant] as suffering from a chronic dysthymia disorder, a form of depression, which would be traceable to his mother's family history of mental disorders." (J.A. at 3993.)

c. Evidence Refuting Both Mr. Bruck and Dr. Connor

While Dr. Connor claims Appellant's "emotional, social and psychological development" was "profound[ly] impact[ed]" and "severely inhibited," Appellant's record shows otherwise. In April 1997, just months after Mrs. Pehling's in-patient depression treatment, Appellant, age 14 at the time, took the Stanford Achievement Test. (Def. Ex. AR.) Of the 15 testing blocks, Appellant scored above the 80th percentile in two blocks, above the 70th percentile in an additional nine blocks, and above the 60th percentile in two additional blocks. (Def. Ex. AR.) Moreover, his "grade equivalent" score for 12 of the 15 blocks placed him at "PHS" or post-high school, with an additional block having a "grade equivalent" of 12.8. (J.A. at 3240-41.) In high school, Appellant maintained a 3.25 grade-point average in 10th grade, 3.191 in 11th grade, and 3.175 as a senior. (J.A. at 3242-53.)

In his sentencing case, Appellant also produced 22 character reference letters from friends and family who knew him from a very young boy up through his Air Force career. (J.A. 3195-3222.) These letters paint Appellant as a "great young man," "gentle," "respectful," "sweet," "compassionate," "fun loving with a very mature outlook on life," who "did not exhibit any of the typical rebellious attitudes or behaviors…so often witnessed in others." (J.A. at 3195-3205.) One family friend described him as "a young man who was well liked and showed a

great deal of intelligence." (J.A. at 3208.) The Dean of Students for his high school said Appellant was "a very intelligent and caring person" who had a "great work ethic." (J.A. at 3210.) The Dean continued, "However, my best recollection is how he would quietly be a leader with his peers." (Id.) All said, these multitude of letters show no signs of someone whose "emotional, social and psychological development" had been "profoundly impacted" or was "severely inhibited" as Dr. Connor claims. As Appellant himself said in a letter prior to trial, "I had a great life. I thought God gave me a royal flush." (J.A. at 3307-08.)

Further, Ms. Pettry's interviews of "numerous co-workers and fellow Airmen of [Appellant] to be able to present information from those who knew [Appellant] during his time in the Air Force" paint Appellant's actual emotional, social, and psychological development as quite healthy. (J.A at 3926.) In those interviews, Appellant was described as "dependable," "respectful," "pleasant," a "gentlemen," "smart," "quick," "never angry," a "best friend," a "hang-out partner," and as someone who was trying to "better himself." (J.A. at 3926-27, 3939.) Moreover, while Dr. Connor would diagnose appellant with "a form of depression," Ms. Pettry makes no mention of receiving *any* information from the "approximately [one] hundred individuals" she interviewed, including Appellant's friends,

coworkers, supervisors, or confinement officers, that suggest Appellant was depressed either before or after the murders.

Other affidavits submitted to this Court ***by Appellant*** refute Dr. Connor's assertions as well in describing his personality. In one, TSgt Pumphrey stated that Appellant "definitely made an impression on me" after being around him only a few times. (J.A. at 4049.) She described him as "outgoing, energetic, and talkative," who was "good, kind, and funny, and that he did not have any enemies." (J.A. at 4049.)

Then there are the powerful words of Appellant himself in 2004, taken just three weeks after his murders. During his 26 July 2004 Sanity Board evaluation by Dr. (Maj) Ajay Makjija, a Board Certified Forensic Psychiatrist, Appellant "denie[d] any prior depressed mood, or neurovegetative signs." (J.A. at 3738.) Appellant said he "had no current medical concerns" and reported "no significant problems after the accident." (J.A. at 3738.) Appellant had no symptoms of "mania, psychosis, obsessive compulsive disorder, or generalized anxiety disorder." (J.A. at 3738.) While Appellant "at the time of th[e] evaluation" did report "mild anxiety and intermittent depressed mood," Appellant reported those were "in response to his current legal situation." (J.A. at 3738.) The report continues, "[Appellant] did not display any current symptoms of psychosis

or cognitive impairment that would impair his ability or insight." (J.A. at 3740.)

Standard of Review

An allegation of ineffective representation presents a mixed question of law and fact which the Court reviews *de novo*. United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009) (citation omitted). Counsel at the trial level are presumed competent by our appellate courts. Id. at 474-75 (citations omitted). As the United States Supreme Court makes clear "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland v. Washington, 466 U.S. 668, 689 (1984).[20] Moreover, the effectiveness of counsel is determined by reviewing the overall performance of counsel throughout the proceedings. United States v. Murphy, 50 M.J. 4, 8 (C.A.A.F. 1998). If a reviewing court finds error, the United States Supreme Court dictates that reviewing courts may only reverse a death sentence where the errors of counsel created a ***substantial***

[20] The Supreme Court further elaborated that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 689-90.

likelihood of shifting the balance of aggravating and mitigating factors from death to life. Harrington v. Richter, 562 U.S. 86, 112 (2011). Put another way, in a capital sentencing context, this Court reweighs the evidence in aggravation against the totality of mitigating evidence to determine if there is a reasonable probability that the panel would have returned a different sentence. United States v. Akbar, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

Law and Analysis

The Supreme Court has made clear that while effective legal representation is of the utmost importance in a capital case, superhuman feats of lawyering are not required. As the Supreme Court again reaffirmed Richter, even within the rarefied air of a capital case, "Strickland does not guarantee perfect representation, only a reasonably competent attorney." Richter, 562 U.S. at 110 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984) (citations omitted)).

Counsel in this case were not deficient for failing to avoid the imposition of the death penalty upon an Airman who slaughtered a husband and wife in cold blood in their home while a tragic and unsuccessful 911 call bore witness to their desperate pleas for their lives. (J.A. at 3091.) Try as they might, the defense litigators in this case were handicapped by

one crushing disability: they had the heinous facts. Thus, despite the fervent investigation by Ms. Cheryl Pettry of approximately 100 potential witnesses (J.A. at 3917); despite the testimony of 16 witnesses in extenuation and mitigation, including his heartbroken parents who begged mercy for their violently misguided son (J.A. at 104); and despite the 22 character letters submitted in support of Appellant at trial (J.A. at 106-07), Appellant received exactly what he deserved: a sentence to forfeit his own life after having robbed the Bielenberg and Schliepsiek families of their children; robbing Jason King of his friends (and nearly his own life); and the Air Force of one of our own young couples.

The standard for measuring a claim of ineffective assistance of counsel is a *de novo* review of the factors set out by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), and further defined by that Court in Lockhart v. Fretwell, 506 U.S. 364 (1993). The two-pronged test of Strickland requires Appellant to demonstrate first, that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and second, that his counsel's deficient performance prejudiced the defense. United States v. Gibson, 46 M.J. 77 (1997).

Within the military context, this Court is also faithful to the Strickland standard set forth by the Supreme Court. However, the Court further clarifies Strickland's ineffective assistance of counsel analysis into a three-prong test applied to military cases to determine if an appellant has overcome the presumption of competence. United States v. Grigoruk, 56 M.J. 304, 307 (C.A.A.F. 2002). The questions to answer are:

> (1) Are appellant's allegations true; if so, is there a reasonable explanation for counsel's actions?;
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?, and
>
> (3) If defense counsel was ineffective, is there a reasonable probability that, absent the errors, there would have been a different result?

Id. at 307 (*citing* United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

In order for an appellant to prevail on an ineffective assistance of counsel claim, he must establish the following:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 689. Counsel is presumed competent until proven otherwise. Id.; Gibson, 46 M.J. at 78; United

States v. Marshall, 45 M.J. 268 (C.A.A.F. 1996); United States v. Jefferson, 13 M.J. 1 (C.M.A. 1982).

More recently, the Supreme Court of the United States has reaffirmed this bedrock principle of ineffective assistance of counsel jurisprudence, cautioning that "[a] court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.'" Richter, 562 U.S. at 104 (citing Strickland, 466 U.S. at 689); *see also* Akbar, 74 M.J. at 371. While Appellant would have this Court codify the ABA Guidelines For Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) as the inexorable commandments for legally effective representation in capital litigation, the fact remains that these provisions do not replace the time-honored Strickland standard. Rather, they are exactly what they profess to be: guidelines.[21] Indeed, this Court firmly and unequivocally addressed the applicability of the ABA Guidelines in military capital litigation in Akbar, holding:

> Appellant and amicus argue that we should adopt the ABA Guidelines in analyzing capital defense counsels' performance. However, we instead adhere to the Supreme Court's guidance that no

[21] The Supreme Court has emphasized that the ABA Guidelines are not "inexorable commands, admonishing reviewing courts that "'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (citing Strickland, 466 U.S. at 688).

> particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." We therefore do not adopt the ABA Guidelines as the ultimate standard for capital defense representation in the military. Instead, we examine whether counsel made objectively reasonable choices based on all the circumstances of a case.

Akbar, 74 M.J. at 399-400 (internal quotations and citations omitted).

Turning to the general contours of the prejudice prong of the Strickland test, the Supreme Court has defined the prejudice prong of an ineffective assistance of counsel claim as follows:

> [T]he prejudice component of the Strickland test . . . focuses on the question whether counsel's performance renders the result of the trial unreliable or the proceedings fundamentally unfair. Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.

Lockhart v. Fretwell, 506 U.S. at 372; *see* United States v. Ingham, 42 M.J. 218 (C.A.A.F. 1995). The Supreme Court specifically held in Lockhart v. Fretwell that ". . . an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Fretwell, 506 U.S. at 369.

Based on the Supreme Court's decision in Fretwell, the relevant consideration when addressing the prejudice prong of Strickland is not what trial defense counsel *could or may* have done that would have affected the outcome of Appellant's trial, but what they were *constitutionally required* to do to ensure that his trial was reliable and not fundamentally unfair. In other words, it is not enough to say that counsel's errors had some conceivable effect on the outcome of the proceedings, but rather, that they were so serious that they did in fact deprive Appellant of a fair trial. Richter, 562 U.S. at 103-06.

a. Death is NOT "Different"—Standard Strickland analysis applies in capital litigation: There is only one standard to apply when determining if an accused has been provided effective assistance of counsel; that is the standard set out in Strickland. No Supreme Court decision since Strickland has ever established a higher (or even different) standard for evaluating ineffective assistance of counsel claims in capital cases. This Court affirmed this idea in Akbar, expressly holding that the Strickland standard applies to allegations of ineffective assistance of counsel in capital cases. Akbar, 74 M.J. at 379. "The quality of representation compelled by the Constitution is determined by reference to *Strickland v. Washington*, *supra*." United States v. Loving, 41 M.J. 213, 300 (C.A.A.F. 1994), aff'd, 517 U.S. 748, 773-74 (1996).

b. Ineffective Assistance of Counsel Inquiry is NOT a Slave to Hindsight: In reviewing a trial defense counsel's performance, appellate courts are required to make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time [of trial]." Akbar, 74 M.J. at 379 (quoting Strickland, 466 U.S. at 689). The fact that military defense counsel may later question whether they could have done something else to prevent a client's sentence to death is irrelevant to whether they were ineffective in their representation of him, and is exactly the type of second guessing involving the "distorting effects of hindsight" that the Supreme Court, in Strickland, said are not appropriate in assessing the effectiveness of counsel. Strickland, 466 U.S. at 689 "The fact that appellate defense counsel have now conceived a different trial tactic from the one use at trial does not mean that the lawyer at trial was ineffective." United States v. Tharpe, 38 M.J. 8, 16 (C.M.A. 1993).

In resisting the distorted appeal of hindsight, appellate courts must consider counsel's actions in light of the circumstances of the trial and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome

the presumption, that under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (internal citations omitted). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690. *See also*, Akbar, 74 M.J. at 371; Mazza, 67 M.J. at 475.

The corollary of this principle is that in assessing claims of ineffective assistance of counsel, appellate courts do not look at the success of a defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (*citing* United States v. Hughes, 48 M.J. 700, 718 (A.F. Ct. Crim. App. 1998)). As the Supreme Court has noted, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 690. This analysis must also be undertaken by giving due weight to the totality of the circumstances over the course of the entire representation, as the Supreme Court noted again in Richter: "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Richter, 562 U.S. at 90.

c. Defense Counsel's "Duty to Investigate": Undoubtedly, a trial defense counsel has a duty to investigate the law and the facts that are relevant to the case and individual he or she is defending. Strickland, 466 U.S. at 690. It is well-established that "[t]he scope of the duty [to investigate], however, depends on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful." Strickland, 466 U.S. at 680-81. Further, there is no duty to make an absolute inquiry into every conceivable matter which might have some tangential relationship to a case, no matter how little probative value that matter might possess. Trial defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691; Sidebottom v. Delo, 46 F.3d 744, 752 (8th Cir. 1995); Loving, 41 M.J. at 242. Additionally, a trial defense counsel's decision to investigate or not to investigate certain matters must be evaluated in light of the information provided to him or her.

> In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those

> investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691; *accord* Loving, 41 M.J. at 242; Tharpe, 38 M.J. at 11; see Bertolotti v. Dugger, 883 F.2d 1503, 1514 (11th Cir. 1989), *cert. denied*, 497 U.S. 1031 (1990).

While Appellant relies upon Wiggins v. Smith in support of his argument that failure to discover and present available mitigation evidence constitutes ineffective assistance of counsel, in Wiggins the Supreme Court still emphasized counsel are not required to investigate every conceivable line of mitigating evidence. Wiggins, 539 U.S. at 533. Summing up the duty of defense counsel to investigate in a capital case, this Court recently held:

> [T]he duty to investigate does not require trial defense counsel to personally interview every potential witness in a case. For example, there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative and distract counsel from more important duties. As a result, the key point in deciding this issue is whether counsel made a good faith and substantive effort to identify those individuals who might be most helpful at trial, and to implement a means for obtaining information about and from these potential witnesses, thereby allowing counsel an opportunity to make an informed decision about their value for Appellant's court-martial.

Akbar, 74 M.J. at 380-81 (internal quotations and citations omitted).

d. Limited Applicability of Post-Trial Affidavits: Given Appellant's penchant for utilizing hindsight aided by post-trial analysis and conclusions by experts and litigators who were never party to the case below, it is important to note that Appellant's attempts to re-litigate his trial via post-trial affidavit is circumscribed in part by law. It is true that this Court has long recognized the right of an appellant to supplement the record of trial with affidavits when there has been a claim of ineffective assistance of counsel. *See* United States v. Lewis, 42 M.J. 1, 3 (C.A.A.F. 1995); United States v. Mays, 33 M.J. 455, 457 (C.M.A. 1991); United States v. Davis, 3 M.J. 430, 431 n.1 (C.M.A. 1977). However, such consideration ought to be limited to affidavits from Appellant and his counsel as well as documents contained in the Allied Papers, rather than soliciting post-hoc analysis from unaffiliated counsel, experts, and "Monday-morning quarterbacking" regarding the conduct of the trial defense team below. *See* Mays, 33 M.J. at 457; Davis, 3 M.J. at 430; United States v. Gray, 51 M.J. 1, 17 (C.A.A.F. 1999). While courts have been liberal in considering extra-record documents in capital cases, there are limits to what may be submitted from outside the record even when the case involves a death sentence.

> The issue before us is not whether there is, or may be developed, some new opinion evidence that appellant was actually abused as a child or

> lacked mental responsibility. The question is whether trial defense counsel made a valid tactical decision, given the information and options available. Trial defense counsel's decision is not rebutted by dredging up some new evidence supporting appellant's belated contention.

United States v. Tharpe, 38 M.J. 8, 15 (C.M.A. 1993).

"The professional opinions of an expert directly (or indirectly, through the argument of counsel) on the quality of trial representation or on other approaches that might have been taken are not presently germane." Tharpe, 38 M.J. at 16. That is not the function of the so-called mitigation expert. "Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses." Loving, 41 M.J. at 250; Thomas, 43 M.J. at 591.

Moreover, within the specific realm of forensic psychology in capital litigation, this Court has demonstrated a reticence to engage in re-litigation via affidavit: "***We, like the Court of Military Review, do not welcome descent into the 'psycho-legal' quagmire of battling psychiatrists and psychiatric opinions, especially when one side wages this war against its own experts by means of post-trial affidavits.***" United States v. Gray, 51 M.J. 1, 17 (C.A.A.F. 1999)(emphasis added) (citing Harris v. Vasquez, 949 F.2d 1497, 1518 (9th Cir 1990).[22]

[22] Harris v. Vasquez involved the appellant's "Ake challenge" (Ake v. Oklahoma, 470 U.S. 68 (1985), holding that indigent defendants are entitled to state funded psychological assistance where mental capacity will be at

Instructively, in Gray, (a death penalty case involving double murder, rape, and burglary) this Court dismissively dealt with the appellant's submission of post-trial affidavits from a third party forensic psychologist expert purporting to articulate how appellant's expert at trial failed to adhere to the "national standard of care" for psychological evaluations. Id. at 18.

e. Limited Applicability of Third Party Capital Litigator Affidavits establishing "norms of the practice": Appellant also submitted to the lower court and now cites to this Court the affidavit of a defense attorney, Mr. David I. Bruck, to support Appellant's ineffective assistance of counsel claim. (J.A. at 3986-90; App. Br. at 90, 92, 94, 96, 98-99, 100.) This Court should not consider this affidavit in determining whether Appellant's trial defense team acted unreasonably. Although courts have accepted affidavits from experienced criminal defense attorneys in capital cases when attempting to determine

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issue in the case) to the adequacy of his state funded forensic expert consultant in his murder trial. In dismissing Harris' claim, the Court lamented the entangled nature of appellate litigation of such issues, declaring:

> Every aspect of a criminal case which involves the testimony of experts could conceivably be subject to such a review-a never ending process.... *A conclusion to the contrary would require this court and other federal courts to engage in a form of "psychiatric medical malpractice" review as part-and-parcel of its collateral review of state court judgments. The ultimate result would be a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis.*

Harris, 949 F.2d at 1517.

the standard of practice in the community, these affidavits have only been accepted when they assisted the court in determining a fact in issue. In this case, the affidavit of Mr. Bruck is not helpful to this Court because his opinion as to what is the required standard of practice in certain aspects of capital cases has already been established for military courts-martial.

First, much of Mr. Bruck's commentary on the standard of practice is not unique to capital cases. Mr. Bruck notes that trial defense counsel must be experienced in handling expert witnesses. (J.A. at 3986-90.) Any defense counsel who has even litigated a urinalysis case has had to deal with requesting an expert consultant or expert witness or cross-examining a government expert. Furthermore, forensic psychologists in particular are commonplace in Air Force trial practice and have been since well before Appellant's court-martial, as they are virtually ubiquitous in Air Force sex assault litigation. Finally, there is no dispute that counsel below understood the importance of expert assistance as they both requested and secured two forensic experts: Dr. Robert Shomer (memory, recall, and perception); and Dr. Bill Mosman (forensic psychologist).

What is even less helpful though, is Mr. Bruck's pronouncement that "By 2005, the ABA Guidelines have been repeatedly recognized by the United States Supreme Court as an

authoritative summary of the prevailing standard of care for counsel in death penalty cases. Rompilla v. Beard, 545 U.S. 374, 387 n.7 (2005)." (J.A. at 3987-88) (italics in original.) Perhaps no one would be more surprised to hear that than the United States Supreme Court. *See* footnote 21, *supra*. Evidently, Mr. Bruck, obviously a seasoned and successful capital litigator in his own right, neglected to qualify his remarks with Supreme Court precedent decided one year prior to his declaration. Under these circumstances, it should at least give this Court pause before relying upon his "expertise" as the all-knowing arbiter of the standard of care in investigating capital murder cases. This Court should dismiss Mr. Bruck's affidavit out of hand and conduct its own analysis relying upon the record below and established case law.

f. Effective Strategy to Limit Extenuation and Mitigation Evidence to Avoid Rebuttal: As adhered to by the trial defense counsel in this case (J.A. at 4022-23), the Supreme Court looks favorably upon "economy of effort," even in capital cases, endorsing a defense counsel's prioritizing of his case investigation and presentation as a matter of strategy. That is, a defense attorney can, consistent with the Sixth Amendment, avoid activities that appear distractive from more important duties. Richter, 562 U.S. at 107 (citing Bobby v. Van Hook, 558 U.S. 4, 11 (2009)). In this regard, the Supreme Court indulges

a "'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" Id. at 109 (citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (per curiam)).

It is a fundamental principle of physics that for every action, there is an equal and opposite reaction. There is a similar principle in criminal trial practice that an attorney cannot take an action or offer evidence without considering what reaction or contrary evidence will be forthcoming. In other words, the value of evidence that a party wishes to introduce must be considered in light of the potential evidence that may be introduced in response. *See* Ingham, 42 M.J. at 227 ("Expert testimony, when injected by a party, often opens the door to experts in rebuttal"); United States v. Stephenson, 33 M.J. 79, 82 (C.M.A. 1991)(not unreasonable for trial defense counsel not to put on potentially favorable mitigation evidence in order to avoid opening the door to damaging rebuttal); United States v. Strong, 17 M.J. 263, 266 (C.M.A. 1984)(Government always has a right to present evidence to rebut evidence of good character offered in mitigation).

A failure to introduce evidence that may do more harm than good is not ineffective assistance of counsel; this is not a novel principle. The Supreme Court specifically recognized it in its landmark decision on ineffective assistance of counsel,

Strickland v. Washington. Strickland's defense counsel did not seek psychiatric reports on his client to support a claim of emotional disturbance and did not develop and present character evidence. Strickland, 466 U.S. at 677. Nevertheless, the Supreme Court found trial defense counsel was not ineffective:

> Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

Id. at 699. Yet, that is contrary to the procedure which Appellant wishes this Court to sanction. Appellant claims that in order to avoid being found ineffective in a capital case, a trial defense counsel *must always* offer certain evidence identified by a mitigation expert, regardless of the ramifications of the action. However, this is exactly the type of analysis the Supreme Court decried in Strickland:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel mush have in making tactical decisions. (citations omitted.) Indeed, the existence of detailed guidelines for representation could

> distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

Strickland, 466 U.S. at 688-89.

The wisdom of not presenting the potential mitigation evidence that Appellant now asserts was so vital can best be evaluated by contrasting the evidence actually before the court members with what they would potentially have had if trial defense counsel had attempted to introduce the mitigation evidence.[23] This analysis should be evaluated not only in relation to the evidence of Appellant's motorcycle accident, but also the evidence of Appellant's mother's mental health records.

> ***g. Judicial Economy in Resolution of Meritless Ineffective Assistance of Counsel Claims:*** Appellate courts are not required to apply the test for ineffective assistance of counsel in any particular order. United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008) (citing United States v. Quick, 59 M.J. 383, 386 (C.A.A.F. 2004)); Grigoruk, 56 M.J. at 307. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, ***that course should be followed.***" Gutierrez, 66 M.J. at 331 (quoting Strickland, 466 U.S. at 697) (emphasis added). In this regard, Appellant's meritless allegations against his trial team are well suited to be resolved easily by the lack of prejudice. This Court should also heed the Supreme Court's warning about such obvious attempts as here to escape waiver and forfeiture through ineffective assistance claims: An ineffective assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial and so the *Strickland* standard must be

[23] The wisdom of this practice is widely recognized in the federal courts. *See* Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991).

> applied with *scrupulous care*, lest intrusive post-trial inquiry threatens the integrity of the adversarial process the right to counsel is meant to serve.

Richter, 562 U.S. at 105. (Emphasis in original.)

A.

Trial defense counsel were not ineffective in failing to offer evidence of Appellant's motorcycle accident, which had no discernible medical or psychological impact on Appellant, and Appellant was not prejudiced by trial defense counsel's failure to offer such evidence.

Analysis

A. Trial defense counsel made a sound and reasonable strategic decision not to offer evidence concerning Appellant's motorcycle accident.

As an initial matter, the government does not concede the motorcycle accident evidence, so vociferously championed by Ms. Pettry as vital to the defense, had any probative value whatsoever in this case.[24] Indeed, Dr. Bill Mosman, expert forensic psychologist for the defense, completed a battery of neuropsychological exams on Appellant, including an intellectual and cognitive functioning assessment, and found no abnormalities. (J.A. at 4009.) In the absence of any pronounced neuropsychological damage emanating from this crash, defense counsel elected NOT to present this extenuation and

[24] As this Court recently held: "there is no basis to find counsel ineffective for failing to always follow the mitigation specialists' advice...It is counsel, not the mitigation specialists, who are entrusted with making strategic litigation decisions in each case." Akbar, 74 M.J. at 382.

mitigation evidence out of fear of looking desperate or pursuing a kitchen sink approach. (Id.)

Van Hook endorses just this type of measured response, consistent with the Sixth Amendment: "[a]n attorney can avoid activities that appear distractive from more important duties." 558 U.S. at 11. Similar to Van Hook, where the Supreme Court upheld defense counsel's decision not to introduce putative evidence of the appellant's borderline personality disorder in light of the mitigation evidence already presented (558 U.S. at 11-13), here this evidence was unnecessary in light of its scientifically speculative nature. Trial defense counsel's decision NOT to offer evidence of Appellant's motorcycle accident was "the result of trial defense counsels' strategic decision to conduct the case in a manner" that focused the case, avoided significant government rebuttal, and did not constitute a kitchen sink approach. *See* Akbar, 74 M.J. at 371. Appellant's desire to impute a post-trial expert assessment upon what trial defense counsel knew and believed at the time is in direct contravention of the Supreme Court's repeated insistence that trial counsel be judged upon information known as of the time of trial. *See* Strickland, 466 U.S. at 689.[25]

[25] "It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . .A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

While Appellant now seeks to argue that Dr. Mosman's conclusions were incorrect, this is not the standard to apply in evaluating the reasonableness of trial defense counsel's investigation and tactical decision making in this case. Appellant's arguments to the contrary, this post-hoc reanalysis by Appellant is precisely the type of post-trial resort to the distorting effects of hindsight which the Supreme Court disdains. Strickland, 466 U.S. at 689; Gray, 51 M.J. at 17. Furthermore, there can be no argument but that trial defense counsel's investigation was reasonable under these circumstances. Here, as Appellant asserts and as the post-trial affidavits bear out, trial defense counsel consulted with both Ms. Pettry and Dr. Mosman about this issue. They reviewed, and made available for their experts to review, witness interviews, physical evidence, and hospital records concerning Appellant's motorcycle accident in April 2004. (J.A. at 4008-09.)

It was only after this thorough investigation, and assurances from the defense expert forensic psychologist that further neuropsychological evaluation was both unnecessary and would be unavailing, that defense counsel demurred to introduce evidence of such slight scientific, and hence, probative value. (J.A. at 4009.) As the Supreme Court has emphasized, such strategic decisions, undertaken after reasonable investigation,

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reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."

are virtually unchallengeable. Strickland, 466 U.S. at 690. The fact that appellate defense counsel was able to locate an expert with a divergent opinion in support of Ms. Pettry's contentions years after the trial is irrelevant for consideration of Appellant's claims on appeal: "***The fact that appellate defense counsel have now conceived a different trial tactic from the one used at trial does not mean that the lawyer at trial was ineffective.***" Tharpe, 38 M.J. at 16 (emphasis added). As the Supreme Court most recently affirmed in Richter (in the context of the defense not seeking additional expert assistance in blood spatter evidence in a murder by stabbing case) and this Court recently affirmed in Akbar, the Strickland standard permits counsel to make reasonable decisions that make particular investigations unnecessary. Richter, 562 U.S. at 105; Akbar, 74 M.J. at 380-81.

Nonetheless, Appellant attempts to impress United States v. Curtis, 44 M.J. 106 (C.A.A.F. 1996), *reconsidered and reversed by* 48 M.J. 330 (C.A.A.F. 1997) into service for his cause, relying upon Curtis for the proposition that "failure to investigate and present evidence of a TBI...alone constitutes adequate grounds to overturn his sentence." (App. Br. at 69.) Importantly, however, there was no available mitigating condition in Appellant's case equivalent to the voluntary intoxication defense that trial defense counsel did not avail

themselves of in Curtis. 48 M.J. 330. In contrast to Curtis, where the appellant by his own admission consumed between 1/2 and 3/4 of a half-gallon of gin approximately one hour before committing his double murder (Curtis, 44 M.J. 117), here, according to Dr. Mosman (a qualified expert forensic psychologist with over 150 capital cases to his credit at the time of trial) (J.A. at 2179), there was no nexus between Appellant's motorcycle accident and the murders. The absence of a scientific nexus is key in this case and conclusively renders Curtis inapposite to the facts at bar. Certainly, Appellant spent a significant amount of time in his brief attacking Dr. Mosman's conclusions, citing to the multitude of declarations presented to the lower Court. However, after a thorough review of the record, it is apparent that the declarations from Ms. Pettry, Dr. Wood, and Appellant's friends and family are a clear example of revisionist history being employed in a desperate attempt to reserve Appellant's just death sentence. Indeed, the inconsistencies between and among the various declarations as well as the significant evolution of the various declarants' positions would be comical if the stakes of this case were not so high.[26] This effort at revising history is precisely why the Supreme Court and this Court have rejected a hindsight view of claims of ineffective assistance of counsel.

[26] These inconsistencies and contradictions are described in detail in the additional facts section above.

By command of the United States Supreme Court, trial defense counsel can and must be judged upon the facts as known to them at trial. Strickland, 466 U.S. at 689. Utilizing this standard, trial defense counsel's decision to omit mention of a motorcycle accident which was effectively and categorically ruled out as a extenuating factor in Appellant's commission of double murder is precisely the type of "strategic choice[] made after thorough investigation of law and facts relevant to plausible opinions that are ***virtually unchallengeable***." Strickland, 466 U.S. 690-91; (emphasis added).

B. Even if trial defense counsel's failure to offer evidence of Appellant's motorcycle accident fell below an objective standard of reasonableness, Appellant has not demonstrated that such evidence would have had a substantial likelihood of shifting the balance between aggravating and mitigating factors at trial.

As a general principle, absence of additional mitigation is not itself prejudicial. The law will find no error and reward no relief simply because additional mitigating evidence might have been available. Pinholster v. Cullen, 563 U.S. 170, 201-02 (2011) (holding additional evidence of brain injury and mental health instability would not have overcome aggravation evidence); Belmontes, 538 U.S. at 28 (affirming death sentence despite counsel's failure to present evidence of appellant's "terrible childhood and abuse"). Rather, the Strickland standard, as reaffirmed by the Supreme Court in Richter and this Court in Akbar is that there must be a causal effect for

prejudice; the standard is that there is a "reasonable likelihood" (i.e. substantial, not just conceivable) that omitted evidence would have made the difference between death and life to the factfinder:

> "A 'reasonable probability' [means] but for counsel's unprofessional errors, the result of the proceeding would have been different, which is a probability sufficient to undermine confidence in the outcome,...[to establish prejudice] ***it is not*** enough to show that counsel's errors had some conceivable effect on the outcome of the proceedings."

Richter, 562 U.S. at 104 (emphasis added).

Here, a review of the record makes apparent that Appellant's paltry available mitigation evidence was buried in an avalanche of aggravation evidence consisting of premeditation, barbarity, and heartbreaking victim impact. This makes the omission of this speculative "mitigation" evidence less prejudicial, not more so. Indeed, the Court's commentary in Belmontes, affirming the death sentence even where defense counsel failed to demonstrate evidence of extended rheumatic fever leading to emotional instability, impulsivity, and impairment of the neurophysiological mechanisms for planning and reasoning (558 U.S. at 389), is particularly apt here, where proof of premeditation is overwhelming: "[A]ppellant's mitigation strategy failed, but the notion that the result could have been different if only [Appellant] had put on more than the

nine witnesses he did, or called expert witnesses to bolster his case, is fanciful." 558 U.S. at 28. *See also* Pinholster, 563 U.S. at 201 (noting that mitigating evidence can be a "two-edged sword" and emphasizing that evidence of mental defect "is by no means clearly mitigating as the jury might have concluded that [the appellant] was simply beyond rehabilitation").

It is also important to note that, contrary to the implication of Appellant's brief, there is no "presumed prejudice" for a failure to offer even authentic information as to traumatic brain injury or mental health in a capital trial. The Supreme Court has taken pains to note instances of "presumed prejudice," even in capital litigation, are extraordinarily limited and involve only the complete breakdown of the adversary process due to actual or constructive denial of counsel, *see* United States v. Cronic, 466 U.S. 648, 660-61 (1984); state interference with counsel, *see* Burger v. Kemp, 483 U.S. 776, 779 & n.6 (1987); and certain actual conflicts of interest, *see* Mickens v. Taylor, 535 U.S. 162, 167-68 (2002).

"In evaluating [prejudice] it is necessary to consider all the relevant evidence that the jury would have had before it had [Appellant] pursued the different path—not just the mitigation evidence [Appellant] could have presented." Belmontes, 588 U.S. at 20. Furthermore, as the Court noted in Pinholster, this is intended to be a thoroughly practical and realistic analysis,

taking into effect the realities of trial practice. For in Pinholster, the Court affirmed the appellant's death sentence, finding failure to present mental health evidence was not prejudicial because introducing this evidence "would have opened the door to rebuttal by a state expert." Pinholster, 563 U.S. at 201. Indeed, an appellant cannot escape the realities of trial on appeal, and must place his prejudice analysis within the realities of that trial because, as the Court pointedly noted: "[a]ny diligent prosecutor would have challenged whatever mitigating evidence the defense had put on and we certainly would not expect the prosecutor's closing argument to have described the evidence in the light most favorable to Pinholster." Id. at 200, n.19.

Here, similar to Pinholster, the realities of this trial are that the government was ready, willing, and able to refute any evidence of traumatic brain damage with a forceful rebuttal from Dr. Rath eviscerating what mitigating effect Appellant may have hoped to gain from a one-vehicle motorcycle accident resulting in a negative CT scan, no inpatient care, and no discernible cognitive trace. In particular, Dr. Rath would have been prepared to testify that it was ***clinically improbable*** that Appellant suffered the "perfect" traumatic brain injury, i.e. one that fails to leave a trace. Or more specifically, that Appellant managed to suffer a severe cognitive transient

impairment from his February 2004 accident that impaired his mental functioning on the night of the July 2004 murders, but then totally remitted afterwards such that an evaluation conducted 14 or 15 months later (September or October 2005) failed to show signs of impairment after examinations by three forensic psychologists and psychiatrists, including his own.[27] (J.A. at 4088.)

This discussion is a significant reminder of why this Court should not accept Appellant's invitation to engage in post-hoc trial by affidavit and fall prey to the "psycho-legal quagmire" so oft lamented by this Court and our sister service courts of criminal appeal. United States v. Gray, 51 M.J. 1, 17 (C.A.A.F. 1999). Indeed, this Court forcefully resisted that very same temptation to engage in re-litigation via affidavit in Akbar, and instead held that the presentation of a 38 minute, 15 exhibit defense mitigation case in the death penalty sentencing phase was not ineffective assistance of counsel. Akbar, 74 M.J. 364.

[27] Appellant argues to this Court that evidence of TBI and Dr. Wood's testimony would have been especially persuasive to members with medical or technical training. (App. Br. at 78.) However, the same is true for the evidence that the government would have offered in rebuttal, as well as the ample evidence that Appellant suffered no immediate or lasting effects from his motorcycle accident. More importantly, the United States respectfully asserts that the proper prejudice analysis ought to be viewed through the eyes of a ***reasonable juror*** in the context of the evidence presented as a whole, not by dissecting the member data sheets and questionnaires to speculate as to how each particular member may have voted.

Appellant cites to three Supreme Court decisions which involved reversible error for ineffective assistance of counsel that warrant a brief review of the striking dissimilarity between the action of counsel in this case and the counsel's actions in the Supreme Court's three decisions: Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); and Rompilla v. Beard, 545 U.S. 374 (2005).

In Williams, 529 U.S. at 398-99, the Court found deficient performance and prejudice arising from counsel's failure to introduce evidence of Williams's low IQ and difficult childhood, and their failure to obtain evidence of his good behavior in prison, where he also obtained a carpentry degree. In Rompilla, the Court found counsel ineffective for failing to investigate the prosecution's file of Rompilla's prior rape conviction, which would have enabled counsel to uncover other mitigating evidence about Rompilla's life, particularly in light of the fact that counsel had to know that the Commonwealth would use the prior rape conviction in aggravation. 545 U.S. 390-91. Finally, in Wiggins, the Court deemed counsel constitutionally ineffective for failing to investigate and present evidence of Wiggins's childhood neglect and abuse, including severe sexual abuse, and his low IQ. 539 U.S. 534-35.

In placing these cases into their proper context, therefore, Appellant's reliance on Wiggins as a basis for

prejudice is misplaced. Specifically, the Court in Wiggins only reversed appellant's death sentence where defense counsel failed to uncover appellant's "***excruciating life history*** on the mitigating side of the scale." *See* Wiggins, 539 U.S. at 537 (emphasis added).[28] By contrast, Appellant's life history was ANYTHING but excruciating, punctuated as it was by a stable upbringing in a Christian home with a successful physician stepfather, including international golf trips to Scotland and paid year-long study abroad at Bible college in England.

Insofar as Appellant's filing has invited this Court on a survey of all manner of federal circuit court and state supreme court decisions, the government rather modestly recommends that perhaps recourse should be made to the following persuasive authority (by no means an exhaustive list) from 2003 onward finding no prejudice in capital cases for failure to present alleged "brain injury" evidence at trial, from the actual jurisdiction where Appellant committed his crimes and faced trial in:

i. Evans v. Secretary, Dept. of Corrections, 703 F.3d 1316 (11th Cir. 2013) (NO PREJUDICE for failure to offer evidence of childhood brain injury and anti-social personality disorder).

[28] Reversing only where the mitigating evidence included physical abuse, sexual molestation, homelessness, diminished mental capacities, and an absentee mother with substance abuse problems. *See also* Williams, 529 U.S. at 397-98 ("[T]he graphic depiction of Williams' childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability").

ii. Morgan v. Branker, 2012 U.S. Dist. LEXIS 98759 at *20, 31 (11th Cir (W.D. N.C.) 2012) (failure to introduce evidence of childhood abuse, childhood head injury and subsequent bizarre behavior, and additional details of his long-term substance abuse).

iii. Holsey v. Warden, Georgia Diagnostic Prison, 694 F.3d 1230 (11th Cir. 2012) (failure at the sentencing phase to present the additional evidence of his limited intelligence and his troubled, abusive childhood).

iv. Haliburton v. Secretary for Department of Corrections, 342 F.3d 1233, 1244 (11th Cir. 2003) (holding that "the indication of brain damage . . . can often hurt the defense as much or more than it can help").

In evaluating these cases one conclusion is obvious: reversal of a death penalty sentence requires much more severe circumstances and much less aggravation evidence than that presented by Appellant's case.

Put simply, Appellant suffered no prejudice from the trial defense counsel's failure to offer evidence of Appellant's minor motorcycle accident. It requires no speculation from this Court – just a full review of the record – to conclude no putative brain injury occasioned by a one vehicle accident, a negative CT scan, no missed days from work, with no cognitive trace after full psychological evaluations by three forensic psychological

and psychiatric experts[29] was ever going to change the balance aggravating and mitigating factors in this case. If this supposed injury did not impact Appellant's ability to premeditate (and it clearly did not as the sanity board and other defense experts confirmed), how could it ***EVER*** shift the balance of aggravating to mitigating factors for so heinous a crime? In this regard, the government invites this Honorable Court to compare and contrast the circumstances of Appellant's case with those cases that were so severe that those appellate courts felt compelled to reverse a death sentence. The government asserts that all these cases have two primary bases in common: (1) more severe injuries than Appellant (borderline retardation and severe physical injury accompanied by substance abuse in most cases); and (2) much less investigation (ranging from none, to as little as 20 hours, to one week in several cases).[30]

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[29] Dr. Bill Mossman (Defense Expert—Forensic Psychology); Dr. Craig Rath (Government Expert—Forensic Psychology); Maj Ajay Makhija, M.D. (Chief of Sanity Board—Forensic Psychiatrist).

[30] *See* Jefferson v. Upton, 130 S.Ct. 2217 (2010) (remanded for further findings where accused had permanent frontal lobe damage with misshapen, swollen, scarred skull; teenage drug/alcohol abuse resulting in "permanent brain damage causing abnormal behavior"); Porter v. McCollum, 558 U.S. 30 (2009) (failure to present Post Traumatic Stress Disorder evidence from decorated combat service); Williams v. Taylor, 529 U.S. 362 (2000) (borderline mental retardation and only 6th grade education); Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003) (prolonged exposure to toxic solvents; severe paranoia; chronic alcoholism; locked in a closet and abused by father; left temporal lobe injury from car crash); Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001) (accused raised in a brothel, exposed to bestiality and voodoo rituals; twice committed to inpatient care for head injuries; high school dropout with 79 IQ

The United States' provided extensive detail about the obvious victim impact proven and truly "unrebutted" in the record, so we will not repeat it here. (*See* Statement of Facts, *supra*.) But when this Court carefully considers the heart-breaking victim impact testimony, and more significantly, when each member of this Court carefully reviews Prosecution Exhibit 37 (J.A. at 3091) (the tragic 911 phone call recording the terrifying final moments of the Schliepsieks as Appellant effected his murderous rampage through their home while they begged for their lives), the Court will put this case into the appropriate perspective. The double murder of an innocent Airman and his wife, in their home, who begged for their lives, calling Appellant by name, imploring him that "he did not have

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(borderline mentally disabled)); Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999) (significant child abuse with "tortured family background", evicted from home at 14, organic brain damage resulting from severe trauma; borderline mentally disabled IQ with mental age of 14 at the time of offenses); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1998) (Almost no mitigation investigation failed to discover defendant never finished the fifth grade and never had been able to read at more than a second-grade level. His IQ was 76 and had organic brain damage from two head injuries for which he had been hospitalized. He was sexually assaulted while at a school for boys, and the first of several suicide attempts occurred at age 13); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) (Defendant had a "long history of psychiatric problems," including being committed for years in a facility. Also a history of mental retardation); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) (Mental retardation, psychosis, paranoid and depressive tendencies, poor contact with reality, and organic brain damages); Commonwealth v. Zook, 887 A.2d 1218 (Pa. 2005)(Psychotic disorder (with possible schizophrenia) and severe head injury that had a profound effect on defendant's behavior and personality; immediately underwent a craniotomy after injury, and suffered "drastic behavioral change[s]" after the injury and procedure, developing seizures and post-traumatic amnesia).

to do this" as he savagely sliced and stabbed their lives away with a 13-inch hunting knife cannot be excused or pardoned. Appellant did so while Andy lay paralyzed and helpless on the living room floor, and while Jamie hid in the fetal position behind the bedroom door, all within just yards of each other. Appellant did so with no more "provocation" than Jamie Schliepsiek exercising her right to rebuff an unwanted and unsolicited sexual advance from Appellant, and Andy Schliepsiek exercising his right as a husband to call Appellant to account for it. It is a study in human credulity, barbarism and evil, unmitigated by any mental irresponsibility or cognitive impairment. Senior Airman Andrew Paul Witt murdered an innocent Airman and his wife in cold blood; he did so with painstaking premeditation; he did so with brutal savagery; he ignored their cries for mercy; he showed no real remorse; and for his unspeakable crimes, he has earned the ultimate penalty. In affirming the death sentence in United States v. Akbar, this Court stated "if ever there was a case where a military court-martial panel would impose the death penalty, this was it." Akbar, 74 M.J. at 372. United States v. Witt is its twin.

B.

Appellant has also failed to meet his high burden to prove deficient performance and prejudice in his trial defense counsel's failure to obtain and present Appellant's mother's mental health records.

Additional Facts

The defense theory at trial in both findings and sentencing was to show Appellant's family experiences, his childhood, and the manner in which he was raised, which is a reasonable and recognized theory in capital cases. "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." (J.A. at 1073.) Trial defense counsel presented extensive evidence to support their theory including 16 sentencing witnesses and an index of sentencing exhibits that was 4-pages long (J.A. at 3191-94) and included 23 character references (J.A. 3195-3222) as well as many other exhibits.

As the Air Force Court correctly found, the record clearly shows that the matter contained in the mental health records of Appellant's mother was in fact cumulative to other evidence in the record. The defense called Appellant's stepfather, who testified extensively about Appellant's upbringing and about the depression experienced by Appellant's mother eight years before Appellant's murderous rampage. Appellant's stepfather testified that he was "very fond of thinking about Andrew calling me 'dad' from the first day. He said that he had two dads. . . .he's

always called me dad." (J.A. at 2487.) Appellant's stepfather took Appellant on a religious mission to Romania to build churches when Appellant was 12 or 13 (J.A. at 2852-53) and on two trips with a group called Promise Keepers, a Christian men's organization. (J.A. at 2853.)

Appellant's mother repeatedly refused to sign a release for her mental health records that are the subject of this issue. (J.A. at 3933.) Nevertheless, this information was presented at trial when Appellant's physician stepfather testified:

> Q. Did [Appellant's mother] go through some depression around that time?
>
> A. Right. And just--I think Andrew was in his eighth grade year and Sam would have been maybe two or three at the time, she became depressed. I think she felt, because I was at work all the time and she had to do all the work--all the homeschooling basically, in a very intense experience; she felt overwhelmed. And we knew about the Minirth Meier Clinic, which is a Christian Counseling Clinic in Wheaton, Illinois. So, she decided to check in there for a couple of weeks and I stayed home while she was there.

(J.A. At 2486.) The prosecution never contested the fact that Appellant's mother was voluntarily treated for depression eight years prior to Appellant's murders. Appellant's mother also testified extensively about her own family history as well as Appellant's upbringing. (J.A. 2884-2925.)

Also, Appellant cites with favor approximately 48 times Judge Saragosa, who was the majority author of the now-vacated

panel decision of the lower Court that sought to set aside Appellant's death sentence and the author of a dissenting en banc opinion in the decision affirming his death sentence that is pending before this Court. Although her original but now vacated panel decision for the majority was unclear in many respects, while writing for the majority Judge Saragosa did not find trial defense counsel were deficient for failing to obtain and present Appellant's mother's mental health records. Judge Saragosa did correctly find such records were cumulative to other evidence presented at trial:

> Given the extent to which the appellant's mother's mental health history and upbringing was presented to the members, this Court finds very little new information that would have been discovered by obtaining the Minirth Meier New Life records.

(J.A. at 0192.) The two dissenting judges in the original panel decision also found Appellant failed to meet his burden to establish prejudice for the deficiencies articulated by the majority (J.A. at 203) -- but again, no member of the original panel found a deficiency on this issue.

The majority en banc opinion now before this Court also did not make a finding of deficiency on this issue: "we hold that the appellant's trial defense counsel were not ineffective for failing to investigate and introduce the mental health records of the appellant's mother." (J.A. at 50.) Judge Saragosa

changed her position during reconsideration concerning the deficiency prong when she wrote in her now-dissenting opinion before this Court and declared for the first time: "Trial defense counsel's lack of investigation in this area was constitutionally deficient." (J.A. at 84.) But, she continued to find this information was "cumulative" to other evidence presented by defense at trial and found that "it adds very little to the overall assessment of prejudice." (J.A. at 87.)

The majority en banc opinion also extensively summarized the evidence in the record concerning Appellant's mother's mental health, her upbringing, her family history, and Appellant's upbringing. (J.A. at 43-46.)

The Air Force Court correctly rejected Appellant's unfounded claim on appeal that he was simply the product of:

> two drug-addled parents, whose upbringing in their care, in combination with other disadvantaged circumstances, left him with irreparable emotional injuries one would reasonable expect as a result of severe physical and emotional adversity. **But voluminous other evidence produced at trial painted what can only be described as a markedly different picture.**

(J.A. at 43; emphasis added.) In fact, as is well supported in the record and as the majority found, Appellant experienced a favorable childhood, and the cumulative information contained in his mother's mental health records would not have made any difference between a life and death sentence. (J.A. at 46.)

Appellant seeks to blame God, his trial defense counsel, and his mother's depression eight years before his murders for his fate, but even his loving parents know who is solely responsible here. Appellant's loving stepfather (a physician), whom Appellant called "Dad" from day one, testified as follows:

> Q. Sir, do you blame Andrew for what happened that night?
>
> A. He's responsible for what he did, yes sir.
>
> Q. And you do not disagree that he needs to face the consequences for that?
>
> A. Correct.
>
> Q. Do you blame anybody else for what happened that early morning?
>
> A. He's responsible for his actions.

(J.A. at 2875.)

Even Appellant's loving mother said the same thing: "I think he's responsible for his actions. I agree with what [Appellant's stepfather] said." (J.A. at 2916.) And Appellant's natural father testified the same way when he said "Yes, I do" to the question, "Do you hold your son responsible for what he did that night, sir?" (J.A. at 2952.)

Standard of Review

> . . . we do not assess trial defense counsels' performance through the prism of appellate hindsight and then apply our subjective view of how we think defense counsel should have conducted the trial. Rather, pursuant to Supreme Court precedent, we are obligated to

> determine whether trial defense counsel's performance fell below an "objective standard of reasonableness" and, if so, whether there was a "reasonable probability" that the result of the proceeding would have been different absent counsels' deficient performance. Strickland, 466 U.S. at 688, 694.

United States v. Akbar, 74 M.J. 364, 385 (C.A.A.F. 2015) (emphasis in original).

Analysis

The United States fully agrees with the en banc majority of the Air Force Court that found that Appellant's trial defense counsel were not constitutionally ineffective for failing to investigate and introduce the mental health records of the appellant's mother. Appellant cannot meet his sole and high burden to establish that his counsel were deficient because his counsel did in fact present evidence of his mother's depression eight years prior to the murders and because the overwhelming evidence presented at trial provides no reasonable nexus between Appellant's generally favorable upbringing and childhood and his mother's depression years before Appellant's murders. Armed with appellate hindsight, Appellant now seeks to apply a subjective and fully self-serving view on appeal of how he thinks trial defense counsel should have conducted the trial -- a claim that the Supreme Court in Strickland and this Court in Akbar commands against.

It cannot be disputed that trial defense counsel did present evidence that Appellant's mother experienced depression

eight years prior to the trial. But through the lens of prohibited appellate hindsight and Monday-morning quarterbacking, Appellant complains through new counsel on appeal that it should have been handled differently -- not that the information was not presented but that it should have been presented differently. Again, that is not the required standard and burden Appellant alone must overcome.

The Air Force Court majority opinion made extensive findings well supported in the record that negate Appellant's claim about his mother's mental health and any possible nexus to Appellant and his murderous rage. His mother, MP, testified that she had a "great relationship" with her own mother and denied any history of physical abuse. MP never became part of the social services system, was an avid reader, graduated from high school, and earned a college degree in journalism. After college, MP worked in what she described as "some pretty good jobs." (J.A. at 43.)

MP met Appellant's natural father, CW, and married him in 1980. MP drank socially from the time she met CW until the time of their divorce a few years later. MP admitted that she tried cocaine one time but denied any other illicit drug use or cigarette use. MP testified that she did not realize that CW was an alcoholic or that he had a drug problem at that time.

The couple divorced when Appellant was three years old, and MP and Appellant moved to Wichita away from CW. (J.A. at 43-44.)

MP got a "very good" journalism job as a copywriter that she held for three years, bought a house, and managed well as a single mother. (J.A. at 44.) In 1988, MP and Appellant moved to Wisconsin to put some distance between them and CW. She got a similar job. MP met Dr. GP (Appellant's stepfather) in 1988, and they married. MP became a stay at home mother. MP became concerned about Appellant's visitation with CW because of CW's problem with drugs. (Id.) CW attended rehab and got his drug problem under control. CW then again had extended visitation with MP. (J.A. at 45.)

MP described Appellant's childhood in Wisconsin in very positive terms, even referring to that time as the "golden days." MP taught Appellant how to drive, and she helped him start his own lawn mowing business. (J.A. at 45.)

In 1996, MP began feeling stress, and she and Dr. GP decided she should voluntarily seek treatment at the Minirth Meier Clinic where she "reported that she had been stressed out by issues related to a summer job, teaching Vacation Bible School, and the requirements of home schooling her children." (J.A. at 45.)

As the majority of the en banc Air Force Court found, Appellant enjoyed a favorable childhood -- one far more

favorable than most appellants on death row in America. Appellant was home schooled in seventh and eighth grades. He then attended a nearby private high school for a year before transferring to Aquinas High School, described as "one of the best, if not the best" high schools in the area with "nice computer labs, good curriculum, [and] quality teachers." (J.A. at 45.) During high school, Appellant was described as a "very fine student" who played in the school jazz band and excelled on the school's golf team. (Id.)

After graduating from high school, Appellant attended Capernwray Bible School, a private college in England where his stepfather and mother paid his tuition and travel expenses in Europe. Appellant also had funds he had saved while working during junior high school and high school. While there, Appellant toured the Lake District, Scotland, and London. (J.A. at 45.) Appellant's classmate from College called Appellant a "good student" who "interacted well" with his peer group. (J.A. at 45-46.) At age 18, Appellant also received $30,000 in oil well stock from his father from a conservatorship established after Appellant's parents divorced. (J.A. at 46.)

The majority of the Air Force Court also noted that both CW and Dr. GP testified about Appellant's "atypical clarity of focus on his plans for the future." (J.A. at 46.)

Appellant actually concedes away this issue in his brief:

> 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).

(App. Br. at 88)(emphasis added.)

Boyde has nothing to do with ineffective assistance of counsel claims; it was purely an instructional issue before the Court. Even so, applying Appellant's selective use of Boyde, it is plainly revealed in this record that Appellant does not come from a "disadvantaged background," and his murderous acts are not attributable to "emotional or mental problems." As a result, Appellant has "no such excuse" and cannot escape responsibility for his barbaric actions. This point is further cemented by Appellant's sanity board.

On 26 July 2004, just three weeks after his murders, Appellant was evaluated by a board certified and forensic psychiatrist during his sanity board. (J.A. at 3730.) The forensic psychiatrist described Appellant at that time as "a fair historian and his self-reported history was consistent with the information obtained from collateral sources." (Id.) Appellant reported that he had experienced no psychiatric symptoms prior to the murders, and he specifically reported that

he experienced no "prior depressed mood." (Id.) Appellant also confirmed that he experienced no physical or sexual abuse as a child, and he had earned a 3.1 grade point average in high school. (Id.) The predicate of a disadvantaged childhood or mental problems Appellant now imagines to support his ineffectiveness claim is simply negated by the actual record.

Bottom line, the Air Force Court correctly found no deficiency or prejudice on this issue. The majority recognized that CW and MP faced troubles in their lives and that MP experienced depression and was treated for "stress" for 17 days when Appellant was a teenager. The Court was absolutely correct to conclude that presenting this information in a different manner than was presented at trial would not have made the difference between a life and death sentence. (J.A. at 46.) There was no deficiency. There was no prejudice. Appellant has failed to meet his burden, especially given the overwhelming evidence of his guilt and the horrific nature of his brutality.[31]

Assuming arguendo there was deficiency, this Court need not even conduct that analysis as this issue can easily be disposed of directly on grounds of lack of prejudice alone. "As the Supreme Court said in Strickland, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient

[31] *See* United States v. Gray, 51 M.J. 1, 18 (C.A.A.F. 1999) where this Court found no deficiency and no prejudice in another double murder capital case, specifically rejecting a similar "failure to investigate" claim that overlooked substantial mitigating evidence presented at trial.

prejudice, which we expect will often be so, that course should be followed.'" United States v. Gutierrez, 66 M.J. 329, 331 (C.A.A.F. 2008)(quoting Strickland, 466 U.S. at 697).

Here, no prejudice within the meaning of the Sixth Amendment occurred because MP's mental health records do not reveal any compelling information that would alter the sentencing landscape, especially given the cumulative nature of the evidence Appellant imagines would have prevented his well-earned death sentence. *See* Strickland, 466 U.S. at 699-700 (finding no prejudice in a triple murder stabbing case where defense counsel failed to offer a psychological evaluation and fourteen character affidavits for the appellant because "The evidence that the respondent says his trial defense counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge."

As this Court noted in Gutierrez, "To show prejudice under the *Strickland* test, [Appellant] must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" "In demonstrating this 'reasonable probability,' [Appellant] must show a 'probability sufficient to undermine confidence in the outcome.'" Gutierrez, 66 M.J. at 331. Appellant can never meet his burden here. Given the extremely aggravating nature of his

senseless slaughter of Andy and Jamie Schliepsiek and the near murder of Jason King and given the cumulative nature of the evidence Appellant now argues should have been presented ***differently*** -- which was cumulative as correctly found by ALL Air Force Court judges in two opinions -- Appellant cannot meet his burden. Appellant alone brought about his justly deserved and inevitable death sentence, and no appellate hindsight can change that fact.

The fact remains that this particular evidence suggested by Appellant has little probative value that would have been necessary to make a difference in this case. This was not evidence of "severe privation" (child abuse; substance abuse; sexual abuse) or other profound emotional distress suffered by Appellant. Without such evidence, courts have found the omissions of such extraneous psychological evidence as seen here to be without prejudice. *See* Bobby v. Van Hook, 558 U.S. 4 (2009); *cf.* Porter v. McCollum, 558 U.S. 30, 40-44 (2009)(in a "heat of passion" case where defendant shot his former girlfriend and her new lover, finding that defense counsel's failure to uncover ***any*** mitigating evidence regarding defendant's (1) heroic military service, (2) resulting life altering post-traumatic stress disorder, (3) history of child abuse, and (4) brain abnormality was deficient and prejudicial performance).

Appellant's case is akin to the controlling Supreme Court case of Bobby v. Van Hook as it illustrates the absence of deficiency and prejudice at issue here. In Van Hook, the Supreme Court unanimously found the appellant suffered no prejudice and counsel committed no deficiency in investigating mitigating evidence: "it was not unreasonable for his counsel to not identify and interview every other living family member or every therapist who had once treated defendant's parents." Van Hook, 558 at 11. Van Hook involved a brutal strangulation and stabbing murder of a homosexual man whom Van Hook lured to his apartment with designs of robbing him. Id. at 5.

In Van Hook, the appellant alleged ineffective assistance of counsel based upon his counsel's failure to fully investigate his difficult childhood, punctuated by bar hopping and drinking with his father when he was 9 years old and his observations of sexual and physical violence between his parents while sleeping in his parent's bedroom. Id. at 10. Pertinent to Appellant's case, Van Hook faulted his counsel for failing to interview a therapist who had once treated his mother, alleging that such information "could have helped his counsel narrate the true story of [his] childhood experiences." Id. at 11.

Analyzing the evidence in that case, the Supreme Court noted that at trial his defense counsel offered eight mitigation witnesses and Van Hook gave an unsworn statement. Id. at 5.

The Supreme Court found counsel was "reasonably effective" in these submissions because the general parameters of his mitigation defense and reference to his difficult childhood were in fact submitted at trial and additional information was unnecessary and cumulative. The same is true here.

> Given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed the history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents.

Id. at 11. Moreover, the Supreme Court found no prejudice resulting from the omission of psychological evidence (including the therapeutic history of the appellant's mother) because "the affidavits submitted by the witnesses not interviewed shows their testimony would have added nothing of value." Id.

As in Van Hook, Appellant's trial defense counsel engaged in extensive investigation of Appellant's background and childhood, securing the services of a mitigation expert to conduct over 100 interviews of persons with knowledge of or association with Appellant over the course of a year prior to trial. Likewise, as Appellant barely concedes (App. Br. at 85, 94), the court members were aware of his mother's inpatient care for depression, having heard testimony from Appellant's stepfather as noted above (J.A. at 2486) as well as a general discussion of his mother's purported family history of mental

illness. (J.A. at 2885-87.) This was not a case like Porter in which trial defense counsel met with their client only once prior to trial to discuss his sentencing case and conducted no research into his personal background. Porter, 558 at 31. Nor was this a case where defense counsel offered only one mitigating witness at trial who testified only to Porter's voluntary intoxication on the night of the murders and of his good relationship with his son. Id. at 31-32. Rather, this was a case like Van Hook, involved extensive mitigation witness testimony from 16 witnesses, including most prominently his mother, father, and stepfather who each detailed Appellant's personal upbringing, challenges, and hopes for the future, and who begged for mercy for their son. As in Van Hook, the fact that more mitigation evidence was available is not the issue in evaluating prejudice. The issue is "whether there is a reasonable probability that, absent the errors, the sentence--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. Here, the evidence was both cumulative and of minimal probative value. As a result, there was neither error nor prejudice in failing to present it.

C.

The victims' family members had a federal statutory right to be present in the courtroom, also codified in Mil. R. Evid. 615, their presence did not deprive Appellant of due process, and their presence in the courtroom did not render defense counsel ineffective.

Analysis

Appellant alleges he was prejudiced by the "emotional displays in full view of the members" by the families of Andy and Jamie Schliepsiek. (App. Br. at 103.) However, the conduct of spectators during a court-martial is only considered prejudicial if it has some discernable impact on the deliberations of the jury. United States v. Vigneault, 9 C.M.R. 247, 257 (A.C.M.R. 1952), *aff'd*, 3 U.S.C.M.A. 247 (C.M.A. 1953). Similar to the case at the bar, Vigneault was a capital murder trial involving a double murder,[32] in which the accused received the death penalty at trial. Vigneault, 9 C.M.R. at 250. In Vingeault, trial defense counsel complained during his closing argument to the members that there had been signs of "partiality" from the spectators during the trial, spectators whom the appellant claimed had been bussed in from the victims' hometown in Germany. Id. at 257. Ultimately, the Army Court of Military Review found no evidence in the record that any putative displays of "partiality" by the spectators impacted the

[32] PVT Vigneault was convicted of murdering two German nationals by shooting them with his carbine rifle after waylaying their vehicle and attempting to rob them at gunpoint. Vigneault, 9 C.M.R. at 250.

jury, and accordingly affirmed the death sentence in the case. Id. at 257, 260.

Furthermore, there is no inherent prejudice recognized under either military case law or procedure concerning the presence of victims' families as spectators throughout a court-martial. Indeed, Mil. R. of Evid. 615 codifies the statutory right which federal law provides victims in attending judicial proceedings. Specifically, the rule provides that at the request of the prosecution or the defense the military judge shall order witnesses excluded, but the rule does not authorize a person authorized by statute to be present at courts-martial, or any victim of an offense from the trial of an accused for that offense because such victim may testify or present information in relation to the sentence or that offense during the presentencing proceedings. The Rule was intended to extend to victims at courts-martial the same rights granted to victims by the Victims' Rights and Restitution Act of 1990 codified at 42 U.S.C. § 10606(b)(4). *See* Drafter's Analysis, Supplement to Manual for Courts-Martial, United States (MCM), A22-58 (2012 ed.) Among the rights afforded to victims is the right to be present at trial unless the court, after receiving clear and convincing evidence, determines their testimony would be materially altered if they heard other testimony at the proceeding. *See* 18 U.S.C. § 3771 (a)(3). Moreover, the term

"victim" includes family members of deceased victims. *See* Drafter's Analysis, Supplement to Manual for Courts-Martial, United States (MCM), A22-58 and 18 U.S.C § 3771(e).

Notwithstanding the unquestioned statutory right of the victims to appear and participate in the proceedings, Appellant asserts in support of his claim that the victims' families displayed too much emotion, that "the 'bloody shirt' was waved at this trial."[33] (App. Br. at 107.) However, contrary to Appellant's assertion, there is absolutely no evidence of inappropriate and prejudicial conduct on the part of the victims' families, who displayed great restraint throughout the course of the trial given the immeasurable pain they were experiencing. Appellant's submission of declarations from his own family members and Ms. Pettry, whose credibility is largely suspect, to establish the victims' family members were crying, shaking their heads, appearing angry, or exhaling during the trial is unavailing, as it merely demonstrates their subjective observations and reactions to the victims' families, a group of people with whom they possess widely conflicting interests. Appellant does cite to the declarations of TSgt Henkel, the

[33] Notably, Appellant makes no mention in his brief of the statutory right of the victims to be present for the court-martial, and makes no effort to explain how defense counsel would have met their burden of showing that the victims' testimony would have been materially altered by their presence in the courtroom, a prerequisite under federal law to any successful objection to their continued presence.

defense paralegal, and Mr. Rawald, one of Appellant's trial defense counsel in support of this allegation.[34] (App. Br. at 105-06.) However, like the declarations of Ms. Pettry and Appellant's family, these declarations provide absolutely no information verifying that the court members even saw such demonstrations from the victims' families, and if so, what their reaction to them was.

Despite Appellant's efforts to paint a picture that the victims' families were engaging in emotional outbursts throughout trial, the military judge only had to speak to the gallery on three occasions during this five-week long trial. (J.A. at 1440, 1793-94, 2773-74.) One instance involved a simple instruction to all the spectators advising them they must refrain from talking because it was hard to hear in the courtroom, after a request made by trial counsel. (J.A. at 1793-94.) More importantly, on another occasion, the military judge was required to admonish ***Appellant's family*** for their inappropriate conduct. (*See* J.A. at 2773-74.)

As noted by Appellant in his brief, emotions ran high during this court-martial, which should come as no surprise to Appellant who savagely murdered two innocent victims and nearly

[34] The United States notes the irony of Appellant's reliance on Mr. Rawald's declaration on this issue. When discussing the motorcycle accident, Appellant quickly discounted Mr. Rawald's declarations. As with the remainder of Appellant's brief, Appellant cherry picks facts that he believes support his attempt to avoid his well-deserved death sentence and ignores or discounts any facts that do not.

took the life of a third victim. Appellant's assertion that "emotional displays" deprived him of a fair trial is both legally and factually unfounded as there is no evidence existing, or even articulated by Appellant, of a nexus between any emotional outbursts and an impact on jury deliberations. Such a nexus is absolutely necessary for a finding of prejudice. Vinegault, 9 C.M.R. at 257.

In support of his untenable argument, Appellant cites primarily to United States v. Pearson, 17 M.J. 149 (C.M.A. 1984). However, Appellant's reliance upon Pearson is misplaced. In Pearson, the Court of Military Appeals found error, noting "emotional displays by aggrieved family members, though understandable, can quickly exceed the limits of propriety and equate to the bloody shirt being waved." 17 M.J. at 153. Appellant fails to point out that in Pearson the "emotional display" was the deceased victim's father criticizing the panel's finding that the accused was only guilty of negligent manslaughter when he testified during sentencing. The Court found the father's emotional comment, although understandable, violated the sanctity of the court-martial. Id. It is also worth noting the full text of the "bloody shirt" language quoted by Appellant and referred to by the Pearson Court originated in the Senate Judiciary Committee's report regarding the passing of the Victim and Witness Protection Act, which warned "we never

want to be guilty of waving the bloody shirt; **neither are we to bury the bloody shirt with the victim still in it.**" Pearson, 17 M.J. at 152 (internal citation omitted) (emphasis added).

Here, the only "bloody shirt" being "waved" was one of Appellant's own making, in the blood soaked skirt of Jamie Schliepsiek and the blood soaked polo of Andy Schliepsiek. In sum, this allegation of error boils down to Appellant's assertion that the preferences of the defense mitigation specialist to bar the victims from the courtroom (a preference which finds no support in law, precedent, or human decency) somehow constitutes grounds for ineffective assistance. However, there is no "Cheryl Pettry" exception to the Strickland standard. It also ignores the fact that trial counsel and defense counsel came to a reasonable agreement prior to trial to permit the presence of the primary family members from each side throughout trial, and without objection. Such an accommodation was both reasonable and no doubt beneficial to the defense as otherwise Mil. R. of Evid. 615 could have been successfully invoked against Appellant's family members who were ultimately called as witnesses during Appellant's sentencing case. (J.A. at 4003.) As the Air Force Court aptly held: "Whether the luxury of hindsight ultimately reveals the choice counsel made to have been the most effective option is not the standard." (J.A. at 32.) Accordingly, particularly in the absence of

either error or prejudice, trial defense counsel were not ineffective in permitting the victims' families to exercise their statutory right to remain in the courtroom throughout trial.

ISSUE A-II

APPELLANT HAS FAILED TO MEET HIS SOLE BURDEN TO ESTABLISH DEFICIENT PERFORMANCE AND PREJUDICE IN HIS TRIAL DEFENSE COUNSEL'S FAILURE TO PRESENT SO-CALLED "REMORSE" TESTIMONY OF A DEPUTY SHERIFF. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL.

Additional Facts

Deputy Foster "knew" Appellant for all of a matter of hours over the course of two days: 15-16 November 2004—the dates of the Article 32 hearing. Specifically, Deputy Foster was assigned to guard Appellant during his Article 32 hearing at the Bibb County Courthouse and witnessed Appellant "overcome by emotion" when confronted with the grisly pictures of his butchery of Andy and Jamie Schliepsiek. (J.A. at 3961-62.) Foster's affidavit omits any mention of Prosecution Exhibits 76 and 77, letters from Appellant to Ms. Fruit and Mr. Emurian, respectively, in which Appellant decries the "unfairness" of his suffering in jail; blames God for his plight; and displays a general apathy for his post-offense existence.

> ***I have argued countless days with God and why I'm here. I have said 'why didn't you stop me?'*** . . . Another thing that bothers me is this prison thing . . . This is a wake

> up call that is just too long. I have read other men's stories about their lives and a few of them have said that God saved them from killing anyone! And these were non-Christians. ***Why did God keep them from killing someone and not me?*** 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 . . . . ***It's just not fair, there I said it.***

(J.A. at 3155-56)(emphasis added.)

But Appellant didn't stop there, his self-pitying reflections continued, as in another letter he lamented the "injustice" of it all that destroyed any remorse evidence his defense counsel did present or could have presented: "***Why do I have to be punished this way? I wasn't a hellion***." (J.A. at 3157-58)(emphasis added). Appellant also displayed tremendous anger and resentment underlying his offenses that renders any fleeting flickers of remorse completely insignificant: "***I look forward to my death, so I can get out of this hell we call life . . . I am angry, bitter, and probably resentful to the point of hatred in the future.***" (J.A. at 3158) (emphasis added.)

In yet another stunning jail house letter, Appellant's total lack of remorse was cemented in stone: ***"I used to love my life and now I hate it. I hate everything. I hate being born. I hate looking at myself. I hate writing meaningless words that do not matter. I hate talking meaningless words that do not matter. I am tired of this hell we call life. I am not looking***

forward to anything. I just want it to end. Things will not get better. This I know." (J.A. at 3160)(emphasis added.) In addition to committing one of the most gruesome acts in modern Air Force history, these damning letters are the cards Appellant dealt to his trial defense counsel.

Given this key omission from Deputy Foster's affidavit, the parties and this Court are left to speculate as to whether Deputy Foster's -- a man with apparent genuine religious sincerity, unlike Appellant -- willingness to testify would have remained intact had he been located, interviewed prior to trial, and cross examined at trial.[35] The United States fully disputes Appellant's self-serving claim that he demonstrated "genuine" remorse to Deputy Foster. (App. Br. at 108).

Standard of Review

See ISSUE A-I, supra.

Analysis

> With the benefit of appellate hindsight, we could dissect every move of these trial defense counsel and then impose our own views on how they could have handled certain matters differently and, perhaps, better. However, that is not the standard of review we are obligated to apply. Rather, based on long-standing precedent from the Supreme Court, we are

[35] While these letters were drafted after Deputy Foster encountered Appellant, his affirmation that he would have testified on Appellant's behalf as to Appellant's perceived "remorse" at his Article 32 hearing, must be measured in light of this significant "did you know/have you heard" type information that trial counsel would have undoubtedly and vigorously tested the foundation and basis of his opinion with, as permitted by R.C.M. 1001(b)(5)(E).

> required to be "highly deferential" in our review of counsel's performance, and we must presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland at 689, 690.

United States v. Akbar, 74 M.J. 364, 371 (C.A.A.F. 2015).

Taking Deputy Foster's affidavit at face value, it appears that trial defense counsel did indeed fail to secure a pre-trial interview of Deputy Foster and that as a result he did not testify. However, contrary to Appellant's claims this does not end the "error" inquiry for the ineffective assistance of counsel analysis because the issue is not simply "Did counsel fail to investigate?," but rather, "Did counsel fail to investigate a significant matter?" While Appellant continues to suggest trial defense counsel's failure to secure Deputy Foster's testimony was unreasonable, the Supreme Court emphasized in Wiggins that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." Wiggins, 539 U.S. 510, 533 (2003).

Appellant would seek to overcome the lack of substance that Deputy Foster could offer with the bare virtue of his status as a corrections officer. While the Supreme Court did find that

law enforcement testimony would be compelling evidence in Skipper v. South Carolina, that case is easily distinguished from Appellant's case as the jailers in Skipper had viewed and interacted with the appellant for seven months, whereas the encounter here was literally a matter of hours. Skipper v. South Carolina, 476 U.S. 1, 3 (1986). Also, the issue in Skipper was the *relevance* of such testimony within a context where the state prosecutor had argued that the appellant would not adapt well to jail and would likely engage in violent behavior while incarcerated; not an explanation on the relative merits of "lay witness" versus law enforcement testimony. *See* Id. at 4. Nonetheless, to the extent Skipper can be read to endorse a "heightened value" upon law enforcement testimony as mitigation in a capital case, such "heightened value" is preconditioned on a foundation and knowledge of the offender that is simply not present in the afternoon that Deputy Foster spent observing Appellant in this case out of the total 434 days Appellant spent in pretrial confinement.

Not all remorse evidence is created equal. The facts of Skipper are completely distinct from Appellant's case.

First, the observation time between the witness and appellant in Skipper was seven and one-half months. Id. at 4. Here, Deputy Foster "knew" Appellant for a matter of hours over two days: 15-16 November 2004, the dates of the Article 32.

Second, the "remorse" evidence suggested by Deputy Foster is restricted to a sole incident at the Article 32, not a consistent course of conduct and good behavior at play in Skipper. Specifically, Deputy Foster was assigned to guard Appellant during his Article 32 hearing at the Bibb County Courthouse and witnessed Appellant "overcome by emotion" when confronted with the grisly evidence of his murders of Andy and Jamie Schliepsiek. By contrast, in Skipper, the defendant sought to offer the testimony of two jailers and a regular visitor who observed him on a regular basis over the course of seven and one-half months. Skipper, 476 U.S. at 3.

Third, unlike Skipper, the prosecution possessed significant rebuttal evidence of Appellant's self-pitying, bitter, lack of remorse translated through the most damaging of sources: Appellant himself. Deputy Foster's affidavit omits any mention of the jailhouse letters from Appellant to his friends authored in September 2005, 10 months after Appellant's encounter with Deputy Foster. Apparently, whatever "remorse" Deputy Foster thought Appellant had demonstrated in November 2004 had completely dissipated by September 2005, as in his letters to friends from pretrial confinement he decries the "unfairness" of his suffering in jail; blames God for his plight; and displays a deeply-held hatred of life as noted.

Appellant seeks mistaken refuge in Skipper, a case which did not involve ineffective assistance of counsel at all, but rather concerned the admissibility of mitigation evidence at trial. Skipper, 476 U.S. at 4.[36]

Appellant cannot meet his burden to prove error or prejudice. There is no sufficient factual predicate upon which to assign any real significance to Deputy Foster's potential testimony because he simply did not have a sufficient basis in fact upon which to base compelling testimony. Deputy Foster "observed" Appellant approximately ***1%*** of the time[37] that the Court was considering in Skipper and approximately ***.5%*** of the time that Appellant was in pretrial confinement.[38] If the principle Appellant is counting on to demonstrate error and prejudice is that law enforcement or correction witnesses have additional credibility to provide "remorse" evidence testimony (because they are seasoned law enforcement professionals familiar with criminals generally and a particular accused specifically), then surely this Honorable Court will not apply this principle where Appellant's "star witness" observed him for

[36] The Court in Skipper was considering not ineffective assistance of counsel, but rather, only an "Eddings" error (i.e. Eddings v. Oklahoma, 455 U.S. 104 (1982), which requires "the sentencer not be precluded from considering, as a mitigating factor, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. (citing Eddings, 455 U.S. at 10).

[37] The jailer in Skipper observed that appellant for seven months (roughly 210 days) whereas Deputy Foster observed Appellant for small portions of 2 days.

[38] Deputy Foster observed Appellant for small portions of 2 days of Appellant's 424 days of pretrial confinement.

just ***1%*** of the time concerned when compared to Skipper and a mere ***.5%*** of Appellant's total period of 424 days of pretrial confinement during which he was supposed to have developed this "remorse" evidence that would have established "substantial" prejudice under Strickland[39] and shifted the balance from the insurmountable mountain of aggravation evidence.

Ultimately, Appellant will never be able to meet his sole burden because his crocodile tears shed when confronted with the heinousness of his barbaric crimes would not sway a reasonable finder of fact when faced with the pages and pages of bitter jailhouse invectives revealing Appellant's true lack of remorse. Such testimony would only have reinforced his inevitable fate before the court members. A contrary conclusion would disregard the crippling effect both of the government's aggravation case and the inevitable cross examination of Deputy Foster conducted by the incredibly able trial counsel. That cross examination would have destroyed any positive effect of Deputy Foster's testimony by exposing the following facts: (1) he encountered Appellant only for a matter of hours at the Article 32; (2) he

[39] *See* Strickland, 466 U.S. at 695:

> When a defendant challenges a death sentence such as the one at issue in this case, ***the question is whether there is a reasonable probability that, absent the errors, the sentence***-including an appellate court, to the extent it independently reweighs the evidence-***would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.***

Id. (emphasis added.)

never observed him during his incarceration; (3) he had no idea if he had apologized to the families; (4) he had no idea if he had apologized to Jason King; (5) the high likelihood that his opinion about the sincerity of Appellant's "remorse" would have been different if he knew that Appellant blamed God for his predicament, after he had so "sincerely" prayed with Deputy Foster at his Article 32 hearing.[40]

To find error and prejudice under these circumstances is directly at variance with the Supreme Court's most recent guidance on prejudice in death penalty cases, as the Court has reiterated its prejudice analysis since Rompilla v. Beard, 545 U.S. 374 (2005) in its Wong v. Belmontes, 538 U.S. 15 (2009), Cullen v. Pinholster, 131 S.Ct. 1388 (2011), and Harrington v. Richter, 131 S.Ct. 770 (2011) decisions, holding that a true prejudice analysis requires consideration of "all of the evidence, the good and the bad, when evaluating prejudice." Belmontes, 130 S.Ct. at 390. More importantly, prejudice is for Appellant to prove, not the government to disprove, as the Supreme Court noted in criticizing the 9th Circuit's application of the prejudice analysis, "Strickland does not require the [government] to 'rule out' a sentence of life in prison to

[40] The Court should note that Deputy Foster's encounter with Appellant was in November 2004, whereas Appellant wrote his bitter jailhouse manifestos from April to September 2005. Interestingly, this considerable amount of time during which one would expect an opportunity for further reflection and deeper remorse appears to have only deepened Appellant's hatred, bitterness, and self-pity -- which further demonstrates the lack of merit of this issue.

prevail. Rather, Strickland places the burden on the defendant, not the [government] to show a reasonable probability' that the result would have been different." Belmontes, 130 S.Ct. at 390-91 (internal citation omitted). Applying these principles, as this Court must, there is simply no way, based upon the heinous facts of this case, coupled with the compelling and heart-breaking victim impact evidence, and crowned by the manifest aggravation evidence in the form of callous disregard for human life, bereft of lawful or moral excuse or explanation, that Appellant could ever meet his burden. These paltry facts bear no resemblance to the evidence at stake in Skipper.

Appellant again desperately shifts focus, seeking alternate refuge in technical "violations" of the ABA Guidelines. (App. Br. at 112.) However, Appellant's attempt to dismiss this practical analysis of the actual facts in favor of the generalized framework of the ABA Guidelines, converting their investigatory suggestions into the "inexorable commands," must fail, as it is an approach that the Supreme Court has consistently rejected: "'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." Bobby v. Van Hook, 130 S.Ct. 13, 17 (2009) (citing Strickland, 466 U.S. at 688). Moreover, this Court unequivocally rejected this argument recently in United States v. Akbar, 74 M.J. 364, 400 (C.A.A.F. 2015)("We therefore do not

adopt the ABA Guidelines as the ultimate standard for capital defense representation in the military.")

In assessing the lack of prejudice in this case, it is vital to consider that whatever momentary value may have been gained from Deputy Foster's testimony that he saw Appellant weeping at the sight of his own premeditated grisly murders during the Article 32 hearing would have quickly been swept away by the crushing onslaught of "did you know" and "have you heard" questions premised upon Appellant's hateful and extremely probative jailhouse correspondence cited above. As this Court has recognized, it is a legitimate trial strategy to avoid rebuttal/impeachment evidence by limiting the introduction of extenuation/mitigation evidence which may open the door to it. United States v. Fluellen, 40 M.J. 96, 97 (C.A.A.F. 1993). "Part of the tactical decisions for the defense . . . involve[] an analysis of which witnesses not to call because of their potential for impeachment . . ." Id. at 98. Although that apparently was not the informed defense strategy here, nevertheless, the inevitable crushing cross examination (or likely outright abandonment of Deputy Foster's remorse opinion -- the clear religious overtones of Deputy Foster's affidavit would have quickly evaporated when trial counsel cross examined him with Appellant's jailhouse letters blaming God for the

murders[41]) demonstrates the utter lack of prejudice and lack of merit to this claim.

In the final analysis, there can be no prejudice here as the evidence at issue simply lacked any significant probative value, even in a run-of-the-mill court-martial, much less a death penalty case. Put simply, the fact that a prison guard saw Appellant engage in self-indulgent/self-pitying weeping when confronted with evidence of his horrific murders does not make the case for life. Here, there can be no prejudice because there is simply no reasonable probability that any testimony from Deputy Foster could have in any reasonable way shifted the balance of aggravating and mitigating circumstances from death to life. Strickland, 466 U.S. at 695; see also Van Hook, 130 S.Ct. at 19 (holding that the affidavits submitted by the witnesses not interviewed shows their testimony would have added nothing of value); Richter, 131 S.Ct. at 792 (holding that the likelihood of a different result must be "substantial" not just "conceivable").

[41] The Court can be absolutely confident that trial counsel would have confronted Deputy Foster with the jailhouse letters when challenging his "remorse" testimony as seen by trial counsel's cross examination of Sheila Fruit concerning Appellant's "remorse" -- as she was the recipient of some of the greatest vitriol in Appellant's letters -- using those very letters. (J.A. at 2766-68.) Rhetorically speaking, the United States asks: what would have been worse for Appellant at trial, one black eye from his jailhouse letters or two? The significance of the jailhouse letters was also apparent to the court members as reflected by Colonel Eriksen's question asking for the letters. (App. Ex. CCXLVII.)

There also can be no error or prejudice here because Appellant's trial defense counsel did in fact present other remorse evidence rendering "largely cumulative" at best any possible positive impact of testimony from Deputy Foster. *See* United States v. Loving, 68 M.J. 1, 16 (C.A.A.F. 2009); United States v. Akbar, 74 M.J. 364, 391 (C.A.A.F 2015). Appellant gave an unsworn statement to the members while on the witness stand and said he felt remorse for his crimes and apologized to the families of his murder victims and to Jason King whose survival was described as a medical miracle. (J.A. at 2954-55; App. Ex. CCXXXVII.) Trial defense counsel presented remorse evidence from the only source that really mattered, Appellant himself, and the members clearly rejected it and voted for death. If Appellant could not sell his "remorse" to the members, it is absurd to think Deputy Foster could have made any difference. Whatever would have come out of Deputy Foster's mouth, assuming he even would have testified once he knew about the jailhouse letters, it just would not have mattered. Appellant cannot meet his burden.

But, trial defense counsel presented even more remorse evidence: Appellant's written unsworn statement in which he described his family background and upbringing and said: "I hope that you will understand that I am truly remorseful and stand ready to accept the punishment you decided to give me."

(J.A. at 3303-06.) Remorse testimony of Sheila Fruit. (J.A. at 2670-75.) Remorse testimony from Richard Jacobson. (J.A. at 2793.) Remorse testimony from Appellant's father in three points. (J.A. at 2943, 2944, 2953.)

Appellant also concedes in his brief that "[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." (App. Br. at 115.) If Appellant and those who knew him best could not persuade the court members on the question of remorse, there is no credible reason to think Deputy Foster -- a virtual stranger with a very limited foundation and an incomplete awareness of the facts -- would have made any difference in this case even in a light most favorable to Appellant, which is not the correct standard of law here. This issue has no merit at all.

Even wildly assuming Deputy Foster's remorse testimony would have been successful and provided any value to the defense -- which the United States does not concede -- it was cumulative at best and damning at worst and cannot provide Appellant with sufficient evidence to meet his high burden to show it would have made a "substantial" difference at trial.

ISSUE A-III

TRIAL COUNSEL DID NOT COMMIT ERROR DURING SENTENCING ARGUMENT, PLAIN OR OTHERWISE.

Standard of Review

Allegations of improper argument are questions of law reviewed *de novo*. United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011) (citations omitted). Absent objection, this Court does permit review of such allegations, but only for "plain error." United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013). In the plain error context, this Court determines whether the cumulative effect of an improper sentencing argument impacted an accused's substantial rights and the fairness and integrity of his trial. United States v. Akbar, 74 M.J. 364, 394 (C.A.A.F. 2015). This inquiry examines whether trial counsel's comments, taken as a whole, were so damaging that this Court cannot be confident that the accused was sentenced based on the basis of the evidence alone.

Law and Analysis

To constitute plain error, the error must be obvious, substantial, and have had an unfair prejudicial impact on the members. United States v. Olano, 507 U.S. 725 (1993); Kropf, 39 M.J. at 110; Toro, 37 M.J. at 316; United States v. Strachan, 35 M.J. 362, 364 (C.M.A. 1992), *cert. denied*, 507 U.S. 990 (1993); United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

The burden is entirely on Appellant to demonstrate plain error. To attain relief under a plain error analysis, an appellant "has the burden of demonstrating that: (1) there was

error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused."[42] United States v. Humphries, 71 M.J. 209, 214 (C.A.A.F. 2012). Appellant, not the Government, bears the sole burden of persuasion to show prejudice. Olano, 507 U.S. at 734; United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007) (appellant's burden is to show that he suffered material prejudice to his substantial rights).

Appellant references Caldwell v. Mississippi for the proposition that if a prosecutor mentions the appellate process during the sentencing argument, he commits plain error. Caldwell v. Mississippi, 472 U.S. 320 (1985).[43] This is not the law and Appellant's reliance on Caldwell is entirely misplaced.[44] In Caldwell, the prosecutor was expressing his personal opinions aside from the appellate issues, stating in sentencing rebuttal

[42] The government asserts that the fourth prong of the Supreme Court's plain error test – "that an appellate court should not correct a plain error unless the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings'" – should particularly apply in this case, and every case subject to plain error review in the military justice system. United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012) (Stucky, J. dissenting) (citing United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998)).

[43] The United States respectfully submits that Caldwell has no applicability to the military. The Supreme Court's basic premise in Caldwell is that "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance." Id. at 320. That may be true in the civilian world, but is certainly not true in the military. Article 66 requires the service Court itself to be independently convinced that Appellant's death sentence is appropriate. Appellant has cited to no authority which would suggest that Caldwell is applicable to the military, and the United States is aware of none.

[44] As an initial matter, Caldwell objected to the sentencing argument while Appellant did not. Therefore, the prosecutor's argument in Caldwell was not reviewed under a plain error analysis.

argument: "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." Caldwell v. Mississippi, 472 U.S. at 325. This was not the case here. Trial counsel did not even come close. Every argument that Appellant attributes to trial counsel is argument based on the current state of the law, the facts, and basic common sense.

Appellant also fails to point out that the U.S. Supreme Court clarified its holding in Caldwell in two separate opinions. "Caldwell is relevant only to 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." Dugger v. Adams, 489 U.S. 401, 407 (1989) (quoting Darden v. Wainwright, 477 U.S. 168, 184, n. 15, (1986)).

The U.S. Supreme Court has explained that "[t]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger, 489 U.S. at 407.

Appellant spends his entire "Analysis" section citing law similar to his Caldwell argument. (App. Br. at 119-24.) What Appellant does not do, however, is explain how the facts in this case rise to the level of Caldwell, Dugger, or Darden. There was no argument by trial counsel nor any instruction given by

the military judge that Appellant points to that inaccurately described the role of the court members. Therefore, there is no Caldwell violation.

Appellant points to three parts of trial counsel's sentencing argument as it relates to Caldwell but does not explain how any of the three meet the Caldwell test. Appellant also ignores that it was he who first injected the appellate process into his court-martial. In his Unsworn Statement, Def. Ex. BS, Appellant stated to the members:

> I have been told that once I receive my sentence, I will be sent to the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. My daily life there will depend on what sentence I get. If I receive the death penalty, I will be placed on death row with the six other military inmates that are currently waiting there. I will be locked down most of the time and escorted by a group of armed guards any time I am let out of my cell. There will be no chance for me to give back to society or take part in any counseling while I wait for my case to work its way through the appellate courts. If I receive a life sentence, however, I will be able to take part in group counseling sessions and even perform a job in the prison. I can earn a small number of limited privileges but I will always be in a more restricted status than those inmates with a prison sentence to a term of years can earn. Still, while spending my life in prison I can at least do something to give back to society and work to rehabilitate myself rather than remaining in my cell all hours of the day counting down until I leave this world.

(J.A. at 3306.) Trial counsel properly rebutted Appellant's Unsworn Statement with a Stipulation of Expected testimony from

the Commandant of the Disciplinary Barracks. (App. Ex. CCLXVI.) Therefore, fundamentally and simply, this was an issue injected into the case by Appellant when he asked to be redeemed while he waited for his case "to work its way through the appellate process," and it was absolutely appropriate for trial counsel to comment on it as such.[45]

There is nothing particularly remarkable about the three comments Appellant argues amount to plain error. Indeed, the Air Force Court of Criminal Appeals aptly and accurately described them as "three passing comments" in trial counsel's sentencing argument. (J.A. at 58.) There is nothing here that misleads the court members regarding their role in the sentencing process in a way that allows the panel to feel less responsible than it should for the sentencing decision. While

[45] Notably, Appellant wholly ignores that he, and not trial counsel, first injected the appellate process into his court-martial. Indeed, conspicuously omitted from his brief is trial counsel's comments that prefaced the first complained of argument and trial counsel's comments that followed it:

> ***When the accused expressed his desire to live and be rehabilitated?*** [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, and it takes years and years and years. ***That's why at Leavenworth, they have school, and activities, games, a chance to talk to their family, phone their family, people they know. It's remarkable. You'll notice in the accused's unsworn to you that he forgot to mention all of that about Leavenworth. His was, well, if I go to the disciplinary barracks, it's gonna be really hard going if I'm on death row 'cause they take everything away from me. And, if you put me in with the general population, I'll be able to attend school and rehabilitate myself. And, now you know better. And, he didn't even tell you that when he gave his unsworn.***

(J.A. at 1454-55.) (emphasis added.)

this argument does talk about the consequences of sentencing Appellant to death, pointing out that once a prisoner gets put on death row it takes years before he is put to death, this has nothing to do with responsibility for sentencing and was fair comment based upon evidence properly in the record, as well as Appellant's own Unsworn Statement. Trial counsel's argument accurately pointed out, in these three passing comments, that there is an appellate process following the verdict, but did not contravene the principle established in the Caldwell plurality opinion, as limited by Justice O'Connor's concurring opinion. More importantly, there is no cognizable argument that this argument permitted the members to feel less responsible than they should for the sentencing decision. Therefore, trial counsel's argument was not error, plain or otherwise.

It is well settled that when reviewing an argument, the focus must be contextual. United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000). As stated in Baer, "the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation but the argument as 'viewed in context.'" Id. at 238 (citing United States v. Young, 470 U.S. 1, 16 (1985)). In the context of the sentencing argument, Appellant only points to three small passing comments over the course of 33 pages of argument. (J.A. at 1441–70; 1483–86.) These three instances

are not egregious, and when one looks at the entire argument, it is evident that trial counsel's argument did not violate any rule, case law, or the Constitution.

Assuming, *arguendo*, this Court finds trial counsel's sentencing argument was improper, Appellant's argument fails because he has failed to show material prejudice to a substantial right. In United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005), this Court listed several factors used to assess "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." Those factors are: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct,[46] and (3) the weight of the evidence supporting the conviction, or in this case, the sentence. Id. In assessing these factors this Court opined in Halpin that factor three alone, the weight

[46] Also ignored by Appellant in his brief, the military judge properly instructed the members on this very issue prior to trial counsel even standing up to argue. Specifically, the military judge instructed the members: "You must not adjudge an excessive sentence in reliance upon possible mitigating action by the Convening or higher Authority." (J.A. at 3782.) Shortly thereafter, the military judge again instructed the members: "[Y]ou should keep in mind your responsibility to adjudge a sentence which you regard as fair and just at the time it is imposed," and not in reliance in action by the convening or higher authority. (J.A. at 3785.) Regarding argument, the military judge instructed the members that "the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel." (J.A. at 3786.) Finally, the military judge reminded the members three more times, after argument, that it was their duty to impose a sentence that was fair and just at the time it was imposed, without regard to action by a higher authority. (J.A. at 3786-93.) In short, even if there was any error in trial counsel's argument, such error was more than cured by the military judge's instructions and the members had no confusion about their role in the sentencing decision.

of the evidence supporting the sentence can eliminate any prejudice from an improper sentencing argument. Halpin, 71 M.J. at 480. "We find that the third *Fletcher* factor weighs so heavily in favor of the Government that we are confident Appellant was sentenced on the basis of the evidence alone." Id. Such was certainly the case here. Here, even more so than in Halpin, the underlying facts of Appellant's are egregious. This Court need only listen to SrA Andy Schliepsiek's 911 call (J.A. at 3091), as he lay paralyzed and helpless while his wife was brutally murdered before he too was murdered as he begged for his life in vain, to understand that Appellant was sentenced on the basis of the horrific evidence alone, and not three innocuous and passing comments of trial counsel. Because Appellant does not carry his burden pursuant to Caldwell, Dugger or Darden and does nothing to show how his allegations amount to plain error, this Court should not reverse Appellant's just death sentence.

ISSUE A-IV

THE MILITARY JUDGE PROPERLY INSTRUCTED THE MEMBERS DURING THE SENTENCING PHASE OF THE TRIAL AND COMMITTED NO ERROR BY NOT INSTRUCTING THE MEMBERS TO DISREGARD PORTIONS OF THE TRIAL COUNSEL'S ARGUMENT REGARDING "THE ALLEGED DESIRES OF SOCIETY OR ANY PARTICULAR SEGMENT OF SOCIETY."

Additional Facts

Appellant's statement of facts is accepted. Appellant omits several important facts, however, including: (1) the military judge's instructions regarding the proper role of society during the court-martial; (2) trial counsel's additional comments putting the quoted passages in better context; and (3) defense counsel's own references to society during the court-martial.

A. The military judge's instructions regarding "society" [47]

The military judge instructed the court members:

> In adjudging a sentence, there are several matters which you should consider in determining an appropriate sentence. Bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are: rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

(J.A. at 3782) (emphasis added).

[47] Appellant asserts that "The military judge did not address any of these remarks [by trial counsel] in his instructions." (App. Br. at 127.) Although the military judge may not have explicitly addressed trial counsel's specific arguments that Appellant now complains about, the military judge did address trial counsel's (and defense counsel's) arguments in part by instructing the court members about the proper role of society during the sentencing proceedings.

The military judge further instructed the court members that they may consider, among other aggravating circumstances "the mental, physical, and emotional impacts the crimes had on the victims, their families, and their friends." (J.A. at 3789) (emphasis added).

The military judge also instructed the court members "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." (J.A. at 3793) (emphasis added).

B. Trial counsel's arguments regarding "society"

The trial counsel's comments regarding society must be viewed against the backdrop of the military judge's instructions and in the overall context of trial counsel's argument. For example, Appellant claims that trial counsel improperly made reference to "the communities who are looking to the Air Force for justice in this case ... 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 wife of their Airman, is attacked and killed in base housing by another Airman." (App. Br. at 125; J.A. at 1463.) Appellant omits, however, the very next sentence in trial counsel's argument: "You've seen the impact on them, and you've heard the impact on everyone else." (J.A. at 1463) (emphasis added).

Similarly, Appellant complains that "trial counsel mentioned that 1500 people attended the victims' funeral in Peoria, Illinois." (App. Br. at 126; J.A. at 1463.) Again, Appellant omits the very next sentences of trial counsel's argument: "Imagine that number. Thirty or so from here, military members. You've heard about the impacts on wives, sisters, brothers, friends, nephews, military members." (J.A. at 1463) (emphasis added).

Appellant also takes out of context trial counsel's arguments about the community never forgetting this crime. (App. Br. at 126.) Trial counsel actually argued:

> I cannot imagine how you can sentence an accused who kills two people, almost kills a third, walks out of a jail, someday to return to his life, and those two people never will. Those families will never forget this. This community will never forget this. The Air Force will never forget this. But, that should be your debate.

(J.A. at 1445) (emphasis added).

Finally, Appellant complains about trial counsel's suggestion that the court members should "[o]ffer the families a chance to see justice in our community" and trial counsel's question "now you have everybody wondering what is Air Force justice?" (App. Br. at 127; J.A. at 1486.) Trial counsel's argument before and after the selective quotation by Appellant is again important:

> As eyes turn here to see what justice in the Air Force is, I would suggest that the Air Force, for all the reasons we've talked about -- good order and discipline, punishment, his rehabilitation, protection of society from that man who sits behind me.
>
> ...
>
> Offer the families a chance to see justice in our community. Offer the families a chance to see Andy and Jamie redeemed. Their lives were taken for really no reason. Their souls were tortured at the time of their death, knowing that they were married mates who, they loved since high school, is going through the same fate. And now you have everybody wondering what is Air Force justice? He says killing him would put it on an equal basis. You could never put this on an equal basis because of this process. Killing him like them would involve stabbing for no reason and leaving him paralyzed to watch a friend who is killed. He is protected by everything. He has been given every bit of due process and that is good. And now, we ask you to do what is just.

(J.A. at 1486) (emphasis added).

C. Defense counsel's arguments regarding "society"

Defense counsel also repeatedly invoked society during his sentencing argument. For example, defense counsel began his argument as follows:

> The principles of sentencing talk about deterrents [sic] and how the punishment should deter others and him from committing the same crime. Many of you have talked about that, and that is important here. And, punishment is important here. You all gave those examples when you answered these questions. And, again, the debate on it has to go in with a heavy heart because he is

> also a person. But, he is a violent person who has taken two lives, two lives that meant a lot to a lot of people for really such a senseless, senseless reason.

(J.A. at 1469) (emphasis added). The defense counsel at times even implied that Appellant somehow deserves sympathy or credit based on the reaction of the particular segment of society that attended the court-martial. (J.A. at 1478-80.)

Finally, defense counsel even posed an alternate theory about what "society" might expect in this case: Is doing what's just, doing what's the hardest punishment? "Or is society going to say, 'Hey, the Air Force shows mercy while holding those who take those kinds of actions accountable.'" (J.A. at 1487) (emphasis added).

Standard of Review

The issue of whether a military judge properly instructed the court members, as a whole, is a question of law, which is reviewed *de novo*. United States v. Hibbard, 58 M.J. 71, 75 (C.A.A.F. 2003); United States v. McDonald, 57 M.J. 18, 20 (C.A.A.F. 2002). A military judge, however, has substantial discretionary authority in determining what instructions to give. United States v. Smith, 50 M.J. 451, 455 (C.A.A.F. 1999); United States v. Damatta-Olivera, 37 M.J. 474 (C.M.A. 1993), *cert. denied*, 512 U.S. 1244 (1994). Thus, the military judge's decision to give, or not give, an instruction is reviewed for an

abuse of discretion. United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996); United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985), *pet. denied*, 21 M.J. 147 (C.M.A. 1985).[48]

Failure to make a timely objection to matters raised in argument constitutes waiver in the absence of plain error. R.C.M. 1005(f); United States v. Ramos, 42 M.J. 392 (C.M.A. 1995); United States v. Kropf, 39 M.J. 107 (C.M.A. 1994); United States v. Toro, 37 M.J. 313, 316-17 (C.M.A. 1993); United States v. Griffin, 25 M.J. 423 (C.M.A. 1988), *cert. denied*, 487 U.S. 1206 (1988). *See* Standard of Review on Issue A-III, *supra* (discussion of plain error analysis).

Law and Analysis

Rule for Courts-Martial (R.C.M.) 1005(a) provides that "The military judge shall give the members appropriate instructions on sentence." R.C.M. 1005(a). The Rules only explicitly require five instructions regarding sentencing.[49] R.C.M. 1005(e). The military judge may give other instructions if

[48] The abuse of discretion standard is a strict one. "To reverse for 'an abuse of discretion' involves far more than a mere difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (*quoting* United States v. Glenn, 473 F.2d 191, 196 (D.C. Cir. 1972)); United States v. McElhaney, 54 M.J. 120, 132 (C.A.A.F. 2000).

[49] Instructions on sentence must include statements relating to: (1) the maximum authorized punishment; (2) the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances; (3) procedures for deliberations and voting; (4) informing the members that they are solely responsible for selecting an appropriate sentence; and (5) informing the members they should consider all matters in extenuation, mitigation, and aggravation. R.C.M. 1005(e)(1)-(5).

appropriate. **A. Appellant failed to demonstrate that the military judge committed plain error.**

1. The military judge's instructions regarding "society" were accurate and appropriate.

The Military Judge's Benchbook provides several sentencing instructions related to "society" (or a segment of society). For example, Instruction 8-3-21 provides: "Bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are: (1) rehabilitation of the wrongdoer...(3) protection of society from the wrongdoer...and (5) deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses." Dept. of the Army Pamphlet (DAP) 27-9, para. 8-3-21 (2008) (emphasis added).

The Benchbook also provides the following standard concluding instruction in sentencing: "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." Id., para. 2-5-24 (emphasis added). In this case, the military judge's instructions regarding "society" were essentially verbatim from the Military Judge's Benchbook. (J.A. at 3782, 3789, 3793.)

Furthermore, the Manual for Courts-Martial and applicable case law recognizes that crime impacts society. See, e.g.,

R.C.M. 1001(b)(4) (permitting evidence of aggravation in court-martial sentencing proceedings, including "any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty"); United States v. Stephens, 67 M.J. 233, 235-36 (C.A.A.F. 2009) (holding relevant victim impact evidence was properly admitted in sentencing); Payne v. Tennessee, 501 U.S. 808 (1991)(victim impact evidence admissible in capital cases); United States v. Wilson, 35 M.J. 473, 476 (C.M.A. 1992) ("permitting evidence of the harm inflicted on the victim's family is an acknowledgment that crime impacts society").

Although not explicitly addressed in his brief, Appellant apparently concedes that the military judge's instructions regarding "society" were accurate. Instead, Appellant argues that the trial defense counsel should have requested additional instructions, and the military judge had a *sua sponte* obligation to instruct even in the absence of a defense-requested instruction. (App. Br. at 127.) As trial counsel's argument was proper, the military judge had no reason to provide curative instructions, and the military judge's instructions were accurate and appropriate.

2. The trial counsel's argument was appropriate in the context of the military judge's instructions and the facts of this case.

Trial counsel's references to society in general or particular segments of society constitute a relatively small portion of trial counsel's overall sentencing argument. Moreover, from the language from trial counsel's argument omitted in Appellant's brief, it is evident trial counsel's references to society were grounded in the permissible punishment rationales and under the appropriate auspices of aggravation evidence. (J.A. at 1445, 1463, 1486.)

Notably, trial counsel's references to society in this case are more limited in scope than in other cases that have been upheld on appeal. For example, in United States v. Loving, 34 M.J. 956 (A.C.M.R. 1992), the accused was convicted of pre-meditated murder, felony-murder, attempted murder, and robbery. During sentencing argument, the trial counsel argued:

> The message that you send out, and you will send out a message with your sentence today, that message is not going to go just over this installation, but it is going to go across the United States. There's going to be a message that's going to be heard by working people. They need to know that they will not be terrorized in their work places. Americans, members of society, need to know that they will be protected and that they will be protected and that we will protect and we will vindicate society's victims.

Loving, 34 M.J. at 965 (emphasis added). The military judge permitted the argument over defense objection and instructed the court to consider evidence in aggravation and mitigation. He

also instructed the court on the sentencing principles laid out above.

In rejecting Loving's improper argument claim, the Army Court cited United States v. Lania, 9 M.J. 100 (C.M.A. 1980), which held that general deterrence is a relevant factor in determining a just sentence within the maximum limits prescribed and can be argued by the trial counsel, provided the military judge instructs the court there are other factors such as rehabilitation of the accused, and admonishes the court members that they must take into account the circumstances of the case and the character and propensities of the accused. Loving, 34 M.J. at 965.

In this case, trial counsel's references to "society" are far more limited than those at issue in Loving. Additionally, as noted above, the military judge in this case instructed the court members to consider other factors, as did the military judge in Loving. Therefore, trial counsel's argument was proper.

3. Appellant's reliance on Pearson is misplaced.

Appellant argues that "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." (App. Br. at 127.) Appellant only cites one case

for this proposition: United States v. Pearson, 17 M.J.149, 153 (C.M.A. 1984). Appellant's reliance on Pearson is, however, misplaced for numerous reasons.

First, Appellant selectively quotes from Pearson (as he does from the trial counsel's argument), and omits relevant information that undercuts his position. For example, Pearson actually involved two witnesses that provided improper testimony: (1) a member of the appellant's unit (cited by Appellant in this case) and (2) the victim's father. Pearson, 17 M.J. at 150-51. The victim's father testified as follows during sentencing, when asked about the impact of his son's death on the community of Reeseville: "The only word that I can use, that doesn't even describe it, is devastating. I don't know – I've been sitting over there trying to think how I can go back home, how I can call my wife tonight, and how I can go back home to Reeseville, and tell them that the verdict was negligent homicide." Pearson, 17 M.J. at 151 (emphasis in original). This omission is notable because the father of the victim provided more problematic testimony for the court in Pearson than did the unit member cited by Appellant, and certainly more problematic than the argument of trial counsel in this case.

Second, the witnesses in Pearson were attacking (even if implicitly and unintentionally) the findings of the court-martial, not simply suggesting what sentence would be

appropriate based on the findings of the court. In Pearson, the accused was charged with murder but, contrary to his pleas, was only convicted of negligent homicide. As noted above, the victim's father testified that he did not know how he could explain that verdict to the "community." Id. The unit member in Pearson similarly suggested that the entire unit, which was "shaken apart" by the tragedy was waiting to find out what would happen to the victim's "killer." Id.

In this case, however, the trial counsel never questioned the verdict of the members. Nor did trial counsel interfere with the independent functioning of the members to arrive at a sentence. In fact, trial counsel explicitly acknowledged after one of the "community" references Appellant complains about: "But, that should be your debate." (J.A. at 1445) (emphasis added).

Third, the Pearson Court acknowledged that evidence regarding impact on the community is permissible.[50] In that case, defense counsel objected to trial counsel submitting any witness testimony in aggravation. Pearson, 17 M.J. at 150. The military judge overruled the objection. On appeal, the Court ruled: "On this record, though we think it a close case, we are not persuaded that the military judge abused his discretion as to the extent of evidence permitted concerning the victim's

[50] Unlike the comments at issue in Pearson, however, trial counsel's argument related to evidence properly admitted in trial without objection.

character and the magnitude of the loss felt by his family and community." Id. at 153 (emphasis added). The Court found that, although generally permissible, the witnesses' testimony was objectionable in the two respects discussed above regarding the province of the court members. Id.

Finally, other cases decided in the seventeen years since Pearson was decided have made clear that societal impact evidence is relevant, admissible evidence that may be considered in sentencing. *See generally* United States v. Stephens, 67 M.J. 233, 235-36 (C.A.A.F. 2009); United States v. Anderson, 60 M.J. 548 (C.A.A.F. 2004); United States v. Wilson, 35 M.J. 473 (C.M.A. 1992).

In sum, Appellant utterly fails to carry his burden to demonstrate that the military judge committed error in instructing the members, let alone plain error.

B. Even assuming *arguendo* that the military judge erred, Appellant fails to demonstrate that he was materially prejudiced.

The plain error doctrine "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." Fisher, 21 M.J. at 328-29 (*quoting* Frady, 456 U.S. at 163 n.14). Moreover, the sentence of a court-martial will be found incorrect only if Appellant's substantial rights were materially prejudiced. Article 59(a), UCMJ, 10 U.S.C. § 859(a). "In assessing prejudice, reviewing courts look

at the nature and extent of the mitigating and extenuating evidence, and the severity of the sentence imposed." Blough, 57 M.J. at 534.

Appellant utterly fails to meet his burden of demonstrating he was substantially prejudiced. In fact, Appellant does not even clearly allege how he was prejudiced. Instead, Appellant simply argues that he is entitled to relief because he received the maximum punishment authorized in this case. Again, Appellant relies on one single case for this proposition: Pearson (App. Br. at 129-30), but again, such reliance is misplaced. First, Pearson is clearly factually distinguishable, as discussed above. Thus, the Pearson Court could reasonably be concerned about the prospect that the court members sentenced appellant to the maximum sentence as a reaction to second-guessing about the verdict on findings (or perhaps some members sentencing him for the crime he was charged with rather than the crime of which he was convicted). The court members had a wide range of punishment options available, but they sentenced him to the maximum authorized punishment.

There is no basis for such concern in this case, however. Appellant heinously murdered two people and almost killed a third, and was convicted of the greater (not lesser included) offenses. Although they chose the maximum punishment, they had relatively few options and there is absolutely no reason to

believe based on the record that it resulted from trial counsel's comments about society during his sentencing argument.

Second, Pearson does not stand for the general proposition that an appellant who receives the maximum sentence has been *per se* prejudiced and is relieved of the burden to demonstrate that prejudice, and Appellant cites no other case in support of this untenable position. Even if Pearson stood for that proposition, it still must be interpreted in light of more recent case law from the Supreme Court and this Court regarding the "plain error" doctrine cited above as well as the plain meaning of Article 59(a).

Finally, the record amply supports Appellant's sentence, given the aggravating circumstances surrounding the offenses and the lack of meaningful mitigating evidence. Appellant senselessly and savagely murdered Andy and Jamie Schliepsiek and nearly murdered Jason King. He donned his battle dress uniform, drove onto base, parked his car a distance from Andy and Jamie's base house, watched Andy, Jamie, and Jason from his darkened vantage point, entered Andy and Jamie's home, and proceeded to stab Andy three times, Jamie six times, and Jason four times. Appellant stabbed Andy through his spine, and then proceeded to chase and stab Andy's wife Jamie, while Andy lay physically paralyzed and helpless but mentally aware on the floor. Appellant stabbed Jamie six times, including puncturing her

lungs. Her death was violent and painful, as evidenced by the bruising to her arms and knees, her broken wrist, and the blood stains throughout the house and on the wall she slid down as she was dying. After stabbing Jamie six times and removing her skirt during the slaughter, Appellant returned to Andy, who still lay paralyzed on the floor, to "finish [him] off" by thrusting the knife straight through his heart as he begged for his life. Given the emotional and physical pain and suffering Appellant caused to Andy and Jamie in their final moments on Earth, the pain endured by Jason King, and the agony still endured by Jason King, as the sole survivor, as well as all the other family members and friends, the result in this case is fair and appropriate. There is certainly no "miscarriage of justice" requiring reversal.

ISSUE A-V

VICTIM IMPACT TESTIMONY OFFERED BY FAMILY MEMBERS OF THE VICTIMS TO SHOW THE EMOTIONAL IMPACT OF THE MURDERS UPON THEM WAS ADMISSIBLE AND NOT OBJECTIONABLE. THERE WAS NO ERROR, PLAIN OR OTHERWISE, IN ADMITTING SUCH TESTIMONY. IN ANY EVENT, APPELLANT HAS FAILED TO DEMONSTRATE PREJUDICE.

Standard of Review

Where no objection is raised at trial, a later claim of erroneous admission of evidence is reviewed for plain error. United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007). "The plain error standard is met when '(1) an error was

committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008) (*citing* Hardison, 64 M.J. at 281). The appellant bears the burden of demonstrating the three prongs of the test are met. Id.

Analysis

Appellant here claims that certain testimony offered by family members of the victims violated the Eighth Amendment as interpreted by the Supreme Court in Booth v. Maryland, 482 U.S. 496 (1987). The testimonial passages to which Appellant objects are found in Appellant's brief. (App. Br. at 130-33)

a. Appellant has forfeited this issue.

As Appellant concedes, at trial, his defense counsel did not object to any of the above testimony. Therefore, Appellant has "forfeit[ed] appellate review of [these issues] absent plain error." United States v. Eslinger, 70 M.J. 193, 197-98 (C.A.A.F. 2011); *see also* United States v. Holt, 33 M.J. 400, 408-09 (C.M.A. 1991). Appellant cannot meet any of plain error prongs and is entitled to no relief.

b. There was no error.

Victim impact testimony is admissible in capital cases to inform the panel about "the specific harm caused by the [accused]." Payne v. Tennessee, 501 U.S. 808, 825 (1991); United

States v. Wilson, 35 M.J. 473, 476 n.6 (C.M.A. 1992). Trial counsel may elicit evidence about (1) the victim and (2) the impact of the murder on the victim's family. *See* Payne, 501 U.S. at 827.

The Court below held statements characterizing Appellant's crimes ("they died alone suffering"; "biggest acts of cowardice"; "no person ought to die that way") constituted error under Booth and Payne, but the United States respectfully disagrees. Recently, this Honorable Court, in evaluating a similar challenge in a different case, pronounced:

> What is not permitted is evidence about the family members' "opinions and characterizations of the crimes," the defendant, or the appropriate sentence. Examples of impermissible victim-impact evidence include: an opinion from the victim's family members that the victims were "butchered like animals"; a statement that the witness "doesn't think anyone should be able to do something like that and get away with it"; and descriptions of the defendant as "vicious," worse than an animal and unlikely to be rehabilitated.

United States v. Akbar, 74 M.J. 364, 393 (*quoting* Booth, 482 U.S. at 508).

In Booth, the Supreme Court recognized, on the one hand, "that a jury must make an '*individualized* determination' whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'" (Booth, 482 U.S. at 502 (*quoting* Zant v. Stephens, 462 U.S. 862, 879 (1983)). However, the Court also observed that,

"any decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'" Id. at 508 (*quoting* Gardner v. Florida, 430 U.S. 349, 358 (1977)). Balancing these principles in the case before it, the Court then noted:

> One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But ***the formal presentation of this information by the State*** can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.

Id. (emphasis added).

In this key respect, Booth is distinguishable from the case *sub judice*. The disputed evidence in Booth was a Victim Impact Statement (VIS) included in a formal presentencing report compiled by the Maryland Division of Parole and Probation and presented to the jury by the prosecution, as was then required by Maryland law in all capital cases brought in that state. Booth, 482 U.S. at 498-99.

By contrast, the allegedly objectionable evidence in this case consisted of a few passing comments by family members of the victims made in the context of their testimony regarding the emotional impact upon them of Appellant's crimes. When viewed in the context of their entire testimony and the crimes committed, the complained of comments were an integral component

of the victims' descriptions of their own emotional injuries caused by Appellant's crimes. As this Court held, it is not improper for government witnesses to express "human responses" which put the "[a]ppellant's crimes in context by describing how his crimes affected the victims of the attack." Akbar, 74 M.J. at 393. This is precisely the type of permissible victim impact testimony that was offered here.

The case *sub judice* is also distinguishable from Gardner v. Florida, 430 U.S. 349 (1977), the case upon which Booth rests. Gardner was convicted of first degree murder in the killing of his wife. After the jury returned an advisory verdict concluding that the mitigating circumstances outweighed the aggravating circumstances and recommending the court impose a life sentence, the judge reached the opposite conclusion and sentenced the appellant to death. Id. at 352-53. In reaching his verdict, the judge relied in part on a Florida Parole and Probation Commission report, a portion of which, marked "confidential," was never provided to Gardner or his counsel, or to the State and was not made a part of the appellate record. Id.

In its review, the Supreme Court considered whether Gardner's due process rights had been violated by the trial judge's reliance on factual information not provided to the

defense prior to reaching his verdict of the death sentence. The Gardner Court declared:

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. ***It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.***

Gardner, 430 U.S. at 357-58 (emphasis added). The Court then held that Gardner "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Id. at 362.

In the case *sub judice*, there is no doubt that the members' "decision to impose the death sentence [was], and appear[ed] to be, based on reason rather than caprice or emotion." Id. at 358. The testimony now challenged on appeal was extremely limited in nature and arose in a larger context of proper testimony regarding the emotional impact of the crimes upon the victims' family members. In total, the government's victim-impact testimony during the pre-sentencing case spanned some one hundred thirty three pages in the record of trial. By contrast, the objected-to testimony collectively totaled less than two pages, and the objected-to comments themselves a mere few sentences.

There is simply no likelihood that, in a sea of properly admitted and powerful victim-impact testimony, the few isolated comments Appellant now singles out inflamed the court members or caused them to base their death sentence on emotion rather than reason. Moreover, unlike in Gardner, no evidence or testimony upon which the members relied in reaching their sentence was hidden from Appellant. Accordingly, Gardner is factually distinguishable and does not govern here.[51]

The United States respectfully submits that, in predicating error on isolated comments regarding Appellant's crimes ("they died alone suffering"; "biggest acts of cowardice"; "no person ought to die that way"), the Court below read Booth too broadly. Booth does not stand for the proposition that isolated comments within the testimony of a victim's family member, and completely divorced from their greater context, can violate an appellant's Eighth Amendment rights. Rather, the key factor in Booth was "***the formal presentation of this information by the State***" which, in the Court's view, risked "inflam[ing] the jury and divert[ing] it from deciding the case on the relevant evidence concerning the crime and the defendant." Booth, 482 U.S. at 508 (emphasis added).

[51] Gardner is also inapposite because its holding rests upon Fifth Amendment Due Process grounds whereas Appellant's challenge here is limited to the Eighth Amendment. (*See* App. Br. at 133.)

Unlike Booth, 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. Further, those comments were consumed within pages of proper victim-impact testimony. The United States respectfully submits Booth was never intended to apply to such facts.

Further support for a narrow reading of Booth lies in Payne v. Tennessee, 501 U.S. 808 (1991), wherein the Supreme Court held the Eighth Amendment permits victim-impact testimony concerning the psychological impact of the victim's death upon surviving family members, thereby overruling that portion of Booth that had held to the contrary. Payne, 501 U.S. at 827. Where, as here, disputed comments are isolated in nature and are part-and-parcel of larger permissible victim-impact testimony, there is no risk that such comments will "inflame the jury and divert it from deciding the case on the relevant evidence." Booth, 482, U.S. at 508. Thus, such comments are permissible under Payne and do not constitute error under Booth.[52]

c. Even if there was error, it was not plain or obvious.

Even if this Honorable Court concludes one or more of the challenged comments were error, they certainly did not rise to

[52] *See also* Witt, 73 M.J. at 801, n. 31 ("Whatever remains of Booth v. Maryland in the wake of Payne v. Tennessee and footnote two of that decision, we note that certain of the Supreme Court's observations in Booth would have limited applicability to the case now before us.")

the level of plain error. "Error is 'plain' when it is 'obvious' or 'clear under current law.'" United States v. Harcrow, 66 M.J. 154, 162 (C.A.A.F. 2008) (Stucky, J., with whom Effron, C.J., joined, concurring in the result) (*quoting* Olano, 507 U.S. at 734). To the United States' knowledge, at the time of Appellant's trial, there was no settled case law establishing that isolated comments made in the context of victim-impact testimony could constitute error under the Eighth Amendment. Thus, any error could not be "clear under current law." *See* United States v. Marsh, 70 M.J. 101, 108 (C.A.A.F. 2011) (Ryan, J., with whom Stucky, J., joined, dissenting) (no plain error where, under the precedent from the relevant Court of Criminal Appeals, the argument at issue appears to have been permissible); United States v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001) (no plain error where "[n]o binding precedent . . . at the time of trial or appeal" established error).

Apparently, such a legal rule first entered military jurisprudence with the opinion below when the Air Force Court found error in certain of the now-challenged comments. This, however, is not sufficient to support a finding of plain error. *See* Olano, 507 U.S. at 735 ("We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified.

At a minimum, a court of appeals cannot correct an error . . . unless the error is clear under current law.")

More fundamentally, the "error" was not "plain" for the same reason that it was not error. The disputed comments arose in the context of proper victim-impact testimony and clearly related to the family members' expression of emotional anguish at Appellant's murder of their loved ones. There is no likelihood any of these comments diverted the court members' attention or inflamed them into adjudging the death sentence on any improper basis.

d. There was no prejudice.

Even if there was error and such error was plain (neither of which the government concedes), Appellant clearly has failed to demonstrate prejudice. In declining to find prejudice on this issue, the Court below observed: "We, therefore, do not consider the comments the appellant now challenges, which were isolated and very brief in the overall context of the Government's lengthy sentencing case, to be so unduly prejudicial that they rendered the trial fundamentally unfair." Witt, 73 M.J. at 802. *See also* Witt, 73 M.J. at 811 (*quoting* Payne, 501 U.S. at 832 ("[S]urely this brief statement did not inflame [the jury's passion more than did the facts of the crime. . ."")).

In Akbar, this Honorable Court rejected a similar Eighth Amendment challenge based on a finding of no error. Akbar, 74

M.J. at 392-93. In *dicta*, this Court also held that the challenged testimony had resulted in no prejudice:

> We recognize that trial counsel elicited testimony by civilians about their reactions upon learning that a service member was responsible for the attacks. To the extent that this testimony by the civilians was improper, ***we find no prejudice because it was brief and unlikely had any impact on the panel where the victims properly testified about their reactions*** upon learning that the perpetrator was a service member. *See* United States v. Davis, 609 F.3d 663, 685 (5th Cir. 2010).

Akbar, 74 M.J at 393, n. 17 (emphasis added). As in Akbar, in the case *sub judice* the challenged testimony was brief and arose in the context of proper testimony regarding the family members' reactions to the crimes. Therefore, there is no likelihood it impacted the members improperly in their sentencing deliberations, and this assigned error is without merit.

ISSUE A-VI

TRIAL DEFENSE COUNSEL'S STRATEGIC DECISION TO LIMIT FAMILY MEMBERS' EMOTIONAL IMPACT TESTIMONY VIA A MOTION IN LIMINE RATHER THAN VIA DIRECT OBJECTION DURING THE TESTIMONY WAS REASONABLE UNDER THE CIRCUMSTANCES AND ACCOMPLISHED THE DESIRED GOAL OF SAFEGUARDING APPELLANT AGAINST IMPROPER AND POTENTIALLY DAMAGING TESTIMONY. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

In reviewing claims of ineffective assistance of counsel, this Court "looks at the questions of deficient performance and

prejudice de novo." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (*quoting* United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)); *see also* United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011). Analysis of defense counsel's performance is "highly deferential." United States v. Mazza, 67 M.J. 470, 474 (C.A.A.F. 2009).

Analysis

This assigned error is simply a re-packaging, under the guise of ineffective assistance of counsel, of Appellant's weak argument of evidentiary error as advanced in Issue A-V, above. Having failed to show that the military judge committed plain error in excluding certain victim-impact testimony, Appellant now argues his trial defense team rendered constitutionally defective assistance of counsel by failing to object to such testimony.

As is clear from the record and the post-trial affidavits, trial defense counsel's failure to object did not result from carelessness but instead reflected a strategic decision. Rather than objecting to the testimony of the victims' family members as it was being presented, and thereby risking highlighting adverse testimony to the court members, counsel filed a motion ahead of the testimony petitioning the military judge to exercise control over the sentencing proceedings and to guard against any improper testimony on the part of the family

members. (J.A. at 110; R. at 14; App. Ex. XXIV.) Under the circumstances presented, counsel's motion, together with an R.C.M. 802 conference held with the military judge, was a reasonable manner of addressing the risk of improper testimony at trial, and should not be second-guessed by this Honorable Court.

a. There was no constitutionally deficient performance.

The Court below found error under the first prong of Strickland v. Washington, 466 U.S. 668 (1984), holding that "a reasonable attorney acting on behalf of a client in a capital sentencing case would have researched and understood the extent to which they may have made arguments to limit the substance, as well as the quantity, of victim impact testimony offered by the Government's sentencing witnesses as trial." Witt, 73 M.J. at 801-02. In reaching this holding, the Court cited the parties' interaction on the record regarding the defense motion in limine and the government's response, as well as excerpts from post-trial affidavits of trial defense counsel. Id. at 800-01.

The United States respectfully submits the Court below focused too narrowly on the record and post-trial affidavits. A broader reading of the entire record including those documents, together with descriptions of the parties' R.C.M. 802 conference on the matter, demonstrates that trial defense counsel

investigated and addressed the matter in a reasonable manner under the circumstances to safeguard Appellant against the risk of improper testimony from the victims' family members.

At the outset it is important to clarify the operative standard from Strickland, of which the Court below cited only a portion. In Strickland, the Supreme Court held:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. ***In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.***

Strickland, 466 U.S. at 691 (emphasis added).

At trial, rather than objecting to testimony of the victims' family members as it was being presented, Appellant's defense team filed a motion in *limine* in advance, petitioning the military judge to regulate the testimony of those witnesses and to exclude or limit any excessive or improper testimony. (J.A. at 110; App. Ex. XXIV) In his post-trial affidavit, Mr. Frank Spinner, Appellant's experienced civilian trial defense counsel, explained the defense strategy on this matter:

> [W]e raised this concern with the trial judge during an R.C.M. 802 session. We knew the government would push the limits and feared that if we made multiple objections that were overruled, it would be held against [the appellant] by the members. We face [sic] the Hobson's choice of either highlighting unduly prejudicial testimony or losing credibility with the members. Thus, we asked the judge to exercise control over the process under Mil. R. Evid. 403. A motion had already been filed raising this issue and the government had opposed it. ***I was confident that the judge understood the law, understood what we were saying and that he would act sua sponte to limit the government's scope of examination. . . . To the extent he did not intervene, it was because he felt the lines were not crossed.***

(J.A. at 4023) (emphasis added.)

Then-Captain Douglas Rawald, Appellant's military trial defense counsel, echoed this in his post-trial affidavit:

> Frank felt that objecting in front of the members would have a negative impact on how they viewed us and our case and so decided not to object during the testimony of any of their witnesses. After some of the witnesses had testified, we did have an off-the-record RCM 802 session in which we raised our concerns about the testimony of the government witnesses to the military judge and expressed our frustration at the fact that we felt we could not object in front of the members without risking highlighting their improper testimony. . . ***The military judge told us and trial counsel that he was closely watching the testimony for whether it was objectionable and then told trial counsel that the questions were dangerously close to the line and that he would prefer it if the questions stayed away from that line.***

(J.A. at 4013) (emphasis added.)

The Court below concluded trial defense counsel conducted a

"less than complete investigation" under Strickland and that therefore their strategy was reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." Witt, 73 M.J. at 801-02. However, under the circumstances, defense counsel conducted as much investigation as possible. Counsel's motion in *limine* was filed 10 June 2005. According to the military judge's colloquy with counsel, this was more than two months before the government's deadline for providing the defense the names of the government's sentencing witnesses.

By necessity, the motion in *limine* was anticipatory and vague because information about the government's witnesses was unknown. Given this, there was no additional research defense counsel could have conducted to ascertain how such testimony might be objectionable or "the extent to which counsel may have made arguments to limit the substance, as well as the quantity" of the anticipated testimony. Witt, 73 M.J. at 802.

The military judge himself understood the anticipatory nature of the defense motion: "And that's the way I took your motion was exactly that. Is [sic] this is coming down the line, please be ready for it [. . .]" (R. at 150; Witt, 73 M.J. at 801).

To the extent further investigation was necessary it was apparently accomplished by the time of the parties' R.C.M. 802

conference, which occurred after some of the government witnesses had already testified. (J.A. at 4013.) By that time, defense counsel were able to articulate sufficiently detailed objections to the testimony to secure a commitment from the military judge that "he was closely watching the testimony for whether it was objectionable." (Id.) Based on the 802 session, Mr. Spinner was also "confident that the judge understood the law, understood what we were saying and that he would act *sua sponte* to limit the government's scope of examination." (J.A. at 4023.)

In view of the above, the government submits trial defense counsel fulfilled their duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. In particular, counsel's strategic decision to file a motion in *limine* well in advance of the testimony in question made it unnecessary, and indeed impossible, to conduct further factual investigation at that time. By the time of the testimony itself, counsel had sufficiently investigated the facts and the law to secure a commitment from the military judge to closely monitor the proceedings and to guard against objectionable testimony. It was also an eminently reasonable strategic decision to raise this issue in the form of a motion in *limine*, and not object in front of members.

b. Even if there was error, there was no prejudice.

Should this Honorable Court find error under Strickland's first prong (which the government does not concede), then clearly Appellant has failed to demonstrate any prejudice. As correctly observed by the Court below:

> [T]he family members' "characterizations" and "opinions" about the crime were offered not in the abstract, but as integral components of the descriptions of their own emotional injuries—"about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." We, therefore, do not consider the comments the appellant now challenges, which were isolated and very brief in the overall context of the Government's lengthy sentencing case, to be so unduly prejudicial that they rendered the trial fundamentally unfair. *Id.* More importantly, under the prejudice prong of a Strickland analysis, we find no reasonable probability that but for their admission, and trial defense counsel's failure to request a curative instruction, the sentence would have been more favorable to the appellant.

Witt, 73 M.J. at 802. Accordingly, this issue is without merit.

ISSUE A-VII

THE MILITARY JUDGE CORRECTLY INSTRUCTED THE MEMBERS ON THE SENTENCING PROCEDURES IN A CAPITAL CASE.

Standard of Review

Ordinarily, the completeness of sentencing instructions is reviewed *de novo*. United States v. Miller, 58 M.J. 266 (C.A.A.F. 2003). A military judge is required to give appropriate sentencing instructions but has broad discretion in

selecting which instructions to give. United States v. Greaves, 46 M.J. 133, 139 (C.A.A.F. 1997) (*citing* United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967)).

However, by failing to object to sentencing instructions, an appellant waives any objection, absent plain error. United States v. Thomas, 46 M.J. 311, 314 (C.A.A.F. 1997); R.C.M. 1005(f). To establish plain error, Appellant bears the burden of showing: (1) there was error; (2) such error was plain, clear, or obvious; and (3) that the error affected substantial rights. United States v. Olano, 507 U.S. 725, 732-35 (1993); United States v. Cardreon, 52 M.J. 213, 216 (C.A.A.F. 1999).

Analysis

As Appellant himself concedes (App. Br. at 138), he did not request the referenced instruction at trial. Accordingly, this Court must review for plain error. Thomas, 46 M.J. at 314.[53] *See also* Akbar, 74 M.J. at 401 ("Ordinarily, we review the adequacy of a military judge's instructions *de novo*. [Citation omitted] However, if an appellant fails to object to the instruction at trial, we review for plain error.")

a. There was no error.

[53] Thomas uses the term "waiver." However, Thomas was decided prior to this Court distinguishing between waiver and forfeiture. Waiver is the "intentional relinquishment or abandonment of a known right," and if an appellant forfeits a right by failing to raise it at trial it is review for plain error, but if an appellant intentionally waives a known right at trial it is extinguished and may not be raised on appeal. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

The military judge properly instructed the members on the appropriate procedure to follow during sentence deliberations. He instructed the members that: they could not adjudge a death sentence unless all the members unanimously found, beyond a reasonable doubt, the same aggravating factor existed; they could not adjudge a death sentence unless all the members unanimously found the mitigating factors were substantially outweighed by the aggravating factors, and; they could only adjudge a sentence to death by unanimous vote of all members. (J.A. at 3788-91.) He also instructed the members they must vote on the proposed sentences beginning with the least severe sentence. (J.A. at. 3791.)

The military judge further instructed the members that even if they unanimously found that an aggravating factor existed, and the extenuating and mitigating circumstances were substantially outweighed by the aggravating factors, each member still had the absolute discretion to not vote for the death sentence. (J.A. at 3790.) Finally, he instructed them that in the event they did not reach the required concurrence on any particular proposed sentence voted upon, they must repeat the process of discussing, proposing, and voting on sentences. (J.A. at 3792.) These instructions were correct and consistent with R.C.M. 1004, R.C.M. 1006, applicable case law, and Department of the Army, Pamphlet 27-9, Military Judges'

Benchbook, Ch. 8, §III, para. 8-3-40.

Nowhere in the rules, case law, or Military Judge's Benchbook is there authority for Appellant's requested instruction that members may not consider the death sentence after voting on a proposed death sentence. In support of his position, Appellant points only to United States v. Simoy, 50 M.J. 1 (C.A.A.F. 1998). In Simoy, this Honorable Court held that the military judge erred by failing to instruct the members that they must vote on the least severe proposed punishment first. Simoy, 50 M.J. at 2. In discussing the four "gates" of the military death penalty process, this Court noted, "If at any step along the way there is not a unanimous finding, this eliminates the death penalty as an option." Id.

Appellant misconstrues the Court's statement that there must be a "unanimous finding at any step along the way" and concludes that any vote failing to result in the death sentence eliminates death as a sentencing option. This is simply not correct and is not what this Court held in Simoy. As noted by the Court below, the pertinent language in Simoy pertains "to the unanimity required before the members may progress from *one gate to the next* in capital sentence deliberations." Witt, 73 M.J. at 805 (*quoting* R.C.M. 1006(d)(3)(A)) (emphasis in

original).[54]

Appellant's argument in the case *sub judice* rests on the same flawed logic as that rejected in Akbar – i.e. that a ***proposed*** sentence may not be revisited or reconsidered with a view toward increasing the sentence to death. Neither R.C.M. 1009 nor the existing case law precludes such a process in reconsideration. Thus, the military judge did not err in failing to *sua sponte* give the instruction now in issue.

c. Appellant has failed to show prejudice.

Even if this Honorable Court were to find the military judge erred in his instructions, Appellant has failed to establish prejudice. *See* United States v. Miller, 58 M.J. 266, 271 (C.A.A.F. 2003) (Assuming *arguendo* that a military judge erred, this error must still be tested for prejudice); *see also* United States v. Hardison, 64 M.J. 279, 281 (C.A.A.F. 2007) (Appellant's burden is to show that he suffered material prejudice to his substantial rights). Nothing in the record indicates the members in fact voted more than once on Appellant's sentence prior to reaching their unanimous decision

[54] A similar issue was raised in United States v. Akbar. There, the appellant alleged the military judge committed plain error in his sentencing reconsideration instructions by failing to instruct the panel that death was no longer an available punishment if the panel's initial vote did not include death. *See* Akbar, 74 M.J. at 401-02. Rejecting this argument, this Honorable Court held that R.C.M. 1009, concerning a court panel's reconsideration of the sentence, "does not explicitly prohibit the panel from reconsidering a sentence with a view to increasing the sentence to death." Akbar, 74 M.J. at 402. This Court further noted it had found no case law supporting the appellant's claim. Id.

to sentence him to death. Thus, Appellant has failed to demonstrate how he was prejudiced by any alleged error. *See* Akbar, 74 M.J. at 401-02 (No prejudice where record did not indicate whether panel requested reconsideration in order to increase the appellant's sentence to death or to decrease his sentence).

ISSUE A-VIII

APPELLANT RECEIVED EFFECTIVE REPRESENTATION FROM TRIAL DEFENSE COUNSEL DURING FINDINGS.

Standard of Review

See Standard of Review at A-I, *supra*.

A.

Trial defense counsel reasonably investigated the possibility of Appellant's mental impairment by having the defense expert consultant, Dr. Mosman, conduct a thorough psychological exam of Appellant prior to trial, and defense counsel reasonably relied on Dr. Mosman's conclusions.

Analysis

Appellant here reiterates his argument from Issue A-I, *supra*, in the context of findings versus sentencing. In short, Appellant claims that: 1) had trial defense counsel conducted more investigation, they would surely have uncovered sufficient evidence to obtain a mental impairment instruction at trial; and 2) had such an instruction been given, there is a reasonable probability that at least one court member would have voted against the death penalty. (App. Br. at 141-42.) Appellant's

argument lacks merit for the same reasons as outlined in the government's Answer to Issue A-I.

Viewing counsel's conduct through the highly deferential lens required by this Court and the Supreme Court, and noting the active pre-trial investigation conducted by the defense's mitigation expert, Ms. Cheryl Pettry, and the defense's forensic psychologist, Dr. Bill Mosman, the Air Force Court correctly concluded that "[t]he case at hand is not one in which trial defense counsel shirked their responsibility to conduct any investigation into the appellant's family and social history, upbringing, or history of mental illness, or utterly failed to present a case in mitigation and extenuation." Witt, 73 M.J. at 775.

This Court should, as did the Court below, reject Appellant's assertion that alleged "unconsciousness" after an accident involving a closed-wound head injury automatically establishes the presence of TBI. *See* Witt, 73 M.J. at 777. Importantly, the Court below observed that the only testimony concerning Appellant's purported "changed behavior" was Ms. Pettry's report of the statement of Appellant's roommate that Appellant "became more outspoken" and "wouldn't put up with anything anymore." Witt, 73 M.J. at 778.

This statement, however, was countered by testimony from several other witnesses, including Appellant's father, a senior

enlisted supervisor, and a Houston County correctional officer, all of whom interacted with Appellant shortly before or after the murders and testified that they had observed no changes in his behavior. Additionally, the Government's forensic psychologist, Dr. Craig Rath, testified that during his examination of Appellant, Appellant clarified that his involvement in a fight following the accident had been based on a non-violent motivation (i.e. to break it up). Considering all the testimony offered at trial, the Court below correctly concluded, "[T]o the extent the evidence of a TBI is based on purported changes in the appellant's personality, we find this point to be resoundingly contradicted by the record." Witt, 73 M.J. at 779.

Finally, assuming, *arguendo*, there was sufficient evidence in the record to establish Appellant had suffered a TBI, there was "no reasonable probability that the omitted evidence would have changed the panel's conclusion that the aggravating circumstances outweighed the mitigating circumstances" in the case. Witt, 73 M.J. at 781-82. *See* Argument at A-I, *supra; see also* Witt, 73 M.J. at 783-84.

Accordingly, this Honorable Court should reject Appellant's meritless claim.

B.

Defense Counsel reasonably elected not to produce testimony alluded to during the opening statement based upon a material and unforeseeable change in circumstances which occurred after the opening statement.

Analysis

Appellant claims his trial defense counsel provided him constitutionally deficient representation by failing to call as witnesses certain parties referred to in his opening statement. Specifically, Appellant avers counsel's failure to call his mother and stepfather, Melanie and Greg Pehling, his natural father, Terry Witt, the natural father's ex-wife, Emily Witt, his aunt, Lynda Smith, and the defense's forensic psychologist, Dr. Bill Mosman, resulted in ineffective assistance of counsel. (App. Br. at 143.)

This issue stands or falls on the reasonableness of trial defense counsel's decision not to call Dr. Mosman to testify after critical portions of his testimony were unexpectedly discredited in the Daubert hearing. As the Air Force Court observed, "[T]he decision not to seek the testimony of the family members, without the corresponding expert testimony from Dr. [Mosman], was also reasonable and [we] conclude that such testimony would have likely been inadmissible." Witt, 73 M.J. at 771. Thus, the government's response below focuses on the decision not to call Dr. Mosman.

a. Appellant has not shown ineffective representation.

Citing various federal circuit cases, Appellant appears to argue for a *per se* rule that would find ineffective assistance of counsel whenever testimony promised in an opening statement is not delivered. (App. Br. at 147.) The law, however, both in military and civilian courts,[55] makes "every effort to eliminate the distorting effects of hindsight" and seeks to "evaluate the [challenged] conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

In United States v. Christy, 46 M.J. 47 (C.A.A.F. 1997), a murder trial, this Court evaluated IAC in the context of failure to deliver promised testimony. In opening statement, trial defense counsel informed the members they would see evidence of the appellant's peaceful nature and good military character and of the wife's suicidal tendencies. Counsel then failed to present any such evidence. This Court also recognized that "[U]nexpected events at trial may lead to changed circumstances or different trial tactics" that might justify a failure to call promised witnesses. Christy, 46 M.J. at 50.

[55] No case cited by Appellant (App. Br. at 147-49) adopted a *per se* rule to this effect. Indeed, one explicitly rejected such a rule and directly cuts against his argument. *See* Turner v. Williams, 35 F.3d 872, 904 (4th Cir. 1994) ("In our view, assuming counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is "virtually unchallengeable") (*citing* Strickland, 466 U.S. at 690)).

After working for months with Dr. Mosman on the defense case theory, at the time of the opening statement defense counsel were confident that Dr. Mosman would deliver admissible and effective testimony that Appellant displayed schizoid features. In the findings case, this testimony was aimed at persuading the members that Appellant suffered from a mental impairment at the time of the murders which precluded his ability to premeditate and which in turn justified sparing his life.

No member of the defense team anticipated any difficulties in presenting Dr. Mosman's testimony at the time of the opening statement. In the words of Captain Rawald, "[W]e thought that there would be no conceivable reason that we would not call Dr. Mosman and confirmed with Dr. Mosman that he foresaw no reason why he would not want to testify." (*See* J.A. at 4016.)

All of that changed unexpectedly during the Daubert hearing when, on cross-examination, Dr. Mosman conceded for the first time that his diagnosis of Appellant had been inaccurate and that, rather than having schizoid traits, Appellant displayed paranoid and borderline traits. This critical change in his testimony threatened Dr. Mosman's credibility as a key witness for the defense. Further, Dr. Mosman himself suddenly became reluctant to testify and advised defense counsel to focus instead on an alternative theory through the defense team's

memory expert, Dr. Shomer – specifically, that an adrenaline rush at the time of the crime had interfered with Appellant's ability to premeditate. (J.A. at 4016.)

Far from being "unreasonable conduct," trial defense counsel's decision to forgo the testimony of Dr. Mosman represented a well-reasoned tactical choice in view of the new development. Moreover, counsel made the choice after careful deliberation, giving much thought to potential adverse consequences. (*See* J.A. at 4016.) Based on this unexpected change in circumstances, counsel were not deficient, either during the opening statement in promising to present Dr. Mosman's testimony or later in the trial by failing to deliver on this promise.

b. Appellant has failed to demonstrate prejudice.

As Appellant himself concedes (App. Br. at 142), there was never any dispute as to whether Appellant committed the heinous crimes of which he was convicted. The only possible battle-ground in the findings case was whether Appellant had acted with premeditation, or whether instead some mental impairment or condition had precluded him from doing so. Even on this point, the government's evidence of premeditation was overwhelming, featuring detailed evidence regarding Appellant's preparation for the crime. *See* Statement of Facts, *supra*. Additionally, to counter any defense evidence suggesting a mental impairment, the

prosecution had waiting in the wings its own expert, Dr. Craig Rath, who was ready to testify that his own examination of Appellant had revealed no impairments that could have mitigated his heinous crimes or the evidence of premeditation.

Against this backdrop, Appellant now argues that trial defense counsel's "flimsy presentation in light of the grandiose review undoubtedly damaged counsel's credibility, and ultimately and more importantly, Appellant." (App. Br. at 150.) However, Appellant has provided, and can provide, nothing whatsoever to substantiate the conclusion that his conviction of first degree murder and the resulting death penalty were rendered constitutionally "unreliable" by virtue of his counsel's tactical decision not to call Dr. Mosman.

Additionally, pursuant to an agreement between the defense and prosecution, any testimony by Dr. Mosman would have opened the door to damaging rebuttal from the government's expert, Dr. Rath, whose own evaluation of Appellant had reached markedly different conclusions than Dr. Mosman. (J.A. at 4017-18.) Therefore, far from bolstering Appellant's case, it is much more likely that any testimony by Dr. Mosman would have only further damaged Appellant.[56] No serious argument can be made here that

[56] The shift in Dr. Mosman's value to the defense team was so profound that even Ms. Pettry, the defense's mitigation expert, who throughout case preparation had advocated the importance of presenting all available mitigating evidence, recognized the wisdom of forgoing his testimony. (*See* J.A. at 4017.)

this strategy deprived Appellant of a fair trial by rendering the outcome unreliable.

C.

Defense Counsel made reasonable, tactical decisions concerning the presentation of mental health issues during both findings and sentencing.

Analysis

Though packaged into six sub-parts, Appellant makes three separate claims in this portion of his IAC allegation: 1) that his defense counsel improperly disclosed privileged statements made by Appellant during his R.C.M. 706 mental evaluation; 2) that counsel improperly consented to an evaluation of Appellant by the government's expert psychologist, Dr. Rath; and 3) that counsel improperly failed to use the defense expert, Dr. Mosman for the purpose for which he had been hired. (App. Br. at 162.) The third claim[57] is a re-packaging of Appellant's claim in Sub Assignment of Error B, *supra*, and is adequately addressed there. Accordingly, the analysis below addresses only Appellant's first two claims.

1. Disclosure of R.C.M. 706 Sanity Board Report

a. Appellant has not shown defective representation as the result of defense counsel's disclosure of the full sanity board report to the prosecution.

[57] *See* App. Br. at 185, Issue No. 6.

Appellant claims defense counsel's disclosure of the full sanity board report, including certain allegedly incriminating statements, reflected a misunderstanding by counsel of Mil. R. Evid. 302 and military case law that rendered counsel's performance constitutionally deficient under Strickland. (App. Br. at 164.) Appellant contends that Mil. R. Evid. 302(c) only required disclosure of the sanity board report minus Appellant's statements at the point where counsel provided notice that Dr. Mosman would be a defense witness. (App. Br. at 166.) Appellant argues, but for this disclosure, the prosecution would not have obtained Appellant's incriminating statements which it then used to cross-examine Dr. Mosman during the Daubert hearing to ultimately keep him off the witness stand. (App. Br. at 174.) The defense disclosure of the full sanity board report, Appellant claims, was done with "no conceivable tactical purpose" and crippled the defense case by denying Appellant the testimony of his star witness. (Id.)

Appellant's argument is riddled with flaws. First, there was no misunderstanding of Mil. R. Evid. 302. Rather, trial defense counsel's disclosure of Appellant's sanity board statements to trial counsel and to Dr. Rath reflected a reasonable, tactical decision to permit Dr. Rath to evaluate Appellant independently, outside the presence of either trial counsel or defense counsel. This tactic was part of a larger

strategy to attempt to evaluate the government's rebuttal evidence and glean potentially favorable testimony from the government's expert forensic psychologist.

By disclosing Appellant's sanity board report to Dr. Rath, counsel facilitated his evaluation of Appellant ahead of any testimony by the defense's expert, Dr. Mosman, enabling the defense to gauge potential rebuttal evidence available to the government through Dr. Rath and to make a more informed decision as to whether or not to call Dr. Mosman as a witness.

Far from being constitutionally erroneous, counsel's disclosure to the prosecution of the sanity report, including Appellant's statements to the sanity board members, did not even constitute error; Mil. R. Evid. 302 forbids the admission of sanity board statements into evidence at trial. Mil. R. Evid. 302(a). While Mil. R. Evid. 302(c) does limit disclosure of an accused's incriminating statements in a sanity board report to instances where the accused "opens the door" by introducing the statements themselves, this rule hinges upon the ***actual use or derivative use*** of those statements ***at trial***. Though the complained-of statements (App. Br. at 154) were released to trial counsel, no actual or derivate use was made of them at trial. Thus, the mere release of these statements did not violate Mil. R. Evid. 302.

As Captain Rawald explained in his post-trial declaration, the decision to release the full sanity board report was motivated by the tactically sound goal of evaluating the continuing viability of Dr. Mosman's testimony at trial. (*See* J.A. at 4017-18.) Furthermore, the defense gained a tactical advantage by reaching an agreement with trial counsel to permit Dr. Rath's mid-trial evaluation of Appellant (including access to the sanity board statements); namely, a preview of the government's potential "rebuttal evidence." Appellant ignores this critical factor in dismissing his counsel's tactics.

Courts will not "second guess" on appeal strategic or tactical decisions made by a defense counsel unless there was no reasonable or plausible basis for the defense counsel's actions. United States v. Anderson, 55 M.J. 198, 202 (C.A.A.F. 2001) (*quoting* United States v. Morgan, 37 M.J. 407, 410 (C.M.A. 1993). If trial defense counsel had any "reasonable trial strategy," actions taken pursuant to that strategy will not be deemed ineffective. United States v. Ingham, 42 M.J. 218, 224 (C.A.A.F. 1995).

As outlined in Captain Rawald's post-trial declaration, the decision to disclose the sanity board report (with Appellant's statements) reflected a reasonable defense trial strategy of discovering what rebuttal testimony the government might marshal

via Dr. Rath, had Dr. Mosman testified for the defense as originally planned. That information assisted defense counsel in reaching a more informed decision as to whether Dr. Mosman should testify.[58] Accordingly, Appellant's argument fails under prong one.

b. Appellant has failed to demonstrate prejudice.

Even assuming, *arguendo*, that the disclosure of the sanity report violated Mil. R. Evid. 302, unauthorized disclosures under Mil. R. Evid. 302 are "non-structural error." Accordingly, they constitute reversible error only when they materially prejudice the substantial rights of the accused. United States v. Clark, 62 M.J. 915, 200 (C.A.A.F. 2005). In assessing non-structural error, this Court examines whether the error had a "substantial influence" by evaluating four factors: (1) the strength of the government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. Id.

In the case *sub judice*, Appellant is able to point to no evidence that any of Appellant's sanity board statements resulted in any additional investigation by the government, impacted the government's decision to prosecute in any way or played any role in the presentation of evidence on the merits at

[58] The fact that Dr. Mosman later essentially disqualified himself as a defense witness by expressing his reluctance to testify is of no moment. Strickland, 466 U.S. at 689 (IAC claims are "evaluate[d] from counsel's perspective at the time [of the challenged conduct]").

trial. Appellant's claim that "trial counsel used the privileged statements in his trial strategy, planning, interpreting the evidence, and cross examination" (App. Br. at 174) is untrue, except for the limited cross examination of Dr. Mosman during the Daubert hearing, which was not testimony on the merits. Accordingly, there was no substantive "use" of the statements – the statements were never introduced directly, nor were they used to cross-examine any witnesses on the merits before the court members. As the Court noted in McDaniel, "the question under *Kastigar* is not whether the testimony relates to the charges, but whether the prosecution has 'used' the testimony in prosecuting those charges." Id. at 310 (*citing* Kastigar v. United States, 406 U.S. 441, 460 (1972). Based on the above, this Honorable Court should reach the same conclusion as below, and find this allegation to be without merit.

2. Consent to Evaluation of Appellant by Dr. Rath

Appellant argues that "Counsel's decision to consent to an evaluation by Dr. Rath was unreasonable, unwarranted, and inconsistent with prevailing law." (App. Br. at 175.) As previously noted, trial defense counsel's original strategy was to have Dr. Mosman provide expert testimony that Appellant suffered from a psychological impairment that could have contributed to an inability to premeditate his actions, but that strategy was foreclosed during the Daubert hearing. Also, in

view of the development during the Daubert hearing, trial counsel petitioned the military judge for an independent evaluation of Appellant by a government psychologist.

Rather than risking a court order granting the government's request which could deprive the defense of any control over the parameters of an evaluation, defense counsel elected to fashion an agreement with trial counsel, in which Appellant would be evaluated by Dr. Rath but the results of such evaluation would be disclosed only to the defense unless Dr. Mosman was called as a defense witness. This strategy provided insights into any potential rebuttal evidence that the government might present through Dr. Rath and also bought the defense additional time to determine whether or not to call Dr. Mosman.

Under the difficult circumstances with which defense counsel were faced, this was a reasonable and prudent trial strategy. In the words of the Court below: "[W]e cannot find the decision to allow their client to be evaluated by Dr. [Rath] was deficient given the unique circumstances that surfaced mid-trial... Attorneys may disagree with the approach taken, but counsel's performance here reflects strategic and tactical decisions that will not be second-guessed by this Court." Witt, 73 M.J. at 773. Put simply, defense counsel's decision to permit the government's expert psychologist to evaluate Appellant was reasonable. Appellant's IAC claim is without

merit and should be rejected by this Honorable Court as it was below.[59]

ISSUE A-IX

THE MILITARY JUDGE APPROPRIATELY DENIED APPELLANT'S CHALLENGE FOR CAUSE AGAINST COLONEL HOLCOMB.

Standard of Review

The burden of establishing grounds for a challenge for cause is upon the party making the challenge. R.C.M. 912(f)(3). A military judge's denial of a challenge for cause is reviewed for an abuse of discretion. United States v. Richardson, 61 M.J. 113, 118 (C.A.A.F. 2005). Rulings on challenges based upon implied bias are reviewed under a standard that is less deferential than abuse of discretion but more deferential than *de novo* review. Id.

Military judges must follow the liberal-grant mandate in ruling on challenges for cause. United States v. White, 36 M.J. 284, 287 (C.M.A. 1993). A military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not. United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

[59] In this Sub Assignment of Error, Appellant also claims he was not adequately advised of his trial defense counsel's strategic decisions. (App. Br. at 184, Issue No. 5) This is patently false: As the Court below noted, Appellant was present during the Daubert hearing, witnessed Dr. Mosman's changed testimony, knew of the government's request for an independent evaluation, and was thoroughly advised by the military judge regarding the parameters of Dr. Rath's proposed evaluation. Witt, 73 M.J. at 773.

Analysis

Under R.C.M. 912(f)(1)(N), a court member should be removed for cause if he or she should not sit on the panel "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912 includes challenges based upon the concepts of both actual and implied bias. United States v. Moreno, 63 M.J. 129, 133 (C.A.A.F. 2006) However, in this assigned error, Appellant alleges only implied bias. (App. Br. at 194-96.)[60]

Implied bias is viewed through the eyes of the public. United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998). Implied bias exists when, despite a member's disclaimer, most people in the same position would be biased. United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000). The general focus is on the perception or appearance of fairness in the military justice system. Id.; *see also* United States v. Strand, 59 M.J. 455, 459 (C.A.A.F. 2004) (the fact that the president of panel was convening authority's son did not raise significant question of legality, fairness, or impartiality to public observer).

In Strand, this Honorable Court observed that implied bias should be relied upon sparingly. Strand, 59 M.J. at 458. Also, "in the absence of actual bias, where a military judge considers

[60] At trial, the military judge also understood Appellant's challenge as being limited to implied bias. The judge noted his impression on the record, and Appellant apparently did not object. *See* Witt, 73 M.J. at 758.

a challenge based on implied bias, recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).

Appellant contends the military judge should have granted the challenge for cause against Colonel Holcomb based upon implied bias because "[f]or 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 a guest in his home on more than one occasion." (App. Br. at 194.) Appellant furthers argues implied bias is evident from the fact the convening authority personally wrote Col Holcomb's name onto the referral list when referring the charges. (App. Br. at 191.) Appellant argues these facts demonstrate that Col Holcomb and the convening authority were "close friends." (App. Br. at 194.)

Contrary to Appellant's assertion, Colonel Holcomb was merely a professional colleague of the convening authority.[61] Moreover, this professional relationship did not require his disqualification as a court member. *See* United States v.

[61] Colonel Holcomb stated under oath that his associations with the convening authority had been limited to attending the same church and Sunday school class, having an occasional lunch together after church, and two occasions on which the convening authority had visited his house as a guest; once for a birthday celebration and the other to offer Colonel Holcomb condolences after he had been injured. (J.A. at 549-50.)

Downing, 56 M.J. 419, 423 (C.A.A.F. 2002). In Downing, this Honorable Court upheld a denial of a challenge for cause based upon implied bias stating:

> [An] . . . objective observer . . . would distinguish between officers who are professional colleagues and friends based on professional contact and those individuals whose bond of friendship might improperly find its way into the members' deliberation room.

Id. Upon receiving Appellant's challenge for cause, the military judge set the proper framework for analysis by setting forth on the record the legal standards governing bias and the liberal-grant mandate:

> In making my determination on the challenges for cause, there are two potential bias standards that I'm required to look at...The second test is implied bias, which indicates would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceedings if the challenge for cause were not granted, and again, an objective test of the public—through the eyes of the public. ***The court is also mindful of our appellate court's direction that challenges for cause be granted liberally***.

(J.A. at 803) (emphasis added.) Furthermore, the military judge did not simply incant the liberal grant mandate without analysis, as frowned upon by this Court in United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015). Instead, the military judge provided detailed analysis and considered the challenge in light of the liberal grant mandate. (J.A. at 830-40.) Because the record clearly reflects that the military judge applied the

liberal grant mandate, his ruling on Appellant's challenge is entitled to greater deference before this Honorable Court. Clay, 64 M.J. at 277; *see also* United States v. Castillo, 74 M.J. 39 (C.A.A.F. 2015). The military judge properly found that there was no bias and clearly articulated his findings on the record. (J.A. at 839-40.) Therefore, he did not abuse his discretion in denying the challenge for cause.

The record demonstrates the military judge applied the liberal grant mandate in making his decisions on challenges, as evidenced by his discussions on the record with counsel regarding that mandate plus the fact that he granted two other defense challenges for cause.[62] (J.A. at 803-840.) Under these circumstances, no reasonable member of the public observing the trial proceedings would doubt the legality, fairness, and impartiality of the proceedings based upon the military judge's rejection of the challenge for cause. Strand, 59 M.J. at 459.

ISSUE A-X

THERE WAS NO UNLAWFUL COMMAND INFLUENCE RESULTING FROM THE STAFF JUDGE ADVOCATE'S ATTENDANCE AT APPELLANT'S COURT-MARTIAL, HIS SEATING SELECTION IN THE SPECTATOR GALLERY, OR HIS COMMUNICATIONS WITH TRIAL COUNSEL.

Standard of Review

Allegations of unlawful command influence are reviewed *de novo*. United States v. Wallace, 39 M.J. 284 (C.M.A. 1994).

[62] The military judge granted Appellant's challenges for cause against Major Shuttleworth and Major Robinson. (J.A. at 810, 838.)

Analysis

Appellant argues that Colonel Jeffrey L. Robb, the Staff Judge Advocate to the Convening Authority (SJA), exercised unlawful command influence (UCI) when he: (1) attended most days of the court-martial; (2) sat in the immediate vicinity of the victims' families and the prosecution's paralegals; and (3) engaged in communications with trial counsel during the court-martial proceedings. (App. Br. at 196-202.)

First, the post-trial affidavits submitted on this issue belie Appellant's factual assertions. Second, even if the facts were as Appellant alleges, they would not meet Appellant's burden of raising UCI.

Appellant has the initial burden of raising UCI. United States v. Stombaugh, 40 M.J. 208, 213 (C.M.A. 1994). However, once the issue of command influence is properly placed in issue, "no reviewing court may properly affirm findings and sentence unless [the Court] is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." United States v. Thomas, 22 M.J. 388, 394 (C.M.A. 1986).

This Court evaluates UCI in the context of a completed trial using the following factors: "[T]he defense must (1) show facts which, if true, constitute [UCI]; (2) show that the proceedings were unfair; and (3) show that [UCI] was the cause

of the unfairness." United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 2003) (*citing* Stombaugh, 40 M.J. at 213). *See also* United States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003).

In an effort to lessen his burden under Stombaugh, Appellant cites United States v. Harvey, 64 M.J. 13 (C.A.A.F. 2006) for the proposition 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." (App. Br. at 201; Harvey, 64 M.J. at 19). Appellant's reliance on Harvey is misplaced. That case concerned an accused's burden of proof in raising UCI ***at the trial level***. Where, as here, an appellant has failed to raise UCI at trial, the appellant bears the burden of meeting the three elements outlined in Biagase. Appellant here has failed to meet his burden on any of the three elements.

In conjunction with Harvey, Appellant also cites the distinguishable Kitts, Youngblood and Hamilton cases.

In Kitts, it was "alleged that the SJA tried to coerce counsel into foregoing any motions concerning change of venue in large part to conceal the exercise of unlawful command influence." United States v. Kitts, 23 M.J. 105, 108 (C.M.A. 1986). There, this Court found that the SJA had been briefing ship crew members on the pending courts-martial and further found this had the potential for unlawfully influencing the outcome of the trials. Id. Clearly, no similar facts are

presented here.

Youngblood involved a staff meeting conducted by the convening authority and his SJA in the presence of the three senior-most members of a court-martial panel. United States v. Youngblood, 47 M.J. 338, 339 (C.A.A.F. 1997). The staff meeting covered a variety of topics, "including a 15–20 minute presentation on standards, command responsibility, and discipline." Id. This Court held that UCI had resulted from the meeting. Again, no similar facts are present here.

In Hamilton this Court found UCI where an SJA unlawfully coerced a Colonel into preferring charges against the accused after his subordinate company commander imposed non-judicial punishment for the same offenses. United States v. Hamilton, 41 M.J. 32, 34 (C.M.A. 1994). Once again, there is no factual similarity between Hamilton and the case *sub judice*.

Thus, Appellant cannot satisfy his burden to meet the three elements of Biagase.

a. The facts are not as Appellant alleges.

The post-trial affidavits submitted into the record on this issue disprove Appellant's factual assertions.

1. Attendance at the court-martial.

The record does not establish that the SJA attended "most" days of the trial. Admittedly, in his own affidavit, Colonel Robb commented, "I attended most days of trial. Public Affairs

asked that I be the spokesperson to the media in attendance to answer their questions and provide their sound bites." (J.A. at 3953.)

However, others in a position to observe the SJA's trial attendance characterized his attendance differently. The lead trial counsel, then-Lt Col Spath, stated, "I don't believe [Col Robb] was there for a vast majority of the testimony or a good part of voir dire." (J.A. at 3956.) The assistant trial counsel, Captain Williams, confirmed the SJA's very limited attendance. (J.A. at 3957.) Finally, Maj Rockenbach, another trial counsel on the case, also confirmed the SJA's minimal attendance. (J.A. at 3959.)

Despite the SJA's own comments, the affidavits of trial counsel establish he was not present for a majority of the trial.[63] Furthermore, Colonel Robb's own affidavit clarifies that his purpose in attending the trial was to serve as a media spokesman in this high-visibility case, rather than to somehow coerce the trial participants or court members, as Appellant insinuates without sufficient support in the record.

2. Seating selection in the spectator gallery.

In his affidavit, Colonel Robb noted:

> During trial, I sat behind both counsel tables at various times, though predominately behind the prosecution table. In this regard, the courtroom

[63] Or even if he was, it certainly wasn't noted by the trial participants, which fully belies Appellant's claim that the SJA's presence amounted to UCI.

> doorway to the hall was on the prosecution's side of the courtroom, and across the courtroom from the defense side. Anyone wanting to discretely enter or leave the courtroom while in session, as I often did, would naturally gravitate toward these seats. The paralegals, who also entered and left the courtroom frequently, sat in these seats too.

(J.A. at 3953.) Colonel Robb further noted, "I also had persistent anxiety that violence might erupt in the courtroom, and was vigilant to be in the location to identify and react to the situation if it arose." (Id.)

Appellant attempts to portray the courtroom as being very small and suggests the SJA's presence there made him conspicuous. (App. Br. at 197-98.) In fact, Lt Col Spath explained, "[d]uring the course of the trial, the courtroom had a number of people in attendance every day. I would guess the courtroom would hold about 175-200 people at a maximum. Depending on what was happening on a particular day, the courtroom would vary from half to completely full." (J.A. at 3955.) Lt Col Spath further confirmed the courtroom layout and noted that the area where Col Robb sat "was also the section closest to the entrance and exit. In fact, if someone walked in during a session, they would typically sit in the section closest to the entrance." (Id.)

All three trial counsel provided affidavits significantly undermining or refuting Appellant's allegation that Colonel Robb

sat with the victims' families. (J.A. at 3956, 3957, and 3959.)

Based on the affidavits of trial counsel, who were actually present for trial, the SJA did not actually sit with the victims' families or with the prosecution's paralegals and that, to the extent he sat near them, it was purely due to the layout of the courtroom and his need to frequently enter and exit the gallery without causing a distraction.

3. Communications with trial counsel.

In his affidavit, Colonel Robb explained:

> During recesses, I deliberately tended to associate with other neutrals or nonparties regularly in the courtroom for appearance sake, primarily the court reporter, Public Affairs, and media persons. I did occasionally talk with trial counsel during recesses. I would also talk with defense counsel. The talk was frequently social or light in nature, but when official would usually deal with logistics of the proceeding.

(J.A. at 3953.)

Lt Col Spath verified these assertions (J.A. at 3956), and Capt Williams addressed this issue at length, verifying Lt Col Spath's and Colonel Robb's declarations. (J.A. at 3957-58.) Major Rockenbach's affidavit confirms the others, fully demonstrating the lack of merit in Appellant's assertion. (J.A. at 3959-60.)

Taken together, the affidavits of Colonel Robb and the three trial counsel establish that any courtroom communications

between them during the trial were either unofficial or administrative in nature. There is no evidence, whatsoever, that the SJA attempted to coerce trial counsel or influence their trial strategy. Also, there is no evidence the court members could have formed such an impression – indeed, care was taken by all parties to have any interactions occur outside their presence. Appellant cannot meet his burden.

b. Even if they were true, the facts as Appellant alleges would not raise UCI.

Even if true, the facts as alleged by Appellant do not constitute UCI. Rather, as the Air Force Court noted, "The facts... only show that [the SJA] attended the trial, sat near the victims' families, and sometimes interacted with counsel for both sides." Id. Appellant has wholly failed to demonstrate how any such behavior constituted UCI or even raised the specter of UCI. Appellant cites, and the government finds, no case law in support of such a conclusion. There must be more than "[command influence] in the air" to justify action by an appellate court. United States v. Allen, 33 M.J. 209 (C.M.A. 1991).

Furthermore, Appellant has provided no evidence to show the proceedings were unfair or that UCI was the cause of any such unfairness. Therefore, Appellant has satisfied none of the three elements under Biagase, as is his burden, and he is

entitled to no relief. *See* Biagase, 50 M.J. at 150.

ISSUE A-XI

TRIAL COUNSEL'S ARGUMENT DOES NOT CONSTITUTE PROSECUTORIAL MISCONDUCT AND APPELLANT FAILS TO CONDUCT ANY ANALYSIS ON ALL BUT ONE ALLEGATION.

Standard of Review

If a proper objection based on alleged improper argument is made at the trial level, an appellate court reviews those comments for prejudicial error. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005).

However, failure to object to an alleged improper argument constitutes waiver of the objection. United States v. Jenkins, 54 M.J. 12, 19 (C.A.A.F. 2000). To overcome waiver, an appellant must prove plain error, which requires: (1) that there was, in fact, an error; (2) that the error was plain or obvious; and (3) that the error materially prejudiced a substantial right. United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005).

Analysis

Appellant, in the "additional facts" section, highlights several of trial counsel's arguments, but only conducts an analysis of one of them. (App. Br. at 203-12.) Additionally, Appellant frames the issue as trial counsel repeatedly referencing the victims' family members and their presence in

the gallery. (App. Br. at 202.) However, the examples that Appellant provides are not relevant to that issue as is evident by the lack of analysis, lack of explanation as to how the arguments were improper, or what law prohibits them. Furthermore, the fact that there were trial spectators, including the victims' family members, was common knowledge to the court members. Commenting on matters of common knowledge in argument is permissible. United States v. Barrazamartinez, 58 M.J. 173, 175 (C.A.A.F. 2003).

Here, trial counsel's argument is viewed within the context of the entire court-martial rather than in isolation. United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000). This includes the weight of the evidence supporting the conviction. Because of this, there was no error here, much less plain error. The test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." Id. at 237. In argument, trial counsel may strike hard blows, as long has he does not strike foul ones. United States v. Stargell, 49 M.J. 92, 93 (C.A.A.F. 1998). That is exactly what occurred here.

In the case *sub judice*, defense counsel's lack of objection is not surprising. "Argument must be limited to evidence of the record and to the fair inferences that can be drawn from that

evidence." United States v. Edmonds, 36 M.J. 791 (A.F.C.M.R. 1993). Arguments aimed at inflaming the passions or prejudices of the court members are clearly improper, and members should not fashion their sentence upon blind outrage and visceral anguish. Baer, 53 M.J. at 235. However, none of the comments Appellant now complains of can accurately be portrayed as statements that would have inflamed the passions of the members or provoked them into blind outrage or visceral anguish.

The United States Supreme Court noted there is no *per se* bar to the admission of victim impact evidence or prosecutorial argument on that topic during the guilt/innocence phase of a trial. Payne v. Tennessee, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Only where such evidence or argument is unfairly prejudicial may a court prevent its use. Castillo v. Johnson, 141 F.3d 218, 224 (5th Cir. 1998) (citations omitted). Moreover, "in assessing the inflammatory nature of closing argument, the presentation must be looked at in its entirety and not through isolated sentences and phrases." United States v. Rodriguez, 28 M.J. 1016 (A.F.C.M.R. 1989).

Trial counsel gave detailed, lengthy closing and rebuttal arguments, which lasted for 120 minutes and spanned 51 pages in the record of trial. (J.A. at 1339-83, 1413-21.) During the course of these lengthy arguments, trial counsel briefly mentioned the victims' families on only five occasions. (J.A.

at 1339, 1353, 1382, 1421.) Because of the properly admitted testimony of Mr. Bielenberg, Mr. Schliepsiek, and Mrs. Smith, the members were fully aware of the families' existence. Moreover, contrary to Appellant's assertion, trial counsel's reference to the families was not a suggestion that the members decide the case on their emotions. If trial counsel's intention was to inflame the passion of the members, surely he would have shown the members the gruesome autopsy photographs and replayed the chilling 911 tape in its entirety, both of which he elected not to do during closing arguments. (J.A. at 1352.) Rather, trial counsel's five brief remarks about the families were simply incidental references to the surviving families who were the only remaining living victims due to Appellant's murder of Andy and Jamie Schliepsiek. In the context in which they were made, trial counsel's brief references to the victims' families did not impermissibly inflame the passions of the jury and were fair statements based upon the evidence presented.

In Appellant's only analysis, his entire argument assumes the prosecutor's argument constituted prosecutorial misconduct and simply discusses prejudice. (App. Br. at 207-12.) Appellant claims that the most egregious comment by trial counsel was "an extended discussion of the failure of Appellant's family to offer a timely apology to the family of the victims." (App. Br. at 208.) Appellant simply misconstrues

trial counsel's argument. Trial counsel was only putting Appellant's evidence and testimony in context. (J.A. 1452-53.) Trial counsel's argument in this section concentrated on Appellant shifting the blame for his crimes and his lack of remorse. (J.A. 1452-53.) Trial counsel argued that Appellant was more concerned about how unfair his confinement time was, compared to his father who actually apologized for his son's actions. (J.A. 1452-53.) Further, trial defense counsel's objection was not to the substance, but instead he argued that trial counsel knew that outside of the courtroom, Appellant's family had attempted to apologize. (J.A. 1453.)

As Appellant only argues prejudice and none exists, he concedes two points that are dispositive against him. First, Appellant concedes that this Court, when determining if there was prosecutorial misconduct looks at, among other things, the weight of the evidence supporting the conviction (the third factor of the Fletcher test). (App. Br. at 207) (citing United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)). Second, Appellant concedes that "the weight of the evidence is strong that Appellant committed two murders[.]" (App. Br. at 209.) This is significant as the Court below found that "based on the evidence before the members when they sentenced the appellant, the third Fletcher factor weighs so heavily in favor of the Government we are confident that the appellant was sentenced on

the basis of the evidence alone." United States v. Witt, 73 M.J. 738, 810 (A.F. Ct. Crim. App. 2014)(citation omitted).

The Court further explained that it "need not address the waived errors separately from the non-waived error as the appellant was not prejudiced by trial counsel's sentencing arguments." Id. Similarly, this Court need not address the waived issues either as Appellant did not address them in his analysis section.

Finally, the Court held that Appellant "therefore was likewise not prejudiced by the military judge's failure to interrupt the arguments or issue a curative instruction or by his trial defense counsel's failure to object to these arguments." Id.

The bottom line is that trial counsel's argument (in Appellant's analysis section) did not constitute prosecutorial misconduct, and this Court should disregard the allegations raised in the "additional facts" section, but that were not briefed.

ISSUE A-XII

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE EXCLUDED FOUR CRIME SCENE AND AUTOPSY PHOTOGRAPHS AND ADMITTED THE REMAINDER OF THE PHOTOGRAPHS OFFERED BY THE PROSECUTION.

Standard of Review

A military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. United States v. Holt, 58 M.J. 227, 230-31 (C.A.A.F 2003). A decision to admit or exclude evidence based upon the balancing test set forth in Mil. R. Evid. 403 is within the sound discretion of the military judge. United States v. Smith, 52 M.J. 337, 344 (C.A.A.F. 2000). The "abuse of discretion" standard is a strict one. To be overturned on appeal, the military judge's ruling must be "arbitrary," "clearly unreasonable," "clearly erroneous," or based on an erroneous view of the law. United States v. Travers, 25 M.J. 61 (C.M.A. 1987) (citations omitted); United States v. Sullivan, 42 M.J. 360, 363 (C.A.A.F. 1995).

Analysis

Appellant argues the military judge abused his discretion in admitting fourteen of the eighteen crime scene and autopsy photographs because the ruling was based, in part, on the need to obtain a unanimous verdict for the death penalty to remain a sentencing option. (App. Br. at 210.) Appellant's claim is entirely without merit.

An "appellant has no right to claim that, because of the gruesomeness of his crime, the trier of fact may not consider evidence as to how the crime was committed." United States v. Nixon, 30 M.J. 501, 503 (A.F.C.M.R. 1989) (*quoting* United States v. Matthews, 16 M.J. 354, 363 (C.M.A. 1983)). Photographs, even

gruesome photographs, are admissible if used to prove a legitimate purpose such as time of death, identity of the victim, or exact nature of the wounds. United States v. Gray, 37 M.J. 730, 738-739 (A.C.M.R. 1992), *aff'd* 51 M.J. 1 (C.A.A.F. 1999). This Court has consistently held that even photographs that possess shocking aspects that might incite the passions of the jury are admissible so long as their probative value is not substantially outweighed by the risk of unfair prejudice.[64]

In Akbar, this Court addressed a similar claim of erroneous admission of autopsy and surgical photographs in a capital murder case. This Court rejected the claim that the photographs were unduly prejudicial and noted that "it cannot be seriously argued that [autopsy and surgical] photographs were admitted only to inflame or shock this court-martial." Akbar, 74 M.J. at 407 (*quoting* Gray, 51 M.J. at 35). Likewise, Appellant here cannot seriously argue that any of the admitted autopsy and crime scene photographs were introduced for an illegitimate purpose or that the probative value was substantially outweighed by the danger of unfair prejudice. The prosecution culled hundreds of photographs from the gruesome crime scene and the autopsies and

[64] *See* Gray, 37 M.J. at 738-739 (finding no error where military judge admitted photograph of badly decayed face with gunshot wound to eye socket.); United States v. Mobley, 28 M.J. 1024, 1028-29 (A.F.C.M.R. 1989) (finding photographs of exposed neck cavity and removed hyoid bone were properly admitted). *See also* United States v. Yanke, 23 M.J. 144, 145 (C.M.A. 1987); United States v. White, 23 M.J. 84, 88 (C.M.A. 1986); United States v. Matthews, 16 M.J. 354, 363 (C.M.A. 1983); United States v. Harris, 21 C.M.R. 58, 66-67 (C.M.A.1956); United States v. Bartholomew, 3 C.M.R. 41, 44 (C.M.A. 1952).

selected only those that were most relevant to the case and most minimally prejudicial. The prosecution proffered twenty nine photographs of the crime scene, nineteen photographs of SrA Schliepsiek's autopsy, and twenty nine photographs of Jamie Schliepsiek's autopsy. (App. Exs. LXIII, LXIV, LXVI; J.A. at 1018, 1020, 1025-26, 1035.)

Before trial, the defense moved to exclude eighteen of the photographs proffered by the prosecution, arguing that they were irrelevant, cumulative, and/or unduly prejudicial. (App. Exs. IV, LVIII, LIX; J.A. at 3309-29, 3703, 3712.) The military judge conducted a full hearing on the motion featuring expert testimony from the medical examiner who had conducted the autopsies and from a blood spatter expert who had examined the crime scene, who articulated the relevance of each photograph. (J.A. at 1017-65.) The experts explained the necessity and relevance of the photos to the case and their expert testimony.

Although the prosecution had already cropped many of the photographs to exclude the victims' faces, during the motion hearing the prosecution agreed to crop more photographs to further minimize any risk of unfair prejudice. (J.A. at 1017-65.) The prosecution also informed the military judge that it intended to use the remaining photographs only as demonstrative aids during the experts' testimony and did not intend to provide the members with printed copies. (Id.)

At the conclusion of the hearing, trial defense counsel raised general objections to all the photographs, arguing they were cumulative and unfairly prejudicial, but only raised specific objections to four photographs, consisting of three images of SrA Schliepsiek's heart and aorta and one image of Jamie Schliepsiek's bloody body as it appeared when she was initially brought to the morgue. (J.A. at 1057-65.)

After taking the matter under advisement for nearly two hours, the military judge issued his ruling excluding the four photographs to which trial defense counsel had specifically objected. (J.A. at 1057-65.) The military judge admitted the remaining fourteen photographs after determining they were relevant and their probative value was not substantially outweighed by the danger of unfair prejudice. (J.A. at 1057-65.)

Review of the record reflects the military judge's ruling was based on a correct application of the law and thoughtful consideration of the probative value and potential prejudicial impact of each and every photograph. The military judge accurately recited the applicable rules of evidence and gave detailed findings of fact explaining how each photograph was relevant and helpful in understanding the experts' testimony and circumstances surrounding the crime.

Appellant cites no legal authority supporting his incorrect and untenable assertion to this Court. When determining

evidentiary matters, a military judge is required to consider the burden of proof, especially in the context of a capital offense where the verdict in findings has a direct consequence on the sentencing phase. In evaluating evidence under Mil. R. Evid. 403, the military judge must consider the ***proponent's need*** for a particular piece of evidence when weighing the probative value against the danger of unfair prejudice. Of course, the higher the burden, the greater the need for evidence, and the greater the need for the evidence, the greater its probative value. *See* Shuffield v. State, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006) (analysis of Federal Rule of Evidence 403 includes consideration of proponent's need for the evidence); Santellan v. State, 939 S.W.2d 155 (Tex. Crim. App. 1997).

Moreover, the need for a unanimous verdict in findings in order to maintain death as a sentencing option is not a secret to court-martial participants. Consistent with the Military Judge's Benchbook's proposed instructions, the military judge during voir dire and findings instructions informed the panel members of the impact of a non-unanimous verdict on their sentencing options. (J.A. at 3764-79.) No objections or concerns were voiced at these times either.

Even if this Court were to find the military judge abused his discretion (which the government does not concede), any error in the military judge's consideration of the heightened

burden of proof was harmless because the probative value of the admitted photographs was not substantially outweighed by the risk of unfair prejudice pursuant to Mil. R. Evid. 403. Based on the military judge's detailed findings in his ruling, it is clear he would have reached the same ruling even had he not considered the government's burden of proof. Just as in Akbar, it cannot be seriously argued that these photographs were not properly admitted. This assigned error is entirely without merit and should be summarily rejected.

ISSUE A-XIII

APPELLANT'S ALLEGATIONS OF ERROR, IN FINDINGS AND SENTENCING, ARE WITHOUT MERIT. THUS, THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

Standard of Review

This Court reviews *de novo* the cumulative effect of all plain errors and properly preserved errors. *See* United States v. Gray, 51 M.J. 1, 61 (C.A.A.F. 1999)

Analysis

As a last resort, Appellant argues that "trial counsel and the military judge inserted myriad errors into [the] record of trial" the cumulative effect of which require reversal.[65] (App. Br. at 213.) Simply put, several non-errors do not add up to a

[65] In his brief below, Appellant included alleged ineffective assistance of counsel in his claim of cumulative error. Here, however he appears to confine his claim to alleged errors committed by trial counsel and the military judge. Given this limitation, presumably, these "myriad errors" refer to the claims Appellant advances in Issues A-III, A-IV, A-V, A-VII, A-IX, A-XI and A-XII.

manufactured cumulative error. Indeed, as this Court recently held, cumulative error cannot be cannot be created from the accumulation of acceptable decisions and actions. Akbar, 74 M.J. at 392.

"Cumulative error is defined as "the existence of errors, 'no one perhaps sufficient to merit reversal, [yet] in combination [all] necessitate[ing] the disapproval of a finding or sentence.'" Id. (*quoting* United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992)). The scope of the cumulative error doctrine requires:

> [C]onsidering each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the [trial] court dealt with the errors as they arose (including the efficacy – or lack of efficacy – of any remedial efforts); and the strength of the government's case. The run of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a longer trial.

United States v. Dollente, 45 M.J. 234, 242 (C.A.A.F. 1996) (*quoting* United States v. Sepulveda, 15 F.3d 1161, 1196 (5th Cir. 1993)). However, "[a]ssertions of error without merit are not sufficient to invoke this doctrine." Gray, 51 M.J. at 61.

In addition, "courts are far less likely to find cumulative error. . . when the record contains overwhelming evidence of a defendant's guilt." Dollente, 45 M.J. at 242; United States v.

Shover, 42 M.J. 753 (A.F. Ct. Crim. App. 1995). Within the sentencing context, the same standard applies: Where there is overwhelming evidence that the aggravating factors substantially outweighed the mitigating factors in Appellant's case, this Court should affirm the sentence. Of the seven alleged errors apparently implicated in this assigned error, five pertain to the sentencing case and two to the findings case.

a. Alleged errors from the sentencing case

Appellant identifies five alleged errors in the sentencing case. These are discussed in Issues A-III through V, Issue A-VII and Issue A-XI. As outlined in the government's response to each (see argument, *supra*), no error occurred in any of these alleged issues.

Because none of these alleged errors have merit, they cannot combine to form cumulative error. Gray, 51 M.J. at 61. Additionally, as noted above, in the case *sub judice* there was overwhelming evidence that the aggravating factors substantially outweighed the mitigating factors. Accordingly, even if there had been errors lending themselves to a cumulative error analysis, the balance of aggravating versus mitigating factors would not be altered sufficiently to warrant reversal.

b. Alleged errors from the findings case

The two alleged errors in the findings case are: Issue A-IX (that the military judge erred in denying a challenge for

cause against court member Colonel Holcomb based on implied bias); and Issue A-XII (that the military judge erred in admitting into evidence certain crime scene photos). Once again, and as discussed above, neither of these claims has merit – there was no error in denying the challenge for cause nor in admitting the disputed crime scene photos. Accordingly, two non-errors may not be combined to form a cumulative error. Gray, 51 M.J. at 61.

The "run of the trial" further militates against cumulative error. Dollente, 45 M.J. at 242. In a record of trial thousands of pages long, Appellant has mustered seven isolated issues, completely unrelated to one another, which he hopes can combine to form cumulative error. Even if this Court were to find error with regard to any of these issues, when considered in the context of the record as a whole and the overwhelming evidence both of Appellant's guilt and the appropriateness of the adjudged death sentence, it is clear that Appellant has not been denied a fair trial. Id. The Court should affirm the findings and sentence given the case as a whole, the limited impact, or non-impact, of the asserted "errors," and the overwhelming strength of the evidence against Appellant in this case. *See* Dollente, 45 M.J. at 242.

ISSUE A-XIV

THIS ISSUE IS NOT RIPE FOR REVIEW BY THIS

HONORABLE COURT BECAUSE THE PRESIDENT HAS NOT ORDERED APPELLANT'S DEATH SENTENCE EXECUTED. IN ANY EVENT, THE SECRETARY OF DEFENSE HAS DESIGNATED THE SECRETARY OF THE ARMY AS THE DEPARTMENT OF DEFENSE EXECUTIVE AGENT FOR CARRYING OUT EXECUTIONS OF MILITARY PRISONERS WITH APPROVED SENTENCES TO DEATH. THUS, THE SECRETARY OF THE AIR FORCE IS NOT REQUIRED TO PRESCRIBE A METHOD OF EXECUTION SPECIFIC TO AIR FORCE PRISONERS AND HER FAILURE TO TAKE SUCH ACTION DID NOT RENDER APPELLANT'S DEATH SENTENCE UNLAWFUL. *SEE* UNITED STATES V. AKBAR, 74 M.J. 364, 379 (C.A.A.F. 2015) (FINDING ALLEGATION THAT DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT DUE TO NO SPECIFIED MEANS OR PLACE OF EXECUTION TO BE WITHOUT MERIT).

ISSUE A-XV

THE SJA WAS NOT DISQUALIFIED FROM PREPARING THE R.C.M. 1106 RECOMMENDATION BY VIRTUE OF THE CONDUCT DISCUSSED IN ISSUE A-X. THUS, NO NEW CONVENING AUTHORITY ACTION IS REQUIRED.

Standard of Review

Whether a staff judge advocate is disqualified from participating in the post-trial review process is a question of law that reviewed *de novo*. United States v. Taylor, 60 M.J. 190, 194 (C.A.A.F. 2004). The appellant "has the initial burden of making a prima facie case for disqualification." Id. (internal quotations and citations omitted).

Analysis

R.C.M. 1106(b) provides that an SJA is disqualified from the post-trial review process if the SJA acted as a member, military judge, prosecutor, defense counsel, or investigating

officer. The Discussion to R.C.M. 1106(b) further provides that the SJA "may also be ineligible when [the SJA] has other than an official interest in the same case." The language, "other than an official interest," means a personal interest or feeling in the outcome of a particular case. United States v. Sorrell, 47 M.J. 432, 433 (C.A.A.F. 1998).[66]

Concerning allegations of a disinterested SJA, this Court has stated it has "no illusions that a staff judge advocate as the legal adviser to the convening authority is disinterested in the successful prosecution of those cases referred by the convening authority for trial." United States v. Caritativo, 37 M.J. 175, 181 (C.M.A. 1993). However, if the SJA's "conduct cannot reasonably be construed as constituting an improper influence or is otherwise ineffectual, no corrective action is normally required." Id.

Citing United States v. Taylor, 60 M.J. 190 (C.A.A.F. 2004), Appellant argues that a new SJA recommendation is required by R.C.M. 1106 "for the reasons set for [sic] in assignment of error A-X." (App. Br. at 215) Taylor, however, is distinguishable on its facts from the case *sub judice*.

[66] Cases interpreting the meaning of this phrase include: United States v. Rice, 33 M.J. 451, 453 (C.M.A. 1991) (legal officer who testified for government during sentencing and "had strong personal feelings or biases about appellant"); United States v. Conn, 6 M.J. 351 (C.M.A. 1979) (convening authority had "official" not "personal" interest in case where he directed others to apprehend accused); United States v. Hamilton, 47 M.J. 32 (C.A.A.F. 1997) (declining to decide whether a legal officer was disqualified from writing SJAR where her husband was originally the chief prosecutor in the case).

In Taylor, during the sentencing hearing the military judge suppressed adverse personnel records due to careless mistakes in their preparation. Thereafter, the trial counsel authored an article which suggested a negative view of the appellant and his rehabilitative potential. Taylor, 60 M.J. at 191.

The SJA conceded that, though he did not author the article, its views could be attributed to him as the senior legal officer on the installation. Further, the SJA failed to disassociate himself from the article or to disqualify himself from the post-trial review. Id.

This Court reversed and remanded the case for a new SJA recommendation. In doing so, the Court first stressed the importance of the neutrality requirement in post-trial review. Taylor, 60 M.J. at 193. This Court then concluded, "Concern for both fairness and integrity suggests that these neutral roles cannot be filled by someone who has publicly expressed a view prejudging the post-trial review process's outcome." Id.

In this appeal, Appellant points to the actions discussed in Issue A-X, *supra*, as supposedly justifying a similar holding. As discussed there, however, and as held by the Court below, none of the alleged conduct by Colonel Robb, even if true, raises UCI or in any way suggests that he had "prejudge[ed] the post-trial review process's outcome." Taylor, 60 M.J. at 193. Therefore, Appellant's claim is entirely without merit.

ISSUE A-XVI

CONSISTENT WITH BARKER V. WINGO, THE MORENO APPELLATE TIME PROCESSING STANDARDS SHOULD NOT BE RIGIDLY APPLIED IN A CAPITAL MURDER CASE.[67] IN ANY EVENT, THE DELAY IN THIS CASE IN APPELLATE REVIEW WAS NOT UNREASONABLE AND APPELLANT AND ANY DELAY WAS HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

"Whether an appellant has been denied the due process right to a speedy post-trial review and appeal, and whether constitutional error is harmless beyond a reasonable doubt are reviewed *de novo*." United States v. Allison, 63 M.J. 365, 370 (C.A.A.F. 2006) (internal citations omitted). *See also*, United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006); United States v. Arriaga, 70 M.J. 51, 55 (C.A.A.F. 2011). The government bears the burden to prove that any constitutional error was harmless beyond a reasonable doubt. United States v. Toohey, 63 M.J. 353, 363 (C.A.A.F. 2006).

Analysis

In evaluating post-trial due process complaints of delay, this Honorable Court has adopted the Supreme Court's analysis in Barker v. Wingo, 407 U.S. 514 (1972). United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006). The four factors set forth in

[67] Appellant has submitted this as a single-sentence, summary issue akin to his issues in Section C. He has provided no analysis or argument for the United States to address and answer or for this Court to consider. In the interest of judicial economy, the United States generally and fully opposes this claim.

Barker were: (1) the length of the delay;[68] (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Id. (*citing* Barker, 407 U.S. at 530).

The Barker factors are to be balanced; no single factor is dispositive. Instead, all factors are considered together along with the relevant circumstances. Id. at 136. *See also*, United States v. Toohey, 63 M.J. 353, 359 (C.A.A.F. 2006). While no single factor is dispositive, this Court has indicated that prejudice is the most important factor. Moreno, 63 M.J. at 138-41 ("We are most sensitive to this final factor that relates to any prejudice either personally to Appellant or the presentation of his case that arises from the excessive post-trial delay.")

When this Court assumes error but is able to directly conclude that any error was harmless beyond a reasonable doubt, there is no need to engage in a separate analysis of each factor. *See* Allison, 63 M.J. at 370. As the lower Court found, such an approach is appropriate here and correctly rejected Appellant's Fifth Amendment claim. Witt, 73 M.J. at 813. The post-trial record contains no evidence that the delay has had

[68] As shown in the record, this case was docketed with the Air Force Court on 24 July 2006 and the Court issued its initial decision on 9 August 2013. Thus, initial appellate review of this case below spanned about eighty-six months, which is not surprising for capital litigation.

any negative impact on Appellant.[69] Therefore, after considering the totality of the circumstances and the entire record, this Court can confidently conclude that any denial of Appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and Appellant is entitled to no relief.

ISSUE A-XVII

THE MEMBERS WERE NOT REQUIRED TO FIND THAT THE AGGRAVATING CIRCUMSTANCES OUTWEIGHED THE MITIGATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT. ACCORDINGLY, THERE WAS NO ERROR, PLAIN OR OTHERWISE, IN THE MILITARY JUDGE'S FAILURE TO PROVIDE THE MEMBERS SUCH AN INSTRUCTION. *SEE* UNITED STATES V. AKBAR, 74 M.J. 364, 401 (C.A.A.F. 2015).

ISSUE A-XVIII

IN PROMULGATING R.C.M. 1004, THE PRESIDENT FULFILLED HIS CONSTITUTIONAL DUTIES AS COMMANDER-IN-CHIEF AND FOLLOWED HIS MANDATE FROM CONGRESS TO PRESCRIBE MAXIMUM PUNISHMENTS IN CAPITAL CASES. THERE WAS NO VIOLATION OF THE SEPARATION OF POWERS.

Standard of Review

This Honorable Court reviews *de novo* whether the President's promulgation of R.C.M. 1004 violates the doctrine of separation of powers. Mistretta v. United States, 488 U.S. 361 (1989).

Analysis

Again relying upon Ring, Appellant next argues Congress unconstitutionally delegated to the President the power to enact

[69] If anything, any delay has been beneficial to Appellant, as it has delayed his adjudged and approved death sentence.

the functional equivalent of elements of capital murder, as set forth in R.C.M. 1004. (App. Br. at 217.)

The Supreme Court considered and rejected this argument in Loving v. United States, 517 U.S. 748, 756-74 (1996). Indeed, in Akbar, this Court rejected the very same claim, citing Loving. Akbar, 74 M.J. at 404. Further, this Court rejected the appellant's contention that Ring had overruled Loving *sub silentio*, on the matter in question. Id. To the extent Appellant here makes the same claim, it is without merit.

ISSUE B-I

THE LOWER COURT PROPERLY RECONSIDERED ITS EARLIER OPINION IN THIS CASE PURSUANT TO ITS OWN RULES AND UPON THE GOVERNMENT'S TIMELY PETITION FOR RECONSIDERATION. IN DESIGNATING A CHIEF JUDGE TO PRESIDE OVER THE RECONSIDERATION, THE JUDGE ADVOCATE GENERAL ACTED WITHIN HIS AUTHORITY AND IN FULFILLMENT OF HIS RESPONSIBILITIES. THERE WAS NO VIOLATION OF APPELLANT'S RIGHTS UNDER ARTICLES 37 OR 66, UCMJ, OR THE FIFTH OR EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Standard of Review

Questions regarding the interpretation of Article 66a, UCMJ, appear to be reviewed *de novo. See e.g.* United States v. Draughton, 42 C.M.R. 447, 451 (A.C.M.R. 1970).

Allegations of cruel or unusual punishment under the Eighth Amendment and Article 55, Uniform Code of Military Justice, are reviewed *de novo*. United States v. White, 54 M.J. 469, 471

(C.A.A.F. 2001).

Analysis

Appellant argues that reconsideration by the Court below of its original opinion was improper because it was "obtained solely by the government's manipulation of the constant rotations" of that Court's judges. (App. Br. at 222-23.) This argument is entirely without merit. There was no "manipulation" in the government's request for reconsideration, and the Court below acted within its authority in granting reconsideration.

a. The Air Force Court properly granted reconsideration.

Under Rule 19(a) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure,[70] the Court may, in its discretion, announce its intent to reconsider any decision or order in any case not later than 30 days after service of such decision or order on the appellate defense counsel or on the appellant, if acting *pro se*. A similar discretion exists under Rule 19(b) whereby the Court may grant a government motion for reconsideration filed within 30 days after the decision is received by counsel.

In the present case, the Court below issued its original decision on 9 August 2013 and the government timely filed its request for reconsideration on 9 September 2013, within the 30-day deadline. The Court's order on 21 October 2013 granting

[70] http://afcca.law.af.mil/content/resources_filter.php%3Fparent=12&content=102.html

reconsideration flowed from the government's request and lay squarely within the Court's discretion under its own rules.

b. TJAG properly designated a chief judge to preside over the reconsideration.

Appellant makes much of the fact that on 18 October 2013 the Air Force Judge Advocate General (TJAG) issued a memorandum designating then-Senior Judge Helget as Chief Judge to preside over the reconsideration. Without any basis, Appellant argues this action was designed to improperly influence the reconsideration panel in the government's favor. To the contrary, TJAG acted in fulfillment of his responsibilities under Article 66(a), UCMJ, and his role was purely ministerial in nature.

Article 66(a), UCMJ, requires TJAG to "establish a Court of Criminal Appeals" and to "designate as chief judge one of the appellate military judges of the Court of Criminal Appeals" which he has established.

This Court has interpreted the above-cited language to allow TJAG also to "designate an appellate military judge as chief judge — for a particular case or cases — to fill the void caused by the recusal of the regularly serving chief judge." United States v. Walker, 60 M.J. 354, 358 (C.A.A.F. 2004). In the present case, this is exactly what happened. In the Air Force Court's original panel opinion of 9 August 2013, then-

Senior Judge Roan recused himself from participation in the case "due to conflicting interests." United States v. Witt, 72 M.J. 727, 776, Note 17 (A.F. Ct. Crim. App. 2013).

By the time of TJAG's 18 October 2013 memorandum, then-Senior Judge Roan was serving as the Court's chief judge. Aware of Chief Judge Roan's prior recusal for conflicting interests, TJAG took proper and permissible action pursuant to Article 66(a), UCMJ, to designate another appellate military judge as chief judge in the matter of the case *sub judice*. Although at the time it was not known whether reconsideration would ultimately be granted, TJAG's action prepared for that eventuality by "allowing the functions of the chief judge [to be] performed by another official" and ensuring that the Court of Criminal Appeals would not be "brought to a halt in a case... from which the chief judge is recused." Walker, 60 M.J. at 357.

c. There was no foul play in the selection of Senior Judge Helget to serve as the Designated Chief Judge.

Unable to circumnavigate Walker (which explicitly allows TJAG to designate a case-specific chief judge in the event of recusal of a sitting chief judge, as was done here), Appellant urges this Court to find foul play in TJAG's particular choice of then-Senior Judge Helget to serve as chief judge. However, under the Air Force Court's own rules, in the absence of the Chief Appellate Judge, the TJAG-designated Chief Appellate Judge

in a specific matter before the Court must be a Senior Appellate Judge present for duty. (AFCCA's Rules of Practice and Procedure, Rule 1.3) As indicated in TJAG's 18 October 2013 memorandum, then-Senior Judge Helget was the lone Senior Appellate Judge present for duty on the Court on that date. Thus, far from being an improper choice, he was ***the only candidate*** qualified to serve as Designated Chief Appellate Judge in any reconsideration granted by the Court below.

Notwithstanding this, Appellant suggests that Judge Helget's designation was improper because he, like judge Roan, had recused himself from participation in the Air Force Court's original decision in the case. (App. Br. at 225.) This argument is a red herring. Unlike Judge Roan, who had recused himself based upon conflicting interests, Judge Helget recused himself "given his recent assignment to the Court." Witt, 72 M.J. at 776, Note 17. In fact, Judge Helget was available and present for duty when the original panel considered Appellant's case. (*See* J.A. at 247-59.) As Appellant himself points out, 73 days elapsed between the Court's original decision and its order granting reconsideration. (App. Br. at 220.) In the interim, Judge Helget participated in 24 separate decisions, including 18 unpublished decisions, two published decisions and

four merits cases.[71] Further, prior to his tenure on the Court from 17 June 2013 to 30 June 2014, Senior Judge Helget had served on the Court from 14 July 2008 to 2 July 2010.[72] Thus, his original recusal due to his "recent assignment to the Court" in no way reflected a lack of appellate judicial experience on his part.

Contrary to Appellant's assertion, Senior Judge Helget's designation as chief judge for the reconsideration did not in any way dispose the Court favorably toward the government or unfairly affect the outcome of the appeal. First, in his capacity as the Designated Chief Judge, Judge Helget had no greater authority than any other judge in the substantive review of the case or voting thereon; instead his duties and powers were solely administrative in nature, as outlined in the Air Force Court's Rules of Practice and Procedure.

Second, TJAG's selection of Senior Judge Helget to serve on the reconsideration panel did not "give the government a coin's toss chance of salvaging the death penalty" as Appellant mistakenly asserts. (App. Br. at 226.) Appellant's math is incorrect – counting Judge Mitchell's concurring opinion in the

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[71] *See* AFCCA 2013 opinions, http://afcca.law.af.mil/content/opinions.php%3Fyear=2013&sort=pub&tabid=3.html

[72] *See* AFCCA Past Judges, http://afcca.law.af.mil/content/resources_filter.php%3Fparent=12&content=103.html

reconsideration,[73] the result of the reconsideration would still have been 3 to 2 in favor of the government even without Senior Judge Helget on the panel.

Again, under the Court's own rules, Senior Judge Helget was the only possible candidate available to serve as Designated Chief Appellate Judge, an entirely ministerial role, for the reconsideration. Once so designated by TJAG, the mere fact that he ultimately voted with the majority does not in any way establish foul play.[74]

d. There was no violation of the Eighth Amendment.

Appellant argues TJAG's designation of a chief judge for this case "ran afoul of the constitutional prohibition on the 'wanton' and 'freakish' imposition of the death penalty." (App. Br. at 223.) In support of this claim, he cites Jackson v. Bradshaw, 681 F.3d 753 (6th Cir. 2012) and Furman v. Georgia, 408 U.S. 238 (1972). Neither case has any bearing on the case *sub judice*.

Furman addressed the constitutionality of the death

[73] Although Judge Mitchell concurred *dubitante*, his opinion is still considered to represent a vote with the majority and, even without Senior Judge Helget's vote, would have led to binding precedent (i.e. not a plurality), as the deciding vote in the case. *See* Jason J. Czarnezki, *The Dubitante Opinion*, 39 Akron L. Rev. 1, 6 (2006), available at: http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1908...lawfaculty.

[74] Beyond being unpersuasive, Appellant's argument that Senior Judge Helget was ineligible to serve on the reconsideration panel because of his original recusal is improper. Appellant voices no objection to Judge Peloquin's presence on the reconsideration panel (in the dissent) even though, just like Senior Judge Helget, he had also recused himself from the original review due to his then-recent assignment to the Court. Witt, 72 M.J. at 776, Note 17.

sentence for certain rape and murder convictions. In a concurring opinion, Justice Stewart lamented what he considered to be the arbitrary application of the death penalty to a "capriciously selected random handful" of criminal defendants.

Jackson v. Bradshaw, 681 F.3d 753 (6th Cir. 2012) is also wholly inapplicable to the case *sub judice*. Affirming in part, the Sixth Circuit rejected the claim that an Eighth Amendment violation resulted when the trial court failed to instruct the jury on the opportunity to recommend life in prison as opposed to the death sentence. Jackson, 681 F.3d at 780. In reaching this finding, the Court distinguished Beck v. Alabama, 447 U.S. 625 (1980), wherein the Supreme Court held that a trial judge's instructional error had "introduce[d] a level of uncertainty and unreliability into the fact-finding process" by distorting the jury's guilt deliberation. Beck, 447 U.S. at 643. Quoting Furman, the Beck court then held this "uncertainty and unreliability" ran afoul of the constitutional prohibition on "the wanton and freakish imposition of the [death] penalty." Id.

Neither Furman nor Jackson is applicable here. Appellant is not among a "capriciously selected random handful" of criminal defendants singled out for the death penalty. Furman, 408 U.S. at 310, and there was no instructional or other trial-level error that "introduce[d] a level of uncertainty and unreliability into the fact-finding process" by distorting the

jury's guilt deliberation. Jackson, 681 F.3d at 778 (*quoting* Beck, 447 U.S. at 643. Therefore, Appellant's Eighth Amendment argument is entirely without merit.

e. There was no violation of Article 55, UCMJ.

Appellant argues TJAG's designation of a chief judge for this case also ran "afoul of the UCMJ." (App. Br. at 223.) In support of this claim, Appellant cites congressional testimony pertaining to a Bill before the United States House of Representatives in the 81st Congress in 1949. Specifically, Appellant focuses on a then-proposed Article 66(e), UCMJ, which would have authorized the Judge Advocates General of each military service, "within ten days after any decision by a board of review [to] refer the case for reconsideration to the same or another board of review." Devoting half of his eight-page argument to this topic, Appellant attempts to draw a parallel between that proposed statute and TJAG's action under Article 66(a), UCMJ, in the present case.

There is no parallel between these two provisions. First, to the government's knowledge, proposed Article 66(e) was never enacted into law. In any event, it certainly has not survived to the present day and is nowhere to be found in the current Manual for Courts-Martial. Thus, no modern TJAG could invoke the powers described in proposed Article 66(e) even if such a desire existed. Second, as Appellant notes, proposed Article

66(e) was soundly rejected because it purported to grant the TJAGs unfettered authority to force the Service courts (then boards of review) to reconsider any decision within ten days of issuance, for any reason or no reason. As the Congressional testimony reflects, such a statute would effectively have empowered the TJAGs to control the appellate service courts by limitlessly ordering reconsideration until an agreeable result was reached.

By contrast, TJAG's designation of a chief judge to preside over the reconsideration of this case was both permissible under Article 66(a), UCMJ, and necessary under this Court's own prior precedent to ensure that the Court of Criminal Appeals would not be "brought to a halt in a case... from which the chief judge is recused." Walker, 60 M.J. at 357. There is simply no comparison between proposed Article 66(e) from 1949 and the action taken in the case *sub judice*. This assigned error is entirely without merit.

ISSUE B-II

STATE V. GLEASON IS NON-BINDING AND SHOULD NOT BE FOLLOWED. THE MILITARY JUDGE PROPERLY INSTRUCTED THE COURT MEMBERS CONCERNING THE STANDARD FOR CONSIDERING AND WEIGHING THE AGGRAVATING AND MITIGATING FACTORS UNDER R.C.M. 1004(b)(4) AND THERE WAS NO REQUIREMENT TO INSTRUCT THAT MITIGATING CIRCUMSTANCES NEED NOT BE PROVEN BEYOND A REASONABLE DOUBT.

Standard of Review

This Honorable Court reviews the completeness of a military judge's sentencing instructions *de novo*. United States v. Forbes, 61 M.J. 354, 357 (C.A.A.F. 2005); *see also* United States v. Miller, 58 M.J. 266, 268 (C.A.A.F. 2003). Such instructions are examined as a whole to determine if they pass constitutional muster. United States v. Simoy, 46 M.J. 592, 613 (A.F. Ct. Crim. App. 1996), *rev'd in part on other grounds*, 50 M.J. 1 (C.A.A.F. 1998).

Analysis

Citing State v. Gleason, 299 Kan. 1127 (2014), Appellant next argues that constitutional error resulted when the military judge failed to affirmatively instruct the members that mitigating circumstances need not be proven beyond a reasonable doubt. While Gleason found error in a trial court's failure to instruct a jury that mitigating factors need not be proven beyond a reasonable doubt, decisions from other states have reached contrary holdings. *See e.g.* State v. Howard, 751 So. 2d 783, 815 (La. 1999); Roche v. State, 690 NE. 2d 1115, 1127 (Ind. 1997); Miller v. State, 623 N.E. 2d 403, 409 (Ind. 1993).[75] More importantly, in Akbar this Court held that capital cases "do not

[75] Still other courts have reached decisions contrary in principle to that reached in Gleason. *See e.g.* People v. Maury, 30 Cal. 4th 342, 440 (Cal. 2003) (Burden of proof for mitigating factors need not be specified in jury instructions); Young v. State, 283 S.W. 3d 854, 883 (Tex. 2009) (Omission of non-unanimity instruction for mitigating factors in capital murder case was not error because instructions did not convey the impression that unanimity was required before mitigating factors could be considered in the balance).

require any particular standard of proof with regard to weighing the aggravating and mitigating circumstances." Akbar, 74. M.J. at 401.

At bottom, therefore, Appellant offers one decision from a state supreme court which favors his position but which is far from representing settled law within state court jurisprudence. This Court should decline to indulge Appellant's cherry-picking venture.

The military judge's instructions were proper. In Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court established that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. *See* Id. at 189. The Court further held that, so long as a state system satisfies these requirements, a state enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. *See* Franklin v. Lynaugh, 487 U.S. 164, 179 (1988) (plurality opinion) (*citing* Zant v. Stephens, 462 U.S. 862, 875-876, n. 13 (1983)).

Applying Furman and Gregg, the Supreme Court later held the

Kansas capital sentencing system constitutional under the Eighth and Fourteenth Amendments because that system did not "preclude[] the sentencer from considering, ***as a mitigating factor***, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Kansas v. Marsh, 548 U.S. 163, 174 (2006) (*quoting* Lockett v. Ohio, 438 U.S. 586 (1978)) (emphasis in original).

In considering a claim that a jury instruction in the penalty phase of a capital trial prevented the jury from giving proper consideration to mitigating evidence, the Supreme Court has held that the standard of review is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380 (1990). In Boyde, the jury was instructed to "consider any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." On appeal, the appellant contended this instruction dissuaded the jury from considering evidence of his background and character because the instruction had suggested they could only consider extenuating circumstances ***of the crime itself*** rather than all extenuating circumstances in general. Id. at 382.

Rejecting this claim, the Supreme Court looked to the

language of the challenged instruction and to the context of the proceedings as a whole. Regarding the language, the Court noted the jury was instructed to consider any other circumstances that might excuse the crime, which clearly was not limited to circumstances of the crime itself. The Court further concluded that "the context of proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation" because several other factors listed by the judge allowed for consideration of mitigating evidence not associated with the crime itself. Id. at 383.

The military judge's sentencing instructions pertaining to aggravating and mitigating circumstances in the case *sub judice* are set forth in the Joint Appendix. (J.A. at 3782-93.) Specifically, the military judge instructed the members that, to impose the death penalty, "All of the members of the court must agree beyond a reasonable doubt that one or more aggravating factors existed at the time of the offenses." He next instructed them, "You may not adjudge a sentence of death unless you unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances." (Id.)

The military judge further instructed, "In addition to the aggravating factors that you have found by unanimous vote, you

may consider but are not limited to considering the following aggravating circumstances:" After this, the judge listed various aggravating circumstances applicable to the case pursuant to R.C.M. 1001(b)(4). Finally, the military judge instructed, "You must also consider all evidence in extenuation and mitigation and balance them against the aggravating circumstances, using the test I've previously instructed you on." (Id.)

In view of the above Supreme Court precedents, even if this Court were to apply Gleason (which it should not for reasons articulated above), the military judge's instructions in this case passed constitutional muster. As in Boyde, there is no "reasonable likelihood that the [members] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380. Looking to the language of the instruction itself, the military judge mentioned the requirement for proof beyond a reasonable doubt only in reference to aggravation, and particularly only regarding the statutory aggravating factors set forth in R.C.M. 1004(c). Given this, there is no likelihood that the members mistakenly believed mitigating circumstances were also subjected to proof beyond a reasonable doubt.

Looking to the broader context, in charging the members with the duty to consider all evidence in extenuation and

mitigation, the military judge enumerated several specific circumstances. (J.A. at 3789-90.) These circumstances related to Appellant himself, not the crimes he had committed. There is no reasonable likelihood the members mistakenly believed such circumstances needed to be proven beyond a reasonable before they could be considered in mitigation. Further, Appellant points to nothing in the record of trial suggesting the members harbored any such confusion. This assigned error lacks merit.

C: SUMMARY ISSUES

SUMMARY ASSIGNMENTS OF ERROR C-I THROUGH C-XLV ARE COMPLETELY VOID OF ANY BRIEFING BY APPELLANT, HAVE, FOR THE MAJORITY, BEEN COMPLETELY REJECTED BY C.A.A.F., ARE COMPLETELY UNSUPPORTED BY EXISTING LAW, AND SHOULD THEREFORE BE FOUND COMPLETELY WITHOUT MERIT.

Appellant has simply copied issues word-for-word or nearly word-for-word directly from previous death penalty cases while offering no argument or analysis. *See e.g.*, United States v. Akbar, 74 M.J. 364 (C.A.A.F. 2015), United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994), United States v. Curtis, 44 M.J. 106 (C.A.A.F. 1996), and United States v. Gray, 51 M.J. 1 (C.A.A.F. 1999). Appellant has recycled issues and prayed for relief, yet offered no reason why this Honorable Court should deviate from its multiple decisions systematically rejected each of these claims. Id. The few summary assignments of error not seized from the pages of prior cases likewise also fail for lack

of support. While the United States appreciates the exacting scrutiny appropriate to a capital case, Appellant's "summary assignments of error" should be recognized for what they are and likewise be summarily dismissed. The following table provides a synopsis of Appellant's issues and relevant law and analysis explain why each should be summarily dismissed:

Issue	Law and Analysis
C-I	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; *see also*, Loving, 41 M.J. at 296.
C-II	Like Loving, throughout his summary assignments of error Appellant "makes a broad-based attack on virtually every aspect of the convening authority's role without briefing the issue." Loving, 41 M.J. at 296. As in Loving, "Appellant has provided no legal basis for his broad based attack on the convening authority's role in the system," and should continue to be rejected. Id.
C-III	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; see also, Curtis, 44 M.J. at 130-33.
C-IV	Identical claim rejected in Gray, 51 M.J. at 60; *see also*, Loving, 41 M.J. at 297.
C-V	**Similar claim involving member selection rejected in Curtis, 44 M.J. at 130-132.**
C-VI	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; *see also*, Curtis, 44 M.J. at 132.
C-VII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; *see also*, Curtis, 44 M.J. at 130-33.
C-VIII	Issue rejected in Loving, 41 M.J. at 294-95 (*citing* Batson v. Kentucky, 476 U.S. 79, 98-99 (1986)), Curtis, 33 M.J. at 107, 131-33, and Gray, 51 M.J. at 33-35.
C-IX	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; *see also*, Curtis, 44 M.J. at 150, and Gray, 51 M.J. at 57-58.
C-X	Exact issue summarily dismissed in Akbar, 74 M.J. at 379,414-15; *see also*, Loving, 41 M.J. at 296, and Gray, 51 M.J. at 60-61 (*citing* Weiss v. United States, 510 U.S. 163 (1994)).
C-XI	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 415; *see also*, Loving, 41 M.J. at 279-80, and Gray, 51 M.J. at 56.
C-XII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 415; *see also*, Loving, 41 M.J. at 296-97, Curtis, 44 M.J.

	at 130 and Gray, 51 M.J. at 50.
C-XIII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 415; *see also*, Curtis, 44 M.J. at 132, and Gray, 51 M.J. at 48.
C-XIV	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 415; *see also*, Loving, 41 M.J. at 295.
C-XV	Similar issue related to "fixed terms" of judges summarily dismissed in Loving, 41 M.J. at 295 (*citing* United States v. Graf, 35 M.J. 450 (CMA 1992)).
C-XVI	**Similar claim summarily** dismissed in Akbar, 74 M.J. at 379, 415; *see also*, Loving, 41 M.J. at 295 (*citing* Weiss, 510 U.S. 163).
C-XVII	Appellant's claim fails to explain how relaxation of rebuttal evidence "forces an accused to forego mitigating evidence" and specific to his case, makes no effort to explain what mitigating evidence he was forced to forego.
C-XVIII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 415-16; *see also*, United States v. Thomas, 43 M.J. 550, 607 (N-M. Ct. Crim. App. 1995).
C-XIX	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 416; *see also*, Loving, 41 M.J. at 293-94.
C-XX	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 416; *see also*, Loving, 41 M.J. at 293.
C-XXI	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 416; *see also*, Loving, 41 M.J. at 297, and Gray, 51 M.J. at 61.
C-XXII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 416; *see also*, Thomas, 43 M.J. 550, 606.
C-XXIII	Similar issue dismissed in Gray, 51 M.J. at 61; *see also*, Glossip v. Gross, 576 U.S. ___ (2015), Gregg v. Georgia, 428 U.S. 153 (1976).
C-XXIV	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 416.
C-XXV	Appellant provides no explanation why the convening authority's discretion to approve a death sentence would violate the Fifth, Sixth, Eighth, and Ninth Amendments to the U.S. Constitution and Article 55 of the Uniform Code of Military Justice, especially when such discretion is only for his benefit.
C-XXVI	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 417; *see also*, Payne v. Tennessee, 501 U.S. 808, 825 (1991).
C-XXVII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 417; *see also*, Payne, 501 U.S. at 825.
C-XXVIII	Just as in Akbar where "Appellant [did] not cite any instances in the record where this occurred," Appellant makes no attempt to guide the Government or this Court to

	the questions, comments, or actions by trial counsel during voir dire that he now finds objectionable. *See* Akbar, 74 M.J. at 407. Further, just as in Akbar, "the record does not reveal (1) any questions in which the Government impermissibly advanced its theory or (2) any objections by Appellant on this basis." Id.
C-XXIX	Unconstitutionality of R.C.M. 1004 issue rejected in Curtis, 32 M.J. at 267-69.
C-XXX	Exact issue rejected in Gray, 51 M.J. at 11.
C-XXXI	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 414; *see also*, Loving, 41 M.J. at 291, and Curtis, 44 M.J. at 106.
C-XXXII	Exact issue summarily dismissed in Akbar, 74 M.J. at 379, 413; *see also*, Curtis, 44 M.J. at 150-51.
C-XXXIII	One need only read the facts described in this brief to see that "there is absolutely no evidence from which a reasonable, prudent person would conclude that appellant had grounds to fear death or grievous bodily harm" from Andy, Jaime, or Jason. *See* Curtis, 44 M.J. at 155. The United States respectfully submits that the record lacks even a scintilla of evidence by which the military judge could have had reason to consider self-defense to be a valid instruction – and in fact, had every reason to believe and abide by the statement of defense counsel that "there is no claim of self-defense." (J.A. at 1083.)
C-XXXIV	Issue rejected in Loving, 41 M.J. at 268-69.
C-XXXV	Issue rejected in Akbar, 74 M.J. at 405-406.
C-XXXVI	Issue rejected in Loving, 41 M.J. at 295, and Curtis, 44 M.J. at 164.
C-XXXVII	Issue rejected in Akbar, 74 M.J. at 405-06 (see footnote 26).
C-XXXVIII	Issue rejected in United States v. Matthews, 16 M.J 354, 362-63 (C.M.A. 1983), Loving, 41 M.J. at 292, and Gray, 51 M.J. at 49.
C-XXXIX	Issue rejected in Matthews, 16 M.J at 362-63, Loving, 41 M.J. at 292, and Gray, 51 M.J. at 49.
C-XL	Issue rejected in Loving, 41 M.J. at 291, and Curtis, 44 M.J. at 106.
C-XLI	Issue rejected in Loving, 41 M.J. at 291, and Curtis, 44 M.J. at 106.
C-XLII	Unconstitutionality of R.C.M. 1004 issue rejected in Curtis, 32 M.J. at 269.
C-XLIII	The convening authority referred these charges for trial by general court-martial as a "capital case" within the definitions of R.C.M. 103(2), was generally aware that the referred charges may carry any one of the aggravating factors, and was specifically aware of the aggravating

	factors being pursued by the government. (*See* R. Vol. 17 at App. Ex. XVII.) Moreover, the Supreme Court has established that aggravating factors are not elements of a crime and this has been well accepted in military courts. *See* Walton v. Arizona, 497 U.S. 639 (1990); *see also*, Curtis, 32 M.J. at 269.
C-XLIV	Appellant fails to specify which witness or which portion of testimony forms the basis of this summary issue. The record establishes that the testimony presenting aggravation evidence of impact upon the victim family members was proper. (J.A. at 2561-2697.) The witnesses placed their testimony in context and focused on the harm resulting from Appellant's brutal slaughtering of their loved ones and at no point was there an improper concentration on Appellant himself or the resulting trial. Further, Appellant raised no objection at trial, and thus waived right to raise this issue absent plain error. See R.C.M. 1005(f).
C-XLV	Appellant's issue provides absolutely no explanation as to why the military judge's bar status would not allow him to practice law, therein failing to even note AFCCA's 19 October 2007 Order that is pertinent to this very issue. (See J.A. at 117-19.) In that Order, AFCCA specifically addressed this issue and used their analysis in United States 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), in which AFCCA set forth the requirements of a judge advocate and essentially concluded that so long as one remained in good standing and maintained compliance with his bar's licensing requirements, the fact that a military judge may be in what is termed "inactive" status is irrelevant. Id. at 779. The Order further discusses how the Florida Bar Regulations themselves simply do not support a claim that the military judge was without proper ability to engage in the practice of law. Members of the Florida Bar who are in good standing "shall mean only those persons licensed to practice law in Florida who have paid annual membership fees or dues for the current year and who are not retired, resigned, delinquent, inactive, or suspended members." (Fla. Bar Reg. R. 1-3.2.) Florida attorneys on active military service are exempt from the state's minimum continuing legal education standards. (J.A. at 3798.) Florida bar members who are exempt from continuing legal education requirements are not to engage in the practice of law in Florida. (Id.) However, members that are exempt from continuing legal education

	requirements by reason of active military service may practice law in Florida if required to do so as a part of assigned military duties. (Id.) It is clear that the military judge was qualified to preside over Appellant's trial. (See also post-trial hearing concerning military judge's qualifications at Vol. 32 at 37-39, 107-40.)

WHEREFORE, the United States respectfully requests this Honorable Court affirm Appellant's findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and to the Appellate Defense Counsel Division on 30 November 2015.

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